

Qualified Immunity

Vermont Department of Public Safety | Vermont Association of Chiefs of Police
Vermont Sheriffs' Association | Vermont Law Enforcement Agencies & Executives | Vermont Troopers'
Association | National Fraternal Order of the Police | Vermont Warden Service | Vermont DMV Enforcement
and Safety Division | Vermont Police Association | New England Police Benevolent Association
United Federation of Police Officers | International Union of Public Employees
VT League of Cities and Towns

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Position Statement

Updated January 13, 2022

The Department of Public Safety (DPS) and partners listed above oppose any legislation that singles out law enforcement officers to strip them of the same legal protections afforded other public officials.

There is a proposed bill creating 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 State, cities, and towns would be responsible for paying any judgment against a law enforcement officer, except if the officer's agency determines the officer acted in bad faith. In those cases, the officer would be personally liable for up to \$25,000; the State, cities, and towns would be responsible for paying the remainder of the judgment.

Our opposition does not originate in an unwillingness to embrace change. Vermont law enforcement is not only open to change but has been driving modernization and system improvement for decades. However, the proposed legislation effectively abandons us in our drive to improve and instead treats alleged violations of constitutional rights by law enforcement officers as mere disputes between private litigants to be resolved in a court of law by the simple payment of monetary damages. Public safety and constitutional rights are too central to our democracy to be treated the same way as car accidents and business disputes.

Real police reform requires structural solutions that address Vermont problems, not symbolic gestures that play to national politics. We oppose this bill for the following reasons:

1. **The legislation is not needed in Vermont.** The doctrine of qualified immunity has not deprived Vermonters of just compensation for harm caused by constitutional violations committed by law enforcement officers. 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. The Second Circuit, the federal court of appeals that has jurisdiction over Vermont cases, has not hesitated to deny qualified immunity to officers in excessive force cases. In fact, it has done so in eight out of the [10 most recently reported cases](#).
2. **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.
3. **This is not the time to give up on real reform and accountability.** This Legislature just passed a sweeping use of force law that has been in effect for just four months. Every law enforcement agency in Vermont has also recently adopted a new, statewide use of force

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- policy. The Legislature should give these reforms a chance to work before giving up on real reform and accountability that will benefit all Vermonters.
4. **The legislation will 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. The bill will make it even more difficult to attract and retain police officers, which will ultimately compromise public safety.
 5. **The legislation 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.
 6. **The legislation will further clog state courts.** The legislation does more than remove the defense of qualified immunity for police officers. It also expands the grounds upon which law enforcement officers may be sued. Under the proposed bill, cases that are now litigated in federal court would be litigated in state court, which would worsen the backlog in state courts.
 7. **The legislation demonizes all law enforcement officers.** The bills send the message that law enforcement officers are somehow less than other public officials who, under the proposed bill, will continue to be afforded the safeguard of qualified immunity. It 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.

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, including:

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;

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- e. Modernizing the public safety system through agency reorganization, exploring regionalization, and other approaches (see dps.vermont.gov/modernization for additional details and initiatives)

Qualified Immunity

Frequently Asked Questions (FAQs)

Q. What is qualified immunity?

A. Qualified immunity is a legal defense available to all state and local governmental officials, including teachers and law enforcement officers, when they are sued under Section 1983 of the Civil Rights Act of 1871 for violating the United States Constitution or federal statutes.

Under the doctrine of qualified immunity, if the constitutional or statutory right a governmental official is accused of violating was not “clearly established” at the time of the alleged violation, the government official cannot be sued and held personally liable.

According to the U.S. Supreme Court, qualified immunity is a safeguard available to all government officials except those who are plainly incompetent or those who knowingly violate the law.

Q. Where did qualified immunity come from?

A. Qualified immunity comes from a 1967 U.S. Supreme Court decision in which the Supreme Court first recognized qualified immunity as a legal defense available to governmental officials sued under Section 1983 of the Civil Rights Act of 1871 for violating the United States Constitution or federal statutes.

In 1982, the Supreme Court adopted the current test for when a governmental official is entitled to the defense of qualified immunity.

Q. What is the current test for when a governmental official is entitled to the defense of qualified immunity?

A. Under the current test, courts ask two questions to determine whether qualified immunity is available to a governmental official: (1) do the facts as alleged by the plaintiff show the government official’s conduct violated a constitutional right; and (2) was the right clearly established at the time of the alleged conduct?

Governmental officials are entitled to the defense of qualified immunity if at the time of the challenged conduct, and under all the circumstances facing the governmental officials, reasonable officials would not have believed that they were violating “clearly established” rights.

