

## National Police Accountability Project

A Project of the National Lawyers Guild

**SUPPORT FOR HB 1202** – Addressing meaningful civil remedies for persons injured as a result of police misconduct, including by allowing for an award of attorney fees in addition to damages and injunctive and declaratory relief.

**Written Testimony** of National Lawyers Guild-National Police Accountability Project, Eliana Machefsky, Legal Fellow

**House Committee on Civil Rights & Judiciary**– Tuesday, January 11, 2022

Dear Members of the Committee,

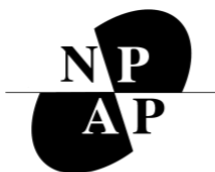
Thank you for the opportunity to provide comment on this important issue. The National Lawyers Guild National Police Accountability Project (“NPAP”) is a nonprofit organization dedicated to holding law enforcement and corrections officers accountable to constitutional and professional standards. We strongly support the passage of HB 1202, a bill that will provide victims of civil rights abuses with a path to sue police 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 also to prove that the violation was of “clearly established” law.<sup>1</sup> The Supreme Court has interpreted the “clearly established” law requirement to mean a plaintiff in Washington must be able to identify a case from the Ninth Circuit Court of Appeals or Supreme Court with nearly identical facts in order to recover.<sup>2</sup>

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<sup>1</sup> *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

<sup>2</sup> *Id.*



## National Police Accountability Project

A Project of the National Lawyers Guild

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 a case called *Corbitt v. Vickers*,<sup>3</sup> 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 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.<sup>4</sup>

Although the Washington 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. It is important to note that Washington would not be the first state to eliminate strict immunity defenses for state court civil rights actions. Colorado,<sup>5</sup> New Mexico,<sup>6</sup> and Connecticut<sup>7</sup> have all rejected qualified immunity defenses for state constitutional actions against law enforcement officers.

A common concern about qualified immunity reform is that it will lead to a significant increase in crime because officers will be reluctant to do their jobs out of fear of litigation. 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

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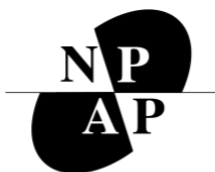
<sup>3</sup> 929 F.3d 1304 (11th Cir. 2019).

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

<sup>5</sup> COLO. REV. STAT. ANN. § 13-21-131 (2020).

<sup>6</sup> New Mexico Civil Rights Act, 2021 Bill Text NM HB 4.

<sup>7</sup> CONN. GEN. STAT. § 52-571k (2021).



## National Police Accountability Project

A Project of the National Lawyers Guild

passed.<sup>8</sup> Crime rates in Denver also remained consistent with cities with similar populations and demographics.<sup>9</sup>

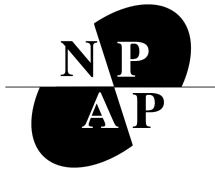
Another argument typically cited in opposition to qualified immunity is that it is too costly. But forcing Washington residents to contend with qualified immunity will not save costs—it will merely shift those costs to the victims of government abuse. Victims of police brutality in particular experience tangible consequences. For instance, they may have medical costs, be forced to miss work, or navigate emotional trauma from their experiences. Barring their suits through the doctrine of qualified immunity forces these victims to bear the cost of police misconduct, rather than the officers and law enforcement agencies responsible for their suffering.

We urge you to recommend that the legislature eliminate qualified immunity for Washington civil rights actions. Thank you for the opportunity to provide comment on this important issue.

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<sup>8</sup> See Exhibit A.

<sup>9</sup> See Exhibit B.



## National Police Accountability Project

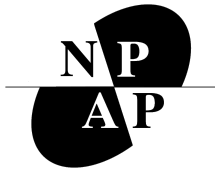
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### **EXPANDING PATHWAYS *to* ACCOUNTABILITY: STATE LEGISLATIVE OPTIONS *to* REMOVE *the* BARRIER *of* QUALIFIED IMMUNITY**

A growing number of Americans have come to the realization that there is a systemic problem with policing in our country. It has become clear that too often, a police officer can violate a person's rights, and even end their life, without facing any meaningful consequences. While there are many police accountability mechanisms in need of change, ensuring officers at least face civil liability for misconduct is critical to any reform effort. Lawsuits alone cannot end problematic policing tactics, eliminate racial bias in law enforcement agencies, or bring peace to the grieving families who lost a loved one to police violence. However, they can deter future officer misconduct, empower Black and Brown communities by giving them recourse to vindicate their rights, and ensure victims of police abuse are not forced to bear the cost of their mistreatment.

Individuals whose rights have been violated by the police face exceptionally difficult barriers to relief in federal court and often lack alternative paths to recovery under state law. In federal litigation, the judge-made doctrine of qualified immunity shields officers from liability in lawsuits alleging constitutional violations because courts often require a plaintiff to point to a factually identical prior case. While many states provide their residents with constitutional protections similar to those guaranteed by the federal bill of rights, there is often no corresponding private right of action. Shut out of both federal and state court, individuals who have been harmed by the police have no avenue to pursue justice and the responsible law enforcement officers are able to escape liability for their misconduct.

