



**NEW MEXICO CIVIL RIGHTS COMMISSION**

**REPORT**

**November 20, 2020**



## **NEW MEXICO CIVIL RIGHTS COMMISSION**

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## Executive Summary

The Legislature created the New Mexico Civil Rights Commission (“the Commission”) during the 2020 Special Session to address one specific option for holding public officials accountable when they engage in misconduct.<sup>1</sup> The United States Constitution protects important rights, and Congress long ago enacted a statute that provides a remedy when those rights are violated.<sup>2</sup> The New Mexico Constitution also recognizes fundamental rights that protect the people from government overreach or abuse. But today—over 100 years after statehood—New Mexico still does not have a statute that allows the victims of state constitutional violations to recover in court. A majority of the Commission (“the Majority”) recommends that the Legislature fix that problem by enacting a New Mexico Civil Rights Act (“the Act”) that:

1. Provides a cause of action allowing people to enforce the fundamental rights the New Mexico Constitution guarantees and recover for the deprivation of those rights;
2. Specifies that qualified immunity will not be a defense to claims brought under the Act;
3. Allows for compensatory damages and equitable and injunctive relief, but not punitive damages;
4. Allows those who prevail in a case brought under the Act to recover reasonable attorney fees; and
5. Specifies that, consistent with New Mexico’s current law under which the state and local governments defend and indemnify their employees, public employees and officials will not bear the personal risk or responsibility for paying a judgment or settlement under the Act.

**The Act.** A New Mexico Civil Rights Act providing victims of official misconduct a remedy under the state Constitution is long overdue. Almost 140 years ago, the United States Congress recognized that, in order for rights important enough to be embodied in the federal Constitution to have meaning, there has to be a remedy available when public employees and officials violate those rights. Congress provided that remedy through a straightforward statute: 42 U.S.C. § 1983. The Legislature has not yet passed a law like Section 1983 to enforce the fundamental rights our state constitutional rights guarantees to the people of New Mexico. That leads to the bizarre circumstance where, for example, someone who slips and falls on government property can recover for their injuries, but a person who is denied any number of their fundamental rights under the state Constitution—including state rights to free speech, freedom of religion, freedom of elections, and the right to bear arms—cannot. It is time to hold public officials accountable for violating those rights through a state analogue to Section 1983.

**No Qualified Immunity.** The Majority next recommends that the Legislature specify that qualified immunity will not be a defense to claims brought under the New Mexico Civil Rights Act. Qualified immunity is a judicially created defense to federal civil rights claims. The doctrine

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<sup>1</sup> H.B. 5, 54th Leg., 1st Spec. Sess. (N.M. 2020).

<sup>2</sup> 42 U.S.C. § 1983.

prohibits courts from allowing such claims to go forward unless the plaintiff first establishes that their rights have been violated *and* demonstrates that the violation was already recognized by courts under “clearly established law.” The second part of the standard is daunting—plaintiffs generally lose unless there is a decision from the United States Supreme Court or the United States Court of Appeals for the Tenth Circuit finding a constitutional violation under nearly identical facts. In practice, this means that a victim of government misconduct cannot recover even when courts agree that their rights have been violated unless a public official previously violated the Constitution in the same way.

Qualified immunity has drawn widespread criticism from judges, legal scholars, elected officials, and respected public figures across the ideological spectrum. Much of that criticism focuses on the fact that the doctrine denies people access to the courts without serving the purposes it is meant to serve. While the future of the defense under the federal Constitution is a matter for federal judges to determine, the Legislature determines what best serves New Mexico citizens. Here, refusing to allow government officials who break the law to be shielded from liability by qualified immunity is the right result.

The Majority is sensitive to, and has carefully considered, concerns that public officials must have room to fulfill their important responsibilities in good faith. But the Majority does not believe that qualified immunity provides the answer to that concern. Instead, public officials’ reasonable, good faith conduct is protected through faithful application of substantive constitutional law by judges and careful instructions to juries in cases with enough merit to go to trial. Excessive force cases against law enforcement officers are a classic example. The Majority agrees that split-second decisions law enforcement officers must make in tense circumstances should not be second-guessed by judges and juries with the benefit of 20/20 hindsight. That is, however, already addressed in the substantive constitutional law. In addition, claims that a public official violated the Constitution (state or federal) consistently are evaluated under high standards—considerably higher than the standards that apply to, for example, a regular negligence case. Those standards provide the appropriate safeguards against liability for reasonable, good-faith conduct.<sup>3</sup>

**Compensatory Damages and Equitable/Injunctive Only.** On monetary damages, the Majority recommends allowing parties that prove a violation to recover for the loss they suffered (compensatory damages) but not punitive damages. Compensatory damages remedy the constitutional violation. Courts often refer to this as making the injured person whole (although money damages often are only a rough substitute for the harm). And while punitive damages are available under Section 1983, the Majority concluded there are strong policy reasons not to allow such damages under the New Mexico Civil Rights Act. For example, allowing for compensatory and not punitive damages will help avoid the risk of wildly divergent verdicts, allay insurability concerns, and protect the taxpayer and public revenue. Equitable relief should remain available, including the right to secure an injunction against unconstitutional conduct.

**Attorney Fees.** Next, awarding reasonable attorney fees to those who prevail on state constitutional claims is essential if the Legislature wants the New Mexico Civil Rights Act to play

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<sup>3</sup> Substantive law protections address concerns the Commission heard, particularly from law enforcement officers, based on the understandable desire to ensure judges and juries do not turn honest mistakes into liability.

a meaningful role in remedying constitutional violations. Congress authorizes attorney fees for federal constitutional violations. In addition, the Legislature has recognized that awarding attorney fees to prevailing parties is essential by providing for them in a long list of statutes, including in the state whistleblower statute<sup>4</sup> and the Inspection of Public Records Act.<sup>5</sup> Here, the issue is the violation of rights important enough to be enshrined in the state Constitution. Sometimes, the deprivation of those rights results in significant money damages. But often, the significance of the violation does not translate to large recoveries. Without an attorney fees provision, the important rights the New Mexico Constitution protects will rarely be vindicated.

**Indemnification.** The Majority does not believe public employees and officials should bear the risk that they personally will have to pay a judgment against them or will individually be responsible for paying to settle a claim. Other states, including Colorado, have opened the door to public employees having to pay at least a portion of judgments against them. No one in the Majority believes New Mexico should do the same. The state already broadly indemnifies public employees, and the Majority believes the Legislature should leave that protection in place for claims under the New Mexico Civil Rights Act.

**Statute of Limitations.** The Majority recommends a three-year statute of limitations with exceptions for minors, people who are incapacitated, and victims of childhood sexual abuse. For federal civil rights cases, the statute of limitations is three years, and the Majority believes New Mexicans should have the same amount of time to bring cases under the New Mexico Civil Rights Act. The Majority also recognizes that minors, people who are incapacitated, and victims of childhood sexual abuse have difficulty bringing these lawsuits quickly, and should not be forced to rely on others to make important decisions for them about whether to bring a claim to enforce their rights. To protect these vulnerable groups, the Majority recommends that they have more time. This is consistent with state laws already in place that govern the statute of limitations for these groups. Minors and people who are incapacitated would be able to bring their lawsuits under the New Mexico Civil Rights Act one year after they reach majority or are no longer incapacitated. For claims of childhood sexual abuse, lawsuits could be filed either on the plaintiff's twenty-fourth birthday or three years after the plaintiff disclosed the sexual abuse to a licensed medical or mental health provider.

**Fiscal Impact/Insurance.** The Legislature also charged the Majority with “review[ing] and assess[ing] the need for and costs of additional insurance policies for public employees and public bodies” if an act were adopted.<sup>6</sup> The Majority was not surprised that local governments, particularly counties and some municipalities, are adamantly opposed to a New Mexico Civil Rights Act based primarily on fiscal concerns. While the Majority appreciates those concerns, they do not undermine the compelling justification for enacting a robust New Mexico Civil Rights Act. This is true for several reasons.

First, the cost of protecting the rights of New Mexicans involves values fundamentally different from other budget questions the Legislature faces. Absent a statutory remedy for state constitutional violations, the Legislature is forcing the citizen who was harmed by government

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<sup>4</sup> NMSA 1978, § 10-16C-4(A) (2010).

<sup>5</sup> NMSA 1978, § 14-2-12(D) (1993).

<sup>6</sup> H.B. 5, ¶ H.

misconduct to pay for the violation they suffered. That is where things stand today. The Legislature therefore has to consider whether it wants to continue saving money by forcing those harmed by government misconduct to bear the cost for the state or responsible local government.

Second, the actual costs of a New Mexico Civil Rights Act are difficult to quantify. Everyone who presented to the Commission agreed on this. The Commission sought substantial data from state and local governments related to the question, but the responses did not lead to a clear conclusion. It is clear, however, that there are reasons to doubt that adopting the Majority's proposals will result in the significant costs that some have claimed. And the Majority is concerned that the inability to answer this question concretely in advance invites speculative doomsday scenarios that never will come to pass. The Majority also questions whether allowing New Mexicans to recover when the government violates their state constitutional rights actually will prevent any New Mexico government from securing adequate insurance. The inability to reasonably insure certainly was not proved during hours of presentations the Commission heard from those best situated to show that—unlike every other statute that preceded it—the New Mexico Civil Rights Act presents an uninsurable risk.

That leaves the Legislature with a choice—do nothing out of fear of an unproven financial risk, or take action realizing that you may amend any statute you adopt to address problems that actually arise. The Majority obviously recommends that the Legislature move forward. As Justice Louis Brandeis stated: “It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”<sup>7</sup> Here, the Legislature is not undertaking anything unique—many other states allow their citizens to enforce their state constitutional rights and have successfully managed the costs of providing that relief—and the consequences of inaction are real.

**Law Enforcement Academy Recommendations.** As a final matter, the Commission has some recommendations for improvements to the New Mexico Law Enforcement Academy (“LEA”). The LEA is not only responsible for police officer training, but also officer discipline, which it carries out through its authority to issue, deny, suspend or revoke certifications for police officers and telecommunicators. While the legislature did not ask the Commission consider the LEA, we believe that reforming the LEA would promote better discipline and training for law enforcement officers across the state. The LEA currently lacks the resources to conduct timely investigations which has caused a serious backlog of cases. This means officers who are under investigation for misconduct remain in their jobs while the investigations are pending for long periods. The LEA also lacks the ability to enforce its rules, and it is part of the Department of Public Safety, a larger law enforcement agency. This lack of independence means that the Department of Public Safety has authority over the same agency investigating law enforcement misconduct. The Commission recommends changes in the following four areas: (1) the LEA needs to be restructured to give it independence from the Department of Public Safety and receive sufficient resources to effectively address police misconduct investigations; (2) the LEA should be given the ability to enforce its regulations, procedures, and directives; (3) the LEA should be required to maintain a database that tracks police misconduct; and (4) the LEA should be fully

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<sup>7</sup> *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932).

funded in an amount sufficient to modernize its operations, fill and maintain all necessary staff positions, and implement the changes recommended by the Commission.

This report is divided into twelve sections. The first is a draft of the proposed New Mexico Civil Rights Act. Then, the Majority has provided nine appendices, each of which addresses the Majority's recommendations in more detail. The Majority has also attached a spreadsheet that shows a summary of the public comment the Commission received as Appendix X. The minority report is attached as Appendix XI.



DRAFT BILL

xxTH LEGISLATURE - STATE OF NEW MEXICO \_\_\_\_\_, 2020

INTRODUCED BY

DISCUSSION DRAFT

AN ACT

RELATING TO CIVIL RIGHTS; ENACTING THE NEW MEXICO CIVIL RIGHTS ACT; ALLOWING AN INDIVIDUAL TO BRING A CLAIM AGAINST A PUBLIC BODY OR PERSON ACTING ON BEHALF OF OR UNDER THE AUTHORITY OF A PUBLIC BODY FOR A VIOLATION OF THE INDIVIDUAL'S RIGHTS, PRIVILEGES OR IMMUNITIES ARISING FROM THE CONSTITUTION OF NEW MEXICO; PROHIBITING THE USE OF QUALIFIED IMMUNITY; MANDATING ATTORNEY FEES; PROVIDING A THREE-YEAR STATUTE OF LIMITATIONS.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF NEW MEXICO:

**SECTION 1.** [NEW MATERIAL] SHORT TITLE.—This act may be cited as the "New Mexico Civil Rights Act".

**SECTION 2.** [NEW MATERIAL] DEFINITION.—As used in the New Mexico Civil Rights Act, "public body" means the state and local governments and all advisory boards, commissions, committees, agencies or entities created by the Constitution of New Mexico or any branch of government that receives public funding, including political subdivisions, special taxing districts, school districts and institutions of higher education.

**SECTION 3.** [NEW MATERIAL] CLAIM FOR VIOLATIONS OF STATE CONSTITUTIONAL RIGHTS.—

A. It is unlawful for any public body or person acting on behalf of, under color of, or within the course and scope of the authority of a public body to subject, or cause to be subjected, any resident of New Mexico or other person within the state to the deprivation of any rights, privileges or immunities secured by the Constitution of New Mexico.

B. Any person who claims to have suffered a deprivation of any rights, privileges or immunities secured by the Constitution of New Mexico due to acts or omissions of a public body or person acting on behalf of, under color of, or within the course and scope of the authority of a public body may maintain an action to establish liability and recover actual damages and equitable and injunctive relief in any district court of New Mexico.

C. The remedies provided for in the New Mexico Civil Rights Act are not exclusive and shall be in addition to any other remedies provided for in any other law or available under common law.

**SECTION 4. [NEW MATERIAL] PROHIBITING THE USE OF QUALIFIED IMMUNITY.**—In any claim for damages or relief under the New Mexico Civil Rights Act, no public body or person acting on behalf of, under color of, or within the course and scope of the authority of a public body shall enjoy the defense of qualified immunity for causing the deprivation of any rights, privileges or immunities secured by the Constitution of New Mexico.

**SECTION 5. [NEW MATERIAL] MANDATING ATTORNEY FEES.**—The court shall award to any person who is successful in a court action to enforce the provisions of the New Mexico Civil Rights Act award reasonable litigation expenses and attorney fees for all work reasonably necessary to obtain the successful result. In determining litigation expenses and reasonable attorney fees, the court shall not exclude work on other claims that was inextricably intertwined with work performed to obtain the successful result under the New Mexico Civil Rights Act.

**SECTION 6. [NEW MATERIAL] STATUTE OF LIMITATIONS AND ABATEMENT.**—

A. Every claim permitted by the New Mexico Civil Rights Act shall be forever barred unless brought within three years from the date of the occurrence resulting in deprivation of any rights, privileges, or immunities secured by the New Mexico Constitution except as set forth in sections B and C or this statute.

B. For minors and incapacitated persons, the statute of limitations shall be extended so that they shall have one year from and after the termination of such incapacity within which to commence said actions.

C. For claims of childhood sexual abuse:  
(1) an action must be commenced before the latest of the following dates:  
(a) the first instant of the person's twenty-fourth birthday; or  
(b) three years from the date that a person first disclosed the person's childhood sexual abuse to a licensed medical or mental health care provider in the context of receiving health care from the provider.

(2) as used in this section, “childhood sexual abuse” means conduct that, if prosecuted in a criminal matter, would constitute a violation of:

(a) NMSA 1978, Section 30-9-11, regarding criminal sexual penetration of a minor;

(b) NMSA 1978, Section 30-9-13, regarding criminal sexual contact of a minor;

or

(c) the Sexual Exploitation of Children Act.

D. No action pending in any court under this act shall abate by the death of either, or both, the parties thereto.

**SECTION 7. [NEW MATERIAL] INDEMNIFICATION BY PUBLIC BODY.**—Any judgment awarded pursuant to the New Mexico Civil Rights Act against a person acting on behalf of, under color of, or within the course and scope of the authority of a public body shall be paid by the public body.

**SECTION 8. [NEW MATERIAL] WAIVER OF SOVEREIGN IMMUNITY.**—The state of New Mexico, on behalf of itself and every public body within its jurisdiction, waives its sovereign immunity for all claims brought pursuant to the New Mexico Civil Rights Act. In any action brought pursuant to the New Mexico Civil Rights Act, the public body or person acting on behalf of, under color of, or within the course and scope of the authority of a public body shall not assert sovereign immunity as a defense or bar to such action.

**SECTION 9. [NEW MATERIAL] RECORDS**—Each public body shall maintain a file of all final judgments and settlements by the public body in cases involving claims under the New Mexico Civil Rights Act and attach to each judgment and settlement a copy of the complaint filed in that case. All judgments, settlements and complaints are public records subject to disclosure under the New Mexico Inspection of Public Records Act.

## **Appendix I: The Commission's Work and Process**

The New Mexico State Legislature created the New Mexico Civil Rights Commission in the 2020 Legislative Special Session through House Bill 5. The Bill called for nine members to be appointed to the Commission with three members appointed by the governor and six members appointed by the New Mexico legislative council. The Commission was fully appointed on August 14, 2020.

The Commission held seven meetings, some of which were two hours long and some of which were three hours long, between August 21, 2020, and November 13, 2020. Each commissioner was asked if they had any recommendations for presentations and presenters. All requests for presenters were honored. At each meeting, Commissioners were able to question all presenters and make comments. The substance of each is detailed below.

**August 21, 2020:** Retired Justice Richard Bosson and Mark Baker were elected chair and vice chair of the Commission, respectively. The scope of the Commission's charge and the logistics of the Commission's work were discussed. The State Risk Management Division presented an overview of civil rights claims they handle. The Commission decided to hire contract staff for the Commission. Alexandra Freedman Smith was hired shortly after this meeting to be the staff attorney for the Commission, and law students Abigail Bannon-Schneebeck and Jacques Chouinard were hired as support staff.

**September 3, 2020:** The Commission heard presentations from Professor Michael Browde of the University of New Mexico School of Law, retired Judge Linda Vanzi, and attorney Andrew Schultz regarding the background of constitutional law and civil rights cases in New Mexico.

**September 18, 2020:** The Commission heard presentations regarding qualified immunity from national experts and legal scholars Professors Joanna C. Schwartz of the UCLA School of Law, Alexander A. Reinert of the Cardozo School of Law, and James D. Pfander of the Northwestern Pritzker School of Law. Each presenter is a national expert and scholar on civil rights law and qualified immunity.

**October 2, 2020:** The Commission heard presentations from the New Mexico Municipal League, New Mexico Counties, and the New Mexico Public School Insurance Authority regarding the costs of a New Mexico Civil Rights Act and insurance for the Act. For the New Mexico Municipal League, executive director A.J. Forte, general counsel Clinton Nicely, and Farmington Police Chief and President of the New Mexico Association of Chiefs of Police Steve Hebbe presented to the Commission. Executive director Steve Kopelman, general counsel Grace Phillips, and insurance broker John Chino gave presentations on behalf of New Mexico Counties. For the New Mexico Public School Insurance Authority, executive director Richard Valerio and general counsel Martin Esquivel presented to the Commission.

**October 16, 2020:** The Commission continued to hear presentations regarding costs and insurance for a New Mexico Civil Rights Act. The New Mexico Risk Management Division gave presentations through director Mark Tyndall and Cabinet Secretary Ken Ortiz. N.M. Counties gave another presentation where the Commission heard from Steve Kopelman, John Chino and their

chief of litigation, Brandon Huss. Maureen Sanders, professor of insurance law at the University of New Mexico School of Law, and attorney Katherine Wray also presented regarding costs and insurance.

**October 23, 2020:** The director of the Law Enforcement Academy, Kelly Alzaharna, presented to the Commission regarding police officer discipline and training in New Mexico. Sandoval County Attorney Robin Hammer also gave a presentation regarding the New Mexico Civil Rights Act, qualified immunity, and indemnification. The Commission then discussed the issues raised in House Bill 5. After discussion, the commissioners voted on various provisions from the bill as follows:

1. The commissioners voted 6–3 in favor of adopting a New Mexico Civil Rights Act.
2. The commissioners voted 5–4 that qualified immunity to specifically exclude qualified immunity as a defense to the New Mexico Civil Rights Act.
3. The commissioners voted 9–0 that government employees who violate the New Mexico Civil Rights Act should be indemnified.
4. The commissioners voted 9–0 in favor of making compensatory damages available under the New Mexico Civil Rights Act.
5. The commissioners voted 9–0 in favor of allowing injunctive and equitable relief to be available under the New Mexico Civil Rights Act.
6. The commissioners voted 5–4 against making punitive damages available under the New Mexico Civil Rights Act.
7. The commissioners vote 5–4 in favor of authorizing attorney’s fees to be awarded to a successful plaintiff.

The commissioners decided that the majority position would be included in this report to the Legislature as required by House Bill 5, Section I. The commissioners who disagreed with the Majority decided to submit a minority report.<sup>8</sup>

**November 13, 2020:** The commissioners discussed the following: a statute of limitations for the New Mexico Civil Rights Act, recommendations regarding the Law Enforcement Academy, recommendations to the legislature including the possibility of a cap on damages, including a provision in the draft bill for record keeping and making records of settlements and judgements under the New Mexico Civil Rights Act available under the Inspection of Public Records Act, and making the public comments the Commission received accessible to the legislature. The Commission also discussed the draft report and bill that were circulated by staff.

In addition to the presentations at Commission meetings, the Commission also considered the information it requested from various government entities. The Commission sent letters to the

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<sup>8</sup> See Appendix 11.

Risk Management Division, the New Mexico Municipal League, New Mexico Counties, and the New Mexico Public School Insurance Authority requesting detailed information regarding the number of civil rights claims they covered, the amounts they paid for these claims, information regarding both plaintiff’s and defendant’s attorney fees and costs, and information about insurance coverage, policies, premiums, and actuarial studies. The Commission also requested information from the Law Enforcement Academy regarding the disciplinary process and training for police officers in New Mexico. The information provided in response to these requests was discussed in the Commission meetings. This information is available on the [Commission’s website](#).<sup>9</sup>

Due to the COVID-19 pandemic, in-person public comment was not possible, so the Commission created a public comment mechanism through its website to solicit public input regarding the Commission’s work. To facilitate public comment, the Commission created a questionnaire asking for people’s thoughts on a New Mexico Civil Rights Act, qualified immunity, indemnification, and costs. People could also submit a general statement in lieu of or in addition to answering the questionnaire.

The Commission received 182 public comments. These included comments on behalf of individuals, organizations, and government entities. The Commission also received two videos from people who had been involved in civil rights lawsuits. Three counties submitted resolutions against a New Mexico Civil Rights Act and in favor of having qualified immunity available as a defense. One organization submitted a draft bill for the legislature. A summary of the responses for questions 1-4 of the questionnaire is attached as Appendix X. All public comments can be viewed on the [Commission’s website](#).<sup>10</sup> The results for each question are provided below.

<b>Questions Asked in Public Comment Questionnaire and Responses</b>		
<b>Question 1:</b> The New Mexico Constitution provides rights to the people in this state, but currently there is not a statute or private right of action that allows people to recover when these rights are violated. Do you support a civil cause of action that would allow a person to bring a lawsuit to recover for violations of their rights under the New Mexico Constitution? Please explain why or why not.		
<b>Yes: 124</b>	<b>No: 42</b>	<b>Unclear: 14</b>
<b>Question 2:</b> Do you believe allowing people to bring lawsuits to recover for violations of the New Mexico Constitution would improve how Government agencies and officials operate and/or the policies and procedures they create?		
<b>Yes: 122</b>	<b>No: 42</b>	<b>Unclear: 15</b>
<b>Question 3:</b> If you are familiar with the doctrine of qualified immunity, do you believe qualified immunity should be a defense to a lawsuit for violations of the New Mexico Constitution?		
<b>Yes: 51</b>	<b>No: 116</b>	<b>Unclear: 16</b>
<b>Question 4:</b> Should government actors found liable for civil rights violations be indemnified in such actions by either their government employer or its insurers?		

<sup>9</sup> See <https://www.generalservices.state.nm.us/crc.aspx>.

<sup>10</sup> <https://www.generalservices.state.nm.us/crc.aspx>.

<b>Yes: 100</b>	<b>No: 25</b>	<b>Unclear: 47</b>
<b>Question 5:</b> If it is shown that adding a civil rights action will lead to increased costs to government for legal defense, payment of judgments, insurance, etc., would that affect your opinion?		
This question did not ask for a yes or no answer, and the responses varied.		

The Commission website not only solicited public comment, but also provided documents, information, agendas for meetings, and meeting minutes. The public was able to view all meetings live or watch recordings of the meetings via the Legislature’s website. Approved minutes of each meeting were also posted on the website for the public to read.

Commission staff conducted research and prepared materials for the commissioners to consider including information regarding the New Mexico Constitution, the New Mexico Tort Claims Act, 42 U.S.C. § 1983, qualified immunity, and the spreadsheet summary of the public comments received. After the commissioners voted on the issues presented in House Bill 5, the staff also drafted this report to the legislature pursuant to House Bill 5, Section I. Commissioners were able to provide their input regarding the report at the November 13, 2020 meeting and via email. The staff incorporated this input into another report that was circulated to all commissioners before being finalized. This report reflects the final product of the majority of the Commission. The commissioners who were in the minority have also submitted a report.

## Appendix II: Rationale for the New Mexico Civil Rights Act

The New Mexico Constitution provides a robust Bill of Rights to the people of New Mexico.<sup>11</sup> However, “[t]he substance of constitutional rights is meaningless if state actors can violate those rights with impunity. Such rights would become, in James Madison’s words, ‘parchment barriers’—symbolic commitments to individual liberty that do nothing in practice to deter or prevent unlawful misconduct by government agents.”<sup>12</sup> That has been true in New Mexico since the state Constitution was adopted. Current New Mexico law is no substitute for the New Mexico Civil Rights Act, and the Legislature should step in now to address this problem.<sup>13</sup>

The United States Constitution is the “supreme law of the land,”<sup>14</sup> and the powers not delegated by the federal Constitution are reserved to the states.<sup>15</sup> This means each state must provide *at least* those rights provided by the United States Constitution, but may also grant *greater* rights to its citizens.<sup>16</sup> New Mexico has done so in its Constitution, and there are meaningful differences between our Constitution and the federal Bill of Rights.

New Mexico State Constitution	United States Constitution	Notable NM Difference <sup>17</sup>
<p><b>Art. II, § 6: Right to Bear Arms</b> No law shall abridge the right of the citizen to keep and bear arms for security and defense, for lawful hunting and recreational use and for other lawful purposes, but nothing herein shall be held to permit the carrying of concealed weapons. No municipality or county shall regulate, in any way, an incident of the right to keep and bear arms.</p>	<p><b>U.S. CONST. amend. II: Right to Bear Arms</b> A well-regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.</p>	<p>The right to bear arms in the NM Constitution is broader than the federal Constitution.</p>
<p><b>Art. II, § 8: Freedom of Elections</b> All elections shall be free and open, and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage.</p>	<p><b>No analog in the U.S. Constitution.</b></p>	<p>The NM Constitution provides a right to freedom of elections that is absent from the federal Constitution.</p>

<sup>11</sup> See N.M. CONST. art. II.

<sup>12</sup> Jay Schweikert, *Qualified Immunity: A Legal, Practical, and Moral Failure*, CATO INSTITUTE, Policy Analysis No. 901 (September 14, 2020), <https://doi.org/10.36009/PA.901>.

<sup>13</sup> The Commission voted 6-3 in favor of creating a New Mexico Civil Rights Act.

<sup>14</sup> U.S. CONST. art. VI.

<sup>15</sup> U.S. CONST. amend X.

<sup>16</sup> See generally Linda M. Vanzi, Andrew G. Schultz, & Melanie B. Stambaugh, *State Constitutional Litigation in New Mexico: All Shield and No Sword*, 48 N.M. L. REV. 302 (2018).

<sup>17</sup> This chart presents a non-exhaustive list of differences between the federal and New Mexico Constitution. There are more differences not listed, but this chart provides some examples.



<p><b>Art. II, § 11: Freedom of Religion</b> Every man shall be free to worship God according to the dictates of his own conscience, and no person shall ever be molested or denied any civil or political right or privilege on account of his religious opinion or mode of religious worship. No person shall be required to attend any place of worship or support any religious sect or denomination; nor shall any preference be given by law to any religious denomination or mode of worship.</p>	<p><b>U.S. CONST. amend. I: Rights to Religion, Speech, Press, Assembly, Petition</b> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.</p>	<p>The religious rights in the N.M. Constitution are broader than federal Constitution.</p>
<p><b>Art. II, § 17: Freedom of Speech and Press; Libel</b> Every person may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press. In all criminal prosecutions for libels, the truth may be given in evidence to the jury; and if it shall appear to the jury that the matter charged as libelous is true and was published with good motives and for justifiable ends, the party shall be acquitted.</p>	<p><b>U.S. CONST. amend. I: Rights to Religion, Speech, Press, Assembly, Petition</b> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.</p>	<p>The free speech rights in the N.M. Constitution are broader than the federal Constitution.</p> <p>There is no express provision about libel in the federal Constitution.</p>
<p><b>Art. II, § 18: Due Process; Equal Protection; Sex Discrimination</b> No person shall be deprived of life, liberty or property without due process of law; nor shall any person be denied equal protection of the laws. Equality of rights under law shall not be denied on account of the sex of any person. The effective date of this amendment shall be July 1, 1973.</p>	<p><b>U.S. CONST. amend. XIV: Due Process; Equal Protection</b> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.</p>	<p>The N.M. Constitution includes an equal rights amendment for women which bans denial of rights on the basis of sex; the federal Constitution contains no such provision</p>
<p><b>Art. II, § 21: Imprisonment for Debt</b> No person shall be imprisoned for debt in any civil action.</p>	<p><b>No analog in the U.S. Constitution.</b></p>	<p>The N.M. Constitution prohibits imprisonment for debt.</p>

Victims of federal constitutional violations can seek redress through 42 U.S.C. § 1983. This law was passed as part of the Ku Klux Klan Act of 1871<sup>18</sup> and states that every person who, under color of law, “subjects... any citizen... to the deprivation of any rights, privileges, or immunities

<sup>18</sup> Jamison v. McClendon, No. 3:16-CV-595-CWR-LRA, 2020 WL 4497723, at \*10 (S.D. Miss. Aug. 4, 2020).

secured by the Constitution... shall be liable to the party injured.”<sup>19</sup> New Mexico does not have a parallel statute that allows people to recover for violations of their state constitutional rights. The Majority believes addressing this problem is long overdue. And by stepping in to provide a remedy for state constitutional violations, New Mexico will join a growing list of states that have taken this important step.<sup>20</sup> Six states have done so by statute:

<b>States with a Statutory Analogue to Section 1983</b>		
<b>State</b>	<b>Statutory Analogue to § 1983</b>	<b>Additional Info</b>
Arkansas	ARK. CODE ANN. §§16-123-101 to -108	Includes attorney’s fees
California	CAL. CIV. CODE § 52.1	Includes attorney’s fees
Colorado	COLO. REV. STAT. ANN. § 13-21-131	Includes attorney’s fees; only applies to “peace officers”
Massachusetts	MASS. GEN. LAWS ch. 12, § 11I	Includes attorney’s fees
Nebraska	NEB. REV. STAT. §20-148	No attorney’s fees provision
New Jersey	N.J. REV. STAT. § 10:6-2	Includes attorney’s fees

Courts in another sixteen states have recognized a cause of action for state constitutional violations in various contexts (some of which are limited in scope):

<b>States with a Common Law Analogue to Section 1983</b>		
<b>State</b>	<b>Common Law Analogue to Section 1983</b>	<b>Additional Info</b>
Alaska	Yes, restricted	Only for <i>flagrant</i> violations.
Connecticut	Yes, restricted	Only specifically recognizes search and seizure and false arrest.
Illinois	Yes, restricted	Only recognizes search and seizure.

