

# DRAFT

## Executive Summary

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

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

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

**No Qualified Immunity.** The Commission next recommends that the Legislature specify that qualified immunity will not be a defense to claims brought under the New Mexico Civil Rights Act. Qualified immunity is a judicially created defense to federal civil rights claims. The doctrine prohibits courts from allowing such claims to go forward unless the plaintiff first establishes that their rights have been violated *and* demonstrates that the violation was already recognized by courts under “clearly established law.” The second part of the standard is daunting—plaintiffs

# DRAFT

generally lose unless there is a decision from the United States Supreme Court or the United States Court of Appeals for the Tenth Circuit finding a constitutional violation under nearly identical facts. In practice, this means that a victim of government misconduct cannot recover even when courts agree that their rights have been violated unless a public official previously violated the constitution in the same way.

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

The Commission is sensitive to, and has carefully considered, concerns that public officials must have room to fulfill their important responsibilities in good faith. But the Commission does not believe that qualified immunity provides the answer to that concern. Instead, public officials' reasonable, good faith conduct is protected through faithful application of substantive constitutional law by judges and careful instructions to juries in cases with enough merit to go to trial. Excessive force cases against law enforcement officers are a classic example. The Commission agrees that split-second decisions law enforcement officers must make in tense circumstances should not be second-guessed by judges and juries with the benefit of 20/20 hindsight. That is, however, already addressed in the substantive constitutional law. In addition, claims that a public official violated the constitution (state or federal) consistently are evaluated under high standards—considerably higher than the standards that apply to, for example, a regular negligence case. Those standards provide the appropriate safeguards against liability for reasonable, good faith conduct.<sup>1</sup>

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

**Attorney Fees.** Next, awarding reasonable attorney fees to those who prevail on state constitutional claims is essential if the Legislature wants the New Mexico Civil Rights Act to play a meaningful role in remedying constitutional violations. Congress authorizes attorney fees for federal constitutional violations. In addition, the Legislature has recognized that awarding attorney fees to prevailing parties is essential by providing for them in a long list of statutes, including in

---

<sup>1</sup> Substantive law protections address concerns the Commission heard, particularly from law enforcement officers, based on the understandable desire to ensure judges and juries do not turn honest mistakes into liability.

# DRAFT

the state whistleblower statute and the Inspection of Public Records Act. Here, the issue is the violation of rights important enough to be enshrined in the state constitution. Sometimes, the deprivation of those rights results in significant money damages. But often the significance of the violation does not translate to large recoveries. Without an attorney fees provision, the important rights the New Mexico Constitution protects often will never be vindicated.

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

**Fiscal Impact/Insurance.** As a final matter, the Legislature charged the Commission with “review[ing] and assess[ing] the need for and costs of additional insurance policies for public employees and public bodies” if an act were adopted.<sup>2</sup> The Commission was not surprised that local governments, particularly the counties and some municipalities, are adamantly opposed to a New Mexico Civil Rights Act based primarily on fiscal concerns. While the Commission appreciates those concerns, they do not undermine the compelling justification for enacting a robust New Mexico Civil Rights Act. That is true for several reasons. First, the cost of protecting the rights of New Mexicans involves values fundamentally different from other budget questions the Legislature faces. Absent a statutory remedy for state constitutional violations, the Legislature is forcing the citizen who was harmed by government misconduct to pay for the violation they suffered. That is where things stand today. The Legislature therefore has to consider whether it wants to continue saving money by forcing those harmed by government misconduct to bear the cost for the state or responsible local government.

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

That leaves the Legislature with a choice—do nothing out of fear of an unproven financial risk, or take action realizing that you may amend any statute you adopt to address problems that actually arise. The Commission obviously recommends that the Legislature move forward. As Justice Louis Brandeis stated: “It is one of the happy incidents of the federal system that a single

---

<sup>2</sup> See *id.* at paragraph H.

# DRAFT

courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.” *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932). Here, the Legislature is not undertaking anything unique—many other states allow their citizens to enforce their state constitutional rights and have successfully managed the costs of providing that relief—and the consequences of inaction are real.

This report is divided into eight sections. The first is a draft proposed New Mexico Civil Rights Act. Behind that, the Commission has prepared seven appendices, each of which addresses the Commission’s recommendations in more detail.

**DRAFT**

**Proposed New Mexico Civil Rights Act**

# DRAFT

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

The New Mexico Constitution provides a robust Bill of Rights to the people of New Mexico. However, “[t]he substance of constitutional rights is meaningless if state actors can violate those rights with impunity. Such rights would become, in James Madison’s words, ‘parchment barriers’—symbolic commitments to individual liberty that do nothing in practice to deter or prevent unlawful misconduct by government agents.”<sup>3</sup> That has been true in New Mexico since the state constitution was adopted. In the absence of a state statute equivalent to Section 1983, the New Mexico Supreme Court has, in fact, heard only three civil cases arising from state constitutional violations since statehood.<sup>4</sup> Current New Mexico law is no substitute for the New Mexico Civil Rights Act, and the Legislature should step in now to address this problem.<sup>5</sup>

The United States Constitution is the “supreme law of the land,”<sup>6</sup> and the powers not delegated by the federal constitution are reserved to the states.<sup>7</sup> This means each state must provide *at least* those rights provided by the United States Constitution, but may also grant *greater* rights to its citizens.<sup>8</sup> New Mexico has done so in its constitution, and there are meaningful differences between our constitution and the federal Bill of Rights. (See a comparison of the New Mexico Constitution to the Federal Constitution below). [ADD CHART]

Victims of federal constitutional violations can seek redress through 42 U.S.C. § 1983. This law was passed as part of the Ku Klux Klan Act of 1871,<sup>9</sup> and it states that every person who, under color of law, “subjects... any citizen... to the deprivation of any rights, privileges, or immunities secured by the Constitution... shall be liable to the party injured.”<sup>10</sup> New Mexico does not have a parallel statute that allows people to recover for violations of their state constitutional rights. The Commission believes addressing this problem is long overdue. And by stepping in to provide a remedy for state constitutional violations, New Mexico will join a growing list of states that have taken this important step.<sup>11</sup> Six states have done so by statute:

States with a Statutory Analogue to § 1983		
State	Statutory Analogue to § 1983	Additional Info

<sup>3</sup> Schweikert, Jay *Qualified Immunity: A Legal, Practical, and Moral Failure*, Cato Institute Policy Analysis No. 901 (September 14, 2020).

