
POLICING: STATE LAWS & RECENT LEGISLATION

AMBER WIDGERY | DECEMBER 2020



NATIONAL CONFERENCE OF STATE LEGISLATURES



- ❑ Non-profit, bi-partisan organization.
- ❑ Members are all 7,383 legislators and 30,000 legislative staff in 50 states, D.C. and U.S. territories.
- ❑ Offices in Denver and D.C.
- ❑ Among our goals - To provide legislatures with information and research about policy issues, both state and federal.
- ❑ NCSL tracks state policy developments in all public policy areas.

CONGRESSIONAL AND ADMINISTRATION RESPONSES TO POLICING

- U. S. House of Representatives – H.R. 7120 the “George Floyd Justice in Policing Act of 2020.”
- U.S. Senate – S. 3985 The “Just and Unifying Solutions to Invigorate Communities Everywhere Act of 2020,” otherwise known as the “Justice Act.”
- Executive Order on Safe Policing for Safe Communities
- NCSL virtual meeting series on House and Senate bills with congressional staff is on our website:

<https://www.ncsl.org/ncsl-in-dc/standing-committees/law-criminal-justice-and-public-safety/law-criminal-justice-public-safety-committee-policing-virtual-meeting-series.aspx>

POLITICS, POLITICS, AND MORE POLITICS

- Need to watch the dynamics of the 117th Congress.
- Post-election 2020 --- House Democrats have a smaller overall majority now.
- House Judiciary Crime, Terrorism, and Homeland Security Subcommittee
 - Current Chair Rep. Karen Bass may be appointed by the CA governor to take Sen. Kamala Harris' Senate seat.
 - Rep. Val Demings (FL) would be next in line to be the Chair.
 - Who will replace current ranking member Rep. John Ratcliff (TX)?
- **U.S. Senate majority is up for grabs because of GA runoff election on Jan. 5.**
 - Sen. Grassley (IA) will be Chair if R's keep control.

POLITICS, POLITICS, AND MORE POLITICS

- President-Elect Biden and Sen. McConnell working relationship.
- Won't be as many judicial nominations – Senate Judiciary Committee has time.
- What happens if there's a 50/50 Senate?
 - VP Harris is tie-breaker BUT bills still must pass committee.
 - Cloture requires 60 votes.
 - Necessity of a power-sharing agreement.
- What happens if Senate stays Republican?

What Do These 3 Have In Common?

- All 3 seek to amend 18 U.S.C. 242 – Deprivation of Rights Under Color of Law
 - Civil Rights Statute - It is a crime for a person acting under color of any law, statute, ordinance, regulation, or custom to **willfully** deprive a person of a right, privilege, or immunity protected by the Constitution or the laws of the United States.
- House and Senate Bills and the Executive Order– Change “willful” to **“knowingly or with reckless disregard”**
 - Change lowers the intent standard.

What Do These 3 Have In Common?

- All 3 want best practices developed.
 - House – Creates law enforcement development programs through AG in consultation with law enforcement accreditation agencies and community-based organizations.
 - Senate – Requires COPS office to develop best practices
 - Exec. Order – AG, Ass't to President for Domestic Policy and Director of Office of Management & Budget develops legislation to proposed to congress.

What Do These 3 Have In Common?

- All 3 want use of force reported to the federal government.
 - House – States required to report to DOJ use of force used against a citizen or law enforcement officer.
 - Senate – Requires State and localities to report to FBI annually on use of force events causing death or serious bodily injury of citizens or law enforcement.
 - Exec. Order – AG will create a database to coordinate sharing of use of force info between and among federal, state, local, tribal, and territorial law enforcement agencies.

House and Senate Bill Similarities

- Registry of Officer Misconduct
 - **House** – federal registry compiles all pending, sustained, and exonerated misconduct complaints, discipline records, termination records, and records of certification for all federal, state, and local enforcement officers.
 - **Senate** – Requires federal, state, and local law enforcement agencies to maintain employment and disciplinary records of law enforcement officers for at least 30 years.
- Training on Bias and Duty to Intervene
 - **House** – federal mandate. Condition federal funding on state/local compliance.
 - **Senate** – AG and states/locals develop training. Incentivize. \$50 million to states through Byrne/JAG to train.

