NOTES

WITHIN A CITY'S LIMITS: A LOCAL GOVERNMENT'S POWER TO HOLD POLICE OFFICERS ACCOUNTABLE

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When a person's constitutional rights are violated by a public official, such as a police officer, who acts under color of law, the official can invoke a qualified immunity defense that immunizes the official unless it is clearly established that such action is unlawful. Over the years, the qualified immunity doctrine has developed into a shield that makes it difficult for aggrieved individuals to recover when they are harmed. As a result of nationwide focus on police brutality, four states—Colorado, Connecticut, Massachusetts, and New Mexico—have modified the use of qualified immunity as a defense in state courts for individuals harmed by police officers acting under their official authority. In 2021, New York City became the first city to join these four states by enacting Local Law 48 of 2021 to hold police officers accountable for use of excessive force and unreasonable searches and seizures. Under the principle of home rule, however, the legislative power of local governments is limited to what the state legislature has delegated to them. Furthermore, states may preempt local governments from exercising power in a manner inconsistent with state law.

This Note provides an overview of the development of qualified immunity, the scope of home rule power, and the constraints imposed by state preemption on a local government's ability to provide solutions to local problems. As the Constitution of the State of New York provides cities with broad powers to create and amend laws regarding their local affairs and the safety and well-being of their residents, this Note argues that Local Law 48 is a valid exercise of New York City's home rule powers. Furthermore, Local Law 48 will likely not be preempted through express, field, or conflict preemption because of the state legislature's failure to expressly or impliedly state their intention to occupy the field or limit local governments from enacting further legislation on the issue. Lastly, although Local Law 48

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establishes a limited right, it can be effective in practice to hold officers accountable and serve as a test case for future legislation.

INTRODUCTION

> Today we provide the people of New York City an important tool for accountability when law enforcement violates their rights. It eliminates the shield of qualified immunity to allow victims the opportunity to seek justice.
>
> —New York City Council Member Stephen Levin[1]

To address the lawless conditions and resulting abuse of formerly enslaved people in the post–Civil War South by states and local governments unwilling to equally enforce the law, Congress in 1871 adopted 42 U.S.C. § 1983 to provide a federal remedy[2] when public officials, acting under color of law, violate an individual's constitutional rights.[3] Concerned that police officers would have to choose between fulfilling their duties and the threat of liability, the U.S. Supreme Court immunized officers from civil liability through a good-faith and probable cause defense.[4] This was the start of qualified immunity, which eventually developed into an affirmative defense[5] that shields police officers from liability for wrongdoing, such as use of excessive force, and presents challenges to plaintiffs in holding officers personally accountable.[6]

Qualified immunity has barred relief for people who are killed or injured by police officers' use of excessive force.[7] However, the brutal murder of

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1. Nick Sibilla, *New York City Bans Qualified Immunity for Cops Who Use Excessive Force*, FORBES (Apr. 29, 2021, 10:55 AM), https://www.forbes.com/sites/nicksibilla/2021/04/29/new-york-city-limits-qualified-immunity-makes-it-easier-to-sue-cops-who-use-excessive-force/ [https://perma.cc/8WAV-YEJX].

2. *See* Monroe v. Pape, 365 U.S. 167, 171, 173–78 (1961), *overruled on other grounds sub nom.* Monell v. Dep't of Soc. Servs. of N.Y., 436 U.S. 658 (1978).

3. JAY R. SCHWEIKERT, CATO INST., QUALIFIED IMMUNITY: A LEGAL, PRACTICAL, AND MORAL FAILURE 3 (2020), https://www.cato.org/sites/cato.org/files/2020-09/pa-901-update.pdf [https://perma.cc/GXW3-Q4UC]. Section 1983 applies only to state or local government agents who are sued in federal courts. *See What Are the Elements of a Section 1983 Claim?*, THOMSON REUTERS (June 13, 2022), https://legal.thomsonreuters.com/blog/what-are-the-elements-of-a-section-1983-claim/ [https://perma.cc/T2M5-HZP7]. The equivalent for federal agents arises under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). As this Note is focused on police officers and their capacity as public officials, *Bivens* will not be further explored.

4. *See* Pierson v. Ray, 386 U.S. 547, 555–57 (1967).

5. *See* Michael E. Beyda, Note, *Affirmative Immunity: A Litigation-Based Approach to Curb Appellate Courts' Raising Qualified Immunity Sua Sponte*, 89 FORDHAM L. REV. 2693, 2695 (2021).

6. *See* Nathaniel Sobel, *What Is Qualified Immunity, and What Does It Have to Do With Police Reform?*, LAWFARE (June 6, 2020, 12:16 PM), https://www.lawfareblog.com/what-qualified-immunity-and-what-does-it-have-do-police-reform [https://perma.cc/8NF2-CNCG].

7. *See* Cary Aspinwall & Simone Weichselbaum, *Colorado Tries New Way to Punish Rogue Cops*, MARSHALL PROJECT (Dec. 18, 2020, 4:00 PM), https://www.themarshallproject.org/2020/12/18/colorado-tries-new-way-to-punish-rogue-cops [https://perma.cc/QB5P-3KFA]. As stated by Anya Bidwell, an attorney at the Institute for Justice, "[q]ualified immunity means that government officials can get away with violating your rights as long as they violated them in a way nobody thought of before." Nick Sibilla, *Colorado Passes Landmark Law Against Qualified Immunity, Creates New Way to Protect Civil Rights*, FORBES (June 21, 2020, 7:36 PM), https://www.forbes.com/sites/

George Floyd, and other recent police killings, have sparked "nationwide protests against police brutality"[8] and raised concerns as to police bias and accountability.[9] As such, some have called for the end of qualified immunity or demanded that the doctrine be reformed.[10]

Because it is difficult for plaintiffs to recover in federal court when their constitutional rights are violated, approximately twenty-five states have considered reforms to the qualified immunity doctrine at the state level, of which four states—Colorado, New Mexico, Connecticut, and Massachusetts—have passed legislation that removed or limited qualified immunity as a defense.[11] Although New York State (NYS) senators have introduced bills that would create a civil right of action when an individual is deprived of their constitutional rights and would limit available immunities, none of these bills have been enacted.[12] In contrast to the state, on April 25, 2021, New York City (NYC) became "the first major city" to limit police officers' use of qualified immunity[13] through Local Law 48 of 2021.[14] The law creates a cause of action when police officers violate a person's right to be secure against unreasonable searches and seizures and use of excessive force, banning qualified immunity as a defense.[15]

Local Law 48 presents questions regarding a city's authority to create a cause of action and to limit immunities provided for by the state. Historically, states limited local government's authority to powers explicitly "delegated to them by state law."[16] However, in the twentieth century, some states (including New York) adopted home rule provisions—establishing the

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nicksibilla/2020/06/21/colorado-passes-landmark-law-against-qualified-immunity-creates-new-way-to-protect-civil-rights/ [https://perma.cc/K7W7-HZB6] (quoting Anya Bidwell).

8. *How George Floyd Died, and What Happened Next*, N.Y. TIMES (July 29, 2022), https://www.nytimes.com/article/george-floyd.html [https://perma.cc/AC7E-M9P5].

9. Joanna C. Schwartz, *Who Can Police the Police?*, 2016 U. CHI. LEGAL F. 437, 437 ("Several recent high-profile police killings have focused national attention on longstanding concerns about police bias, police violence, and the lack of police accountability."); *see also* Daniele Selby, *New Mexico Is the Second State to Ban Qualified Immunity*, INNOCENCE PROJECT (Apr. 7, 2021), https://innocenceproject.org/new-mexico-bans-qualified-immunity-police-accountability/ [https://perma.cc/DL5E-F7YL] ("Police officers rarely face criminal charges or even internal disciplinary measures when they engage in misconduct. When misconduct goes unchecked, officers may continue to abuse their powers.").

10. Emma Tucker, *States Tackling 'Qualified Immunity' for Police as Congress Squabbles over the Issue*, CNN, https://www.cnn.com/2021/04/23/politics/qualified-immunity-police-reform/index.html [https://perma.cc/8CH7-7G9G] (Apr. 23, 2021, 7:45 AM).

11. *Id.*; *see also* Sibilla, *supra* note 1. *See generally infra* Part I.C.

12. *See* S.B. 8668B, 2019–2020 Leg. Sess. (N.Y. 2020); The Restoring Accountability and Civil Equity Act, S.B. 8669, 2019–2020 Leg. Sess. (N.Y. 2020); S.B. 1991, 2021–2022 Leg. Sess., Reg. Sess. (N.Y. 2021). This Note will not further discuss these bills because none of them have passed.

13. Sibilla, *supra* note 1.

14. N.Y.C., N.Y., ADMIN. CODE §§ 8-801 to 8-807 (2022). This Note uses the popular name of the uncodified version of the municipal law, Local Law 48, to refer to the ordinance.

15. *Id.* §§ 8-801 to 8-804.

16. *See* Paul A. Diller, *The City and the Private Right of Action*, 64 STAN. L. REV. 1109, 1112–13 (2012). Cities were considered to have "scant inherent powers"—their ability to regulate in certain areas limited to "a specific grant of power from the [state] legislature." *Id.*

right for cities to legislate and adopt social policies without approval from the state legislature.[17] The Constitution of the State of New York and the New York Municipal Home Rule Law give local governments the power to adopt and amend local laws as to their "property, affairs, or government," along with ten enumerated subjects.[18] Under the preemption doctrine, however, local governments cannot enact laws that conflict with the state constitution or general law.[19] Even if a local government has broad powers to legislate, the preemption doctrine acts as a limit that enforces the state legislature's primacy.[20]

This Note examines whether Local Law 48 is a valid exercise of NYC's home rule powers and whether it is preempted by state law. Part I of this Note surveys (1) the evolution of the qualified immunity doctrine; (2) NYS immunities and defenses; and (3) legislation in Colorado, Connecticut, Massachusetts, and New Mexico that modify the use of qualified immunity as a defense.

Part II discusses Local Law 48 and NYC's authority to create such an ordinance. Part II.A dives into what Local Law 48 does, and the debate surrounding its enactment. Part II.B outlines the home rule powers given by NYS to local governments, as well as state preemption.

Part III then argues that (1) Local Law 48 is a valid exercise of NYC's home rule power and (2) Local Law 48 is not preempted.

Lastly, Part IV discusses that although the ordinance is limited, if administered properly, it can be an effective law in practice that will hold police officers accountable for use of excessive force and unreasonable searches and seizures.

I. THE RISE OF QUALIFIED IMMUNITY AS A DEFENSE AND STATUTORY RESPONSES BY STATES TO CREATE ACCOUNTABILITY

Section 1983 provides persons with a federal cause of action to hold public officials liable for depriving them of the "rights, privileges, or immunities" guaranteed by the U.S. Constitution and federal laws.[21] However, the Supreme Court adopted the qualified immunity doctrine to allow public officials to raise an affirmative defense when they are sued under § 1983.[22] Part I.A provides the evolution of qualified immunity starting from § 1983's enactment to modern cases. Part I.B discusses the doctrine of qualified immunity and indemnification in NYS. Part I.C explores legislation enacted by four states that limit or remove qualified immunity as a defense.

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17. *See id.* at 1110, 1113.

18. N.Y. CONST. art. IX, § 2(b)–(c); *see also* N.Y. MUN. HOME RULE LAW § 10(1)(ii)(a)(1)–(14) (McKinney 2022). Although section 10 lists fourteen enumerated subjects, they are generally similar to, but are more elaborate powers than, those listed in the state constitution.

19. MUN. HOME RULE LAW § 10(1)(i)–(ii).

20. *See* Wambat Realty Corp. v. State, 362 N.E.2d 581, 586 (N.Y. 1977).

21. 42 U.S.C. § 1983; *see also* Beyda, *supra* note 5, at 2698.

22. Beyda, *supra* note 5, at 2695–96.

A. An Absolute Shield: The Evolution of Qualified Immunity

While § 1983 provides plaintiffs with a cause of action for civil damages against public officials who violate their constitutional rights,[23] it remained mostly unused[24] until the Supreme Court in *Monroe v. Pape*[25] allowed a plaintiff to sue police officers under the statute.[26] *Monroe*'s affirmation that plaintiffs could sue officers under § 1983, however, was short lived. A mere six years after *Monroe*, the Supreme Court in *Pierson v. Ray*[27] voiced concerns that police officers may have to choose between being charged for abandoning their duty if probable cause for an arrest existed and being held liable for damages if they did make the arrest.[28] Thus, the Court articulated a good-faith defense that eventually developed into today's qualified immunity doctrine in the form of the "clearly established" standard.[29] As a result, it has become increasingly difficult for civil rights plaintiffs to overcome the qualified immunity defense with the amount of specificity required.[30]

Part I.A.1 starts with a discussion of the adoption of § 1983 by Congress and the purpose it meant to serve. Part I.A.2 discusses *Monroe*'s interpretation of § 1983. Part I.A.3 analyzes the cases that shaped the qualified immunity doctrine into what it is today.

1. The Aspirations of § 1983

The origins of qualified immunity date back to 1871 and the postwar South.[31] Various opponents resisted[32] the Thirteenth Amendment's abolishment of slavery and involuntary servitude,[33] the Fourteenth Amendment's grant of equal protection and citizenship to formerly enslaved people,[34] and the Fifteenth Amendment's grant of the right to vote regardless of "race, color, or previous condition of servitude."[35] One key and violent opponent was the Ku Klux Klan, which persecuted Black citizens to prevent them from exercising their rights, including their right to vote and run for

23. *See* WHITNEY K. NOVAK, CONG. RSCH. SERV., LSB 10492, POLICING THE POLICE: QUALIFIED IMMUNITY AND CONSIDERATIONS FOR CONGRESS 2 (2020).

24. Beyda, *supra* note 5, at 2699; *see also* Sheldon Nahmod, *Section 1983 Is Born: The Interlocking Supreme Court Stories of* Tenney *and* Monroe, 17 LEWIS & CLARK L. REV. 1019, 1021 (2013) (noting that for many decades, § 1983 laid "largely dormant" due to "restrictive interpretations of state action and the Fourteenth Amendment").

25. 365 U.S. 167 (1961), *overruled on other grounds sub nom.* Monell v. Dep't of Soc. Servs. of N.Y., 436 U.S. 658 (1978).

26. *See id.* at 169–70, 187.

27. 386 U.S. 547 (1967).

28. *Id.* at 555.

29. *See* NOVAK, *supra* note 23, at 2–3.

30. *Id.* at 3.

31. *See* Schweikert, *supra* note 3, at 3.

32. *See The Enforcement Acts of 1870 and 1871*, U.S. SENATE, https://www.senate.gov/artandhistory/history/common/generic/EnforcementActs.htm [https://perma.cc/TDR4-FRV7] (last visited Nov. 7, 2022).