<sup>4</sup> See e.g., *New Mexico Right to Choose/NARAL v. Johnson*, 1999-NMSC-005, 7975 P.2d 841; *Griego v. Oliver*, 2014-NMSC-003, 316 P.3d 865; *Morris v. Brandenburg*, 2015-NMSC-100, 356 P.3d 564.

<sup>5</sup> The Commission voted 6-3 in favor of creating a New Mexico Civil Rights Act.

<sup>6</sup> U.S. Const. art. VI.

<sup>7</sup> U.S. Const. amend X.

<sup>8</sup> See generally, Vanzi, Schultz & Stambaugh, *State Constitutional Litigation in New Mexico: All Shield and No Sword*, 48 N.M. L. Rev. 302 (2018).

<sup>9</sup> *Jamison v. McClendon*, No. 3:16-CV-595-CWR-LRA, 2020 WL 4497723, at \*10 (S.D. Miss. Aug. 4, 2020).

<sup>10</sup> 42 U.S.C. § 1983.

<sup>11</sup> Vanzi, Schultz & Stambaugh, *supra*.

# DRAFT

Arkansas	Ark. Code Ann. §§16-123-101 through 108 <a href="#">Civil Rights Act</a>	Includes attorney's fees
California	Cal. Civ. Code § 52.1 <a href="#">Civil Rights Act</a>	Includes attorney's fees
Colorado	Colo. Rev. Stat. Ann. § 13-21-131 <a href="#">Bill</a>	Includes attorney's fees Only applies to "peace officers"
Massachusetts	Mass. Gen. Laws <a href="#">Ch. 12, § 11I</a>	Includes attorney's fees
Nebraska	Neb. Rev. Stat. §20-148 <a href="#">Statute</a>	No attorney's fees provision
New Jersey	N.J. Rev. Stat. § 10:6-2 <a href="#">Civil Rights Act</a>	Includes attorney's fees

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

States with a Common Law Analogue to Section 1983		
State	Common Law Analogue to Section 1983	Additional Info
Alaska	Yes, restricted	Only for <i>flagrant</i> violations
Connecticut	Yes, restricted	Only specifically recognizes: search and seizure and false arrest
Illinois	Yes, restricted	Only specifically recognizes: search and seizure
Iowa	Yes, restricted	Only specifically recognizes: right of persons, searches & seizures, due process, equal protection
Louisiana	Yes, restricted	Only specifically recognizes: right to privacy
Maryland	Yes, restricted	Only specifically recognizes due process and search and seizure claims
Michigan	Yes, restricted	Restricted to only due process claims

# DRAFT

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

Existing New Mexico law is no substitute for the statute the Commission recommends.<sup>12</sup> In particular, the New Mexico Tort Claims Act (“NMTCA”) only allows people to bring suit

---

<sup>12</sup> NMSA (1978) § 41-4-1.



# DRAFT

against New Mexico governmental actors in limited circumstances, including negligent operation of a building, operation of a vehicle, and in the provision of medical care.<sup>13</sup> It prohibits legal action for violations of state constitutional rights against all government employees except for law enforcement officers.<sup>14</sup> And even with law enforcement officers, the right to recover for state constitutional violations under the NMTCA is limited in ways the New Mexico Civil Rights Act would correct—the NMTCA limits constitutional claims against law enforcement officers to those involving personal injury, bodily injury, wrongful death and property damage; does not allow for attorney fees; and imposes outdated caps on damages.<sup>15</sup>

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

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

---

<sup>13</sup> See NMSA 1978 Sections 41-4-5, 41-4-6, 41-4-9, and 41-4-10.

<sup>14</sup> See NMSA 1978 Section 41-4-12.

<sup>15</sup> The NMTCA allows people to bring suit against law enforcement officers for:

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

NMSA § 41-4-12 (emphasis added).

# DRAFT

Statute	New Mexico Tort Claims Act NMSA (1978) § 41-4-1 et. seq.	Federal Civil Rights Act, 42 U.S.C. § 1983
<p style="text-align: center;">Allows Lawsuits Against Public Employees for:</p>	<p>Allows lawsuits for bodily injury, wrongful death or property damage caused by the negligence of public employees while acting within the scope of their duties for:</p> <ul style="list-style-type: none"> <li>• Operation or maintenance of any motor vehicle, aircraft, or watercraft</li> <li>• Operation or maintenance of any building, public park, machinery, equipment or furnishings</li> <li>• Operation of airports</li> <li>• Operation of public utilities</li> <li>• Operation of any hospital, infirmary, mental institution, clinic, dispensary, medical care home or like facilities</li> <li>• Provision of health care services (for licensed health care workers)</li> <li>• Construction, and in the subsequent maintenance, of any bridge, culvert, highways, roadway, street, alley, sidewalk, or parking area</li> <li>• Law enforcement officers- lawsuits can be brought against law enforcement officers for personal injury, bodily injury, wrongful death or property damage resulting from assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, defamation of character, violation of property rights, failure to comply with duties established under statute or law or deprivation of any rights, privileges or immunities secured by the constitution and laws of the United States or New Mexico when caused by law enforcement officers while acting within the scope of their duties</li> </ul>	<p>Allows lawsuits against any person acting under color of law who “subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws...”</p> <p style="text-align: center;">42 U.S.C.A. § 1983</p>

