



National Police Accountability Project

A Project of the National Lawyers Guild

**SUPPORT HB 115 – Civil Rights – Violation of Rights – Government Liability
Written Testimony of National Lawyers Guild-National Police Accountability
Project, Keisha James, Staff Attorney
House Judiciary Committee – Thursday, January 19, 2023**

Dear Members of the House Judiciary Committee,

Thank you for the opportunity to provide comment on this important issue. The National Lawyers Guild National Police Accountability Project (“NPAP”) is a nonprofit organization dedicated to holding law enforcement and corrections officers accountable to constitutional and professional standards. We support the passage of HB 115, a bill that will enable victims of civil rights abuses to hold police officers accountable in state court without the shield of qualified immunity.

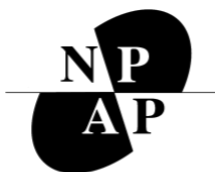
The doctrine of qualified immunity has created a nearly insurmountable barrier for communities to hold police officers civilly liable in federal court for civil rights violations. Qualified immunity requires a victim of police misconduct to not only show that their constitutional rights were violated but prove that the violation was of “clearly established” law.¹ The Supreme Court has interpreted the “clearly established” law requirement to mean a plaintiff must be able to identify existing precedent that “squarely governs” the specific facts in their case in order to recover.²

There are many cases where an officer’s patently unconstitutional conduct was shielded by qualified immunity because no prior defendant had been sued for similar behavior. For instance, in *Corbitt v. Vickers*,³ a Georgia deputy sheriff accidentally shot a ten-year-old child lying on the ground while repeatedly attempting to shoot a pet dog that posed no threat. The circuit court held that the deputy was entitled to qualified immunity because there was no prior case with

¹ *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

² *Kisela v. Hughes*, 138 S. Ct. 1148, 1153 (2018).

³ 929 F.3d 1304 (11th Cir. 2019).



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the same unique set of facts. There are dozens of other equally ludicrous and unjust outcomes that have resulted from the doctrine of qualified immunity.⁴

While the Maryland legislature cannot eliminate qualified immunity in federal courts, it can provide people in this state with an alternative method to vindicate their rights in state court. Although Maryland provides a common law private right of action that allows people to recover for violations perpetrated by local police officers,⁵ state police officers are still granted immunity by statute and, as such, victims of civil rights abuses do not currently have a clear path to hold state police officers accountable.⁶ In *Smith v. Md. State Police Dep't*,⁷ Maryland State Police officers stopped a car without probable cause and commanded a K-9 to attack an individual after he had already been restrained. The court found that the officers were not entitled to qualified immunity because prior cases had clearly established the constitutional rights at issue. If these prior cases had not existed, however, the officers would have been shielded by qualified immunity. HB 115 would eliminate qualified immunity for police officers who deprive people of their constitutional rights, privileges, or immunities, enabling victims to vindicate their rights whether or not there are prior cases with similar facts.

Although Maryland passed reforms two years ago that addressed various areas of policing, qualified immunity remains unaddressed. The repeal of the Law Enforcement Officers' Bill of Rights ("LEOBOR") was a key step in increasing transparency in policing and ensuring that police officers face employment consequences for misconduct. However, LEOBOR's repeal does not help victims of civil rights abuses who have suffered tangible injuries as a result of police misconduct. HB 115 seeks to help these victims. It is important to note that Maryland would not be the first state to eliminate strict immunity defenses for state court civil rights actions against police officers. Montana,⁸ Colorado,⁹ and

⁴ See Expanding Pathways to Accountability: State Legislative Options to Remove the Barrier of Qualified Immunity (attached).

⁵ See *Ritchie v. Donnelly*, 597 A.2d 432 (Md. 1991); *Clea v. Mayor and City Council of Baltimore*, 541 A.2d 1303, 1312 (Md. 1988).

⁶ See Md. Code Ann., Cts. & Jud. Proc. § 5-522; *Lee v. Cline*, 863 A.2d 297 (Md. 2004).

⁷ Civil Action No. GLR-18-2836, 2019 U.S. Dist. LEXIS 170767 (D. Md. Sep. 30, 2019).

⁸ *Dorwat v. Caraway*, 58 P.3d 128, 131 (Mont. 2002).

⁹ COLO. REV. STAT. ANN. § 13-21-131 (2020).