House and Senate Bill Similarities

- No-Knock Warrants
 - House – Banned in federal drug cases and state/local law enforcement funding is conditioned on their prohibition of no-knock warrants in drug cases.
 - Senate – Requires state/locals to report data on no-knocks to the AG annually. Federal funding is tied to compliance.
- Chokeholds
 - House – Chokeholds and carotid holds banned. Condition federal funding on state/local compliance.
 - Senate – Requires states/locals to implement policies severely restricting the use of chokeholds. Exception is when deadly force is authorized. Annual Byrne/JAG and COPS funding penalties for noncompliance.

House and Senate Bill Similarities

- Body Cameras
 - House – Requires federal law enforcement to wear them and requires dashcams on federal law enforcement vehicles. Authorizes GAO study on training, vehicle pursuits, and use of force.
 - Senate – Requires entities receiving \$\$ for purchase institute appropriate guardrails for their use and discipline officers who intentionally do not comply. 20% federal funding penalty for noncompliance.

Unique House Bill Provisions

- Qualified Immunity Reform
- Only the House bill modifies the doctrine of qualified immunity (QI).
 - Qualified immunity is a limited defense to a Sec. 1983 action
 - Section 1983 makes government employees and officials (here – police officers) personally liable for money damages if they violate a person’s federal constitutional or statutory rights.
 - Qualified immunity provides limited protections – per the Supreme Court, it is NOT available to a government employee who violates “clearly established law and does not protect the “plainly incompetent” or those who “knowingly violate the law.”
 - If qualified immunity applies state and local government officials cannot be sued civilly for money damages for constitutional violations.

Qualified Immunity Cont'd

- House bill:
 - Removes the defense of “acting in good faith” from a qualified immunity defense.
 - Removes the defense that the defendant police officer believed his or her conduct was lawful at the time of the deprivation of rights.
 - Removes the defense that the rights, privileges, or immunities secured by the Constitution were not “clearly established” at the time of the deprivation of rights.
 - Removes the defense that at the time of the deprivation the defendant officer could not have reasonably known his or her conduct was not lawful.

State Policy Considerations on Qualified Immunity

- General “pro” qualified immunity arguments:
 - limited in scope.
 - Provides fair notice to government employees.
 - Reduces burden of litigation including costs and non-meritorious cases.
 - Helps to attract and retain government employees.
 - Doesn’t prevent criminal prosecution or adverse employment actions.
 - Allows all government employee to be “unflinching [in the] discharge of their duties.”
(*Harlow v. Fitzgerald*, 457 U.S. 800)

State Policy Considerations on Qualified Immunity

- General “pro” qualified immunity arguments related to police:
 - The 4th Amendment prohibits police officer use of “unreasonable” or excessive force.
 - Doesn’t protect officers who use force that is “clearly established” to be unreasonable.
 - When officers use force they must make a split-second decision in a fast-moving situation.
 - Operates “to protect officers from the sometimes ‘hazy border between excessive and acceptable force. (*Saucier v. Katz*, 533 U.S. 194)
- Some arguments against qualified immunity:
 - Hard for plaintiffs to meet the burden of proof needed
 - Threat of civil liability will make police more careful - accountability
 - If police departments have to pay out damages, they will change police culture
 - Symbolic message from courts to public

Unique House Bill Provisions, Con't

- Pattern and Practice Investigations/Independent Investigations
- Expands the effectiveness of pattern and practice investigations by granting the U.S. Attorney General subpoena power to conduct such investigations.
- Creates a grant program that would provide state attorneys general the resources necessary to conduct pattern and practice investigations.
- Authorizes \$750 million to be appropriated to a grant program that state attorneys general may access to create an independent investigation process for police misconduct and excessive use of force.

Unique House Bill Provisions, Con't

- Requires the AG to create law enforcement accreditation standard recommendations based on President Obama's Task Force on 21st Century Policing.
- Study the impact of any law, rule, or procedure that allows a law enforcement officer to delay for an unreasonable or arbitrary period the answer to questions posed by investigators of law enforcement misconduct.
- Establishes a DOJ task force to coordinate the investigation, prosecution and enforcement of federal, state and local government efforts in cases related to law enforcement misconduct.
- Requires all law enforcement agencies to ensure all officers hired are certified within the state.