33. U.S. CONST. amend. XIII.

34. *Id.* amend. XIV.

35. *Id.* amend. XV.

public office.[36] Local authorities not only failed to protect formerly enslaved people, but would also sometimes participate in the persecution themselves.[37]

Congress responded to such civil rights violations and lawless conditions[38] by passing the Enforcement Acts of 1870 and 1871.[39] As part of the third of the Enforcement Acts,[40] Congress enacted 42 U.S.C. § 1983 to allow plaintiffs to sue public officials who, while acting under state or local law, violate the plaintiff's guaranteed rights under the Constitution and other federal laws.[41] To bring a § 1983 claim, the plaintiff must prove that (1) a person[42] acted under color of law of any state, territory, or the District of Columbia and (2) the actions of that person deprived the plaintiff of "rights, privileges, or immunities" guaranteed "by the Constitution and laws."[43] A government official or employee who is found to have violated such rights can be held personally liable for monetary damages or injunctive relief.[44]

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36. *The Enforcement Acts of 1870 and 1871*, *supra* note 32.

37. *See* Myriam E. Gilles, *Breaking the Code of Silence: Rediscovering "Custom" in Section 1983 Municipal Liability*, 80 B.U. L. REV. 17, 55–56 (2000).

38. Schweikert, *supra* note 3, at 3. The purpose of § 1983 was to fix the lawless conditions exhibited in the southern states, as well as the "inability or unwillingness" of state actors to guarantee equal protection of the law to citizens. Evelyn Michalos, Note, *Time over Matter: Measuring the Reasonableness of Officer Conduct in § 1983 Claims*, 89 FORDHAM L. REV. 1031, 1037 (2020). In *Monroe v. Pape*, the Supreme Court noted that a driving force behind the Third Enforcement Act was not a lack of state remedies to deal with the lawlessness in the South, but rather the failure of states "to enforce the laws with an equal hand." 365 U.S. 167, 174–75 (1961), *overruled on other grounds sub nom.* Monell v. Dep't of Soc. Servs. of N.Y., 436 U.S. 658 (1978).

39. *See The Enforcement Acts of 1870 and 1871*, *supra* note 32.

40. Section 1983 is part of the Ku Klux Klan Act of 1871. Schweikert, *supra* note 3, at 3. The Ku Klux Klan Act is another name for the Third Enforcement Act. *The Ku Klux Klan Act of 1871*, OFF. OF THE HISTORIAN, OFF. OF ART & ARCHIVES & OFF. OF THE CLERK, https://history.house.gov/Historical-Highlights/1851-1900/hh_1871_04_20_KKK_Act/ [https://perma.cc/U7GK-MC4D] (last visited Nov. 7, 2022).

41. *See* NOVAK, *supra* note 23, at 2. Section 1983 does not provide citizens with new or expanded rights; it merely provides citizens with a remedy when a clearly established right, such as a constitutional or statutory right, is violated. *See What Are the Elements of a Section 1983 Claim?*, *supra* note 3.

42. A "person" includes state and local government actors, private actors that operate under state authority, and, occasionally, private actors that act alone. *See* Michalos, *supra* note 38, at 1036. In *Monroe*, the Supreme Court decided that municipalities are not included in § 1983's definition of a "person." 365 U.S. at 191. This holding was later overruled in *Monell v. Department of Social Services of New York*, 436 U.S. 658, 690, 694 (1978).

43. 42 U.S.C. § 1983. The relevant text reads:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

Id.; *see also* Michalos, *supra* note 38, at 1037 (stating that plaintiffs must prove two essential elements to bring § 1983 claims).

44. *See* § 1983; *Qualified Immunity*, NAT'L CONF. OF STATE LEGISLATURES (Jan. 12, 2021), https://www.ncsl.org/research/civil-and-criminal-justice/qualified-immunity.aspx [https://perma.cc/6B52-TX5F]; *see also* Edward C. Dawson, *Replacing* Monell *Liability with Qualified Immunity for Municipal Defendants in 42 U.S.C § 1983 Litigation*, 86 U. CIN. L.

Thus, through § 1983, Congress gave individuals a civil remedy to protect themselves against states' misuse of power.[45]

Although § 1983 created a cause of action for violations of a constitutional right, nothing in § 1983's text mentions a potential immunity defense.[46] For many years after enactment, § 1983 laid "largely dormant" until 1961, when the Supreme Court "breathed life into the statute" in *Monroe v. Pape*.[47]

2. Statutory Interpretation of § 1983: Limiting State Powers

In *Monroe*, the Supreme Court allowed a § 1983 suit to proceed.[48] There, the plaintiff, Monroe, sued police officers for § 1983 damages after the plaintiff and others were forced to stand naked while thirteen officers raided their home without an arrest warrant.[49] Monroe argued that the officers' actions violated his Fourth Amendment right against unreasonable searches and seizures.[50] The Court held that § 1983 provides persons with a remedy when officials abuse their position to deprive plaintiffs of their rights, privileges, and immunities.[51]

The Court considered the history and purpose of § 1983 against the backdrop of violations in the South and established that the legislation served three functions.[52] First, § 1983 may override certain state laws because it prohibits discriminatory laws by states.[53] Second, § 1983 provides a remedy when state law is insufficient.[54] Finally, as to § 1983's broadest purpose, when state remedies are not an option in practice, § 1983 provides a federal remedy.[55]

In reaching its decision, the Court also reaffirmed a broad interpretation of "under color of law" that includes wrongdoing made possible due to the official's outward appearance of bearing state authority.[56] Furthermore, the

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REV. 483, 492 (2018). However, although the government employee can be held personally liable, "the government entity virtually always pays." *Qualified Immunity*, *supra*.

45. Michalos, *supra* note 38, at 1036.

46. *See* Schweikert, *supra* note 3, at 3; *see also* William Baude, *Is Qualified Immunity Unlawful?*, 106 CALIF. L. REV. 45, 49–50 (2018) (noting that neither the original statute nor the version codified in the U.S. Code "makes any reference to immunity").

47. Lynn Adelman, *The Supreme Court's Quiet Assault on Civil Rights*, AM. CONST. SOC'Y (Jan. 12, 2018), https://www.acslaw.org/expertforum/the-supreme-courts-quiet-assault-on-civil-rights/ [https://perma.cc/BZR7-CCN4].

48. *See* Monroe v. Pape, 365 U.S. 167, 169–70, 187 (1961), *overruled on other grounds sub nom.* Monell v. Dep't of Soc. Servs. of N.Y., 436 U.S. 658 (1978). *Monroe* arose at a time when the nation was "increasingly focused on racial discrimination." Nahmod, *supra* note 24, at 1022. The case focused not only on § 1983, but also on actions under the Fourteenth Amendment and on local government liability. *Id.*

49. *Monroe*, 365 U.S. at 169–70.

50. *See id.* at 170–71.

51. *Id.* at 172.

52. *Id.* at 171–80.

53. *See id.* at 173.

54. *Id.*

55. *Id.* at 174. The federal remedy does not replace the state remedy—it is merely "supplementary." *Id.* at 183. It is not necessary to invoke and be refused the state remedy before invoking the federal remedy. *Id.*

56. *Id.* at 184 (citing United States v. Classic, 313 U.S. 299, 326 (1941)).

Court held that no specific intent to deprive an individual of their federal right is required.[57]

After *Monroe*, § 1983 was, and continues to be, the primary method used to enforce and protect constitutional rights.[58] However, in 1967, the Supreme Court expressed fears of the implications of holding public officials personally liable,[59] resulting in a limited immunity that later developed into today's qualified immunity. The next section considers the modern cases that shaped the doctrine.

3. The Weakening of § 1983 in Modern Cases

The doctrine of qualified immunity traces its roots to *Pierson v. Ray*.[60] Approximately six years after the Supreme Court affirmed that § 1983 creates a cause of action, the Court expressed fears that "the threat of being held personally liable for damages" may deter public officials from doing their job effectively.[61] Although police officers are not protected by absolute immunity, the Court posited that police officers must not be made to choose between abandoning their duty when there is probable cause to arrest and being punished with damages if the officer does arrest.[62] Thus, the Court held that police officers may invoke a "good faith and probable cause" defense under § 1983.[63]

To reach its decision, the Court distinguished the facts in *Pierson* from those in *Monroe*.[64] In *Monroe*, the officers acted illegally without the authority of any state law, and so, *Monroe* did not foreclose a good-faith and probable cause defense.[65] Because good faith and probable cause is a defense for the common-law tort of false arrest, the Court determined that defendants in comparable § 1983 suits should be able to invoke the same defense.[66] As such, a limited immunity was born.

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57. *Id.* at 187. The Court believed that § 1983 should be construed "against the background of tort liability that makes a man responsible for the natural consequences of his actions." *Id.*

58. *See* Adelman, *supra* note 47; *see also* Dawson, *supra* note 44, at 491–92.

59. *See* Pierson v. Ray, 386 U.S. 547, 555 (1967).

60. *See id.*

61. Beyda, *supra* note 5, at 2699.

62. *See Pierson*, 386 U.S. at 555. The Court also considered whether a local judge could be held liable under § 1983 for damages. *See id.* at 554–55. While this Note limits its scope to consider police officers, it is important to note that the Court decided on different immunity levels for judges and police officers. The Court found absolute immunity at common law for judges when they act "within their judicial jurisdiction," even if the judge is "accused of acting maliciously and corruptly." *Id.* at 554. This is "for the benefit of the public" because judges should be free to make "principled and fearless decisionmaking." *Id.* Unlike judges, there is no "absolute and unqualified immunity" at common law for police officers. *Id.* at 555.

63. *See id.* at 557.

64. *See id.* at 556. *Monroe* did not consider immunities. *See id.*

65. *See id.*

66. *See* Schweikert, *supra* note 3, at 5; *see also Pierson*, 386 U.S. at 556–57. This defense is subjective. In *Pierson*, the Court remanded for a new trial so that the jury could determine whether the officers "reasonably believed in good faith that the arrest was constitutional." *Id.* at 557–58. If the jury finds good faith, then an unconstitutional arrest does not matter and a

Despite initially analogizing qualified immunity to common-law torts that allowed a good faith defense, the Court eventually deserted this analogy as it continued to develop the doctrine.[67] In *Harlow v. Fitzgerald*,[68] the Court "fundamentally changed" the standard articulated in *Pierson*.[69] The Court in *Harlow* acknowledged that determining subjective good faith would be difficult, and the resulting discovery costs "disruptive of effective government."[70] The Court effectively shifted from a subjective test to one of objective reasonableness.[71] Defendants no longer have to prove an actual good-faith belief that their actions were lawful.[72] Public officials performing discretionary functions are not liable for civil damages unless they violated a "clearly established" law or a reasonably known constitutional right.[73] The Court reasoned that an official cannot anticipate civil liability if the conduct has not been formerly declared unlawful.[74] The Court has defined "clearly established" to require existing case law not necessarily "directly on point," but sufficiently similar so that "existing precedent . . . placed the statutory or constitutional question beyond debate."[75] Without precedent establishing an action as unconstitutional, a plaintiff will likely not succeed in their claim.[76] For example, in *Corbitt v. Vickers*,[77] when the defendant-officer fired at a nonthreatening dog, the officer instead accidentally shot a child who was within view and lying down per the officer's order.[78] The U.S. Court of Appeals for the Eleventh Circuit upheld the officer's qualified immunity defense because no clearly established law made clear to the officer (or any

verdict for the officers would stand. *See id.* Thus, defendants must have a good-faith belief that their actions were lawful. Schweikert, *supra* note 3, at 6.

67. *See* Schweikert, *supra* note 3, at 5.

68. 457 U.S. 800 (1982). *Harlow* considered the qualified immunity doctrine in the context of two White House aides charged with violating respondent's constitutional and statutory rights. *See id.* at 802. Although *Harlow* does not involve § 1983, the Court implied that the standard articulated in *Harlow* for federal officials applies to suits under § 1983 involving state officials. *See id.* at 818 n.30.

69. Schweikert, *supra* note 3, at 6.

70. *Harlow*, 457 U.S. at 816–17. In particular, the Court emphasized "broad-ranging discovery" costs and concerns that inquiries into "judgments surrounding discretionary action" would be "influenced by the decisionmaker's experiences, values, and emotions." *Id.*

71. *Id.* at 818. The objective reasonableness standard marks a departure from a "common law interpretation" to a standard that officials must "know the law." Jim Hilbert, *Improving Police Officer Accountability in Minnesota: Three Proposed Legislative Reforms*, 47 MITCHELL HAMLINE L. REV. 222, 254 (2021).

72. *See* Schweikert, *supra* note 3, at 6.

73. *Harlow*, 457 U.S. at 818.

74. *See id.* at 818–19. However, the clearly established standard is not a "license" for "lawless conduct." *Id.* at 819. A person injured by conduct the official "could be expected to know . . . violate[s] statutory or constitutional rights . . . may have a cause of action." *Id.*

75. Ashcroft v. al-Kidd, 563 U.S. 731, 741 (2011); *see also* Sobel, *supra* note 6 ("[T]he court has generally required plaintiffs to point to an already existing judicial decision, with substantially similar facts.").

76. *See* Sobel, *supra* note 6.

77. 929 F.3d 1304 (11th Cir. 2019), *cert. denied*, 141 S. Ct. 110 (2020) (mem.).

78. *See id.* at 1308.

reasonable officer) that he would violate the Fourth Amendment if he fired at the dog and accidentally shot the child.[79]

Twenty years after *Harlow*, in *Saucier v. Katz*,[80] the Supreme Court established a two-step analysis for the qualified immunity defense.[81] Under the first step, a court considers whether the alleged facts demonstrate that a public official violated the injured party's constitutional rights.[82] If the answer is no, then the officer is entitled to qualified immunity.[83] But if the answer is yes, then step two inquires whether the official's conduct violated clearly established law.[84] If the official was not on notice that the conduct was unlawful, then qualified immunity applies and a court may award summary judgment for the official.[85]

Nine years later, in *Pearson v. Callahan*,[86] the Supreme Court stated that it is not mandatory to strictly follow the order of the two-step process set forth in *Saucier*.[87] Lower courts may decide which of the two *Saucier* steps to address first to prevent unnecessary litigation by forcing parties to litigate the constitutional question first when the facts may not violate a clearly established right.[88]

By narrowing the power of § 1983 and creating the qualified immunity doctrine, the Court has (1) made it difficult for plaintiffs to seek relief for constitutional rights violations, even if the conduct is extreme and egregious, and (2) failed to protect the purpose of § 1983 as a vehicle that limits state power by guaranteeing basic federal rights.[89] The next section explores NYS's qualified immunity doctrine and available defenses and immunities.