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Frequently Asked Questions (FAQs)

Q. What are “clearly established” rights?

A. “Clearly established” rights are those rights that are beyond debate. It means that at the time of the governmental official’s alleged conduct, the law was sufficiently clear that every reasonable official would understand that what they are doing is unconstitutional.

Previous decisions of the United States Supreme Court create “clearly established” rights. Appellate court decisions may also create “clearly established” rights. And decisions of the highest court in the jurisdiction where the conduct occurred may also create “clearly established” rights.

Q. Who decides whether a right is “clearly established”?

A. Trial court judges make the initial determination whether a right is “clearly established.” If government officials disagree with the decision, they may immediately appeal to a higher court.

Q. Do the facts of a case have to be identical to a previous Supreme Court or appellate court decision for a right to be considered “clearly established”?

A. No. The Supreme Court has said “qualified immunity does not require a case directly on point.” It does require that “existing precedent must have placed the statutory or constitutional question beyond debate.”

Q. What’s the purpose of the qualified immunity defense?

A. The U.S. Supreme Court has offered multiple justifications for qualified immunity. For example, it encourages government officials to “unflinch[ingly] discharge ... their duties” without worrying about being sued for actions a court has not yet held violate the constitution.

Qualified immunity also balances the desire to compensate individuals for harm caused by constitutional violations with the need to protect government officials from the harassment and distraction of unmerited lawsuits that are costly for taxpayers to defend, deter people from taking public service jobs, and inhibit governmental officials from effectively carrying out their duties.

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Frequently Asked Questions (FAQs)

Q. Do courts ever deny government officials the right to assert the defense of qualified immunity?

A. Yes. The Second Circuit, the federal appeals court that has jurisdiction over Vermont cases, has denied qualified immunity to an officer for use of force in [eight out of the 10 most recently reported cases](#).

Q. Does qualified immunity apply to criminal cases against government officials?

A. No. Qualified immunity applies only in civil lawsuits.

Q. Does qualified immunity apply to personnel decisions or employment cases?

A. No. Qualified immunity applies only in civil lawsuits for constitutional and/or statutory violations.

Q. Does qualified immunity apply in lawsuits for violations of the Vermont constitution?

A. Yes. The Vermont Supreme Court held in a case called [Zullo v. State](#), 2019 VT 1, that imposing restrictions similar to qualified immunity is appropriate to protect the interests of the taxpayers and avoid unwarranted reallocation of scarce public resources.

The Vermont Supreme Court reasoned that qualified immunity was necessary to protect against a “potential flood of litigation for every alleged constitutional violation” that could otherwise result without it.

Q. How does qualified immunity protect the interests of Vermont taxpayers?

A. When governmental officials are sued for constitutional violations, the government entity usually pays the official’s attorney’s fees, litigation costs, and award of money damages or amount agreed upon in settlement. Governments may also pay insurance premiums out of public coffers to manage the risks of being sued.

By limiting recovery of monetary damages to only egregious cases, the interests of taxpayers are protected.

Qualified Immunity Frequently Asked Questions (FAQs)

Q. Why does the Vermont Supreme Court apply qualified immunity in the law enforcement context?

A. The Vermont Supreme Court reasoned that permitting lawsuits against law enforcement officers without affording officers the defense of qualified immunity would impact the officer's ability to effectively do their job. The court explained:

“On a daily basis, law enforcement officers must make numerous decisions on how to handle interactions with citizens, particularly motorists. Even with liability falling on the State rather than the individual officer, a rule that exposes the State to a potential civil damages suit following every roadside stop, or whenever a motion to suppress is granted, could inhibit law enforcement officers from taking some effective and constitutionally permissible actions in pursuit of public safety. This would not be an appropriate result.” (*Zullo v. State*, 2019 VT 1, ¶ 53)

Q. Has the Vermont Supreme Court ever denied Vermont law enforcement officers the defense of qualified immunity?

A. The defense of qualified immunity has been mentioned in [12 Vermont Supreme Court cases](#) involving law enforcement officers. Of those 12 cases, the Vermont Supreme Court denied qualified immunity in three cases, allowed qualified immunity in five cases, and did not reach the issue in four cases.

Q. What were the facts of the cases in which the Vermont Supreme Court denied the defense of qualified immunity?

A. The Court ruled that qualified immunity did *not* apply (1) when an officer injured a suspect in a high-speed pursuit and a statute governed pursuits that did not relieve officers of the duty to drive with due care; (2) when an officer arrested someone for disorderly conduct without probable cause when the suspect merely used profanity, and; (3) when officers mistakenly responded to the wrong house for a welfare check. In these cases, the Court determined that a civil lawsuit for damages against an officer *should* be allowed to proceed. The officers could not avail themselves of the defense when a statute clearly governed official conduct, when an officer clearly did not have probable cause to make an arrest, and when an officer made mistakes about matters that did not require judgment or discretion.

