

Committee Report

CONSENT CALENDAR

March 2, 2021

HOUSE OF REPRESENTATIVES

REPORT OF COMMITTEE

**The Committee on Judiciary to which was referred HB
111,**

**AN ACT establishing a cause of action against the state
to protect individual rights. Having considered the
same, report the same with the recommendation that
the bill OUGHT TO PASS.**

Rep. Paul Berch

FOR THE COMMITTEE

COMMITTEE REPORT

Committee:	Judiciary
Bill Number:	HB 111
Title:	establishing a cause of action against the state to protect individual rights.
Date:	March 2, 2021
Consent Calendar:	CONSENT
Recommendation:	OUGHT TO PASS

STATEMENT OF INTENT

This bill would allow a citizen to sue in state court for an injury caused by an agent of the State of NH or a subdivision thereof, if it involved a violation of state or federal law. It waives immunity of the state so that such a suit can occur. If the agent of the state is found liable, any financial liability will only be assessed against the state or the subdivision that employed the agent, and not the individual employee. This bi-partisan bill assures that the doors of our courts will be open to our citizens for redress of harm; will promote better training of police, correctional officers and other governmental employees; and encourages the state and its political subdivisions to be vigilant in making hiring decisions.

Vote 19-2.

Rep. Paul Berch
FOR THE COMMITTEE

Original: House Clerk
Cc: Committee Bill File

CONSENT CALENDAR

Judiciary

HB 111, establishing a cause of action against the state to protect individual rights. **OUGHT TO PASS.**

Rep. Paul Berch for Judiciary. This bill would allow a citizen to sue in state court for an injury caused by an agent of the State of NH or a subdivision thereof, if it involved a violation of state or federal law. It waives immunity of the state so that such a suit can occur. If the agent of the state is found liable, any financial liability will only be assessed against the state or the subdivision that employed the agent, and not the individual employee. This bi-partisan bill assures that the doors of our courts will be open to our citizens for redress of harm; will promote better training of police, correctional officers and other governmental employees; and encourages the state and its political subdivisions to be vigilant in making hiring decisions. **Vote 19-2.**

Voting Sheets

HOUSE COMMITTEE ON JUDICIARY

EXECUTIVE SESSION on HB 111

BILL TITLE: establishing a cause of action against the state to protect individual rights

DATE: 3/2//2021

LOB ROOM: 208/Remote

MOTION: (Please check one box)

- | | | | |
|------------------------------|------------------------------|--|--|
| <input type="checkbox"/> OTP | <input type="checkbox"/> ITL | <input type="checkbox"/> Retain (1 st year) | <input type="checkbox"/> Adoption of
Amendment # _____
<i>(if offered)</i> |
| | | <input type="checkbox"/> Interim Study (2nd year) | |

Moved by Rep. Berch Seconded by Rep. Simpson Vote: **19-2**

MOTION: (Please check one box)

- | | | | | |
|------------------------------|--------------------------------|------------------------------|--|--|
| <input type="checkbox"/> OTP | <input type="checkbox"/> OTP/A | <input type="checkbox"/> ITL | <input type="checkbox"/> Retain (1 st year) | <input type="checkbox"/> Adoption of
Amendment # _____
<i>(if offered)</i> |
| | | | <input type="checkbox"/> Interim Study (2nd year) | |

Moved by Rep. _____ Seconded by Rep. _____ Vote: _____

MOTION: (Please check one box)

- | | | | | |
|------------------------------|--------------------------------|------------------------------|--|--|
| <input type="checkbox"/> OTP | <input type="checkbox"/> OTP/A | <input type="checkbox"/> ITL | <input type="checkbox"/> Retain (1 st year) | <input type="checkbox"/> Adoption of
Amendment # _____
<i>(if offered)</i> |
| | | | <input type="checkbox"/> Interim Study (2nd year) | |

Moved by Rep. _____ Seconded by Rep. _____ Vote: _____


MOTION: (Please check one box)

- | | | | | |
|------------------------------|--------------------------------|------------------------------|--|--|
| <input type="checkbox"/> OTP | <input type="checkbox"/> OTP/A | <input type="checkbox"/> ITL | <input type="checkbox"/> Retain (1 st year) | <input type="checkbox"/> Adoption of
Amendment # _____
<i>(if offered)</i> |
| | | | <input type="checkbox"/> Interim Study (2nd year) | |

Moved by Rep. _____ Seconded by Rep. _____ Vote: _____

CONSENT CALENDAR: XX YES _____ NO

Minority Report? ____ Yes ____ No If yes, author, Rep: _____ Motion: _____

Respectfully submitted: 
Rep Kurt Wuelper, Clerk

STATE OF NEW HAMPSHIRE
OFFICE OF THE HOUSE CLERK



1/22/2021 10:07:24 AM
Roll Call Committee Registers
Report

2021 SESSION

Judiciary

Bill #: HB111 Motion: OTP AM #: _____ Exec Session Date: 3/2/2021

<u>Members</u>	<u>YEAS</u>	<u>Nays</u>	<u>NV</u>
Gordon, Edward M. Chairman	19		
McLean, Mark Vice Chairman	1		
Sylvia, Michael J.	2		
Wuelper, Kurt F. Clerk	3		
Alexander, Joe H.		1	
Rice, Kimberly A.	4		
Silber, Norman J. Smith, Steven	5		
Greene, Bob J.	6		
Kelley, Diane E.	7		
Tausch, Lindsay	8		
Trottier, Douglas R.		2	
Smith, Marjorie K.	9		
Berch, Paul S.	10		
Horrigan, Timothy O.	11		
DiLorenzo, Charlotte I.	12		
Chase, Wendy	13		
Kenney, Cam E.	14		
Langley, Diane M.	15		
McBeath, Rebecca Susan	16		
Paige, Mark	17		
Simpson, Alexis	18		
TOTAL VOTE:	19	2	

Rep Kurt Wuelper *Kurt Wuelper*

Public Hearing

HOUSE COMMITTEE ON JUDICIARY

PUBLIC HEARING ON HB 111

BILL TITLE: establishing a cause of action against the state to protect individual rights.

DATE: 2/23/2021

LOB ROOM: 208/Remote **Time Public Hearing Called to Order:** 10:42 AM
Time Adjourned: 11:42 AM

Committee Members: Reps. Gordon, McLean, Wuelper, Sylvia, Alexander Jr., Rice, Silber, Greene, D. Kelley, Tausch, Trottier, M. Smith, Berch, Horrigan, DiLorenzo, Chase, Kenney, Langley, McBeath, Paige and Simpson

Bill Sponsors: Rep Berch

TESTIMONY

* Use asterisk if written testimony and/or amendments are submitted.

***Rep. Berch Ches 1 Sponsor** Hb111 involves what is called 'Qualified immunity' which shields gov't officials from penalty, even if they have violated a citizen's constitutional rights. Courts have ruled that only a factually similar earlier decision is grounds for overcoming this immunity. The courts created this standard and it is grievous failure. It prevents citizens for finding out how a police officer or a teacher is miscreant because there will be no previous case with the same facts. Qualified immunity is defended by the argument that police have to make split second decision, but many others, doctors, etc. do the same and have no protection. This bill does not remove the protection for an officer. The employer will have to pay if the case is lost. This bill allows people to sue for violation of their constitutional rights and protects the offending individual from harm. Q Silber: if this pass wouldn't gov't agency be covered by insurance? A Yes, some places self-insure but largely yes.