States do not need to wait for Congress or the United States Supreme Court to allow their residents to hold police officers accountable. State lawmakers can pass legislation that: (1) creates a private right of action for individuals whose state constitutional rights are violated by the police and; (2) eliminates immunity defenses, including qualified immunity. Montana and Colorado already provide their residents with state constitutional causes of action without the barrier of qualified immunity. Increasing access to justice can be accomplished without the doomsday scenarios forecasted by opponents of qualified immunity reform. This paper outlines the shortcomings in existing civil rights enforcement regimes, proposes recommendations for state-level reform legislation, and responds to common objections raised by opponents of immunity reform efforts.



# National Police Accountability Project

A Project of the National Lawyers Guild

## *The* DOCTRINE of QUALIFIED IMMUNITY IMPEDES JUSTICE *in* FEDERAL COURT

Congress enacted Section 1983 of the Civil Rights Act of 1871 to provide a cause of action against government officials who used their authority to violate a person’s constitutional rights. The legislation, commonly referred to as the Ku Klux Klan Act, can be invoked by anyone whose rights are violated but was designed to ensure African Americans could hold government officials accountable for perpetrating or sanctioning racial violence.

Nothing in the text of the statute provides for immunities. Instead, qualified immunity is a judge-created doctrine that has questionable common law precedent as applied to many claims.<sup>1</sup> The Supreme Court first articulated the current standard for qualified immunity in *Harlow v. Fitzgerald*.<sup>2</sup> This standard requires an individual to not only show that her constitutional rights were violated, but prove that the violation was of “clearly established” law.<sup>3</sup> A law is “clearly established” where “existing precedent places the legal question ‘beyond debate’ to ‘every reasonable officer.’”<sup>4</sup>

Over the last three decades, the Supreme Court has urged lower courts to apply qualified immunity more and more strictly, resulting in harsh and unjust decisions. Many courts have held that qualified immunity requires civil rights plaintiffs to identify a prior case with facts that are nearly identical to those giving rise to their case. Consequently, Section 1983 police brutality cases are often not decided on whether the plaintiff’s rights were violated, but rather their ability to locate an identical constitutional violation in a prior case. This requirement severely undermines civil rights guarantees by providing protection to inventive, grossly incompetent, and uniquely egregious officers. 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. The following recent cases highlight how this protection operates in practice:

- *Jessop v. City of Fresno*<sup>5</sup>—a Fresno police officer stole more than \$225,000 in cash and rare coins while executing a search warrant. The Ninth Circuit held that while “the theft [of]

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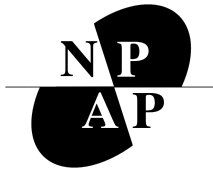
<sup>1</sup> See Eg. *Ziglar v. Abbasi*, 137 S.Ct. 1843, 1871 (2017)(Thomas, J., concurring)(explaining “We have not attempted to locate that standard in the common law as it existed in 1871, however, and some evidence supports the conclusion that common-law immunity as it existed in 1871 looked quite different from our current doctrine.”); Joanna Schwartz, *The Case Against Qualified Immunity*, 93 Notre Dame L. Rev. 1797, 1801 (2018); William Baude, *Is Qualified Immunity Unlawful*, 106 Cal. L. Rev. 45, 55-57 (2018).

<sup>2</sup> 457 U.S. 800, 818 (1982)

<sup>3</sup> *Id.*

<sup>4</sup> *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011); *Kisela v. Hughes*, 138 S. Ct. 1148, 1153 (2018)

<sup>5</sup> 936 F.3d 937 (9th Cir. 2019)



## National Police Accountability Project

A Project of the National Lawyers Guild

personal property by police officers sworn to uphold the law” may be “morally wrong,” the officer could not be sued for the theft because the Ninth Circuit had never specifically decided “whether the theft of property covered by the terms of a search warrant, and seized pursuant to that warrant, violates the Fourth Amendment.”

- *Corbitt v. Vickers*<sup>6</sup>—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 Eleventh Circuit held that the deputy was entitled to qualified immunity because there was no prior case with this particular set of facts.
- *Dukes v. Deaton*<sup>7</sup>—Clayton County narcotics officers began a military-style assault on a sleeping couple’s bedroom without providing a warning or visually inspecting the room. The Eleventh Circuit concluded that throwing an explosive device into an occupied bedroom was not a clearly established constitutional violation because there was no decisional case law on point.

Additionally, courts often seize on minor factual distinctions in finding that “clearly established law” does not exist. The following cases illustrate how qualified immunity denies victims of police brutality access to justice even in situations where the abuse they have experienced is not novel:

- *Baxter v. Bracey*<sup>8</sup> —an officer deployed a police dog against a man suspected of a crime who had already surrendered and was sitting on the ground with his hands up. The Sixth Circuit granted the officer qualified immunity even though the plaintiff had successfully identified a prior case with nearly identical facts, in which the court had held that it was unconstitutional for police to deploy a dog against a suspect who had surrendered by lying on the ground.<sup>9</sup> However, the Sixth Circuit distinguished the circumstances because the plaintiff was sitting in clear surrender rather than lying down.
- *Kisela v. Hughes*<sup>10</sup>—an officer shot a woman holding a knife who was reportedly calm and standing 5-6 feet away from the nearest person. The Supreme Court held that officer was entitled to qualified immunity, in part because the most similar prior case involved an officer who shot someone from the top of a hill, not from behind a fence.