<sup>19</sup> 42 U.S.C. § 1983.

<sup>20</sup> See Vanzi, Schultz, & Stambaugh, *supra* note 5, at 308-10.

Iowa	Yes, restricted	Only specifically recognizes right of persons, searches & seizures, due process, equal protection.
Louisiana	Yes, restricted	Only specifically recognizes right to privacy.
Maryland	Yes, restricted	Only specifically recognizes due process and search and seizure claims.
Michigan	Yes, restricted	Restricted to due process claims alone.
Mississippi	Yes, restricted	Only recognizes search and seizure claims.
Montana	Yes, restricted	Only recognizes due process, search and seizure, and privacy claims.
New York	Yes, restricted	Only recognizes equal protection and search and seizure claims.
North Carolina	Yes, restricted	Only recognizes free speech, due process, and claims for all other rights in the state's Declaration of Rights where there is no analogous statutory cause of action.
Utah	Yes, restricted	Restricted to rights that are self-executing and situations where the constitutional violation is flagrant, existing remedies do not redress the injury, and equitable relief will not redress the injuries.
Vermont	Yes, restricted	Specifically recognizes claims for common benefits, search and seizure, freedom of speech and of the press.
Virginia	Yes, restricted	Only recognizes due process claims, specifically property deprivation and self-executing provisions.
West Virginia	Yes, fairly broad	Specifically recognizes due process and excessive force claims. WV courts generally imply that private causes of action exist for all violations of the WV Constitution.

Wisconsin	Yes, restricted	Specifically recognizes due process claims; for other violations, plaintiffs must demonstrate an intentional violation of the state Constitution.
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Existing New Mexico law is no substitute for the statute the Majority recommends.<sup>21</sup> In particular, the New Mexico Tort Claims Act (“NMTCA”) only allows people to bring suit against New Mexico governmental actors in limited circumstances, including negligent operation of a building,<sup>22</sup> operation of a vehicle,<sup>23</sup> and in the provision of medical care.<sup>24</sup> It prohibits legal action for violations of state constitutional rights against all government employees except for law enforcement officers.<sup>25</sup> And even with law enforcement officers, the right to recover for state constitutional violations under the NMTCA is limited in ways the New Mexico Civil Rights Act would correct. The NMTCA limits constitutional claims against law enforcement officers to those involving personal injury, bodily injury, wrongful death and property damage, does not allow for attorney fees, and imposes outdated caps on damages.<sup>26</sup>

Thus, if a person’s free speech rights under the state Constitution are violated by any public official, including a law enforcement officer, they typically have no recourse under the NMTCA at all since such claims rarely involve personal injury or property damage. Even within the subset of state constitutional claims a person can bring against law enforcement officers, the NMTCA imposes limitations inconsistent with the significant role constitutional rights play in our society. The Majority believes that a New Mexico Civil Rights Act is a better way to afford state constitutional protections to citizens.

<sup>21</sup> NMSA 1978, § 41-4-1 (1981).

<sup>22</sup> NMSA 1978, § 41-4-6 (1977).

<sup>23</sup> NMSA 1978, § 41-4-5 (1977).

<sup>24</sup> NMSA 1978, §§ 41-4-9, -4-10 (1978).

<sup>25</sup> NMSA 1978, § 41-4-12 (2020).

<sup>26</sup> The NMTCA allows people to bring suit against law enforcement officers for:

[P]ersonal injury, bodily injury, wrongful death or property damage resulting from assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, defamation of character, violation of property rights, the independent tort of negligent spoliation of evidence or the independent tort of intentional spoliation of evidence, failure to comply with duties established pursuant to statute or law or any other deprivation of any rights, privileges or immunities secured by the constitution and laws of the United States or New Mexico when caused by law enforcement officers while acting within the scope of their duties.

§ 41-4-12. *See also* NMSA 1978, § 41-4-19 (2007) (stetting statutory damages caps on NMTCA claims).

The following chart lays out the differences between the NMTCA and Section 1983:

Statute	New Mexico Tort Claims Act NMSA (1978) § 41-4-1 et. seq.	42 U.S.C § 1983
Lawsuits Against Public Employees for:	<p>Allows lawsuits for bodily injury, wrongful death or property damage caused by the negligence of public employees while acting under color of law involving:</p> <ul style="list-style-type: none"> <li>• Operation or maintenance of any motor vehicle, aircraft, or watercraft</li> <li>• Allows lawsuits for bodily injury, wrongful death or property damage caused by the negligence of public employees while acting under color of law involving:</li> <li>• Operation or maintenance of any motor vehicle, aircraft, or watercraft</li> <li>• Operation or maintenance of any building, public park, machinery, equipment or furnishings</li> <li>• Operation of airports</li> <li>• Operation of public utilities</li> <li>• Operation of any hospital, infirmary, mental institution, clinic, dispensary, medical care home or like facilities</li> <li>• Provision of health care services (for licensed health care workers)</li> <li>• Construction, and in the subsequent maintenance, of any bridge, culvert, highways, roadway, street, alley, sidewalk, or parking area</li> <li>• Law enforcement officers- lawsuits can be brought against law enforcement officers for personal injury, bodily injury, wrongful death or property damage resulting from assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, defamation of character, violation of property rights, failure to comply with duties established under statute or law or deprivation of any rights, privileges or immunities secured by the Constitution and laws of the United States or New Mexico when caused by law enforcement officers while acting within the scope of their duties</li> </ul> <p>Limited to only the enumerated exceptions and persons (No education, CYFD, elected bodies, etc.)</p> <p>For all <i>except</i> law enforcement officers:</p> <ul style="list-style-type: none"> <li>• Violations of constitutional rights are not actionable.</li> </ul> <p>For law enforcement officers:</p> <ul style="list-style-type: none"> <li>• Limited to personal injury, bodily injury, wrongful death and property damage (e.g. would not cover a constitutional violation for which</li> </ul>	<p>Allows lawsuits against any person acting under color of law who “subjects, or causes to be subjected, any citizen of the United State or other person within the jurisdiction thereof to the deprivation of any privileges, or immunities secured by the Constitution and laws...”</p>

	<p>there is no personal injury or property damage such as a free speech violation)</p> <p>Caps on damages are set by NMSA 1978, § 41-4-19:</p> <ol style="list-style-type: none"> <li>1. \$200,000 for property damage</li> <li>2. \$300,000 for past and future medical expenses</li> <li>3. \$400,000 to any person for any number of claims arising out of a single occurrence other than property damage and medical expenses</li> <li>4. The total liability for all claims under (1) and (3) that arise out of a single occurrence shall not exceed \$750,000.</li> </ol>	
Provides Attorney's Fees?	No.	Yes. <i>See</i> 42. U.S.C. § 1988.
Qualified Immunity?	No.	Yes.
Individuals Indemnified?	Yes. <i>See</i> NMSA (1978) § 41-4-4.	Yes, in New Mexico. State statute indemnifies public employees for constitutional violations in cases brought under 42 U.S.C. § 1983. <i>See</i> NMSA (1978) § 41-4-4.

### **Appendix III: Qualified Immunity Should Not Be A Defense under the New Mexico Civil Rights Act**

Qualified immunity has been widely criticized by judges, legal scholars, elected officials, and respected public figures across the ideological spectrum. Much of that criticism focuses on the fact that qualified immunity denies people a remedy in court without satisfying the purposes it is meant to serve. While the future of the defense in federal court is a matter for federal judges to resolve, the Legislature works on a clean slate in determining what best serves New Mexico public policy on civil rights. The Majority believes that importing qualified immunity as a defense would be a mistake.

#### ***What is qualified immunity?***

When Congress enacted Section 1983 in 1871, it spoke in clear and broad language: anyone who violates someone’s federal constitutional rights “shall be liable” to the injured party.<sup>27</sup> In 1967, however, the United States Supreme Court sharply limited Section 1983’s reach by creating the doctrine of qualified immunity.<sup>28</sup> The doctrine renders government actors immune from suit even if they violate the Constitution.<sup>29</sup> To overcome this defense, the plaintiff must show two things: (1) that the government actor violated his or her constitutional right; and (2) that there is clearly established law showing that the right was violated.<sup>30</sup>

#### ***Qualified immunity has drawn widespread, bipartisan criticism.***

Federal judges at all levels and across the ideological spectrum have criticized qualified immunity. Justice Sonia Sotomayor and the late Justice Ruth Bader Ginsburg wrote that the doctrine “tells officers that they can shoot first and think later, and it tells the public that palpably unreasonable conduct will go unpunished.”<sup>31</sup> Justice Clarence Thomas has expressed “strong doubts” about qualified immunity,<sup>32</sup> while the late Justice Antonin Scalia stated that the Court’s “treatment of qualified immunity under 42 U.S.C. § 1983 has not purported to be faithful to the common-law immunities that existed when Section 1983 was enacted, and that the statute presumably intended to subsume.”<sup>33</sup>

Judges from lower courts have also criticized qualified immunity. Judge L. Steven Grasz, a recent appointee to the Eight Circuit, explained that “[i]n the context of violations of constitutional rights by state officials, application of [qualified immunity] imposes a judicially created exception to a federal statute that effectively prevents claimants from vindicating their

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<sup>27</sup> 42 U.S.C. § 1983.

<sup>28</sup> *Pierson v. Ray* involved a group of Black ministers who brought a federal civil rights claim after they were arrested for using segregated bus facilities. 386 U.S. 547 (1967). The Court held that the police officers “should not be liable if they acted in good faith and with probable cause in making an arrest under a statute that they believed to be valid.” *Id.* at 555. See also Joanna C. Schwartz, *The Case Against Qualified Immunity*, 93 Notre Dame L. Rev. L. Rev. 1797, 1801 (2018).

<sup>29</sup> *Harlow v. Fitzgerald*, 457 U.S. 800, 817-18 (1982).

<sup>30</sup> *Id.* at 818.

<sup>31</sup> *Kisela v. Hughes*, 138 S. Ct. 1148 (2018) (Sotomayor, J., dissenting) (Justice Ginsberg joined Justice Sotomayor in dissent).

<sup>32</sup> *Baxter v. Bracey*, 140 S. Ct. 1862, 1865 (Mem.) (Thomas, J., dissenting from denial of certiorari).

<sup>33</sup> *Crawford-El v. Britton*, 523 U.S. 574, 611 (1998) (Scalia, J., dissenting).

constitutional rights. The law is never made clear enough to hold individual officials liable [under] 42 U.S.C. § 1983.”<sup>34</sup> Judge James O. Browning, a respected conservative who serves as a New Mexico federal district court judge has concluded that: “[I]n a day when police shootings and excessive force cases are in the news, there should be a remedy when there is a constitutional violation, and jury trials are the most democratic expression of what police action is reasonable and what action is excessive. If the citizens of New Mexico decide that state actors used excessive force or were deliberately indifferent, the verdict should stand, not be set aside because the parties could not find an indistinguishable Tenth Circuit or Supreme Court decision.”<sup>35</sup>

Criticisms of qualified immunity are not limited to the judiciary. Elected officials have also harshly criticized the doctrine, including a bipartisan coalition in the U.S. House of Representatives that introduced legislation to abolish the doctrine entirely.<sup>36</sup> Colorado recently passed a law much like the proposed New Mexico Civil Rights Act. That statute, which is limited to law enforcement officers, does not allow qualified immunity as a defense.<sup>37</sup> Other state legislatures are also considering laws to eliminate qualified immunity.

### 2020 State Legislation Addressing Qualified Immunity

State	Legislation	Effect	Status
Colorado	S.B. 217 (2020)	Provides a state constitutional claim for violations of civil rights by police officers; abolishes qualified immunity as a defense in these cases; provides partial indemnification of officers but also imposes individual liability for 5% of judgment or \$25,000, whichever is less.	Passed, codified.
Kentucky	H.B. 177 (Jan. 7, 2020)	Codifies qualified immunity for torts arising from the operation of law enforcement vehicles.	Introduced.
Louisiana	H.B. 51 (June 8, 2020)	Eliminates qualified immunity for law enforcement officers as a defense to in wrongful death and use of force claims.	Introduced.
Missouri	H.B. 30 (Aug. 7, 2020)	Creates a state cause of action for violations of constitutional rights; provides for attorney’s fees; abolishes qualified immunity as a defense in constitutional actions.	Introduced.
New Jersey	A.B. 4578 (Aug. 25, 2020)	Shifts burden to establish qualified immunity from plaintiffs to law enforcement officers in use of force or	Introduced.

<sup>34</sup> Kelsay v. Ernst, 933 F.3d 975, 987 (8th Cir. 2019) (Grasz, J., dissenting).

<sup>35</sup> Manzanares v. Roosevelt Cty. Adult Det. Ctr., 331 F.Supp.3d 1260, 1293 (D.N.M. 2018).

<sup>36</sup> Ending Qualified Immunity Act, H.R. 7084, 116th Cong. (2020).

<sup>37</sup> COLO. REV. STAT. § 13-21-131(2)(b) (2020).



		deadly force cases brought under the New Jersey Civil Rights Act.	
New York	S.B. 8668 (Aug. 21, 2020)	Provides a state cause of action for deprivation of any state or federal constitutional right by a public employee; establishes a fee shifting provision; abolishes qualified immunity as a defense; allows the state attorney general to seek civil penalties.	Introduced.
Virginia	S.B. 5065 (Aug. 26, 2020)	Creates a civil claim for deprivation of rights by law enforcement officers under the state constitution; provides for compensatory and punitive damages; abolishes qualified immunity; indemnifies individual officers.	Introduced.

Further still, the American Civil Liberties Union has called on the Supreme Court to “abolish qualified immunity and return Section 1983 to its original meaning.”<sup>38</sup> Three national think tanks widely recognized as the conservative libertarian counterparts to the ACLU—the Cato Institute, the Institute for Justice and Americans for Prosperity—all likewise have weighed in against continuing to recognize qualified immunity in federal court. The Cato Institute has called qualified immunity “one of the most obviously unjustified legal doctrines in our nation’s history.”<sup>39</sup> Beyond writing to the Commission to express support for the recommendations set out in this report, the Institute for Justice submitted a model statute for the Commission’s consideration that rejects qualified immunity and goes beyond the Commission’s recommendations in a number of other areas.<sup>40</sup> Consistent with the national organization’s position, Americans for Prosperity-New Mexico wrote to the Commission that it “strongly believes that public officials who violate the constitutional rights of New Mexicans should be held accountable, as the rule of law demands” and “commend[ing] the Commission for recommending a ‘New Mexico Civil Rights Act’ to remove qualified immunity as a defense to ensure that such accountability becomes a reality.”<sup>41</sup>

Respected public figures and the media have highlighted similar concerns with qualified immunity. Conservative commentator George Will has called on the United States Supreme Court to “rethink” qualified immunity due to its effects on both the general public and law enforcement officers “tainted by the unpunished unconstitutional behavior of a few.”<sup>42</sup> Additionally, a diverse

<sup>38</sup> April Rodriguez, *Lower Courts Agree—It’s Time to End Qualified Immunity*, ACLU (Sept. 10, 2020), <https://www.aclu.org/news/criminal-law-reform/lower-courts-agree-its-time-to-end-qualified-immunity/>.

<sup>39</sup> Schweikert, *supra* note 4. Mr. Schweikert testified at some length before the House of Representative’s Criminal Justice Reform Subcommittee on August 10, 2020 to further express the Cato Institute’s opposition to qualified immunity.

<sup>40</sup> Letter from Keith W. Neely on behalf of the Institute for Justice to the Commission (Oct. 29, 2020) (on file with the New Mexico Civil Rights Commission).

<sup>41</sup> Letter from Brenda Boatman on behalf of Americans for Prosperity-New Mexico to the Commission (Oct. 31, 2020) (on file with the New Mexico Civil Rights Commission).

<sup>42</sup> George F. Will, *This Doctrine Has Nullified Accountability for Police. The Supreme Court Can Rethink It*, WASHINGTON POST (May 13, 2020), [https://www.washingtonpost.com/opinions/will-the-supreme-court-rectify-its-qualified-immunity-mistake/2020/05/12/05659d0e-9478-11ea-9f5e-56d8239bf9ad\\_story.html](https://www.washingtonpost.com/opinions/will-the-supreme-court-rectify-its-qualified-immunity-mistake/2020/05/12/05659d0e-9478-11ea-9f5e-56d8239bf9ad_story.html).

group of media outlets including The New York Times,<sup>43</sup> The Wall Street Journal,<sup>44</sup> and The New Republic<sup>45</sup> have all published searing criticisms of the doctrine.

Finally, individual New Mexicans weighed in on this issue by submitting public comment to the Commission, primarily in the form of submissions through the Commission’s website. Joining the national chorus detailed above, most comments the Commission received also advocated against recognizing qualified immunity as a defense to claims under the New Mexico Civil Rights Act.<sup>46</sup>

A review of cases where courts have applied qualified immunity illustrates the harsh impact the doctrine has on an injured person’s right to even try to pursue relief in court. Examples include:

SAMPLE OF QUALIFIED IMMUNITY CASES
<p><b>Corbitt v. Vickers, 929 F.3d 1304 (11th Cir. 2019):</b> Dismissing civil rights case against an officer who, hunting a fugitive, ended up at the wrong house and forced six children, including two children under the age of three, to lie on the ground at gunpoint. The officer tried to shoot the family dog but missed and shot a 10-year-old child lying face down, 18 inches away from the officer. The court held that the case had to be dismissed because there was no prior case where an officer accidentally shot a child laying on the ground while the officer was aiming at a dog.</p>
<p><b>Jessop v. City of Fresno, 936 F.3d 937 (9th Cir. 2019):</b> Granting qualified immunity to officers sued for stealing hundreds of thousands of dollars in cash and rare coins while executing a search warrant. The court stated, “We recognize that the allegation of any theft by police officers—most certainly the theft of over \$225,000—is deeply disturbing. Whether that conduct violates the Fourth Amendment’s prohibition on unreasonable searches and seizures, however, would not be clear to a reasonable officer.” (Internal quotations omitted)</p>
<p><b>Doe v. Woodard, 912 F.3d 1278 (10th Cir. 2019):</b> Granting qualified immunity for social worker who, without a warrant, “took color photographs of [a preschooler’s] naked body.” The child’s mother only learned of the search when the child told her that she hoped not to see the social worker because “I don’t like it when she takes all my clothes off.” Although precedent established that a police officer could not engage in this type search without a warrant, there</p>

<sup>43</sup> Editorial Board, *How the Supreme Court Lets Cops Get Away With Murder*, N.Y. TIMES (May 29, 2020), <https://www.nytimes.com/2020/05/29/opinion/Minneapolis-police-George-Floyd.html>.

<sup>44</sup> Robert McNamara, *Tear-Gas Grenades and ‘Qualified Immunity’*, WALL ST. J. (Jan. 15, 2020), <https://www.wsj.com/articles/tear-gas-grenades-and-qualified-immunity-11579133525>.

<sup>45</sup> Matt Ford, *To Protect and Serve, or Pilfer and Steal?* THE NEW REPUBLIC (April 17, 2020), <https://newrepublic.com/article/157342/supreme-court-police-qualified-immunity>.

<sup>46</sup> See <https://www.generalservices.state.nm.us/crc.aspx>.

was no prior case involving a social worker.

**A.M. v. Holmes, 830 F.3d 1123 (10th Cir. 2016):** Qualified immunity granted to officers who arrested a 13-year-old child for burping in gym class despite state law establishing that officers could not arrest schoolchildren for “noises or diversions” that merely “disturb the peace or good order” of individual classes. Then-judge (and now U.S. Supreme Court Justice) Gorsuch dissented.

**Allah v. Milling, 876 F.3d 48 (2d. Cir. 2017):** Qualified immunity granted for prison guards who kept a man awaiting trial on drug charges in extreme solitary confinement for seven months. His alleged misconduct was asking to speak with a Lieutenant about why he could not visit the commissary. The court held that his constitutional rights were violated, but there were no prior cases concerning the particular practices employed by the prison.

**Kelsay v. Ernst, 933 F.3d 975 (8th Cir. 2019) (en banc):** Qualified immunity granted to a police officer on a claim that he grabbed a 5-foot tall, 130-pound woman in a bear hug and body slammed her to the ground, breaking her shoulder and knocking her unconscious. The woman was neither fleeing nor resisting arrest, and she posed no threat to the officer or anyone else. The court held that it was not clearly established that an officer could not use a takedown maneuver under the specific circumstances.

### ***The problem of “clearly established law.”***

The plaintiffs did not lose the cases listed above because they did not have evidence to support their claims. They did not lose because the Constitution was not violated. They lost only because neither the United States Supreme Court nor the court of appeals deciding the case already had found a constitutional violation under similar enough facts to overcome qualified immunity. And in recent years, federal courts have required plaintiffs to identify existing cases that recognized a constitutional violation under ever-closer facts to defeat this defense. As United States District Judge James O. Browning has explained, “the Supreme Court has sent unwritten signals to the lower courts that a ***factually identical or a highly similar factual case*** is required for the law to be clearly established, and the Tenth Circuit [which hears federal cases out of New Mexico and surrounding states] is now sending those unwritten signals to the district courts[.]”<sup>47</sup> Judge Don Willett, a judicial conservative serving on the Fifth Circuit, has taken on this issue directly:

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<sup>47</sup> Favela v. City of Las Cruces ex rel. Las Cruces Police Dep’t, 398 F. Supp. 3d 858, 894 (D.N.M. 2019) (emphasis added) (citing Malone v. Bd. of Cty. Comm’rs for Cty. of Doña Ana, 707 F. App’x 552, 556 (10th Cir. 2017)).

To some observers, qualified immunity smacks of unqualified impunity, letting public officials duck consequences for bad behavior—no matter how palpably unreasonable—as long as they were the *first* to behave badly. Merely proving a constitutional deprivation doesn't cut it; plaintiffs must cite functionally identical precedent that places the legal question “beyond debate” to “every” reasonable officer. Put differently, it's immaterial that someone acts unconstitutionally if no prior case held such misconduct unlawful. This current “yes harm, no foul” imbalance leaves victims violated but not vindicated. Wrongs are not righted, and wrongdoers are not reproached.<sup>48</sup>

The difficulty of citing such closely analogous law is then made worse by another change in how federal courts deal with qualified immunity. Federal courts originally started by determining whether a plaintiff had met their burden of establishing a violation of their constitutional rights and then determined whether the relevant law was clearly established.<sup>49</sup> But in 2009, the United States Supreme Court allowed courts to begin skipping directly to the second step.<sup>50</sup> This created a new problem—when courts jump to whether the law was clearly established to dispose of cases, they do not develop the substantive law any further. Dismissing a case because the law is not clearly established does not guide future courts regarding what is and is not a constitutional violation. In this way, courts can forever avoid deciding whether rights were violated. Stated differently, “[i]mportant constitutional questions go unanswered precisely because no one's answered them before. Courts then rely on that judicial silence to conclude there's no equivalent case on the books. No precedent = no clearly established law = no liability. An Escherian Stairwell. Heads government wins, tails plaintiff loses.”<sup>51</sup>

### ***Qualified immunity does not do what it is supposed to do.***

In light these concerns, there would have to be a compelling justification to adopt qualified immunity as a defense to New Mexico Civil Rights Act claims; the Majority has not found such a justification. There is instead compelling evidence that qualified immunity does not meaningfully advance the interests it is meant to serve, and the Majority believes there are better ways to address those interests.

### **Protection from Frivolous Lawsuits and Burdens of Litigation**

One rationale for qualified immunity is that it shields government employees from frivolous lawsuits. That argument suffers from two fundamental flaws. First, it is not supported by any data the Majority has seen. Second, there already are substantial safeguards against frivolous lawsuits, particularly in cases involving constitutional claims.

On the first issue, a groundbreaking study of cases involving qualified immunity nationally found that the doctrine is “utterly miserable” at resolving insubstantial claims, and rarely disposes

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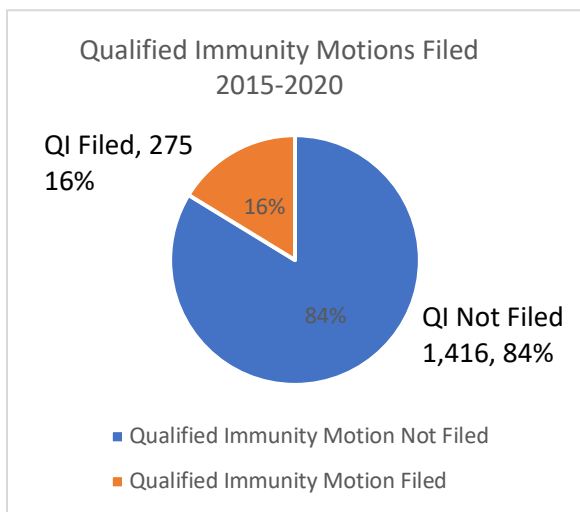
<sup>48</sup> *Zadeh v. Robinson*, 928 F.3d 457, 479 (5th Cir. 2019) (Willett, J. dissenting).

<sup>49</sup> See *Anderson v. Creighton*, 483 U.S. 635, 639-40 (1987); *Saucier v. Katz*, 533 U.S. 194, 200 (2001).

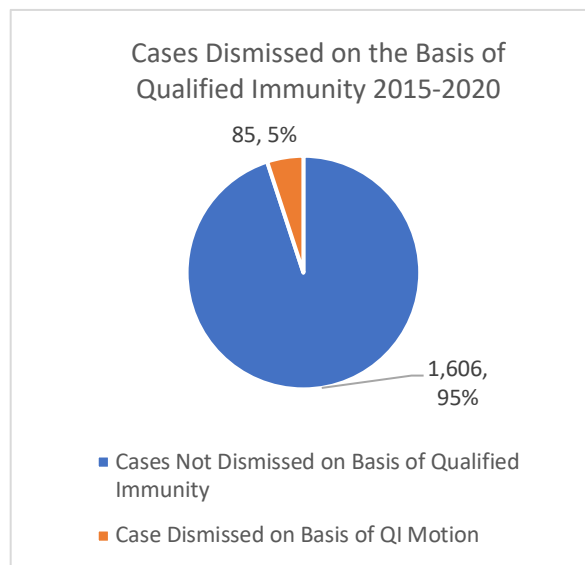
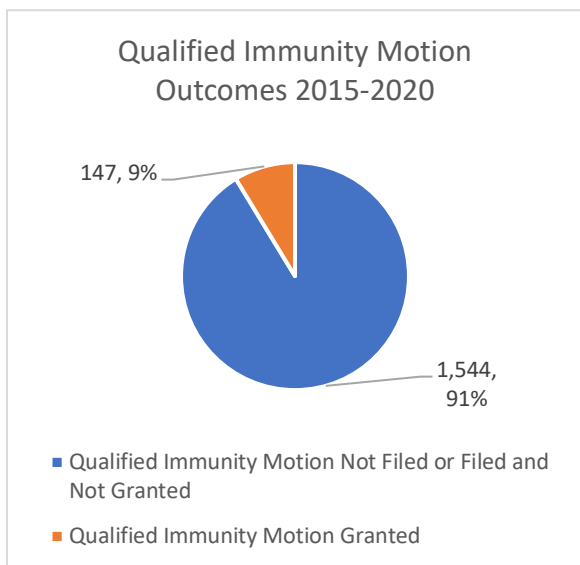
<sup>50</sup> *Pearson v. Callahan*, 555 U.S. 223, 236 (2009); Karen Blum, Erwin Chemerinksy, & Martin A. Schwartz, *Qualified Immunity Developments: Not Much Hope Left For Plaintiffs*, 29 *Touro L. Rev.* 633, 644 (2013).

<sup>51</sup> *Zadeh*, 928 F.3d at 489-80 (Willett, J. dissenting).

of cases before discovery is conducted.<sup>52</sup> In the study, Professor Joanna Schwartz analyzed 1,183 lawsuits brought under Section 1983 over a two-year period in five federal districts.<sup>53</sup> The data showed that just 0.6% of cases were dismissed on qualified immunity grounds before discovery, with only 3.2% dismissed based on the defense before trial.<sup>54</sup> When Professor Schwartz limited her analysis to only cases where qualified immunity could be raised (979 cases), qualified immunity resolved just 3.9% of cases even though defendants raised qualified immunity in over 37%.<sup>55</sup>



Albuquerque attorney Katherine Wray presented the Commission with her review of 1,691 federal civil rights cases filed in the District of New Mexico. That analysis revealed similar trends here.<sup>56</sup> Wray’s study showed that at least one qualified immunity motion was filed in 257 cases, or 16% of the total sample.<sup>57</sup> Qualified immunity was granted in 147 of those cases, which represents 9% of the total sample.<sup>58</sup> And where qualified immunity was granted, only 85 cases—just 5% of the 1,691 cases analyzed—were dismissed solely based on qualified immunity.<sup>59</sup>



<sup>52</sup> Joanna C. Schwarz, *The Case Against Qualified Immunity*, 93 Notre Dame L. Rev. 1797, 1809 (2018).

<sup>53</sup> Joanna C. Schwarz, *How Qualified Immunity Fails*, 127 Yale L. J. 2, 23 (2017).

<sup>54</sup> *Id.* at 60.