***Giles Bissonnette:** ACLU NH Supports ACLU has historically defended Qualified Immunity. This bill creates a cause of action when a police officer violates the constitution and causes harm to an individual. Currently there is no such cause of action. It will help build public trust. Creating that cause of action removes Qualified Immunity for such cases. Qualified Immunity shields police even when they injure people while violating their constitutional rights. We do not think Qualified Immunity should exist for violation of civil rights.

Mark Morrison NHPA Opposes I was part of the governor's LEAC commission on Police matters. We heard a lot about Qualified Immunity and how important it is. The LEAC commission chose to exclude Qualified Immunity from its recommendations and this bill should be defeated. Police will not be willing to traumatize their families with the risk inherent in removing Qualified Immunity. Any decision will be open to litigation. That will create frivolous v litigation and cost the taxpayers a lot. Police operation is to violate people's constitutional rights. Every time we seize something that violates a constitutional right. No other profession is similar. Q Smith: I don't expect you to answer these questions right now. I would like to have the documentation that shows the flood of litigation and the tax increases resulting from this. A My comments are to show what types of conditions exist in our decision making. Right now, the lawsuits need to be disposed of as soon as possible. Without Qualified Immunity, there is no doubt more suits will be brought, not just against police, but against other government actors.

Ross Connolly AFP Supports Currently there are few ways to get accountability for violation of Constitutional rights. HB111 allows action only against an agency or employer-not against an individual. We think this will bring accountability to all government. A recent Gallup poll showed peoples' trust in government is waning and we think it should be restored. The legislation brings together groups from across the political spectrum and we think it should pass. Q McLean Has similar legislation passed in Colorado? A Yes. They removed qualified immunity but puts the burden on the individual vice on the agency which HB111 does. Q In Colorado, did they see any

impact regarding recruitment or anything? A I don't have that information, but if you don't get a good answer I will follow up.

John Williams with Audrey Mulliner Legislative director HHS Today we are submitting a request for evaluation of this legislation. Any bill with a fiscal impact above \$10,000 required a fiscal note. HB111 is expected to increase litigation with cost above that level. The committee can request such a fiscal note now. Q Smith: Do you know we are a policy committee-not the finance committee? Have you no problems with the policy? A WE feel it important that you have complete information around the consequences of this legislation. We do have some concerns about how this might apply to the National Guard and some others. We do you need to know the cost. Q Again, do you have anything substantive about the policy in this bill? A The Dept is not taking a position on the bill and remain a resource for the committee. There are several unanswered questions about this bill, but we think the fiscal analysis is critical. Q Simpson: We head about split-second decision making and I was thinking about doctors who are liable for those decision. Do you see any difference from the police department in your Department? A Within our agency we interact with a lot of people. Q Horrigan: HHS has a lot of people unhappy with it. Does Qualified Immunity inhibit a large number of cases against HHS? A Most people are happy with our services. I could work up an idea of how much exposure we might have. There is litigation regarding many state agencies. Q Gordon: Social workers have to make decisions about removing children from their home etc. Are you concerned about suits over those kinds of things? A Yes

***Cordell Johnston:** * NHMA Oppose The bill appears to remove just Qualified Immunity but all kinds of immunity. I will follow up in writing. If all immunity is removed, local government becomes impossible, Road Agents, building inspectors and many other municipal employees could be exposed to suits under this bill. The bill clearly allows suits against the individual. The bill allows suits against officers even if the officer had no reason to think their actions unconstitutional. The provision allowing the firing of a police officer appears to breach the sanctity of contracts. Remember, the municipality has no requirement to provide law enforcement or other service and suits allowed under this could inhibit them from doing so. Q Alexander: Are you saying if an individual violated a law or policy, they would be liable under this bill? A Yes. Q If it were narrowed to constitutional violations would that suffice? A It would remove a small part of our objections.

Patrick Jaicomo Inst for Justice Supports It is important that constitutional rights can actually be enforced. Under the current legal regime, the courts have so protected the government that there is no real way to enforce constitutional rights. Since 1982, the standard for applying Qualified Immunity has been reckless behavior. There has been no 'good faith' provision. This bill will add accountability without flooding the courts with suits. Q McLean If there is no established case law is there an opportunity to establish new case law? A Courts have discretion to decide a new issue, but they typically choose to not decide such cases. Q Sylvia; What about the termination language? A it could easily be avoided through collective bargaining.

Lyn Marie Cusack Director of Prof Standards@ Dept of Corrections Opposes I think the bill is much broader than we are being told. Qualified immunity is a defense in a case. RDA 541-B:19 would essentially be repealed by this bill. Other RSAs will also be affected. This should really go to a study committee.



Rep Kurt Wuelper

House Remote Testify

Judiciary Committee Testify List for Bill HB111 on 2021-02-23

Support: 71 Oppose: 15 Neutral: 2 Total to Testify: 7

Export to Excel

<u>Name</u>	<u>City, State</u> <u>Email Address</u>	<u>Title</u>	<u>Representing</u>	<u>Position</u>	<u>Testifying</u>	<u>Non-Germane</u>	<u>Signed Up</u>
Jaicomo, Patrick	Arlington, VA pjaicomo@ij.org	A Lobbyist	The Institute for Justice	Support	Yes (5m)	No	2/22/2021 9:12 AM
Bissonnette, Gilles	Concord, NH gilles@aclu-nh.org	A Lobbyist	ACLU of New Hampshire	Support	Yes (5m)	No	2/22/2021 4:06 PM
Morrison, Mark	Londonderry, NH mmorrison@londonderrynhpd.org	A Member of the Public	NHPA	Oppose	Yes (5m)	No	2/22/2021 7:42 PM
Connolly, Ross	Merrimack, NH rconnolly@afphq.org	A Lobbyist	Americans for Prosperity New Hampshire	Support	Yes (3m)	No	2/22/2021 10:19 AM
Johnston, Cordell	Concord, NH cjohnston@nhmunicipal.org	A Lobbyist	NH Municipal Association	Oppose	Yes (3m)	No	2/23/2021 6:16 AM
Williams, John	Concord, NH john.williams@dhhs.nh.gov	State Agency Staff	DHHS	Neutral	Yes (2m)	No	2/22/2021 1:33 PM
Mulliner, Audrey	Concord, NH a.mulliner@unhlaw.unh.edu	State Agency Staff	DHHS	Neutral	Yes (2m)	No	2/22/2021 1:34 PM
Koch, Laurie	Concord, NH kochlj@aol.com	A Member of the Public	Myself	Support	No	No	2/22/2021 1:47 PM
Kallinich, Kayla	Boston, MA kaylakall47@gmail.com	A Member of the Public	Myself	Support	No	No	2/22/2021 2:22 PM
Feder, Marsha	HOLLIS, NH marshafeder@gmail.com	A Member of the Public	Myself	Support	No	No	2/22/2021 2:55 PM
Frey, Gina	Amherst, NH ginagfrey@gmail.com	A Member of the Public	Myself	Support	No	No	2/22/2021 2:56 PM
Frey, Kevin	Amherst, NH kevfrey@gmail.com	A Member of the Public	Myself	Support	No	No	2/22/2021 3:17 PM
Kaufman, Amy	Newfields, NH seventags@hotmail.com	A Member of the Public	Myself	Support	No	No	2/22/2021 3:46 PM