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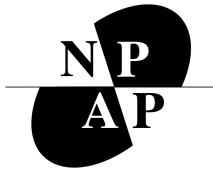
<sup>6</sup> 929 F.3d 1304 (11th Cir. 2019)

<sup>7</sup> 852 F.3d 1035 (11th Cir. 2017)

<sup>8</sup> 751 F. App’x 869 (6th Cir. 2018)

<sup>9</sup> *Campbell v City of Springsboro*, 700 F.3d 779, 789 (6th Cir. 2012)

<sup>10</sup> 138 S. Ct. 1148, 1154 (2018)



## National Police Accountability Project

A Project of the National Lawyers Guild

- *De Boise v. Taser Int'l, Inc.*<sup>11</sup>— St. Louis police officers rejected safer alternatives to gain compliance and tased an unarmed man to death while he was in the throes of a mental health episode. The Eighth Circuit dismissed the family’s lawsuit on the basis of qualified immunity, finding prior cases prohibiting repeated tasing were not sufficiently similar.

In addition to producing unjust results, qualified immunity stalls the development of new law and fosters inefficiency in civil rights litigation. First, courts rarely make new “clearly established law” as cases are often dismissed on qualified immunity grounds without ever deciding whether a constitutional violation occurred.<sup>12</sup> This means that courts can avoid providing warnings about what the Constitution requires by simply holding that a violation was not previously established.

Moreover, the qualified immunity doctrine allows government defendants to make civil rights actions slower and more expensive. Federal civil procedure typically bars a party from appealing a district court decision until a final judgment has been entered in the case.<sup>13</sup> However, orders denying qualified immunity can be appealed on an interlocutory basis—pausing the case from moving forward, often for years, while the appeal is pending, and increasing litigation costs. Defendants can even file multiple interlocutory appeals in the same case. That means victims of police misconduct who ultimately prevail have to wait much longer to obtain justice.

The bad decisions and unfair results attributable to the qualified immunity doctrine have mobilized a diverse collection of critics. Jurists and legal advocacy organizations across the ideological spectrum have spoken out in favor of eliminating the defense of qualified immunity. For instance, Justice Thomas recently filed a dissent from a denial of certiorari stating “I continue to have strong doubts about our § 1983 qualified immunity doctrine.”<sup>14</sup> Justice Sotomayor expressed a similar disapproval of the doctrine in her dissenting opinion in *Kisela v. Hughes*, “the majority today exacerbates [qualified immunity’s] troubling asymmetry . . . It tells officers that they can shoot first and think later, and it tells the public that palpably unreasonable conduct will go unpunished.”<sup>15</sup> In the NGO sector,

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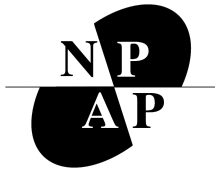
<sup>11</sup> 760 F.3d 892, 898 (8th Cir. 2014)

<sup>12</sup> *Pearson v. Callahan*, 555 U.S. 223, 236 (2009)(authorizing courts to resolve question of whether challenged conduct violated clearly established law without first determining whether a constitutional violation occurred)

<sup>13</sup> 28 U.S.C. 1291

<sup>14</sup> *Baxter v. Bracey*, 140 S. Ct. 1862 (Mem.) (2020) (Thomas)

<sup>15</sup> *Kisela v. Hughes*, 138 S. Ct. 1148, 1162 (Sotomayor, J., dissenting) (2018)



# National Police Accountability Project

A Project of the National Lawyers Guild

the Cato Institute,<sup>16</sup> American Civil Liberties Union,<sup>17</sup> Law Enforcement Action Partnership,<sup>18</sup> and the Movement for Black Lives<sup>19</sup> have all called for the end of the qualified immunity in its current form.

Given the growing consensus that qualified immunity is in need of abolition, there is hope that federal level reform could be on the horizon. However, judicial reconsideration and federal legislative action are far from guaranteed. Additionally, states that provide their residents with more expansive protections than the federal constitution have an interest in ensuring there is a vehicle to vindicate those rights regardless of federal reform. State legislators must take action to ensure their citizens have an avenue to obtain justice in state court and hold police officers accountable for misconduct.

## ***There are CURRENTLY INSUFFICIENT STATE COURT ALTERNATIVES AVAILABLE to hold POLICE ACCOUNTABLE***

State courts provide remedies for certain types of police abuse through common law torts like false arrest, trespass, assault, battery, malicious prosecution, and wrongful death. However, the relief available to plaintiffs under tort law is generally not coextensive with federal constitutional protections. Many existing tort law regimes deprive plaintiffs of relief for common injuries that flow from police misconduct like interference with speech and protest rights. Additionally, state tort laws also contain broad immunities that operate to help police officers avoid accountability.<sup>20</sup> And tort remedies frequently do not include attorney's fees, so victims of police misconduct who are unlikely to recover large awards often cannot find a lawyer to take their tort case on a contingent fee basis.