<sup>55</sup> *Id.*

<sup>56</sup> Katherine A. Wray, *Section 1983 Cases Filed in the United States District Court for the District of New Mexico Between 2015 and September 2020*, (unpublished study) (on file with the New Mexico Civil Rights Commission).

<sup>57</sup> *Id.* at 10.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.* at 12 (other cases where qualified immunity was granted resulted in a verdict (1%), were settled or voluntarily dismissed (22%), remanded (13%), or still pending at the time of the study (6%).)

In both studies, Section 1983 cases were overwhelmingly settled or dismissed before trial for reasons other than qualified immunity: 88% (1,050) of cases for Professor Schwartz<sup>60</sup> and 71% (1,203) of cases for Wray.<sup>61</sup> These results show that qualified immunity is not an effective tool to quickly dispose of Section 1983 cases.<sup>62</sup>

On the second issue, no plaintiff can win in court without proving their case to a jury or judge at trial (or, in rare cases where the evidence is entirely lopsided in their favor, through summary judgment). And courts already scrutinize the cases that come before them to ensure trials are reserved for claims with merit. The scrutiny begins early, including right after the plaintiff starts their case by filing a complaint. If that document does not allege a valid legal claim, courts will dismiss the case without allowing it to go forward.<sup>63</sup> If a case survives the motion to dismiss phase, the parties may engage in discovery—a process by which the parties determine whether evidence supports the plaintiff’s claims. If that process does not provide the plaintiff with evidence that would allow a reasonable jury to rule in their favor, courts will again dispose of the case by entering a summary judgment in the defendant’s favor.<sup>64</sup> These procedural tools allow courts to dispose of frivolous claims before trial. If a plaintiff clears these preliminary hurdles, the jury or judge deciding the case provides a final check. Claiming that defendants also need qualified immunity for the system to work reflects unfounded cynicism about the basic civil process.

The Majority does not share in that cynicism, and it is particularly unwarranted in the context of constitutional claims. Such claims have long been governed by some of the highest standards in the law. Even proof of negligence by a public official generally is not enough to prove a constitutional claim,<sup>65</sup> and specific examples of the hurdles plaintiffs must overcome to prove a deprivation of their constitutional rights include:

- To prove an excessive force claim, the plaintiff must establish that a law enforcement officer’s conduct was objectively unreasonable “from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight.”<sup>66</sup> Similarly, New Mexico courts have recognized that, within reasonable limits, officers “are the judges of the force necessary to enable them to make arrests or to preserve the peace.”<sup>67</sup> When

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<sup>60</sup> Schwartz, *supra* note 45, at 46.

<sup>61</sup> Wray, *supra* note 48, at 5.

<sup>62</sup> Qualified immunity also has the effect of dragging out cases, including by allowing a defendant to interrupt the case with an immediate appeal if the trial court finds the plaintiff has overcome the claim of immunity. *See Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985). The appeal can take a year or more, and if the court of appeals rules for the plaintiff, the defendant can assert qualified immunity yet again before the case can go to trial. The Commission received detailed examples of how this impacts real parties in real cases, including in *Browder v. City of Albuquerque*. 675 F. App’x 845 (10th Cir. 2017) (unpublished). There, Ashley and Lindsay Browder were killed when a police officer ran a red light at 60 miles per hour, killing Ashley and seriously injuring Lindsay. *Id.* at 847. The family filed a federal civil rights case to try to recover for their loss, but the defendant filed two qualified immunity motions. *Id.* at 846. The result was four years of litigation before the case ultimately settled.

<sup>63</sup> Rule 1-012(b)(6) NMRA.

<sup>64</sup> Rule 1-056 NMRA.

<sup>65</sup> *Bryson v. City of Edmond*, 905 F.2d 1386, 1390 (10th Cir.1990) (holding that more than mere negligence is required for constitutional deprivation in civil rights action).

<sup>66</sup> *State v. Mantelli*, 2002-NMCA-033, ¶ 22, 131 N.M. 692, 42 P.3d 92 (quoting *Graham v. Connor*, 490 U.S. 386, 396 (1989); *see also Tanberg v. Sholtis*, 401 F.3d 1151, 1168 (10th Cir. 2005) (“New Mexico law . . . reflects the same sensitivity as federal law to the split-second decisions officers must make.”).

<sup>67</sup> *Mead v. O’Connor*, 1959-NMSC-077, ¶ 4, 66 N.M. 170, 344 P.2d 478.

applying this standard, courts subject a plaintiff's claim to a non-exhaustive list of seven factors designed to ensure law enforcement officers are treated fairly.<sup>68</sup>

- To establish a substantive due process violation under the federal Constitution, a plaintiff must do more than show that the government actor intentionally or recklessly injured the plaintiff by abusing or misusing government power. The plaintiff must demonstrate a degree of outrageousness and a magnitude of potential or actual harm that is truly conscience shocking.<sup>69</sup>
- To prove a violation of the Eighth Amendment ban on cruel and unusual punishment, the plaintiff must prove that a prison official used force “maliciously and sadistically for the very purpose of causing harm.”<sup>70</sup>

There is no easy path to recover on a constitutional claim for government misconduct under the law even without qualified immunity.

#### Protection for Government Officials from Personal Financial Liability

Many comments the Commission received expressed concern that not adopting qualified immunity for New Mexico Civil Rights Act claims would expose individual public employees to personal financial liability. The Majority agrees that individual employees should not face personal financial liability, and none of its recommendations—including those related to qualified immunity—would lead to that result. New Mexico law already provides that government employees and officials acting within the scope of their duties will be indemnified (meaning the state or local government that employs them pays) for any for judgments or settlements based a violation of the state or federal constitutions.<sup>71</sup> And the Commission unanimously voted that this should remain true if the Legislature enacts a New Mexico Civil Rights Act.

#### Providing Government Actors with Fair Warning of the Unlawfulness of Their Conduct

Finally, qualified immunity is justified based on the theory that public officials should have fair warning that their actions violated the law. The “clearly established law” standard federal courts apply today, however, has drifted far away from the practical knowledge public officials are expected to have to perform their jobs in good faith. Specifically, government employees typically are not given training beyond a basic overview of constitutional law, and they certainly are not keeping track of each case where courts determine what is “clearly established” and what is not. It is instead far more common—and realistic—to expect public officials to be trained only on major cases that set general principles relevant to their work.<sup>72</sup> Yet as detailed above, those same general principles are not enough for plaintiffs to overcome qualified immunity.<sup>73</sup> And the level of factual similarity now required to defeat qualified immunity presumes that public officials

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<sup>68</sup> Estate of Larsen ex rel. Sturdivan v. Murr, 511 F.3d 1255, 1260 (10th Cir. 2008).

<sup>69</sup> Ganley v. Jojola, 402 F. Supp. 3d 1021, 1067 (D.N.M. 2019).

<sup>70</sup> Whitely v. Albers, 475 U.S. 312, 320-21 (1986).

<sup>71</sup> NMSA 1978, § 41-4-4 (2001).

<sup>72</sup> Joanna C. Schwartz, Qualified Immunity's Boldest Lie, 87 Univ. Chi. L. Rev., at 5-6 (forthcoming 2021).

<sup>73</sup> See White v. Pauly, 137 S. Ct. 548, 552 (2017).

are being educated about thousands of cases that control whether their conduct is constitutional.<sup>74</sup> The Legislature should not buy into the fallacy that public officials are tracking court dockets and altering their behavior based on each decision as it is handed down.<sup>75</sup>

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<sup>74</sup> Schwartz, *supra* note 64, at 5.

<sup>75</sup> *Id.*



## Appendix IV: Damages and Equitable/Injunctive Relief

Enacting the New Mexico Civil Rights Act without including a provision that allows for the recovery of compensatory damages would defeat the purpose of the statute. Compensatory damages provide relief only equal to the harm plaintiffs prove they have suffered because of unconstitutional government misconduct. The same is true of equitable and injunctive relief, which already are available against state and local governments and should remain available under the New Mexico Civil Rights Act.

The closer question for the Commission was whether to recommend also providing for punitive damages under the Act. Ultimately, the Majority concluded that the better course is for the Legislature not to expose the state and local governments to such relief under the Act. On this issue, the Majority recommends that the Legislature take a more restrictive approach than federal courts have taken under Section 1983, where punitive damages are available.<sup>76</sup> Three reasons for this stand out.

First, the Majority concluded that limiting the statute to compensatory damages will help avoid the risk of wildly divergent verdicts. An insurance representative for New Mexico Counties suggested to the Commission that including in the proposed Act punitive damages and attorney fees without qualified immunity would make it difficult for local governments to secure excessive coverage insurance. He confessed to being far less certain when commissioners asked if that would remain true if the Act did not include each of those elements. It is reasonable to expect that eliminating the risk of cases with extraordinary punitive damages will allow the state, local governments, and their insurers to accurately estimate their risk and insure against it. Eliminating punitive damages will assist in addressing that concern without sacrificing the fundamental importance of enacting the New Mexico Civil Rights Act.

Second, the Legislature has made the policy decision not to allow for punitive damages in some other remedial statutes. For example, the New Mexico Human Rights Act provides for the recovery of “actual damages and reasonable attorney fees”<sup>77</sup> but does not allow for punitive damages.<sup>78</sup>

Third, the New Mexico Supreme Court has found that, although “government liability for punitive damages would deter the abuse of governmental power and promote accountability among government officials,” countervailing considerations justify limiting punitive damages.<sup>79</sup> From the Court’s perspective, those include: (1) the need to protect public revenues absent a statute specifically allowing punitive damages; and (2) the injustice of punishing innocent taxpayers rather than the officials at fault.<sup>80</sup>

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<sup>76</sup> See, e.g., *Smith v. Wade*, 461 U.S. 30, 56 (1983).

<sup>77</sup> NMSA 1978, § 28-1-13(D) (2005).

<sup>78</sup> *Gandy v. Wal-Mart Stores, Inc.*, 1994-NMSC-040, ¶ 8, 117 N.M. 441, 872 P.2d 859 (“Punitive damages are sometimes recoverable in tort actions but are not recoverable under the Human Rights Act.”).

<sup>79</sup> *State ex rel. N.M. State Highway & Transp. Dep’t v. Baca*, 1995-NMSC-033, ¶ 19, 120 N.M. 1, 896 P.2d 1148.

<sup>80</sup> *Id.*

There are compelling arguments on both sides of this issue, but the Majority ultimately concluded that limiting the New Mexico Human Rights Act to compensatory damages, equitable and injunctive relief strikes the right balance between important competing interests.

## Appendix V: Attorney Fees

The Commission also considered whether the New Mexico Civil Rights Act should include a provision awarding reasonable attorney's fees.<sup>81</sup> The Commission heard from legal scholars regarding this issue and has concluded that an attorney's fee provision is essential if the Legislature wants the New Mexico Civil Rights Act to play a meaningful role in remedying constitutional violations for three reasons.

First, there are sound public policy reasons to award attorney's fees. "When a plaintiff succeeds in remedying a civil rights violation...he serves as a private attorney general, vindicating a policy that Congress [here, the Legislature] considered of the highest priority" and "therefore should ordinarily recover an attorney's fee from the defendant—the party whose misconduct created the need for legal action."<sup>82</sup> This is done when the statute involves important issues including anti-discrimination laws, environmental protection laws, and wage protection laws. Importantly, Congress has authorized attorney's fees to be awarded for violations of the federal Constitution.<sup>83</sup> This is to ensure that fundamental rights granted by the Constitution are protected. The Legislature should take the same approach for the New Mexico Constitution.

Second, without an attorney's fees provision, the likelihood of an injured person finding an attorney to take their claim would be low for many cases involving constitutional violations because they are often unlikely to result in substantial recovery. For example, a person whose state free speech rights are violated will not have damages in an amount that would be sufficient to entice an attorney to pursue claims if he or she will only be able to obtain a contingency fee from a low damages award. Additionally, in cases where a person is seeking injunctive relief for violations of their state constitutional rights, there is no incentive for an attorney to take the case because there are no damages from which an attorney could be compensated.

Third, it is not uncommon for the Legislature to include a provision awarding attorney's fees in New Mexico statutes. For example, the New Mexico Human Rights Act,<sup>84</sup> the New Mexico Whistleblower Protection Act,<sup>85</sup> the New Mexico Minimum Wage Act,<sup>86</sup> the New Mexico Fair Pay for Women Act,<sup>87</sup> the Inspection of Public Records Act,<sup>88</sup> and the Open Meetings Act<sup>89</sup> all provide attorney's fees to prevailing plaintiffs. The New Mexico Civil Rights Act which would protect our citizens' state constitutional rights is at least as important as these statutes and should also include a provision allowing reasonable attorney's fees to be awarded to a prevailing plaintiff.

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<sup>81</sup> H.B. 5, ¶ F, 54th Leg., 1st Spec. Sess. (N.M 2020).

<sup>82</sup> *Fox v. Vice*, 563 U.S. 826, 833 (2011).

<sup>83</sup> 42 U.S.C. § 1988.

<sup>84</sup> NMSA 1978, § 28-1-11(E) (1995).

<sup>85</sup> NMSA 1978, § 10-16C-4(A) (2010).

<sup>86</sup> NMSA 1978, § 50-4-26(E) (2013).

<sup>87</sup> NMSA 1978, § 28-23-4(B) (2013).

<sup>88</sup> NMSA 1978, § 14-2-12(D) (1993).

<sup>89</sup> NMSA 1978, § 10-15-3(C) (1997).

## Appendix VI: Indemnification

The Majority recommends that the Legislature provide public officials the same indemnification protections under the New Mexico Civil Rights Act that they currently receive under New Mexico law.<sup>90</sup> New Mexico law currently provides indemnification to public employees for violations of both the federal and the New Mexico Constitutions pursuant to NMSA 1978, Section 41-4-4(D)(2), which provides that “[a] governmental entity shall pay any settlement or any final judgment entered against a public employee for...a violation of...any rights, privileges or immunities secured by the constitution and laws of the United States *or the constitution and laws of New Mexico* that occurred while the public employee was acting within the scope of his duty.” (emphasis added). There is no reason to change that rule.

Applying the current indemnification rule to claims under the New Mexico Civil Rights Act instead makes sense for at least three reasons. First, exposing public officials to personal liability would serve as a disincentive for the recruitment and retention of government employees in New Mexico. The Majority does not want to decrease the number of high-quality candidates for government employment based on concerns they may face personal liability. The Majority respects that public employees often have difficult jobs for which they are paid less than they might make in the private sector. Changing Section 41-4-4(D)(2) to expose public employees to personal liability would be counterproductive.

Second, one purpose of the Act is to provide compensation for the victims of government misconduct that violates the New Mexico Constitution. If government employees are not indemnified, then victims will frequently be unable to recover for the injuries they receive because the governmental employee does not have the resources to pay the judgment or settlement. Additionally, if government entities are not financially responsible for their employees, there will be less incentive for these entities to provide the training and oversight programs needed to prevent violations of the New Mexico Constitution from occurring.

Finally, providing for broad indemnification of public officials follows other states. In a study of 9,225 cases where plaintiffs received payments from eighty-one state and local law enforcement agencies over a six-year period, individual law enforcement officers contributed in only .41% of those cases, totaling just .02% of the payments.<sup>91</sup> As the study’s author commented, “officers are more likely to be struck by lightning than to contribute to a settlement or judgment over the course of their career.”<sup>92</sup>

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<sup>90</sup> H.B. 5, ¶ F, 54th Leg., 1st Spec. Sess. (N.M 2020).

<sup>91</sup> Schwartz, *supra* note 44, at 1805.

<sup>92</sup> *Id.* at 1806.

## Appendix VII: Statute of Limitations

The legislature asked the Commission to consider the statute of limitations for the New Mexico Civil Rights Act. The statute of limitations for civil rights violations pursuant to 42 U.S.C. § 1983 is three years because the federal courts look to the state statute of limitations for personal injury for civil rights lawsuits brought under Section 1983.<sup>93</sup> In New Mexico, the statute of limitations for personal injuries is three years.<sup>94</sup> To ensure that New Mexicans receive the same statute of limitations for violations of the New Mexico Constitution as they would for violations of the federal Constitution, the Majority recommends a statute of limitations of three years.

The Majority also recognizes that minors and incapacitated people are not always able to promptly bring claims to address violations of their constitutional rights because they often lack capacity to do so. Similarly, childhood victims of sexual abuse at the hands of a government employee are not always able to quickly report this abuse. Recognizing that children and those who are incapacitated are often the victims of constitutional violations, the Majority seeks to protect the most vulnerable by ensuring that children and those who are incapacitated have a year after the incapacity terminates to bring a lawsuit under the New Mexico Civil Rights Act. This is the same rule for minors and incapacitated people that applies in personal injury lawsuits in New Mexico.<sup>95</sup> For victims of childhood sexual abuse, the Majority recommends that they be permitted to bring a lawsuit either by their twenty-fourth birthday or within three years of the date that the person first disclosed the abuse to a licensed medical or mental health care provider in the context of receiving health care from the provider. This mirrors New Mexico law regarding the statute of limitations for childhood sex abuse.<sup>96</sup>

Finally, the New Mexico Civil Rights Act also recognizes that any pending action under the New Mexico Civil Rights Act should not abate due to the death of any party to the lawsuit.

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<sup>93</sup> *Owens v. Okure*, 488 U.S. 235, 249-250 (1989).

<sup>94</sup> NMSA 1978, § 37-1-8 (1976).

<sup>95</sup> NMSA 1978, § 37-1-10 (1975).

<sup>96</sup> NMSA 1978, § 37-1-30 (2017).

## Appendix VIII: Costs and Insurance

House Bill 5 also required the Commission to “review and assess the need for and costs of additional insurance policies for public employees and public bodies, or for persons acting on behalf of or under the authority of public bodies” if a New Mexico Civil Rights Act is adopted.<sup>97</sup> The Commission devoted substantial time to this issue, including inviting the New Mexico Counties, the Municipal League, the State Risk Management Division (“RMD”), and the New Mexico Public School Insurance Association (“NMPSIA”) to provide information and present over two Commission meetings. Maureen Sanders, who teaches insurance law at the University of New Mexico School of Law, and Katherine Wray, an attorney in Albuquerque, also gave presentations. The Majority was not surprised that local governments, particularly the counties and some municipalities, are adamantly opposed to a New Mexico Civil Rights Act based primarily on fiscal concerns. The Majority appreciates those concerns but does not believe they undermine the compelling justification for enacting a robust New Mexico Civil Rights Act.

First, the cost of protecting the rights of New Mexicans involves values questions fundamentally different from other budget issues the Legislature faces. Absent a statutory remedy for state constitutional violations, the Legislature is forcing the citizen who was harmed by government misconduct to pay for the violation they suffered. That is where things stand today. The Legislature must consider whether it wants to continue saving money by forcing those harmed by government misconduct to bear the cost for the state or responsible local government.

Second, the actual costs of a New Mexico Civil Rights Act are difficult to quantify. Everyone who presented to the Commission agreed on that fact. The Commission sought substantial data from state and local governments related to this question, but the responses did not allow for any clear conclusion. There are, however, reasons to doubt that adopting the Majority’s proposals will cause the significant costs that some have claimed:

- By not including punitive damages in the New Mexico Civil Rights Act, the Legislature avoids the risk of wildly divergent verdicts (a risk the state and local governments will continue to bear in federal court cases under Section 1983). This will also ameliorate concerns raised about the cost and availability of insurance.
- While some presenters argued that not recognizing qualified immunity will significantly increase the fiscal impact of the New Mexico Civil Rights Act, that is not supported by the data the Commission received from either critics or proponents of qualified immunity. While disagreeing on the merits of the defense, everyone who presented to the Commission instead agreed that qualified immunity is disposing of a small percentage of civil rights cases. According to a study of all civil rights cases in federal court in New Mexico from 2015-2020, qualified immunity motions were only filed in 16% of the cases. (See chart on page 26). Of those that were filed, the motions were granted 54% of the time.<sup>98</sup> This means that qualified immunity motions were

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<sup>97</sup> H.B. 5, ¶ H, 54th Leg., 1st Spec. Sess. (N.M 2020).

<sup>98</sup> See also Wray, *supra* note 48.

granted in only 9% of civil rights cases in federal court.<sup>99</sup> (See chart on page 26). Even in those cases, qualified immunity did not always fully dispose of the case. Instead, it often resulted in the court dismissing one of many claims or one of many defendants from the case.<sup>100</sup> Of the cases in which qualified immunity was granted, only 85 out of 1,691 were fully disposed of by the qualified immunity motion from 2015-2020. (See chart on page 26). That is approximately 7 cases per year. This handful of cases in which the qualified immunity defense would no longer be available will not dramatically increase costs to the public entities. The impact on those denied relief for reasons unrelated to the merits of their case, however, is devastating.

- New Mexico already awards attorney fees to parties who prevail under a long list of statutes, and fees are available to plaintiffs who prove under Section 1983 that their federal constitutional rights were violated. Against that backdrop, the Majority has seen nothing that indicates including an attorney fees provision in the New Mexico Civil Rights Act will materially alter the litigation costs state and local governments already bear.
- Unlike most costs, the exposure governments face for constitutional violations is within their control. The New Mexico Civil Rights Act would act as an incentive for government entities to impose the training, oversight, and accountability policies that are necessary to prevent government misconduct. By implementing aggressive loss prevention programs, the state and local governments can avoid constitutional violations in the first place. These loss prevention programs also reduce the costs of insurance. The Majority rejects persistent efforts to frame this as an either/or issue: either compensate the victims of constitutional violations or prevent constitutional violations through training and oversight. The New Mexico Civil Rights Act will allow those whose rights have been violated to obtain justice and will hold those who cause the violations accountable. The victims of government misconduct should not be denied relief in the name of subsidizing reform efforts by the same government entity responsible for the violation. Instead, the realization that allowing misconduct to continue will come at a cost should incentivize government entities to take the steps necessary for their employees to stay within the boundaries the state Constitution imposes.
- Relatedly, civil rights statutes like the New Mexico Civil Rights Act promote the accountability and the same policies that the governmental entities insist that they want to adopt. For example, Stephen Slevin was held for two years in solitary confinement at the Dona Aña County Detention Center in violation of his constitutional rights.<sup>101</sup> A federal jury awarded \$22 million for the harm he suffered as a result of government misconduct. That led the N.M. Counties to institute an accreditation program for county

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<sup>99</sup> NM Counties presented information that qualified immunity was granted 57% of the times it was raised equaling 16% of the total cases, but this data was for only one year—2015—whereas Wray’s study presented data for the past 6 year—2015-2020.

<sup>100</sup> See Wray, *supra* note 48.

<sup>101</sup> See Rene Romo, ‘Treated Like an Animal,’ ALBUQUERQUE J. (Jan. 26, 2012, 12:05 AM), <https://www.abqjournal.com/83498/treated-like-an-animal.html>.

jails throughout the state to prevent constitutional violations.<sup>102</sup> Compensating victims and instituting reform go hand-in-hand.

- The cost concerns the Majority has heard do not account for the fact that the New Mexico Civil Rights Act fills a narrow gap in the laws under which the state and local governments already can be sued. The Legislature is not being asked to open up a new universe of litigation. Instead, the New Mexico Civil Rights Act gives similar meaning to state constitutional rights that Congress gave to federal rights in 1871. As things stand today, a person deprived of their federal constitutional rights can seek compensation for the injuries they suffer with no cap on damages, attorney's fees if they prevail, and punitive damages. A limited subset of state constitutional claims are actionable under the New Mexico Tort Claims Act, but only against law enforcement for certain types of injuries. Adding a remedy for misconduct that violates the New Mexico Constitution makes meaningful the fundamental rights that document protects without fundamentally changing the litigation landscape.
- New Mexico has other statutes like the proposed New Mexico Civil Rights Act that the Legislature adopted to protect its citizens. Many have no cap on damages and allow a prevailing party to recover their attorney's fees from government entities. The includes the New Mexico Human Rights Act, the New Mexico Whistleblower Protection Act, the New Mexico Fair Pay for Women Act, and the New Mexico Minimum Wage Act. The Majority would be surprised if claims about cost and increased insurance premiums were not relied on to argue that the Legislature should not enact those statutes as well. But each statute remains in place and none has devastated government budgets. Everyone affected by these laws has instead adjusted their practices and policies to comply, defended claims when necessary, and compensated those who establish the right to recover.

Recognizing that victims of government misconduct that violates the New Mexico Constitution also should be able to recover through the New Mexico Civil Rights Act is not the seismic shift some have portrayed and will continue to portray. Moreover, the cost concern here is not a new phenomenon—the Legislature confronts similar questions every time it enacts a statute that allows for litigation. The Legislature has addressed that in the past by going forward thoughtfully, observing how a statute operates, and readjusting when the facts show it is necessary. This situation is no different. If problems arise, or if the various arguments about aspects of the Majority's proposal prove true, the Legislature can amend the New Mexico Civil Rights Act to address that issue.

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<sup>102</sup> However, only 9 of the 29 counties who are members of N.M. Counties are accredited. See Elizabeth Flock & Mark Scialla, *Cruel and Usual: Taos County Jail Accused of Abuse and Dysfunction*, N.M. POL. REP. (Oct. 17, 2020), <https://nmpoliticalreport.com/2020/10/17/cruel-and-usual-taos-county-jail-accused-of-abuse-and-dysfunction/>.



### *Options to Address Any Increased Costs.*

While the insuring entities have stated that a New Mexico Civil Rights Act would have a negative impact on their ability to obtain reinsurance in the small percentage of cases that exceed the amounts for which they are self-insured, they were unable to quantify this or provide any data to support this.<sup>103</sup> Insurers decide whether to insure and how much to charge based on data concerning the claims paid. If, however, there are any increased costs or issues obtaining insurance, the Majority includes here a range of options the Legislature might consider as options to improve how the state and local governments manage risk generally, and to minimize fiscal concerns related to the New Mexico Civil Rights Act in particular:

- Set up a monitoring mechanism for studying the fiscal impact and effectiveness of loss prevention measures related to the New Mexico Civil Rights Act over a period of time, such as three years. Such a lookback would ensure the Legislature determines whether to change the Act based on actual data.
- Establish a pool to reinsure all public entities, further spreading the risk. The reinsurance pool can then either self-insure or purchase reinsurance on the commercial market. Any such reinsurance pool should require strict underwriting guidelines that require loss prevention programs such as training, accreditation requirements, and oversight to reduce the risks of government misconduct.
- Require individual insurance policies for law enforcement officers provided through their government employer. This would track the insurance that doctors, attorneys, and other professionals must obtain. The fact that an officer became uninsurable based on a history of misconduct reasonably would justify their removal.
- Develop a database that would make public information regarding law enforcement officers and other categories of employees whose actions result in criminal charges or civil judgments against them. Such a database exists for doctors and has the benefit of allowing future employers to accurately check the histories of potential employees.
- If costs increase for the counties or municipalities, the state could provide funds for any such increase.

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<sup>103</sup> For cases involving state agencies and employees, the state's Risk Management Division provides compensation. RMD is fully self-insured and has no insurance policies. They maintain a large reserve and charge premiums to each department based on past experience and projected exposure. Departments also pay deductibles. New Mexico Counties provides insurance to 29 of the 33 counties in the state. They are self-insured for up to \$2 million per occurrence, and they purchase reinsurance for any claims over \$2 million. This reinsurance pays for an additional \$3 million per occurrence with a \$10 million yearly aggregate for each member, and up to \$15 million in the aggregate for all members each year. For law enforcement officers, this insurance coverage is provided at \$657 per year per officer. N.M. Counties determines the amount of the premiums charged to each county based on actuarial studies, and each county has a deductible that it pays for each claim. The New Mexico Municipal League provides insurance coverage to most cities and towns in New Mexico, excepting some of the larger cities such as Albuquerque, Las Cruces and Santa Fe. It is self-insured for claims up to \$500,000, has reinsurance for an additional \$500,000 per occurrence, and has an aggregate limit of \$2 million. NMPSIA provides civil rights coverage to public school systems through a combination of both self-insurance and reinsurance and charges premiums to its members.

- To the extent the legislature believes there may be sufficiently increased costs to raise concerns about enacting the statute, it could consider an appropriate cap on damages.

## Appendix IX: Improve the Law Enforcement Academy

The Commission heard from the director of the Law Enforcement Academy (“LEA”), Kelly Alzaharna, when she presented at a meeting addressing police officer discipline and training in New Mexico. She responded to a series of questions on these topics posed by the Commission in a letter before her presentation. Her presentation revealed a number of problems regarding the disciplinary process and training for police officers throughout the state. These problems have also been the subject of recent media scrutiny.<sup>104</sup> Some of the problems include a backlog of police misconduct investigations allowing police officers who have engaged in misconduct to remain employed.

While the Commission was not asked by the legislature to make recommendations regarding law enforcement, we believe that reforms to the LEA would have a significant benefit in addressing some police misconduct and civil rights violations. The Commission recommends the following:

### 1. The LEA should be restructured.

- The LEA should be a cabinet department in the executive branch or adjunct agency that is separate and distinct from the Department of Public Safety (“DPS”). LEA is currently administratively attached to DPS. Because DPS is also a law enforcement agency and currently funds and houses the LEA, there is an appearance of a conflict of interest. The proposed structure provides more transparency and independence.
- Governing authority over the LEA should be vested in the LEA Board and administrative authority should be vested in the Director.
- The Commission recommends the LEA Board be required by law or regulation to meet a minimum of at least six as opposed to four times a year. This will allow the agency to address matters more frequently and efficiently, and to avoid future backlogs.
- The Commission further recommends that the composition of the LEA Board be changed to accommodate an additional four board members to consist of: (1) a board-certified psychologist, (2) a certified telecommunications officer (dispatcher), (3) a county chief executive officer, and (4) a municipal chief executive officer.

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<sup>104</sup> See, e.g., Nathan O’Neal, *List Reveals ‘Alarming’ Picture of Police Misconduct in New Mexico*, KOB4.COM (Nov. 2, 2020, 10:29 AM), <https://www.kob.com/albuquerque-news/4-investigates-list-reveals-lsquoalarmingrsquo-picture-of-police-misconduct-in-new-mexico/5912987/?cat=504>; Nathan O’Neal, *Facing Backlog of Police Misconduct Cases, AG Calls State Agency’s Process ‘Absolute Train Wreck’*, KOB4.COM (September 14, 2020, 1:14 PM), <https://www.kob.com/albuquerque-news/facing-backlog-of-police-misconduct-cases-ag-calls-state-agencysrsquo-process-lsquototal-train-wreckrsquo/5861211/>.