Lane, Connie	Concord, NH connie.lane@leg.state.nh.us	An Elected Official	Merrimack 12	Support	No	No	2/22/2021 6:38 PM
Chase, Wendy	Rollinsford, NH wendy.chase@leg.state.nh.us	An Elected Official	Myself	Support	No	No	2/22/2021 12:01 PM
Hamblet, Joan	Portsmouth, NH joan.hamblet@leg.state.nh.us	A Member of the Public	Myself	Support	No	No	2/22/2021 8:40 PM
Bouchard, Donald	MANCHESTER, NH donaldjbouchard@gmail.com	A Lobbyist	Myself	Support	No	No	2/22/2021 12:48 PM
Russell, Scott	Hillsborough, NH srussell@nhpd.org	A Member of the Public	Myself	Oppose	No	No	2/22/2021 1:16 PM
Cook, Richard	Warner, NH r_cook@mcttelecom.com	A Member of the Public	Myself	Support	No	No	2/22/2021 9:22 AM
Spillers, Jessica	Manchester, NH jspillers102@gmail.com	A Member of the Public	Myself	Support	No	No	2/22/2021 9:37 AM
Mangipudi, Latha	Nashua, NH Latha.mangipudi@leg.state.N.H.us	An Elected Official	Hills 35	Support	No	No	2/22/2021 9:40 AM
Gilman, Rep. Julie	Exeter, NH julie.gilman@leg.state.nh.us	An Elected Official	Town of Exeter	Support	No	No	2/22/2021 9:50 AM
woodcock, stephen	center conway, NH slwoodcock116@gmail.com	An Elected Official	Myself	Support	No	No	2/22/2021 10:05 AM
Weinzierl, Kylie	Woburn, MA kylie.weinzierl@gmail.com	A Member of the Public	Myself	Oppose	No	No	2/23/2021 6:21 AM
Elhuni, Asma	Lebanon, NH asma@radnh.org	A Lobbyist	Rights and Democracy	Support	No	No	2/23/2021 12:55 AM
Christina, Barrett	Concord, NH bchristina@nhsba.org	A Lobbyist	NH School Boards Association	Oppose	No	No	2/23/2021 7:30 AM
Dontonville, Roger	Enfield, NH rdontonville@gmail.com	An Elected Official	Myself	Support	No	No	2/23/2021 8:27 AM
Howard Jr., Raymond	Alton, NH brhowardjr@yahoo.com	An Elected Official	Myself	Support	No	No	2/23/2021 9:15 AM
Groetzinger, Tonda	Farmington, NH groetzinger6@aol.com	A Member of the Public	Myself	Oppose	No	No	2/23/2021 8:54 AM
Schuett, Dianne	Pembroke, NH dianne.schuett@leg.state.nh.us	An Elected Official	Co-Sponsor - (Merr. 20)	Support	No	No	2/23/2021 10:08 AM
Alleman, Bill	Weare, NH gencourt@allemanse.com	A Member of the Public	Myself	Support	No	No	2/23/2021 10:56 AM

Austin, Suzanne	Brentwood, NH suzanne321@comcast.net	A Member of the Public	Myself	Support	No	No	2/23/2021 9:34 AM
Janeway, Elizabeth C.	Webster, NH Ecjway1@aol.com	A Member of the Public	Myself	Support	No	No	2/23/2021 11:47 AM
Collins, Lindsey	Plymouth, NH Lindseyellisoncollins@gmail.com	A Member of the Public	Myself	Support	No	No	2/23/2021 11:57 AM
Hoebeke, Joseph	Hollis, NH jhoebeke@hollisnh.org	State Agency Staff	NH Chiefs Association	Oppose	No	No	2/23/2021 10:20 AM
evankow, abby	gorham, NH abbyaustin89@gmail.com	A Member of the Public	Myself	Support	No	No	2/23/2021 10:28 AM
Kean, Wesley	Laconia, NH wesley@kodamiami.com	A Member of the Public	Myself	Support	No	No	2/23/2021 11:04 AM
Moore, Aidan	Greenland, NH ajem@comcast.net	A Member of the Public	Myself	Oppose	No	No	2/23/2021 11:08 AM
McBeath, Rebecca	Portsmouth, NH bmcbe@comcast.net	A Lobbyist	Myself	Support	No	No	2/23/2021 11:39 AM
Batstone, Adam	Gilford, NH acbatstone@gmail.com	A Member of the Public	Myself	Oppose	No	No	2/23/2021 11:42 AM
Bates, David	dbates3@yahoo.com	A Member of the Public	Myself	Support	No	No	2/13/2021 11:21 AM
Fenner-Lukaitis, Elizabeth	glukaitis@mcttelecom.com	A Member of the Public	Myself	Support	No	No	2/13/2021 1:40 PM
Gibbons, Cheryl	cherylsark@gmail.com	A Member of the Public	Myself	Support	No	No	2/14/2021 10:28 AM
Johnson, Sara	nhchicagocubfan@gmail.com	A Member of the Public	Myself	Support	No	No	2/14/2021 5:22 AM
Wells, Lee	leewells.locustfarm@gmail.com	A Member of the Public	Myself	Support	No	No	2/14/2021 12:24 PM
Thompson, Laura	nicnmom@hotmail.com	A Member of the Public	Myself	Support	No	No	2/14/2021 12:37 PM
Clark, Lynn	rubylynn862@gmail.com	A Member of the Public	Myself	Support	No	No	2/14/2021 6:37 PM
Ingram, April	aandk@tds.net	A Member of the Public	Myself	Support	No	No	2/14/2021 7:41 PM
Ingold, bret	bretingold@gmail.com	A Member of the Public	Myself	Support	No	No	2/15/2021 4:32 PM
McLaughlin, Barbara	brbmclaughlin42@gmail.com	A Member of the Public	Myself	Support	No	No	2/15/2021 10:30 PM
Roach, Matthew	coolairlova@yahoo.com	A Member of the Public	Myself	Support	No	No	2/15/2021 11:44 PM
Kendrick, Michele	Michelleleekendrick@gmail.com	A Member of the Public	Myself	Support	No	No	2/16/2021 10:27 AM
Chase, Susan	Andover, NH srfchase@gmail.com	A Member of the Public	Myself	Support	No	No	2/17/2021 9:24 PM

Warren, Joan	Warner, NH joanbcwarren@gmail.com	A Member of the Public	Myself	Support	No	No	2/18/2021 11:09 AM
Keeler, Margaret	New London, NH peg5keeler@gmail.com	A Member of the Public	Myself	Support	No	No	2/18/2021 10:19 AM
Buck, Jean	Hopkinton, NH jean.buck@tds.net	A Member of the Public	Myself	Support	No	No	2/18/2021 2:12 PM
Fordey, Nicole	Litchfield, NH nikkif610@gmail.com	A Member of the Public	Myself	Oppose	No	No	2/19/2021 12:44 PM
Mott-Smith, Wiltrud	Loudon, NH wmottsm@worldpath.net	A Member of the Public	Myself	Support	No	No	2/20/2021 12:49 PM
Lynch, Chrisinda	Concord, NH cmmelynych@comcast.net	A Member of the Public	Myself	Support	No	No	2/20/2021 12:07 PM
Joyce, Ellen	Meriden, NH ejoyce1961@gmail.com	A Member of the Public	Myself	Support	No	No	2/20/2021 7:29 AM
Nardino, Marie	Andover, NH mdnardino@gmail.com	A Member of the Public	Myself	Support	No	No	2/21/2021 5:12 PM
Lister, Charlotte	Chester, NH lister@gsinet.net	A Member of the Public	Myself	Support	No	No	2/21/2021 11:42 AM
Phillips, margery	hanover, NH margeryphillips@gmail.com	A Member of the Public	Myself	Support	No	No	2/21/2021 12:34 PM
DeMark, Richard	Meredith, NH demarknh114@gmail.com	A Member of the Public	Myself	Oppose	No	No	2/21/2021 2:40 PM
Pospychala, Erin	WILMOT, NH erinmvp@gmail.com	A Member of the Public	Myself	Support	No	No	2/21/2021 7:01 PM
Piedra, Israel	Manchester, NH israel.piedra@leg.state.nh.us	An Elected Official	Myself	Support	No	No	2/21/2021 7:20 PM
Howland, Curt	Manchester, NH howland@priss.com	A Member of the Public	Myself	Support	No	No	2/21/2021 7:49 PM
Lamb, Ashley	Durham, NH campioa@gmail.com	A Member of the Public	Myself	Support	No	No	2/21/2021 8:24 PM
Lamb, Albert	Durham, NH alamb@pobox.com	A Member of the Public	Myself	Support	No	No	2/21/2021 8:29 PM
Wells, Ken	Andover, NH kenwells3@gmail.com	A Member of the Public	Myself	Support	No	No	2/21/2021 10:13 PM
Stevens, Representative Deb	Nashua, NH debstevens4ward7@gmail.com	An Elected Official	My 10K constituents	Support	No	No	2/21/2021 10:21 PM