B. NYS Defenses and Immunities for Police Officers

Although qualified immunity protects officials only under a federal cause of action, a similar doctrine exists under New York common law.[90] NYS courts generally refer to this type of immunity as "governmental immunity" and apply it to discretionary actions taken by a public official in carrying out

79. *Id.* at 1323.
80. 533 U.S. 194 (2001).
81. *See id.* at 201.
82. *See id.*
83. *See id.*
84. *See id.*
85. *See id.* at 201–02.
86. 555 U.S. 223 (2009).
87. *See id.* at 236.
88. *See id.* at 236–37.
89. *See* Hilbert, *supra* note 71, at 241–42; *see also* Schweikert, *supra* note 3, at 10. In *Kisela v. Hughes*, Justice Sotomayor acknowledged the Court's trend of reversing orders that deny officers qualified immunity but rarely intervening when officers are wrongfully awarded the doctrine's protection. 138 S. Ct. 1148, 1162 (2018) (Sotomayor, J., dissenting). This approach has "transform[ed] the doctrine into an absolute shield" that effectively "gut[s] the deterrent effect of the Fourth Amendment" and sends officers the signal that "they can shoot first and think later." *Id.*
90. Jenkins v. City of New York, 478 F.3d 76, 86 (2d Cir. 2007); *see also* Biswas v. City of New York, 973 F. Supp. 2d 504, 520–21 (S.D.N.Y. 2013) ("New York common law provides for analogous qualified immunity.").

their governmental duties.[91] Public officials thus face no liability if the act that led to the wrongdoing was in the "exercise of discretionary authority."[92] The purpose of governmental immunity is to advance the state's interest in ensuring that government officials can carry out their official duties without fear of being held civilly liable for causing public harm.[93] Summary judgment is appropriate under state law if a defendant is entitled to a qualified immunity defense under federal law.[94]

Public employees also have defenses and indemnification in civil actions under local and state law. For example, New York General Municipal Law section 50-k[95] governs civil actions against NYC employees.[96] It outlines the availability of and restrictions on indemnification, as well as the defenses available to city employees under state and federal law.[97] Under section 50-k(3), employees must be indemnified for judgments entered against them, in both state and federal court, if the act or omission that led to the alleged violation (1) is done "within the scope of [their] public employment," (2) is done while performing their duties, (3) does not violate any rule or regulation of the employee's agency, and (4) is not intentionally wrongful or reckless.[98] Section 50-k(9) explicitly states that nothing under section 50-k modifies or limits any immunities, defenses, or indemnification available to city employees or employees in "any other level of government" under "state, federal or local law or common law."[99] The generality of this provision, along with state and federal case law, implies the inclusion of qualified immunity in state law. Furthermore, New York Public Officers Law section 17[100] closely mirrors section 50-k. Section 17(3)(a) provides that the state must indemnify state employees for judgments against them if the employee's action was within their employment duties, provided that the injury in question did not result from the employee's intentional

91. *See, e.g.*, Valdez v. City of New York, 960 N.E.2d 356, 361 (N.Y. 2011); *see also Council Votes to End Qualified Immunity and Seven Other Measures to Reform NYPD*, N.Y.C. COUNCIL (Mar. 25, 2021), https://council.nyc.gov/press/2021/03/25/2079/ [https://perma.cc/JJ4V-FE4F] ("New York courts have created their own version of the federal doctrine of qualified immunity, which shields police officers who are performing discretionary functions from civil liability.").

92. *Valdez*, 960 N.E.2d at 362. "Discretionary acts" are defined as "conduct involving the exercise of reasoned judgment." Lauer v. City of New York, 733 N.E.2d 184, 187 (N.Y. 2000).

93. *See* Haddock v. City of New York, 553 N.E.2d 987, 991 (N.Y. 1990) ("Whether absolute or qualified, this immunity reflects a value judgment that—despite injury to a member of the public—the broader interest in having government officers and employees free to exercise judgment and discretion in their official functions . . . outweighs the benefits to be had from imposing liability for that injury.").

94. *See Jenkins*, 478 F.3d at 87.

95. *See* N.Y. GEN. MUN. LAW § 50-k (McKinney 2022).

96. *See id.*

97. *See id.*

98. *Id.* § 50-k(3).

99. *Id.* § 50-k(9).

100. N.Y. PUB. OFF. LAW § 17 (McKinney 2022).

wrongdoing.[101] Section 17(9) also affirms that section 17 does not limit any defenses available under all levels of government to state employees or employees of "any other level of government."[102] Both the General Municipal Law and Public Officers Law apply to claims under § 1983.[103]

Even if a defendant is not entitled to immunities, including qualified immunity, indemnification by employers or the city is widespread. According to Professor Joanna C. Schwartz of the UCLA School of Law, "officers are virtually always indemnified even if they have been disciplined, terminated, or criminally prosecuted" for their conduct.[104] NYC is a prime example of this, as it frequently indemnifies police officers, even when their conduct was egregious.[105] If the employee intentionally committed such wrongdoing or was reckless in their behavior, the city may still choose to indemnify the employee, as the statute merely states that there is no mandatory duty to represent and indemnify.[106] Thus, while civil litigation "[a]t worst . . . 'punishes'" an officer by forcing them to testify under oath, be cross-examined, and face public scrutiny, it is also ineffective in holding officers accountable because officers rarely "pay anything out of their own pockets" for judgments or settlements.[107]

To summarize, qualified immunity is available as a defense in state courts, generally through state law, and police officers are often indemnified by their employers. The next section considers laws enacted by four states to hold police officers accountable for wrongdoing.

C. States Reform the Qualified Immunity Doctrine

The outrage and anger following George Floyd's murder empowered various state legislatures to seek to tackle the qualified immunity doctrine.[108] However, many of these attempts "withered,"[109] and only four states have

101. *Id.* § 17(3)(a). Unlike section 50-k, section 17(3)(a) does not mention reckless conduct, only intentional wrongdoing. *See id.*

102. *Id.* § 17(9).

103. *See* GEN. MUN. LAW § 50-k(2); PUB. OFF. LAW § 17(2).

104. Joanna C. Schwartz, *Police Indemnification*, 89 N.Y.U. L. REV. 885, 925–26 (2014). For example, in forty-four of the largest U.S. jurisdictions, "of the approximately 9225 civil rights damages actions resolved in plaintiffs' favor," officers only financially contributed to about 0.41 percent of those judgments between 2006 and 2011. *Id.* at 890. This "amounted to just .02% of the over $730 million spent by cities, counties, and states in these cases." *Id.*

105. *See* Richard Emery & Ilann Margalit Maazel, *Why Civil Rights Lawsuits Do Not Deter Police Misconduct: The Conundrum of Indemnification and a Proposed Solution*, 28 FORDHAM URB. L.J. 587, 587–88 (2000).

106. *See id.* at 591; GEN. MUN. LAW § 50-k(3) (stating that "the duty to indemnify and save harmless . . . shall not arise where the injury or damage resulted from intentional wrongdoing or recklessness on the part of the employee").

107. Emery & Maazel, *supra* note 105, at 589–90.

108. *See* Kimberly Kindy, *Dozens of States Have Tried to End Qualified Immunity. Police Officers and Unions Helped Beat Nearly Every Bill.*, WASH. POST (Oct. 7, 2021, 6:00 AM), https://www.washingtonpost.com/politics/qualified-immunity-police-lobbying-state-legislatures/2021/10/06/60e546bc-0cdf-11ec-aea1-42a8138f132a_story.html [https://perma.cc/2NUK-5CPV].

109. *Id.*

passed legislation that restricts or ends qualified immunity as a defense.[110] It is necessary to explicitly restrict the doctrine; where § 1983 state analogues are enacted, state courts have generally embraced a state version of "federal qualified immunity," even when the statute is silent on immunity.[111] For example, in *Rodriques v. Furtado*,[112] the Massachusetts Supreme Judicial Court found that an officer was immunized because, in enacting the state's civil rights act, the state legislature adopted the same immunity standard developed under § 1983.[113] In this case, the officer obtained a warrant to search the plaintiff's vagina for drugs.[114] Although the officers that searched the plaintiff's apartment did not find any drugs, she was taken to a hospital where medical staff forcibly held her down to search her vagina.[115] Nothing was found.[116] The plaintiff argued that she was deprived of her constitutional right "to be free from unreasonable searches" under Massachusetts's state constitution.[117] The court stated: "We cannot say that a reasonable police officer in [this] position would have known that the search of the plaintiff's vagina violated constitutional rights which were clearly established at the time of the search."[118]

The next four sections review the way in which four states have limited qualified immunity for state courts.[119]

1. Colorado's Accountability Act

On June 19, 2020, in honor of Juneteenth, Colorado governor Jared Polis signed into law a "sweeping" reform bill, SB 20-217,[120] making Colorado

110. *See* Tucker, *supra* note 10; *see also* Sibilla, *supra* note 1. Although Colorado, Connecticut, Massachusetts, and New Mexico mark recent attempts to limit the qualified immunity doctrine, Ohio, for example, eliminated immunities generally in 2003 for employees who act outside of the scope of their employment or maliciously or recklessly. *See* OHIO REV. CODE ANN. § 2744.03(A)(6)(a)–(b) (West 2022). Furthermore, some state courts have also "interpreted their state constitutions, statutes, and common law to narrow or eliminate qualified immunity." Aaron L. Nielson & Christopher J. Walker, *Qualified Immunity and Federalism*, 109 GEO L.J. 229, 297 (2020).

111. Jay Schweikert, *Colorado Passes Historic, Bipartisan Policing Reforms to Eliminate Qualified Immunity*, CATO INST. (June 22, 2020, 11:31 AM), https://www.cato.org/blog/colorado-passes-historic-bipartisan-policing-reforms-eliminate-qualified-immunity [https://perma.cc/GBL6-TC5Y].

112. 575 N.E.2d 1124 (Mass. 1991).

113. *Id.* at 1127

114. *Id.* at 1126.

115. *Id.* at 1126–27.

116. *Id.* at 1127.

117. *Id.* at 1126.

118. *Id.* at 1128.

119. While the state laws provide a wide range of protections and requirements, the following sections will be limited to discussing what is protected, who is covered, what defenses and immunities are available, and applicable statutes of limitations. Furthermore, in text, this Note refers to the enacted state bills, except for Massachusetts, by their legislative names but cites to the enacted statute.

120. Enhance Law Enforcement Integrity Act, S.B. 20-217, 2020 Gen. Assemb., Reg. Sess. (Colo. 2020); *see also* Sibilla, *supra* note 7. This bill passed "with *overwhelming* bipartisan support" in both the Colorado House of Representatives and Senate. Schweikert, *supra* note 111.

the first state to explicitly ban qualified immunity as a defense.[121] About one year later, HB 21-1250[122] was enacted to clarify and address unresolved issues related to SB 20-217.

SB 20-217 creates a state civil cause of action for deprivation of rights.[123] Like § 1983, the act permits plaintiffs to bring a civil action against a peace officer[124] who, "under color of law," deprived the plaintiff of their individually guaranteed state constitutional rights.[125] Peace officers who fail to intervene when a person is deprived of these rights can also be held liable for harms to the injured party.[126] SB 20-217 broadly encompasses "all violations of the Colorado Bill of Rights," but only permits civil lawsuits against peace officers.[127]

Furthermore, as to claims brought under the newly created civil action, statutory immunities, limitations on liability,[128] and qualified immunity as a "defense to liability" do not apply.[129] Even so, peace officers are not individually liable. A peace officer who has a judgment or settlement entered against them pursuant to this statute must be indemnified by their employer unless the officer acted without "good faith and reasonable belief that the action was lawful."[130] In this scenario, the officer is responsible for the lesser of either "five percent of the judgment or settlement or twenty-five thousand dollars."[131] The officer's employer or insurance must pay the full settlement or judgment if the officer is unable to pay.[132] There is no duty to indemnify if the officer is convicted for a criminal violation unless the employer, "through its action or inaction," contributed to the violation.[133] The statute of limitations is two years after the cause of action accrues.[134]

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121. Schweikert, *supra* note 111 ("Colorado is not the first state to enact a 'state analogue' to Section 1983, but it *is* the first state to specifically negate the availability of qualified immunity as a defense through legislation."); *see also* Sibilla, *supra* note 7.

122. Measures to Address Law Enforcement Accountability, H.B. 21-1250, 2021 Gen. Assemb., Reg. Sess. (Colo. 2021).

123. S.B. 20-217, 2020 Gen. Assemb., Reg. Sess. (Colo. 2020). For the enacted statute, see COLO. REV. STAT. § 13-21-131 (2022).

124. "Peace officer" includes police officers, sheriffs, and state patrol officers. COLO. REV. STAT. §§ 24-31-901(3), 16-2.5-102 (2022).

125. *Id.* § 13-21-131(1). While § 1983 allows individuals to sue for damages in federal court when their federal constitutional rights are violated, SB 20-217 allows individuals to sue in a state court when their state constitutional rights are violated. Schweikert, *supra* note 111.

126. COLO. REV. STAT. § 13-21-131(1) (2022).

127. Nick Sibilla, *New Mexico Bans Qualified Immunity for All Government Workers, Including Police*, FORBES (Apr. 7, 2021, 4:00 PM), https://www.forbes.com/sites/nicksibilla/2021/04/07/new-mexico-prohibits-qualified-immunity-for-all-government-workers-including-police/ [https://perma.cc/3B33-HW4Y].

128. COLO. REV. STAT. § 13-21-131(2)(a) (2022).

129. *Id.* § 13-21-131(2)(b).

130. *Id.* § 13-21-131(4)(a). The requirement of good faith and reasonable belief for indemnification is reminiscent of limited immunity at common law, as discussed by the U.S. Supreme Court in *Pierson*. *See supra* notes 60–66 and accompanying text.

131. COLO. REV. STAT. § 13-21-131(4)(a) (2022).

132. *Id.*

133. *Id.*

134. *Id.* § 13-21-131(5).