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New Mexico¹⁰ have all rejected qualified immunity defenses for state constitutional actions against law enforcement officers. Most recently, the Nevada Supreme Court ruled that qualified immunity is not a defense in cases where government officials conduct unlawful searches and seizures.¹¹

A common concern about qualified immunity reform is that it will lead to a significant increase in crime because officers will be afraid to do their job. However, that has not been the case in Colorado. An examination of data from Denver and Colorado Springs shows that violent crime rates have remained the same since qualified immunity reform was passed.¹² Crime rates in Denver also remained consistent with cities with similar populations and demographics.¹³

Another concern is that eliminating qualified immunity will result in court inefficiencies. However, that has not been in the case in New Mexico following the elimination of qualified immunity, where civil rights attorneys have reported a decrease in litigation delays.¹⁴ Yet another argument typically cited in opposition to ending qualified immunity is that it is too costly. However, forcing Maryland residents to contend with statutory and qualified immunity will not save costs but shift them to victims of government abuse. Victims of police brutality in particular experience tangible consequences, including medical costs, lost wages, and emotional trauma. Barring their suits through qualified immunity forces victims to bear the costs of police misconduct rather than the officers and law enforcement agencies responsible for their suffering.

We urge you to pass HB 115. Thank you, again, for the opportunity to provide comment on this important issue.

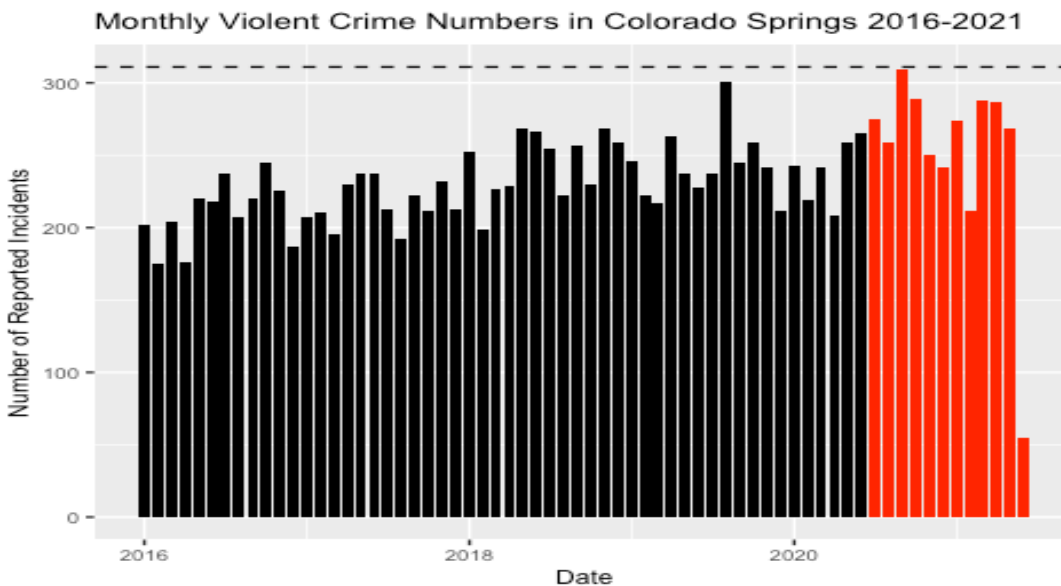
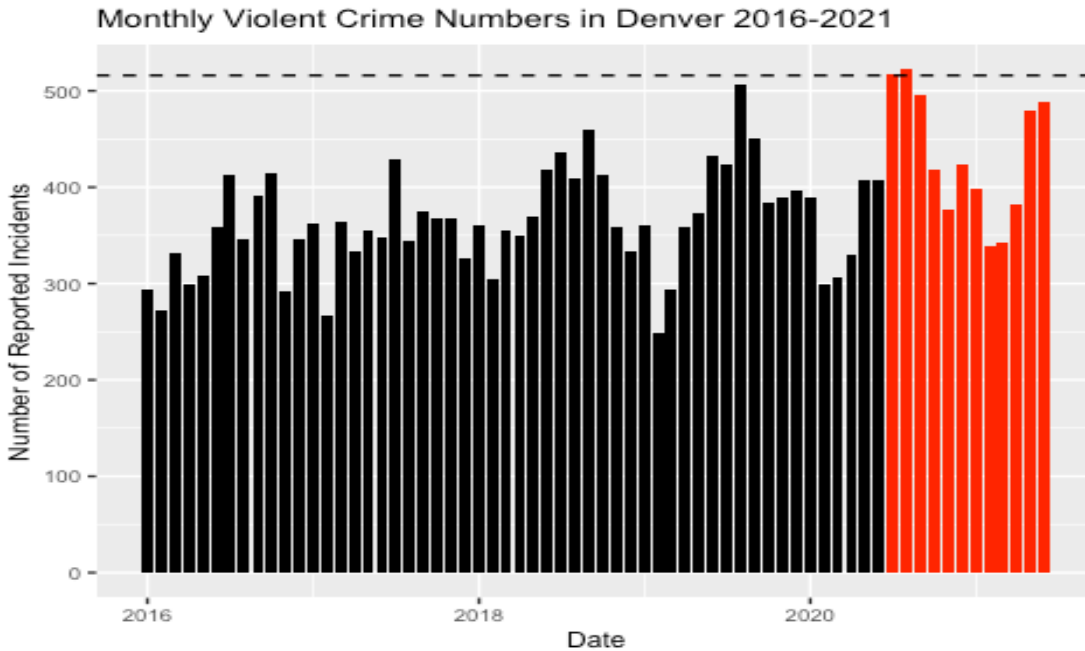
¹⁰ New Mexico Civil Rights Act, 2021Bill Text NM HB 4.