# DRAFT

<p><b>Limitations</b></p>	<p>Limited to only the enumerated exceptions and persons (No education, CYFD, elected bodies, etc.)</p> <p>For all <i>except</i> law enforcement officers:</p> <ul style="list-style-type: none"> <li>- Violations of constitutional rights are not actionable.</li> </ul> <p>For law enforcement officers:</p> <ul style="list-style-type: none"> <li>- Limited to personal injury, bodily injury, wrongful death and property damage (e.g. would not cover a constitutional violation for which there is no personal injury or property damage such as a free speech violation)</li> </ul> <p>Cap on damages (NMSA 19878 § 41-4-19)</p> <ul style="list-style-type: none"> <li>• \$200,000 for property damage</li> <li>• \$300,000 for past and future medical expenses</li> <li>• \$400,000 to any person for any number of claims arising out of a single occurrence other than property damage and medical expenses</li> </ul>	<p>Limited to violations of the United States Constitution and laws (does not cover violations of the New Mexico Constitution and laws)</p>
<p><b>Provides Attorney's Fees?</b></p>	<p style="text-align: center;">No</p>	<p style="text-align: center;">Yes- 42 U.S.C. § 1988</p>
<p><b>Qualified Immunity?</b></p>	<p style="text-align: center;">No</p>	<p style="text-align: center;">Yes</p>
<p><b>Individuals Indemnified?</b></p>	<p style="text-align: center;">Yes- NMSA (1978) § 41-4-4</p>	<p>Yes, in New Mexico. State statute indemnifies public employees for constitutional violations in cases brought under 42 U.S.C. § 1983- NMSA (1978) §41-4-4</p>

# DRAFT

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

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

### *What is qualified immunity?*

When Congress enacted Section 1983 in 1871, it spoke in clear and broad language: anyone who violates someone’s federal constitutional rights “shall be liable” to the injured party.<sup>16</sup> In 1967, however, the United States Supreme Court sharply limited Section 1983’s reach by creating the doctrine of qualified immunity.<sup>17</sup> The doctrine renders government actors immune from suit even if they violate the constitution.<sup>18</sup> To overcome this defense, the plaintiff must show two things: (1) that the government actor violated his or her constitutional right; and (2) that there is clearly established law showing that the right was violated.<sup>19</sup>

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

Federal judges at all levels and across the ideological spectrum have criticized qualified immunity. Justice Sonia Sotomayor and the late Justice Ruth Bader Ginsburg wrote that the doctrine “tells officers that they can shoot first and think later, and it tells the public that palpably unreasonable conduct will go unpunished.”<sup>20</sup> Justice Clarence Thomas has expressed “strong doubts” about qualified immunity,<sup>21</sup> while the late Justice Antonin Scalia stated that the Court’s “treatment of qualified immunity under 42 U.S.C. § 1983 has not purported to be faithful to the common-law immunities that existed when Section 1983 was enacted, and that the statute presumably intended to subsume.”<sup>22</sup>

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

---

<sup>16</sup> 42 U.S.C. § 1983.

<sup>17</sup> *Pierson v. Ray*, 386 U.S. 547 (1967). *Pierson* involved a group of Black ministers who brought a federal civil rights claim after they were arrested for using segregated bus facilities. The Court held that the police officers “should not be liable if they acted in good faith and with probable cause in making an arrest under a statute that they believed to be valid.” *Id.*; see also Joanna C. Schwartz, *The Case Against Qualified Immunity*, 93 *Notre Dame L. Rev.* 1797, 1801 (2018).

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

<sup>19</sup> *Id.* at 818.

<sup>20</sup> *Kisela v. Hughes*, 138 S. Ct. 1148 (2018) (Sotomayor joined by Ginsberg, dissenting).

<sup>21</sup> *Baxter v. Bracey*, 140 S. Ct. 1862 (Mem.) (Thomas, J. dissenting from denial of certiorari).

<sup>22</sup> *Crawford-El v. Britton*, 523 U.S. 574 (1998).

# DRAFT

constitutional rights. The law is never made clear enough to hold individual officials liable [under] 42 U.S.C. § 1983.”<sup>23</sup> Judge James O. Browning, a respected conservative who serves as a New Mexico federal district court judge has concluded that: “[I]n a day when police shootings and excessive force cases are in the news, there should be a remedy when there is a constitutional violation, and jury trials are the most democratic expression of what police action is reasonable and what action is excessive. If the citizens of New Mexico decide that state actors used excessive force or were deliberately indifferent, the verdict should stand, not be set aside because the parties could not find an indistinguishable Tenth Circuit or Supreme Court decision.”<sup>24</sup>

Criticisms of qualified immunity are not limited to the judiciary. Elected officials also have harshly criticized the doctrine, including a bipartisan coalition in the U.S. House of Representatives that introduced legislation to abolish the doctrine entirely.<sup>25</sup> Colorado recently passed a law much like the proposed New Mexico Civil Rights Act. That statute, which is limited to law enforcement officers, does not allow qualified immunity as a defense.<sup>26</sup> Other state legislatures are also considering laws to eliminate qualified immunity. [ADD CHART]

The American Civil Liberties Union has called on the Supreme Court to “abolish qualified immunity and return Section 1983 to its original meaning.”<sup>27</sup> Three national think tanks widely recognized as the conservative libertarian counterparts to the ACLU—the Cato Institute, the Institute for Justice and Americans for Prosperity—all likewise have weighed in against continuing to recognize qualified immunity in federal court. The Cato Institute has called qualified immunity “one of the most obviously unjustified legal doctrines in our nation’s history.”<sup>28</sup> Beyond writing to the Commission to express support for the recommendations set out in this report, the Institute for Justice submitted a model statute for the Commission’s consideration that rejects qualified immunity and goes beyond the Commission’s recommendations in a number of other areas.<sup>29</sup> Consistent with the national organization’s position, Americans for Prosperity-New Mexico wrote to the Commission that it “strongly believes that public officials who violate the constitutional rights of New Mexicans should be held accountable, as the rule of law demands” and “commend[ing] the Commission for recommending a ‘New Mexico Civil Rights Act’ to remove qualified immunity as a defense to ensure that such accountability becomes a reality.”<sup>30</sup>

Respected public figures and the media have highlighted similar concerns with qualified immunity. Conservative commentator George Will has called on the United States Supreme Court to “rethink” qualified immunity due to its effects on both the general public and law enforcement

---

<sup>23</sup> *Kelsay v. Ernst*, 933 F.3d 975 (8th Cir. 2019).

<sup>24</sup> *Manzanares v. Roosevelt Cty. Adult Det. Ctr.*, 331 F.Supp.3d 1260, 1293 (D.N.M. 2018).

<sup>25</sup> Ending Qualified Immunity Act, H.R. 7084, 116th Cong. (2020).