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<sup>16</sup> Lawrence Hurley and Andrew Chung, *Before the court: A united front takes aim at qualified immunity*, REUTERS, (May 8, 2020) <https://www.reuters.com/investigates/special-report/usa-police-immunity-opposition/>

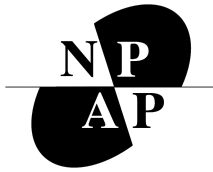
<sup>17</sup> *Id.*

<sup>18</sup> *Recommendations to Reform Policing*, Law Enforcement Action Partnership, (June 3, 2020), <https://lawenforcementactionpartnership.org/national-policing-recommendations/>

<sup>19</sup> *End of the War on Black Communities*, Movement for Black Lives, <https://m4bl.org/policy-platforms/end-the-war-on-black-communities/> (last visited Feb. 12, 2021, 12:45 PM).

<sup>20</sup> See *Eg., Ridley v. Johns*, 274 Ga. 241, 242, 552 S.E. 2d 853 (2001); See OCGA § 50-21-25(a)(the Georgia Tort Claims Act "exempts state officers and employees from liability for any torts committed while acting within the scope of their official duties or employment."); *McKenna v. Julian*, 763 N.W.2d 384, 389–90 (Neb. 2009) (Nebraska's Political Subdivisions Tort Claims Act immunizes any officer, agent, or employee of a political subdivision for claims "arising out of assault, battery, false arrest, false imprisonment, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights."); *Pauley v. Reinoehl*, No. 679, 2002, 848 A.2d 561 (Del. 2004)(the state statutes waived sovereign immunity only to the extent that any loss was covered by insurance); *Dall v. Caron*, 628 A.2d 117, 119 (Me. 1993) (Maine Tort Claims Act "confers immunity on the police officers for their decision to prosecute the criminal charges on which the malicious prosecution claims are based").





# National Police Accountability Project

A Project of the National Lawyers Guild

Even though many state constitutions recognize their residents possess fundamental rights analogous to or greater than those enshrined in the federal bill of rights, they do not always have a recognized private right of action. Currently only 22 states provide a statutory or common law private right of action that allows people to recover for violations of their state constitutional rights.<sup>21</sup> Even the states that have recognized their residents have a constitutional private right of action have limited the situations in which a plaintiff can recover. Some states only permit recovery for specific types of injuries<sup>22</sup> or only in the event of flagrant violations.<sup>23</sup> Moreover, several states have adopted the federal “clearly established law” qualified immunity standard for state constitutional challenges—effectively foreclosing meaningful recovery.<sup>24</sup>

## STATE LEGISLATION *can* EXPAND ACCOUNTABILITY *for* POLICE

State legislatures have the authority to provide the people in their state with a clear civil court remedy when police violate their civil rights. While the optimal legislative strategy will vary depending on the state’s existing laws and political landscape, enacting a state analogue to Section 1983 that eliminates the shield of qualified immunity would provide a remedy for constitutional violations. To ensure meaningful recovery for police misconduct, the reform bill should include the following features:

- Provide a cause of action allowing people to enforce the fundamental rights guaranteed by the state constitution;
- Specify that qualified immunity is not a defense to claims brought under the Act;
- Provide for monetary damages and injunctive relief;
- Allow for plaintiffs who prevail in cases brought under the Act to recover reasonable attorney’s fees and costs;
- Ensure that state and local governments indemnify their employees where failure to do so would leave the plaintiff without a method of recovery.

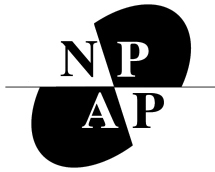
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<sup>21</sup>Arkansas (ARK. CODE ANN. §§16-123-101 to -108), California (CAL. CIV. CODE § 52.1), Colorado (COLO. REV. STAT. ANN. § 13-21-131) Massachusetts (MASS. GEN. LAWS ch. 12, § 11I), Nebraska (NEB. REV. STAT. §20-148), New Jersey (N.J. REV. STAT. § 10:6-2), Alaska, Connecticut, Iowa, Illinois, Louisiana, Maryland, , Michigan, Mississippi, Montana, New York, North Carolina, Utah, Vermont, Virginia, West Virginia, Wisconsin *See*, Sharon N. Humble, *Implied Cause of Action for Damages for Violation of Provisions of State Constitutions*, 75 A.L.R. 5th 619, 624-28 (2000)

<sup>22</sup> *See Old Tuckaway Assocs. Ltd. P’ship v. City of Greenfield*, 509 N.W.2d 323, 328–29 & n.4 (Wis. Ct. App. 1993)(recognizing constitutional claims only for due process violations)

<sup>23</sup> *See Eg. Hertz v. Beach*, 211 P.3d 668, 677 (Alaska 2009)(limiting damages for private causes of action enforcing Alaska’s constitution except in cases of flagrant violations)

<sup>24</sup> *See e.g.*, Gary S. Gildin, *Redressing Deprivations of Rights Secured by State Constitutions Outside the Shadow of the Supreme Court’s Constitutional Remedies Jurisprudence*, 115 Penn St. L. Rev. 877, 903–04 (2011).



