

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  
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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.

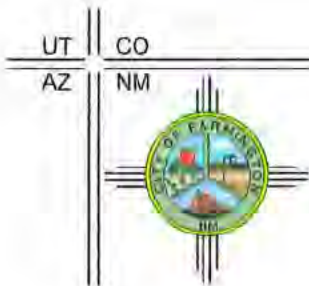
Sincerely,



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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  
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## CITY OF FARMINGTON

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November 10, 2020

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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  
Santa Fe County  
102 Grant Ave.  
Santa Fe NM 87501  
Tele: 505.986.6200  
kmiller@santafecountynm.gov

Gregory S. Shaffer  
County Attorney  
Santa Fe County  
102 Grant Ave.  
Santa Fe NM 87501  
Tele: 505.986.6216  
gshaffer@santafecountynm.gov

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.

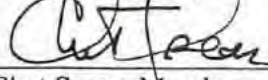
CURRY COUNTY  
BOARD OF COMMISSIONERS

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

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

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

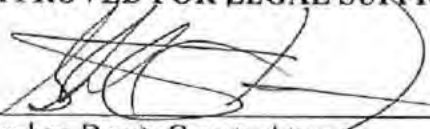
  
\_\_\_\_\_  
Robert Sandoval, Member

  
\_\_\_\_\_  
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.

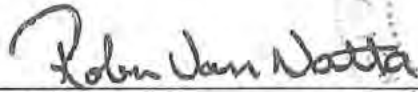
**PASSED, APPROVED AND ADOPTED** this 3<sup>RD</sup> day of **November, 2020**, by the Eddy County Board of Commissioners in an open meeting in Carlsbad, Eddy County, New Mexico.

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,

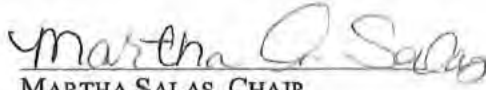
**NOW, THEREFORE, BE IT RESOLVED** by the Board of County Commissioners of Socorro County, New Mexico, that:


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**

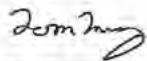
**PASSED, AND APPROVED AND ADOPTED THIS 4<sup>th</sup> DAY OF NOVEMBER 2020.**



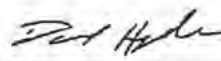
\_\_\_\_\_  
Jhonathan Aragon  
Chair, District V



\_\_\_\_\_  
Gerard Saiz  
Vice-Chair, District I



\_\_\_\_\_  
Tom Mraz  
Commissioner, District II



\_\_\_\_\_  
David A. Hyder  
Commissioner, District III

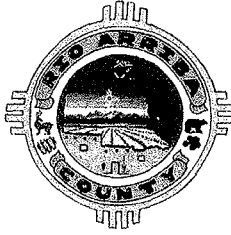
\_\_\_\_\_  
Charles D. Eaton  
Commissioner, District IV

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 Cámpo 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:

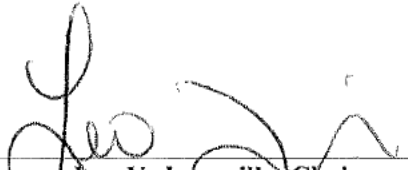
1. WOULD include attorney fees for prevailing plaintiffs on top of compensatory damages. Fees for plaintiff's attorneys – many of whom charge in excess of \$450 per hour – often exceed the amount of damages awarded to plaintiffs;
2. WOULD require public employers to indemnify public employees for claims 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.

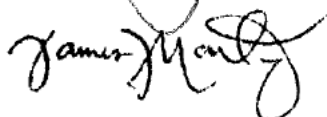
**NOW, THEREFORE, BE IT RESOLVED** by the Board of County Commissioners of Rio Arriba County, New Mexico, that:

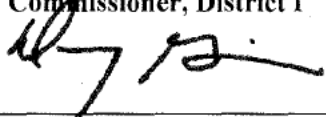
1. Rio Arriba County opposes the recommendations of the Commission or broader legislation pursued by individual legislators, which:
  - a. are unnecessary for victims of State constitutional violations by law enforcement (including detention officers) to be compensated;
  - b. will not address at all 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.

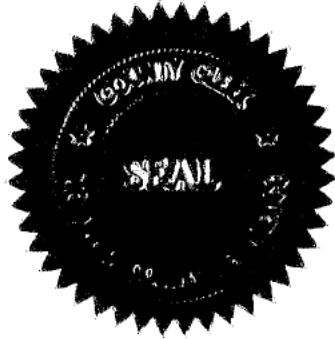
**BOARD OF COUNTY COMMISSIONERS  
RIO ARRIBA COUNTY, NEW MEXICO**

  
\_\_\_\_\_  
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.

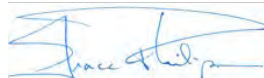
### **Conclusion**

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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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.



mailservices2@sk.com <mailservices2@sk.com>  
To: civil.rtscmsn@nmlegis.gov

Oct 9 at 12:16 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.

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

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.

Amber Hamilton  
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[ahamilton@roosevel county.com](mailto:ahamilton@roosevel county.com)

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.



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

Oct 19 at 3:58 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.

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

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.

Wayne Johnson  
County Manager  
Sandoval County, NM

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.

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.



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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.