2. Connecticut Expands Police Officers' Liability

Although Connecticut did not ban qualified immunity, on July 31, 2020, Connecticut limited police officers' legal immunity through HB 6004.[135] Prior to this bill, police officers could be sued for specific constitutional violations.[136] This right was established in *Binette v. Sabo*,[137] in which the Connecticut Supreme Court held that plaintiffs can seek monetary damages under a private cause of action for violations of article I, sections 7 and 9 of the Constitution of the State of Connecticut.[138] While section 7 protects against unreasonable searches or seizures, section 9 protects against detainment or punishment unless "clearly warranted by law."[139] State officers and employees are immune from personal liability for damages that occur within the "discharge of [their] duties or within the scope of [their] employment" if their conduct is not "wanton, reckless, or malicious."[140]

Effective July 1, 2021, HB 6004 created a new law that expands police officers' liability: "No police officer, acting alone or in conspiracy with another," can deprive a person of their rights under state law or article I of the state constitution.[141] Additionally, if officer A witnesses officer B use what officer A "objectively knows to be unreasonable, excessive or illegal use of force," then officer A must both report and intervene.[142]

Unlike Colorado's SB 20-217, Connecticut's HB 6004 does not specifically mention qualified immunity. It addresses governmental immunity generally,[143] limiting it to damages claims in which police officers "had an objectively good faith belief" that their conduct "did not violate the law."[144] There is no governmental immunity for equitable relief.[145] Still, police officers are not personally liable. Unless the officer's act was "malicious, wanton, or wilful," the law enforcement unit or municipality

135. H.B. 6004, 2020 Gen. Assemb., July Spec. Sess. (Conn. 2020); Nick Sibilla, *New Connecticut Law Limits Police Immunity in Civil Rights Lawsuits, but Loopholes Remain*, FORBES (July 31, 2020, 9:09 PM), https://www.forbes.com/sites/nicksibilla/2020/07/31/new-connecticut-law-limits-police-immunity-in-civil-rights-lawsuits-but-loopholes-remain/ [https://perma.cc/E8D8-76BH]. For the enacted statute, see CONN. GEN. STAT. ANN. § 52-571k (West 2022).

136. *See* Sibilla, *supra* note 135.

137. 710 A.2d 688 (Conn. 1998).

138. *Id.* at 689.

139. CONN. CONST. art. 1, §§ 7, 9.

140. CONN. GEN. STAT. ANN. § 4-165(a) (West 2022).

141. *Id.* § 52-571k(b). The term "police officer" includes members of the local police department, constables in criminal law enforcement, special policemen, or members of law enforcement "who perform[] police duties." *Id.* § 7-294a(9).

142. *Id.* § 7-282e(a)(1) to (2).

143. *See id.* § 52-571k(d)(1). Connecticut courts refer to "qualified immunity" as "governmental immunity." *See What Is Qualified Immunity*, ACLU CONN. (July 22, 2020, 12:00 PM), https://www.acluct.org/en/news/what-qualified-immunity [https://perma.cc/8BWD-BNRQ].

144. CONN. GEN. STAT. ANN. § 52-571k(d)(1) (West 2022). Like Colorado's SB 20-217, Connecticut's HB 6004 is different from the U.S. Supreme Court's current immunity standard, which cares not for good faith but whether the officer violated clearly established law. *See supra* notes 68–76.

145. CONN. GEN. STAT. ANN. § 52-571k(d)(1) (West 2022).

must protect the officer from "financial loss and expense."[146] Plaintiffs may recover court costs and reasonable attorneys' fees only if the violation was "deliberate, wilful or committed with reckless indifference."[147] Plaintiffs must commence their claim within one year of when their right was violated.[148]

Officers are authorized to use force, including deadly force and chokeholds, under very specific conditions, some of which require a reasonable belief that force is necessary to arrest or for self-defense.[149]

3. Massachusetts Narrowly Removes Immunities for Decertified Officers

Massachusetts, like Connecticut, also did not outright ban qualified immunity. Instead, on December 31, 2020, Massachusetts reformed police standards by limiting law enforcement officers' legal immunity through SB 2963,[150] which amends Massachusetts General Law sections 11H and 11I on constitutional violations.[151] Both sections set out a civil cause of action for persons whose constitutional rights are violated, but actions under section 11H are to be brought by the attorney general, whereas actions under section 11I are to be brought by aggrieved persons.[152] Massachusetts permits individuals to sue persons, including law enforcement officers, who violate their federal and state constitutional rights only if the person used or attempted to use "threats, intimidation or coercion."[153] Quite notably, Massachusetts, unlike Colorado and Connecticut, does not limit its protection to rights in its state constitution, but also protects rights secured under the U.S. Constitution.[154]

Originally, section 11H made no mention of immunity.[155] Section 11H has since been amended (through SB 2963) to assert that no law enforcement officer[156] will have immunity from civil liability if they engaged in conduct that violates an individual's right under state law to be free of biased policing, provided that such conduct led to the officer's decertification.[157] However, if an officer knowingly or unreasonably interferes with an individual's rights under the federal and state constitutions and laws through use or attempted use of "threat, intimidation or coercion," then section 11H does not grant the

146. *Id.* § 52-571k(e).
147. *See id.* § 52-571k(f).
148. *See id.* § 52-571k(g).
149. *See id.* § 53a-22.
150. S.B. 2963, 191st Gen. Ct. (Mass. 2020).
151. *See* MASS. GEN. LAWS ch. 12, §§ 11H(a)(1)–11I (2022).
152. *See id.*
153. *Id.*
154. *See id.*
155. *See id.* § 11H (2021).
156. "Law enforcement officer" is defined as "any officer of an agency," including "special state police officer[s]," special sheriffs "performing police duties," deputy sheriffs, constables who arrest, and so forth. *Id.* ch. 6E, § 1 (2022).
157. *See id.* ch. 12, § 11H(b).

officer immunity from civil liability.[158] Unlike other states' laws, SB 2963 makes no mention of indemnification.[159]

Available relief for constitutional violations under sections 11H and 11I includes an injunction or any other "appropriate equitable relief."[160] Plaintiffs asserting a constitutional violation under section 11I must commence their claim within three years of the violation occurring, as per limits imposed on civil rights actions.[161]

4. New Mexico's Statutory Cause of Action Against Government Officials

On April 7, 2021, Governor Michelle Lujan Grisham signed the New Mexico Civil Rights Act, HB 4, into law,[162] making New Mexico the second state to completely ban the use of qualified immunity for state constitutional violations.[163] HB 4 allows a person deprived of their rights under the state's bill of rights to sue in the state's district court and recover damages, equitable relief, or injunctive relief.[164] New Mexico's bill is inclusive in that it applies to a public body or person who acts under color of, or within, a public body's authority.[165] "Public body" includes state or local government, agencies or entities created by New Mexico's state constitution, and branches of government that "receive[] public funding," such as school districts.[166] Thus, unlike the laws in Colorado, Connecticut, and Massachusetts, which limit liability to police officers and officers in similar capacities, HB 4 "applies to all government officials."[167]

HB 4 also bans qualified immunity as a defense, provided that (1) the plaintiff seeks relief or damages pursuant to the New Mexico Civil Rights Act; (2) the public body or person acted either under color of authority or within a public body's authority; and (3) the public body or person deprived the plaintiff of their state constitutional "rights, privileges or immunities."[168] Still, a police officer would not be personally liable.[169] All claims must be

158. *Id.*
159. *See generally* S.B. 2963, 191st Gen. Ct. (Mass. 2020).
160. MASS. GEN. LAWS ch. 12, § 11H(a)(1) (2022).
161. *See id.* ch. 260, § 5B.
162. New Mexico Civil Rights Act, H.B. 4, 2021 Leg., Reg. Sess. (N.M. 2021); Press Release, Off. of the Governor Michelle Lujan, Gov. Lujan Grisham Ratifies Civil Rights Act (Apr. 7, 2021), https://www.governor.state.nm.us/2021/04/07/gov-lujan-grisham-ratifies-civil-rights-act/ [https://perma.cc/S95Z-EAZ7]. For the statute, see N.M. STAT. ANN. § 41-4A-1 to 41-4A-13 (2022).
163. Selby, *supra* note 9.
164. N.M. STAT. ANN. § 41-4A-3(B) (2022).
165. *Id.*
166. *Id.* § 41-4A-2.
167. *New Mexico Ends Qualified Immunity for Abusive Police*, EQUAL JUST. INITIATIVE (Apr. 9, 2021), https://eji.org/news/new-mexico-ends-qualified-immunity-for-abusive-police/ [https://perma.cc/7A2H-HWWK].
168. N.M. STAT. ANN. § 41-4A-4 (2022). Sovereign immunity is also not available as a defense for New Mexico civil rights claims. *Id.* § 41-4A-9. However, "judicial immunity, legislative immunity or any other constitutional, statutory or common law immunity" may still be invoked. *Id.* § 41-4A-10.
169. *See id.* § 41-4A-3(C).

brought against the public body;[170] employers are held "vicariously liable" for their employee's conduct.[171] Unlike Colorado's bill, HB 4 does not explicitly address whether an individual who did not act within the scope of a public body's authority could be held personally liable by a plaintiff.[172] Upon enactment, liability was capped at two million dollars, with the maximum recovery increasing as the cost of living increases.[173]

Claimants must bring claims under the New Mexico Civil Rights Act within three years of the alleged unlawful conduct unless state law provides for "a longer statute of limitations."[174]

II. LOCAL LAW 48: THE CITY'S HOME RULE POWERS AND THE BOUNDARIES OF STATE PREEMPTION

In line with the push for police reform that followed the murder of George Floyd, local governments have made efforts to deal with police accountability while the U.S. Supreme Court refuses to reassess the federal qualified immunity doctrine.[175] The New York City Council passed Local Law 48 in 2021 to remove the qualified immunity barrier from suits against officers for use of excessive force and/or unlawful searches and seizures.[176] As the first city to join four states in creating a cause of action to hold officers accountable, it raises questions of whether such legislation is within the city's home rule power,[177] and whether Local Law 48 is preempted by NYS law on the immunities, defenses, and indemnification available to state and city employees.[178] Part II.A analyzes Local Law 48, with Part II.A.1 explaining the law and Part II.A.2 summarizing what various groups have said about the law. Part II.B explores the breadth of home rule powers, and Part II.C discusses the limits posed by the preemption doctrine on home rule.

A. NYC Local Law 48

Through Local Law 48, NYC curtailed qualified immunity and provided plaintiffs with a cause of action when their rights are violated.[179] Although Local Law 48 is narrowly tailored to apply only to police officers who use excessive force or engage in unreasonable searches and seizures while acting

170. *Id.* For judgments awarded under the New Mexico Civil Rights Act against a person who acts "under color of or within the . . . scope" of a public body's authority, the person will be indemnified by the public body. *Id.* § 41-4A-8.

171. Sibilla, *supra* note 127.

172. *See generally* N.M. STAT. ANN. § 41-4A-1 to 41-4A-13 (2022).

173. *Id.* § 41-4A-6.

174. *Id.* § 41-4A-7.

175. *See* James Craven, *New York City Council Passes Qualified Immunity Reform*, CATO INST. (Mar. 31, 2021, 5:30 PM), https://www.cato.org/blog/nyc-council-passes-qualified-immunity-reform-bill-bolstering-citizens-fourth-amendment-rights [https://perma.cc/AU4U-AULQ].

176. *See* Sibilla, *supra* note 1.

177. *See infra* Part II.B.

178. *See supra* Part I.B.

179. N.Y.C., N.Y., ADMIN. CODE §§ 8-803 to 8-804 (2022).

under color of law,[180] the ordinance has faced questions as to its effectiveness and legality. Part II.A.1 discusses the scope of Local Law 48 and Part II.A.2 outlines various opinions on the ordinance pre-enactment.

1. A Right of Security

On April 25, 2021, Local Law 48, which amends NYC's administrative code to create a civil action for unreasonable searches and seizures and the use of excessive force, was enacted.[181] Thus, NYC became the "first major city" to join four states in creating a law that either ends or limits qualified immunity following the murder of George Floyd.[182]

Local Law 48 grants natural persons security against excessive force independent of whether such force was used in the context of a search or seizure.[183] It creates a civil action for the deprivation of rights that is similar but not analogous to § 1983 actions. A "covered individual" who deprives a person of rights guaranteed under section 8-802(a) of the New York City Administrative Code, while acting under color of law, can be held liable to the aggrieved person for relief.[184] This is a limited right, as the law only provides individuals security against unreasonable searches and seizures and the use of excessive force.[185] Furthermore, a "covered individual" is defined under section 8-801 of the New York City Administrative Code to mean either (1) a police department employee or (2) a person appointed as a special patrolman.[186] No other type of officers are covered. However, employers also face liability. Employers are liable for the actions of their employees when the employee (1) acts under color of law and (2) deprives a natural person of the rights guaranteed to them in section 8-802.[187] Failure to intervene for a violation of a protected right can also result in liability for the employee and the employer.[188] Per section 8-807 of the New York City Administrative Code, the rights guaranteed under the law against unreasonable searches and seizures and the use of excessive force are to be interpreted "in the same manner" as the rights granted under (1) the Fourth and Fourteenth Amendments of the U.S. Constitution, (2) article I, sections

180. *Id.* §§ 8-802 to 8-803.

181. *Int. 2220-2021*, N.Y.C COUNCIL, https://legistar.council.nyc.gov/LegislationDetail.aspx?ID=4771043&GUID=32ED0C83-7506-45F9-81AA-F5144FCA193A [https://perma.cc/D6ZY-6GNM] (click "20. Local Law 48") (last visited Nov. 7, 2022).

182. Sibilla, *supra* note 1.

183. N.Y.C., N.Y., ADMIN. CODE § 8-802 (2022).

184. *Id.* § 8-803(a). The full text reads:

> A covered individual who, under color of any law, ordinance, rule, regulation, custom or usage, subjects or causes to be subjected, including through failure to intervene, any other natural person to the deprivation of any right that is created, granted or protected by section 8-802 is liable to the person aggrieved for legal or equitable relief or any other appropriate relief.

Id.

185. *Id.* § 8-802.

186. *Id.* § 8-801.

187. *Id.* § 8-803(b).

188. *Id.* § 8-803(a)–(b).

6 and 12 of New York's state constitution, and (3) section 8 of New York's civil rights law.[189]

A person need not exhaust all remedies before commencing a claim under section 8-803 of the New York City Administrative Code.[190] Pursuing a private cause of action under the ordinance will also not interfere with claims the plaintiff may assert "under common law or pursuant to any other law or rule."[191] Similarly, available remedies include those under Local Law 48 and all applicable remedies under common law or any other law.[192] Like Colorado and New Mexico, Local Law 48 explicitly states that qualified immunity is not a defense, but the law also removes "any other substantially equivalent immunity."[193] Notably, when determining officer liability or the applicability of qualified immunity, the law is silent as to whether there must be either an intent to deprive or reckless conduct that deprives an individual of their rights.[194]

Relief available to a prevailing plaintiff under section 8-805 of the New York City Administrative Code includes (1) a choice between compensatory damages, with courts having discretion to also impose punitive damages, or liquidated damages of one thousand dollars; (2) attorneys' fees and court costs; and (3) a restraint on the covered individual "from engaging in further conduct in violation of such section."[195] There is no elaboration as to how long the restraint would last, nor any indication that the covered individual would be removed from their employment, as "restraint" refers only to continued engagement in unlawful conduct.[196] Plaintiffs must commence their section 8-803 civil action claim within three years of the "alleged deprivation of a right created, granted or protected by section 8-802," implying that the law is not retroactive.[197]

Local Law 48 does not refer to the indemnification of police officers.[198] Although former Mayor Bill de Blasio stated in an interview that officers will not be held personally liable,[199] this contrasts with the plain text of the

189. *Id.* § 8-807; *see also* Craven, *supra* note 175. By holding both the officer and the police department liable, the law incentivizes good behavior as police departments will not want the risk of litigation for bad officers, and officers will not want to be the center of litigation. *See id.* It also ensures that an aggrieved plaintiff is still able to recover when the defendant-officer is unable to pay a damage award by holding employers liable. *Id.*

190. N.Y.C., N.Y., ADMIN. CODE § 8-803(d) (2022).

191. *Id.*

192. *Id.*

193. *Id.* § 8-804; *see also supra* notes 128–29, 168.