<sup>26</sup> Colo. Rev. Stat. Ann. § 13-21-131(2)(b) (West)

<sup>27</sup> April Rodriguez, *Lower Courts Agree—It’s Time to End Qualified Immunity*, ACLU (Sept. 10, 2020), <https://www.aclu.org/news/criminal-law-reform/lower-courts-agree-its-time-to-end-qualified-immunity/>.

<sup>28</sup> Schweikert, Jay *Qualified Immunity: A Legal, Practical, and Moral Failure*, Cato Institute Policy Analysis No. 901 (September 14, 2020). Mr. Schweikert testified at some length before the House of Representative’s Criminal Justice Reform Subcommittee on August 10, 2020 to further express the Cato Institute’s opposition to qualified immunity.

<sup>29</sup> See public comments, attached at \_\_\_ and \_\_\_.

<sup>30</sup> See public comment at \_\_\_

# DRAFT

officers “tainted by the unpunished unconstitutional behavior of a few.”<sup>31</sup> Additionally, a diverse group of media outlets including The New York Times,<sup>32</sup> The Wall Street Journal,<sup>33</sup> and The New Republic<sup>34</sup> have all published searing criticisms of the doctrine.

Finally, individual New Mexicans weighed in on this issue by submitting public comment to the Commission, primarily in the form of submissions through the Commission’s website. Joining the national chorus detailed above, most comments the Commission received also advocated against recognizing qualified immunity as a defense to claims under the New Mexico Civil Rights Act.<sup>35</sup>

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

SAMPLE OF QUALIFIED IMMUNITY CASES
<p><b>Corbitt v. Vickers, 929 F.3d 1304 (11th Cir. 2019):</b> Dismissing civil rights case against an officer who, hunting a fugitive, ended up at the wrong house and forced six children, including two children under the age of three, to lie on the ground at gunpoint. The officer tried to shoot the family dog but missed and shot a 10-year-old child lying face down, 18 inches away from the officer. The court held that the case had to be dismissed because there was no prior case where an officer accidentally shot a child laying on the ground while the officer was aiming at a dog.</p>
<p><b>Jessop v. City of Fresno, 936 F.3d 937 (9th Cir. 2019):</b> Granting qualified immunity to officers sued for stealing hundreds of thousands of dollars in cash and rare coins while executing a search warrant. “We recognize that the allegation of any theft by police officers—most certainly the theft of over \$225,000—is deeply disturbing. Whether that conduct violates the Fourth Amendment’s prohibition on unreasonable searches and seizures, however, would not be clear to a reasonable officer.” (Internal quotations omitted)</p>
<p><b>Doe v. Woodard, 912 F.3d 1278 (10th Cir. 2019):</b> Granting qualified immunity for social</p>

<sup>31</sup> George F. Will, *This Doctrine Has Nullified Accountability for Police. The Supreme Court Can Rethink It*, Washington Post (May 13, 2020), [https://www.washingtonpost.com/opinions/will-the-supreme-court-rectify-its-qualified-immunity-mistake/2020/05/12/05659d0e-9478-11ea-9f5e-56d8239bf9ad\\_story.html](https://www.washingtonpost.com/opinions/will-the-supreme-court-rectify-its-qualified-immunity-mistake/2020/05/12/05659d0e-9478-11ea-9f5e-56d8239bf9ad_story.html).

<sup>32</sup> Editorial Board, *How the Supreme Court Lets Cops Get Away With Murder*, N.Y. Times (May 29, 2020), <https://www.nytimes.com/2020/05/29/opinion/Minneapolis-police-George-Floyd.html>.

<sup>33</sup> Robert McNamara, *Tear-Gas Grenades and Qualified Immunity*, Wall St. J. (Jan. 15, 2020), <https://www.wsj.com/articles/tear-gas-grenades-and-qualified-immunity-11579133525>.

<sup>34</sup> Matt Ford, *To Protect and Serve, or Pilfer and Steal?* The New Republic (April 17, 2020), <https://newrepublic.com/article/157342/supreme-court-police-qualified-immunity>.

<sup>35</sup> See Summary of Public Comment.

# DRAFT

worker who, without a warrant, “took color photographs of [a preschooler’s] naked body.” The child’s mother only learned of the search when the child told her that she hoped not to see the social worker because “I don’t like it when she takes all my clothes off.” Although precedent established that a police officer could not engage in this type search without a warrant, there was no prior case involving a social worker.

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

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

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

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

The plaintiffs did not lose the cases listed above because they did not have evidence to support their claims. They did not lose because the constitution was not violated. They lost only because neither the United States Supreme Court nor the court of appeals deciding the case already had found a constitutional violation under similar enough facts to overcome qualified immunity. And in recent years, federal courts have required plaintiffs to identify existing cases that recognized a constitutional violation under ever-closer facts to defeat this defense. As United States District Judge James O. Browning has explained, “the Supreme Court has sent unwritten signals to the lower courts that a *factually identical or a highly similar factual case* is required for the law to be clearly established, and the Tenth Circuit [which hears federal cases out of New Mexico and surrounding states] is now sending those unwritten signals to the district courts[.]”<sup>36</sup>

---

<sup>36</sup> *Favela v. City of Las Cruces ex rel. Las Cruces Police Dep’t*, 398 F. Supp. 3d 858, 894 (D.N.M. 2019) (citing *Malone v. Bd. of Cty. Comm’rs for Cty. of Dona Ana*, 707 F. App’x 552, 556 (10th Cir. 2017)).