¹¹ Nick Sibilla, *Nevada Supreme Court Upholds The Right To Sue The Government, Blocks Qualified Immunity*, Forbes (Jan. 12, 2023), <https://www.forbes.com/sites/nicksibilla/2023/01/12/nevada-supreme-court-upholds-the-right-to-sue-the-government-blocks-qualified-immunity/?sh=4e992837588e>.

¹² See Exhibit A (attached).

¹³ See Exhibit B (attached).

¹⁴ See Exhibit C (attached).

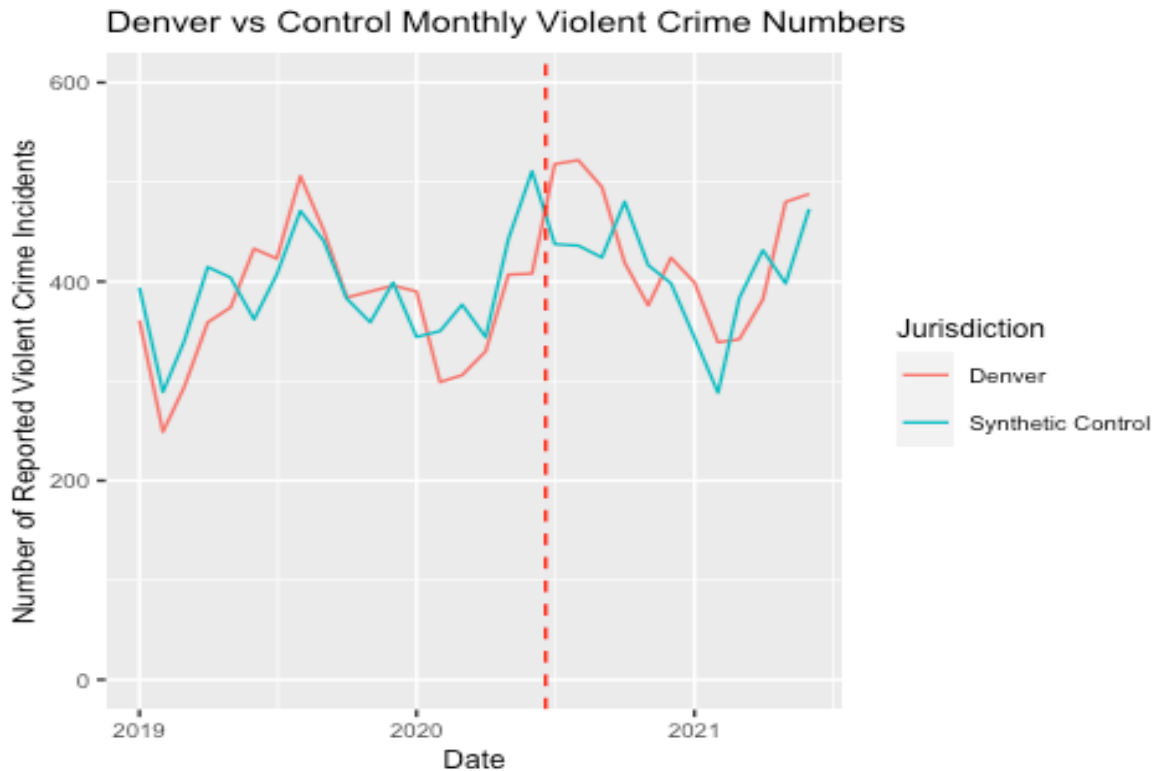


Monthly Violent Crime Numbers 2016-2021: Each bar represents the number of reported incidents in a single month. Red bars represent the months following the passage of the police accountability legislation in June 19, 2020. Data from June 20-30 is included in the month immediately preceding the red bars (June 2020). The black dotted line represents 10 reported violent incidents above the previous maximum number of offenses in a single month in the four years prior to legislation. Data was derived from the FBI,¹ CSPD,² and DPD.³

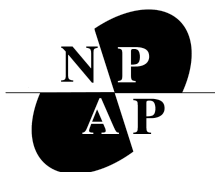
¹ <https://crime-data-explorer.app.cloud.gov/pages/explorer/crime/crime-trend>

² <https://policedata.coloradosprings.gov/Crime/Crimes-Against-People/ghs7-nqyk>.

³ <https://www.denvergov.org/opendata/dataset/city-and-county-of-denver-crime>.



Monthly Violent Crime Numbers in Denver Compared to Control 2019-2021: The red dashed line represents the passage of the police accountability legislation in June 19, 2020. The control continues to mostly track Denver violent crimes even after the passage of the police accountability law. The synthetic control model was created by culling data from American municipalities from 2011-2019 that had both UCR and American Community Survey census data. From there, the cities were filtered to only include cities greater than 50000 in population to identify roughly 500 similar jurisdictions to Denver. “Similar” cities were identified by analyzing the following factors: population size, single female-led family household percentage, high school graduate or higher percentage, percentage of the population who lived in the same house they lived in a year ago, percentage of the population who were over 18, percentage of the population who were white, percentage of the population who were self-employed, unemployment rate, median income, child poverty rate, and the percentage of housing units occupied by their owners.