- The LEA should also have its own investigators and prosecutors and a sufficient number of hearing officers to effectively deal with the current backlog of misconduct cases and to efficiently process new cases.
- The Commission further recommends that LEA have a deputy director level position tasked with training compliance to verify that all law enforcement and dispatcher curriculum is up to date, meets uniform standards, is being taught by all satellite academies, and that all policing agencies have an approved field officer training program and all officers, including new hires, are in compliance with all certification and continuing education requirements.

**2. The New Mexico Administrative Code should be changed to provide LEA with clear enforcement authority.**

- As it stands, LEA does not have the authority to enforce its regulations, procedures or directives. The LEA must have broad authority to investigate, obtain information, and enforce reporting compliance with its regulations, procedures, and directives. The Commission recommends that LEA be granted the following powers: (1) the power to subpoena documents and witnesses; (2) the authority to levy civil penalties against individuals or agencies; (3) the ability to suspend or revoke agency and individual officer certifications for failing to report misconduct, comply with LEA procedures or regulations, and training directives; and (4) the ability to initiate an investigation or complaint for misconduct without a referral from a law enforcement head or agency.
- 10.29.1.11 NMAC should be revised to define what constitutes "moral turpitude, or lack of good moral character." It currently appears that agency heads and the LEA apply subjective standards to determine what conduct falls under this regulation, which has led to underreporting of misconduct.
- The timelines under 10.29.1.13 NMAC should be shortened that so that the referral process is more efficient for LEA, law enforcement agencies, and individual officers. This will allow officers that should be removed to be removed more quickly, and will allow officers who have not committed an infraction to get back to work more quickly.

**3. The LEA should be required to maintain a database that tracks police misconduct.**

- This information system should include specific instances of excessive force, lying, and other behavior or information that helps law enforcement agencies with employment decisions and prosecuting agencies with constitutional discovery and disclosure requirements.

**4. The LEA should be fully funded in an amount sufficient to modernize its operations, fill and maintain all necessary staff positions, and implement the changes recommended by the Commission.**

## Appendix X: Public Comment Summary

	A	B	C	D	E	F	G	H	I	J	K	L	M	N	O
	Name	Location	Job	Voted Yes on Question 1	Voted No on Question 1	Unclear or Other Question 1	Voted Yes on Question 2	Voted No on Question 2	Unclear or Other Question 2	Voted Yes on Question 3	Voted No on Question 3	Unclear or Other Question 3	Voted Yes on Question 4	Voted No on Question 4	Unclear or Other Question 4
1	Greg Whited	Las Cruces	Law enforcement	X			X					X			X
2	Jackson Brown	Las Cruces	?		X					X					
3	Phil Davis	Albuquerque	Attorney	X			X			X					
4	Terry Storch	Albuquerque	?	X						X					
5	Karen Aubrey	Santa Fe	?	X			X			X					
6	Brian Yardman-Frank	Albuquerque	Law Student	X			X			X					
7	Elijah Maestas	Tijeras	?	X			X			X					
8	Sage Harrington	Albuquerque	?		X					X					
9	Daniel McLaughlin	Albuquerque	?		X					X					
10	Dian Sewell McCash	Albuquerque	?	X			X			X					
11	Nicholas Davis	Albuquerque	Attorney	X			X			X					
12	Sandra Penn	Albuquerque	Doctor	X			X			X					
13	Craig Martin	Las Vegas	Law Enforcement	X			X			X					
14	Maria Martinez Sanchez	Albuquerque	Attorney	X			X			X					
15	Randall Wilkoff	Nogal	Law Enforcement	X			X			X					
16	Charles Evans	Lincoln County	Law Enforcement	X			X			X					
17	Steve Allen	Albuquerque	Attorney	X			X			X					
18	Jesse Finley	Ruidoso	Law enforcement		X					X					
19	Sean Terry	?	Law enforcement		X					X					
20	Arnel Leonard	Albuquerque	Attorney	X			X			X					
21	Charles Goodmacher	Rio Rancho	?	X			X			X					
22	Allen Davis	Carlsbad	County Manager	X			X			X					
23	Amber Hamilton	Portales	?		X										
24	Mary Lou Kern	Raton	County Manager		X										
25	Stephen Despin	Albuquerque	?	X			X			X					
26	Matt Coyte	Albuquerque	Attorney	X			X			X					
27	Andrea Harris	Albuquerque	?	X			X			X					
28	Sean Fitzpatrick	Albuquerque	?	X			X			X					
29	Joshua Bradley	Albuquerque		X			X			X					
30	Feliz Rael	Albuquerque	Attorney	X			X			X					
31	Mollie McGraw	Las Cruces	Attorney	X			X			X					
32	Jamison Shakter	Albuquerque	Attorney	X			X			X					
33	Mike Gallegos	Albuquerque	Attorney	X			X			X					
34	Sean McAfee	Albuquerque	?	X			X			X					
35	Ashley Davis	Albuquerque	Healthcare	X			X			X					
36	Kathy Love	Albuquerque	Attorney	X			X			X					
37	Brian Branch	Albuquerque	Attorney			X									
38	Matthew Zamora	Las Cruces	Attorney	X			X			X					
39	Richard Strickland	Albuquerque	Attorney	X			X			X					
40	Richard Feterman	Albuquerque	Attorney	X			X			X					
41	Frances Carpenter	Albuquerque	Attorney	X			X			X					
42	Susan Vvooli	Albuquerque	Legal Assistant	X			X			X					
43	Micahel Doyle	Los Lunas	Attorney	X			X			X					
44	Larel Crespin	Las Cruces	?	X			X			X					
45	Rich Valle	Albuquerque	Attorney	X			X			X					
46	Michael Schwarz	Santa Fe	Attorney			X									
47	Jeffrey Macdonald	Albuquerque	?	X			X			X					

	A	B	C	D	E	F	G	H	I	J	K	L	M	N	O
1	Name	Location	Job	Voted Yes on Question 1	Voted No on Question 1	Unclear or Other Question 1	Voted Yes on Question 2	Voted No on Question 2	Unclear or Other Question 2	Voted Yes on Question 3	Voted No on Question 3	Unclear or Other Question 3	Voted Yes on Question 4	Voted No on Question 4	Unclear or Other Question 4
49	Elizabeth Maher	Albuquerque	?	X			X			X	X		X		X
50	David Kramer	Albuquerque	Attorney	X			X			X	X		X		
51	Caren Friedman	Santa Fe	?	X			X			X	X		X		
52	Randi McGinn	Albuquerque	Attorney	X			X			X	X		X		
53	Corbin Hildebrandt	Albuquerque	Attorney	X			X			X	X		X		
54	Roberta Colton	Santa Fe	?	X			X			X	X		X		
55	Michael Stout	Las Cruces	Attorney	X			X			X	X		X		
56	Ryan Villa	Albuquerque	Attorney	X			X			X	X		X		
57	Jennifer Burrill	Santa Fe	Attorney	X			X			X	X		X		
58	Barbara Bloomberg	Santa Fe	?	X			X			X	X		X		
59	Kelly Sanchez	Albuquerque	Attorney	X			X			X	X		X		
60	Heather Burke	Santa Fe	Attorney	X			X			X	X		X		
61	Michael Stewers	Albuquerque	Attorney	X			X			X	X		X		
62	Carolyn Nichols	Albuquerque	Attorney	X			X			X	X		X		
63	Lauren Barera	Belen	Attorney	X			X			X	X		X		
64	Kristina Martinez	Santa Fe	Attorney	X			X			X	X		X		
65	Troy Weisler	Albuquerque	?	X			X			X	X		X		
66	Jess Lilley	Las Cruces	Attorney	X			X			X	X		X		
67	Felice Garcia	Albuquerque	?	X			X			X	X		X		
68	David Pato	Socorro	Attorney	X			X			X	X		X		
69	Matt Broom	Albuquerque	?	X			X			X	X		X		
70	Bruce Swingle	Truth or Consequenc	?	X			X			X	X		X		
71	James Paxton	Truth or Consequenc	Sierra County Commissioner		X		X			X	X		X		
72	Rachel Higgins	Albuquerque	Attorney	X			X			X	X		X		
73	Katherine Miller	Santa Fe	County Manager	X			X			X	X		X		
74	Gregory Shaffer	Santa Fe	Attorney	X			X			X	X		X		
75	Laura Schauer Ives	Albuquerque	Attorney	X			X			X	X		X		
76	Ryan Nelson	Albuquerque	Law Enforcement	X			X			X	X		X		
77	Kate Loewe	Albuquerque	Attorney	X			X			X	X		X		
78	Kelly Waterfall	Los Lunas	Attorney	X			X			X	X		X		
79	Wayne Johnson	Sandoval County	County Manager	X			X			X	X		X		
80	Mark Mattaini	Paguate		X			X			X	X		X		
81	Will Glaspy	Las Cruces	Retired DEA	X			X			X	X		X		
82	Alan Wagman	Albuquerque		X			X			X	X		X		
83	Martha Salas	Bernardo		X			X			X	X		X		
84	Monica Gilboa	Santa Fe		X			X			X	X		X		
85	Rachel Loya-Hobbs	Farmington		X			X			X	X		X		
86	Ariana Torres	Santa Fe			X		X			X	X		X		
87	Brianna Roper-Willis	Rio Rancho		X			X			X	X		X		
88	Mallory Gagan	Albuquerque	Attorney	X			X			X	X		X		
89	Katherine Candela	Roswell		X			X			X	X		X		
90	Patricia Hudson	Santa Fe		X			X			X	X		X		
91	Jeffery Bernard	Albuquerque		X			X			X	X		X		
92	Bev Heidin	Santa Fe		X			X			X	X		X		
93	Bernadette Bisbing	Philadelphia		X			X			X	X		X		
94	Casey Malone	Farmington	Law Enforcement	X			X			X	X		X		

	A	B	C	D	E	F	G	H	I	J	K	L	M	N	O
	Name	Location	Job	Voted Yes on Question 1	Voted No on Question 1	Unclear or Other Question 1	Voted Yes on Question 2	Voted No on Question 2	Unclear or Other Question 2	Voted Yes on Question 3	Voted No on Question 3	Unclear or Other Question 3	Voted Yes on Question 4	Voted No on Question 4	Unclear or Other Question 4
95	Frances Sherwood	Santa Fe	Attorney	X			X			X			X		
96	Eric Jantz	Kirtland													
97	Jasper Dominici	Farmington													
98	Nicole	Farmington	Sheriff												
99	Denise Vigil	Los Lunas		X			X			X					X
100	Randy Velarde	Bloomfield			X		X			X					
101	Andrew Rodriguez	Rio Rancho	Law Enforcement			X			X						
102	Rodney Paris	Logan	Law Enforcement			X			X						
103	Stewart Steele	Rio Rancho			X		X		X						
104	Geoff Davis	Farmington					X		X						
105	Rachel Feldman	Santa Fe	Activist	X			X		X						X
106	Ben Sanchez	Rio Rancho	Law Enforcement		X		X		X						
107	No Name	Albuquerque				X			X						
108	Eric	Albuquerque			X		X		X						
109	Becky Wallace	Quay County							X						
110	Brittany DuChaussee	Albuquerque							X						
111	Lorraine Mendiolola	Santa Fe		X			X		X						X
112	Taft Tracy	Farmington	Law Enforcement		X		X		X						
113	Robert Warrick	Albuquerque			X		X		X						X
114	No Name	Dona Ana County							X						
115	Zoila Alvarez Hernandez	Albuquerque		X			X		X						X
116	"c_star"				X				X						
117	Stephanie Maenz	Albuquerque								X					
118	Jana Theis	Santa Fe		X			X		X						
119	Ashleigh Steele	Albuquerque		X			X		X						
120	Travis Spruell	Farmington			X		X		X						X
121	Odian Powell	Las Cruces		X					X						
122	Leon Howard	Albuquerque	ALCU- civil rights law	X			X		X						X
123	Ben Jemmett	Farmington	Law Enforcement			X			X						
124	Mountaintair Police Dep	Mountain	Law Enforcement			X			X						
125	Gunhild Vetter	Bosque Farms			X		X		X						
126	Marshall Martinez	Albuquerque	Civil Rights Org.	X					X						X
127	Joseph Polisar	Albuquerque	Law Enforcement						X						
128	Thomas Jameson	Albuquerque	Attorney	X					X						
129	Fowler Johnston	Florida	Law Enforcement						X						
130	Kevin Fredekin	Rio Rancho			X		X		X						
131	John Mark Gaines	Farmington			X		X		X						X
132	Rachel Donovan	Albuquerque	Mediator		X		X		X						X
133	Marisa Martinez	Albuquerque			X		X		X						
134	Chris Halloran	Albuquerque	Law Enforcement		X		X		X						
135	Ciff Saylor	Albuquerque	Law Enforcement		X		X		X						
136	Dan Klein	Albuquerque	Business Owner		X		X		X						X
137	Peter Simonson	Albuquerque	ACLU Exec Director	X			X		X						
138	Tobias Gallegos	Albuquerque	Law Enforcement		X		X		X						
139	Kenneth Stalter	Albuquerque	Attorney	X			X		X						
140	Mckenzie St. Denis	Bernalillo		X			X		X						X
141	Theresa Haeasi	Albuquerque	Attorney	X			X		X						

	A	B	C	D	E	F	G	H	I	J	K	L	M	N	O
				Voted Yes on Question 1	Voted No on Question 1	Unclear or Other on Question 1	Voted Yes on Question 2	Voted No on Question 2	Unclear or Other on Question 2	Voted Yes on Question 3	Voted No on Question 3	Unclear or Other on Question 3	Voted Yes on Question 4	Voted No on Question 4	Unclear or Other on Question 4
1	Name	Location	Job	1	1	1	2	2	2	3	3	3	4	4	4
142	Jason Bowles	Albuquerque	Attorney	x											
143	David Ferrance	Albuquerque		x									x		
144	David Humphreys	Santa Fe		x										x	
145	William Angellely	Santa Fe	Attorney	x											
146	Lori Bencoe	Albuquerque	Attorney	x											x
147	Levi Moragie	Albuquerque		x											
148	Ray Vargas	Albuquerque	Attorney	x											
149	Stewen Farber	Santa Fe	Attorney	x											
150	Greg Garvey	Las Cruces		x											
151	Catherine Rlyard	Santa Fe	Attorney	x											x
152	Anonymous			x											
153	Rachel Berenson	Albuquerque	Attorney	x											
154	Lynn Barnhill	Santa Fe	Attorney	x											
155	Rob Treinen	Albuquerque	Attorney	x											
156	Dan Shapiro	Albuquerque	Attorney	x											
157	Frank Davis	Albuquerque	Attorney	x											
158	Amber Fayerberg	Santa Fe	Attorney	x											
159	Ava Roybal	Albuquerque		x						x					
160	Maxwell Pines	Albuquerque	Attorney	x											
161	Sam	Albuquerque		x											
162	Sarah Wintermute	Albuquerque		x											
163	Justin Kaufman	Santa Fe		x											
164	Timothy Butler	Santa Fe		x						x					
165	Karlos Ulibarri	Albuquerque		x											x
166	Karen Aubrey	Santa Fe		x											
167	Maria Garcia Greer	Albuquerque	Attorney	x											
168	Tim White	Albuquerque	Attorney	x											
169	Joseph Goldberg	Albuquerque	Attorney	x											
170	Kate Ferlic	Santa Fe		x											
171	Christopher Templema	Albuquerque	Attorney	x											
172	Richard Rosenstock	Santa Fe		x											
173	Gary Mitchell	Ruidoso	Attorney	x											
174	Victor Titus	Farmingtion	Attorney	x											
175	Marc Lowry	Albuquerque	Attorney	x											
176	Nicole Moss	Albuquerque	Attorney	x											
177	Chris Lucero	Albuquerque	Attorney	x											
178	George Weeth	Albuquerque	Attorney	x											
179	Rebekah Wright	Albuquerque	Attorney	x											
180	Stephen Barnes	Houston	Attorney	x											
181	Scott Voorhees	Santa Fe	Attorney	x											
182	Iyer Atkins	Albuquerque	Attorney	x											
183	Molly Kicklighter	Ruidoso	Attorney	x											
184				Voted Yes on Question 1	Voted No on Question 1	Unclear or Other on Question 1	Voted Yes on Question 2	Voted No on Question 2	Unclear or Other on Question 2	Voted Yes on Question 3	Voted No on Question 3	Unclear or Other on Question 3	Voted Yes on Question 4	Voted No on Question 4	Unclear or Other on Question 4
185				124	42	14	122	42	15	51	116	16	100	25	47



## Appendix XI: Minority Report

New Mexico Civil Rights Commission (Commission) members Senator Steve Neville, Sheriff Kim Stewart, former Chief of Police Victor Rodriguez, and District Attorney Gerald Byers dissent from the recommendations made by the Commission majority because creation of a new state law is unnecessary and will mostly serve to enrich lawyers while not benefiting victims.

### SUMMARY

This Commission was purportedly created to address law enforcement misconduct and accountability in the wake of a national outcry regarding excessive force incidents. However, the majority's proposed bill does nothing to increase law enforcement accountability or redress for law enforcement conduct; instead, with regard to law enforcement claims, it simply serves to benefit lawyers and make it easier for them to collect more fees. The majority's proposal ignores the balance that must be struck between an individual's need to recover and the taxpayers' ability to pay unlimited damages. It will likely make it harder to recruit, retain, and train good government employees and law enforcement officers. The information presented to the Commission was mostly one-sided and often inaccurate. For example, interested parties misrepresented that there is not currently a damages remedy for any New Mexico Constitutional violation, ignoring the express waiver of sovereign immunity for State constitutional violations by law enforcement that has existed for years and was recently expanded by the Legislature. Commission staff repeated this misinformation on the Commission's public questionnaire. The process was rushed and lacked a meaningful opportunity to hear from opposing views. Finally, the majority's recommendation will dramatically expand public liability in almost every other area of government conduct.

The new civil rights cause of action recommended by the majority:

- is unnecessary to remedy New Mexico statutory and constitutional violations by law enforcement, given the broad and recently expanded waiver in the New Mexico Tort Claims Act (NMTCA);
- will apply to all public officials and employees, including school teachers, social workers, city councilors, county commissioners, etc.; straying far afield from the public reckoning over police brutality that prompted creation of this Commission. The only apparent exceptions to the new cause of action are judges and prosecutors, despite the obvious role that they can play in perpetrating institutional racism and even though the same expert relied upon by the majority to abolish qualified immunity also recommends eliminating absolute immunity<sup>1</sup>;
- will not increase individual law enforcement officer accountability, since taxpayers rather than officers will foot the bill;
- will further dry up the insurance market, reducing the amount of money readily available to pay claims, requiring local governments to self-insure unsustainable amounts of risk, and creating the near certainty that property taxes will need to be imposed to meet uninsured judgments;

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<sup>1</sup> *Hold Prosecutors Accountable, Too* www.bostonreview.net June 22, 2020 Kate Levine, Joanna Schwartz.

- will not address the root cause of many claims against local governments: namely, inadequate State resources to treat substance abuse and mental health disorders in non-penal settings;
- will be ineffective at driving reform or improving services, since it will divert resources away from law enforcement and detention officer recruitment, retention, and training and other critical services to claims and attorneys' fees; and
- will increase the number and cost of claims, creating the real risk of material, adverse, unintended consequences, including:
  - closure of small, rural police departments, thereby making the public, as a whole, less secure; and
  - privatization of some or all county jail operations, reversing positive trends in recent years away from privatization and reducing the quality of care.

Procedurally, we are concerned that the process was calculated (or at least appears to have been calculated) to lead to a predetermined result, based upon the following:

- the Commission did not include diverse legal viewpoints - most of the civil attorneys appointed to the Commission are or were lawyers who represent plaintiffs;
- the attorney hired by the Commission to conduct research and draft its recommendations specializes in advocating for plaintiffs in civil rights, police misconduct, prisoner rights, and personal injury cases;
- presenters invited to speak on the merits of qualified immunity overwhelmingly favored creation of the new cause of action;
- the Commission did not meet often or long enough to thoroughly evaluate the questions posed to it or alternatives to the recommended cause of action; and
- the Commission voted before expiration of its deadline for public comment.

As a result, the majority's recommendations appear to be preordained and driven by the plaintiffs' bar, without allowing for due consideration of different viewpoints and alternatives.

## DISCUSSION

### A New Cause of Action Duplicates Existing Remedies and Serves Only to Increase Profits to Lawyers

The NMTCA strikes a balance between the “inherently unfair and inequitable results which occur in the strict application of the doctrine of sovereign immunity” and the specter of governmental bankruptcy that could result from uncapped liability. NMSA 1978, § 41-4-2(A).

Just this year, the New Mexico legislature twice amended the NMTCA to both expand the scope of the law enforcement waiver and the definition of “law enforcement officer” so that it applies to more public officials and employees. Under Section 41-4-12 NMSA 1978 (2020), anyone can sue any public employee “with the power to maintain order” for “deprivation of any rights, privileges or immunities secured by the constitution and laws of the United States or New Mexico”. Such claims are not subject to any qualified or sovereign immunity and serve to vindicate any infringement of constitutional rights in New Mexico by law enforcement. The

Commission was not advised of this fact until our fourth meeting, and the majority through its recommendation dismissed it as inadequate even though it addresses the perceived need for the new cause of action.

The attorney majority also dismissed the significance of mandamus actions, declaratory judgments, and injunctive relief, even though such cases are not limited by the Act's waivers and have achieved significant public policy changes in this State. Notable examples include cases abolishing the prohibition on same-sex marriage (*Griego v. Oliver*, 2014 -NMSC-003, 316 P.3d 865) and finding the State is violating the Education Clause, Article XII, Section 1, of the New Mexico Constitution (*Martinez v. State*, State of New Mexico, First Judicial District Court, No. D-101-CV-2014-00793).

The majority recommendations concede that New Mexico law currently provides for claims against law enforcement for money damages in State court. The majority's suggestion that a new cause of action is necessary to vindicate State constitutional rights not recognized by the US Constitution is unpersuasive. Although the attorneys in the majority regularly announced that a multitude of rights exist in our State constitution without a money damages remedy, they failed to provide a single concrete example. The overwhelming number of examples presented to the commission involved law enforcement officers accused of deprivation of rights, for which a remedy already exists under the NMTCA.

#### It is Against the Public Interest to Include Uncapped Damages and an Attorneys' Fee Provision in any New Waiver of Immunity

The only changes to the existing remedies against law enforcement recommended by the majority are (i) that attorneys who bring claims, even claims with minimal damages, would be entitled to have their entire fee paid by the taxpayers and (ii) to not cap compensatory damages. Adding attorneys' fees to the damages collected only serves to drive up the number of claims filed and the cost for taxpayers. With the provision of attorneys' fees, even trifling claims become appealing. The majority has either forgotten or disregarded the balance the Legislature struck between plaintiff recovery and government solvency. By simultaneously calling for indemnification of bad actors and higher remedies, the majority has proposed a path that is financially unsustainable for our poor State.

Although one presenter suggested that "no one is getting rich bringing civil rights cases", inadequately compensated attorneys is not a societal ill facing New Mexico. The data presented showed that state and local governments spent tens of millions of taxpayer dollars on attorneys' fees related to civil rights cases.<sup>2</sup> Additional financial incentive to sue government is not needed.

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<sup>2</sup> During a 5-year period, the New Mexico County Insurance Authority, New Mexico Municipal League, State Risk Management, and the NM Public School Insurance Authority paid approximately \$93 million dollars in attorneys' fees for civil rights cases. This figure does not include attorneys' fees paid by cities not in the New Mexico Municipal League pool (including Albuquerque, Las Cruces, Santa Fe, and Farmington) or counties not in the New Mexico County Insurance Authority pool. It also does not include attorneys' fees paid for other types of cases brought against government under the NMTCA.

No evidence was presented establishing a shortage of plaintiffs' attorneys willing to accept cases brought under the NMTCA, which does not provide for recovery of attorneys' fees.

The lack of a cap is equally troubling. The legislature has long recognized that caps on recovery play an important role in balancing the interests of individuals who have claims against the government with the need of government to continue to function and provide services for all. Although the attorney majority describes the NMTCA caps as outdated, the information provided actually shows that the New Mexico caps are in fact more generous than the great majority of other states. Initially, a dissenting commissioner and later a presenter suggested that the Commission might recommend expanding the waivers and increasing the NMTCA cap, but the majority never engaged in a meaningful discussion of this proposal and instead stuck to the "my way or the highway" mentality.

Limiting recovery to compensatory damages is appropriate but not sufficient. The reality is that pain and suffering, emotional distress, and similar components of compensatory damages are impossible to quantify, and juries are given no standards to guide their decisions. *E.g.*, NMRA 13-1807 (uniform jury instruction on pain and suffering damages) ("No fixed standard exists for deciding the amount of these damages. You must use your judgment to decide a reasonable amount to compensate the plaintiff for the pain and suffering."). Consequently, the majority position that plaintiffs will only recover the damages they prove ignores the inherent vagaries in the process and the reality that juries can – and do – award large sums of compensatory damages based upon nothing more than their unguided judgment and desire to punish government. Accordingly, it is critical that any new cause of action include a reasonable cap on damages, including attorneys' fees if they are authorized, in line with the NMCTA, so as to protect limited public resources and public services from wildcard jury verdicts.

#### Indemnification Does Not Increase Accountability or Improve Performance; Other Alternatives Are Necessary

We agreed that indemnification of government employees is appropriate, especially since the majority voted to eliminate qualified immunity as a defense, as we did not want good individual actors to be subjected to personal liability. If the Legislature declined to provide indemnification and removes the defense of good faith, it will be even harder to recruit qualified individuals to pursue public service careers, which often pay less than private sector opportunities. In addition, without indemnification, plaintiffs are less likely to be compensated for proven wrongs.

We comment on indemnification because it demonstrates the shortcomings in the Commission's work. The public outcry over police brutality that led to the Commission's creation was, among other things, about (i) holding cops accountable for their misdeeds and (ii) improving law enforcement performance. The Commission's recommendations accomplish neither paramount objective.

There is no evidence that a fully indemnified cause of action affects the behavior of individual law enforcement officers or that increased exposure for the public body will drive meaningful reform. To the contrary, the evidence we heard and comments submitted suggested that systemic, meaningful change in law enforcement operations requires better pay to attract the best

quality candidates, more training to ensure those quality candidates are up to date on best practices, and more oversight and individual accountability when officers commit misconduct. This last point includes the ability to more quickly remove law enforcement officers who violate people's rights, through discipline or revocation of their certification by the New Mexico Law Enforcement Academy.

As explained in detail elsewhere, the Commission failed to adequately explore alternatives to hold bad cops accountable or improve law enforcement performance. It is apparent, however, that such alternatives require resources. Unfortunately, the majority's recommendations will divert resources from these alternative methods to claims (including reserves) and attorneys' fees.

### Qualified Immunity Is a Red Herring; Majority Refused to Consider Absolute Judicial or Prosecutorial Immunity

Although disagreement exists about the standard for granting qualified immunity, every presenter agreed that the number of cases actually lost in federal court due to a successful motion for qualified immunity is very small. Courts only apply it when they believe the individual government actor has met the burden required to "qualify" for the defense. Moreover, qualified immunity only applies to individuals. It cannot even be raised in defense of claims against counties and cities. More importantly, it does not apply at all to claims brought under the NMTCA.

The qualified immunity discussion also shows the disconnect between what the Commission recommended and rhetoric used to justify it. Proponents argued for the end of qualified immunity because it allows bad government actors to escape accountability. Yet indemnifying those bad actors does not hold them accountable.

The majority adopted the position that the Legislature should reject qualified immunity (also known as good faith immunity) because individuals' rights to recover for any violation, no matter how small or how novel, overrides the taxpayers' need to provide for the public good. However, the same argument applies to the absolute immunity enjoyed by judges and prosecutors, who can act with deliberate, contemplated, and intentional malice but remain immune from suit. Yet the Commission did not hear any evidence or have any meaningful discussion concerning the absolute immunity enjoyed by judges and prosecutors. This is noteworthy for two reasons.

First, the Commission's charge included assessing a new potential cause of action against all public bodies, which HB 5 defined as "the executive, legislative and judicial branches of state and local governments and all advisory boards, commissions, committees, agencies or entities created by the constitution of New Mexico or any branch of government that receives public funding, including political subdivisions, special taxing districts, school districts and institutions of higher education."

Second, judges and prosecutors have an obvious role in perpetuating institutional racism and violating the rights of persons of color. Indeed, one of the experts contacted by the majority and

its staff to present to the Commission – Professor Joanna Schwartz – has argued for abolishing absolute immunity for prosecutors. (*Hold Prosecutors Accountable, Too*, Kate Levine and Joanna Schwartz, [www.bostonreview.net](http://www.bostonreview.net) June 22, 2020) Yet she was not asked to speak on that topic.

This is not to say that absolute immunity should or should not be abolished. Rather, we raise the issue of absolute judicial and prosecutorial immunity to demonstrate that the majority picked and chose what to look at. That, coupled with the facts that the majority chose what information was presented on the selected areas of interest and procedural issues detailed elsewhere, paints the picture of a predetermined outcome. The Legislature and public deserved better.

### Unintended Consequences

The presentations were clear. Enactment of the new cause of action with increased financial exposure will mean the loss of reinsurance and umbrella insurance for the 29 counties that get their law enforcement coverage from the New Mexico County Insurance Authority. This will greatly reduce the money available to compensate plaintiffs from \$5-10 million to \$2 million—. Based on information presented to the Commission, the new cause of action recommended by the majority will also decrease the availability of other insurance, such as medical malpractice insurance for jail and other medical operations.

This will damage the very services we are seeking to improve. Taxpayer dollars are not limitless. As the City of Albuquerque pointed out, city budgets are a zero-sum game. Local governments who are unable to afford or obtain insurance may be forced to reduce or cut services entirely. From a public safety perspective, elimination or reduction in law enforcement services could leave smaller communities reliant on state police, greatly increasing the time it takes for an emergency response. Even if services are maintained, cuts to budgets to pay claims will mean cuts to the very training and staffing essential to provide the kind of services our communities need and deserve.<sup>3</sup>

Alternatively, local governments who are unable to afford or obtain insurance may have no choice but to resort to privatizing all or part of their jails —undoing years of work to reform detention in the state.

Finally, no-one should forget who pays for uninsured judgments that cannot be satisfied through existing resources: our citizens, through property taxes levied to meet the judgment. N.M. Const., art. 8, Section 7; NMSA 1978§7-37-7(C)(3)

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<sup>3</sup> The majority also fails to consider the implication of its recommendations in the area of education. The State has been found to have violated the Education Clause, Article XII, Section 1, of the New Mexico Constitution. Will the new cause of action allow children denied an adequate education to sue for damages calculated based upon a lifetime of reduced earning potential?