# DRAFT

Judge Don Willett, a judicial conservative serving on the Fifth Circuit, has taken on this issue directly:

To some observers, qualified immunity smacks of unqualified impunity, letting public officials duck consequences for bad behavior—no matter how palpably unreasonable—as long as they were the *first* to behave badly. Merely proving a constitutional deprivation doesn't cut it; plaintiffs must cite functionally identical precedent that places the legal question “beyond debate” to “every” reasonable officer. Put differently, it's immaterial that someone acts unconstitutionally if no prior case held such misconduct unlawful. This current “yes harm, no foul” imbalance leaves victims violated but not vindicated. Wrongs are not righted, and wrongdoers are not reproached.<sup>37</sup>

The difficulty of citing such closely analogous law is then made worse by another change in how federal courts deal with qualified immunity. Federal courts originally started by determining whether a plaintiff had met their burden of establishing a violation of their constitutional rights and then determined whether the relevant law was clearly established.<sup>38</sup> In 2009, however, the United States Supreme Court allowed courts to begin skipping directly to the second step.<sup>39</sup> This creates a new problem—when courts jump to whether the law was clearly established to dispose of cases, they do not develop the substantive law any further. Dismissing a case because the law is not clearly established does not guide future courts regarding what is and is not a constitutional violation. In this way, courts can forever avoid deciding whether rights were violated. Stated differently, “[i]mportant constitutional questions go unanswered precisely because no one's answered them before. Courts then rely on that judicial silence to conclude there's no equivalent case on the books. No precedent = no clearly established law = no liability. An Escherian Stairwell. Heads government wins, tails plaintiff loses.”<sup>40</sup>

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

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

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

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

---

<sup>37</sup> Zadeh, at 479 (Willett, J. dissenting).

<sup>38</sup> See *Anderson v. Creighton*, 483 U.S. 635, 639-40 (1987); *Saucier v. Katz*, 533 U.S. 194, 200 (2001).

<sup>39</sup> *Pearson v. Callahan*, 555 U.S. 223, 236 (2009); Karen Blum, Erwin Chemerinksy, & Martin A. Schwartz, *Qualified Immunity Developments: Not Much Hope Left For Plaintiffs*, 29 *Touro L. Rev.* 633, 644 (2013).

<sup>40</sup> *Zadeh v. Robinson*, 928 F.3d 457, 489-80 (5th Cir. 2019) (Willett, J. dissenting).



# DRAFT

On the first issue, a study of cases involving qualified immunity nationally found that the doctrine is “utterly miserable” at resolving insubstantial claims, and rarely disposes of cases before discovery is conducted.<sup>41</sup> In a groundbreaking study, Professor Joanna Schwartz analyzed 1,183 lawsuits brought under Section 1983 over a two-year period in five federal districts.<sup>42</sup> The data showed that just 0.6% of cases were dismissed on qualified immunity grounds before discovery, with only 3.2% dismissed based on the defense before trial.<sup>43</sup> When Professor Schwartz limited her analysis to only cases where qualified immunity could be raised (979 cases), qualified immunity resolved just 3.9% of cases even though defendants raised qualified immunity in over 37%.<sup>44</sup> Albuquerque attorney Katherine Wray presented to the Commission her review of 1,691 federal civil rights cases filed in the District of New Mexico. That analysis revealed similar trends here.<sup>45</sup> Wray’s study showed that at least one qualified immunity motion was filed in 257 cases, or 16% of the total sample.<sup>46</sup> Qualified immunity was granted in 147 of those cases, which represents 9% of the total sample.<sup>47</sup> And where qualified immunity was granted, only 85 cases—just 5% of the 1,691 cases analyzed—were dismissed solely based on qualified immunity.<sup>48</sup> In both Professor Schwartz’s and Wray’s studies, Section 1983 cases were overwhelmingly settled or dismissed before trial for reasons other than qualified immunity: 88% (1,050) of cases for Professor Schwartz<sup>49</sup> and 71% (1,203) of cases for Wray.<sup>50</sup> These results show that qualified immunity is not an effective tool to quickly dispose of Section 1983 cases.<sup>51</sup>

On the second issue, no plaintiff can win in court without proving their case to a jury or judge at trial (or, in rare cases where the evidence is entirely lopsided in their favor, through summary judgment). And courts already scrutinize the cases that come before them to ensure trials are reserved for claims with merit. The scrutiny begins early, including right after the plaintiff starts their case by filing a complaint. If that document does not allege a valid legal claim, courts

---

<sup>41</sup> Joanna C. Schwarz, *The Case Against Qualified Immunity*, 93 Notre Dame L. Rev. 1797, 1809 (2018).

<sup>42</sup> Joanna C. Schwarz, *How Qualified Immunity Fails*, 127 Yale L. J. 2, 23 (2017).

<sup>43</sup> *Id.* at 60.

<sup>44</sup> *Id.*

<sup>45</sup> Katherine A. Wray, *Section 1983 Cases Filed in the United States District Court for the District of New Mexico Between 2015 and September 2020*, (unpublished study) (on file with the New Mexico Civil Rights Commission).

<sup>46</sup> *Id.* at 10.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.* at 12 (other cases where qualified immunity was granted resulted in a verdict (1%), were settled or voluntarily dismissed (22%), remanded (13%), or still pending at the time of the study (6%)).

<sup>49</sup> Joanna C. Schwarz, *How Qualified Immunity Fails*, 127 Yale L. J. 2, 46 (2017).

<sup>50</sup> Katherine A. Wray, *Section 1983 Cases Filed in the United States District Court for the District of New Mexico Between 2015 and September 2020*, at 5 (unpublished study) (on file with the New Mexico Civil Rights Commission).

<sup>51</sup> Qualified immunity also has the effect of dragging out cases, including by allowing a defendant to interrupt the case with an immediate appeal if the trial court finds the plaintiff has overcome the claim of immunity. *See Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985). The appeal can take a year or more, and if the court of appeals rules for the plaintiff, the defendant can assert qualified immunity yet again before the case can go to trial. The Commission received detailed examples of how this impacts real parties in real cases, including in the *Browder* case. There, Ashley and Lindsay Browder were killed when a police officer ran a red light at 60 miles per hour, killing Ashley and seriously injuring Lindsay. The family filed a federal civil rights case to try to recover for their loss, but the defendant filed two qualified immunity motions. The result was four years of litigation before the case ultimately settled.

# DRAFT

will dismiss the case without allowing it to go forward.<sup>52</sup> If a case survives the motion to dismiss phase, the parties may engage in discovery—a process by which the parties determine whether evidence supports the plaintiff’s claims. If that process does not provide the plaintiff with evidence that would allow a reasonable jury to rule in their favor, courts again will dispose of the case by entering a summary judgment in the defendant’s favor.<sup>53</sup> These procedural tools allow courts to dispose of frivolous claims before trial. If a plaintiff clears these preliminary hurdles, the jury or judge deciding the case provides a final check. Claiming that defendants also need qualified immunity for the system to work reflects unfounded cynicism about the basic civil process.

