

# Qualified Immunity

## Position Statement

Updated March 2, 2022

The Department of Public Safety (DPS) is not only open to change but has been a driving force in modernization and system improvement for decades. We welcome the opportunity to collaborate with the Vermont General Assembly and our communities to increase trust, transparency, and accountability.

However, DPS opposes any legislation that singles out law enforcement officers to strip them of the same legal protections afforded other public officials.

[S.254, as introduced](#), would create a new, private right of action solely against law enforcement officers for injuries or damages resulting from alleged violations of the Vermont constitution, Vermont statutes or Vermont common law. The most recent version of S.254 -- [Draft 2.1-S.254](#) -- also singles out law enforcement officers and would also create a new, private right of action solely against law enforcement officers.

Both [S.254](#), as introduced, and [Draft 2.1-S.254](#) would deprive law enforcement officers, and only law enforcement officers, of the defense of qualified immunity. Other government officials would continue to perform their governmental functions with the safeguard afforded by qualified immunity.

By singling out law enforcement officers, [S.254](#) feeds anti-police sentiment, sends the message to Vermont's Judiciary that it is not applying the doctrine of qualified immunity fairly in cases involving law enforcement officers, and abdicates the Legislature's responsibility to work with law enforcement and our communities to improve public safety.

We oppose [S.254](#) and [Draft 2.1-S.254](#) for the following reasons:

- 1. Vermonters have not been denied just compensation for harm caused by law enforcement officers because of the doctrine of qualified immunity.** Vermont state government and local towns paid out more than a [quarter of million dollars](#) between 2004 and 2014 for alleged Taser misuse. The City of Burlington paid the Estate of Wayne Brunette \$270,000 in 2019, and the Estate of Douglas Kilburn \$45,000 in 2021; the town of Hartford paid \$500,000 to Wayne Burwell for alleged unreasonable force in 2017. Since 2016, Vermont League of Cities and Towns – which operates a municipal property and casualty fund that insures most of Vermont's municipalities and their law enforcement organizations – has paid out more than [\\$1.7 million](#) in law enforcement-related damages and settlements.
- 2. Vermont courts are not applying the doctrine of qualified immunity unfairly or with egregious results.** The Second Circuit, the federal court of appeals that has jurisdiction over Vermont cases, has denied qualified immunity in eight out of the 10 most recently reported cases alleging excessive force by law enforcement officers. In the eight cases where the Vermont Supreme Court was asked to apply the doctrine of qualified immunity, the Vermont Supreme Court denied qualified immunity in three cases and allowed qualified immunity in five cases.
- 3. The defense of qualified immunity does not disproportionately impact Vermonters by race.** The doctrine of qualified immunity was not a bar to the recovery of damages to [Wayne Burwell](#) (\$500,000) or [Obediah Jacobs](#) (\$50,000) or [Gregory Zullo](#) (\$50,000). And just last month, federal

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district court Judge William Sessions ruled that a pair of civil rights lawsuits brought by [J r mie Meli](#) and [Mabior Jok](#) against Burlington police officers can proceed to trial.