Unique House Bill Provisions, Con't

- Prohibits discriminatory racial, religious and otherwise discriminatory profiling and creates a cause of action for injunctive relief.
- Limits the transfer of certain types of military-grade equipment to law enforcement.
 - No military grade firearms, bayonets, grenade launchers, grenades (including flash-bang), or explosives.
 - No military vehicles except for passenger automobiles and bucket trucks
 - No drones or other controlled aircraft, silencers, or long-range acoustic devices.

Unique Senate Bill Provisions

- Establishes a new commission called the “National Criminal Justice Commission” to conduct a comprehensive review of the criminal justice system.
- Requires the Director of the National Museum of African American History and Culture to develop and disseminate nationally a curriculum to educate eligible participants on the history of racism in the United States.
- Creates a grant program authorized at \$112 million for FY2021 for state and local governments to help them comply with reporting requirements for use of force and no-knock warrant provisions.

Unique Senate Bill Provisions

- Allows a law enforcement agency which has a substantially different racial and ethnic demographic than the community it serves to use COPS \$\$ to hire candidates with a similar racial and ethnic demographic.
- Reauthorizes Byrne/JAG grant program at \$800 million for FY 2021-2025
- Creates a new criminal penalty of up to 20 years for falsifying reports filed in connection with a civil rights violation that results in serious bodily injury or death.
- Establishes a Commission on the Social Status of Black Men & Boys.
- Closes the consent loophole by making it unlawful for federal law enforcement officer to engage in a sexual act while acting under color of law.

Unique Executive Order Provisions

- The Attorney General **shall** identify and develop opportunities to train law enforcement officers to appropriately handle individuals suffering from mental health issues, homelessness, and addiction.
- Asks for increased capacity of social workers to work directly with law enforcement agencies and provide guidance to develop and implement co-responder programs.

Predictions?

- Incremental bills rather than comprehensive legislation.
 - Examples
 - De-escalation training bill
 - Federal database bill
- Start with the “easy” stuff and save the hard stuff for later in the year.

STATE LEGISLATIVE RESPONSES FOR POLICING

TOPICS		STATES		
<input type="checkbox"/> All Topics	<input type="checkbox"/> Executive Orders	<input type="checkbox"/> All States	<input type="checkbox"/> Alabama	<input type="checkbox"/> Alaska
<input type="checkbox"/> Other Issues	<input type="checkbox"/> Oversight and Data	<input type="checkbox"/> Arizona	<input type="checkbox"/> Arkansas	<input type="checkbox"/> California
<input type="checkbox"/> Policing Alternatives and Collaboration	<input type="checkbox"/> Technology	<input type="checkbox"/> Colorado	<input type="checkbox"/> Connecticut	<input type="checkbox"/> Delaware
<input type="checkbox"/> Training, Standards and Certification	<input type="checkbox"/> Use of Force			

KEYWORD	STATUS	BILL NUMBER	YEAR	AUTHOR
<input type="text"/>	All ▾	<input type="text"/>	2020 ▾	<input type="text"/>