Qualified Immunity Frequently Asked Questions (FAQs)

Q. What were the facts of the cases in which the Vermont Supreme Court allowed the defense of qualified immunity?

A. The Court *granted* qualified immunity to an officer (1) when an officer issued a citation to an individual for bringing a gun into a state police barracks when an existing criminal law prohibited bringing a weapon into a “state institution”; (2) when an officer asked a motorist to talk in a cruiser, empty his pockets, and sign consent forms; (3) when an officer told a parent in good faith to comply with a court-ordered parent-child contact plan or else face arrest; (4) when an officer took actions to investigate a misdemeanor telephone harassment case but the suspect murdered the complainant before receiving a citation for the misdemeanor; and (5) when a game warden issued a warning for a violation of Department regulations because issuing warning was well within the scope of his discretionary duties, and omitting a description of plaintiff's “defense” to the charge and notice of a right to appeal were not evidence of a lack of good faith.

In these cases, the Court determined that a civil lawsuit for damages against the officers should not be allowed to proceed because the officers did not violate any clearly established rights.

Q. Is qualified immunity denying Vermonters just compensation for harm caused by constitutional violations committed by law enforcement officers?

A. No. For example, Vermont state government and local towns paid out more than a quarter of a 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.

Q. How are Vermont law enforcement officers currently held accountable for misconduct?

A. Vermont law enforcement is held accountable for misconduct by codes of conduct, agency policy, and Act 56. Act 56 (2017), an relating to the professional regulation of law enforcement officers by the Vermont Criminal Justice Council, which took effect in 2018, requires full investigation of all reports of misconduct. [Act 56](#) established a range of sanctions that the Council may impose including written warning, suspension, revocation with the option of recertification at the Council’s discretion and permanent revocation.

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Frequently Asked Questions (FAQs)

Q. There is a proposed bill to end qualified immunity in Vermont. How does it do that?

A. The proposed bill does not end qualified immunity in Section 1983 actions for violations of the United States constitution and federal statutes. The proposed bill creates a new, private right of action against only law enforcement officers for violations of the Vermont constitution, statutes, and common law. Qualified immunity would still apply in lawsuits involving other governmental officials.

Q. How does the proposed bill define law enforcement officers?

A. The proposed bill borrows the definition of law enforcement found in 20 V.S.A. § 2351a. Under 20 V.S.A. § 2351a, law enforcement officer includes “a member of the Department of Public Safety who exercises law enforcement powers; a member of the State Police; a Capitol Police officer; a municipal police officer; a constable who exercises law enforcement powers; a motor vehicle inspector; an employee of the Department of Liquor and Lottery who exercises law enforcement powers; an investigator employed by the Secretary of State; a Board of Medical Practice investigator employed by the Department of Health; an investigator employed by the Attorney General or a State's Attorney; a fish and game warden; a sheriff; a deputy sheriff who exercises law enforcement powers; a railroad police officer commissioned pursuant to 5 V.S.A. chapter 68, subchapter 8; a police officer appointed to the University of Vermont's Department of Police Services; or the provost marshal or assistant provost marshal of the Vermont National Guard.”

Q. What are the provisions of the proposed bill?

A. The proposed bill would create a new cause of action under the Vermont Constitution, Vermont statutes, or Vermont common law for suits against law enforcement officers, It would eliminate all immunities and limitations on liability, damages, and attorney’s fees for those suits. It allows plaintiffs to recover their attorney’s fees and litigation costs if they prevail. It would require law enforcement agencies to indemnify its officers unless the agency finds that the officer did not act in good faith, in which case the officer is personally liable for up to \$25,000. However, if the officer who did not act in good faith is unable to pay up to \$25,000, the agency is responsible for paying the full amount.

Qualified Immunity Frequently Asked Questions (FAQs)

Q. In the “cases of concern” that were sent to the Department of Public Safety, was qualified immunity allowed in those cases?

A. No. We’ve found no indication that a judge allowed qualified immunity in any of the eight cases included in the list of [“cases of concern.”](#) Two of the cases on the list were settled outside of court for monetary damages (Douglas Kilburn and Wayne Burwell). In one case, the officer was criminally charged, and no lawsuit has been filed to date (Vincent Ford). One case is pending (Meli Brothers). There was no lawsuit filed in one of the cases and the statute of limitations has passed (Phil Grenon). There is no indication that lawsuits have been filed in the two remaining cases, however, the statute of limitations has yet to run in these two cases (DJ Lambert and Jonathan Mansilla). One case resulted in a jury trial and the jury decided in favor of the officer. (*Kent v. Katz*, 327 F. Supp.2d 302 (D.Vt. 2005).