194. *See* N.Y.C., N.Y., ADMIN. CODE § 8-803 to § 8-804 (2022).

195. *Id.* § 8-805(a)(1) to (3).

196. *See generally id.*

197. *Id.* § 8-806. This interpretation is consistent with the last version of the bill posted on the New York City Council website, which explicitly states that only violations on or after the effective date fall under Local Law 48. *See Int. 2220-2021*, *supra* note 181.

198. *See generally* N.Y.C., N.Y., ADMIN. CODE §§ 8-801 to 8-807 (2022).

199. Luke Barr, *New York City Moves to End Qualified Immunity, Making It the 1st City in US to Do So*, ABC NEWS (Mar. 29, 2021, 4:47 PM), https://abcnews.go.com/Politics/york-city-moves-end-qualified-immunity-making-1st/story?id=76752098 [https://perma.cc/B3UL-AGL9].

legislation. Under section 8-803, an injured person may sue an officer under subsection (a) and the officer's employer under subsection (b).[200] Local Law 48 also amends section 7-114(b) of the New York City Administrative Code: civil actions filed against a covered individual should include information on the resolution of the action, including payment to the injured party "by a covered individual or an employer or other person paying on behalf of a covered individual."[201] If officers cannot be held personally liable or are indemnified, then the text related to a covered individual's liability is superfluous. Furthermore, the first draft of the bill, Introduction No. 2220 ("Int. 2220"), contained an indemnification provision.[202] Under that provision, officers were personally liable for either "the lesser of $25,000 or 5 percent of the amount of such judgment or settlement."[203] Neither the employer nor the city can indemnify the officer for that portion unless (1) the officer is unable to pay the required amount, and (2) the city or employee would "have been required or reasonably likely to indemnify."[204] The indemnification provision also directly acknowledged General Municipal Law section 50-k and enforced personal liability on officers in spite of section 50-k.[205] Its exclusion from the enacted law indicates the New York City Council's intent not to indemnify police officers or limit officers' personal liability to the amounts previously stated.

2. Hearing Testimonies: Reception of Local Law 48 Pre-enactment

The pre-enactment bill, Int. 2220,[206] garnered a wide range of arguments for and against the ordinance, raising traditional arguments in support of qualified immunity and questions as to the authority of local governments.

One contention is that Int. 2220 shows a lack of understanding and misguided assumptions as to qualified immunity.[207] Qualified immunity is not an absolute immunity; officers are not shielded when they intentionally violate a plaintiff's constitutional rights.[208] The doctrine does not preclude

200. N.Y.C., N.Y., ADMIN. CODE § 8-803(a) to (b) (2022).

201. *Id.* § 7-114(b)(1) to (3).

202. *See generally Int. 2220-2021*, N.Y.C. COUNCIL, https://legistar.council.nyc.gov/LegislationDetail.aspx?ID=4771043&GUID=32ED0C83-7506-45F9-81AA-F5144FCA193A [https://perma.cc/D6ZY-6GNM] (click "3. Int. No. 2220") (last visited Nov. 7, 2022).

203. *Id.* at 4.

204. *Id.*

205. *Id.* ("Notwithstanding any provision to the contrary in section 50-k of the general municipal law or any other provision of law, a covered individual . . . [will] be personally liable for a portion of such judgment or settlement . . . .").

206. These arguments were brought forth during a hearing before Local Law 48 was enacted. The version discussed is Int. 2220, which contains a few differences from the enacted version. For this section only, I will be referring to the ordinance as Int. 2220.

207. *See Int. 2220-2021*, N.Y.C COUNCIL, https://legistar.council.nyc.gov/LegislationDetail.aspx?ID=4771043&GUID=32ED0C83-7506-45F9-81AA-F5144FCA193A [https://perma.cc/D6ZY-6GNM] (click "8. Hearing Testimony 2/16/2021") (last visited Nov. 7, 2022) (testimony of Benny Boscio Jr., president of the Corrections Officers' Benevolent Association).

208. *Id.*

a criminal prosecution or bar recovery in civil actions when a clearly established right is violated.[209] Qualified immunity also protects officers carrying out their duties.[210] To remove the defense is to allow frivolous suits to proceed and force officers who risk their lives to undergo civil suits for carrying out their job functions.[211] This is a traditional argument most analogous to the justifications provided by the Supreme Court as it developed the federal qualified immunity doctrine.[212]

Int. 2220 also appears to create various conflicts with established structures. First, the ordinance "ignores" that the New York City Office of the Corporation Counsel represents officers in suits and often chooses to settle cases before trial.[213] The ordinance, by placing personal liability on officers, would require officers to pay a settlement they had no part in negotiating, effectively creating a "statute-based conflict of interest" between lawyer and client.[214] Second, Int. 2220 is "unenforceable" because state law preempts it.[215] General Municipal Law section 50-k, mirroring Public Officers Law section 17, requires that public employees be indemnified for judgments entered against them.[216] By making police officers personally liable,[217] the ordinance "attempts to effectively amend [General Municipal Law section] 50-k and subvert the will of the legislature."[218] It interferes with the state legislature's authority by stepping into an area of law the state intends to occupy.[219]

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209. *Id.*

210. *Id.* ("Our members cannot be expected to put their lives on the line and carry out their responsibilities . . . only to subject themselves to civil liabilities simply for doing their jobs.").

211. *Id.*; *see also id.* (testimony of Paul DiGiacomo, president of Detectives' Endowment Association, Inc.) ("Int. 2220 will only serve to embolden the criminal element by providing the ability to use the threat of frivolous lawsuits against law enforcement Officers to discourage them from carrying out their duties.").

212. *See supra* notes 60–63.

213. *See Int. 2220-2021*, *supra* note 207 (testimony of Paul DiGiacomo).

214. *Id.*

215. *Int. 2220-2021*, *supra* note 207 (Memorandum in Opposition to Introduction No. 2220 from the Police Benevolent Association).

216. *See id.*; *see also supra* notes 96–99 and accompanying text.

217. The hearing took place before the indemnification provision was removed from Int. 2220. As stated previously, initial drafts of Int. 2220 did not permit officers to be indemnified for a specified amount. *See supra* notes 203–05 and accompanying text. The Police Benevolent Association also argued against Int. 2220's allowance of punitive damages. Generally, courts are not permitted to award punitive damages against municipalities because the purpose of punitive damages is to punish and deter, two goals that cannot be advanced when the taxpayers and citizens bear the cost of that punishment. *Int. 2220-2021*, *supra* note 207 (Memorandum in Opposition to Introduction No. 2220 from the Police Benevolent Association). In the enacted law, if silence regarding indemnification indicates that the city means to hold officers personally liable for the full amount of the judgment entered against them, then the punitive damages argument does not apply.

218. *Int. 2220-2021*, *supra* note 207 (Memorandum in Opposition to Introduction No. 2220 from the Police Benevolent Association).

219. *Id.* A similar argument could be made for the ordinance's removal of qualified and relevant immunities, which may conflict with General Municipal Law section 50-k(9). *See supra* Parts I.B, II.A.1 and accompanying text.

Opponents also raised policy arguments for why Int. 2220 should be rejected. The ordinance "creates no new substantive" right because the right of action that the ordinance created under section 8-802 is already secured under the Fourth Amendment and enforceable via a § 1983 claim or a "state Constitutional tort claim."[220] The ordinance serves no purpose other than to punish officers.[221] The removal of qualified immunity as a defense, the threat of a punitive damages award, and the possibility of officers being held personally liable show the punitive components of the ordinance and place enormous burdens on officers at a time when violent crime is rampant in NYC.[222] The ordinance effectively "creates a strict liability offense" as even good faith is not a defense, causing "uncertainty" for officers.[223]

Lastly, while some groups emphasized that Int. 2220 is a great step forward, they also acknowledged that the ordinance is too narrow, failing to hold officers properly accountable for the myriad of Fourth Amendment violations officers engage in.[224]

B. The State of Affairs in New York: Home Rule and Preemption

To appreciate the issue of a local government creating an ordinance that restricts defenses available to police officers, it is important to understand the state of affairs in NYS. Local governmental authority was initially limited to that "delegated to them by state law"[225] until twentieth century reforms granted cities a "permanent source" of power.[226] Through the state constitution, NYC is given broad powers to create and amend laws as to its local affairs.[227] Part II.B.1 analyzes the development of home rule powers and determines what power local governments, such as NYC, have to enact and amend laws. Part II.B.2 then reviews the constraints posed by the preemption doctrine.

1. The Development of Home Rule Powers: Can NYC Create a Cause of Action?

Although states can create state law to hold officers accountable,[228] what power does a city have to do the same? The "federal Constitution is silent"

220. *Int. 2220-2021*, *supra* note 207 (Memorandum in Opposition to Introduction No. 2220 from the Police Benevolent Association).

221. *See id.*

222. *See id.*

223. *Int. 2220-2021*, *supra* note 207, at 3 (testimony of Chelsea Davis, chief strategy officer at the Office of the First Deputy Mayor).

224. *See id.* at 5–6 (testimony of Michael Sisitzky of the New York Civil Liberties Union); *see also id.* at 12–13 (testimony of the Legal Aid Society) (stating that Int. 2220 should encompass more state and federal constitutional rights, include corrections officers, and impose municipal liability).

225. Diller, *supra* note 16, at 1112–13.

226. *Id.* at 1113.

227. *See* N.Y. CONST. art. IX, § 2(c).

228. *See* Hilbert, *supra* note 71, at 257 ("States have the power to restore the original promise of § 1983 by creating an equivalent statute under state law."); *see also* Sibilla, *supra*

on the authority of local governments.[229] As a result, for much of the nineteenth century, states controlled local governments, which were viewed as subordinate to the state.[230] This is known as "Dillon's Rule." The powers that a local government could exercise were limited to only that which the state explicitly delegated.[231] Local governments had "no inherent lawmaking authority."[232] Cities could regulate private law matters as defined and limited by the state.[233] But powers that touched on liberty or property were considered unusual and narrowly read.[234] Dillon's Rule was later embraced by the Supreme Court in *Hunter v. City of Pittsburgh*,[235] in which the Court held that municipal corporations (e.g., cities) are "political subdivisions of the state" that could be destroyed without or against "the consent of the citizens."[236] This changed in the nineteenth century, as cities were empowered through Progressive Era reforms that emerged from various post–Civil War factors: cities grew more populous and urbanized, and movements emerged to challenge local governments' legal powerlessness.[237] As a result, some states embraced home rule, which gave cities "a broader and more permanent source of authority from which to govern."[238] Local governments could only legislate in matters of local concern; they were not given "plenary legislative authority."[239] This was known as "imperio" home rule: cities had full control over local matters but could not legislate in areas of state concern.[240] Courts struggled to interpret what qualifies as a "local matter," and many were unwilling to uphold local governments' immunity from state interference, allowing states to dominate if there was an interest in a shared matter.[241]

In 1953, the American Municipal Association proposed providing local governments with full "state legislative authority" while allowing states to "structure or preempt" general local laws.[242] This led to most states amending or enacting new home rule provisions in their constitutions.[243] Over time, states have continued to modify local governments' authority,

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note 1 (noting that states can create a state cause of action and ban "qualified immunity as a defense").

229. NAT'L LEAGUE OF CITIES, PRINCIPLES OF HOME RULE FOR THE 21ST CENTURY 7 (2020), https://www.nlc.org/wp-content/uploads/2020/02/Home-Rule-Principles-ReportWEB-2-1.pdf [https://perma.cc/M54J-3QCM].

230. *Id.* at 9.

231. Diller, *supra* note 16, at 1112–13.

232. NAT'L LEAGUE OF CITIES, *supra* note 229, at 10.

233. Diller, *supra* note 16, at 1113.

234. *Id.*

235. 207 U.S. 161 (1907).

236. *Id.* at 178–79; *see also* Diller, *supra* note 16, at 1113.

237. NAT'L LEAGUE OF CITIES, *supra* note 229, at 11.

238. Diller, *supra* note 16, at 1113.

239. *Id.*

240. *Id.*; *see also* NAT'L LEAGUE OF CITIES, *supra* note 229, at 11. This version of home rule treated states and cities as distinct. Diller, *supra* note 16, at 1113.

241. *See* NAT'L LEAGUE OF CITIES, *supra* note 229, at 11–12.

242. *Id.* at 12.