The Commission does not share in that cynicism, and it is particularly unwarranted in the context of constitutional claims. Such claims have long been governed by some of the highest standards in the law. Even proof of negligence by a public official generally is not enough to prove a constitutional claim,<sup>54</sup> and specific examples of the hurdles plaintiffs must overcome to prove a deprivation of their constitutional rights include:

- To prove an excessive force claim, the plaintiff must establish that a law enforcement officer’s conduct was objectively unreasonable “from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight.”<sup>55</sup> Similarly, New Mexico courts have recognized that, within reasonable limits, officers “are the judges of the force necessary to enable them to make arrests or to preserve the peace.”<sup>56</sup> When applying this standard, courts subject a plaintiff’s claim to a non-exhaustive list of seven factors designed to ensure law enforcement officers are treated fairly.<sup>57</sup>
- To establish a substantive due process violation under the federal constitution, a plaintiff must do more than show that the government actor intentionally or recklessly injured the plaintiff by abusing or misusing government power; the plaintiff must demonstrate a degree of outrageousness and a magnitude of potential or actual harm truly conscience shocking.<sup>58</sup>
- To prove a violation of the Eighth Amendment ban on cruel and unusual punishment, the plaintiff must prove that a prison official used force “maliciously and sadistically for the very purpose of causing harm.”<sup>59</sup>

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

---

<sup>52</sup> Rule 1-012(b)(6) NMRA.

<sup>53</sup> Rule 1-056 NMRA.

<sup>54</sup> *Bryson v. City of Edmond*, 905 F.2d 1386, 1390 (10th Cir.1990) (more than mere negligence required for constitutional deprivation in civil rights action).

<sup>55</sup> *State v. Mantelli*, 2002-NMCA-033, ¶ 22, 131 N.M. 692 quoting *Graham v. Connor*, 490 U.S. 386, 396 (1989); see also, *Tanberg v. Sholtis*, 401 F.3d 1151, 1168 (10th Cir. 2005) (“New Mexico law . . . reflects the same sensitivity as federal law to the split-second decisions officers must make.”).

<sup>56</sup> *Mead v. O’Connor*, 1959 -NMSC- 077, ¶ 4, 344 P.2d 478.

<sup>57</sup> *Estate of Larsen ex rel. Sturdivan v. Murr*, 511 F.3d 1255, 1260 (10th Cir. 2008).

<sup>58</sup> *Ganley v. Jojola*, 402 F. Supp. 3d 1021, 1067 (D.N.M. 2019)

<sup>59</sup> *Whitely v. Albers*, 475 U.S. 312, 320-21 (1986).

# DRAFT

## Protection for Government Officials from Personal Financial Liability

Many comments the Commission received expressed concern that not adopting qualified immunity for New Mexico Civil Rights Act claims would expose individual public employees to personal financial liability. The Commission agrees that individual employees should not face personal financial liability, and none of its recommendations—including those related to qualified immunity—would lead to that result. But New Mexico law already provides that government employees and officials acting within the scope of their duties will be indemnified (meaning the state or local government that employs them pays) for any for judgments or settlements based a violation of the state or federal constitutions.<sup>60</sup> And the Commission unanimously voted that this should remain true if the Legislature enacts a New Mexico Civil Rights Act.

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

Finally, qualified immunity is justified based on the theory that public officials should have fair warning that their actions violated the law. The “clearly established law” standard federal courts apply today, however, has drifted far away from the practical knowledge public officials are expected to have to perform their jobs in good faith. Specifically, government employees typically are not given training on more than a basic overview of constitutional law, and they certainly are not keeping track of each case where courts determine what is “clearly established” and what is not. It is instead far more common (and realistic) to expect public officials to be trained only on major cases that set general principles relevant to their work.<sup>61</sup> Yet as detailed above, those same general principles are not enough for plaintiffs to overcome qualified immunity.<sup>62</sup> And the level of factual similarity now required to defeat qualified immunity presumes that public officials are being educated about thousands of cases that control whether their conduct is constitutional.<sup>63</sup> The Legislature should not buy into the fallacy that public officials are tracking court dockets and altering their behavior based on each decision as it is handed down.<sup>64</sup>

---

<sup>60</sup> NMSA 1978 § 41-4-4.

<sup>61</sup> Joanna C. Schwartz, *Qualified Immunity’s Boldest Lie*, 87 *Univ. Chic. L. Rev.*, at 5-6 (forthcoming 2021).

<sup>62</sup> See *White v. Pauly*, 137 S. Ct. 548, 552 (2017).

<sup>63</sup> *Id.* at 5 (forthcoming 2021).

<sup>64</sup> *Id.*

# DRAFT

## Appendix III: Damages and Equitable/Injunctive Relief

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

The closer question for the Commission was whether to recommend also providing for punitive damages under the Act. Ultimately, the Commission concluded that the better course is for the Legislature not to expose the state and local governments to such relief under the Act. On this issue, the Commission recommends that the Legislature take a more restrictive approach than federal courts have taken under Section 1983, where punitive damages are available.<sup>65</sup> Three reasons for this stand out.

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

Second, the Legislature has made the policy decision not to allow for punitive damages in some other remedial statutes. For example, the New Mexico Human Rights Act provides for the recovery of “actual damages and reasonable attorney fees”<sup>66</sup> but does not allow for punitive damages.<sup>67</sup>

Third, the New Mexico Supreme Court has found that, although “government liability for punitive damages would deter the abuse of governmental power and promote accountability among government officials,” countervailing considerations justify limiting punitive damages.<sup>68</sup> From the Court’s perspective, those include: (1) the need to protect public revenues absent a statute specifically allowing punitive damages; and (2) the injustice of punishing innocent taxpayers rather than the officials at fault.<sup>69</sup>

---

<sup>65</sup> See, e.g., *Smith v. Wade*, 461 U.S. 30, 56 (1983).

<sup>66</sup> NMSA, 1978, § 28-1-13(D)

<sup>67</sup> *Gandy v. Wal-Mart Stores, Inc.*, 1994-NMSC-040, ¶ 8, 117 N.M. 441 (“Punitive damages are sometimes recoverable in tort actions but are not recoverable under the Human Rights Act.”).

