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January 25, 2022

Vermont Legislature
Senate Judiciary Committee

Re: S. 254 Qualified Immunity is a Barrier to Disability Rights

On behalf of Disability Rights Vermont (DRVT), the federally authorized disability protection and advocacy system in Vermont pursuant to 42 U.S.C. 10801 et seq., and the Mental Health Care Ombudsman for the State of Vermont pursuant to 18 V.S. A. §7259, I submit the following written testimony regarding the doctrine of qualified immunity and its impact on disability justice.

DRVT is a private, non-profit, statewide legal-service agency dedicated to advancing the rights of people with all types of disability. Our purpose is to promote equality, dignity and self-determination of people with disabilities. We support human and civil rights by investigating complaints of abuse and neglect, advocating for systemic improvements, and providing legal representation to remedy rights violations or other harmful conduct when appropriate.

1. People with disabilities disproportionately come into contact with law enforcement

People with disabilities find themselves interacting with police in a number of contexts. About 1 in 20 police encounters involve individuals with psychiatric disabilities.¹ These

¹ Martha Williams Deane et al., *Emerging Partnerships Between Mental Health and Law Enforcement*, 50 *Psychiatric Servs.* 99, 100 (1999) (estimating that 7% of all police contacts involve someone with a psychiatric disability); Lodestar, *Los Angeles Police Department Consent Decree Mental Illness Project: Final Report* (May 28, 2002), http://assets.lapdonline.org/assets/pdf/consent_decree_mental_ill_finalrpt.pdf (estimating that 2-3% of calls to the Los Angeles Police Department involve mental health); Jennifer L.S. Teller et al., *Crisis Intervention Team Training for Police Officers Responding to Mental Disturbance Calls*, 57 *Psychiatric Servs.* 232, 234 (2006) (finding that 6.55% of calls to the Akron, Ohio Police Department involve mental health). But see Alexander Black et al., *The Treatment of People with Mental Illness in the Criminal Justice System: The Example of Oneida County, New York*, *Levitt Ctr. for Pub. Affs. At Hamilton Coll.* (June 2019) at 9, https://digitalcommons.hamilton.edu/cgi/viewcontent.cgi?article=1005&context=student_scholarship (estimating that ten percent of police calls involve mental health).

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interactions include responses to mental health crises, welfare checks, criminal investigations, and as victims of crimes. Individuals with disabilities are about two times more likely to be victims of violent crimes.² Effective and safe policing reduces harm caused to people with disabilities in all these contexts.

People with disabilities are disproportionately harmed at the hands of law enforcement. About 33% of incidents of uses of force are committed against people with disabilities.³ The harm can be fatal. It can also result in long-term trauma and fear of law enforcement resulting in further marginalization of people with disabilities.

There are a number of ways to improve policing to result in better outcomes for people with disabilities. The state, with guidance from this Legislature, has already taken important steps to improve policing. These steps include crafting an improved state-wide use-of-force policy, developing and providing training to reduce uses of force and training in disability awareness, providing funding for programs for law enforcement alternatives and programs that encourage law enforcement to partner with mental health professionals. The state has also created police oversight committees to review instances of excessive uses of force. Nevertheless, there will always be a need to hold bad actors and the system accountable rights are violated and people with disabilities are harmed. Access to the judicial system to seek remedy for wrongs caused becomes critical in these circumstances. Qualified immunity is a barrier to accessing justice.

To be clear, we are not talking about all instances of uses of force. We are not even talking about all officers. Most officers avoid uses of force most of the time. And most of the time, when force is used, it is not excessive. But in some rare instances, law enforcement does use force that is excessive and results in harm that was unnecessary. Those rare instances of harm are what we are talking about here.

2. When people with disabilities are harmed by law enforcement, they need adequate access to justice to get their day in court.

The adversarial process of our judicial system is an effective way to determine whether harm was done and if that harm violated our social code of conduct—the law. The judicial process allows plaintiffs to put on evidence of their injury and explain why they

² https://ovc.ncjrs.gov/ncvrw2018/info_flyers/fact_sheets/2018NCVRW_VictimsWithDisabilities_508_OC.pdf; see also Erika Harrell, *Crime Against Persons with Disabilities, 2009-2015 - Statistical Tables*, U.S. Department of Justice Bureau of Justice Statistics, (July 2017).

³ *see* The Ruderman White Paper on Media Coverage of Law Enforcement Use of Force and Disability https://rudermanfoundation.org/wp-content/uploads/2017/08/MediaStudy-PoliceDisability_final-final.pdf (discussing that the data is not clear on law enforcement uses of force and disability but “It is safe to say that a third to a half of all use-officer incidents involve a disabled civilian.”).

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are entitled to a remedy. Through the process, we identify the facts of what happened and the court and/or jury make a judgement as to whether those facts support a rights violation.