243. *Id.*

leading to a "varied landscape"[244] that keeps courts central in interpreting constitutional and statutory home rule provisions.[245] Thus, generally, state political subdivisions, such as cities, can exercise lawmaking authority to the extent that states have delegated such authority to them[246] as allowed under the state constitution.[247]

There are two strands of home rule: (1) initiative or the power of a local government to act as to local issues and (2) immunity or the ability of a local government to protect their decisions from state preemption.[248] Through home rule powers, cities have discretion to create solutions to solve local problems by legislating and adopting social policies without approval from the state legislature.[249] But despite local governments' powers to take initiative, those powers are often constrained by the doctrine of preemption, which requires that local laws be consistent with state or general law.[250] Where there is conflict, state law prevails.[251]

In New York, home rule lives within the state constitution.[252] Although NYS has a long tradition of active local government, local powers were given by the state and could be "taken back by the state."[253] Early NYS constitutions provided little authority to local governments, but gradually, each revision expanded their powers, resulting in article IX being ratified in 1963[254] to "strengthen[] the governments closest to the people," as stated by former Governor Nelson Rockefeller.[255] Article IX and Municipal Home Rule Law section 10 give the city broad authority to handle its matters.[256] Article IX outlines the powers of local governments and the interplay between local and state relations.[257] Under article IX, local governments are given two broad powers: First, local governments can "adopt and amend local laws" as to their "property, affairs, or government."[258] Second, local governments can adopt and amend laws on ten enumerated subjects, which includes the protection, safety, and well-being of persons within the locality,

244. *Id.* at 13.
245. *Id.*
246. *See* Albany Area Builders Ass'n v. Town of Guiderland, 546 N.E.2d 920, 921 (N.Y. 1989); *see also* Wells v. Town of Salina, 23 N.E. 870, 871 (N.Y. 1890); Whittaker v. Village of Franklinville, 191 N.E. 716, 717 (N.Y. 1934); Inc. Vill. of Atl. Beach v. Kimmel, 223 N.E.2d 489, 490 (N.Y. 1966).
247. *See Inc. Vill. of Atl. Beach*, 223 N.E.2d at 490.
248. Richard Briffault, *Article IX: The Promise and Limits of Home Rule* 4 (Columbia L. Sch. Pub. L. Working Paper, Paper No. 14-436, 2015).
249. *Id.* at 7; Diller, *supra* note 16, at 1110.
250. Briffault, *supra* note 248, at 7.
251. *Id.*
252. *Id.* at 2–3.
253. *Id.* at 2.
254. *Id.* at 3.
255. Michael A. Cardozo & Zachary W. Klinger, *Home Rule in New York: The Need for a Change*, 38 PACE L. REV. 90, 91 (2017) (quoting ROBERT B. WARD, NEW YORK STATE GOVERNMENT 547 (2d ed. 2006)).
256. *See* N.Y. CONST. art. IX, § 2; *see also* N.Y. MUN. HOME RULE LAW § 10 (McKinney 2022).
257. N.Y. CONST. art. IX, § 2.
258. *Id.* § 2(c).

regardless of whether the law relates to its "property, affairs or government."[259] The state constitution supports local governments' broad powers by mandating that the powers and privileges bestowed by article IX "be liberally construed."[260] Furthermore, in New York, the judiciary permits cities to create private causes of action.[261] This power is supported by an intermediate appellate court's holding[262] that the breadth of home rule powers "is broad enough to include the creation of a private cause of action."[263]

However, local governments do not have unlimited or absolute power to enact laws in NYS. Preemption will be further discussed in the next section, but generally, home rule powers are limited. If a local government in NYS exercises their power in a manner that is inconsistent with the state constitution or general law, NYS law preempts such local law.[264] Furthermore, under *Adler v. Deegan*,[265] there are matters on which the state can legislate even if it falls within home rule powers. In *Adler*, the state enacted a multiple dwelling law that was challenged as an unconstitutional violation of home rule provisions because it touched on the "property, affairs,

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259. *Id.* The ten enumerated subjects are:

> (1) The powers, duties, qualifications, number, mode of selection and removal, terms of office, compensation, hours of work, protection, welfare and safety of its officers and employees, except that cities and towns shall not have such power with respect to members of the legislative body of the county in their capacities as county officers.
>
> (2) In the case of a city, town or village, the membership and composition of its legislative body.
>
> (3) The transaction of its business.
>
> (4) The incurring of its obligations, except that local laws relating to financing by the issuance of evidence of indebtedness by such local government shall be consistent with laws enacted by the legislature.
>
> (5) The presentation, ascertainment and discharge of claims against it.
>
> (6) The acquisition, care, management and use of its highways, roads, streets, avenues and property.
>
> (7) The acquisition of its transit facilities and the ownership and operation thereof.
>
> (8) The levy, collection and administration of local taxes authorized by the legislature and of assessments for local improvements, consistent with laws enacted by the legislature.
>
> (9) The wages or salaries, the hours of work or labor, and the protection, welfare and safety of persons employed by any contractor or sub-contractor performing work, labor or service for it.
>
> (10) The government, protection, order, conduct, safety, health and well-being of persons or property therein.

Id. § 2(c)(ii)(1)–(10).

260. *Id.* § 3(c).

261. *See* Diller, *supra* note 16, at 1133 n.117. In many home rule states, whether local governments can create a private right of action remains uncertain. *Id.* at 1134. Despite this uncertainty or sometimes outright denial, many cities have used state delegation of power or home rule powers alone to establish "private rights of action by local ordinance." *Id.* at 1132–34.

262. *See id.* at 1172.

263. Bracker v. Cohen, 612 N.Y.S.2d 113, 114 (App. Div. 1994).

264. N.Y. CONST. art IX, § 2(c); Briffault, *supra* note 248, at 7.

265. 167 N.E. 705 (N.Y. 1929), *amended by* 252 N.Y. 615 (1930).

or government" of the city.[266] The court found the law constitutional because it addressed unsanitary living conditions, and the state's police power "has never been questioned when it dealt directly with hygienic conditions of a community."[267] As NYC is a starting point for a vast amount of immigrants, any disease that could affect the city would touch the welfare of the state as immigrants move throughout the state and beyond.[268] In his concurrence, then Chief Judge Benjamin Cardozo considered that there are matters where state and local concerns overlap; when the state has a "substantial degree" of concern in such matters, then the state may legislate.[269]

The next section discusses the preemption doctrine.

2. The State Preemption Doctrine

The powers given to local governments by the NYS constitution is fundamentally limited by the preemption doctrine—local laws must not conflict with the constitution or general laws of the state.[270] It matters not that local governments have been bestowed with considerable powers, or that states are restricted in meddling with local concerns.[271] The preemption doctrine expresses "the untrammeled primacy of the Legislature to act . . . with respect to matters of State concern."[272] Neither the constitution nor a statute can prevent a state from interfering in matters in which the state has a strong interest.[273]

There are three ways a city ordinance may be preempted: (1) the ordinance expressly conflicts with the state law, (2) the state has either explicitly or implicitly expressed an intent to occupy the relevant field, or (3) the city ordinance is conflict preempted.[274]

Express conflict occurs when the state expressly forbids the local government from enacting an ordinance as to a specific issue.[275]

Local governments are preempted from imposing additional regulations on a subject that the state substantially regulates (effectively occupying the

266. *Id.* at 706 (quoting N.Y. CONST. art. IX, § 2(c)).
267. *Id.* at 709.
268. *See id.* at 708–09.
269. *See id.* at 713–14 (Cardozo, J., concurring). The *Adler* case continues to be a "guiding principle of Home Rule today." Cardozo & Klinger, *supra* note 255, at 94.
270. Briffault, *supra* note 248, at 7.
271. Albany Area Builders Ass'n v. Town of Guilderland, 546 N.E.2d 920, 922 (N.Y. 1989).
272. Wambat Realty Corp. v. State, 362 N.E.2d 581, 586 (N.Y. Ct. App. 1977) (citing Floyd v. N.Y. State Urb. Dev. Corp., 300 N.E.2d 704, 705–06 (N.Y. 1973)).
273. *See id.* at 586–87; *see also* Mayor of New York v. Council of New York, 780 N.Y.S.2d 266, 273 (Sup. Ct. 2004).
274. *See* DJL Rest. Corp. v. City of New York, 749 N.E.2d 186, 190 (N.Y. 2001); *Mayor of New York*, 780 N.Y.S.2d at 273; Brief of *Amici Curiae* Local Government Law Professors in Support of Defendant's Motion to Dismiss at 11, Int'l Franchise Ass'n v. City of New York, No. 655987/2018 (N.Y. Sup. Ct. Mar. 15, 2019), https://www.abetterbalance.org/wp-content/uploads/2020/02/NY-FWW-Amicus-FINAL-3.15.19.pdf [https://perma.cc/3Y7E-VRZQ].
275. *See* Brief of *Amici Curiae* Local Government Law Professors in Support of Defendant's Motion to Dismiss, *supra* note 274, at 11.

field).[276] This is known as field preemption. For example, in *Albany Area Builders Ass'n v. Town of Guilderland*,[277] a town board adopted a local law imposing an "impact fee" when building permit applicants attempt to change the land use in a way that results in more traffic.[278] The court held that the local law was preempted because the state legislature had enacted a "comprehensive and detailed regulatory scheme in the field of highway funding."[279] State laws regulated the budget and financing of road improvements, creating a detailed system for highway repair budgets, limiting "amounts to be raised" for highway improvements, regulating fund expenses, and so forth.[280] The specificity of such laws indicates the legislature's intent to create a uniform scheme among different localities within the state.[281] The town board's local law interfered with this scheme because it allowed towns to go against statutory restrictions.[282] Thus, when the same subject matter is regulated by the city and state, it "is deemed inconsistent with the State's transcendent interest," regardless of whether there is an actual conflict between the two laws.[283] This is true even when the differences are minor.[284] The subject matter and purpose of the state law, as well as need for uniformity across the state, are also relevant inquiries for field preemption.[285] Without explicit authority, any local ordinance that interferes with a field that the state occupies is rendered invalid.[286]

However, a law is not preempted because it touches on some matters of state law; the state must show that they wish to occupy the field "to the exclusion of local law."[287] Furthermore, when local governments enact laws of general application that address "legitimate concerns," such laws are not

276. *See id.* at 15–16.

277. 546 N.E.2d 920 (N.Y. 1989).

278. *Id.* at 921. The town roots its support for the law in several provisions of the Municipal Home Rule Law. *Id.* at 921–22. In its opinion, the court decided not to determine what delegated power justified the law. *See id.* at 922. The sole issue they considered was whether such law was preempted. *See id.*

279. *Id.*

280. *Id.* at 922–23.

281. *See id.* at 923.

282. *See id.*

283. *Id.* at 922.

284. *See* Mayor of New York v. Council of New York, 780 N.Y.S.2d 266, 273 (Sup. Ct. 2004).

285. *See Albany Area Builders Ass'n*, 546 N.E.2d at 923; *see also* Cohen v. Bd. of Appeals of Saddle Rock, 795 N.E.2d 619, 624 (N.Y. 2003) (holding that a state legislation that imposes a "statewide standard for area variance review" preempts local authority because of the advantages of a uniform standard of review and "traditional respect for the primacy of state interest"); Dougal v. County of Suffolk, 477 N.Y.S.2d 381, 383 (App. Div. 1984) (holding that local ordinances that regulate drug paraphernalia are preempted because of New York's desire to adopt a "State-wide approach to combat the drug paraphernalia industry").

286. Memorandum of Law in Support of Plaintiff's Cross-Motion for Summary Judgment and in Opposition to Defendant's Motion for Summary Judgment at 23, Police Benevolent Ass'n of N.Y., Inc. v. City of New York, No. 653624 (N.Y. Sup. Ct. Jan. 15, 2021), 2021 WL 3137571.

287. People v. Judiz, 344 N.E.2d 399, 401 (N.Y. 1976); People v. Webb, 356 N.Y.S.2d 494, 498 (Crim. Ct. 1974).

preempted if it "incidentally infringes on a preempted field."[288] For example, in *Vatore v. Commissioner of Consumer Affairs*,[289] the New York Court of Appeals considered whether the Adolescent Tobacco Use Prevention Act,[290] enacted by the legislature, preempted Local Law 67 of 1990, which regulates the sale of tobacco products in vending machines.[291] The act was less restrictive than Local Law 67 as to location requirements for the vending machines.[292] Although the Supreme Court of the State of New York, Appellate Division, held that Local Law 67 was preempted because it added further regulation in a field that the state legislature wished to occupy,[293] the Court of Appeals disagreed and held that the law was valid.[294] The court stated that (1) the act did not show a need to uniformly control the sale of tobacco products in vending machines across the state, and (2) the statutory scheme was not "so broad and detailed in scope" that it prevented local regulation of the field, especially when the local law "further[s] the State's policy interests" of discouraging adolescents from using tobacco products.[295] Also relevant in the court's decision was a preemption provision in the act as to the "distribution of tobacco products without charge."[296] This provision led the court to infer that, by expressly preempting one provision of the act, the legislature did not intend to preempt other sections.[297]

In contrast to field preemption, conflict preemption occurs when a local law is inconsistent with state law because the local law either forbids conduct that state law permits or restricts rights under state law.[298] For example, in *Lansdown Entertainment Corp. v. New York City Department of Consumer Affairs*,[299] NYC enacted a cabaret law that forced patrons to leave cabarets at 4:00 a.m., in contrast to the state's Alcoholic Beverage Control Law section 106(5)(b),[300] which prohibited the sale of alcohol past 4:00 a.m. but allowed patrons to stay on the premises until 4:30 a.m.[301] The court referred

288. DJL Rest. Corp. v. City of New York, 749 N.E.2d 186, 191 (N.Y. 2001).
289. 634 N.E.2d 958 (N.Y. 1994).
290. N.Y. PUB. HEALTH LAW §§ 1399-AA to 1399-MM-3 (McKinney 2022).
291. *Vatore*, 634 N.E.2d at 958.
292. *Id.* at 959.
293. *See* Vatore v. Comm'r of Consumer Affs. of N.Y., 596 N.Y.S.2d 113, 114–15 (App. Div. 1993), *rev'd*, 634 N.E. 958 (N.Y. 1994).
294. Vatore v. Comm'r of Consumer Affs. of N.Y., 634 N.E.2d 958, 959 (N.Y. 1994).
295. *Id.* at 959–60.
296. *Id.* at 960.
297. *See id.*
298. Consol. Edison Co. of N.Y., Inc. v. Town of Red Hook, 456 N.E.2d 487, 491 (N.Y. 1983); *see also* F.T.B Realty Corp. v. Goodman, 89 N.E.2d 865, 868 (N.Y. 1949); Wholesale Laundry Bd. of Trade, Inc. v. City of New York, 234 N.Y.S.2d 862, 865 (App. Div. 1962), *aff'd*, 189 N.E.2d 623 (N.Y. 1963); Chwick v. Mulvey, 915 N.Y.S.2d 578, 584 (App. Div. 2010); Brief of *Amici Curiae* Local Government Law Professors in Support of Defendant's Motion to Dismiss, *supra* note 274, at 12–13.
299. 543 N.E.2d 725 (N.Y. 1989). For another example of conflict preemption, see *Wholesale Laundry Bd. of Trade, Inc.*, 234 N.Y.S.2d at 864–65 (holding that a local law regulating employees' wages is conflict preempted because state law provides for a different minimum wage framework).
300. N.Y. ALCO. BEV. CONT. LAW § 106(5)(b) (McKinney 1989).
301. *Lansdown Ent. Corp.*, 543 N.E.2d at 726.

to its decision in *People v. De Jesus*,[302] in which the court held that a Rochester, New York, ordinance prohibiting the sale of alcohol after 2:00 a.m. was preempted because it directly made illegal what the state specifically permitted.[303] In *Lansdown Entertainment Corp.*, the court held the same: the cabaret law is preempted because it is in direct opposition to what the state allows.[304] The court spent some time reviewing the general application exception to the preemption rule.[305] The respondent invoked the exception, stating that the cabaret law is of general application because the locality acted within their police power "to maintain the peace, comfort and decency of residential neighborhoods by controlling noise and traffic."[306] Still, the ordinance's infringement must be incidental.[307] Here, there was "a head-on collision" with section 106(5)(b) because the cabaret law did not allow patrons to stay until the permissible time under state law and thus directly impacted the state's power to regulate the matter.[308]