### The Commission Did Not Consider Meaningful Alternatives

We came to the Commission expecting to focus on what could be done about police misconduct. The Commission could have explored meaningful reforms that would actually improve accountability without the devastating cost of a new, more profitable for attorneys cause of action. We repeatedly failed to do so.

On the day we were asked to vote, we heard from the director of the New Mexico Law Enforcement Academy. It was apparent that there is much that can be done to improve officer training and accountability. Recent news coverage has highlighted the fact that even officers who have been criminally convicted and are serving time continue to maintain their law enforcement certification. But those ideas were relegated to an appendix instead of included in the recommendations.

Discipline is also an obvious form of individual accountability, and yet the Commission never followed up on suggestions that the Public Employee Bargaining Act be amended to remove discipline as a topic of bargaining for law enforcement unions. Union reform is a meaningful solution that is front and center in a number of states already. It represents an effective, no-cost alternative that provides for actual accountability.

Finally, any conversation about public safety reform must acknowledge the serious deficiencies in behavioral health services in our communities that lead to (i) law enforcement intervention in situations involving mental health crises and (ii) the unnecessary incarceration of individuals suffering from substance abuse and/or mental health disorders. These deficiencies have transformed our local jails into de facto mental health institutions, a role they are not well-equipped to serve. This Commission could and should have explored what could be done to solve a significant root causes of the problem. We did not.

### The Process was Rushed and Biased, Without Allowing for Adequate Time for Debate and Discussion, Creating the Impression that the Result was Predetermined

Based upon the comments received, the public believes that the Commission is working towards recommendations that will address law enforcement misconduct and create individual accountability. But the recommended new cause of action goes much further. If enacted, all public officers and employees – not just law enforcement – would be subject to a damages lawsuit. This fact should have been broadly advertised to universities, school districts, and other governmental entities that would be impacted by the new cause of action. But it was not. The public comments submitted to the Commission came largely from lawyers who practice civil rights or personal injury litigation, overshadowing the few law enforcement officers and agencies who responded. We received no responses from school employees, social workers, or healthcare workers, highlighting how uninformed or unaware the public was as to the true purpose of the Commission and how each of them would be negatively impacted by the majority's recommendations.

Information presented to the Commission and public misrepresented the current state of the law, and likely skewed public perception of the Commission's work. During the first two meetings,

we were lead to believe that New Mexicans have no remedy in State court if law enforcement violates their State constitutional rights. That incorrect message was repeated on our Commission website, where our survey advised the public that “[t]he New Mexico Constitution provides rights to the people in this state, but currently there is not a statute or private right of action that allows people to recover when these rights are violated...” After the error was pointed out, Commission staff did not amend or correct the question. Survey responses based upon this misinformation are not particularly useful.

Presenters disproportionately favored a new cause of action without qualified immunity, suggesting that a new cause of action may unlock New Mexico constitutional protections that do not currently exist. We believe the technical legal issues are more nuanced and opinions on them more diverse than what was presented.

The dissenters include a State Senator, a District Attorney, and two law enforcement officers. No attorney with a government perspective regarding civil litigation was appointed to the Commission. The dissenting Commissioners are of different political affiliations. The dissenting Commissioners are racially and culturally diverse. The two law enforcement representatives on this Commission understand both sides of the issues, with their law enforcement leadership experience and both being plaintiffs against government on complaints involving civil rights matters. None of the dissenting Commissioners stand to financially gain from the outcome of these recommendations.

Each dissenting Commissioner strongly believes in holding bad government actors accountable and, if needed, were willing to consider recommending reforms to the NMTCA, but those alternatives were never considered or discussed by the majority. We cannot in good faith support the majority’s rushed effort to generate an un-vetted report of recommendations to our Legislature and Governor.

Dissenting Commissioners did not have ample time to consider, review, or discuss among all Commissioners the information presented to them, including testimonies. If the dissenting Commissioners had the opportunity to vet the information and testimonies, we would have likely had additional questions, thus raising the likelihood that additional stakeholders would have been scheduled to testify before the Commission or requested to provide additional information. The Commission membership was not finalized until mid-August 2020, yet had a November 15 deadline to provide its recommendations. The dissenting Commissioners strongly believe there was not enough time to consider such critical issues in a few meetings of 2-3 hours. Two dissenting Commissioners offered to meet on weekends to provide more review and discussion time, but that option was never utilized, resulting in less meetings. These deficiencies further explain why the dissenting Commissioners cannot support the majority’s recommendation to create a new state cause of action for civil rights deprivation and to not allow qualified immunity as a defense.

In our last meeting, the Commission spent just a few minutes approving the staff attorney’s recommendation that the new cause of action have a three-year statute of limitation, with an extended time frame for minors and victims of sexual abuse. Although it may have been well



known to the attorney majority, those of us who are not civil attorneys did not learn until after the vote that there are other laws (such as the NMTCA and state and federal civil rights statutes) with shorter statutes of limitations and notice requirements that might have been more appropriate. Although dissenting Commissioners did not object to the statute of limitation recommendation, that was because it was clear to each of us that the majority supported the recommendation and it would be meaningless to argue against the majority, as previously seen with the new cause of action and qualified immunity votes.

Similarly, although the attorney majority is emphatic that State courts should interpret our State constitutional rights, we were presented with few (if any) concrete examples of meaningful divergence between federal and State constitutional law in the civil arena. In fact, we were separately informed that our Supreme Court has instructed New Mexico Courts to consider State constitutional claims only if the asserted right is not protected under the federal constitution and to only deviate from established federal constitutional law in specified circumstances. Consequently, we have no basis upon which to conclude that the new cause of action will unlock a treasure chest of new State constitutional protections.

The question of whether to create a new cause of action with serious practical consequences for the State is an issue too important to rush, especially when rushing means a lack of broad public input and consideration of alternatives to a new cause of action.

#### CONCLUSION

We have great respect for all who served on this Commission. We believe, however, that the Commission was stacked with lawyers from the plaintiffs' bar with the ability to solicit overwhelming plaintiffs' bar public comments; went about its work too quickly; failed to seek out differing viewpoints on nuanced and complicated issues; and failed to duly consider real alternatives that might address the reasons for this Commission's existence – law enforcement misconduct and accountability. These shortcomings taint all of the majority's recommendations.

On the merits, the majority's recommendations are not necessary. Ample remedies for State and federal constitutional violations by law enforcement already exist under both federal and State law. Nor will the recommended new cause of action improve government accountability or law enforcement conduct. It will simply divert scarce public resources to claims from the efforts to recruit, retain, and train good government employees and law enforcement officers (and other critical services).

Cavalier suggestions have been made that governments can avoid liability by simply not making mistakes. No organization bats 1000, be it in sports, government, or other areas. Humans make mistakes, and that is especially true in the high stress area of public safety, where split second decisions in emotional settings are often demanded. Opening up government to nuclear verdicts when mistakes are inevitably made accomplishes nothing productive.

For all of the reasons expressed above, we respectfully dissent from the majority's recommendations. If the Legislature creates a new cause of action, it should do so only in the context of a new waiver under the NMTCA, where government liability is capped and attorneys'

fees are not awarded to prevailing plaintiffs. Government cannot afford the astronomical jury awards granted by New Mexico juries, examples of which were shared with the Commission.

#### DRAFTING SUPPORT

The dissenters received the support of New Mexico Counties in drafting this report.

#### APPENDIX

Attached are materials supporting the opinions contained herein.

<https://www.abqjournal.com/1484495/editorial-qualified-immunity-provides-reasonable-protection-for-police-officers.html>.

# CITY OF ALBUQUERQUE

*Office of the City Attorney*



October 29, 2020

Justice Richard Bosson (Ret.), Chair  
New Mexico Civil Rights Commission  
925 Luna Cir. NW  
Albuquerque, NM 87102  
[civil.rtscmsn@nmlegis.gov](mailto:civil.rtscmsn@nmlegis.gov)

Dear Hon. Chair Bosson,

On behalf of the City of Albuquerque, I write to you and the New Mexico Civil Rights Commission concerning the Commission's current charge from the New Mexico Legislature. The Commission has explored a number of ways to expand liability for police misconduct, including changing sovereign immunity under the Tort Claims Act, NMSA 1978, 41-4-1, *et seq.* ("TCA") and the possible creation of a state version of 42 U.S.C. § 1983. As a municipality with a strong commitment to police reform, we are concerned that expanding liability will result in fewer resources being available for police reform methods that have been proven to work, while having no impact on the behavior of individual officers. We also want to encourage the Commission to recommend more effective tools that will more directly impact officer behavior. If we want to fix the system, let's actually invest in fixing it, instead of just increasing the cost of being broken.

Over the course of the last several months, the Commission has heard presentations from a multitude of sources concerning the creation of a state corollary to Section 1983. The Commission has also heard about whether such a statute would (1) have a cap on damages, (2) have a qualified immunity component, (3) allow for attorney's fees, and (4) allow for punitive damages. Various presenters raised concerns about the creation of such a statute and the financial burden it might pose, particularly if the statute allowed for attorney's fees and punitive damages and did not have a cap on damages or availability of qualified immunity.

For a few reasons, we question whether dramatically expanding liability is the best path to the goal we all share of reducing police misconduct. At the outset, we note that sovereign immunity exists to protect taxpayers, not to shield law enforcement officers from the consequences of their behavior. On the most basic level of cause and effect, increasing the amount taxpayers pay for police misconduct has a very limited impact on the behavior of officers. In Albuquerque, multiple seven-figure judgments in police misconduct cases and years of Department of Justice oversight have taught us a simple lesson. Without culture change, without a true belief in reducing the use of force in everyday officer interactions from the top to the bottom of the chain of command, and without the resources to invest in reform, neither the expensive judgments nor the costly compliance process will get us where we need to be.

City budgets are, in the short-term, a zero-sum game. The City of Albuquerque is a self-insured municipality, so the cost of additional liability comes from our general fund budget. We can take that money from the Police Department by cutting funding for officers, training and equipment. But we have learned that these are precisely the expenditures necessary to reduce police

misconduct. The DOJ reform process has dramatically increased the staff and budgets of our compliance, internal affairs and academy divisions, and the number of sworn officers we need on the whole. Our major equipment purchases in the last few years have gone towards increasing accountability through items like body cameras and electronic control weapons with audit trails. And if we don't take that money from elsewhere in the Police Department, we must cut other services or programs.

Next, we already have avenues to pursue civil rights violations and police misconduct in court. A cause of action for the violation of state constitutional rights has been and is allowed by Section 41-4-12 of the TCA. Section 41-4-12 provides the citizens of New Mexico with a right of action to be compensated for violations of the New Mexico Constitution by law enforcement officers. Recent amendments to the Tort Claims Act have addressed a potential gap in the law with regard to such claims, such that Section 41-4-12 acts as a civil rights statute. Section 41-4-12, coupled with 42 U.S.C. § 1983, currently provide New Mexico citizens with adequate remedies for civil rights violations.

Furthermore, increasing the risk for governments does not actually affect officers. As the law currently stands under the TCA, we are legally obligated to provide for the damages assessed as well as the costs of the defense of our officers. Abolishing qualified immunity would only increase costs to the governmental entity and not have an impact on the officer.

What truly affects an individual officer is discipline. Officer accountability fundamentally comes through a police department's internal affairs and disciplinary processes. Maintaining the integrity of those processes and instilling in investigators the courage to be critical of their peers is a constant struggle. Investigators must be empowered to call out misconduct, even if it means an officer gets fired. We have two challenges in this respect. First, collective bargaining agreements that were drafted before the current era of accountability set unacceptable conditions on discipline. Second, investigators fear that a finding of misconduct might cost the agency millions of dollars, or result in bankrupting a fellow officer. Expanding civil liability does not help with the first concern, and only exacerbates the second.

Finally, New Mexico Courts are not equipped to handle the volume of cases that a state civil rights cause of action would create. As it is, our State courts are overwhelmed and dealing with significant backlogs, which were complicated by the global COVID-19 pandemic. We routinely settle and try cases that happened under the previous mayoral administration, involving officers who are long gone from the department. The outcome of those cases has no effect whatsoever on the officers who were involved in the incident or the top-level management overseeing the department at the time. Shifting the majority of these cases to State court will only lengthen the time it takes to resolve them, thus decreasing their impact on the people involved.

The criminal justice reform community has long understood that the system of fees and fines does not make us any safer. Police reform is no different. Penalties have their place, but real change comes from addressing systemic and institutional causes underlying the problem.

As the Commission heard, the best avenues for institutional behavioral change include: (1) ensuring that the policies are aligned with national best practices; (2) providing the best training

available for the implementation of the policies; and (3) demanding accountability. The State can play a role in all of these areas.

- The State can fund and oversee the development of best-practice policies that all departments in New Mexico can tailor and adopt.
- The State can fund and expedite procurement through the statewide pricing agreement of state-of-the-art technology that enhances officer accountability.
- Through the Law Enforcement Academy Board, the State can enhance consequences for officers who have committed misconduct, require additional training, and stop the cycle of subpar officers who move from one department to the next. This would include investments to reduce the backlog of disciplinary matters that the LEA Board currently faces.
- The Legislature can explore empowering management to take full control over the police disciplinary process, rather than being hamstrung by decades-old collective bargaining agreements. This effort would need to be carefully managed so as not to negatively impact labor as a whole.

We are grateful that the Commission has invested so much time and thoughtfulness into understanding different approaches to police reform. Thank you for your consideration of these concerns.

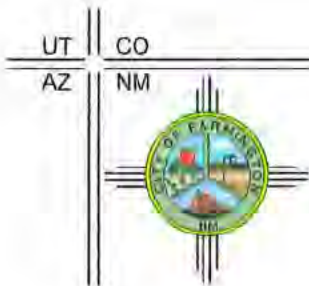
Sincerely,



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Esteban Aguilar, Jr.  
City Attorney  
City of Albuquerque

Cc: Mark Baker, Vice Chair  
Gerald Byers, Commissioner  
Zackeree Kelin, Commissioner  
Senator Steven Neville, Commissioner  
Victor Rodriguez, Commissioner  
Kim Stewart, Commissioner  
Denise Torres, Commissioner  
Judge Stan Whitaker, Commissioner  
Senator Peter Wirth, Majority Leader of the New Mexico Senate  
Rep. Brian Egolf, Speaker of the New Mexico House of Representatives  
Senator John Arthur Smith, Chair, Legislative Finance Committee  
Rep. Patricia A. Lundstrom, Vice-Chair, Legislative Finance Committee  
Matt Garcia, Acting Chief of Staff, Office of the Governor  
David Abbey, Director, Legislative Finance Committee  
Raul Burciaga, New Mexico Legislative Council Service  
AJ Forte, New Mexico Municipal League  
Steve Kopelman, New Mexico Counties



## CITY OF FARMINGTON

800 Municipal Drive  
Farmington, NM 87401-2663  
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November 10, 2020

Justice Richard Bosson (Ret.), Chair  
New Mexico Civil Rights Commission  
925 Luna Cir. NW  
Albuquerque, NM 87102  
[civil.rtscmsn@nmlegis.gov](mailto:civil.rtscmsn@nmlegis.gov)

Dear Hon. Chair Bosson,

On behalf of the City of Farmington, I write to you and the New Mexico Civil Rights Commission concerning the Commission's current focus from the New Mexico Legislature. The Commission has explored the concept of expanded liability for police misconduct, including changing sovereign immunity under the Tort Claims Act, NMSA 1978 41-4-1, *et seq.* ("TCA") and the possible creation of a State charge of 42 U.S.C. §1983. As a municipality who believes in transparency, accountability and community policing within our police department, we are concerned with the direction the Civil Rights Commission has chosen to take to gain further accountability from police in New Mexico. The concepts put forward by the Commission will not further police reform or accountability, but will instead increase the costs of operation.

The City of Farmington is a self-insured municipality. Any costs associated with additional liability comes directly from our general fund budget. We can take money from other budgets to pay for potential litigation, including monies from the Farmington Police Department ("FPD") budget, but this would be at the expense of hiring, training, and holding accountable our police officers. We believe that the keys to making effectual change that promotes better policing and minimizes police misconduct revolves around effectively adopting, implementing, training, and coaching good police policies with consistent follow-up and coaching from a robust Internal Affairs Division. While there are no guarantees that any strategy employed to minimize police misconduct will be perfect, we believe this is the best path forward and one that we model ourselves. The City of Farmington and the FPD are transparent and professionally run organizations. FPD is, and has been, ahead of the widely acceptable police practices and policies in use-of-force, protection of citizens' rights, and accountability. For example, FPD's in-car and body-worn cameras have been in operation in excess of ten years. Yet, if the changes suggested by the Civil Rights Commission are adopted, the ability for the Police Department to maintain this status is greatly threatened due to the reduction in funding that will result from the proposed changes.

**OFFICE of the MAYOR**

We already have causes of actions to pursue civil rights violations and police misconduct in court. A cause of action for the violation of the State constitutional rights has been, and is allowed by, Section 41-4-12 of the TCA. Section 41-4-12 provides a citizen with a right of action to be compensated for violations of the New Mexico Constitution by law enforcement officers. Section 41-4-12 and 42 U.S.C. §1983 provide adequate remedies for civil rights violations.

Furthermore, increasing the risk for governments does not actually affect officers. As the law currently stands under the TCA, we are legally obligated to provide for the damages assessed, as well as the costs of the defense of our officers. **Abolishing qualified immunity would only increase costs to the governmental entity and not have an impact on the officer.**

Officers and their behavior are affected by discipline. Officer accountability comes through a police department's internal affairs and disciplinary process. There are challenges in holding officers accountable. A substantial challenge is collective bargaining units. The State recently passed a law that provides greater power and protection to unions. The Collective Bargaining Agreements and the increased power and protections Unions have received exacerbates the issue of officer accountability.

As the Commission heard, the best path for institutional behavioral change includes: 1) the policies of a police department are aligned with national best practices; (2) providing the best training available for the implementation of the policies; and (3) demanding accountability. The State can play a role in all of these areas, particularly in accountability by investments in the Law Enforcement Academy Board to reduce the backlog of disciplinary matters that the LEA Board currently faces.

We appreciate the time that the Commission has invested into police reform. Thank you for your time and consideration regarding these concerns.

Sincerely,



Nate Duckett, Mayor  
City of Farmington



Linda Rodgers, City Councilor – District 1  
City of Farmington



Sean Sharer, City Councilor – District 2  
City of Farmington



Jeanine Bingham-Kelly, City Councilor – District 3  
City of Farmington



Janis Jakino, City Councilor – District 4  
City of Farmington

Cc: Mark Baker, Vice Chair  
Gerald Byers, Commissioner  
Zackeree Kelin, Commissioner  
Senator Steven Neville, Commissioner  
Victor Rodriguez, Commissioner  
Kim Stewart, Commissioner  
Denise Torres, Commissioner  
Judge Stan Whitaker, Commissioner  
Senator Peter Wirth, Majority Leader of the New Mexico Senate  
Rep. Brian Egolf, Speaker of the New Mexico House of Representatives  
Senator John Arthur Smith, Chair, Legislative Finance Committee  
Rep. Patricia A. Lundstrom, Vice- Chair, Legislative Finance Committee  
Matt Garcia, Acting Chief of Staff, Office of the Governor  
David Abbey, Director, Legislative Finance Committee  
Raul Burciaga, New Mexico Legislative Finance Council Service  
AJ Forte, New Mexico Municipal League  
Steve Kopelman, New Mexico Counties



**SANTA FE COUNTY MANAGER AND ATTORNEY'S RESPONSE  
TO CIVIL RIGHTS COMMISSION'S PUBLIC COMMENT QUESTIONNAIRE**

**Statement of Interest:** Please provide your name, the city in which you reside, and contact information where Commissioners and Commission staff can contact you if they need further information. If you are submitting a response on behalf of an entity, please provide the name of the entity, whether it operates in New Mexico, the contact information of the entity, when the entity was founded and describe its membership and activities.

Katherine Miller  
County Manager  
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Gregory S. Shaffer  
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We submit these comments on behalf of Santa Fe County, a political subdivision of the State of New Mexico.

**GENERAL COMMENTS**

We are deeply concerned about expanding county liability for alleged New Mexico Constitutional violations. If implemented, such expanded liability will likely:

- Result in counties self-insuring unsustainable levels of risk;
- Divert scarce tax dollars from expanding and improving law enforcement and other services to claims;
- Put more pressure on counties to close or privatize jails; and
- Cause property taxes to increase to pay uninsured judgments.

Our Adult Detention Facility (ADF) puts all of these concerns in stark relief. ADF, one of the few accredited New Mexico detention facilities, serves a fragile population. Many inmates have co-occurring substance abuse and mental health disorders. They enter ADF with severe physical health complications, resulting from years of substance abuse and unreliable access to medical care outside ADF. Withdrawal only complicates things. ADF is no longer a jail. It (and jails nationwide) have become de facto substance abuse and mental health treatment facilities, as states fail to invest the resources necessary to treat these individuals in appropriate, non-penal settings. Trying to fill the void left by the State, we have invested substantial resources to try and create a continuum of care for this population, both inside and outside ADF. This includes reentry specialists, a behavioral crisis center, mobile crisis team, and various other services. Much more work remains to be done.

Staffing is also a critical issue at ADF (and other public safety organizations). To combat chronically high vacancy rates, the County made significant investments in the salaries of our public safety employees in FY2020. For example, probationary detention officers with no experience join ADF at a starting salary of \$17.50/hr., increasing steadily over five years to \$21/hr. We still have consistent vacancies.

Despite these investments, our total cost of insurance and claim exposure under existing law continues to grow. This is demonstrated by our experience procuring \$1M per claim/\$3M aggregate medical malpractice insurance for ADF.

- In FY2019, our deductible was \$25,000 per claim; the premium \$297,984.
- In FY2020, our deductible was \$75,000 per claim; the premium \$594,100.
- In FY2021, our self-insured retention is \$200,000 per claim; the premium \$575,000. In addition, of the 21 carriers contacted, only one quoted coverage.

In ordinary times, such massive increases in our total cost of insurance and uninsured claim exposure would constrain our ability to continue the investments described above or make the new ones that our community needs. In these extraordinary times, they make it nearly impossible to do so.

Diverting taxpayer dollars from the work that needs to be done to claims is the exact wrong policy to be pursuing at this time. Instead, the Legislature should be providing more resources to our law enforcement agencies, jails, and prisons and to address the root causes of the challenges they face.

### **QUESTIONNAIRE**

**Question 1:** The New Mexico Constitution provides rights to the people in this state, but currently there is not a statute or private right of action that allows people to recover when these rights are violated. Do you support a civil cause of action that would allow a person to bring a lawsuit to recover for violations of their rights under the New Mexico Constitution? Please explain why or why not.

**Answer to Question 1:** No, because there already exists a recently expanded civil cause of action for deprivation of New Mexico Constitutional rights by law enforcement officers.

The New Mexico Tort Claims Act allows governmental entities and their public employees to be sued for “any other deprivation of any rights, privileges or immunities secured by the **constitution** and laws of the United States **or New Mexico** when caused by law enforcement officers while acting within the scope of their duties.” NMSA 1978, Section 41-4-12 (2020) (emphasis added). Pursuant to this provision, deputy sheriffs and detention officers have been subject to suit for New Mexico constitutional violations for years.

In 2020, the Legislature expanded the scope of this sovereign immunity waiver by broadening the definition of “law enforcement officer” for purposes of Section 41-4-12. Specifically, a law enforcement officer under this section now includes public officers and employees “vested by law with the power to maintain order, to make arrests for crime or to detain persons suspected of or convicted of committing a crime, whether that duty extends to all crimes or is limited to specific crimes.” NMSA 1978, Section 41-4-12 (2020) (emphasis added). While the extent to which these amendments have expanded governmental liability is still unfolding, it is undeniable that an individual can sue for violations of their State constitutional rights in State court under this waiver and **the defense of qualified immunity cannot be raised in response to such claims.**

In addition, research by New Mexico Counties shows that New Mexico's existing tort claims caps are higher than the majority of other states. The areas in which an individual can sue government in New Mexico are also broader than most other states—including those states with comparable caps.

In sum, this Commission was created “in light of an ongoing national reckoning on unnecessary excessive force by police officers,…” See

<https://www.governor.state.nm.us/2020/06/26/governor-establishes-civil-rights-commission-signs-election-protections-solvency-measures-into-law/>. The facts demonstrate that New Mexico already has a robust civil cause of action to address excessive force and other New Mexico Constitutional claims by law enforcement officers, including detention officers.

**Question 2:** Do you believe allowing people to bring lawsuits to recover for violations of the New Mexico Constitution would improve how Government agencies and officials operate and/or the policies and procedures they create?

**Answer to Question 2:** No, we do not believe that expanding government liability for New Mexico Constitutional violations will improve governmental operations and/or the policies and procedures governments create.

First, as previously indicated, the right to sue governments for violations of the New Mexico Constitution already exists.

Second, diverting more resources to paying claims is not the way to improve law enforcement and jail operations. Instead, the Legislature should be providing more resources. More resources to local governments for law enforcement and jail operations. More resources for the treatment of people suffering from substance abuse and/or mental health disorders, which would minimize their interactions with police officers and keep them out of county jails. More resources to train and supervise law enforcement officers, including independent, elected County sheriffs.

Third, increasing liability may push more counties toward the privatization of jails. As indicated above, Santa Fe County only received one quote for medical malpractice insurance at our jail for FY2021. If the law changes being contemplated by this Commission – attorney fee awards, unlimited liability, punitive damages, etc. – were enacted during the next legislative session, we are certain that we will receive 0 quotes for medical malpractice insurance for FY2022. In that case, Santa Fe County may have no choice but to outsource the provision of medical care at its jail.

As documented by New Mexico Counties, the insurance market for general law enforcement liability is a similar story.

**Question 3:** If you are familiar with the doctrine of qualified immunity, do you believe qualified immunity should be a defense to a lawsuit for violations of the New Mexico Constitution?

**Answer to Question 3:** It is not currently a defense to lawsuits brought against law enforcement officers for New Mexico Constitutional violations under NMSA 1978, Section 41-4-12.

Looking at the doctrine in the context of federal civil rights claims, where liability is unlimited and prevailing plaintiffs have their attorney fees paid, the doctrine is fundamentally sound. Such

astronomical exposure should only exist if the public official had notice that his or her conduct was unconstitutional. Absent such clear notice, public officials are judged in hindsight by making discretionary judgment calls in unsettled areas of the law.

**Question 4:** Should government actors found liable for civil rights violations be indemnified in such actions by either their government employer or its insurers?

**Answer to Question 4:** Yes. Most public servants would be bankrupted by existing claims or claims arising under a new State law cause of action and the legal fees necessary to defend them. Indemnification insures that plaintiffs recover on settlements and judgments. In addition, the specter of personal liability could drive high quality law enforcement officers, detention officers, and other public servants toward other careers. This would decrease the quality of governmental operations.

**Question 5:** The commission has been asked to consider the potential for increased costs to government that adding a civil rights action might lead to. Please provide your thoughts on this issue.

**Answer to Question 5:** This public policy debate is about the allocation of scarce taxpayer dollars. Namely, how much to allocate to individual claims versus the public good and improving the services provided to everyone. Consequently, this Commission would be derelict in its duties if it did not duly consider the very real impact that expanded civil liability will have on government finances and the ability of government to provide quality law enforcement, detention, and the other critical services our communities need.

In addition, no-one should forget who pays for uninsured judgments that cannot be satisfied through existing resources: our citizens, through property taxes levied to meet the judgment. N.M. Const., art. 8, Section 7.

**CURRY COUNTY  
BOARD OF COUNTY COMMISSIONERS  
RESOLUTION № 2020-78**

**A RESOLUTION  
OPPOSING THE RECOMMENDATIONS OF THE NEW MEXICO CIVIL  
RIGHTS COMMISSION AND URGING THE LEGISLATURE TO  
PROVIDE MORE RESOURCES TO ADDRESS ROOT CAUSES OF CIVIL  
RIGHTS CLAIMS AGAINST LOCAL GOVERNMENTS**

**WHEREAS**, in Laws 2020, First Special Session, Chapter 1 (HB 5) and in response to certain high-profile civil rights violations in other states, the New Mexico Legislature created the New Mexico Civil Rights Commission (Commission) to “develop policy proposals for laws for the creation of a civil right of action for the deprivation, by a public body or a person acting on behalf of or under the authority of a public body, of any right, privilege or immunity secured by the Constitution of New Mexico”; and,

**WHEREAS**, the Commission’s makeup and work call into question whether it was duly presented with or considered all relevant points of view; and,

**WHEREAS**, most of the five civil attorneys who were appointed to the Commission (excluding retired and sitting judges) are or were lawyers who represent plaintiffs; and,

**WHEREAS**, legal staff hired by the Commission to conduct research and draft its recommendations, is an attorney who specializes in advocating for Plaintiffs in civil rights, policy misconduct, prisoner rights, and personal injury cases; and,

**WHEREAS**, the Commission did not hear balanced presentations from individuals and local Law Enforcement entities with varying positions on the merits of those critical legal issues that were before the Commission; and,

**WHEREAS**, the Commission invited public comment through October 31, 2020, but then inexplicably voted on the questions posed to it in HB 5 on October 23, 2020, before the close of the public comment period it created and before receiving insightful comments from several governmental and other affected entities; and,

**WHEREAS**, a new cause of action is not necessary to address New Mexico constitutional deprivations by law enforcement, since the New Mexico Tort Claims Act already waives immunity for such claims and qualified immunity is not a defense to such claims (NMSA 1978, §41-4-12); and,

**WHEREAS**, research by New Mexico Counties presented to the Commission demonstrated that New Mexico – one of the poorest states in the Union – already allows for some of the highest damage awards in the Country for State law claims against Law Enforcement Officers; and,

**WHEREAS**, New Mexico Counties and other governmental entities also demonstrated that a new cause of action would result in reinsurance and other insurance coverage no longer being available to the New Mexico County Insurance Authority and/or local governments; and,

**WHEREAS**, the unavailability of commercially reasonable insurance will cause local governments to self-insure unsustainable amounts of risk, which will divert scarce resources from the very services that proponents of the new cause of action are trying to improve to individual claimants and their attorneys; and,

**WHEREAS**, uninsured judgments that cannot be satisfied through existing resources are paid by our citizens, through property taxes levied to meet the judgment (N.M. Const., art. 8, Section 7); and,

**WHEREAS**, many of the challenges faced by local Law Enforcement and County jails stem from co-occurring substance abuse and mental health disorders in the population with which they interact; and,

**WHEREAS**, instead of diverting resources to individual claims, the Legislature should be providing more resources to serve this population, which would minimize their interactions with police officers and keep them out of County jails; and

**WHEREAS**, information presented to the Commission demonstrated that the New Mexico Law Enforcement Academy needs additional resources to timely discharge its goal of investigating law enforcement officers accused of misconduct; and

**WHEREAS**, timely removing the certification of so-called “bad cops” would more effectively and quickly meet the goal of improving Law Enforcement by avoiding the recycling of such cops among Law Enforcement Departments; and,

**WHEREAS**, notwithstanding the evidence presented to it and the consequences of a new cause of action, the Commission voted before the close of public comment to recommend that the Legislature create a new State law cause of action for violations of the New Mexico Constitution that:

- **WOULD** include attorney fees for prevailing Plaintiffs on top of compensatory damages. Fees for Plaintiff’s attorneys – many of whom charge in excess of \$450 per hour – often exceed the amount of damages awarded to Plaintiffs;
- **WOULD** require public employers to indemnify public employees for claims brought under the recommended cause of action. This means that the public entity would pay for the costs of defense and any settlement or judgment; and

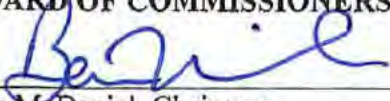
- **WOULD NOT** include qualified immunity as a defense, which means that officials can be second-guessed in hindsight for making judgment calls in unsettled areas of the law.