# National Police Accountability Project

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The first two sections of this paper detail the importance of creating a state cause of action and eliminating the defense of qualified immunity. Damages, attorney's fees, and indemnification are also necessary to ensure plaintiffs have a meaningful opportunity to pursue relief under the statute. Section 1983 authorizes both compensatory and punitive damages for civil rights violations. Compensatory damages are grounded in the plaintiff's actual losses and designed to make the plaintiff whole as well as deter the defendant from engaging in future constitutional violations.<sup>25</sup> They are indispensable to most civil remedial statutes and must be included in a state reform bill to provide comparable relief to Section 1983. While many important policy rationales support the provision of punitive damages,<sup>26</sup> proponents of state reform bills may determine it is not strategic to include them. As discussed further below, a common concern about qualified immunity reform is cost and permitting plaintiffs to seek punitive damages may exacerbate that concern since it would potentially expose the government to much higher liability. Excluding punitive damages from state legislation may allay fears that the bill will produce a wave of multi-million dollar verdicts and make law enforcement agencies uninsurable.

It is also critical that a state reform bill entitles prevailing plaintiffs to recover reasonable attorney's fees. Civil rights cases often do not involve large damage awards for plaintiffs, particularly where the challenged conduct did not result in injury or death. Accordingly, contingent fee arrangements are insufficient to compensate lawyers in many constitutional rights cases. Congress enacted the Civil Rights Attorney's Fees Awards Act<sup>27</sup> to address this problem in federal civil rights litigation.<sup>28</sup> Including a fee shifting provision will promote enforcement of the statute and help victims of police misconduct obtain counsel irrespective of the damage value of their case. Without an attorney's fee provision, many meritorious cases will never be filed.

Indemnification of law enforcement officers provides a guarantee that individuals who sue under the state reform bill will actually recover for the harm they suffered. Civil rights plaintiffs would be left empty handed if an officer cannot afford to satisfy the judgment and their government employer refuses to contribute to the award. Colorado recently struck a balance that provided for both individual officer accountability and plaintiff recovery by requiring the officer to pay for 5% or \$25,000 of the judgment if they failed to act in good faith unless the amount is not collectible, in

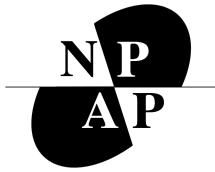
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<sup>25</sup> *Memphis Community School District v. Stachura*, 477 U.S. 299 (1986);

<sup>26</sup> *Smith v. Wade*, 461 U.S. 30, 34 (1983) (explaining punitive damages punish the defendant for outrageous conduct and serve as a deterrent from similar conduct in the future)

<sup>27</sup> 42 U.S.C. 1988

<sup>28</sup> *City of Riverside v. Rivera*, 477 U.S. 561, 578 (1986) ("the function of an award of attorney's fees to encourage the bringing of meritorious claims that would otherwise be abandoned because of financial imperatives")



## National Police Accountability Project

A Project of the National Lawyers Guild

which case the employer is required to pay the outstanding costs.<sup>29</sup> NPAP does not have a specific recommendation on the ideal indemnification model so long as the state reform bill provides plaintiffs with some method to recover the full judgment of their successful case.

### **ADDRESSING MISCONCEPTIONS *about* STATE LEGISLATIVE REFORM *to* QUALIFIED IMMUNITY**

In addition to Colorado's successful passage of SB 217 last summer, several state legislatures have already started considering laws to eliminate qualified immunity. These initial reform efforts have been met with opposition stemming from three general objections:

- (1) eliminating the defense of qualified immunity will be prohibitively costly;
- (2) eliminating the defense of qualified immunity will expose law enforcement officers to liability for reasonable, good faith performance of their duties; and
- (3) law enforcement officers will be apathetic or afraid to effectively do their jobs for fear of being sued.

These concerns are largely premised on a misunderstanding about how qualified immunity functions in practice.

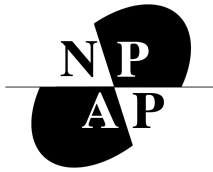
#### ***Any Increased Costs Associated with Eliminating Qualified Immunity Would Be Reasonable and Manageable***

Opponents of ending qualified immunity have warned that removing the defense will increase the cost of litigation and lead to an explosion of expensive verdicts. While qualified immunity reform will make it possible for additional victims of police misconduct to recover compensation, that does not mean there will be a significant net rise in costs.