Although there are cases that hold that direct conflict of laws result in state preemption, other courts disagree. When a local law merely adds or "supplements" in an area where a state statute is silent, some courts have held that such laws are not conflict preempted.[309] For example, in *People v. Judiz*,[310] the city enacted a local law that forbade the possession of "imitation pistols or revolvers" that could "readily be mistaken for real guns."[311] The defendant, convicted for having a toy gun that resembled a real gun, argued that state penal law preempted the local law because (1) an intent to unlawfully use the toy gun is necessary, and (2) mere possession does not automatically infer intent.[312] Ultimately, the court upheld the defendant's conviction, finding the city law to be a valid exercise of state constitutional and municipal home rule powers.[313] The applicable portion of state penal law was not restricted to imitation guns but also encompassed other types of

302. 430 N.E.2d 1260 (N.Y. 1981).
303. *See id.* at 1261, 1263.
304. 543 N.E.2d at 727.
305. *Id.* at 726. For the law of general application exception to apply, the local law must be of "legitimate concern[]" to the locality and only "incidentally infringe" on the state law. *Id.*
306. *Id.*
307. *Id.*
308. *See id.*
309. Zorn v. Howe, 716 N.Y.S.2d 128, 132 (App. Div. 2000) (stating that "courts have upheld local laws that provide details of a topic on which State statutes remained silent, wherein the local ordinance supplements, rather than supplants, the State legislation"); *see also* People v. Cook, 312 N.E.2d 452, 457 (N.Y. 1974); N.Y. State Club Ass'n, Inc. v. City of New York, 505 N.E.2d 915, 920 (N.Y. 1987), *aff'd*, 487 U.S. 1 (1988).
310. 344 N.E.2d 399 (N.Y. 1976). For another example, see Garcia v. N.Y.C. Dep't of Health & Mental Hygiene, 106 N.E.3d 1187, 1191–92, 1201 (N.Y. 2018) (stating that the NYC health code adding flu vaccinations to the list of vaccinations required for children to enroll in schools under New York Public Health Law section 2164 is not conflict preempted; the list in section 2164 is not "an exclusive one that may not be expanded by local municipalities to which the authority to regulate vaccinations has been delegated").
311. *Judiz*, 344 N.E.2d at 401.
312. *See id.*
313. *Id.*

deadly weapons with intent to use unlawfully.[314] Although the statute imposes an element of intent, local governments are not "precluded" from imposing "further control," even if it results in a "direct prohibition."[315] Only full occupation of the field prevents local governments from further action.[316] Thus, the local law and state law are not inconsistent because the local law targets a specific weapon (toy guns not easily discernible as toys), whereas the state covers many other types of weapons "used with illegal intent."[317]

Lastly, when a local law is enacted through a city's home rule powers, there is a presumption against preemption.[318] Because home rule powers are to be liberally construed under article IX, section 3(c) of the state constitution, a liberal construction would require the presumption that local laws are not preempted by state law unless the statutory text "manifestly and unambiguously supersedes local law."[319] Local power cannot be liberally construed if limits imposed by state preemption are not "narrowly" interpreted.[320]

The next part argues that NYC acted within its home rule powers to enact Local Law 48, and that the law is not preempted.

III. AN AFFIRMATIVE GRANT OF HOME RULE POWER

Part II examined the breadth and limits of home rule power and state preemption. First, the state constitution provides the scope of a local government's home rule power.[321] NYC has broad home rule powers to create and amend laws as to the locality's affairs and ten enumerated subjects.[322] Second, even though home rule powers may be broad, such powers are constrained by three types of preemption.[323] This Note argues that Local Law 48 is likely a valid exercise of the city's home rule power and is likely not preempted. Part III.A outlines supporting arguments for why the ordinance is lawful under the home rule power. Part III.B argues that the ordinance will not be preempted because there is no express, field, or conflict preemption.

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314. *Id.*
315. *Id.*
316. *See id.*
317. *Id.* at 402.
318. Brief of *Amici Curiae* Local Government Law Professors in Support of Defendant's Motion to Dismiss, *supra* note 274, at 5–7; *see also* Defendant's Memorandum of Law in Support of Its Motion for Summary Judgment at 10–11, Police Benevolent Ass'n of N.Y. v. City of New York, No. 653624 (N.Y. Sup. Ct. Nov. 20, 2020), 2020 WL 10502751.
319. Roderick M. Hills, Jr., *Hydrofracking and Home Rule: Defending and Defining an Anti-preemption Canon of Statutory Construction in New York* 646 (NYU L. Sch. Pub. L. Working Paper, Paper No. 14-28, 2014). For cases that consider limits to state preemption, see People v. Cook, 312 N.E.2d 452, 457 (N.Y. 1974); *Judiz*, 344 N.E.2d at 401–02; McDonald v. N.Y.C. Campaign Fin. Bd., 965 N.Y.S.2d 811, 828 (Sup. Ct. 2013), *aff'd as modified*, 985 N.Y.S.2d 557 (App. Div. 2014).
320. Hills, *supra* note 319, at 652.
321. *See supra* note 252 and accompanying text.
322. *See supra* notes 258–63 and accompanying text.
323. *See supra* note 274 and accompanying text.

A. NYC Can Create a Cause of Action

Local Law 48 is likely a valid exercise of NYC's home rule powers. Opponents of the law may criticize Local Law 48 by using the reasoning in *Adler*[324]: regulating the police force touches on the welfare of the state because removing indemnification and qualified immunity as a defense would expose officers to liability, thereby burdening them, reducing their efficiency, and allowing crime to spread.[325] The state has an interest in officers having immunity so that they can efficiently perform their duties.[326] Alternatively, even if Local Law 48 falls within one of the ten enumerated subjects, it is prohibited by article IX, section 2(c) because that area of law has been restricted by the state's regulation of immunities and defenses of officers.[327] Thus, the regulation of immunities and defenses of police officers is not solely within the affairs of a local government but involves a field in which the state has already legislated.

Still, home rule, in its simplest form, is understood as conferring on local governments a permanent source of power to decide on matters of local concern and impact without the need for explicit state permission.[328] While the state may have an interest in regulating police officers generally, NYC faces unique problems as the home to one of the largest police forces in the country.[329] The New York Civil Liberties Union's NYPD Misconduct Complaint Database contains 97,950 entries regarding complaints for use of force alone.[330] Generally, since 2000, complaints that allow race to be self-reported revealed that "about 81% [of impacted persons] are Black or Latinx."[331] Thus, who can more effectively and efficiently respond to the problems that unrestrained police brutality has caused but the local government, which is not only the "closest to those governed" but also "better situated" to both identify the needs of the governed and respond with policies?[332] Furthermore, the vast diversity and varying needs in the state emphasize the importance of local democracy.[333] NYC needs to have a degree of freedom to respond to problems on the ground that other areas of

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324. *See supra* notes 265–69 and accompanying text.
325. *See supra* notes 210–11, 222 and accompanying text.
326. *See supra* notes 91–93 and accompanying text.
327. *See supra* Part I.B.
328. *See supra* notes 256–63 and accompanying text.
329. *See About NYPD*, CITY OF N.Y., https://www1.nyc.gov/site/nypd/about/about-nypd/about-nypd-landing.page [https://perma.cc/V2X9-NCW7] (last visited Nov. 7, 2022).
330. *NYPD Misconduct Complaint Database*, N.Y. C.L. UNION, https://www.nyclu.org/en/campaigns/nypd-misconduct-database [https://perma.cc/H5S8-PHJJ] (last visited Nov. 7, 2022).
331. *Id.* This percentage refers to all types of complaints. It is not limited to complaints for use of force.
332. *See* Brief of *Amici Curiae* Local Government Law Professors in Support of Defendant's Motion to Dismiss, *supra* note 274, at 7; *see also* Hills, *supra* note 319, at 646 ("A single statewide policy might bog down in acrimonious gridlock, but municipal legislators can more easily enact local solutions because their constituents share more consensus on the same issues than the citizens of the state as a whole.").
333. *See* Brief of *Amici Curiae* Local Government Law Professors in Support of Defendant's Motion to Dismiss, *supra* note 274, at 7.

the state may not face. Removing immunities and defenses from police officers for specific violations like use of excessive force and unreasonable searches and seizures motivates officers to be conscious of their actions and affords individuals, especially those from underrepresented communities, greater protection.[334]

Additionally, the ten enumerated subjects give local governments power over "most matters" of local concern.[335] Regulating the accountability of police officers would likely fall within the city's power to legislate for the safety and well-being of NYC residents and thus, within the city's affairs. When a local law is passed pursuant to its state-delegated home rule power, it is to be "judged by the same standards as an act of the Legislature itself."[336] There is "little litigation" as to whether a local government is able to "act concerning local matters."[337]

Given the breadth of powers conferred to municipalities under the state constitution and Municipal Home Rule Law,[338] as well as an explicit authority to liberally construe such powers,[339] local governments have considerable "latitude" to enact local laws, even if the law's subject is within a field that the state "has already legislated in."[340] Absent clear intent by the state to preempt, state laws should not preempt local laws.[341] Allowing localities such latitude paves the way for social and economic innovations that cast cities as "leading innovators" with the potential "to identify and fix policy mistakes locally."[342] Local Law 48 is one such innovation; having identified that injured persons are unprotected in the wake of police killings, the city has sought to grapple with how best to deal with police immunities and indemnification to hold officers accountable for their actions.[343]

B. Local Law 48 Is Not Preempted

Local Law 48 is likely not preempted.[344] As stated previously, preemption occurs when there is (1) an express conflict, (2) the state shows an intent to

334. *See The Fight to End Qualified Immunity Is Just Beginning in States Across the Country*, GOVERNING (Jan. 6, 2022), https://www.governing.com/sponsored/the-fight-to-end-qualified-immunity-is-just-beginning-in-states-across-the-country [https://perma.cc/3EFA-F2AM]; SBA (@SBANYPD_Archive), TWITTER (Apr. 16, 2021, 5:21 PM), https://twitter.com/SBANYPD_Archive/status/1383168759997870085 [https://perma.cc/XMS4-K3TM].

335. Briffault, *supra* note 248, at 7.

336. People v. Lewis, 295 N.Y. 42, 47 (1945).

337. Briffault, *supra* note 248, at 7.

338. *See supra* Part II.B.1.

339. *See supra* notes 260, 318–20 and accompanying text.

340. McDonald v. N.Y.C. Campaign Fin. Bd., 965 N.Y.S.2d 811, 828 (Sup. Ct. 2013), *aff'd as modified*, 985 N.Y.S.2d 557 (App. Div. 2014).

341. *See id.*; Brief of *Amici Curiae* Local Government Law Professors in Support of Defendant's Motion to Dismiss, *supra* note 274, at 7.

342. *See* Brief of *Amici Curiae* Local Government Law Professors in Support of Defendant's Motion to Dismiss, *supra* note 274, at 8.

343. *See supra* notes 7–10 and accompanying text; *see also supra* Part II.A.1.

344. Note that there remains a question of whether Local Law 48 is unconstitutionally vague. *See* Police Benevolent Ass'n of N.Y., Inc. v. City of New York, 168 N.Y.S.3d 462

occupy the field, or (3) there is conflict between the ordinance and state law.[345] First, there is no express preemption for Local Law 48 because the state has not explicitly prohibited the city from enacting laws that regulate the immunities and defenses of officers in civil actions for unreasonable searches and seizures and use of excessive force.[346]

Second, Local Law 48 is not field preempted because the legislature has not established a comprehensive and detailed regulatory scheme as to immunities and defenses of police officers.[347] To begin the analysis, it is important to consider the alternative situation in which General Municipal Law section 50-k and Public Officers Law section 17(9) reflect the intent of the legislature to occupy the field of immunities and indemnification in civil actions against public employees. Both laws could be considered as enacting a detailed and comprehensive scheme to protect state and NYC employees in civil actions through indemnification, defenses, and immunities.[348] The statutes explain who falls under "employee,"[349] set a standard for when indemnification can be applied,[350] and explicitly proclaim that all state, federal, local, and common-law immunities, defenses, and indemnification are available to employees.[351] Public Officers Law section 17(9) goes as far as to deliberately state that such immunities, defenses, and indemnification include those provided to officers or employees of the state or "any other level of government."[352] This presents a balancing act; the need to balance plaintiff's recovery in civil actions with the need to protect state and city employees.

Even so, both laws reflect defenses in a general manner and not to the levels of specificity observed in *Albany Area Builders Ass'n*.[353] NYS courts have had to impute qualified immunity in the absence of an express directive as to whether police officers are entitled to qualified immunity for state causes of action.[354] General Municipal Law section 50-k and Public Officers Law section 17 do not address defenses, immunities, and indemnification specifically to police officers but to employees generally; "the mere fact" that a local law may touch on matters dealt with by state law does not automatically invalidate the law.[355] The legislature, through section 50-k and section 17, has not expressed a desire to preclude NYC from creating

(App. Div. 2022), for an example of a law under which both preemption and constitutionality are considered. This Note does not discuss the constitutionality question.

345. *See supra* Part II.B.2.

346. *See supra* note 275 and accompanying text.

347. *See supra* notes 276–82 and accompanying text.

348. *See* N.Y. GEN. MUN. LAW § 50-k (McKinney 2022). Public Officers Law section 17 is relevant for the state scheme of indemnification and defenses, which mirrors, to an extent, the general municipal law.

349. *See* GEN. MUN. LAW § 50-k(e); N.Y. PUB. OFF. LAW § 17(1) (McKinney 2022).

350. *See supra* notes 96–98, 101 and accompanying text.

351. *See supra* notes 99, 102 and accompanying text.

352. PUB. OFF. LAW § 17(9).

353. *See supra* notes 277–82 and accompanying text.

354. *See supra* notes 90–93 and accompanying text.