Larson, Ruth	Alton, NH ruthlarson@msn.com	A Member of the Public	Myself	Support	No	No	2/21/2021 10:22 PM
Bartlett, Rep Christy	Concord, NH christydbartlett@gmail.com	An Elected Official	Merrimack 19	Support	No	No	2/21/2021 10:32 PM
Rich, Cecilia	Somersworth, NH cecilia.rich@leg.state.nh.us	An Elected Official	Myself	Support	No	No	2/22/2021 12:02 AM
Zaenglein, Barbara	Amherst, NH bzaenglein@gmail.com	A Member of the Public	Myself	Support	No	No	2/22/2021 7:29 AM
Zaenglein, Eric	Amherst, NH henley11@comcast.net	A Member of the Public	Myself	Support	No	No	2/22/2021 7:29 AM
McKevitt, Susan	Bradford, NH mcwil@tds.net	A Member of the Public	Myself	Support	No	No	2/22/2021 8:59 AM
Farley, Teresa	Concord, NH farleytd@gmail.com	A Member of the Public	Myself	Support	No	No	2/22/2021 9:06 AM
Hamer, Heidi	Manchester, NH heidi.hamer@leg.state.nh.us	An Elected Official	Myself	Support	No	No	2/22/2021 9:07 AM
Aronson, Laura	MANCHESTER, NH laura@mlans.net	A Member of the Public	Myself	Oppose	No	No	2/22/2021 8:44 PM
Cooper, Michael	Canterbury, NH Cooperm4118@yahoo.com	A Member of the Public	Myself	Oppose	No	No	2/22/2021 9:15 PM
Aikawa, Timon	Londonderry, NH timonaikawa@yahoo.com	A Member of the Public	Myself	Oppose	No	No	2/22/2021 9:30 PM
Hennessey, Martha	Hanover, NH Martha.hennessey@gmail.com	A Member of the Public	Myself	Support	No	No	2/23/2021 12:11 AM
Sargent, Elizabeth	Concord, NH esargent@sheehan.com	A Lobbyist	NH Association of Chiefs of Police	Oppose	No	No	2/22/2021 4:51 PM
Moe, Carmeiita	andover, NH carmelitaymoe@outlook.com	A Member of the Public	Myself	Support	No	No	2/22/2021 5:11 PM
Levesque, Cassandra	Barrington, NH cassandra.levesque@leg.state.nh.us	An Elected Official	Myself	Support	No	No	2/22/2021 5:55 PM
Pham, Jacqueline	Portsmouth, NH jackiepham19@gmail.com	A Member of the Public	Myself	Support	No	No	2/22/2021 10:27 PM
Gibbs, Shanna	New York, NY Shanna.m.gibbs@gmail.com	A Member of the Public	Myself	Support	No	No	2/23/2021 12:34 AM

Testimony

HB111 Testimony

Dear Mr. Chairman and Members of the Judiciary Committee,

Attached is my written statement in support of HB 111. I look forward to speaking with you all tomorrow.

Sincerely, Patrick Jaicomo Institute for Justice

Dear Chairman Gordon and Members of the House Judiciary Committee,

I listened carefully to the public hearing today on HB 111 and felt compelled to provide you with written testimony. I ask that my written sentiments (attached) in opposition to this legislation be considered for record.

Wishing you all a safe and productive week, and thank you for your service to this great State.

Respectfully,

Joseph R. Hoebeke, Chief of Police Hollis Police Department

9 Silver Lake Road Hollis, New Hampshire 03049 Business: (603) 465-7637

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Respectfully,

Joseph R. Hoebeke, Chief of Police Hollis Police Department

9 Silver Lake Road Hollis, New Hampshire 03049 Business: (603) 465-7637

Dear Honorable House Judiciary Committee Members,

I am writing to you in opposition of HB 111 which your Committee is scheduled to act on Monday, March 1st.

HB111 Testimony

As you know, the bill's primary purpose as stated by its supporters, is to eliminate "qualified immunity" which is a federal doctrine that provides limited immunity to government employees and officials when they are sued under federal law for violations of individuals' federal constitutional rights. Qualified immunity states that an employee or official is protected from liability unless the constitutional right in question was "clearly established" at the time of the conduct in question, such that a reasonable person would have known the conduct was unlawful.

By way of example, if a police officer takes every reasonable precaution but still arrests the wrong person, or if an officer arrests someone for violating a statute that turns out to be unconstitutional, or if a Town Manager/Administrator takes an employment action that is later found to violate some kind of previously unarticulated right, the good faith or reasonableness of the conduct will be no defense and the municipality will be liable for damages apparently with no cap as this bill suggests. This bill would also require the municipality to be liable for all the plaintiff's attorney fees and litigation costs. And on top of that, the bill allows the municipality to terminate an employee, no matter how reasonable their conduct was (almost certainly an unconstitutional impairment of the employee's rights).

Can you personally imagine making a decision based on information you believed to be factual and legal only to find out after the fact it was flawed? On top of that, that your employer is liable and you are in turn terminated? I don't believe any of you would care to be in such a situation. It's clear that the financial consequences of this bill to your constituents should it pass, could be astronomical.

Please vote to kill HB 111. Thank you for your consideration.

Laura Buono, CPM Town Administrator

Town of Hillsborough PO Box 7 Hillsborough, NH 03244-0007

603.464.7970 603.464.5060 fax Laura@Hillsboroughnh.net

Please note that all communications to and from this email address is subject to NH RSA 91-A which affords the public access to this information, with the exception of limited, sensitive information.

To the Judiciary Committee members,

I am the Chairman of the Town of Effingham's Board of Selectmen.

Small towns like Effingham will undoubtedly experience several negative effects of HB-111. Staffing is always problematic with small communities payrates on the lower end as compared with other


HB111 Testimony

employment options. We often have few if any qualified applicants applying for these positions. The addition of increased exposure to legal liability will be a deterrent for recruitment to law enforcement. Law enforcement staffing shortfalls are a constant in our area towns, one neighboring community employees ten (10) Police officers, at this time their staffing level is under five (5) and it is my understanding the Carroll County Sheriffs Department and Troop-E of the State Police are both understaffed and that is typical to be so. This effects the overall coverage and safety of a large percentage of the State. This competition for police personnel can be and is, felt in small towns not just as we depend on these larger departments for support in so many ways, but in our ability to attract quality professionals to interact with and protect our citizens.

Please vote against "House Bill 111" and the movement it represents in moving our State that much closer to becoming a lawless entity.

