

# Protecting Everyone's Constitutional Rights Act

A State Solution to the Problem of Qualified Immunity  
that Stymies Federal Litigation under 42 U.S.C. 1983

May 19, 2021

## **Section 1: Definitions**

1. "Government" means state, county, municipal, and other governmental entities in this state.
2. "Government employee" means an individual employed or contracted by the government.

## **Section 2: Responsibility of the Government Employer**

1. The government is responsible for a wrongful act or omission of its government employee if such acts occurs when the government employee is acting under color of law.
2. This chapter abrogates governmental immunity, official immunity, qualified immunity, and sovereign immunity at all levels of government and without regard to whether the government employee acted pursuant to a government policy or custom.
3. Nothing in this chapter abrogates judicial or legislative immunity at any level of government.

## **Section 3: Cause of Action**

1. An individual ("plaintiff") may seek legal, equitable, or other relief in a court of this state for an injury caused by an act or omission of a government employee under color of law in violation of a right under the laws or constitution of this State or the United States.
2. The proper defendant in an action, under this chapter, is the government employer and not a government employee.
3. A government employee shall not be found financially liable, under this chapter, for a violation of a right under the laws or constitution of this State or the United States.
4. The government employer shall notify the government employee, whose act or omission is the subject of a claim under this chapter, within 10 days of the government employer being served. The government employee has an unconditional right to intervene in the action, as a third-party defendant, pursuant to this State's rules of civil procedure and court rules.
5. The plaintiff bears the burden of proving a violation of a right under the laws or constitution of this State or the United States by a preponderance of the evidence.

#### **Section 4: Judicial Process**

1. A court shall not deny a claim based on the invocation of a government employee's defense or immunity<sup>1</sup> including that:
  - A. the rights, privileges, or immunities secured by the laws or constitution of this State or the United States were not clearly established at the time of their deprivation by the government employee, or that the state of the law was otherwise such that the government employee could not reasonably or otherwise have been expected to know whether the government employee's conduct was lawful;<sup>2</sup> or
  - B. the government employee acted in good faith or that the government employee believed, reasonably or otherwise, that the government employee's conduct was lawful at the time it was committed.<sup>3</sup>
2. When evaluating a government employee's use of force under the constitution of this State or the United States, the court's determination of reasonableness shall be an objective one based on the facts and circumstances confronting the employee. It shall not be based on hindsight. It shall recognize an employee often must make split-second decisions in dangerous situations.<sup>4</sup>
3. The court's order shall be supported by findings of facts and conclusions of law. The court shall make the findings of fact in a bench trial and the jury shall make them in a jury trial. The court shall make conclusions of law.

#### **Section 5: Jurisdiction in State Court**

1. An action under this chapter arises out of State law.
2. Jurisdiction is in this State's judicial system pursuant to this State's laws and rules of civil procedure.

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<sup>1</sup> In *Monell v. Department of Social Services of the City of New York*, 436 U.S. 658 (1978), the U.S. Supreme Court held that a municipality can be liable for constitutional torts. The defenses and immunities available to an individual government employee are not available to a municipality.

<sup>2</sup> Paragraph 1A is prophylactic. It ensures a state court does not import the federal immunity from *Harlow v. Fitzgerald*, 457 U.S. 800 (1982). It is unnecessary to import the federal immunity into a state court proceeding because this model holds the government employee financially harmless.

<sup>3</sup> Paragraph 1B also is prophylactic. It ensures a state court does not import the federal immunity based on the subjective beliefs of the government employee from *Pierson v. Ray*, 386 U.S. 547 (1967). It is unnecessary to import the federal immunity into a state court proceeding because this model holds the government employee financially harmless.

<sup>4</sup> *Plumhoff v. Rickard*, 572 U.S. 765, 777 (2014). (the Court has repeatedly emphasized that police officers "are often forced to make split second judgments—in circumstances that are tense, uncertain, and rapidly evolving.")

**Section 6: Attorney Fees**

1. In any proceeding in which a plaintiff's claim prevails, the government shall be liable for reasonable attorney fees and other litigation costs.
2. Reasonable attorney fees include those incurred on an hourly or contingency basis, or by an attorney providing services on a pro bono basis.
3. The court shall recognize that a plaintiff's claim prevails if the plaintiff obtains any relief the plaintiff seeks in its complaint, whether the relief is obtained via judgment, settlement or the government's voluntary change in behavior.

**Section 7: Termination of Contract, Agreement or Employment**

1. Notwithstanding any other law, no government shall enter into a contract or agreement, after the effective date of this legislation, that restricts its ability to terminate the employment of a government employee if a court finds a government employee violated a right under the laws or constitution of this State or the United States claimed under this chapter.
2. The government's termination of a contract, agreement or employment with the government employee shall not affect the government's liability under this chapter.

**Section 8: Statute of Limitations**

A claim, under this chapter, shall be commenced no later than three years from the date a claim can be brought for the deprivation of a right under the laws or constitution of this State or the United States.

**Section 9: Public information**

All documents, including complaints, judgements, settlements, and consent decrees, are subject to public disclosure.

**Section 10: Effective date**

## Legislative Findings<sup>5</sup>

1. Government's most important responsibility is to protect rights under the laws and constitutions of this State and the United States.
2. Government's violation of rights diminishes the lives, liberty, property and pursuits of individuals.
3. Government's failure to remedy a violation of rights imposes an unjust cost on an injured individual.
4. Government's legitimacy is threatened by the absence of a meaningful civil process for an injured individual to seek redress of a violation of rights.
5. Government is responsible for hiring, training, supervising and retaining employees, and for ensuring they perform their duties consistent with rights under the laws and constitutions of this State and the United States.
6. The U.S. Supreme Court has interpreted the U.S. Constitution to protect police officers and other government employees against claims of excessive force in an arrest, investigatory stop or other seizure under a standard of objective reasonableness. An objectively reasonable action does not violate the U.S. Constitution. The Court's interpretation of the 4th Amendment protects against second-guessing reasonable split-second decisions made by police officers. The legislature recognizes and agrees with the Supreme Court's precedent.<sup>6</sup>
7. Courts can address frivolous lawsuits. Rules of civil procedure authorize judges (a) to grant a motion to dismiss and (b) to sanction an attorney who files a case to harass a defendant.
8. Courts must be free to engage in fact finding to determine whether a government employee's action violates a constitutional right. By making the government a defendant and the financially responsible party, the legislature wants to free courts to determine if an employee's action violated the constitution (a) unencumbered by doctrines that impede fact finding, like the federal doctrine of qualified immunity, and (b) without the employee being exposed to personal financial liability.

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<sup>5</sup> These legislative findings will not be codified in state statute.

<sup>6</sup> A police officer has discretion to make split-second decisions. In *Graham v. Connor*, 490 U.S. 386 (1989), the U.S. Supreme Court held that an officer's split-second decision that is objectively reasonable does not violate the U.S. Constitution. Having decided that an officer's action did not violate the 4th Amendment, the Supreme Court did not have to reach the question of immunity.