**NOW, THEREFORE, BE IT RESOLVED** by the Board of County Commissioners of Curry County, New Mexico, that:

1. Curry County opposes the recommendations of the Commission and broader legislation pursued by individual legislators, which:
  - a. are unnecessary for victims of State constitutional violations by Law Enforcement (including detention officers) to be compensated; and,
  - b. will not address at all the root cause of many claims against local governments: namely, the lack of State resources to treat substance abuse and mental health disorders in non-penal settings; and,
  - c. will be ineffective at driving reform or otherwise improving services, since they will divert resources from Law Enforcement and Detention Officer recruitment, retention, and training and other critical services to claims; and,
  - d. will further dry up the insurance market, requiring local governments to self-insure more and more risk and creating the real possibility that property taxes will need to be imposed to meet uninsured judgments.
2. Curry County urges the New Mexico Legislature to instead provide more resources for:
  - a. Law Enforcement and jail operations; and,
  - b. the treatment of people suffering from substance abuse and/or mental health disorders, which would minimize their interactions with police officers and keep them out of county jails; and,
  - c. more resources to the New Mexico Law Enforcement Academy to train and investigate Law Enforcement Officers, including independent, elected County sheriffs.

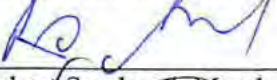
APPROVED AND ADOPTED THIS 17 DAY OF NOVEMBER, 2020.

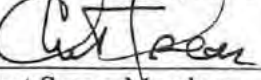
CURRY COUNTY  
BOARD OF COMMISSIONERS

  
\_\_\_\_\_  
Ben McDaniel, Chairman

Approved via Virtual Meeting  
\_\_\_\_\_  
Seth Martin, Vice Chair

  
\_\_\_\_\_  
Robert Thornton, Member

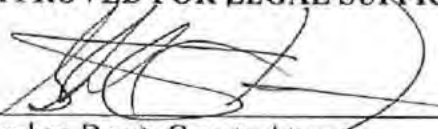
  
\_\_\_\_\_  
Robert Sandoval, Member

  
\_\_\_\_\_  
Chet Spear, Member



  
\_\_\_\_\_  
Annie Hogland, County Clerk

APPROVED FOR LEGAL SUFFICIENCY:

  
\_\_\_\_\_  
Stephen Doerr, County Attorney





**STATE OF NEW MEXICO  
COUNTY OF EDDY**

**RESOLUTION NO: R-20-89**

**RECOGNIZING THE OBJECTIONS OF EDDY COUNTY BOARD OF  
COUNTY COMMISSIONERS TO CERTAIN PROPOSALS BEFORE THE  
NEW MEXICO CIVIL RIGHTS COMMISSION**

**WHEREAS**, the New Mexico Civil Rights Commission was established by the New Mexico Legislature in response to certain high-profile civil rights violations in other states; and

**WHEREAS**, among the proposals presented to the New Mexico Civil Rights Commission is the establishment of a new state law civil rights cause of action which would be filed in state court and would not be subject to removal to federal court; and

**WHEREAS**, among the proposals presented are the elimination of the defense of qualified immunity to governmental employees and entities against whom claims are made; and

**WHEREAS**, based upon the research presented by New Mexico Counties and others, only a small percentage of civil rights claims are actually dismissed as a result of the application of the defense of qualified immunity; and

**WHEREAS**, local governmental entities primarily provide law enforcement and detention services to its local citizens and are already responsible for paying any settlement or judgment concerning claims of civil rights violations made against those entities and their employees pursuant to NMSA § 41-4-4; and

**WHEREAS**, New Mexico law already provides a remedy to individuals harmed by law enforcement officers and the defense of qualified immunity is not available for these claims pursuant to NMSA § 41-4-12; and

**WHEREAS**, because NMSA § 41-4-12 compensates individuals harmed by the negligence of law enforcement officers, no additional laws are necessary or required to protect the people of New Mexico; and

**WHEREAS**, based on the testimony provided to the New Mexico Civil Rights Commission, the cost of any proposed state civil rights law is unduly burdensome on local governments and appears designed to benefit lawyers bringing claims under the new proposed state civil rights statute instead of benefitting the people of New Mexico; and

**WHEREAS**, at least one neighboring state has also proposed to establish a \$25,000 personal liability on any officer or employee found liable for violation of civil rights; and

**WHEREAS**, this imposition of personal, non-indemnified liability will have a chilling effect on the abilities of New Mexico law enforcement and detention facilities to hire law enforcement officers and detention officers; and

**WHEREAS**, all brokers and insurers who have appeared before the Commission, as well as, brokers and insurance carriers working with Eddy County, have indicated that such a change would likely result in loss of re-insurance; and

**WHEREAS**, the loss of re-insurance would greatly reduce the amounts available to pay claims and could result in increases in property tax assessments and reduced services to the residents of Eddy County, such as a reduction in road construction and repair; and

**WHEREAS**, the jurisprudence developed by the federal courts for violation of federal civil rights is well established giving law enforcement officers clear direction as to what constitutes a constitutional violation; and

**WHEREAS**, the proposed state civil rights statute could result in decisions that are inconsistent with decisions made by the United States Supreme Court and it would fail to provide appropriate guidance to law enforcement officers concerning their abilities to perform their duties as law enforcement officers.

**NOW, THEREFORE, BE IT RESOLVED** by the Board of County Commissioners of Eddy County, New Mexico, that:

1. Eddy County opposes any effort to create a new state civil rights cause of action or expand state court jurisdiction for alleged civil rights violations. Such expansion serves no purpose other than to increase litigation against governmental entities and their employees, increase the costs of litigation against Eddy County and its employees that must be borne by Eddy County taxpayers, and reduce the services that Eddy County can provide to its residents.
2. Eddy County opposes the suggestion that the defense of qualified immunity should not apply to any civil rights actions brought against Eddy County and its employees.

3. Eddy County opposes any effort to impose additional personal liability on individual government officials or employees, as such conduct would have a chilling effect on all governmental entities to recruit, hire, and maintain critical public safety and other employees.

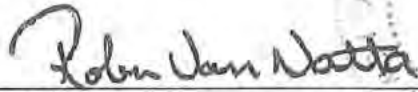
**PASSED, APPROVED AND ADOPTED** this 3<sup>RD</sup> day of **November, 2020**, by the Eddy County Board of Commissioners in an open meeting in Carlsbad, Eddy County, New Mexico.

EDDY COUNTY BOARD OF COMMISSIONERS  
EDDY COUNTY, NEW MEXICO

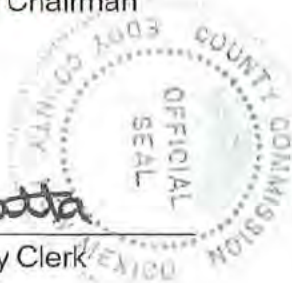


Ernie Carlson, Commission Chairman

ATTEST:



Robin Van Natta, County Clerk



**FY 2020-2021  
QUAY COUNTY  
RESOLUTION NO. 12**

**RECOGNIZING THE OBJECTIONS OF THE QUAY COUNTY  
BOARD OF COUNTY COMMISSIONERS TO CERTAIN  
PROPOSALS BEFORE THE NEW MEXICO CIVIL RIGHTS  
COMMISSION**

**WHEREAS**, the New Mexico Civil Rights Commission was established by the New Mexico Legislature in response to certain high-profile civil rights violations in other states; and

**WHEREAS**, among the proposals presented to the New Mexico Civil Rights Commission is the establishment of a new state law cause of action which would be filed in state court and would not be subject to removal to federal court; and

**WHEREAS**, among the proposals presented are the elimination of the defense of qualified immunity to governmental employees and entities against whom claims are made; and

**WHEREAS**, based upon the research presented by New Mexico Counties and others, only a small percentage of civil rights claims are actually dismissed as a result of the application of the defense of qualified immunity; and

**WHEREAS**, local governmental entities primarily provide law enforcement and detention services to its local citizens and are already responsible for claims of civil rights violations made against those entities; and

**WHEREAS**, at least one neighboring state has also proposed to establish a \$25,000 personal liability on any officer or employee found liable for violation of civil rights; and

**WHEREAS**, this imposition of personal, non-indemnified liability will have a chilling effect on the abilities of New Mexico law enforcement and detention facilities to hire law enforcement officers and detention officers; and

**WHEREAS**, all brokers and insurers who have appeared before the Commission, as well as brokers and insurance carriers working with Quay County, have indicated that such a change would likely result in a premium increase which, until the terms of the legislation are finalized, cannot be quantified; and

**WHEREAS**, these increases could cripple smaller entities in their ability to provide services to their residents and might result in tax increases on everyone; and

**WHEREAS**, the jurisprudence developed by the federal courts for violation of federal civil rights is well established while the proposals could result in a total reset of state civil rights jurisprudence.

**NOW, THEREFORE, BE IT RESOLVED** by the Board of County Commissioners of Quay County, New Mexico, that:

1. Quay County opposes any effort to expand state court jurisdiction for civil rights violations. Such expansion serves no purpose other than to create the potential for inconsistent results thereby making it more difficult for law enforcement officers to know if actions are permissible or impermissible and will result in increased costs.
2. Quay County opposes the suggestion that the defense of qualified immunity should not apply to any civil rights action brought in state court.
3. Quay County opposes any effort to impose additional personal liability on individual government officials or employees, as such conduct would likely have a chilling effect on all governmental entities to recruit, hire, and maintain critical public safety and other employees.

**PASSED, APPROVED AND ADOPTED** this 26th day of October, 2020.

**BOARD OF COUNTY COMMISSIONERS OF  
QUAY COUNTY, NEW MEXICO**

  
Franklin McCasland, Commissioner

  
Sue Dowell, Commissioner

  
Mike Cherry, Commissioner

(Seal)

Attest:

  
Ellen White, County Clerk



**RESOLUTION NUMBER: 2020-30**

**Opposing the Recommendations of the New Mexico Civil Rights Commission  
and Urging the Legislature to Provide More Resources to Address the Root  
Causes of Civil Rights Claims Against Local Governments**

**WHEREAS**, in Laws 2020, 1<sup>st</sup> Special Session, Chapter 1 (HB 5) and in response to certain high-profile civil rights violations in other states, the New Mexico Legislature created the New Mexico Civil Rights Commission (Commission) to “develop policy proposals for laws for the creation of a civil right of action for the deprivation, by a public body or a person acting on behalf of or under the authority of a public body, of any right, privilege or immunity secured by the Constitution of New Mexico”; and

**WHEREAS**, the Commission’s makeup and work call into question whether it was duly presented with or considered all relevant points of view; and

**WHEREAS**, most of the five civil attorneys who were appointed to the Commission (excluding retired and sitting judges) are or were lawyers who represent plaintiffs; and

**WHEREAS**, legal staff hired by the Commission to conduct research and draft its recommendations, is an attorney who specializes in advocating for plaintiffs in civil rights, policy misconduct, prisoner rights, and personal injury cases; and

**WHEREAS**, the Commission did not hear balanced presentations from individuals with varying positions on the merits of critical legal issues before the Commission; and

**WHEREAS**, the Commission invited public comment through October 31, 2020, but then inexplicably voted on the questions posed to it in HB 5 on October 23, 2020, before the close of the public comment period it created and before receiving insightful comments from several governmental entities; and

**WHEREAS**, a new cause of action is not necessary to address New Mexico constitutional deprivations by law enforcement, since the New Mexico Tort Claims Act already waives immunity for such claims and qualified immunity is not a defense to such claims (NMSA 1978, §41-4-12); and

**WHEREAS**, research by New Mexico Counties presented to the Commission demonstrated that New Mexico – one of the poorest states in the Union – already allows for some of the highest damage awards in the Country for State law claims against law enforcement officers; and



**WHEREAS**, New Mexico Counties and other governmental entities also demonstrated that a new cause of action would cause reinsurance and other insurance coverage to no longer be available to the New Mexico County Insurance Authority and/or local governments; and

**WHEREAS**, the unavailability of commercially reasonable insurance will cause local governments to self-insure unsustainable amounts of risk, which will divert scarce resources from the very services that proponents of the new cause of action are trying to improve to individual claimants and their attorneys; and

**WHEREAS**, uninsured judgments that cannot be satisfied through existing resources are paid by our citizens, through property taxes levied to meet the judgment (N.M. Const., art. 8, Section 7); and

**WHEREAS**, many of the challenges faced by local law enforcement and county jails stem from co-occurring substance abuse and mental health disorders in the population with which they interact; and

**WHEREAS**, instead of diverting resources to individual claims, the Legislature should be providing more resources to serve this population, which would minimize their interactions with police officers and keep them out of county jails; and

**WHEREAS**, information presented to the Commission demonstrated that the New Mexico Law Enforcement Academy needs additional resources to timely discharge its goal of investigating law enforcement officers accused of misconduct; and

**WHEREAS**, timely removing the certification of so-called “bad cops” would more effectively and quickly meet the goal of improving law enforcement by avoiding the recycling of such cops among law enforcement departments; and

**WHEREAS**, notwithstanding the evidence presented to it and the consequences of a new cause of action, the Commission voted before the close of public comment to recommend that the Legislature create a new State law cause of action for violations of the New Mexico Constitution that:

- WOULD include attorney fees for prevailing plaintiffs on top of compensatory damages. Fees for plaintiff’s attorneys – many of whom charge in excess of \$450 per hour – often exceed the amount of damages awarded to plaintiffs;
- WOULD require public employers to indemnify public employees for claims brought under the recommended cause of action. This means that the public entity would pay for the costs of defense and any settlement or judgment; and
- WOULD NOT include qualified immunity as a defense, which means that officials can be second-guessed in hindsight for making judgment calls in unsettled areas of the law.

**NOW, THEREFORE, BE IT RESOLVED** by the Board of County Commissioners of Roosevelt County, New Mexico, that:

1. Roosevelt County opposes the recommendations of the Commission or broader legislation pursued by individual legislators, which:
  - a. are unnecessary for victims of State constitutional violations by law enforcement (including detention officers) to be compensated;
  - b. will not address at all the root cause of many claims against local governments: namely, the lack of State resources to treat substance abuse and mental health disorders in non-penal settings;
  - c. will be ineffective at driving reform or otherwise improving services, since they will divert resources from law enforcement and detention officer recruitment, retention, and training and other critical services to claims; and
  - d. will further dry up the insurance market, requiring local governments to self-insure more and more risk and creating the real possibility that property taxes will need to be imposed to meet uninsured judgments.
  
2. Roosevelt County urges the New Mexico Legislature to instead provide more resources for:
  - a. law enforcement and jail operations;
  - b. the treatment of people suffering from substance abuse and/or mental health disorders, which would minimize their interactions with police officers and keep them out of county jails; and
  - c. more resources to the New Mexico Law Enforcement Academy to train and investigate law enforcement officers, including independent, elected County sheriffs.

**PASSED, APPROVED, and ADOPTED** this 9th day of November, 2020.

**BODY OF COUNTY COMMISSIONERS  
ROOSEVELT COUNTY, NEW MEXICO**

ATTEST:

  
\_\_\_\_\_  
Nath Baca, Deputy County Clerk

Telephonically approved  
Matthew Hunton, Chairman – District II  
Voted:  Yes    No    Abstained

Telephonically approved  
Tina Dixon, Vice Chair – District IV  
Voted:  Yes    No    Abstained

Telephonically approved  
Dennis Lopez – District I  
Voted:  Yes    No    Abstained

Telephonically approved  
Lewis (Shane) Lee – District III  
Voted:  Yes    No    Abstained

Telephonically approved  
Paul Grider – District V  
Voted:  Yes    No    Abstained





**Jack L. Fortner**  
Chairman

**Jim Crowley**  
Chairman Pro-Tem

**GloJean Todacheene**  
Member

**Michael Sullivan**  
Member

**John T. Beckstead**  
Member



**Mike Stark**  
County Manager

**Jim Cox**  
Deputy County Manager

100 South Oliver Drive  
Aztec, New Mexico 87410  
Phone: (505) 334-4271 Fax: (505) 334-3168  
[www.SJCounty.net](http://www.SJCounty.net)

**SAN JUAN COUNTY  
RESOLUTION NO. 20-21-25**

**RECOGNIZING THE OBJECTIONS OF THE SAN JUAN COUNTY BOARD OF  
COUNTY COMMISSIONERS TO CERTAIN PROPOSALS BEFORE THE  
NEW MEXICO CIVIL RIGHTS COMMISSION**

**WHEREAS**, the New Mexico Civil Rights Commission was established by the New Mexico Legislature in response to certain high-profile civil rights violations in other states; and

**WHEREAS**, among the proposals presented to the New Mexico Civil Rights Commission is the establishment of a new state law cause of action which would be filed in state court and would not be subject to removal to federal court; and

**WHEREAS**, among the proposals presented are the elimination of the defense of qualified immunity to governmental employees and entities against whom claims are made; and

**WHEREAS**, based upon the research presented by New Mexico Counties and others, only a small percentage of civil rights claims are actually dismissed as a result of the application of the defense of qualified immunity; and

**WHEREAS**, local governmental entities primarily provide law enforcement and detention services to its local citizens and are already responsible for claims of civil rights violations made against those entities; and

**WHEREAS**, at least one neighboring state has also proposed to establish a \$25,000 personal liability on any officer or employee found liable for violation of civil rights; and

**WHEREAS**, this imposition of personal, non-indemnified liability will have a chilling effect on the abilities of New Mexico law enforcement and detention facilities to hire law enforcement officers and detention officers; and

**WHEREAS**, all brokers and insurers who have appeared before the Commission, as well as brokers and insurance carriers working with San Juan County, have indicated that such a change would likely result in a premium increase which, until the terms of the legislation are finalized, cannot be quantified; and

**WHEREAS**, these increases could cripple smaller entities in their ability to provide services to their residents and might result in tax increases on everyone; and

**WHEREAS**, the jurisprudence developed by the federal courts for violation of federal civil rights is well established while the proposals could result in a total reset of state civil rights jurisprudence.

**NOW, THEREFORE, BE IT RESOLVED** by the Board of County Commissioners of San Juan County, New Mexico, that:

1. San Juan County opposes any effort to expand state court jurisdiction for civil rights violations. Such expansion serves no purpose other than to create the potential for inconsistent results thereby making it more difficult for law enforcement officers to know if actions are permissible or impermissible and will result in increased costs.
2. San Juan County opposes the suggestion that the defense of qualified immunity should not apply to any civil rights action brought in state court.
3. San Juan County opposes any effort to impose additional personal liability on individual government officials or employees, as such conduct would likely have a chilling effect on all governmental entities to recruit, hire, and maintain critical public safety and other employees.

**PASSED, APPROVED AND ADOPTED** this 20th day of October, 2020.

**BOARD OF COUNTY COMMISSIONERS  
OF SAN JUAN COUNTY, NEW MEXICO**

By: \_\_\_\_\_

*Jack L. Fortner*  
Jack L. Fortner, Chairman



*Tanya Shelby*  
Tanya Shelby, County Clerk



**SOCORRO COUNTY  
BOARD OF COUNTY COMMISSIONERS  
RESOLUTION № 2020-60**

**OPPOSING CERTAIN PROPOSALS BEFORE THE NEW MEXICO CIVIL RIGHTS  
COMMISSION AND REQUESTING THAT ANY LEGISLATOR WHO WILL PROFIT FROM  
THE LEGISLATION RECUSE THEMSELVES FROM THE VOTE**

**WHEREAS**, the Socorro County Commission met in a special meeting on February 10, 2020 at 10:00 AM in the Socorro County Annex Building, 198 Neel Ave., Socorro, New Mexico 87801; and,

**WHEREAS**, NMSA 1978, Section 4-37-1 (1995) provides that Counties have the power to, “provide for the safety, preserve the health, promote the prosperity and improve the morals, order, comfort and convenience of any county or its inhabitants”; and,

**WHEREAS**, NMSA, 1978, Section 4-38-18 (1976) provides that a Board of County Commissioner has the duty and authority “[t]o represent the county;” and,

**WHEREAS**, the New Mexico Civil Rights Commission was established by the New Mexico Legislature in response to certain high-profile civil rights violations in other states in a hastily called legislative session, not open to the public, called for the limited purposes of addressing the COVID-19 pandemic ; and

**WHEREAS**, among the proposals presented to the New Mexico Civil Rights Commission is the establishment of a new state law cause of action which would be filed in state court and would not be subject to removal to federal court; and

**WHEREAS**, among the proposals presented are the elimination of the defense of qualified immunity to governmental employees and entities against whom claims are made; and

**WHEREAS**, based upon the research presented by New Mexico Counties and others, only a small percentage of civil rights claims are actually dismissed as a result of the application of the defense of qualified immunity; and.

**WHEREAS**, local governmental entities primarily provide law enforcement and detention services to its local citizens and are already responsible for claims of civil rights violations made against those entities; and.

**WHEREAS**, at least one neighboring state has also proposed to establish a \$25,000 personal liability on any officer or employee found liable for violation of civil rights; and,

**WHEREAS**, this imposition of personal, non-indemnified liability will have a chilling effect on the abilities of New Mexico law enforcement and detention facilities to hire law enforcement officers and detention officers; and,

**WHEREAS**, all brokers and insurers who have appeared before the Commission, as well as brokers and insurance carriers working with Socorro County, have indicated that such a change would likely result in a premium increase which, until the terms of the legislation are finalized, cannot be quantified; and,

**WHEREAS**, these increases could cripple smaller entities in their ability to provide services to their residents and might result in tax increases on everyone; and,

**WHEREAS**, the jurisprudence developed by the federal courts for violation of federal civil rights is well established while the proposals could result in a total reset of state civil rights jurisprudence; and,

**WHEREAS**, the proposed legislation will be a windfall for insurance brokers and plaintiff's attorneys, including 19 legislators, that may benefit from insurance sales or attorneys that may benefit from the legislative proposal to have their fees paid by the taxpayers; and,

**WHEREAS**, the Government Conduct Act disqualifies public officers from engaging in official acts that affect their financial interests, *see* NMSA 1978, Section 10-16-4 (2011); and,

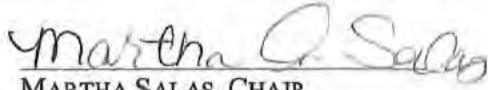
**NOW, THEREFORE, BE IT RESOLVED** by the Board of County Commissioners of Socorro County, New Mexico, that:


1. Socorro County opposes any effort to expand state court jurisdiction for civil rights violations. Such expansion serves no purpose other than to create the potential for inconsistent results thereby making it more difficult for law enforcement officers to know if actions are permissible or impermissible and will result in increased costs.
2. Socorro County opposes the suggestion that the defense of qualified immunity should not apply to any civil rights action brought in state court.
3. Socorro County opposes any effort to impose additional personal liability on individual government officials or employees, as such conduct would likely have a chilling effect on all governmental entities to recruit, hire, and maintain critical public safety and other employees.
4. Socorro County demands that any legislator who will financially benefit from the qualified immunity proposal recuse themselves from the vote or that insurance broker or attorney members of the legislature pledge neither they nor their firm(s) will ever sell

insurance policies to cover the liability created or accept attorney fees required to be paid by the legislation.

**PASSED, AND APPROVED AND ADOPTED THIS 27<sup>th</sup> DAY OF OCTOBER 2020.**

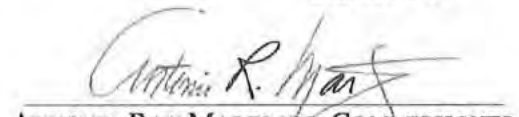
**BOARD OF COUNTY COMMISSIONERS**

  
MARTHA SALAS, CHAIR  
DISTRICT II

  
MANUEL E. ANAYA, VICE CHAIR  
DISTRICT III

  
JOE GONZALES, COMMISSIONER  
DISTRICT I

  
GLEN DUGGINS, COMMISSIONER  
DISTRICT IV

  
ANTONIO RAY MARTINEZ, COMMISSIONER  
DISTRICT V

ATTEST BY:  
  
BETTY SAAVEDRA, COUNTY CLERK





**VALENCIA COUNTY  
BOARD OF COUNTY COMMISSIONERS  
RESOLUTION Nº 2020- 062**

**OPPOSING CERTAIN PROPOSALS BEFORE THE NEW MEXICO CIVIL RIGHTS  
COMMISSION AND REQUESTING THAT ANY LEGISLATOR WHO WILL PROFIT FROM  
THE LEGISLATION RECUSE THEMSELVES FROM THE VOTE**

**WHEREAS**, the Board of County Commissioners met at a duly noticed and advertised meeting on November 4, 2020 at 5:00 PM in the Valencia County Administration Building located at 444 Luna Avenue, Los Lunas, New Mexico 87031; and,

**WHEREAS**, NMSA 1978, Section 4-37-1 (1995) provides that Counties have the power to, “provide for the safety, preserve the health, promote the prosperity and improve the morals, order, comfort and convenience of any county or its inhabitants”; and,

**WHEREAS**, NMSA, 1978, Section 4-38-18 (1976) provides that a Board of County Commissioner has the duty and authority “[t]o represent the county;” and,

**WHEREAS**, the New Mexico Civil Rights Commission was established by the New Mexico Legislature in response to certain high-profile civil rights violations in other states in a hastily called legislative session, not open to the public, called for the limited purposes of addressing the COVID-19 pandemic ; and

**WHEREAS**, among the proposals presented to the New Mexico Civil Rights Commission is the establishment of a new state law cause of action which would be filed in state court and would not be subject to removal to federal court; and

**WHEREAS**, among the proposals presented are the elimination of the defense of qualified immunity to governmental employees and entities against whom claims are made; and

**WHEREAS**, based upon the research presented by New Mexico Counties and others, only a small percentage of civil rights claims are actually dismissed as a result of the application of the defense of qualified immunity; and.

**WHEREAS**, local governmental entities primarily provide law enforcement and detention services to its local citizens and are already responsible for claims of civil rights violations made against those entities; and.

**WHEREAS**, at least one neighboring state has also proposed to establish a \$25,000 personal liability on any officer or employee found liable for violation of civil rights; and.

**WHEREAS**, this imposition of personal, non-indemnified liability will have a chilling effect on the abilities of New Mexico law enforcement and detention facilities to hire law enforcement officers and detention officers; and.

**WHEREAS**, all brokers and insurers who have appeared before the Commission, as well as brokers and insurance carriers working with Valencia County, have indicated that such a change would likely result in loss of reinsurance for counties who are members of the New Mexico County Insurance Authority pool.

**WHEREAS**, loss of reinsurance would immediately reduce the amount of coverage available to pay law enforcement claims against county defendants in the pool; and,

**WHEREAS**, the loss of coverage could financially cripple Valencia County and result in a reduction of essential services and/or property tax assessments in the event that there is a judgment that exceed the reduced coverage amount; and,

**WHEREAS**, the proposed legislation will be a windfall for insurance brokers and plaintiff's attorneys, including 19 legislators, that may benefit from insurance sales or attorneys that may benefit from the legislative proposal to have their fees paid by the taxpayers; and,

**WHEREAS**, the Government Conduct Act disqualifies public officers from engaging in official acts the affect their financial interests, *see* NMSA 1978, Section 10-16-4 (2011); and,

**NOW, THEREFORE, BE IT RESOLVED** by the Board of County Commissioners of Valencia County, New Mexico, that:

1. Valencia County opposes any effort to expand state court jurisdiction for civil rights violations. Such expansion serves no purpose other than to create the potential for inconsistent results thereby making it more difficult for law enforcement officers to know if actions are permissible or impermissible and will result in increased costs.
2. Valencia County opposes the suggestion that the defense of qualified immunity should not apply to any civil rights action brought in state court.
3. Valencia County opposes any effort to impose additional personal liability on individual government officials or employees, as such conduct would likely have a chilling effect on all governmental entities to recruit, hire, and maintain critical public safety and other employees.
4. Valencia County demands that any legislator who will financially benefit from the qualified immunity proposal recuse themselves from the vote or that insurance broker or attorney members of the legislature pledge neither they nor their firm(s) will ever sell

insurance policies to cover the liability created or accept attorney fees required to be paid by the legislation.