<sup>68</sup> *State ex rel. New Mexico State Highway & Transp. Dept. v. Baca*, 1995-NMSC-033, ¶ 19, 120 N.M. 1.

<sup>69</sup> *Id.*

# DRAFT

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

# DRAFT

## Appendix IV: Attorney Fees

The Commission also considered whether the New Mexico Civil Rights Act should include a provision awarding reasonable attorney's fees.<sup>70</sup> The Commission heard from legal scholars regarding this issue and has concluded that an attorney's fee provision is essential if the Legislature wants the New Mexico Civil Rights Act to play a meaningful role in remedying constitutional violations for three reasons.

First, there are sound public policy reasons to award attorney's fees. "When a plaintiff succeeds in remedying a civil rights violation...he serves as a private attorney general, vindicating a policy that Congress [here, the Legislature] considered of the highest priority" and "therefore should ordinarily recover an attorney's fee from the defendant—the party whose misconduct created the need for legal action."<sup>71</sup> This is done when the statute involves important issues including anti-discrimination laws, environmental protection laws, and wage protection laws. Importantly, Congress has authorized attorney's fees to be awarded for violations of the federal constitution.<sup>72</sup> This is to ensure that fundamental rights granted by the constitution are protected. The Legislature should take the same approach for the New Mexico Constitution.

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

Third, it is not uncommon for the Legislature to include a provision awarding attorney's fees in New Mexico statutes. The New Mexico Human Rights Act, the New Mexico Whistleblower Protection Act, the New Mexico Minimum Wage Act, and the New Mexico Fair Pay for Women Act, all provide attorney's fees to prevailing plaintiffs. It also includes the Inspection of Public Records Act and the Open Meetings Act, just to name a few. The New Mexico Civil Rights Act which would protect our citizens' state constitutional rights is at least as important as these statutes and should also include a provision allowing reasonable attorney's fees to be awarded to a prevailing plaintiff.

---

<sup>70</sup> H.B. 5, ¶ F.

<sup>71</sup> *Fox v. Vice*, 563 U.S. 826, 833 (2011).

<sup>72</sup> 42 U.S.C. § 1988.

# DRAFT

## Appendix V: Indemnification

The Commission unanimously recommends that the Legislature provide public officials the same indemnification protections under the New Mexico Civil Rights Act that they currently receive under New Mexico law.<sup>73</sup> New Mexico law currently provides indemnification to public employees for violations of both the federal and the New Mexico constitutions pursuant to NMSA 1978 § 41-4-4(D)(2), which provides that “[a] governmental entity shall pay any settlement or any final judgment entered against a public employee for...a violation of...any rights, privileges or immunities secured by the constitution and laws of the United States *or the constitution and laws of New Mexico* that occurred while the public employee was acting within the scope of his duty.” (emphasis added). There is no reason to change that rule.

Applying the current indemnification rule to claims under the New Mexico Civil Rights Act instead makes sense for at least three reasons. First, exposing public officials to personal liability would serve as a disincentive for the recruitment and retention of government employees in New Mexico. The Commission does not want to decrease the number of high-quality candidates for government employment based on concerns they may face personal liability. The Commission respects that public employees often have difficult jobs for which they are paid less than they might make in the private sector. Changing NMSA 1978 § 41-4-4(D)(2) to expose public employees to personal liability would be counterproductive.

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

Finally, providing for broad indemnification of public officials follows other states. In a study of 9,225 cases where plaintiffs received payments from eighty-one state and local law enforcement agencies over a six-year period, individual law enforcement officers contributed in only .41% of those cases, totaling just .02% of the payments.<sup>74</sup> As the study’s author commented, “officers are more likely to be struck by lightning than to contribute to a settlement or judgment over the course of their career.”<sup>75</sup>

---

<sup>73</sup> HB 5, paragraph F.

<sup>74</sup> Joanna C. Schwartz, *The Case against Qualified Immunity*, 93 NOTRE DAME L. REV. 1797 (2018).

<sup>75</sup> *Id.* at 10.

# DRAFT

## Appendix VI: Costs and Insurance

House Bill 5 also required the Commission to “review and assess the need for and costs of additional insurance policies for public employees and public bodies, or for persons acting on behalf of or under the authority of public bodies” if a New Mexico Civil Rights Act is adopted.<sup>76</sup> The Commission devoted substantial time to this issue, including inviting the New Mexico Counties, the Municipal League, the State Risk Management Department (“RMD”), and the New Mexico Public School Insurance Association (“NMPSIA”) to provide information and present over two Commission meetings. Maureen Sanders, who teaches insurance law at the University of New Mexico School of Law, and Katherine Wray, an attorney in Albuquerque, also gave presentations. The Commission was not surprised that local governments, particularly the counties and some municipalities, are adamantly opposed to a New Mexico Civil Rights Act based primarily on fiscal concerns. The Commission appreciates those concerns but does not believe they undermine the compelling justification for enacting a robust New Mexico Civil Rights Act.

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

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

- By not including punitive damages in the New Mexico Civil Rights Act, the Legislature avoids the risk of wildly divergent verdicts (a risk the state and local governments will continue to bear in federal court cases under Section 1983). This will also ameliorate concerns raised about the cost and availability of insurance.
- While some presenters argued that not recognizing qualified immunity will significantly increase the fiscal impact of the New Mexico Civil Rights Act, that is not supported by the data the Commission received from either critics or proponents of qualified immunity. While disagreeing on the merits of the defense, everyone who presented to the Commission instead agreed that qualified immunity is disposing of a small percentage of civil rights cases. According to a study of all civil rights cases in federal court in New Mexico from 2015-2020,<sup>77</sup> qualified immunity motions were only

---

<sup>76</sup> HB 5 at ¶ H.

<sup>77</sup> Study conducted by attorney Katherine Wray and results presented to the Commission.