Thank you,

Michael Cahalane Effingham Selectman
68 School Street Effingham NH 03882 603-539-7770


Rep Kurt Wuelper



March 1, 2021

Hon. Edward Gordon, Chairman
House Judiciary Committee
Legislative Office Building, Room 208
Concord, New Hampshire

Via Electronic Mail Only

Re: HB 111, establishing a cause of action against the state to protect individual rights

Dear Chairman Gordon:

This supplements my hearing testimony on HB 111, which the New Hampshire Municipal opposes. The bill appears to eliminate all sovereign and municipal immunity and implicitly repeal the limits on state and municipal liability for damages under RSA 541-B and 507-B. It would subject countless municipal officials and employees to lawsuits for good-faith decisions made in the reasonable exercise of their discretion.

Under existing law, municipalities and their officials and employees are subject to liability for both negligent and intentional misconduct, but subject to various limitations and immunities. These are summarized below in very general fashion.

Discretionary function immunity is a common-law doctrine that shields municipalities from liability for decisions made that involve the exercise of a legislative or judicial function or the exercise of an “executive or planning function involving the making of a basic policy decision which is characterized by the exercise of a high degree of official judgment or action.” Thus, a municipality is not liable for alleged injuries resulting from, for example, a planning board’s approval of a site plan, the selectmen’s decision not to lay out a road, or the town’s traffic control regulations.

Official immunity is a related common-law doctrine that protects individual municipal officials and employees from personal liability for discretionary actions taken within the scope of their employment, such as a police officer’s decision to arrest or not arrest someone. It is available only if (1) the action is within the scope of the person’s duties; (2) the action is discretionary, not ministerial, and (3) the actions are not taken in a “wanton or reckless manner.” The legislature has codified a similar immunity for some, but not all, local officials in [RSA 31:104](#). Official immunity applies only if the employee reasonably believed his or her conduct was lawful. When an employee receives official immunity, the municipality usually, but not always, has “vicarious immunity.”

Qualified immunity is similar to official immunity, except that it shields individual employees and officials against lawsuits alleging violations of the United States Constitution, while

official immunity shields against lawsuits alleging common-law torts, such as negligence. Qualified immunity is a federal doctrine developed by the courts to apply to claims under 42 U.S.C. §1983, which provides a cause of action for violations of federal constitutional rights. Qualified immunity protects a government official or employee unless the right in question was “clearly established” at the time of the incident so that a reasonable official or employee would have understood that his or her conduct was unlawful. It is called “qualified” to distinguish it from the absolute immunity that judges and prosecutors enjoy for actions taken in the conduct of their responsibilities.

RSA 507-B provides statutory immunity for municipalities against common-law tort actions, but, as with official immunity, it applies only if the person whose action caused an injury reasonably believed that his or her conduct was lawful. In addition, under RSA 507-B:2, a municipality is liable for injuries caused by its fault or that of its officials or employees arising out of the ownership or operation of motor vehicles or premises.

RSA 507-B also limits a municipality’s liability to \$325,000 for damages sustained by any one person, and \$1 million for any number of persons in a single incident or occurrence.

The state legislature and the New Hampshire Supreme Court (and, in the case of qualified immunity, the United States Supreme Court) developed these immunities and limitations over the last half-century in recognition that municipalities and their employees are expected to provide an extensive array of services, unlike private entities, and holding them liable for every error in judgment would lead to endless lawsuits and potentially unlimited taxpayer expense, as well as paralyzing local government with a fear of litigation. As the New Hampshire Supreme Court explained with respect to official immunity for police officers:

Police officers are trusted with one of the most basic and necessary functions of civilized society, securing and preserving public safety. This essential and inherently governmental task is not shared with the private sector. Police officers are regularly called upon to utilize judgment and discretion in the performance of their duties. . . .

Further, law enforcement by its nature is susceptible to provoking the hostilities and hindsight second-guessing by those directly interacting with police as well as by the citizenry at large. . . . Unbridled exposure to personal liability and hindsight review of their decisions would undoubtedly compromise effective law enforcement and unfairly expose officers to personal liability for performing inherently governmental tasks. . . . The public simply cannot afford for those individuals charged with securing and preserving community safety to have their judgment shaded out of fear of subsequent lawsuits or to have their energies otherwise deflected by litigation, at times a lengthy and cumbersome process.

Everitt v. General Electric Co., 156 N.H. 202, 217-18 (2007).

HB 111 would sweep away all these immunities for municipalities and their officials and employees. It creates a cause of action “for an injury caused by an agent of the state or New Hampshire or a political subdivision in violation of a right under the laws or constitution of New Hampshire or the United States.” In such an action, “the court shall not be impeded by an invocation

of a state agent's defense or immunity." The bill expressly supersedes all defenses and immunities contained in RSA 507-B or any other statute.

There would be no "defense or immunity" based on the fact that the employee or official acted in good faith or reasonably believed his or her conduct was lawful, or that the rights in question "were not clearly established at the time of their deprivation," or that the official or employee "could not reasonably or otherwise have been expected to know whether [his or her] conduct was lawful." (See page 2, lines 1-8.)

This language is clearly targeted at eliminating qualified immunity, and almost all of the hearing testimony in support of the bill was about the need to eliminate qualified immunity. Again, qualified immunity applies only in cases brought under federal law for violations of the federal constitution, a very narrow class of all the cases that might be brought against a governmental entity. In this narrow class of cases, the bill would do *more* than eliminate qualified immunity—*i.e.*, the immunity that applies when the federal constitutional right is not "clearly established." It would also eliminate *any defense* that the government employee acted in good faith or believed his or her conduct was lawful. Thus, the employee could be liable even though: (1) the employee did not violate a clearly established constitutional right; and (2) the employee acted in good faith; and (3) the employee reasonably believed his or her conduct was lawful.

This would also eliminate official immunity (protecting individual employees and officials in common-law tort actions) and arguably discretionary function immunity (which protects the municipality itself from liability for discretionary legislative or executive actions). It may even eliminate the immunity enjoyed by judges and prosecutors for making unpopular decisions. It also appears to eliminate the damage caps in RSA 507-B, although this is not certain—an additional problem with the bill is that its language is so vague in some places that it will likely require many court decisions just to understand what it means.

However, this much is clear: If a municipal employee commits an act that is *subsequently* found to have deprived someone of a *previously unarticulated* right under state or federal law or constitution, the person whose rights were violated can bring an action—whether as a constitutional claim or otherwise—against the employee and the employer. There would be no "defense or immunity" based on the employee's good faith conduct, the employee's belief that his or her conduct was lawful, or the fact that the plaintiff's right was not "clearly established" at the time.

For example, a police officer arrests someone for violating a state law. The officer does everything exactly right, and the person clearly violated the statute; but the supreme court rules that the statute—enacted by this legislature—is unconstitutional because it violates the arrestee's First (or Second or Fourth) Amendment rights. Under HB 111, although the arresting officer did everything right, he is subject to liability. This will affect not only police officers, but any municipal employee or official—town manager, building inspector, recreation director—who might innocently take an action that is subsequently determined to have violated someone's rights.

The bill's supporters made much of the fact that it protects individual employees from having to pay damages personally, although the employee would still be named as a defendant. Instead, the municipality, as the employer, would be liable for all damages. This is hardly an improvement. If a

municipality has trained its employees properly and one of those employees is sued for an action that he took in good faith and reasonably believed to be lawful, and which in fact had never previously been found to be unlawful, why should anyone, including the municipality—that is, its taxpayers—be required to pay damages? On the other hand, if an employee does something truly reprehensible that town officials could not have foreseen, why should the town be liable while the employee is spared?