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10 Most Recently Reported Second Circuit Cases Involving Qualified Immunity and Use of Force

The table below contains summaries of the 10 most recently reported Second Circuit cases involving qualified immunity and officer use of force. The cases were selected by searching the Westlaw database in December 2021 for “adv: ‘qualified immunity’ AND use /3 force” in the Second Circuit, selecting only reported decisions for the Second Circuit Court of Appeals (total of 121 cases) and sorting by date in reverse chronological order. Unreported summary orders were excluded because they lack precedential effect. See 2d. Cir. R. 32.1.1(a). The first 10 cases involving a decision on qualified immunity for an officer’s use of force were selected.

Line No.	Date	Name	Immunity Granted?	Summary
1	March 2021	<i>Ketcham v. City of Mount Vernon</i> 992 F.3d 144	No	Vacating grant of summary judgment for officers because issue of material fact remained on amount and necessity of force used by officer, holding that qualified immunity would not protect over-tightening of handcuffs after explicit verbal complaint of pain nor deliberate infliction of harm against a restrained and unresisting suspect.
2	November 2020	<i>Frost v. New York City Police Dep’t</i> 980 F.3d 231	No	Reversing grant of summary judgment in part for 2 of 3 excessive force claims when disputed facts could show that corrections officers used excessive force when they allegedly tackled, kicked, and dragged arrestee who was not actively resisting, holding that it was clearly established at the time of the incident that an officer could not strike an individual who was compliant and did not pose an imminent risk of harm to others.

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10 Most Recently Reported Second Circuit Cases
Involving Qualified Immunity and Use of Force

Line No.	Date	Name	Immunity Granted?	Summary
3	July 2020	<i>Lennox v. Miller</i> 968 F.3d 150	No	Affirming in part denial of motion for summary judgment on basis of qualified immunity when officer allegedly pushed handcuffed suspect onto the ground and kneeled on suspect's back, holding that it was clearly established that it is impermissible to use significant force against a restrained arrestee who is not actively resisting.
4	June 2020	<i>Jones v. Treubig</i> 963 F.3d 214	No	Reversing grant of motion for judgment as a matter of law based on qualified immunity when officer used stun gun a second time against an individual who allegedly was no longer resisting arrest or posing a threat to the officers or others, holding that under clearly established law an officer could not use significant force against an individual who was no longer resisting arrest.
5	May 2020	<i>Chamberlain v. City of White Plains</i> 960 F.3d 100	No	Vacating in part grant of motion to dismiss to officers for unlawful entry claim and grant of motion for summary judgment on excessive force claim when plaintiff plausibly alleged that warrantless entry was not justified by exigent circumstances and remanding on excessive force claim to determine whether use of beanbag shotgun was objectively unreasonable under the circumstances.

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10 Most Recently Reported Second Circuit Cases
Involving Qualified Immunity and Use of Force

Line No.	Date	Name	Immunity Granted?	Summary
6	October 2019	<i>Cugini v. City of New York</i> 941 F.3d 604	Yes	Affirming grant of motion for summary judgment on qualified immunity grounds when the law left room for reasonable debate as to whether arrestee was required to verbally alert officer to her pain from over-tight handcuffing, holding that a reasonable officer could have concluded at the time of arrest that he was not required to respond to non-verbal indications of discomfort and pain.
7	December 2018	<i>Muschette on Behalf of A.M. v. Gionfriddo</i> 910 F.3d 65	Yes	Reversing denial of motion for summary judgment for qualified immunity when officer used stun gun on deaf student following incident at school, holding that it was objectively reasonable for the officer to believe his conduct was lawful when officer had reasonable basis to believe student posed a threat to himself or other staff members, there was a risk of further flight, and student was holding large rock and refusing to abide by sign language instructions to comply.
8	June 2018	<i>Edrei v. Maguire</i> 892 F.3d 525	No	Affirming denial of motion to dismiss based on qualified immunity when officers used "sound gun" to disperse allegedly non-violent protesters who had not been ordered to disperse.

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10 Most Recently Reported Second Circuit Cases
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Line No.	Date	Name	Immunity Granted?	Summary
9	May 2018	<i>Bryant v. Egan</i> 890 F.3d 382	No	Dismissing appeal by officer when district court granted arrestee's motion for new trial, ruling that factual disputes precluded determination that officer was entitled to qualified immunity when officer allegedly tased arrestee while another officer was already restraining arrestee.
10	March 2018	<i>Outlaw v. City of Hartford</i> 884 F.3d 351, 367	No	Affirming judgment denying officer qualified immunity when no competent police officer could have failed to comprehend that prohibition against use of excessive force would encompass repeatedly beating an unresisting suspect with a nightstick.