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LEGISLATION BY THE NUMBERS

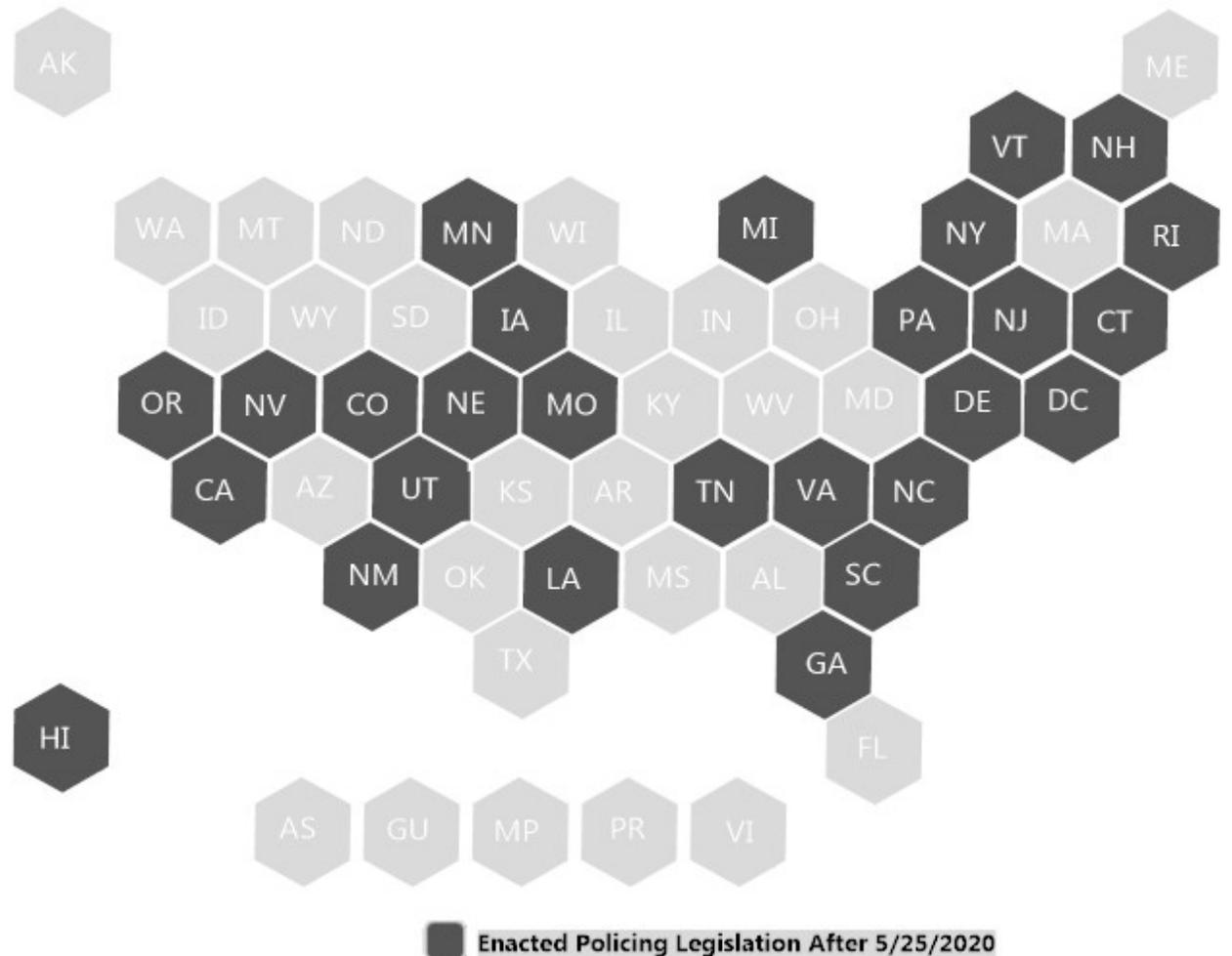
Since May 2020:

- 36 states and Washington D.C. have introduced or filed legislation.
- 723 bills introduced, amended or prefiled
- 93 enacted bills/adopted resolutions
- 402 measures currently pending/prefiled.