# DRAFT

filed in 16% of the cases.<sup>78</sup> Of those that were filed, the motions were granted 54% of the time.<sup>79</sup> This means that qualified immunity motions were granted in only 9% of civil rights cases in federal court.<sup>80</sup> Even in those cases, qualified immunity did not always fully dispose of the case. Instead, it often resulted in the court dismissing one of many claims or one of many defendants from the case.<sup>81</sup> Of the cases in which qualified immunity was granted, only 86 out of 1,691 were fully disposed of by the qualified immunity motion from 2015-2020.<sup>82</sup> That is approximately 7 cases per year. This handful of cases in which the qualified immunity defense would no longer be available will not dramatically increase costs to the public entities. The impact on those denied relief for reasons unrelated to the merits of their case, however, is devastating.

- New Mexico already awards attorney fees to parties who prevail under a long list of statutes, and fees are available to plaintiffs who prove under Section 1983 that their federal constitutional rights were violated. Against that backdrop, the Commission has seen nothing that indicates including an attorney fees provision in the New Mexico Civil Rights Act will materially alter the litigation costs state and local governments already bear.
- Unlike most costs, the exposure governments face for constitutional violations is within their control. The New Mexico Civil Rights Act would act as an incentive for government entities to impose the training, oversight, and accountability policies that are necessary to prevent government misconduct. By implementing aggressive loss prevention programs, the state and local governments can avoid constitutional violations in the first place. These loss prevention programs also reduce the costs of insurance. The Commission rejects persistent efforts to frame this as an either/or issue: either compensate the victims of constitutional violations or prevent constitutional violations through training and oversight. The New Mexico Civil Rights Act will allow those whose rights have been violated to obtain justice and will hold those who cause the violations accountable. The victims of government misconduct should not be denied relief in the name of subsidizing reform efforts by the same government entity responsible for the violation. Instead, the realization that allowing misconduct to continue will come at a cost should incentivize government entities to take the steps necessary for their employees to stay within the boundaries the state constitution imposes.
- Relatedly, civil rights statutes like the New Mexico Civil Rights Act promote the accountability and the same policies that the governmental entities insist that they want

---

<sup>78</sup> NM Counties presented information stating that qualified immunity was raised in 28% of federal civil rights cases, but this data was for only one year, 2015, whereas Katherine Wray's study presented data for the past 6 years, 2015-2020.

<sup>79</sup> *See id.*

<sup>80</sup> NM Counties presented information that qualified immunity was granted 57% of the times it was raised equaling 16% of the total cases, but this data was for only one year-- 2015-- whereas Katherine Wray's study presented data for the past 6 years-- 2015-2020.

<sup>81</sup> *See id.*

<sup>82</sup> *See id.*

# DRAFT

to adopt. For example, Stephen Slevin was held for two years in solitary confinement at the Dona Aña County Detention Center in violation of his constitutional rights.<sup>83</sup> A federal jury awarded \$22 million for the harm he suffered and the government misconduct that caused that harm. That led the NM Counties to institute an accreditation program for county jails throughout the state to prevent constitutional violations.<sup>84</sup> Compensating victims and instituting reform go hand-in-hand.

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

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

---

<sup>83</sup> <https://www.abqjournal.com/83498/treated-like-an-animal.html>

<sup>84</sup> However, only 9 of the 29 counties who are members of NM Counties are accredited. *See* <https://nmpoliticalreport.com/2020/10/17/cruel-and-usual-taos-county-jail-accused-of-abuse-and-dysfunction/>

# DRAFT

## Options to Address Any Increased Costs

While the insuring entities have stated that a New Mexico Civil Rights Act would have a negative impact on their ability to obtain reinsurance in the small percentage of case that exceed the amounts for which they are self-insured, they were unable to quantify this or provide any data to support this.<sup>85</sup> Insurers decide whether to insure and how much to charge based on data concerning the claims paid. If, however, there are any increased costs or issues obtaining insurance, the Commission includes here a range of options the Legislature might consider as options to improve how the state and local governments manage risk generally, and to minimize fiscal concerns related to the New Mexico Civil Rights Act in particular.

- Set up a monitoring mechanism for studying the fiscal impact and effectiveness of loss prevention measures related to the New Mexico Civil Rights Act over a period of time, such as 3 years. Such a lookback would ensure the Legislature determines whether to change the Act based on actual data.
- Establish a pool to reinsure all public entities, further spreading the risk. The reinsurance pool can then either self-insure or purchase reinsurance on the commercial market. Any such reinsurance pool should require strict underwriting guidelines that require loss prevention programs such as training, accreditation requirements, and oversight to reduce the risks of government misconduct.
- Require individual insurance policies for law enforcement officers provided through their government employer. This would track the insurance that doctors, attorneys, and other professionals must obtain, and the fact that an officer became uninsurable based on a history of misconduct reasonably would justify their removal.
- Develop a database that would make public information regarding law enforcement officers and other categories of employees whose actions result in criminal charges and/or civil judgments against them. Such a database exists for doctors and has the benefit of allowing future employers to accurately check the histories of potential employees.

---

<sup>85</sup> For cases involving state agencies and employees, the state's Risk Management Division ("RMD") provides compensation. RMD is fully self-insured and has no insurance policies. They maintain a large reserve and charge premiums to each department based on past experience and projected exposure. Departments also pay deductibles. New Mexico Counties provides insurance to 29 of the 33 counties in the state. They are self-insured for up to \$2 million per occurrence, and they purchase reinsurance for any claims over \$2 million. This reinsurance pays for an additional \$3 million per occurrence with a \$10 million yearly aggregate for each member, and up to \$15 million in the aggregate for all members each year. For law enforcement officers, this insurance coverage is provided at \$657 per year per officer. NM Counties determines the amount of the premiums charged to each county based on actuarial studies, and each county has a deductible that it pays for each claim. The New Mexico Municipal League ("NMML") provides insurance coverage to most cities and towns in New Mexico, excepting some of the larger cities such as Albuquerque, Las Cruces and Santa Fe. It is self-insured for claims up to \$500,000, has reinsurance for an additional \$500,000 per occurrence, and has an aggregate limit of \$2 million. NMPSIA provides civil rights coverage to its insureds through a combination of both self-insurance and reinsurance and charges premiums to its members.

DRAFT

# DRAFT

## Appendix VII: Improve the Law Enforcement Academy

[Pending discussion at next meeting re Kelin/Rodriguez/Stewart recommendations]