Qualified Immunity
Vermont Supreme Court Cases Involving
Qualified Immunity and Law Enforcement or Police Officers
All Cases, Chronological Order

Year	Case Name	Immunity Granted?	Case Summary
1993	<i>Coll v. Johnson</i> 161 Vt. 163	N/A	Reversing a directed verdict made in favor of officer in use of force case and holding that reasonableness of force was a matter for the jury, not the judge, when officer shot and wounded suspect armed with a knife; qualified immunity not addressed because it was not raised below.
1994	<i>Morais v. Yee</i> 162 Vt. 366	No	Held that qualified immunity did not apply to officers who engaged in high-speed pursuit resulting in injuries to others because the doctrine “does not extend to situations in which the legislature establishes a clear duty and liability for a breach of that duty.” A statute covered high speed pursuits and did not relieve the driver of an authorized emergency vehicle from the duty to drive with due regard for the safety of all persons, nor did it protect the driver from the consequences of the reckless disregard for the safety of others. Factual disputes remained under that standard and so the matter was remanded.
1997	<i>Long v. L'Esperance</i> 166 Vt. 566	No	Reversing grant of judgment as a matter of law to officer, holding that officer was not entitled to qualified immunity because officer did not act in good faith by arresting person for disorderly conduct without probable cause when person used profanity in conversation with officer.
1998	<i>Cook v. Nelson</i> 167 Vt. 505	Yes	Applying qualified immunity to trooper sued for malicious prosecution when trooper issued citation to individual who brought a gun into the state police barracks; held that any right to bring a gun into the state police barracks was not clearly established considering criminal statute that forbids bringing a weapon into a “state institution.”

Qualified Immunity
Vermont Supreme Court Cases Involving
Qualified Immunity and Law Enforcement or Police Officers
All Cases, Chronological Order

Year	Case Name	Immunity Granted?	Case Summary
2001	<i>Winfield v. State</i> 172 Vt. 581	Yes	Game warden entitled to qualified immunity for warden's decision to issue warning when issuing a warning for a violation of Department regulations was well within the scope of his discretionary duties, and omitting a description of plaintiff's "defense" to the charge and notice of a right to appeal were not evidence of a lack of good faith.
2004	<i>Rochon v. State</i> 2004 VT 77	N/A	Emergency vehicle statute barred suit for negligence against emergency responder for accident occurring in response to emergency call, and plaintiff failed to plead facts supporting reckless driving. Did not reach issue of whether qualified immunity applied.
2005	<i>Sprague v. Nally</i> 2005 VT 85	Yes	Asking motorist to have conversation in cruiser, asking motorist to show officer contents of pockets before entering cruiser, and asking motorist to sign consent search form did not violate clearly established law, especially when the court determined the consent to be voluntary. Reasonable officer would believe they were acting within their authority on each of these issues. However, Court remanded to determine whether damage to personal possessions and later reentry into home was actionable, ruling that dismissal of those claims was premature.
2007	<i>Kane v. Lamothe</i> 2007 VT 91	N/A	Officer had no specific duty to arrest domestic violence suspect to support a negligence action for failure to arrest suspect, and allegation was insufficient to support gross negligence claim; immunity defense not decided because no duty existed.
2009	<i>Livingston v. Town of Hartford</i> 2009 VT 54	Yes	Officer entitled to qualified immunity when he in good faith told mother to comply with court-ordered parent-child contact plan and warned her that she would be arrested if she continued to violate court-ordered plan.

Qualified Immunity
Vermont Supreme Court Cases Involving
Qualified Immunity and Law Enforcement or Police Officers
All Cases, Chronological Order

Year	Case Name	Immunity Granted?	Case Summary
2011	<i>Kennery v. State</i> 2011 VT 121	No	Held discretionary function immunity did not bar negligence and gross negligence claims against state troopers conducting welfare check when troopers mistakenly responded to wrong house.
2013	<i>Baptie v. Bruno</i> 2013 VT 117	Yes	Qualified immunity applied to claim of negligent investigation when officer investigated complaint of threatening telephone calls, located individual, and attempt to serve him with a misdemeanor citation, but individual murdered complainant before citation was served. Record contained no evidence of bad faith by officer. Also, there was no legal duty by officer to prevent the murder.
2019	<i>Zullo v. State</i> 2019 VT 1	N/A	Creating a direct cause of action under Article 11 and adding restrictions akin to qualified immunity that the officer either knew or should have known that he or she was violating clearly established law or he or she acted in bad faith. Holding that Article 11 violations occurred but remanding on remaining elements of new cause of action.