It should first be acknowledged that forcing communities to contend with qualified immunity will not save costs but shift them to the people injured by police misconduct. Victims of police brutality

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<sup>29</sup> COLO. REV. STAT. ANN. § 13-21-131 ("A peace officer's employer shall indemnify its peace officers for any liability incurred by the peace officer and for any judgment or settlement entered against the peace officer for claims arising pursuant to this section; except that if the peace officer's employer determines that the officer did not act upon a good faith and reasonable belief that the action was lawful, then the peace officer is personally liable and shall not be indemnified by the peace officer's employer for five percent of the judgment or settlement or twenty-five thousand dollars, whichever is less...if the peace officer's portion of the judgment is uncollectible from the peace officer, the peace officer's employer or insurance shall satisfy the full amount of the judgment or settlement.")



## National Police Accountability Project

A Project of the National Lawyers Guild

experience tangible consequences. For instance, they may have medical costs, be forced to miss work, or be injured so severely that their earning potential is permanently reduced. Barring suits through the doctrine of qualified immunity forces victims to bear the cost of police misconduct rather than the officers and law enforcement agencies responsible for their suffering.

Should we choose to evaluate cost from a litigation defense standpoint, qualified immunity still does not save government defendants money. First, asserting qualified immunity does not automatically dispose of a lawsuit. While a government actor can move to dismiss a case on qualified immunity grounds in the initial stages of litigation, many cases proceed to discovery and even trial before the defense is granted.<sup>30</sup> Additionally, qualified immunity has the effect of *increasing* costs in some cases due to the multiple interlocutory appeals a defendant can pursue challenging the district court's denial of the defense.

Fears that state and local governments will face insurmountable expenses related to an influx of new claims currently precluded by qualified immunity have no concrete basis. Indeed, other states have already eliminated qualified immunity for state civil rights claims. Montana also eliminated qualified immunity defenses for state constitutional actions against law enforcement officers over a decade ago in *Dorwat v. Caraway*.<sup>31</sup> In the years following the *Dorwat* decision, the number of reported cases against employees in their individual capacity only marginally increased.

An analysis of reported decisions involving constitutional claims against public employees the three years prior to and following the court's 2002 decision reveals a difference of only nine cases. The number of cases reported against local governments remained steady. Only one additional individual liability case against local government was reported in the three-year period following the 2002 decision. While reported decisions are not a perfect proxy for cases filed, they do provide insight into filing trends. Colorado also recently created a state cause of action to challenge police misconduct while eliminating qualified immunity.<sup>32</sup> The changes recommended in this paper are not unprecedented and have been managed by other states for years.

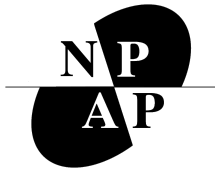
Some cost concerns are based on the speculative assertion that eliminating qualified immunity will significantly increase insurance premiums. While it is difficult to project the precise impact on

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<sup>30</sup> See Eg. Joanna C. Schwartz, *How Qualified Immunity Fails*, 127 YALE LAW JOURNAL 2, 9 (2017) (UCLA Law Professor Joanna Schwartz studied civil rights cases in five federal district courts over a two-year period and found that qualified immunity was only raised as a defense prior to discovery in 13.9% of cases where the defense was available).

<sup>31</sup> 58 P.3d 128, 131, 137 (Mont. 2002)

<sup>32</sup> COLO. REV. STAT. ANN. § 13-21-131



# National Police Accountability Project

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insurance, a recent study by the Insurance Law Center at University of Connecticut determined that removing qualified immunity would not compromise the insurability of municipal law enforcement agencies in the state because the cost of police liability represented a fairly small portion of municipal policies.<sup>33</sup>

Finally, it is important to note that an increased risk of liability will ultimately help save government entities money in the long run through deterrence. One of the core policy functions of permitting private enforcement of civil rights statutes is to deter future violations.<sup>34</sup> By enhancing opportunities to hold government officials accountable for misconduct, the proposed state bill will deter future constitutional violations, obviating the cost of defending against lawsuits and settlement payouts.

## ***Constitutional Jurisprudence Affords Officers Protection for Reasonable, Good Faith Conduct, Particularly in the Police Misconduct Context***

Qualified immunity is often misrepresented as the only protection police officers have against liability for making reasonable, good faith decisions in high pressure situations. However, law enforcement officers are already accorded a great deal of deference under the Fourth Amendment and analogous state constitutional provisions.<sup>35</sup> In use of force cases, courts evaluate the reasonableness of an officer's conduct to determine whether a constitutional violation occurred. The Fourth Amendment reasonableness standard "allows for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving" and acknowledges that decisions cannot be judged with "the 20/20 vision of hindsight."<sup>36</sup> An officer can mistakenly determine that force is necessary without facing constitutional liability so long as his mistake is

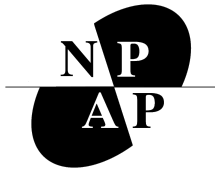
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<sup>33</sup> Peter Kochenburger & Peter Siegelman, *Preliminary report on insurance related issues*, UConn Insurance Law Center (Jan. 5, 2021) available at [https://www.ctnewsjunkie.com/upload/2021/01/UCONN\\_Law\\_and\\_Logistics\\_Subcommittee\\_Section\\_41\\_Assessment\\_1.pdf](https://www.ctnewsjunkie.com/upload/2021/01/UCONN_Law_and_Logistics_Subcommittee_Section_41_Assessment_1.pdf)