The bill's problems do not end there. In any action in which the plaintiff prevails, the municipality would also be liable for attorney fees and "other litigation costs." This—in addition to eliminating the statutory damage caps—will result in huge costs for municipalities.

Finally, under the proposed new RSA 507-H:7 (page 2, lines 21-24), the municipality could fire an employee whose conduct, however innocent, is found to have deprived someone of his or her rights. This appears to be an unconstitutional impairment of the obligation of contracts.

In the past, some legislators have asked why municipalities should benefit from immunities that are not available to private businesses. The answer, as stated above, is that municipalities perform an array of services that no private business would ever consider: provide police and fire protection, build and maintain roads, dispose of trash, protect public health, provide ambulance service, inspect buildings, and run recreation programs, to name a few. But this bill does not merely eliminate immunities and subject municipalities to the same rules as private businesses. It goes much further, by depriving them of defenses that are available to other defendants and requiring them to pay the plaintiff's attorney fees and litigation costs, a burden that is almost never placed on private defendants.

The consequences of this legislation will be extreme. Police departments already have trouble recruiting new officers, and municipalities have trouble finding people to serve in all kinds of positions. The prospect of being sued for every error in judgment or innocent mistake will exacerbate these problems. Litigation and insurance costs will rise, bringing property tax rates with them. Finally, municipalities may decide that it is simply not worth it to provide police protection or the many other services that will now subject them to lawsuits.

Please find HB 111 inexpedient to legislate.

Thank you very much for your consideration.

Sincerely,



Cordell A. Johnston
Government Affairs Counsel

cc: Committee members



Statement by Gilles Bissonnette, Legal Director of the ACLU-NH
House Judiciary Committee
House Bill 111
February 23, 2021

I am the Legal Director of the American Civil Liberties Union of New Hampshire (ACLU-NH)—a non-profit organization working to protect civil liberties throughout New Hampshire for over fifty years. On behalf of the ACLU-NH, I appreciate the opportunity to testify today in support of the concept of HB111, which would establish a cause of action against the state to protect individual rights and, in doing so, would eliminate the concept of qualified immunity.

If public distrust of law enforcement could be attributed to a single thing, it likely would be how common it is for an officer to evade individual legal accountability for violating someone’s constitutional rights, particularly in cases where lethal force is used. While the most high profile cases of this have not occurred in New Hampshire, the policy that prevents officers and their departments from being held accountable does exist in New Hampshire, and that is qualified immunity. HB111 would help address this problem.

I. There is Currently No Recognized Cause of Action Where a Person Can Seek Compensation for a Violation of His or Her Rights Under the New Hampshire Constitution.

Currently, if a state or local government agency violates the New Hampshire Constitution and, as a result, causes damage to a person, there is no recognized cause of action for this violation.¹ Put another way, if a state or local governmental entity harms someone in violation of the New Hampshire Constitution, that person does not have an established right to sue in court for this violation and seek compensation. This is a significant loophole that may come as a surprise to most people in New Hampshire. After all, what good are the independent protections of our New Hampshire Constitution if a citizen cannot sue for damages when those protections are violated and damage is caused? Indeed, there is less of an incentive for a local governmental entity to comply with the New Hampshire Constitution if it can rarely be held accountable in court for a lack of compliance.

HB111 remedies this problem by creating a state cause of action for damages arising out of the New Hampshire Constitution (*see* Page 1, Lines 19-27) and, in so doing, will make local governments more accountable to the public and the independent protections that our New Hampshire Constitution provides. Indeed, providing this relief under the New Hampshire Constitution is important because the New Hampshire Constitution often provides separate and independent protections that do not exist under the Federal Constitution. These rights, for example, include greater protections against searches and seizures (Part I, Article 19) and greater protections ensuring equality for women (Part I, Article 2).

¹ *See Marquay v. Eno*, 139 N.H. 708, 721 (1995) (our constitution does not specify remedies for its violation; noting that a claim could not be brought under the New Hampshire Constitution for violation of equal protection where students alleged that school employees failed to report sexual misconduct; “While this court ultimately has the authority to fashion a common law remedy for the violation of a particular constitutional right, we will avoid such an extraordinary exercise where established remedies -- be they statutory, common law, or administrative -- are adequate.”); *see also Rockhouse Mountain Prop. Owners Ass’n v. Conway*, 127 N.H. 593, 598 (1986).

II. HB111 Appropriately Eliminates Qualified Immunity to Ensure that Constitutional Wrongs Are Remedied.

HB111 appropriately eliminates qualified immunity as a defense to this new cause of action (*see* Page 2, Lines 1-8). In the context of federal civil rights law, qualified immunity is a judge-made doctrine that shields government officials from liability for damages — even if they have violated the Constitution — so long as they did not violate “clearly established” law. According to the U.S. Supreme Court, the law is “clearly established” only when a prior court has held that an officer violated the Constitution under similar circumstances. Under this doctrine, victims and families accusing police officers of wrongdoing must often find an incredibly similar case where officers were held responsible to cite as precedent. This can be exceedingly difficult. As a result, police officers are often not held liable when they violate the federal constitutional rights of citizens. In short, qualified immunity often immunizes an officer from personal accountability.²

It is important to note that when a police officer violates the constitutional rights of a citizen, the citizen’s only recourse is usually to sue the officer because, absent special circumstances (e.g., where this is an established policy or established pattern and practice), the police department or municipality cannot be held liable for the actions of its officers. However, as explained above, the doctrine of qualified immunity makes holding individual officers accountable extremely difficult. This leaves citizens whose constitutional rights have been violated often with little recourse. Not only is this unfair and unjust, but it also tells officers that they likely will not be held accountable for misconduct because they are immune from personal liability. This message is harmful to public trust.

Qualified immunity has been repeatedly used by federal courts to immunize police officers even when the officer has violated a citizen’s constitutional rights, even in some egregious cases. Below are examples of some cases:

- Fresno police officers stealing \$225,000 they seized pursuant to a warrant. *Jessop v. City of Fresno*, 936 F.3d 937 (9th Cir. 2019).
- Allowing a police dog to bite a suspect did not violate “clearly established law” because the case cited by the plaintiff involved a suspect who had surrendered by lying on the ground with his hands to the side, whereas the plaintiff had surrendered by sitting on the ground with his hands raised. *Baxter v. Bracey*, 751 F. App’x 869 (6th Cir. 2018).
- A police officer shot a ten-year-old child who was lying on the ground, while the officer repeatedly tried to shoot a non-threatening family dog. *Corbitt v. Vickers*, 929 F.3d 1304 (11th Cir. 2019).
- Police officers shot and killed a mentally ill man who was dozens of feet away from the nearest person and turning to run from the officers. *Reich v. City of Elizabethtown*, 945 F.3d 968 (6th Cir. 2019).
- A police officer body slammed a non-threatening woman and broke her collarbone as she walked away from him. *Kelsay v. Ernst*, 933 F.3d 975 (8th Cir. 2019).

² *See* Joanna C. Schwartz, Suing police for abuse is nearly impossible. The Supreme Court can fix that, *Washington Post* (June 3, 2020), <https://www.washingtonpost.com/outlook/2020/06/03/police-abuse-misconduct-supreme-court-immunity/>.