**BOARD OF COUNTY COMMISSIONERS**

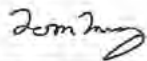
**PASSED, AND APPROVED AND ADOPTED THIS 4<sup>th</sup> DAY OF NOVEMBER 2020.**



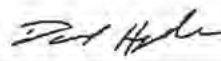
Jhonathan Aragon  
Chair, District V



Gerard Saiz  
Vice-Chair, District I



Tom Mraz  
Commissioner, District II



David A. Hyder  
Commissioner, District III

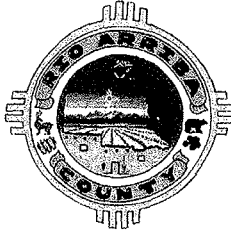
Charles D. Eaton  
Commissioner, District IV

Attest:



Peggy Carabajal, County Clerk





**Rio Arriba  
Board of County Commissioners**

**COMMISSIONERS**

**Leo V. Jaramillo  
Chairman  
District II**

**Danny J. Garcia  
District III**

**James J. Martinez  
District I**

**COUNTY MANAGER**

**Tomas Campos III**

**DEPUTY COUNTY  
MANAGER**

**Leo R. Márquez**

Doc Id: 2021-033 Debbie  
Meeting Date: 11/10/2020  
Receipt #: 57856 Page 1 of 4 Doc Code: RES  
Linda J. Padilla County Clerk & Recorder Rio Arriba, New Mexico

**Resolution No. 2021-033**

**A RESOLUTION  
OPPOSING THE RECOMMENDATIONS OF THE NEW MEXICO CIVIL  
RIGHTS COMMISSION AND URGING THE LEGISLATURE TO  
PROVIDE MORE RESOURCES TO ADDRESS ROOT CAUSES OF CIVIL  
RIGHTS CLAIMS AGAINST LOCAL GOVERNMENTS**

**WHEREAS**, in Laws 2020, 1<sup>st</sup> Special Session, Chapter 1 (HB 5) and in response to certain high-profile civil rights violations in other states, the New Mexico Legislature created the New Mexico Civil Rights Commission (Commission) to “develop policy proposals for laws for the creation of a civil right of action for the deprivation, by a public body or a person acting on behalf of or under the authority of a public body, of any right, privilege or immunity secured by the Constitution of New Mexico”; and

**WHEREAS**, the Commission’s makeup and work call into question whether it was duly presented with or considered all relevant points of view; and

**WHEREAS**, most of the five civil attorneys who were appointed to the Commission (excluding retired and sitting judges) are or were lawyers who represent plaintiffs; and

**WHEREAS**, legal staff hired by the Commission to conduct research and draft its recommendations, is an attorney who specializes in advocating for plaintiffs in civil rights, policy misconduct, prisoner rights, and personal injury cases; and

**WHEREAS**, the Commission did not hear balanced presentations from individuals with varying positions on the merits of critical legal issues before the Commission; and

*P.O. Box 158 \* Tierra Amarilla, New Mexico 87575 \* Phone (575) 588-7724 \* Fax (575) 588-7814  
Espanola Annex \* 1122 Industrial Park Road \* Espanola, New Mexico 87532 \* Phone (505) 753-1780 \* Fax  
(505) 753-1258*

**WHEREAS**, the Commission invited public comment through October 31, 2020, but then inexplicably voted on the questions posed to it in HB 5 on October 23, 2020, before the close of the public comment period it created and before receiving insightful comments from several governmental entities; and

**WHEREAS**, a new cause of action is not necessary to address New Mexico constitutional deprivations by law enforcement, since the New Mexico Tort Claims Act already waives immunity for such claims and qualified immunity is not a defense to such claims (NMSA 1978, §41-4-12); and

**WHEREAS**, research by New Mexico Counties presented to the Commission demonstrated that New Mexico – one of the poorest states in the Union – already allows for some of the highest damage awards in the Country for State law claims against law enforcement officers; and

**WHEREAS**, New Mexico Counties and other governmental entities also demonstrated that a new cause of action would cause reinsurance and other insurance coverage to no longer be available to the New Mexico County Insurance Authority and/or local governments; and

**WHEREAS**, the unavailability of commercially reasonable insurance will cause local governments to self-insure unsustainable amounts of risk, which will divert scarce resources from the very services that proponents of the new cause of action are trying to improve to individual claimants and their attorneys; and

**WHEREAS**, uninsured judgments that cannot be satisfied through existing resources are paid by our citizens, through property taxes levied to meet the judgment (N.M. Const., art. 8, Section 7); and

**WHEREAS**, many of the challenges faced by local law enforcement and county jails stem from co-occurring substance abuse and mental health disorders in the population with which they interact; and

**WHEREAS**, instead of diverting resources to individual claims, the Legislature should be providing more resources to serve this population, which would minimize their interactions with police officers and keep them out of county jails; and

**WHEREAS**, information presented to the Commission demonstrated that the New Mexico Law Enforcement Academy needs additional resources to timely discharge its goal of investigating law enforcement officers accused of misconduct; and

**WHEREAS**, timely removing the certification of so-called “bad cops” would more effectively and quickly meet the goal of improving law enforcement by avoiding the recycling of such cops among law enforcement departments; and

**WHEREAS**, notwithstanding the evidence presented to it and the consequences of a new cause of action, the Commission voted before the close of public comment to recommend that the Legislature create a new State law cause of action for violations of the New Mexico Constitution that:

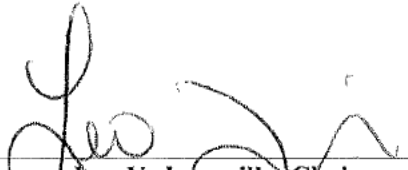
1. WOULD include attorney fees for prevailing plaintiffs on top of compensatory damages. Fees for plaintiff's attorneys – many of whom charge in excess of \$450 per hour – often exceed the amount of damages awarded to plaintiffs;
2. WOULD require public employers to indemnify public employees for claims brought under the recommended cause of action. This means that the public entity would pay for the costs of defense and any settlement or judgment; and
3. WOULD NOT include qualified immunity as a defense, which means that officials can be second-guessed in hindsight for making judgment calls in unsettled areas of the law.

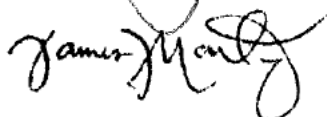
**NOW, THEREFORE, BE IT RESOLVED** by the Board of County Commissioners of Rio Arriba County, New Mexico, that:

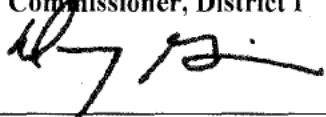
1. Rio Arriba County opposes the recommendations of the Commission or broader legislation pursued by individual legislators, which:
  - a. are unnecessary for victims of State constitutional violations by law enforcement (including detention officers) to be compensated;
  - b. will not address at all the root cause of many claims against local governments: namely, the lack of State resources to treat substance abuse and mental health disorders in non-penal settings;
  - c. will be ineffective at driving reform or otherwise improving services, since they will divert resources from law enforcement and detention officer recruitment, retention, and training and other critical services to claims; and
  - d. will further dry up the insurance market, requiring local governments to self-insure more and more risk and creating the real possibility that property taxes will need to be imposed to meet uninsured judgments.
2. Rio Arriba County urges the New Mexico Legislature to instead provide more resources for:
  - a. law enforcement and jail operations;
  - b. the treatment of people suffering from substance abuse and/or mental health disorders, which would minimize their interactions with police officers and keep them out of county jails; and
  - c. more resources to the New Mexico Law Enforcement Academy to train and investigate law enforcement officers, including independent, elected County sheriffs.

SIGNED, ADOPTED AND APPROVED THIS 10<sup>th</sup> DAY OF NOVEMBER, 2020.

**BOARD OF COUNTY COMMISSIONERS  
RIO ARRIBA COUNTY, NEW MEXICO**

  
\_\_\_\_\_  
Leo V. Jaramillo, Chairman  
Commissioner, District II

  
\_\_\_\_\_  
James J. Martinez  
Commissioner, District I

  
\_\_\_\_\_  
Danny J. Garcia  
Commissioner, District III

ATTEST:   
\_\_\_\_\_  
Linda J. Padilla, Rio Arriba County Clerk



Doc Id: 2021-033 Debbie  
Meeting Date: 11/10/2020  
Receipt #: 57856 Page 4 of 4 Doc Code: RES  
Linda J. Padilla County Clerk & Recorder Rio Arriba, New Mexico

**RECOGNIZING THE OBJECTIONS OF THE NEW MEXICO SHERIFFS'  
ASSOCIATION AND NEW MEXICO ASSOCIATION OF POLICE CHIEFS  
TO CERTAIN PROPOSALS BEFORE THE  
NEW MEXICO CIVIL RIGHTS COMMISSION**

**WHEREAS**, the New Mexico Civil Rights Commission was established by the New Mexico Legislature in response to certain high-profile civil rights violations in other states; and

**WHEREAS**, among the proposals presented to the New Mexico Civil Rights Commission is the establishment of a new state law cause of action which would be filed in state court and would not be subject to removal to federal court; and

**WHEREAS**, among the proposals presented are the elimination of the defense of qualified immunity to governmental employees and entities against whom claims are made; and

**WHEREAS**, based upon the research presented by New Mexico Counties and others, only a small percentage of civil rights claims are actually dismissed as a result of the application of the defense of qualified immunity; and

**WHEREAS**, local governmental entities primarily provide law enforcement and detention services to its local citizens and are already responsible for claims of civil rights violations made against those entities; and

**WHEREAS**, at least one neighboring state has also proposed to establish a \$25,000 personal liability on any officer or employee found liable for violation of civil rights; and

**WHEREAS**, this imposition of personal, non-indemnified liability will have a chilling effect on the abilities of New Mexico law enforcement and detention facilities to hire law enforcement officers and detention officers; and

**WHEREAS**, all brokers and insurers who have appeared before the Commission, as well as brokers and insurance carriers working with San Juan County, have indicated that such a change would likely result in a premium increase which, until the terms of the legislation are finalized, cannot be quantified; and

**WHEREAS**, these increases could cripple smaller entities in their ability to provide services to their residents and might result in tax increases on everyone; and

**WHEREAS**, the jurisprudence developed by the federal courts for violation of federal civil rights is well established while the proposals could result in a total reset of state civil rights jurisprudence.

**NOW, THEREFORE, BE IT RESOLVED** by the Board of the New Mexico Sheriffs' Association and Board of the New Mexico Association of Police Chiefs, that:

1. New Mexico Sheriffs' Association and New Mexico Association of Police Chiefs oppose any effort to expand state court jurisdiction for civil rights violations. Such expansion serves no purpose other than to create the potential for inconsistent results thereby making it more difficult for law enforcement officers to know if actions are permissible or impermissible and will result in increased costs.
2. New Mexico Sheriffs' Association and New Mexico Association of Police Chiefs opposes the suggestion that the defense of qualified immunity should not apply to any civil rights action brought in state court.
3. New Mexico Sheriffs' Association and New Mexico Association of Police Chiefs opposes any effort to impose additional personal liability on individual government officials or employees, as such conduct would likely have a chilling effect on all governmental entities to recruit, hire, and maintain critical public safety and other employees.

**PASSED and APPROVED** this 21th day of October, 2020.

<b>New</b>	<b>Mexico</b>	<b>Sheriffs'</b>	<b>Association</b>
<b>New Mexico Association of Police Chiefs</b>			
By: _____	By: _____		
President Tony Mace	President Steve Hebbe		



October 20, 2020

Dear Justice Bosson and Members of the Commission:

Thank you for the opportunity to present information regarding the consequences of enacting a new civil rights cause of action under state law. As noted by the Governor, this Commission was created “in light of an ongoing national reckoning on unnecessary excessive force by police officers,...” See <https://www.governor.state.nm.us/2020/06/26/governor-establishes-civil-rights-commission-signs-election-protections-solvency-measures-into-law/>. Creation of a new cause of action to address claims against law enforcement under the New Mexico constitutional violations is neither necessary nor productive:

- A recently expanded State law cause of action already exists to remedy New Mexico Constitutional violations by law enforcement officers.
- The State, counties, municipalities, and the public schools are struggling to balance budgets in light of the pandemic and the reduction of oil and gas revenues, and creation of a new cause of action will put an enormous strain on already dwindling revenues, resulting in the substantial reduction of essential services (a preliminary analysis indicates that the annual cost to counties to pay for judgments, settlements, and attorney fees would increase from 50 to 75% annually even if no new claims are filed).
- An expanded state law cause of action for state constitutional violations without caps, with punitive damages, and with fee-shifting provisions will **eliminate** reinsurance and umbrella coverage for New Mexico counties, thereby decreasing the resources available for claims.
- The resulting void will be filled by taxpayers, who will either:
  - Suffer from reduced governmental services as existing tax dollars are syphoned off for attorney fees, settlements, and judgments; and/or
  - Pay higher property taxes to fund uninsured judgments.

### **State Law Already Provides a Cause of Action for New Mexicans to Sue Law Enforcement for Violations of their State Constitutional Rights**

Section 41-4-12 of the New Mexico Tort Claims Act waives immunity for claims against the state, counties, and cities for injuries caused by law enforcement officers, including those arising from “deprivation of any rights, privileges or immunities secured by the **constitution and laws** of the United States **or New Mexico** when caused by law enforcement officers while acting within the scope of their duties.” NMSA 1978, Section 41-4-12 (2020) (emphasis added). Just this year, the Legislature twice amended this section of law (SB5 2020 and SB8 2020 special) to expand both the scope of the waiver and the definition of “law enforcement officer” beyond traditional police officers and detention officers. The definition now includes any number of public officials who have the “power to maintain order”. While the extent to which these amendments have expanded governmental liability is still unfolding, it is undeniable that an

individual can sue for violations of their state constitutional rights in state court under this waiver and **the defense of qualified immunity cannot be raised in response to such claims.**

County jailers have been subject to suit as law enforcement officers since 1985. *See* NMSA 1978 § 33-3-28 (1985). Recent amendments to Section 41-4-12 made state correctional officers law enforcement officers under the Act.

Although federal claims have no cap, it is noteworthy that New Mexico's existing tort claims caps are higher than the majority of other states. The areas in which an individual can sue government in New Mexico are also broader than most other states—including those states with comparable caps.

### **Creating a New Cause of Action Will Have an Immediate Detrimental Effect on Counties' Abilities to Obtain Reinsurance and Umbrella Coverage**

The New Mexico County Insurance Authority (NMCIA) provides liability insurance for 29 of the 33 counties in New Mexico. Currently, NMCIA carries a \$2 million self-insurance retention and purchases an additional \$3 million in reinsurance (four class A counties purchase an additional \$5 million in umbrella coverage and 12 county detention facilities do not qualify for any reinsurance). We are in an extremely hard insurance market and our reinsurer has informed us they will no longer provide law enforcement coverage if a new civil rights law expanding remedies in state court is enacted. The immediate effect of losing reinsurance and umbrella coverage will be to reduce available coverage for NMCIA covered counties to the \$2 million dollar SIR<sup>1</sup>. This will greatly reduce funds available to pay claims and require counties to cut their budgets, transfer assets, and/or assess property taxpayers to pay claims that exceed this amount.

### **Creation of a New Cause of Action Will Not Hold Individual Officers Accountable**

Section 41-4-4 of the New Mexico Tort Claims Act provides that all attorney fees, costs of defense and damages incurred by individual public employees must be paid by the governmental entity. Thus, it is the taxpayer who pays all damages including punitive damages intended to punish an individual officer for bad acts.

### **Qualified Immunity is a Narrow Defense that can only be raised by Individual Defendants under Specific Circumstances.**

The legal doctrine of qualified immunity is not applicable to any action in state court. It can only be raised in federal court by individually named defendants and, in New Mexico, it seldom results in dismissal of entire cases. The vast majority of cases continue under state and/or federal law because qualified immunity is not a defense to county or municipal liability. However, it is a critical defense under federal law that allows for dismissal of claims where the constitution was not violated or the public official lacked notice that his or her conduct was unconstitutional.

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<sup>1</sup> The \$2 million SIR is based upon the current reinsurance structure which expires 12-31-20 and may change upon renewal.



## **Attorney Fees Are Already Excessive and Adding Attorney Fees to a New Cause of Action Will Drive the Litigation, Discourage Efficiency, and Unreasonably Increase Costs**

We calculate that NMCIA paid over \$37 million dollars to attorneys for defense and prosecution of county employment and law enforcement civil rights cases for the five-year period 2012-2017. This represents only a small fraction of the fees paid by cities, schools, the state, and non-member counties for civil rights cases during the same period. We anticipate that the amount paid to attorneys will substantially increase if a new state cause of action is enacted. New Mexico attorneys who are awarded attorney fees by the federal court on top of the amounts obtained for their clients are typically compensated at rates of \$350-\$450 per hour. And, as evidenced by the volume of attorney advertising for contingency fee cases, attorneys do not need additional financial incentive to take state cases against government.

### **Governmental Immunity Serves an Essential Policy Purpose**

Unlike private businesses, government cannot choose its areas of interaction with the public:

[T]he legislature recognizes that while a private party may readily be held liable for his torts within the chosen ambit of his activity, the area within which the government has the power to act for the public good is almost without limit, and therefore government should not have the duty to do everything that might be done...

NMSA § 41-4-2. Unlike private industry, government cannot simply choose to cease providing services such as detention or law enforcement because they are fertile grounds for litigation. Regardless of the risk involved, government exists to provide essential services and, therefore, the limited immunity and caps provided in the New Mexico Tort Claims Act are necessary to preserve solvency of government making it possible to invest in training and other loss prevention strategies. A single run-away verdict could devastate most, if not all, county and municipal budgets, and could have a devastated impact on the state budget as well.

### **There are Far More Effective Ways to Create Law Enforcement Accountability**

Creation of a sweeping new cause of action with uncapped compensatory damages, punitive damages, and attorney fees has been billed as a method for creating accountability and forging change. The cost will fall to the taxpayer in the form of increased taxes and reduced services. Addressing training and accountability deficiencies in the Law Enforcement Academy, bolstering management's authority to investigate and discipline law enforcement officers who have engaged in misconduct, and examining law enforcement policies, would be far more effective and less costly. Using additional tax dollars for claims means less money for essential services and for recruiting, training, and retaining high quality police officers.

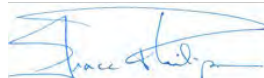
### **Conclusion**

The Commission should recommend that no additional expansion of governmental liability be advanced at this time. Instead, it should encourage legislation that would increase accountability

by enhancing the Law Enforcement Academy powers to efficiently decertify, and reinforcing the authority of law enforcement management to investigate and discipline, law enforcement officers who have abused the public trust.

Sincerely,

  
Steve Kopelman  
Executive Director

  
Grace Philips  
General Counsel

Cc: HB 5 sponsors Speaker Brian Egolf and Senator Jerry Ortiz y Pino  
NMC Board of Directors  
NMCIA Board of Directors



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November 17, 2020

Dear Justice Bosson and Members of the Commission:

Thank you for the opportunity to present information regarding the insurance climate and the consequences of enacting a new civil rights cause of action under state law. We did not have an opportunity to respond to the presentation made by Maureen Sanders and, therefore, offer the follow summary of points:

- It is uncontroverted that, if the civil rights bill is approved by the legislature as recommended by the civil rights commission, reinsurance or excess insurance for law enforcement agencies in New Mexico will no longer be available, or will be cost prohibitive.
- The only reinsurer that will underwrite law enforcement reinsurance for New Mexico counties (currently \$3 million excess of \$2 million) has unequivocally said that such coverage will not be available if the civil rights bill is passed.
- Law enforcement reinsurance or excess insurance is very hard to obtain in New Mexico currently; it will be virtually impossible if this bill is passed.
- For New Mexico counties, if the bill is passed and reinsurance cancelled, law enforcement coverage will be significantly reduced.
- Self-insured entities, e.g., the State of New Mexico, the City of Albuquerque, will have to set aside significant dollars now to offset the potential liability. This will present an enormous problem in light of Covid-ravaged budgets as we enter a serious recession.
- In the mid-1980's, every single workers' compensation carrier pulled out of the public sector market in New Mexico because of the high liability and defective statutory scheme. This wasn't corrected until the legislature amended the law. However, this crisis precipitated the formation of self-insurance pools for New Mexico local governments. We are looking at repeating history, with no safety net.
- The suggestion that public entities could merely form one giant pool to manage the risk for all public entities is very misguided. Remember that in the 1980's and through the mid-1990's, State Risk Management did in fact manage what was at the time a statewide pool covering law enforcement violations. The State decided to cease covering counties because of the excessive liability and how fiscally unsound it was, and gave local governments six months to obtain alternate coverage.
- All it will take is one runaway jury award (see New Mexico Counties' presentation slide number 17 which highlights jury awards in state courts) for a public entity to be forced to assess a special tax assessment to pay for the award.
- The largest jury awards are in the First Judicial District in Santa Fe, where all the lawsuits against the State of New Mexico will be filed.
- Because of the risk of attorney fees being assessed, and the difficulty of getting state courts to grant dispositive motions, having the new cause of action will dramatically drive up the settlement value of cases for public entities.

- Remember: every additional dollar to pay attorneys' fees or settlements for this dramatically expanded liability is one less dollar that otherwise goes for essential governmental services. Plaintiffs already are compensated adequately in New Mexico, and we currently are one of the most generous venues for plaintiffs in the U.S. In addition, New Mexico is one of the poorest states in the country. Opening the door to enormous judgments and settlements against public entities seems short sighted and very dangerous, especially at this time.

Sincerely,



Steve Kopelman  
Executive Director

Cc: HB 5 sponsors Speaker Brian Egolf and Senator Jerry Ortiz y Pino  
NMC Board of Directors  
NMCIA Board of Directors

## NEW MEXICO MUNICIPAL LEAGUE



**AJ Forte**  
Executive Director



1229 Paseo de Peralta  
Santa Fe, NM 87501

Date: November 2, 2020  
From: AJ Forte, *Executive Director*, New Mexico Municipal League  
To: Justice Bosson, New Mexico Civil Rights Commission  
Re: Supplemental Information

Dear Justice Bosson:

The New Mexico Municipal League ("League") writes this letter as a supplement to the comments it made orally at the New Mexico Civil Rights Commission's ("Commission") October 2, 2020 meeting.

The League is opposed to several changes considered by the Commission, such as a new state law civil rights cause of action without qualified immunity, and any and all capless or cap-increase measures, because they are unlikely to improve policing in the way the Commission's creators intended.

In fact, the specific solutions above are more likely to aggravate the very real problems they purport to solve.

### OVERALL CONCERNS

1. *More litigation is no way to correct bad behavior.* Excluding protections such as qualified immunity from actors that operate reasonably but mistakenly, i.e., without notice of unconstitutionality, is ill-conceived.
2. *Holistic risk management cannot exclude accountability.* Forcing insurers to be more reactive because of a hopeful deterrent effect on front-end behavior is inapposite.
3. *The last thing taxpayers need is another cost.* Increasing statutory caps on certain claims, or creating new cause(s) of action with no caps at all, will only force insurers to raise premiums and municipalities to shift money from essential services to pay judgments and settlements.

### DISCUSSION

#### *Qualified Immunity.*

Qualified immunity is intended to protect reasonable behavior in areas where no clear guidance for that behavior exists. In theory, police officers need the ability to operate using their best judgment, and qualified immunity allows for such an approach. Opponents argue that, in practice, the tool protects too many bad actors, and is so insignificant that it will not be missed when gone<sup>1</sup>.

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<sup>1</sup> <https://secure.gsd.state.nm.us/VideoTube/Modules/Video/Player.aspx?VideoID=0C6900CC-07C6-4256-ACB1-8A5EDAC61CF6>

Such a position is akin to claiming reasonable, mistaken behavior does not exist, or does exist but must be punished anyway. Stated more simply, opponents believe that because judges sometimes apply qualified immunity incorrectly, we should remove it from our laws entirely. Reputational harm and financial harm to the well-meaning, reasonable officer, opponents believe, is irrelevant to the task at hand.

Stripping legal protections from reasonable actors because some judges may on occasion give too much credit is a solution utterly lacking in precision, and one that punishes good behavior in order to ensure bad behavior might later meet greater consequence. Qualified immunity is an affirmative defense that will with its repeal be gone, and in its wake will be a well-meaning, reasonable officer to confront the same reputational and financial harm as the bad actor.

Moreover, pairing a removal of qualified immunity with personal liability will achieve the worst behavioral result imaginable – an exodus of good men and women from our law enforcement community to industries less punitive in nature. And for those individuals who have dreamed all their lives of the call to protect and serve, they are faced with a fresh disincentive to consider such a career path.

#### *Risk Management.*

Historically, when an insurer went to work, it simply waited until it received a claim, investigated allegations and collected facts, then placed a value on that claim that would inform its intent to settle or litigate. This traditional model is known within the industry as reactive risk management.

Within the last twenty years, insurers have shifted to an enterprise model that prioritizes working with its insured directly to produce better results for the pool. Reactive risk management became antiquated, so insurers did what they do best – found ways to better manage risk.

The League is no different – it shifted its business model to include preventive care, such as de-escalation and mental health services for its law enforcement insureds. The thought process here is straightforward: investment on the front end will save money, but it'll also save lives. Across the board, better-trained and equipped law enforcement make better decisions.

Unfortunately, the state has not partnered in that effort. Its officer decertification body, for example, has a significant backlog, which makes it difficult to remove the type of law enforcement officer who puts the public at risk.

The larger discussion here is even more striking when you consider that we already know the solutions to what ails our law enforcement community: hire the most-qualified applicants, create the best policies, provide for the best training, and hold bad actors accountable. These solutions are simply good risk management.

Changes such as a new state law civil rights cause of action without qualified immunity, and any and all capless or cap-increase measures, are silent as to *all four* of these critical needs.

Instead, House Bill 5 may actively render risk management more difficult, and such a result is certain to bring stakeholders back to the table to discuss increased payouts the legislature itself designed.

*Another Cost.*

Risk management at the state, counties, and municipalities is funded entirely by the taxpayer. Every judgment a plaintiff obtains in court, or settlement the parties agree to at mediation, and all costs to adjust and defend in between, are paid exclusively by the citizens of New Mexico.

This point alone is critical to understanding what is at stake in our discussion.

Taxpayer dollars are part of a city's budget, and comprise a set-aside premium that a city uses to insure itself from all types of risk. Premiums are created at the League, as elsewhere, by combining two different data sets – exposure and experience.

The Commission may recommend a change to the law, and whether it be a new state law civil rights cause of action, an upward increase in statutory damage caps, personal liability, or some other mixture of attorney's fees and damages, it is near-certain to mean a substantial increase in exposure.

Any increase to exposure will raise premiums, regardless of good behavior that follows. Even if cities perform no differently than they do now, premiums will increase time and again because of the additional risk the legislature may ask the taxpayers to fund.

We don't even have to see a bill to know this much: New Mexicans will be asked to shoulder another cost.

## **CONCLUSION**

Well-intentioned changes such as a new state law civil rights cause of action without qualified immunity, and any and all capless or cap-increase measures, miss the mark. As a result, the League opposes those changes in their entirety.

The League prefers partnership with the state on efforts more likely to create positive behavioral shifts, such as best practices training and education – and that door will remain open.

Further, the League stands ready to provide assistance in whatever form may be helpful to organizations such as the state's chief accountability body.

We thank the Commission for the opportunity to share our experiences and insight on this important discussion, and hope it considers making recommendations most likely to succeed.

Respectfully,

AJ Forte

## The Angel Fire Police Department

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October 30, 2020

THE CIVIL RIGHTS COMMISSION OF NEW MEXICO  
925 LUNA CIR. NW,  
ALBUQUERQUE, NM 87102  
RE: HOUSE BILL 5 / QUALIFIED IMMUNITY

Greetings.

In light of the commission exploring the possibility of suggesting legislation that could alter current protections for law enforcement officers from frivolous law suits, I would like to offer a perspective as a career law enforcement professional having 23 years of experience. Many examples of legislation passed and signed into law yielded unintended consequences that proved to have had a negative impact on the citizens. It is my strong personal opinion that the eradication of QUALIFIED IMMUNITY will be such legislation. There are already tools in place to deal with any and all peace officers who violate local, state and federal laws. If one is determined to be in violation of the statutes, they must answer to the agency they work for and very likely the criminal courts. Seeking civil remedy from guilty violators is a given however, throwing peace officers "to the wolves" who have not violated any of the statutes and have been determined to be justified in their actions shows a surrender to foolish political trends generated by the media who has most assuredly abused their first amendment privileges.

Historically speaking, a vast majority of suits filed are settled out of court for money to make the suit go away in an effort to protect municipalities as much as possible. These settlements do not produce any viable solutions for improvement of standards for law enforcement agencies nor do they hold the plaintiff accountable for their actions that lead to their encounter with law enforcement. Therefore, I am encouraging the examination of the state's current tort process and have it corrected for the protection of all involved.

I would like to argue that peace officers are held to a much higher standard than our average citizens. This higher standard we hold to is in our chosen profession and in our personal lives as well. It is readily agreed upon that an incredible amount of officer to citizen interactions go without a major incident. Therefore, the discussion of such legislation gives the appearance that this is just another "knee-jerk" reaction.

Considering that the eradication or alteration of QUALIFIED IMMUNITY is being discussed has caused me to perceive that the State of New Mexico's current leadership is becoming "anti-cop" like other states and municipalities controlled by the left. **I truly fear that removing this line of defense from our peace officers will cause many to leave the state for friendlier areas. This exodus will surely lead to a rise in crime** and then once again, faulty legislation will prove to be burdensome to our citizens who will ultimately pay the price.

As the commission continue to meet and discuss this issue, I would reiterate that the unintended consequences of the removal of QUALIFIED IMMUNITY be strongly considered. It is important to note that this letter and perspective is endorsed by the chief of police, BRAD MCCASLIN.

Sincerely,

Handwritten signature of J.D. Harvey in blue ink.

**J.D. HARVEY,**  
POLICE LIEUTENANT  
THE ANGEL FIRE POLICE DEPARTMENT  
ANGEL FIRE NEW MEXICO  
JHarvey@angelfirenm.gov

Handwritten signature of Brad McCaslin in blue ink.

**BRAD MCCASLIN**  
CHIEF OF POLICE  
THE ANGEL FIRE POLICE DEPARTMENT  
ANGEL FIRE NEW MEXICO  
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Statement of Interest: Please provide your name, the city in which you reside, and contact information where Commissioners and Commission staff can contact you if they need further information. If you are submitting a response on behalf of an entity, please provide the name of the entity, whether it operates in New Mexico, the contact information of the entity, when the entity was founded and describe its membership and activities.

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Cibola County, New Mexico (Created 1981)  
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Socorro County, New Mexico (Created 1851)  
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You may use this space to provide the Commission with your comments, a short personal experience with a civil rights issue or to expand on any of the questions below. Space is limited to 3000 characters.

Our firm has had the honor and privilege of representing five (5) New Mexico Counties, some of which we have represented for over the past fifteen (15) years. I write from a place of genuine concern for balancing the interests and needs of individuals aggrieved in connection with governmental action, and the needs of the public to have its governmental entities provide essential services such as fire protection, infrastructural improvements, fair and efficient elections, fair and efficient assessment of property values, fair and efficient collection of property taxes, law enforcement and detention services, and to generally protect the health, safety and welfare of all County inhabitants. I would respectfully suggest that, just as creating additional mechanisms to sue teachers would not improve the quality of our education here in New Mexico, creating additional mechanisms to sue law enforcement officers and detention officers will not improve our law enforcement or detention operations. As with teachers, law enforcement and detention need additional resources to tackle the very substantial and difficult challenges they face throughout the State.