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Discussion of “Cases of Concern” Provided DPS

This is a discussion of “cases of concern” that were sent to the Department of Public Safety in response to an inquiry to a legislator about case examples underpinning a need for the proposed bill.

1. **Douglas Kilburn – Burlington (March 2019 incident):** Mr. Kilburn died three days after an altercation with a Burlington Police Department officer. His estate sued in federal court in November 2020 and the matter was settled in October 2021 for \$45,000. The Attorney General’s Office declined criminal charges against the officer, determining that the officer acted in self-defense. The parties did not engage in motion practice in federal court and settled the case through mediation within one year.

The doctrine of qualified immunity was not litigated in this case.

2. **Meli Brothers - Burlington (September 2018 incident):** These cases (regarding the Meli brothers and Mabior Jok) were filed in federal court in May 2019 and are currently awaiting decisions on summary judgment motions. The State’s Attorney did not consider the force used to rise to the level of criminal activity.

It is unknown at this time if or how the doctrine of qualified immunity will affect the civil cases.

3. **Phil Grenon - Burlington (March 2016 incident):** This incident was studied in detail by the Vermont Mental Health Crisis Response Commission, created in 2017 and chaired by Wilda White. No federal civil lawsuit was filed.

It should be noted that Ms. White has since been assisting DPS as a consultant in developing and training the statewide use of force policy. That policy includes use of force guidelines for interacting with people experiencing mental impairment. Ms. White joined the training team to teach these guidelines to officers this fall, and these guidelines became a prominent aspect of the officer training.

4. **Wayne Burwell – Hartford (May 2010 incident):** This case involved officers responding to an erroneous burglary call and pepper spraying and striking an individual suffering from a hypoglycemic event triggered by a medical condition. The matter was settled for \$500,000 just before trial. The court denied the motion for summary judgment on the excessive force claims and ruled that it was premature to determine whether qualified immunity applied. See *Burwell v. Peyton*, 131 F. Supp. 3d 268, 294 (D. Vt. 2015). The Second Circuit affirmed the denial of qualified immunity. See *Burwell v. Moody*, 670 F. App'x 734 (2d Cir. 2016). It was after these rulings that the parties settled.

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Discussion of “Cases of Concern” Provided DPS

This case demonstrates the willingness of Vermont District Courts and the Second Circuit to deny qualified immunity.

5. **Jonathan Mansilla – Rutland (August 2021 incident):** Rutland City officer Christopher Rose shot Jonathan Mansilla in a Rutland McDonalds in August 2021. The State Police investigated, and the Attorney General’s Office and Bennington County State’s Attorney’s Office concluded that the officer’s actions were justified and no criminal charges against the officer would be filed.

It is unknown whether a civil suit will be filed, so it is unknown whether qualified immunity will play any role in the outcome of this incident.

Officer Rose did not have a body camera at the time of the incident. Body cameras improve trust and accountability in law enforcement and DPS supports their statewide adoption. DPS explored a [statewide purchasing option](#) in its December 2020 assessment and finalized a [statewide body camera policy](#) in February 2021. We welcome the opportunity to discuss next steps on this topic in 2022.

6. **DJ Lambert – St. Albans (May 2017 incident):** In this case St. Albans officers used a drive stun taser to arrest a teenager who the officers allege was actively resisting arrest. There are no further details available on this case other than the media report.

No civil lawsuit was located. As such, there is no indication that qualified immunity played a role in the outcome of this incident.

7. **Vincent Ford – St. Albans (February 2019 incident):** Officer Mark Schwartz was criminally charged for simple assault in 2021 for improperly using a taser against a suspect. No civil lawsuit was located. As such, there is no indication that qualified immunity played a role in the outcome of this incident.

8. **Kent v. Katz, 327 F.Supp.2d 302 (D.Vt. 2005) (June 1996 incident):** In this case the district court affirmed a jury determination that an officer was entitled to qualified immunity for excessive force when the officer was arresting a suspect for suspicion of DUI, the suspect resisted arrest and struggled with the officer, the officer placed the suspect in a rear wrist lock, and the suspect’s wrist was broken. This case reached a jury, and it was the jury’s verdict that qualified immunity applied. The court explained that this result was supported by testimony from the officer and an expert use-of-force instructor that the use of a rear wrist lock to restrain defendants during an arrest was consistent with officer training, and its use in this case was virtually identical to the appropriate method demonstrated by the use-of-force expert.