- *Farrelly v. City of Concord*, 902 F. Supp. 2d 178, 195 (D.N.H. 2012) (qualified immunity barred a false arrest claim against an officer for arresting the plaintiff under a statutory provision that had been held unconstitutional by the New Hampshire Supreme Court some 5 years before).
- *Gray v. Cummings*, 917 F.3d 1, 10, 12 (1st Cir. 2019) (“Based on the body of available case law, we hold that an objectively reasonable police officer in May of 2013 could have concluded that a single use of the Taser in drive-stun mode to quell a nonviolent, mentally ill individual who was resisting arrest, did not violate the Fourth Amendment. Even if such a conclusion was constitutionally mistaken — as a jury could find on the facts of this case — Cummings is shielded by qualified immunity.”; noting that “the plaintiff must identify either controlling authority or a consensus of cases of persuasive authority sufficient to send a clear signal to a reasonable official that certain conduct falls short of the constitutional norm”).

However, one federal judge—Carlton Reeves—was recently heavily critical of the qualified immunity doctrine, though he reluctantly concluded the officer should benefit from qualified immunity based on current case law. In this case, a white police officer pulled over a Black man driving through Mississippi in a newly purchased Mercedes convertible. For nearly two hours, the officer pushed to search the vehicle, allegedly lied to its owner, enlisted a drug detection dog, and ultimately left the exhausted man by the side of the road to put his car back together again. The Mercedes had been ripped apart, and the driver was so shaken he sued the police officer. Judge Reeves urged the Supreme Court to revisit the issue of qualified immunity and to toss it into “the dustbin of history.” “Immunity is not exoneration,” Reeves wrote. “And the harm in this case to one man sheds light on the harm done to the nation by this manufactured doctrine.” See *Jamison v. McClendon*, 476 F. Supp. 3d 386 (S.D. Miss. 2020), <https://www.documentcloud.org/documents/7013933-Jamison-v-McClendon.html>.

Finally, police officers have argued that qualified immunity is essential for officers’ ability to respond to calls and to make split-second decisions. However, qualified immunity applies even where the officer did not engage in a split-second decision.

In sum, the public has a difficult time believing that law enforcement is committed to accountability when its members are shielded from individual accountability, even when they violate a person’s rights – including taking their life. HB111 would help address this problem.

III. HB111 Would Not Cause Police Officers To Lose Their Assets to Compensate a Victim; Rather, That Compensation Would Come from the Local Government Agency Which is Insured.

Police officers are not going to lose their assets under this bill if they are found liable for having committed a violation under the New Hampshire Constitution. This is because HB111 causes the local agency—which is insured—to compensate the victim, as opposed to the individual officer. (*see* Page 1, Lines, 9-18; Page 2, Lines 9-10).

Indeed, officers are already protected under current law without qualified immunity. This is the case because, if they make a mistake and are personally liable, they are indemnified. In other words, if a police

officer is held liable, the officer is not going to lose or his or her house or assets.³ Police were also still able to do their jobs even before the U.S. Supreme Court created qualified immunity several decades ago.

It is expected that local government agencies will oppose this bill out of a fear of liability. But, under this position, municipalities are effectively arguing that, even if a municipality violates the New Hampshire Constitution and creates harm, they should not be liable. This is bad policy that undermines the protections provided under the New Hampshire Constitution. Of course, municipalities will have the ability to defend themselves in court to argue that they did not, in fact, violate the New Hampshire Constitution and cause harm.

³ See RSA 99-D:2 (indemnifying state employees for negligent or wrongful acts within the scope of official duties so long as such acts were not wanton or reckless); RSA 31:106 (indemnifying municipal employees except for violations of civil rights done within the scope of employment so long as the acts were not committed with malice).



Joseph R. Hoebeke
CHIEF OF POLICE

HOLLIS POLICE DEPARTMENT
HOLLIS, NEW HAMPSHIRE
A Nationally Accredited Agency



Brendan T. LaFlamme
CAPTAIN

23 February 2021

To the Members of the House Judiciary Committee,

Please allow this written testimony to serve as an expression of my opposition of House Bill 111. As I listen to the emerging debate on Qualified Immunity and Official Immunity, I am confused. In the past months, I have watched as legislatures and individuals across the country have conversations about qualified immunity. In doing so, I often asked myself, “What are we doing here, and do people really understand the ramifications of dissolving Qualified Immunity?”

The first question we need to consider is how are you going to legislate qualified immunity? How do you legislate a Supreme Court decision? Our democracy is based upon the separation of power, the balance of power, and the three branches of government. Again, I repeat my question, “How are you going to legislate a Supreme Court decision?”

One of the biggest concerns when it comes to qualified immunity is the term “clearly established law”, which is based on jurisprudence of the First Amendment and Fourth Amendments of the United States Constitution. As we know, qualified immunity in application of law shields government officials from damages in lawsuits, most notably under 42 USC section 1983. The doctrine is intended to balance a very important part of a police department’s operation; the need to uphold public officials’ accountability. Simply stated, we need to hold our public officials accountable while also shielding these officials from harassment, distraction, and liability when performing their duties reasonably. Moreover, qualified immunity provides government officials with ‘breathing room’ to make reasonable but mistaken judgements about certain legal questions. A government official, like a police officer, does and will get things wrong (Daigle Law Group, 2020).

Qualified immunity follows a two-part test: one, that there has to be a constitutional deprivation. And number two, that if the constitutional deprivation occurred, then the official has to have violated a clearly established right at the time of the violation. In other words, part one asks whether the facts alleged by a plaintiff show that the officer’s conduct violated the constitutional rights of a plaintiff? This must be based on facts most favorable to the plaintiff, in the plaintiff’s view. The second part considers if the right was clearly established? And how was it determined? In summary, the two-part test provides the public with the knowledge that there has to be some checks and balances on the reasonableness of an officer’s decision, and that does come from the doctrine of qualified immunity (Daigle Law Group, 2020).

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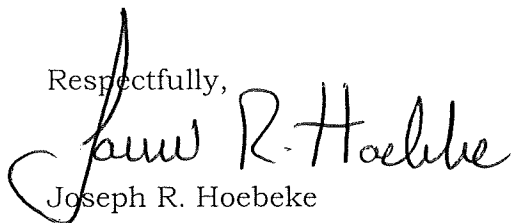
(603) 465-7637 • FAX 465-7808

In response to some arguments for the reduction, limitation, or elimination of qualified immunity, I can assert that such calls do not represent a reasonable and constructive path forward (Callahan, 2020). It is ironic to think that most of the general public never heard of qualified immunity until after the horrific events in Minneapolis, but let me assure you that qualified immunity did not lead to Mr. Chauvin kneeling on the neck of Mr. Floyd, nor will it protect him from criminal prosecution. Qualified immunity is an essential part of policing and American jurisprudence, and the doctrine allows officers to respond to incidents without pause and in rapidly evolving situations. I have heard repeated arguments about doctors and other professions not having this same protection; I think it is grossly inappropriate to compare the role of a police officer to that of a doctor, engineer, or construction worker, etc. The loss of this protection would have a chilling and lasting impact on the policing profession in this country and hinder its member's willingness and ability to respond to critical and dynamic incidents without hesitation.

In closing, let's not confuse an elimination of qualified immunity as being the solution for officer misconduct. In fact, such a move will likely not have any impact on reducing officer misconduct, and most certainly stands to dissuade qualified applicants from pursuing a career in law enforcement. One way to reduce police misconduct is to hire highly qualified applicants, but it seems as though there is little or no thought to certain 'reformatory' efforts like an elimination of qualified immunity and the significant damage it will cause to our ability to recruit, hire, and retain people willing to perform the very difficult and ever-changing job of a police officer. So, what will agencies do to hire positions that need to be filled in a world where there are already historically low levels of applicants? Many will likely lower their standards. Ask yourself this: Does this not conflict with the whole argument for and the very premise of police reform? Is the purpose not to hire and retain only the best, most ethical and moral individuals? I can assure you, based on my practical experience in this profession, that when you lower standards, you do not get higher levels of performance, accountability, and morality in policing.