355. *See* People v. Judiz, 344 N.E.2d 399, 401 (N.Y. 1976).

additional legislation that would remove certain immunities in very specific circumstances. Indeed, the state regulation "does not include an overarching statement of intent to cover the waterfront."[356] Like the court found in *International Franchise Ass'n v. City of New York*[357] regarding NYC's fair workweek law purporting to regulate workers' schedules despite NYS law,[358] a court analyzing Local Law 48 may find that current state law is "a little this" (general immunities and defenses that are not limited by the statute), and "a little that" (civil actions).[359] Local Law 48 is narrowly limited to regulate two specific violations (unreasonable searches and seizures and excessive use of force), committed by very specific employees (police officers), and thus, it does not infringe on "State prerogatives."[360]

Furthermore, opponents of Local Law 48 could argue that the ordinance may encourage other cities to enact similar legislation, disrupting "the State's efforts to achieve a uniform, statewide policy."[361] This would likely be unpersuasive. Although General Municipal Law section 50-k and Public Officers Law section 17 mirroring each other may indicate the legislature's attempt to maintain consistency, not all localities within the state are the same. Here, there is no express need for statewide uniformity, especially considering that NYC has one of the largest municipal police departments[362] and is the most populous city in the country.[363] By referring to employees and civil actions generally, there is no indication that the legislature intended to preempt the city from passing further legislation. As Local Law 48 serves to protect the safety and well-being of persons within the city from unreasonable searches and seizures and use of excessive force by police officers, a court may apply a presumption against preemption.[364]

Third, Local Law 48 is not conflict preempted. Opponents of the law may argue that Local Law 48 directly conflicts with section 50-k and section 17, either because Local Law 48 (1) impliedly forbids indemnification of police officers who are city employees and explicitly forbids the defense of

356. Int'l Franchise Ass'n v. City of New York, No. 655987/2018, 2020 WL 871402, at *2 (N.Y. Sup. Ct. Feb. 13, 2020), *aff'd*, 148 N.Y.S.3d 28 (App. Div. 2021), *appeal dismissed*, 174 N.E.2d 368 (N.Y.).

357. No. 655987/2018, 2020 WL 871402 (N.Y. Sup. Ct. Feb. 13, 2020), *aff'd*, 148 N.Y.S.3d 28 (App. Div. 2021), *appeal dismissed*, 174 N.E.3d 368 (N.Y.).

358. *See id.* at *1.

359. *See id.* at *2.

360. *See id.*

361. *See* Memorandum of Law in Support of Plaintiff's Cross-Motion for Summary Judgment and in Opposition to Defendant's Motion for Summary Judgment, *supra* note 286, at 25. This case is about a different NYC law that made the use of chokeholds a misdemeanor. *Id.* at 3. It is not related to Local Law 48, but the arguments asserted there could be used against Local Law 48.

362. *See supra* notes 329–34 and accompanying text; *see also Int. 2220-2021*, *supra* note 207 (testimony of Alexandra Fisher, senior trial attorney at Brooklyn Defender Services) (stating that the New York City Police Department "is the size of the seventh-largest standing army in the world with a total budget of around $11 billion").

363. *See U.S. and World Population Clock*, U.S. CENSUS BUREAU, https://www.census.gov/popclock/ [https://perma.cc/QAK3-SZRZ] (last visited Nov. 7, 2022).

364. *See supra* notes 318–20 and accompanying text.

qualified immunity available under state law, or (2) restricts defenses available under the state law.[365] Furthermore, it could be argued that Local Law 48's lack of an intentional or reckless conduct provision[366] goes against section 50-k, under which indemnification is required unless the employee acted intentionally or recklessly.[367] The absence of intentionality goes against the balance between allowing plaintiffs to recover for constitutional violations and protecting city and state employees, as seen through state and federal case law that led to the development of qualified immunity.[368] Thus, like with the city's cabaret law discussed in *Lansdown Entertainment Corp.*, there is a "head-on collision" between fundamental components of Local Law 48 and section 50-k, namely, protections afforded to employees when there are civil actions that result in judgments against them.[369]

However, state laws that set out a regulatory scheme that applies to an entire state set the floor but not the ceiling.[370] Local governments are free to supplement state law.[371] In at least two cases, the New York Court of Appeals has expressed that the argument that a law is invalid if it forbids what the state allows is too broad and meritless.[372] Here, Local Law 48 is like the city law restricting toy guns in *People v. Judiz*.[373] While section 50-k addresses civil actions and defenses generally, Local Law 48 addresses a particular type of civil action (use of excessive force and unreasonable searches and seizures) and the qualified immunity defense for a particular employee (police officers).[374] Although there is overlap because section 50-k and section 17 can apply to civil actions for unreasonable searches and seizures and excessive force, it is settled that a local law is not invalid merely because the local law deals with some of the same subject matters that the state law addresses.[375] If conflict preemption is applied too broadly, then the power of local governments to regulate would be "illusory."[376]

365. *See supra* note 298 and accompanying text.
366. *See generally supra* Part II.A.1.
367. *See supra* Part I.B.
368. *See generally supra* Parts I.A.3, I.B.
369. *See supra* notes 307–08 and accompanying text.
370. Brief of *Amici Curiae* Local Government Law Professors in Support of Defendant's Motion to Dismiss, *supra* note 274, at 13. Although section 50-k only applies to NYC, the equivalent state version under Public Officers Law section 17 is a regulatory scheme for the entire state. *See* N.Y. GEN. MUN. LAW § 50-k (McKinney 2022); N.Y. PUB. OFF. LAW § 17 (McKinney 2022).
371. *See supra* note 309 and accompanying text.
372. *See* People v. Cook, 312 N.E.2d 452, 457 (N.Y. 1972) ("[When s]tate law is silent on a subject, the likelihood is that a local law regulating that subject will prohibit something permitted elsewhere in the state. That is the essence of home rule"); *see also* Jancyn Mfg. Corp. v. County of Suffolk, 518 N.E.2d 903, 907–08 (N.Y. 1987).
373. *See supra* notes 310–17 and accompanying text.
374. *See supra* Parts I.B, II.A.1. Compare Local Law 48 with *Judiz*, where the state law in question contained a general list of weapons covered, while the local law focused only on toy guns that resembled real guns. *See supra* note 317 and accompanying text.
375. *See supra* notes 309–17 and accompanying text.
376. *See* Garcia v. N.Y.C. Dep't of Health & Mental Hygiene, 106 N.E.3d 1187, 1200 (N.Y. 2018); *see also Cook*, 312 N.E.2d at 457.

Even if a court were to find that there is inconsistency with the state law, a local law may still be upheld if there is a "special local problem" that supports the need for the "variance."[377] Although police brutality is widespread in the state, NYC is the focus of police reform because, as stated previously, the New York City Police Department (NYPD) is one of the largest police departments in the United States, serving one of the most populous and diverse cities in the country.[378] Local Law 48 could serve the purpose of creating transparency and accountability, as well as fostering trust between the NYPD and neighborhoods, "particularly in communities of color."[379]

IV. LOCAL LAW 48 CAN BE EFFECTIVE IN PRACTICE

Even though NYC may have authority to create Local Law 48, and the ordinance may not be preempted, is Local Law 48 effective in practice? While Local Law 48 is limited, it is a good step forward.

Local Law 48 creates a limited right in two aspects. First, it offers protection only against unwarranted searches and seizures and/or use of excessive force (both are not necessary to have a cause of action).[380] No other right is protected under the law. This contrasts with legislation enacted in Colorado, Connecticut, Massachusetts, and New Mexico, which cover all violations of each state's bill of rights.[381] Colorado's law gained "national spotlight" because it specifically prohibited qualified immunity,[382] as well as certain statutory immunities.[383] Connecticut's HB 6004 has also been praised as "focused on bringing real change" because it went from providing a state constitutional tort remedy only for "wrongful arrests and unreasonable searches and seizures" to providing remedies for the rest of the rights enumerated in Connecticut's bill of rights.[384] There are a vast array of constitutional violations that remain outside of the sphere of Local Law 48, and thus police officers will still be able to invoke qualified immunity defenses.[385] In this sense, Local Law 48 is lackluster and should follow the lead of the other four states by addressing all constitutional violations.

377. *Cook*, 312 N.E.2d at 458.

378. *See supra* notes 362–63; *see also* Rebecca C. Lewis, *Police Brutality Is Prevalent Statewide in NY*, CITY & STATE N.Y. (Sept. 4, 2020), https://www.cityandstateny.com/policy/2020/09/police-brutality-is-prevalent-statewide-in-ny/175664/ [https://perma.cc/R7QS-LT35].

379. *Int. 2220-2021*, *supra* note 207, at 1 (testimony of Andrew Yang). Note that Andrew Yang was not discussing Local Law 48 but was generally praising efforts for "further transparency and accountability." *Id.* However, his statements are generally applicable to what Local Law 48 could do for the people of NYC.

380. *See* N.Y.C., N.Y., ADMIN. CODE § 8-802 (2022).

381. *See supra* Part I.C.

382. *See* Kyle Johnson, *A New Frontier for Ending Qualified Immunity: State Civil Rights Acts*, 26 PUB. INT. L. REP. 55, 59–60 (2020).

383. *See supra* notes 128–29.

384. Sibilla, *supra* note 135; *see also supra* Part I.C.2.

385. *See Int. 2220-2021*, *supra* note 207, at 12–13 (testimony of the Legal Aid Society).

Second, Local Law 48 is much narrower in coverage as it only places liability on "covered individuals," which is defined to only include officers who work for the police department and special patrolmen.[386] New Mexico's HB 4 is historic as it is the first and only state to "enact legislative qualified immunity reform for all public officials."[387] While Local Law 48 does not necessarily need to be as broad as HB 4, it still holds a much narrower definition of "police officer" than Colorado's, Connecticut's, and Massachusetts's laws, which encompass more people under definitions of peace officer, law enforcement officer, and police officer.[388] By limiting Local Law 48 only to the NYPD, many abuses by jail guards, corrections officers, and school guards remain without a remedy because they are excluded from the city ordinance.[389]

However, Local Law 48 is revolutionary in its blanket ban of qualified immunity and relevant immunities, as well as in its silence on indemnification.[390] This is in contrast to Colorado, where despite the breadth of protections guaranteed under SB 20-217, at least one person has noted that the law "unfortunately" allows both "tort immunity and indemnification to government officers acting within the scope of their employment."[391] Though qualified immunity is banned as a defense, there will still be "barriers" that prevent plaintiffs from holding officers personally accountable for misconduct.[392] Similarly, Connecticut's HB 6004 has been criticized because of its "multiple loopholes," which grant immunity when an officer has a "good faith belief" (without defining the term), and because it provides for officers' indemnification.[393] New Mexico's HB 4 offers even greater immunity from personal liability: indemnification is required when a person acts within the proper scope of authority, with no mention of whether there needs to be good faith or reasonable belief.[394] Such loopholes will continue to result in many victims being unable to seek justice, and most officers not being held personally liable for violating a person's constitutional rights.[395] As NYS law provides for the indemnification of state and city employees unless they acted intentionally or recklessly (though employers still indemnify even if there is intentional or reckless conduct),[396] Local Law 48 roots out the problem of officers not facing any consequences for their actions by placing liability on both officers and their employers

386. *See supra* notes 184–86 and accompanying text.
387. *See* Jay Schweikert, *New Mexico's Landmark Qualified Immunity Reform Gets It Mostly Right*, CATO INST. (Apr. 11, 2021), https://www.cato.org/commentary/new-mexicos-landmark-qualified-immunity-reform-gets-it-mostly-right [https://perma.cc/A3YU-HXEV].
388. *See supra* Part I.C.
389. *See* Sibilla, *supra* note 1.
390. *See supra* Part II.A.1.
391. Johnson, *supra* note 382, at 63–64.
392. *Id.* at 64.
393. Sibilla, *supra* note 135; *see also supra* Part I.C.2.
394. *See supra* notes 169–72 and accompanying text.
395. Sibilla, *supra* note 127.
396. *See supra* Part I.B.

separately.[397] Although it is not clear whether employees will be indemnified, previous drafts discussing indemnification and its absence from the enacted law support the assumption that officers will not be indemnified.[398]

Thus, NYC's Local Law 48 does what it purports to do—provide plaintiffs with a right of security that is not shackled with immunities and indemnification for an officer who unconstitutionally violates a plaintiff's right to be free from unreasonable searches and seizures and/or the use of excessive force.[399] While this right is limited and should be expanded to include other constitutional rights and covered individuals, it is a good first step to test the waters and begin to hold officers accountable. Still, there is a question of whether the right is too broad. Qualified immunity developed because of the concern that officers will be prevented from efficiently doing their jobs due to the fear of constant liability.[400] It may be sufficient to impose a detailed and objective good-faith defense while removing all indemnification, thereby balancing the need to protect plaintiffs who suffer constitutional violations and holding police officers accountable while protecting them from a vast amount of litigation. It remains unclear whether removal of immunities and indemnification will deter officers, as the qualified immunity doctrine began to take shape not long after *Monroe* allowed suits against police officers.[401] However, changes are already evident in Colorado, where several officers have been charged with failure to intervene and report as required by SB 20-217.[402] Furthermore, a memo from lawyers representing officers of the Police Benevolent Association of the City of New York cautioned officers on using force unless they are certain that using such force is clearly legal.[403] Thus, NYC is a good testing ground for a law that could continue to develop to hold officers accountable to those that they injure. While the Supreme Court continues to uphold the qualified immunity doctrine and the federal government fails to reach a consensus, Local Law 48 could potentially influence and encourage further policymaking not only at the state level, but also in major cities across the country.[404]

397. *See supra* Part II.A.1.
398. *See supra* notes 202–05 and accompanying text.
399. *See supra* Part II.A.1.
400. *See supra* notes 62–66 and accompanying text.
401. *See supra* Parts I.A.2–3.
402. *See* Allison Sherry, *It's Early, but Colorado's Police Reform Efforts Have Already Resulted in Charges for Officers*, CPR NEWS (Aug. 3, 2021, 4:33 PM), https://www.cpr.org/2021/08/03/its-early-but-colorados-police-reform-efforts-have-already-resulted-in-charges-for-officers/ [https://perma.cc/6NPL-LSKY].
403. *See* SBA (@SBANYPD_Archive), TWITTER (Apr. 16, 2021, 5:21 PM), https://twitter.com/SBANYPD_Archive/status/1383168759997870085 [https://perma.cc/XMS4-K3TM].
404. *See supra* notes 340–42 and accompanying text.

CONCLUSION

Qualified immunity has made it difficult for plaintiffs to recover for constitutional violations. Following recent cases of police brutality, four states have taken the initiative to enact laws that either remove or limit qualified immunity as a defense, allowing plaintiffs to recover when police officers violate their state constitutional rights. Although NYS has not yet successfully enacted a similar law, NYC, as one of the most populous cities with the largest police force, enacted Local Law 48 to protect plaintiffs from unreasonable searches and seizures and use of excessive force by police officers.

Given the novelty of a city enacting a law to curtail qualified immunity and other available defenses in the state, this Note analyzed Local Law 48 and argued that it is a valid exercise of the city's home rule power and will likely not be preempted by state law. Although Local Law 48 applies only to the NYPD and protects limited constitutional rights, the law could be effective in accomplishing its goal of holding police officers accountable by stripping them of immunities and indemnification. While Local Law 48 leaves many violations uncovered and violators free to invoke immunity defenses and be indemnified, it is a first and needed step for a city to protect its people.