Question 1: The New Mexico Constitution provides rights to the people in this state, but currently there is not a statute or private right of action that allows people to recover when these rights are violated. Do you support a civil cause of action that would allow a person to bring a lawsuit to recover for violations of their rights under the New Mexico Constitution? Please explain why or why not.

Creating additional mechanisms to deplete limited public resources does not advance the interests or needs of New Mexico residents. Such additional mechanisms would place additional strain on an already broken system, and would drive yet additional governmental entities to privatize detention operations given their inability to secure insurance coverage. In the last five years, and as a result of excessive litigation and increasing premiums, as well as plant and facility limitations and the lack of access to inmate medical care, both Sierra and Cibola Counties were forced to close their detention operations. Sierra County has contracted with Luna County to house its detainees, removing Sierra County residents from the County and from their families, creating scheduling nightmares for the Courts, and exposing detention staff and detainees to harm by virtue of the additional miles that must be traveled to accommodate the detention. That is not to mention the increased strain on already limited County resources. Cibola County has contracted with CoreCivic to house its detainees, as a result of the many challenges attendant to providing medical care in a detention setting in a rural community. Valencia County now pays nearly \$1,000,000 a year for detainee medical care, which cost is driven largely by the requirement that it requires that the private provider agree to defend and indemnify the County from detainee claims regarding the provision of medical care. Rather than developing new and novel ways of depleting already limited public resources, I would respectfully suggest that it would be more advantageous to the public at large were the Commission to explore mechanisms by which the State can support and assist local public bodies in providing additional training opportunities for law enforcement, to implement a training protocol and regimen for detention staff, for auditing local law enforcement and detention operations to ensure that such operations are protecting the rights of New Mexicans, and providing the law enforcement and detention operations the necessary resources to improve their operations and to keep New Mexicans safe. I would also note that there already exists a mechanism for individuals aggrieved in connection with a deprivation of their Constitutional rights to seek redress. Section 41-4-12 contains a broad waiver of immunity for liability for personal injury, bodily injury, wrongful death or property damage resulting from a host of specific actions, including but

not limited to a failure to comply with the duties established pursuant to statute or law or any other deprivation of any rights, privileges or immunities secured by the Constitution and laws of the US or NM when caused by law enforcement officers while acting within the scope of their duties. Reducing available resources does not improve outcomes. It makes trial attorneys and insurance companies richer at the expense of the hard-working New Mexican taxpayers.

Question 2: Do you believe allowing people to bring lawsuits to recover for violations of the New Mexico Constitution would improve how Government agencies and officials operate and/or the policies and procedures they create?

Creating an additional mechanism to permit for recovery of violations of Constitutional rights would not improve how Government agencies and officials operate and/or the policies and procedures they create. Rather, such additional mechanism(s) would deplete the already limited resources government agencies have to address the many needs of their constituents. What would, however, improve how Government agencies and officials operate and/or the policies and procedures they create is (1) for the State to provide additional resources for additional training of law enforcement, (2) for the State to provide training of detention staff, (3) for the State to support the provision of medical care to our detainees, particularly in rural communities, (4) for the State to fully compensate the Counties for the detention of its probation and parole violators or, alternatively, for the State to assume all detention operations so that it might implement standardized policies and procedures across all detention centers, and (5) for the State to provide adequate support for treatment of those with drug addiction and mental health disorders. As the State has abdicated its fundamental responsibility to provide even the most basic of supports, such as training for detention officers, or to even satisfy its basic statutory commitments to compensate the Counties for the housing of State detainees, the Counties are left to utilize their very limited resources to address not only those functions I addressed above, but also to protect the Constitutional rights of its citizens. Again, taking away the limited resources of governmental entities will have the opposite of the desired effect. One need only look towards the abolition of sovereign immunity in *Hicks v. State* and the Tort Claims Act. Had subjecting the State and its political subdivisions to liability for deprivations of rights, privileges and immunities secured by the Constitution and laws of the United States or New Mexico forty-two (42) years ago addressed the violations about which we here discuss, we would not be having this discussion about creating yet additional mechanisms by which trial attorneys and insurance companies can further deplete our County's limited resources.

Question 3: If you are familiar with the doctrine of qualified immunity, do you believe qualified immunity should be a defense to a lawsuit for violations of the New Mexico Constitution?

Absolutely. It is one of the very few tools in a public agency's toolbox to protect the public purse from civil liability in a public official's performance of their discretionary duties unless a plaintiff can show the official violated clearly established statutory or constitutional rights of which a reasonable person would have known. It protects the Counties from claims against public officials who make reasonable but mistaken judgments about open legal questions, and extends to all officials but the plainly incompetent or those who knowingly violate the law. As explained by the United States Supreme Court in *Pierson v. Ray*, the doctrine was enacted with the rationale of protecting governmental entities from frivolous claims and financial liability where its public officials acted in good faith in unclear legal situations. There is no question that qualified immunity could not be submitted as a viable defense in a situation like that presented in Minneapolis by the killing of George Floyd, as it appears that the officials involved in that action violated clearly established constitutional rights of which a reasonable person would have known. Again, creating additional mechanisms to attack the public purse, and removing available defenses, does little to address the concerns regarding the protection of the civil rights of New Mexican. Rather, it taxes an already stretched system at the expense of all New Mexicans and the services upon which they rely.

Question 4: Should government actors found liable for civil rights violations be indemnified in such actions by either their government employer or its insurers?

I very much appreciate the tension between holding accountable those public officials who violate the civil rights of New Mexicans and the need for local law enforcement agencies and detention centers to recruit and retain competent and qualified individuals. Certainly, as explained above, those aggrieved in connection with a deprivation of civil rights are already entitled to seek redress and recover for such violations, and it is unlikely that low-earning detention and law enforcement personnel will be able to satisfy a judgment occasioned by virtue of a finding of such violation. I am very concerned about the County's ability to recruit and retain qualified and competent law enforcement officers were public entities precluded from indemnifying its public officials. Fundamentally, the Government has an interest to ensure that individuals are compensated for violations of their civil rights, as that protects the civil rights of all. I would suspect that, were the County to be precluded from indemnifying the actions of its public officials, a market would open for such public officials to procure their own insurance, which costs would ultimately be borne by the taxpayers of the County, whether by necessitating pay increases to cover the costs of those additional premiums or otherwise. It might generate a great soundbite for the Commission to recommend that government employers not indemnify governmental actions found liable for civil rights violations but, in reality, such a change would not result in a substantive change regarding who is ultimately paying for such coverage and, ultimately, such judgments. Additionally, such a change may further drive unnecessary settlements in what might otherwise have been a legitimately contested claim by virtue of the government actor's fear of not being indemnified by the public body, resulting in fewer resources to tackle the very problems this Commission has been established to address. Again, throwing money at trial lawyers and insurance companies does little to fix the systemic challenges we face. I recognize that it is much more difficult to develop real solutions to these problems than to pander to a push by trial attorneys to identify additional ways to line their pockets. I would respectfully suggest that this Commission has both the expertise and wisdom to identify and pursue those meaningful solutions.

Question 5: The commission has been asked to consider the potential for increased costs to government that adding a civil rights action might lead to. Please provide your thoughts on this issue.

I cannot imagine how the Commission can render a recommendation without consideration of the full scope of the implications of that recommendation. Throughout my responses, I identified the impacts such additional mechanisms for bringing claims against the Government may have on an already broken system. I urge the Commission to instead examine ways in which it might better protect the civil rights of New Mexicans by recommending that the State devote additional resources to the training of law enforcement, that the State provide training of detention staff, that the State support the provision of medical care to our detainees, particularly in rural communities, that the State fully compensate the Counties for the detention of its probation and parole violators or, alternatively, for the State to assume all detention operations so that it might implement standardized policies and procedures across all detention centers, and for the State to provide adequate support for treatment of those with drug addiction and mental health disorders. Along with these measures, I am confident that this Commission can develop a thoughtful and meaningful approach to this very serious concern. To the extent that it is within the purview of the Commission, I might also suggest that the Commission explore and propose recommendations for ethics reform, to preclude individuals from advancing and voting on legislation that would enhance their financial interests or financial position at the expense of the New Mexico taxpayers.



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Oct 9 at 12:16 PM

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Allen Davis - Eddy County Manager; Carlsbad, NM; [ardavis@co.eddy.nm.us](mailto:ardavis@co.eddy.nm.us)

You may use this space to provide the Commission with your comments, a short personal experience with a civil rights issue or to expand on any of the questions below. Space is limited to 3000 characters.

Question 1: The New Mexico Constitution provides rights to the people in this state, but currently there is not a statute or private right of action that allows people to recover when these rights are violated. Do you support a civil cause of action that would allow a person to bring a lawsuit to recover for violations of their rights under the New Mexico Constitution? Please explain why or why not.

It's my understanding that State statutes do currently provide that opportunity and capability. My concern is that at face value the changes risk the reduction to public safety, increase the exposure of tax payers and benefit litigators without resulting in the societal changes that the commission proposes.

Question 2: Do you believe allowing people to bring lawsuits to recover for violations of the New Mexico Constitution would improve how Government agencies and officials operate and/or the policies and procedures they create?

No - I think such action would have quite the opposite effect. I think that such changes would diminish the ability of local governments to provide for public safety and unnecessarily expose those local governments and their tax payers to extreme costs and excessive litigation.

Question 3: If you are familiar with the doctrine of qualified immunity, do you believe qualified immunity should be a defense to a lawsuit for violations of the New Mexico Constitution?

I think the question is over simplified and misleading (actually leading the response). I think that qualified immunity serves the purpose of protecting individuals employed by governments that act in good faith to carry out the tasks and responsibilities they've been asked to provide.

Question 4: Should government actors found liable for civil rights violations be indemnified in such actions by either their government employer or its insurers?

The phrasing of the question seems to only elicit a binary response. When in reality, the vast majority "government actors" conduct their business with best effort and a good faith approach to their responsibilities. The way the question is phrased would seem that the commission has presumed guilt until proven innocent. I would hope that's not the approach and purpose of the Commission.

Question 5: The commission has been asked to consider the potential for increased costs to government that adding a civil rights action might lead to. Please provide your thoughts on this issue.

In my opinion, from what I understand about the path currently under consideration is that local governments will be hard pressed to obtain insurance. The cost of having that insurance will be exorbitant and would be borne by the taxpayers. Again, the cost seems unwarranted when considering the likelihood of reduced public safety as a consequence of the proposed path and the limited benefactors (litigants and litigators) when compared to the broader community. Those unwarranted costs would seem better utilized in public programs rather than litigation changes.



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Oct 19 at 2:01 PM

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Amber Hamilton  
Roosevelt County  
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You may use this space to provide the Commission with your comments, a short personal experience with a civil rights issue or to expand on any of the questions below. Space is limited to 3000 characters.

I would humbly ask the Commission to slow this process down as the potential of long-lasting negative impacts for all NM taxpayers are extreme. I'm not certain of why the perception of an immediate need has been portrayed by the sponsoring trial attorney. Local governments receive countless claims from qualified attorneys and there are numerous advertisements within our communities offering legal representation. I would also implore the commission to also consider the element of jury inconsistency as there could be a disproportionate award aspect based upon geographic location and law enforcement perception within that area.

Question 1: The New Mexico Constitution provides rights to the people in this state, but currently there is not a statute or private right of action that allows people to recover when these rights are violated. Do you support a civil cause of action that would allow a person to bring a lawsuit to recover for violations of their rights under the New Mexico Constitution? Please explain why or why not.

This question is framed or posed incorrectly as there is an available remedy provided within statute to allow a person to bring such a suit. I do not support further laws as it is not necessary, warranted, or financially feasible. Please refer to Section 41-4-12 NMSA 1978 and its recent amendments.

Question 2: Do you believe allowing people to bring lawsuits to recover for violations of the New Mexico Constitution would improve how Government agencies and officials operate and/or the policies and procedures they create?

Governmental agencies operate within limited budgets and are burdened with providing numerous services through unfunded legislative mandates. Creating additional remedies would decimate these already strained budgets and could prevent governmental agencies from recruiting qualified applicants and continually training staff. Currently, within Roosevelt County, we took the initiative and worked to earn accreditation for our detention facility. This is an elective accreditation program offered to counties through New Mexico Counties and eleven counties are currently accredited or scheduled to be assessed this year for accreditation, including the largest four county facilities in the state. Roosevelt County valued this program and the principle of facility operational improvement and voluntarily elected to pursue this accreditation. This is not unique to our County, as local governments elect to pursue numerous accreditation designations.

Question 3: If you are familiar with the doctrine of qualified immunity, do you believe qualified immunity should be a defense to a lawsuit for violations of the New Mexico Constitution?

Yes, as I equate qualified immunity to that of "good faith". As a public servant, I believe most operate and protect NM residents in good faith. Qualified immunity does not prevent a person from bringing a suit, it only protects government employees acting in good faith and within the scope of their job descriptions and duties. Also, qualified immunity never protects the public entity from suits or claims, it only affords a necessary personal protection to a public servant as noted above.

Question 4: Should government actors found liable for civil rights violations be indemnified in such actions by either their government employer or its insurers?

Again, I feel this could prevent governmental agencies from recruiting and retaining qualified personnel due to the perceived threat of personal liability exposure. Why should a public servant face liability in a circumstance when they were operating in good faith and within their scope of duties?

Question 5: The commission has been asked to consider the potential for increased costs to government that adding a civil rights action might lead to. Please provide your thoughts on this issue.

I believe the potential cost and burden that would be placed upon government, and eventually all of us as taxpayers is beyond comprehension at this point. If new laws such as what is currently being discussed by this commission were adopted, government would not be able to secure reinsurance or likely insurance for the most part. Though I strongly believe our local government does an outstanding job of providing all of the numerous essential, public safety and required functions, I also fully realize things happen. As a small local government, we do not have the reserve capacity to payout multiple 6-figure and/or 7-figure claims. The financial burden would then have to be passed along to residents through new taxes and could take years to collect and payout.



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Oct 19 at 3:58 PM

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Mary Lou Kern, Colfax County Manager  
PO Box 1498  
Raton, NM 87740

You may use this space to provide the Commission with your comments, a short personal experience with a civil rights issue or to expand on any of the questions below. Space is limited to 3000 characters.

As County Manager, I deal with Civil Rights issues on a daily basis. We have both an ethnic, cultural and economic diverse County. We protect the rights of all, from the sheriff's office, commission, detention, taxes and property values. To even suggest the degree of qualified immunity that is being suggested will break the county financially with claims and increased insurance premiums. We have a hard enough time finding detention employees and law enforcement, this will make it impossible.

Question 1: The New Mexico Constitution provides rights to the people in this state, but currently there is not a statute or private right of action that allows people to recover when these rights are violated. Do you support a civil cause of action that would allow a person to bring a lawsuit to recover for violations of their rights under the New Mexico Constitution? Please explain why or why not.

The current statutes allows for it. This question is misleading and inaccurate.

Question 2: Do you believe allowing people to bring lawsuits to recover for violations of the New Mexico Constitution would improve how Government agencies and officials operate and/or the policies and procedures they create?

No

Question 3: If you are familiar with the doctrine of qualified immunity, do you believe qualified immunity should be a defense to a lawsuit for violations of the New Mexico Constitution?

If an individual is working with in the scope of their job duties, they should be protected. If they are outside of that scope, then no. Again your questions are leading.

Question 4: Should government actors found liable for civil rights violations be indemnified in such actions by either their government employer or its insurers?

Question 5: The commission has been asked to consider the potential for increased costs to government that adding a civil rights action might lead to. Please provide your thoughts on this issue.

Again, the suggested action will be very detrimental to the County both financially and on a personnel basis.



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Oct 23 at 12:22 PM

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Wayne Johnson  
County Manager  
Sandoval County, NM

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In short, this is a solution in search of a problem - the primary beneficiaries of which would not be those whose civil rights are violated but rather trial attorneys. Currently, people can recover damages under the NM Tort Claims Act which also provides reasonable limits.

Question 1: The New Mexico Constitution provides rights to the people in this state, but currently there is not a statute or private right of action that allows people to recover when these rights are violated. Do you support a civil cause of action that would allow a person to bring a lawsuit to recover for violations of their rights under the New Mexico Constitution? Please explain why or why not.

A private right of action is not necessary as NMSA 1978 § 41-4-12, as recently amended waives immunity for claims against the state, counties, and cities for injuries caused by law enforcement officers. Claims for damages can include "deprivation of any rights, privileges or immunities secured by the constitution and laws of the United States or New Mexico when caused by law enforcement officers while acting within the scope of their duties."

Complicating matters is the recent expansion of the definition of "law enforcement officer" to include any public official who has the "power to maintain order." This expansion could create a civil rights cause of action for every act of a school teacher, zoning officer, social worker, etc. Clearly, this new cause of action has the potential to wreak havoc with government entities, their finances, and the courts.

Question 2: Do you believe allowing people to bring lawsuits to recover for violations of the New Mexico Constitution would improve how Government agencies and officials operate and/or the policies and procedures they create?

No. There is little to no evidence that potential for lawsuits affects behavior. If the objective is to change the behavior of law enforcement officials, there are far better ways to do so without bankrupting the governments they work for. Better standards for training and accountability for officers who are bad actors will go much farther, much faster, if the objective is to protect the public in the first place. We need to create a system where bad apples are not passed from department to department through tighter controls on certification.

Question 3: If you are familiar with the doctrine of qualified immunity, do you believe qualified immunity should be a defense to a lawsuit for violations of the New Mexico Constitution?

I am familiar with the doctrine. It only applies to dismissing cases against individuals who work for government agencies and not the government entities themselves. Under New Mexico law, individual public officials and employees cannot be held monetarily accountable for their actions. Therefore, I do not oppose abolishing the qualified immunity defense for violations of New Mexico Constitutional claims. In the end, governmental entities are financially responsible for wrong doing by their employees and officials. Removing the qualified immunity defense for individual public servants does not change this and does little to protect the public from future offenses.

Question 4: Should government actors found liable for civil rights violations be indemnified in such actions by either their government employer or its insurers?

Section 41-4-4 of the New Mexico Tort Claims Act provides that all attorney fees, costs of defense and damages incurred by individual public employees must be paid by the governmental entity. Thus, it is the taxpayer who pays all damages including punitive damages intended to punish an individual officer for bad acts.

Any change of Section 41-4-4 would violate existing collective bargaining agreements with unionized government workers.

Requiring individual government actors to indemnify New Mexico state and local governments would make it impossible to hire quality government employees. Only persons who could not find work in private industry or a federal government agency would apply to work in a position where potentially their house and life savings could be taken away in the blink of the eye with one good-faith, split-second decision made during the course and scope of their employment with New Mexico state or local government.

Question 5: The commission has been asked to consider the potential for increased costs to government that adding a civil rights action might lead to. Please provide your thoughts on this issue.

This proposal could be catastrophic in the best of times. These are not the best of times. Adding a new cause of action with no cap to damages would bankrupt state and local governments and make it impossible to provide critical services to the public. Any commission recommendation should - at a minimum - include a cap and limits consistent with the New Mexico Tort Claims Act.



Statement of Interest: Please provide your name, the city in which you reside, and contact information where Commissioners and Commission staff can contact you if they need further information. If you are submitting a response on behalf of an entity, please provide the name of the entity, whether it operates in New Mexico, the contact information of the entity, when the entity was founded and describe its membership and activities.

Stewart Steele  
Rio Rancho  
505-219-7016

You may use this space to provide the Commission with your comments, a short personal experience with a civil rights issue or to expand on any of the questions below. Space is limited to 3000 characters.

The goal of ending qualified immunity, in New Mexico, for law enforcement officers is driven by a perceived failure of accountability in the criminal justice system. This perception, founded mostly by recent events and claims of law enforcement malfeasance (real or otherwise), leads one to believe that both the national and state standards for qualified immunity are flawed. Simply put, it is argued that law enforcement officers are not being held accountable due to protections of qualified immunity in the federal courts and liability immunities in state statutes and codes. Narrowing our scope to New Mexico statutes (41-4-4 NMSA, and 41-4-12 NMSA), it is clear that language already exists to limit liability protection for law enforcement officers acting outside the scope of their duties.

New Mexico statute 41-4-4 NMSA (Granting immunity from tort liability) provides a layer of protection to those public employees acting within the scope of their duty. This prevents a plaintiff from successfully bringing a tort claim personally against a public employee performing his or her job. However, there is no such protection when an employee acts with intentional malice. Furthermore, section 41-4-12 NMSA provides a lengthy list of when the tort immunity does not apply to law enforcement officers, even when acting in the scope of their duties. When enumerated, the list appears as follows:

1. Personal injury
2. Bodily injury
3. Wrongful death
4. Property damage resulting from assault
5. Battery
6. False imprisonment
7. False arrest
8. Malicious prosecution
9. Abuse of process
10. Libel
11. Slander
12. Defamation of character
13. Violation of property rights
14. Negligent or intentional spoliation of evidence
15. Failure to comply with duties established pursuant to statute or law or any other deprivation of any rights, privileges or immunities secured by the constitution and laws of the United States or New Mexico when caused by law enforcement officers while acting within the scope of their duties (this is the catch all).

In order for any amendment to the New Mexico Tort Claims Act to take place, the legislature must be clear on the challenges the current law presents. In a review of sections 41-4-4 and 41-4-12, one may find it difficult to explain a necessary change to the language. No evidence has been presented that challenges the efficacy of the Tort Claims Act. The list of 15, the last being all encompassing, exceptions to the liability protections provides a clear pathway in resolving any real or perceived injustice fueled by the actions of a law enforcement officer. The passions and emotions to reform law enforcement are misdirected at qualified immunity and should be refocused on the challenges identified by police chiefs and sheriffs throughout New Mexico.

Question 1: The New Mexico Constitution provides rights to the people in this state, but currently there is not a statute or private right of action that allows people to recover when these rights are violated. Do you support a civil cause of action that would allow a person to bring a lawsuit to recover for violations of their rights under the New Mexico Constitution? Please explain why or why not.

No, I do not support this. There is already a mechanism in place to address such actions under 42 U.S.C. dated 1983. True police reform in New Mexico should address areas such as peace officer decertification when due process has been conducted and the action deemed as misconduct. This would also crack down on another issue here known as "gypsy cops". A police officer is deemed a "gypsy cop" is when they have went from department to department legally because the decertification process is so slow that they are able to maintain their certification for extended periods of time.

Question 2: Do you believe allowing people to bring lawsuits to recover for violations of the New Mexico Constitution would improve how Government agencies and officials operate and/or the policies and procedures they create?

Yes, I do believe qualified immunity should be used as a defense to a lawsuit when a police officer is doing their job appropriately and within the parameters of the law considering the facts the officer had the time of the incident.

Question 3: If you are familiar with the doctrine of qualified immunity, do you believe qualified immunity should be a defense to a lawsuit for violations of the New Mexico Constitution?

No. Any additional options for lawsuits to recover for violations of the NM constituents would be dangerous to the state and all government agencies operating within. Furthermore, it does not and will not effect how policies and procedures are created. Instead of allowing lawsuits to try to drive policies and procedures, why not push for agencies to become accredited, which holds agencies to a higher standard of conduct and professionalism. Not only are accredited agencies required to have policies, they must show proof they are following those policies. This creates an interdepartmental accountability system from the individual officer to the chief.

Question 4: Should government actors found liable for civil rights violations be indemnified in such actions by either their government employer or its insurers?

Yes, indemnification should be provided for all government actors found liable for civil rights violations when the violation occurred in the process of them doing their job.

Question 5: The commission has been asked to consider the potential for increased costs to government that adding a civil rights action might lead to. Please provide your thoughts on this issue.

Any potential increase will require an increase in taxes and could potentially bankruptcy cities.



**Naithan Gurule** <ngurule@loslunasnm.gov>

Oct 27 at 7:39 PM

To: civil.rtscmsn@nmlegis.gov <civil.rtscmsn@nmlegis.gov>

Cc: victorem@yahoo.com <victorem@yahoo.com>, Vince Torres <vtorres@loslunasnm.gov>.

Frank Lucero <flucero@loslunasnm.gov>, Lisa Valenzuela <lvalenzuela@loslunasnm.gov>.

Jose Hernandez <jhernandez@loslunasnm.gov> more...

New Mexico Civil Rights Commission,

Hello, my name is Naithan Gurule and I am the Chief of Police for the Los Lunas Police Department. I have a Bachelor's Degree in Criminal Justice and a Master's Degree in Criminal Justice. My Bachelor's Degree Capstone Project was on use of force and my Master's Degree thesis was also on use of force. I am a graduate of the 249th session of the FBI National Academy and a graduate of the 340th session of the Northwestern University School of Police Staff and Command. I want to offer my perspective on what can be put in place to standardize four key elements that go hand in hand to review and reduce use of force without having to reduce or remove qualified immunity.

**Use of Force**

Law enforcement currently does not have a standard definition of use of force. Departments use varying definitions of use of force, ranging from force that is anything more than un-resisted handcuffing to believing force was used only if an injury occurred. Law enforcement also does not have a use of force reporting standard. Agency reporting requirements range from a requirement to report un-resisted handcuffing to reporting only if an injury occurs. Generally, use of force reporting requirements are similar to the definitions of use of force. The lack of both a standard definition and a reporting standard for use of force generates a lack of oversight. Use of Force reporting should also include the pointing of a firearm and the pointing of an Electronic Control Device.

Because the spectrum of reporting requirements is so broad, not every agency is sufficiently examining use of force by their police officers. This helps us to closely monitor all officers to ensure they are utilizing force according to state law and departmental procedure.

**Citizen Complaint System**

All citizen complaints should be investigated to include anonymous complaints. Unfortunately, there are still departments in our country that shy away from taking citizen complaints unless a complainant is willing to sign their name on an official complaint form.

**Body Worn Cameras**

The body worn cameras benefits are dependent on proper use. The proper usage is dependent on a good policy that department personnel are required to adhere to. Studies show the benefits of BWC outweigh any challenge an agency might face not having a body worn camera program. In my experience, the body worn cameras have been a valuable tool for many different reasons. The cameras' recordings provide us the opportunity to more thoroughly evaluate officers' tactics. This process is similar to what a coach does to evaluate players, ensuring they continue to be as safe and efficient as possible. We are able to better document crimes and crime scenes with the camera recordings. The camera recordings have proven to be an invaluable tool when investigating citizen complaints and officer use of force cases. More times than not, the camera recordings have exonerated the officers. The use of body worn cameras has provided a large return on investment because they have helped to reduce lawsuits.

**EIPS (Early Intervention Personnel System)**

The Early Intervention Personnel System is designed to proactively and systematically review certain employee work behaviors (uses of force, complaints, sick leave, crashes, failure to activate body worn camera, awards and commendations) for possible indicators of performance or stress related problems, to assist employees who may benefit from departmental intervention. The emphasis of the EIPS is on training and coaching, and is designed as a system to assist supervisory personnel in evaluating and guiding the employee.

Qualified Immunity does not have to be somehow reduced or removed. We have to standardize these important elements in law enforcement. We standardized standard field sobriety testing (SFST), why have we not standardized such important issues? I would encourage you to examine the information I have provided and take into account the possibility that reducing or removing qualified immunity could have an adverse impact on recruiting and retention. I am available to provide further information or answer any questions. I can be contacted by phone at 505 991 6516 or by e-mail.

Thank you for your time.

Chief Naithan Gurule  
660 Main Street NW  
Los Lunas Police Department







mailservices2@sks.com  
To: civil.rtscmsn@nmlegis.gov

Nov 5 at 5:58 PM

Statement of Interest: Please provide your name, the city in which you reside, and contact information where Commissioners and Commission staff can contact you if they need further information. If you are submitting a response on behalf of an entity, please provide the name of the entity, whether it operates in New Mexico, the contact information of the entity, when the entity was founded and describe its membership and activities.

Mountainair Police Department, PO BOX 436, MTN,NM 87036. Chief of Police, Juan Reyes, EST 1903. Provides law enforcement services to this community.

You may use this space to provide the Commission with your comments, a short personal experience with a civil rights issue or to expand on any of the questions below. Space is limited to 3000 characters.

Question 1: The New Mexico Constitution provides rights to the people in this state, but currently there is not a statute or private right of action that allows people to recover when these rights are violated. Do you support a civil cause of action that would allow a person to bring a lawsuit to recover for violations of their rights under the New Mexico Constitution? Please explain why or why not.

Under current NM Tort Claim Act, claims can be brought against an agency for any misconduct or violation of civil rights. Which they can also, file with the US District Courts under USC 1983. I do not agree with creating a new statute. All rights are protected under the US 4th Amendment.

Question 2: Do you believe allowing people to bring lawsuits to recover for violations of the New Mexico Constitution would improve how Government agencies and officials operate and/or the policies and procedures they create?

This is a speculative question, that has no grounds without knowing what the parameters of the new law is? As stated above we have those laws in place already.

Question 3: If you are familiar with the doctrine of qualified immunity, do you believe qualified immunity should be a defense to a lawsuit for violations of the New Mexico Constitution?

Yes, it has been proven that Police Officers need that law to protect them. When officers commit any violations that are not malicious or with intent. They should be protected, take away this provision and you subject the officers to personal tort claims made by the public. You will see a drastic decline in retention of officers through out the State. No one will place their personal assets at stake for doing their job. Officers risk their lives to protect the public everyday, do not take away this defense. Just to follow the current trends.....

Question 4: Should government actors found liable for civil rights violations be indemnified in such actions by either their government employer or its insurers?

Yes, if they committed the acts in a malicious intent they should be liable. But to apply this to all officers is a mistake and unfair. That is why we pay high insurance rates to cover this type of activities. Address only the ones that violate the law.. dont punish the ones that are acting professionally.

Question 5: The commission has been asked to consider the potential for increased costs to government that adding a civil rights action might lead to. Please provide your thoughts on this issue.

If the State wants to spend money on this action, then it should be on the State to pay for this possible action. The taxpayers are already paying high taxes. To add this its unfair and unreasonable. Its the agency responsibility to provide liability insurance for their officers.. Sounds like the committee is jumping the gun here, where is the propose law or recommendations. Then is when you all should be asking these questions. Just saying.. Thank You.