<sup>34</sup> See *Eg.* William M. Landes & Richard A. Posner, *The Positive Economic Theory of Tort Law*, 15 GA. L. REV. 851, 852-57 (1980-1981); *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971)(Burger, dissenting)(explaining that deterrence of police misbehavior could be achieved better through private lawsuits and an administrative structure in which aggrieved citizens would make monetary claims against officers )

<sup>35</sup> Many state constitutional provisions regarding use of force are coextensive with the Fourth Amendment and have adopted a similar reasonableness analysis. See *Eg.* *Norcross v. Town of Hammonton*, 2008 U.S. Dist. LEIS 9067 (D. N.J. 2008); *Jones v. City of Philadelphia*, 890 A.2d 1188 (Pa..2006); *State v. Gallup*, 512 S.E. 2D 66, 69 (Ga. Ct. App. 1999). While a full survey of state constitutional claims is beyond the scope of this paper, a selection of states that have recognized broader state protections also have robust safeguards. See *Eg.* *State v. Bayard*, 71 P.3d 498, 502 (Nev. 2003)(analyzing reasonableness of arrest).

<sup>36</sup> *Graham v. Connor*, 490 U.S. 386, 397 (1989)



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reasonable. For example, the Eleventh Circuit held that an officer had not violated the Constitution when he ordered a police dog to attack an unarmed man because he incorrectly, but reasonably, believed the man had a weapon.<sup>37</sup>

The Fourth Amendment and its state analogues are not unique in creating a demanding burden to prevail on a constitutional claim. Many government officials are protected by analytical frameworks that defer to their decision-making. For instance, a prison official's conduct is protected by the Eighth Amendment's deliberate indifference standard which permits incorrect and even negligent decisions regarding an inmate's health and safety so long as the official does not disregard a known risk.<sup>38</sup> A correctional officer in a pretrial detention center whose conduct is evaluated under the Fourteenth Amendment is generally protected unless he uses force in an objectively unreasonable manner.<sup>39</sup> Civil rights plaintiffs have a high threshold to meet in virtually every constitutional claim they pursue.<sup>40</sup>

Qualified immunity is not necessary to ensure that police and other government officials do not face legal consequences for split-second decisions, because that protection is typically already an integral part of the underlying constitutional analysis.

### ***There is No Evidence That Officers Will Stop Performing Lawful, Public Safety Functions Out of Fear They Will Be Sued***

Qualified immunity is currently not protecting police officers who are making reasonable, good faith decisions in carrying out their duties. Officers who follow their training and department policies, and who are doing their job "by the book," do not need qualified immunity. As discussed in the prior section, Fourth Amendment law provides that safeguard. Only a police officer who profoundly misunderstood their Fourth Amendment training would pull back from reasonably carrying out their duties because qualified immunity was eliminated.

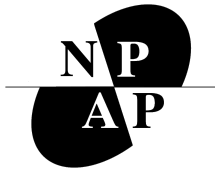
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<sup>37</sup> *Crenshaw v. Lister*, 556 F.3d 1283 (11th Cir. 2009)

<sup>38</sup> *Farmer v. Brennan*, 511 U.S. 825, 836-837 (1994)

<sup>39</sup> *Kingsley v. Hendrickson*, 135 S.Ct. 2466 (2015)

<sup>40</sup> A comprehensive list of constitutional standards is beyond the scope of this paper but the following precedential cases illustrate the high burdens placed on plaintiffs pursuing common civil rights claims: *Washington v. Davis*, 426 U.S. 229, 240 (1976)(holding a plaintiff must prove the government intended to discriminate on the basis of race in order to prevail in an Equal Protection challenge even if a policy or law has demonstrable discriminatory impacts); *Turner v. Safley*, 482 U.S. 78, 89-90 (1987)(establishing standard for prisoner First Amendment claims which permits the prison to impose restrictions so long as they are reasonably related to a legitimate penological interest and not an exaggerated response); *Nieves v. Bartlett*, 139 S. Ct. 1715 (2019)(requiring a plaintiff to prove an officer lacked probable cause or present evidence that other similarly situated individuals not engaged in protected activity were not arrested in order to prevail on a First Amendment retaliation claim).