4. **There is no evidence that three of every four Vermonters support ending qualified immunity.** Some have touted that [75 percent of Vermonters](#) support ending qualified immunity. That claim is based on a dubious statistical inference from a [November 2021 survey](#) of 883 Vermont voters who were asked in a telephone survey: *“Qualified immunity prevents people who are victims of police misconduct from having their cases heard when their rights have been violated. Removing this legal barrier would allow families, victims, and survivors to access justice in court and hold law enforcement accountable when they commit civil rights violations. Would you strongly support, somewhat support, somewhat oppose, or strongly oppose eliminating qualified immunity in Vermont?”* Forty-three percent said they would “strongly support” eliminating qualified immunity as qualified immunity was described in the question. However, the question did not accurately describe qualified immunity. At best, it described a “symptom” of qualified immunity in some cases. More importantly, in the same survey, only 17 percent of respondents said they knew “a lot” about qualified immunity. The remainder said they were “not sure,” “[knew] nothing at all,” “just a little,” or “some.” The survey also had a margin of error of approximately six percentage points. So, the number of respondents who said they knew “a lot” about qualified immunity could be as low as 11 percent and the number of respondents who said they strongly support ending qualified immunity as described by survey could be as low as 37 percent.
5. **Draft 2.1 – S.254, which purports to codify Zullo, a 2019 Vermont Supreme Court decision, does not do so.** [Draft 2.1 – S.254](#) differs from the *Zullo* decision in several, material aspects. For example, *Zullo* allows lawsuits against law enforcement agencies, not law enforcement officers. Draft 2.1 – S.254 permits lawsuits directly against a law enforcement officer. *Zullo* allows lawsuits based on violations of Article 11 of the Vermont constitution. Draft 2.1 – S.254 permits lawsuits for any violation of “rights, privileges and immunities guaranteed” by the Vermont Constitution. *Zullo* preserved the defense of qualified immunity. Draft 2.1—S.254 eliminates the defense of qualified immunity for law enforcement officers.
6. **Making it easier to sue police officers will not increase police accountability.** Most lawsuits are settled out of court with no admission of liability, typically because it’s cheaper to settle than to litigate.
7. **The Vermont General Assembly just passed a sweeping use of force law that should be given a chance to work.** In October 2021, Vermont’s new, use of force law went into effect. In addition, every Vermont law enforcement agency has adopted a new, statewide use of force policy. Those reforms should be given an opportunity to show results before giving up on real reform and accountability that will benefit all Vermonters.
8. **Singling out law enforcement officers for disparate treatment will further exacerbate the current crisis in public safety.** Many law enforcement agencies are at their lowest staffing levels in history. Some agencies are on the precipice of closure. The State Police has seen three times more departures than hires in 2021 – an unsustainable attrition rate. S.254, as introduced, or as revised, will make it more difficult to attract and retain police officers, which will ultimately compromise public safety.

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9. **S.254 demonizes all law enforcement officers.** The proposed bill feeds into and fuels anti-police sentiment that has taken root nationally in our country. By targeting law enforcement officers, the bill sends the message that law enforcement officers and the work they do are somehow less important and less deserving of protection than other government officials or other government work. This is a demeaning and demoralizing message that will likely drive out of the profession altogether those who are in the profession nobly to serve their communities.
10. **S.254 is fiscally irresponsible.** This bill will cause money that could be spent on improved training and robust innovation to be invested instead in insurance premiums, attorney's fees, and litigation costs with taxpayers footing the bill.

Vermont can and should build the most trusted and competent public safety system possible. Our collective efforts should be focused on ensuring the best outcomes possible in policing operations. We welcome the opportunity to build trust and improve oversight for law enforcement through effective, practical reforms, and investments in training and collaboration with community stakeholders. Examples of some of the reforms we support include:

1. Improving the Act 56 professional regulation and investigation process by providing adequate resources to the newly constituted Criminal Justice Council, expanding the scope of authority to investigate misconduct, increasing misconduct reporting obligations, and ensuring sufficient staff and resources to fully execute its duty.
2. Supporting and funding the Vermont Criminal Justice Council's work to modernize hiring systems and training methodologies to ensure our practices are contemporary and meet our community standards.
3. Continuing to support and fund improvements to law enforcement oversight and accountability, including:
  - a. Supporting and funding robust hiring systems for officers, supervisors, and chief executives in all agencies;
  - b. Increasing the use of body worn cameras;
  - c. Enhancing and modernizing training for law enforcement, with ongoing emphasis on the new use of force policy, innovative responses to mental health calls, and fair and impartial policing;
  - d. Unifying statewide law enforcement data collection; and
  - e. Modernizing the public safety system through agency reorganization, exploring regionalization, and other approaches (see [dps.vermont.gov/modernization](https://dps.vermont.gov/modernization) for additional details and initiatives).

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Please refer to the January 13, 2022 [qualified immunity document](#) for more information about DPS's position on qualified immunity, qualified immunity FAQs, a discussion of recent Second Circuit cases, Vermont Supreme Court cases, and so-called cases of concern.