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Discussion of “Cases of Concern” Provided DPS

The court further explained that the jury could have found that the officer reasonably believed the amount of force needed to arrest the suspect was legal, and therefore he was entitled to qualified immunity, even if the jury also found the officer was mistaken about the facts facing him during the incident, rendering the amount of force itself unreasonable under the circumstances. In this case the plaintiff got his day in court, and the jury concluded that the officer reasonably believed the amount of force needed to arrest the suspect was legal. The outcome in this case is consistent with officer training at that time that a rear wrist lock may be used to arrest a non-compliant suspect.

The issue of qualified immunity went to the jury because the court had previously *denied* qualified immunity to the officer in an earlier ruling, stating: “The Court cannot, at this stage of the proceedings, conclude that Katz should be entitled to qualified immunity on Kent's excessive force claim. Material issues of fact remain as to whether Katz violated Kent's clearly established rights, and as to whether it was objectively reasonable for Katz to believe that the amount of force he used was lawful.” *Kent v. Katz*, 146 F. Supp. 2d 450, 462 (D. Vt. 2001). The Second Circuit affirmed the denial of qualified immunity. *Kent v. Katz*, 312 F.3d 568, 577 (2d Cir. 2002).

Like Burwell, this case demonstrates the willingness of Vermont District Court and the Second Circuit to deny qualified immunity.



New England Police Benevolent Association
7 Technology Drive
Chelmsford, MA 01863
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CHRISTOPHER S. RYAN
President

GERALD J. FLYNN, JR.
Executive Director

January 14, 2022

To: Senate Committee on Judiciary
Senator Becca Balint, President Pro Tempore
Senator Dick Sears, Chair
Senator Philip Baruth
Senator Janette White
Senator Alice Nitka
Senator Joe Benning

*Re: S.250, An act relating to enhanced administrative and judicial accountability of law enforcement officers
S.254, An act relating to creating a private right of action against law enforcement officers for violating rights established under Vermont law*

Members of the Senate Committee on Judiciary,

Please accept this letter on behalf of the New England Police Benevolent Association (NEPBA), its Locals, and members across the State of Vermont with regards to qualified immunity reform.

The NEPBA represents law enforcement professionals in more than 30 bargaining units across our State. Our membership spans the entire State – they're both large and small departments from Milton to Bennington and from Middlebury to Thetford, with numerous in-between. These are law enforcement professionals working in your communities protecting businesses, families, schools and universities. The greater NEPBA family also includes hard-working corrections officers and many civilian staff carrying out some of the most difficult, draining and tedious duties when it comes to the field of law enforcement. Our Locals represent the best of Vermont's working families. I write to you on behalf of these members, and on behalf of those working families.

We hope quick sweeping changes aren't passed without truly heeding and empathizing with the concerns presented to you by our law enforcement community. As we've seen recently in other Vermont municipalities making these kinds of changes before understanding the potential impacts often result in the desire to go back and handle things differently. We would rather changes be passed professionalizing the occupation and bringing unity to the important issues. We don't want the legislature to miss the opportunity of bringing everyone together in this just cause.

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CHRISTOPHER S. RYAN
President

GERALD J. FLYNN, JR.
Executive Director

I urge you to not make any changes to qualified immunity and leave the long-standing law in place, which protects good law enforcement professionals, good municipal employers, and taxpayers. Currently an officer who uses excessive force can be sued – no change is needed for this. Excessive force allegations rarely result in qualified immunity as those officers can be fired, those officers can be prosecuted. No changes are needed for any of this. Please don't put the profession, which is already in crisis and the security of the remaining good public employees at risk to satisfy a need, which doesn't exist.

We all stand here as citizens of the State of Vermont in support of ending inequities. However, we cannot marginalize the few who've taken the sacred oath to protect and serve the other citizens of this State, while fulfilling their duties in the most dangerous situations in society, and done so well.

Respectfully,

Christopher R. Hoar

Christopher R. Hoar
Executive Vice President
New England Police Benevolent Association

On behalf of the NEPBA and its members from the following Vermont Locals:

Bellows Falls Police Union	Hartford Police Union*	Saint Johnsbury Police Union*
Bennington Police Union*	Ludlow Police Union*	Shelburne Police Union*
Brandon Police Union	Lyndonville Police Union*	South Burlington City Police Union*
Brattleboro Police Union*	Middlebury Police Union	Springfield Police Union*
Bristol Police Union	Milton Police Union*	Stowe Police Union
Castleton Police Union	Northfield Police Union	Thetford Police Union
Chester Police Union*	Norwich Police Union*	Vergennes City Police Union
Colchester Police Union	Richmond Police Union*	Williston Police Union*
Essex Police Union*	Rutland City Police Union	Windsor Police Union*
Fairhaven Police Union	Saint Albans City Police Union	Woodstock Police Union*
Hardwick Police Union*		