Part of DRVT's role is to investigate complaints of abuse and neglect. Some of these complaints include police uses of force. In the four years that I have been with DRVT, we have investigated about a dozen such complaints. DRVT is often the first place individuals with disabilities who have been harmed go for assistance. Our role is to investigate the allegation and determine whether we believe the evidence supports a rights violation. In most instances of police use of force, we have concluded that the evidence does not support a rights violation and that the force used was reasonable. In fact, we have only concluded that it was likely an individual's rights were violated in about three cases.

When DRVT determines that someone's rights were likely violated, we assist the individual in addressing the rights violations. This can include informal grievances and administrative complaints and/or legal representation. We also seek to understand whether there is a systemic failure and if so, how best to address that. Sometimes that too can include litigation. In determining whether to pursue litigation after determining evidence of a rights violation, DRVT has to carefully consider our limited resources.

The judicially created doctrine of qualified immunity acts as a hurdle to pursuing valid legal claims. Attorneys, including DRVT, fear that qualified immunity would block a valid legal claim from being heard based not on the facts of the case at hand, but instead on whether a court finds adequate legal precedent that the law was clearly established so that a reasonable person would have known what conduct was impermissible or unreasonable.⁴ Whether a court will find that the law was clearly established is highly subjective and fraught with judicial disagreement. *See e.g. Kisela v. Hughes*, 138 S. Ct. 1148, 200 L. Ed. 2d 449 (2018) where the majority of the U.S. Supreme Court found insufficient legal precedent that the law was clearly established but the dissent of two Supreme Court justices concluded that the law sufficiently established in a case involving a police shooting of a woman holding a kitchen knife but not immediately threatening after police received a call about a woman acting erratically with a knife.⁵ In other words, qualified immunity is not an inquiry into the facts or what the officer actually knew or believed about their conduct thus testing the evidence through the adversarial process. Instead, qualified immunity is a doctrine having the effect of eliminating access to the judicial system. When a valid claim is dismissed due to qualified immunity, the injury is

⁴ *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982).

⁵ See also *Kisela v. Hughes*, 138 S. Ct. 1148, 1162 (2018) (Sotomayor, J., dissenting) (expressing concern that the Court's decision "sends an alarming signal to law enforcement officers ... that they can shoot first and think later").

ignored as is the harm perpetuated not only for the individual, but the entire community.

At DRVT, when we consider whether to pursue litigation, we consider, among other things, the likelihood of success. Evaluating qualified immunity as a barrier to success is part of that analysis.

One such case that we did not provide representation on in court due in part to concerns about qualified immunity, involved an individual engaging in bizarre behaviors that were frightening to some people. In response to these behaviors, several police officers went to the individual's residence. This was a person that law enforcement had interacted with in the past and was known to them to experience psychiatric symptoms. Instead of arriving with mental health supports, several officers approached him at his residence. When officers confronted him on his porch, he became fearful and attempted to retreat back inside his home. Police seized him and applied force to arrest him.⁶ It was unclear to DRVT from the evidence we gathered in our investigation as to how much force was actually used. The individual did not suffer any long-term physical injuries. Psychological harm, however, was great and long-lasting. DRVT concluded that his right to be free from excessive police use of force was likely violated. Yet, the concern of qualified immunity served as a deterrent from pursuing the case in court.⁷

Previous testimony from law enforcement has expressed concern that eliminating qualified immunity in Vermont would open the flood gates for litigation. Such a concern is unsupported. As others have pointed out, there are many other steps in the judicial process to weed out frivolous claims. In addition, pursuing litigation is emotionally challenging. The process for some without the benefit of free legal services can also be financially prohibitive. Succeeding in any lawsuit, especially one against law enforcement is no easy feat. So not only is there no evidence to support the fear that litigation will be substantially increased, but it simply is not realistic.

A number of other fears have been raised about what eliminating qualified immunity would do to law enforcement but none of these fears are supported with data. Thus, it is unknown whether any of these fears would come to fruition. What is known, however, is that as it currently exists, qualified immunity is a barrier to justice. One scholar has suggested that eliminating qualified immunity would likely serve to clarify the law, increase judicial efficiency, increase the number of civil rights lawsuits, and shift the

⁶ Criminal charges were pursued but ultimately dismissed.

⁷ DRVT did represent the client in the Vermont Human Rights Commission but there, the investigation was focused on whether law enforcement had a duty to accommodate his disability rather than assessing whether the force used was excessive in violation of Constitutional law.

focus of civil rights litigation to the question of whether law enforcement abused their governmental power and harmed a citizen.⁸ She went on to explain that eliminating qualified immunity likely would not change the scope of legal protections, dramatically increase the rate at which plaintiffs prevail, or lead to budget concerns.⁹ Indeed, there are sound reasons to eliminate qualified immunity.

Thank you for your consideration of these comments as you consider S. 254. I am available to answer any questions and provide further testimony on these and other issues impacting people with disabilities as the Committee so desires.

Sincerely,
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⁸ Joanna C. Schwartz, *After Qualified Immunity*, 120 Colum. L. Rev. 309, 316–17 (2020).

⁹ *Id.*