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IMPACT OF THE NEW MEXICO CIVIL RIGHTS ACT ONE YEAR LATER

In July 2022, NPAP polled fifteen members who practice civil rights in New Mexico to tell us how the New Mexico Civil Right Act (NMCRA) has impacted the rights of their clients since going into effect in July 2021. Overall, NPAP attorneys have not filed more cases than usual but they believe NMCRA will help ensure that their clients who suffered constitutional violations will not have their cases dismissed or stalled because of qualified immunity.

- **NM Civil Rights Attorneys Are Not Filing Significantly More Cases.**
 - Most attorneys that had sued under the law responded that they added NMCRA claims to cases they would have otherwise filed as a standard Section 1983 action.
 - Only two members reported filing a case exclusively under NMCRA and not Section 1983.
 - Five members reported having a case in development that they think would be vulnerable to dismissal under qualified immunity if it were filed as a standard Section 1983 case but will survive under NMCRA.
- **NMCRA Will Help Civil Rights Plaintiffs Survive Dispositive Motions.**
 - Most members anticipate that NMCRA will help them survive dispositive motions on qualified immunity.
 - Members are also optimistic that NMCRA will help their cases against institutional defendants since it creates a cause of action against them, as well. In *Hand v. Cty. of Taos, NM*, the District court found the plaintiff had stated a claim against the county board under NMCRA but not Section 1983 because he had not identified an official policy or custom in his complaint. 2022 U.S. Dist. LEXIS 115462, at *5-6 (D.N.M. June 29, 2022).
- **NMCRA Is Helping Avoid Delays Associated with Qualified Immunity**
 - One member thinks that the NMCRA will also lower the number of motions to dismiss, interlocutory appeals, and discovery stays caused by qualified immunity. He is basing this on the fact that a defendant he regularly sues did not file a motion to dismiss in a case where he added NMCRA claims.