*Indicate Union Locals in your constituency

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January 13, 2022

Senator Becca Balint, President Pro Tempore
Senator Dick Sears, Chair Senate Committee on Judiciary
Senator Philip Baruth, Senate Committee on Judiciary
Senator Janette White, Senate Committee on Judiciary
Senator Alice Nitka, Senate Committee on Judiciary
Senator Joe Benning, Senate Committee on Judiciary

Dear Senators,

On behalf of law enforcement officers in Vermont, we write to express our concern and perceived lack of support from our elected leaders resulting from proposed language contained in draft request 22-0215 – draft 3.1 an act relating to creating a private right of action against law enforcement officers for violating rights established under Vermont law. Vermont law enforcement officers proudly serve our communities with honor and we have built long term relationships with you by working together to resolve issues that have made a difference in the lives of those you represent. Without your continued support and collaboration it will become increasingly difficult to provide high quality public safety services to the people of Vermont.

Law enforcement officers are beginning to feel abandoned, and forgotten by many people who no longer acknowledge the risks and dedication that the men and women of our profession provide to every Vermonter. We are committed to ensuring law enforcement officers are held accountable for misconduct when acting under color of the law. We have worked collaboratively with the General Assembly to pass Act 56 and continue to develop systems to ensure accountability at all levels and in every community.

Law enforcement leaders in Vermont have worked hard to professionalize our career, develop fair and impartial policing practices and hold police accountable for misconduct. Specifically, many agencies have developed and implemented comprehensive programs and training to ensure fair and impartial policing practices at all levels of law enforcement within Vermont. These efforts include building relationships of trust with the communities of color and other marginalized communities, diversifying our workforce and improving our cultural awareness as the State of Vermont becomes more diverse.

This proposed legislation appears to be an overreaction that will cause harm to our profession and ultimately the public. This legislation appears to be intentionally punitive to law enforcement. Qualified immunity balances two important interests- the need to hold public officials accountable when they exercise power irresponsibly and the need to

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shield government officials from harassment, distraction, and liability when they perform their duties reasonably. (Pearson v. Callahan, 555 U.S. 223 (2009)) All government employees are afforded the protections of qualified immunity so that they are able to make legal, good faith decisions, without fear of personal civil liability.

This bill will do nothing to achieve the level of accountability that supporters claim. True accountability comes in the form of oversight, hiring practices, policy development, training, discipline, termination, de-certification and leadership. There is nothing in this bill to help invest in or improve our profession in any of these areas.

Law enforcement agencies in Vermont are currently experiencing unprecedented challenges recruiting and retaining qualified candidates and officers. The scope of this issue is beyond what we have ever experienced. We are in a staffing crisis driven in part by a lack of public support for police officers. The lack of public support is driven by a variety of factors. This decay of confidence could eventually lead to an erosion in hiring practices, reduced capabilities and a rapid degradation of police professionalism.

We understand that you have a responsibility to fulfill your oath of office to protect and defend the lives of all citizens, however law enforcement officers also deserve and expect their elected leaders to support and defend them as well. We know from experience, if those who fail to understand the dangers of our profession create policy or statute without hearing our perspective it risks diminishing the ability of our law enforcement agencies to provide high quality public safety services.

Vermont's law enforcement leaders have issued a joint memorandum regarding facts surrounding qualified immunity. We encourage you to read that memo and let us know if there are questions that arise.

Respectfully,

Michael O'Neil

Michael O'Neil, Executive Director
Vermont Troopers Association, Inc

Sgt. Seth Loomis, President
Vermont Troopers Association, Inc

Seth P. Loomis

Commissioner Michael Schirling
Vermont Department of Public Safety



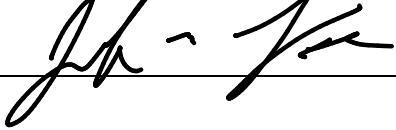
Colonel Matthew Birmingham, Director
Vermont State Police

Matthew Birmingham

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Chief Jennifer Frank, President
Vermont Association of Chiefs of Police



Sheriff Mark Anderson, President
Vermont Sheriffs' Association



Kevin Blongy, President
Vermont Police Association



Corporal Joe Corrow, President
Burlington Police Officers Assn.
FOP Lodge 21



Jack Parlon, Labor Services
National Fraternal Order of Police



Christopher Hoar, Executive Vice President
New England Police Benevolent Association
Affiliate organizations:

United Federation of Police Officers
International Union of Public Employees