THANK YOU FOR YOUR TIME AND CONSIDERATION, and please feel free to contact me with any questions or concerns you might have.

Respectfully,

A handwritten signature in black ink that reads "Joseph R. Hoebeke". The signature is written in a cursive style with a large, stylized initial "J".

Joseph R. Hoebeke

Chief of Police

References:

Callahan, M. (n.d.). *Policechiefmagazine.org*. Retrieved February 23, 2021, from <https://www.policechiefmagazine.org/complexities-of-qualified-immunity/>

Daigle Law Group. (2020, December 29). Qualified immunity – what every officer needs to know: Parts 1, 2, & 3. Retrieved February 23, 2021, from <https://dlglearningcenter.com/qualified-immunity-what-every-officer-needs-to-know-part-one/>



INSTITUTE FOR JUSTICE

Statement by Patrick Jaicomo in support of HB 111

February 22, 2021

The Institute for Justice supports HB 111. It will ensure that every right has a remedy in New Hampshire without flooding governments with lawsuits.

The U.S. and New Hampshire constitutions exist to regulate government by, among other things, limiting ways that government employees may infringe on individual rights. Unfortunately, various court-created doctrines have turned some constitutional rights into empty promises by making them unenforceable. One of the most pernicious of these doctrines is qualified immunity, which HB 111 addresses.

The U.S. Supreme Court created qualified immunity in 1982. Thanks to that doctrine, all government workers who violate the Constitution are immune from liability by default, even if they intentionally or obviously violate the law. The only way around qualified immunity is if a victim of abuse can find an earlier court decision that “clearly establishes” the very same conduct under similar circumstances is unconstitutional. Because of that unforgiving standard, constitutional rights often have no corresponding remedies.

To provide recent examples from across the country, courts have granted qualified immunity to police accused of stealing more than \$200,000; regulators who searched a doctor’s confidential files without a warrant; a prison guard who pepper-sprayed an inmate for no reason; and a police officer who shot a child while trying to kill a non-threatening family dog. Although a nation-wide problem, qualified immunity is also a problem in New Hampshire; hundreds of decisions in federal courts cite the doctrine.

HB 111 solves the problem in a reasonable and fair way that will not cause a flood of lawsuits. HB 111 shifts liability from individual government workers to their employers and places those government employers on the same footing as their private counterparts.

Under standards developed over centuries at common law, private employers are responsible for their employees’ acts. This ensures that employers—as the entities in the position to do so—are vigilant about the hiring, training, and firing of employees. There is no principled reason why government employers should be treated differently. And just as the availability of employer liability does not cripple private employers, neither will it drain government coffers. Owing to a variety of court rules and procedures that weed out insubstantial and frivolous claims, the employer liability that HB 111 will introduce will not cause a flood of litigation.

The Institute for Justice asks you to pass HB 111.

Bill as
Introduced

HB 111 - AS INTRODUCED

2021 SESSION

21-0089
04/10

HOUSE BILL ***111***

AN ACT establishing a cause of action against the state to protect individual rights.

SPONSORS: Rep. Berch, Ches. 1; Rep. Bixby, Straf. 17; Rep. Schuett, Merr. 20; Rep. Wuelper, Straf. 3; Rep. M. Smith, Straf. 6; Rep. Amanda Bouldin, Hills. 12; Rep. T. Lekas, Hills. 37; Rep. M. King, Hills. 33

COMMITTEE: Judiciary

ANALYSIS

This bill creates a cause of action in state court for an injury to an individual caused by an agent of the state of New Hampshire, or any of its political subdivisions, which constitutes the violation of a right under state or federal law.

The bill also waives the state's sovereign immunity for deprivations of an individual's rights under state or federal law.

Explanation: Matter added to current law appears in ***bold italics***.

Matter removed from current law appears [~~in brackets and struck through~~].

Matter which is either (a) all new or (b) repealed and reenacted appears in regular type.

21-0089
04/10

STATE OF NEW HAMPSHIRE

In the Year of Our Lord Two Thousand Twenty One

AN ACT establishing a cause of action against the state to protect individual rights.

Be it Enacted by the Senate and House of Representatives in General Court convened:

1 New Chapter; Cause of Action to Protect Individual Rights. Amend RSA by inserting after chapter 507-G the following new chapter:

CHAPTER 507-H

CAUSE OF ACTION TO PROTECT INDIVIDUAL RIGHTS

507-H:1 Superseding Enactment. To the extent of any conflict, this chapter supersedes a defense or immunity in RSA 99-D, 507-B, 541-B, or other RSA section enacted prior to the effective date of this chapter.

507-H:2 Respondeat Superior.

I. The state of New Hampshire and its political subdivisions shall be responsible for the actions of its employees.

II. An employee is an agent of the state of New Hampshire or a political subdivision that employs the employee.

III. The state of New Hampshire or a political subdivision shall be legally responsible for any wrongful act of its agents if such act occurs under the color of law.

IV. This chapter shall constitute a waiver of sovereign immunity by the state of New Hampshire and its political subdivisions, and acceptance by the state and its political subdivisions of responsibility for an agent's acts under the color of law under the common law theory of respondeat superior, as required to enforce this chapter.

507-H:3 Cause of Action.

I. An individual may seek legal, equitable, or other relief under this chapter in state court for an injury caused by an agent of the state of New Hampshire or a political subdivision in violation of a right under the laws or constitution of New Hampshire or the United States.

II. The individual seeking relief shall name as defendants the state agent and the state employer, or official who acts in an official capacity for the state employer, pursuant to the New Hampshire rules of civil procedure.

III. The individual seeking relief shall bear the burden of proving a violation of a right under the laws or constitution of New Hampshire or the United States by a preponderance of the evidence.

507-H:4 Judicial Process.

I. Any judgment against the state of New Hampshire or a political subdivision, or other defendant, shall be supported by findings of fact and conclusions of law.

II. The court shall not be impeded by an invocation of a state agent's defense or immunity including that:

(a) The rights, privileges, or immunities secured by the laws or constitution of New Hampshire or the United States were not clearly established at the time of their deprivation by the state agent, or that the state of the law was otherwise such that the state agent could not reasonably or otherwise have been expected to know whether the such agent's conduct was lawful; or

(b) The state agent acted in good faith, or that the state agent believed, reasonably or otherwise, that his or her conduct was lawful at the time it was committed.

III. A state agent shall not be found financially liable for a violation of a right under the laws or constitution of New Hampshire or the United States.

507-H:5 Jurisdiction in State Court.

I. Any action under this chapter shall arise out of state law.

II. Jurisdiction shall be in the New Hampshire judicial system pursuant to New Hampshire laws and rules of civil procedure.

507-H:6 Attorney Fees.

I. In any proceeding in which a plaintiff's claims prevail, the state of New Hampshire or a political subdivision shall be liable for reasonable attorney fees and other litigation costs.

II. Paragraph I of this section shall include reasonable attorney fees incurred on a contingency basis or by an attorney providing legal services on a pro bono basis.

507-H:7 Termination of Contract, Agreement, or Employment.

I. Notwithstanding any provision of law, contract, or agreement to the contrary, the state of New Hampshire or a political subdivision may terminate a contract, agreement, or employment with a state agent if the court finds, under this section, that the state agent violated an individual's right under the laws or constitution of New Hampshire or the United States.

II. The termination of a contract, agreement, or employment by the state of New Hampshire or a political subdivision with a government agent shall not affect the liability of the state or a political subdivision under this chapter.

2 Effective Date. This act shall take effect 60 days after its passage.