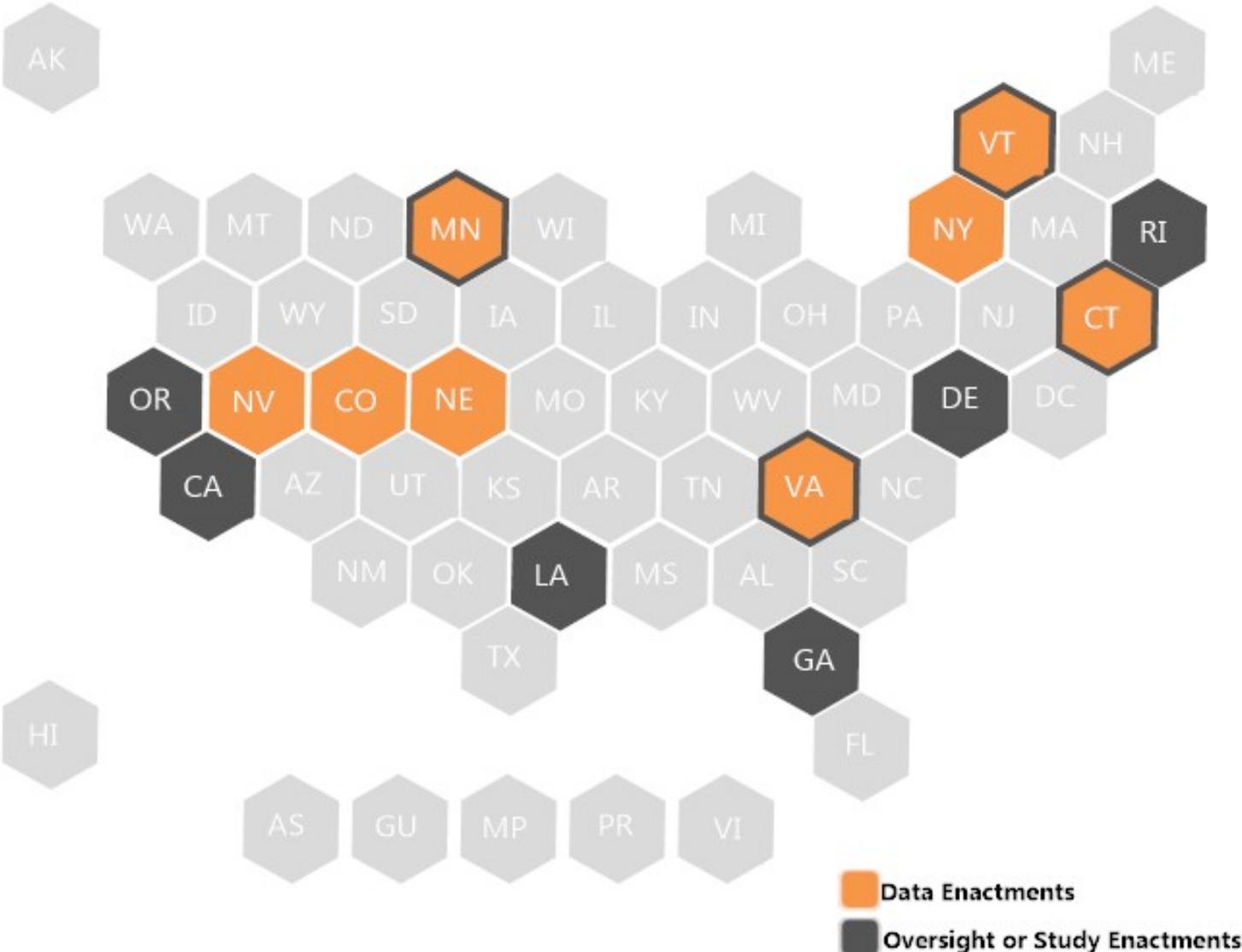


ENACTED LEGISLATION

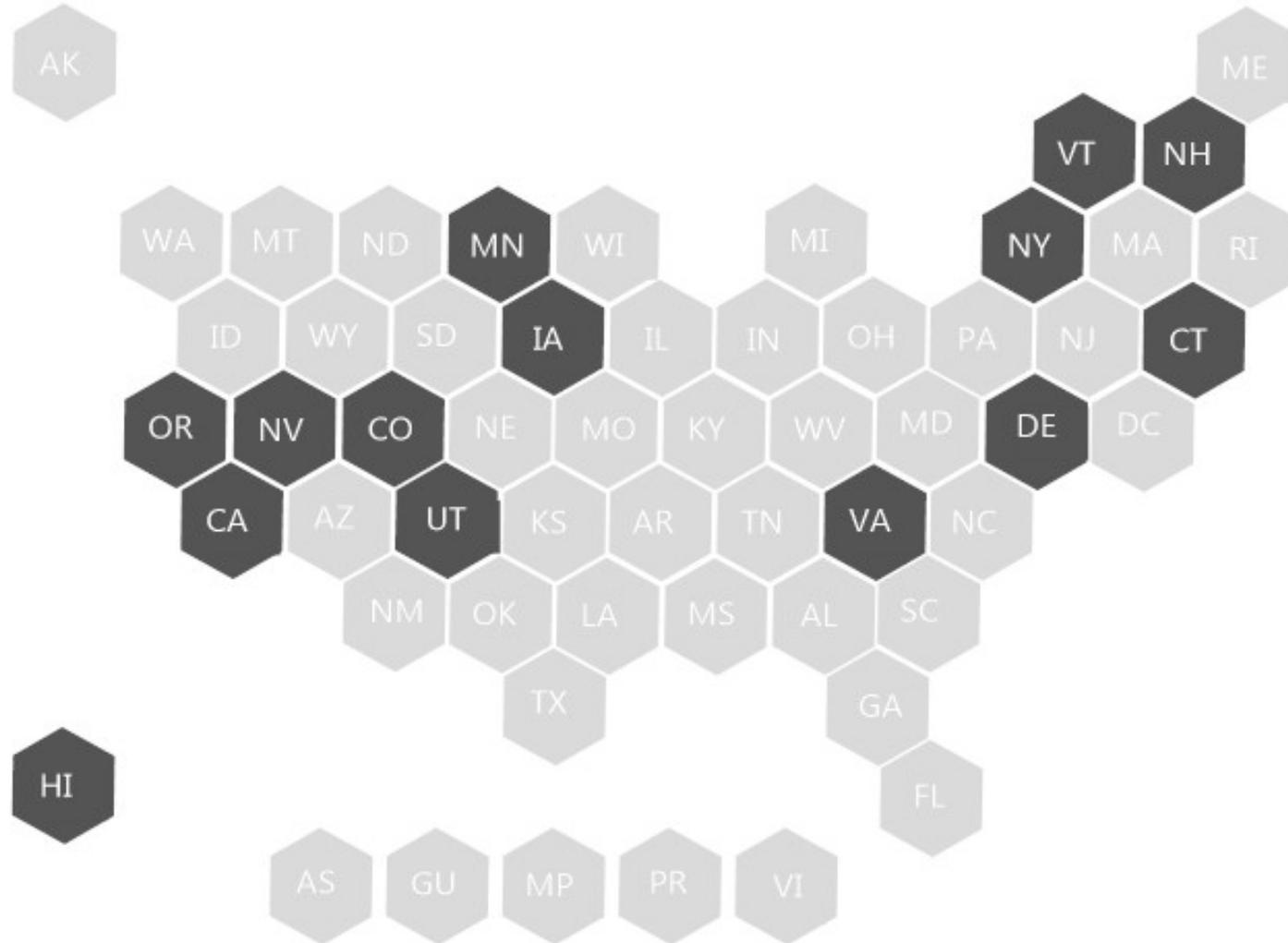
- 26 states and Washington D.C. have enacted legislation. Topics include:
 - Oversight & Data
 - Use of Force, including Chokeholds
 - Duty to Intervene/Report/Provide Aid
 - Independent Investigation/Prosecution
 - Training
 - Officer Certification/Decertification
 - Body Cameras
 - Alternative Responses & Officer Wellness



OVERSIGHT & DATA



USE OF FORCE RESTRICTIONS & STANDARDS



 Use of Force Restrictions & Standards Enactments

INVESTIGATION & PROSECUTION OF MISCONDUCT AND EXCESSIVE FORCE



ALTERNATIVE RESPONSES & OFFICER WELLNESS

- CT HB 6004 – Requires each municipal department to evaluate the benefits of using social workers during emergency response situations and report back to POST.
- MN HF 1 – Authorizes and regulates the use of peer counseling for officers and critical incident stress management teams. Specifies that officers should exercise special care when interacting with individuals with known physical, mental, developmental or intellectual disabilities.
- VA HB 5043/SB5038/SB5014 – Requires the establishment of Marcus alert programs and community care or mobile crisis teams throughout the state by 2026. Requires the establishment of protocols for diversion of certain 911 calls to crisis call centers.

OTHER

- No knock warrants
- Funding for officer tuition reimbursement
- Prohibition of traffic citation quotas
- Prohibitions on use of military uniforms
- Residency restrictions
- Executive orders

Questions?

Susan Parnas Frederick, Sr. Federal Affairs Counsel

susan.frederick@ncsl.org

Amber Widgery, Program Principal

amber.widgery@ncsl.org