# National Police Accountability Project

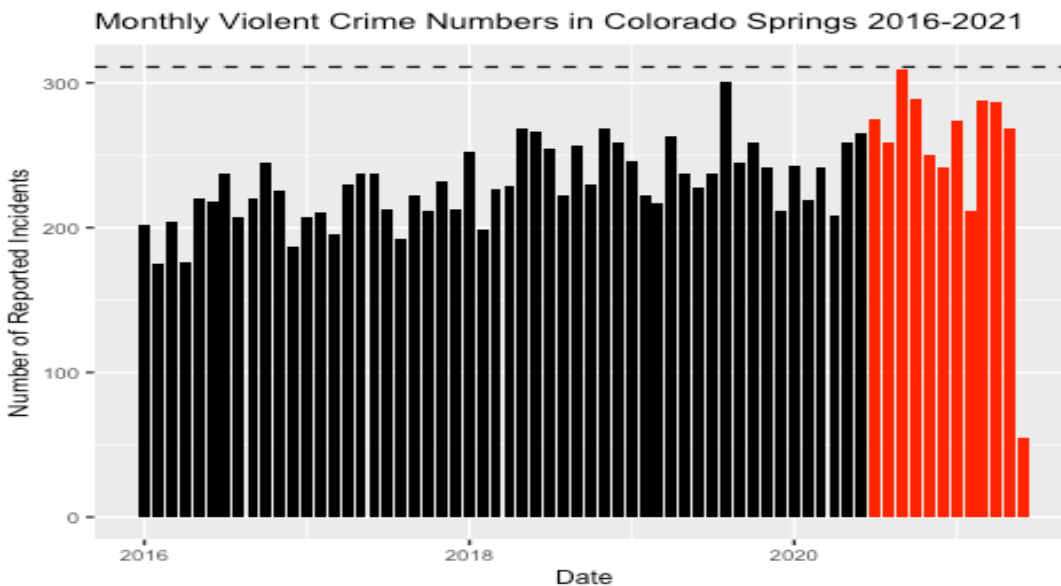
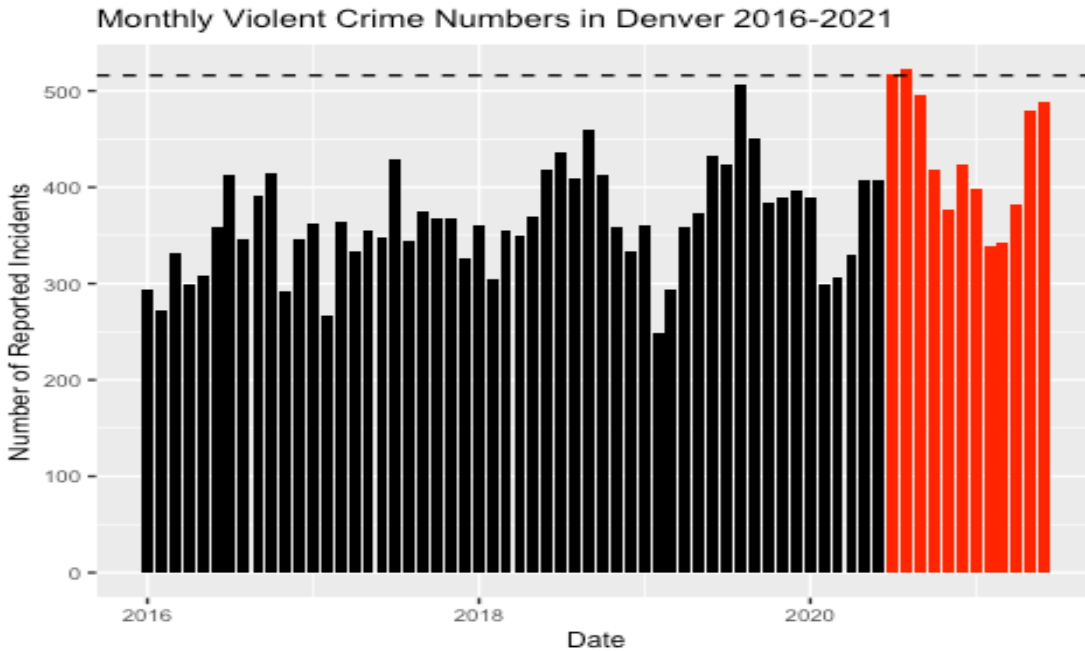
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Moreover, there is no evidence that police officers are apathetic or afraid to perform their jobs in states that have already eliminated qualified immunity defenses. That argument denigrates dedicated, law-abiding, law enforcement officers. It is also important to note that many people employed in high stakes professions are able to effectively do their jobs even though they face financial liability for misconduct and mistakes. There is no reason to assume that a police officer would respond to an increased risk of liability differently than a doctor.

## CONCLUSION

Meaningful police reform cannot happen where officers are insulated from civil liability when they violate the Constitution. The doctrine of qualified immunity has inhibited progress by permitting officers who engage in misconduct to escape accountability. State lawmakers do not have to accept the judge-created system of impunity that exists in federal civil rights litigation. They can and should provide their constituents with a state court cause of action to sue police officers who violate civil rights and eliminate the defense of qualified immunity.

We urge every state legislator that acknowledged the need to improve police accountability in the wake of George Floyd's murder to take action and eliminate qualified immunity defenses for state constitutional claims. NPAP is eager to assist with these efforts. Please do not hesitate to contact us at [legal.npap@nlg.org](mailto:legal.npap@nlg.org) if you are interested in pursuing legislative reform in your state.



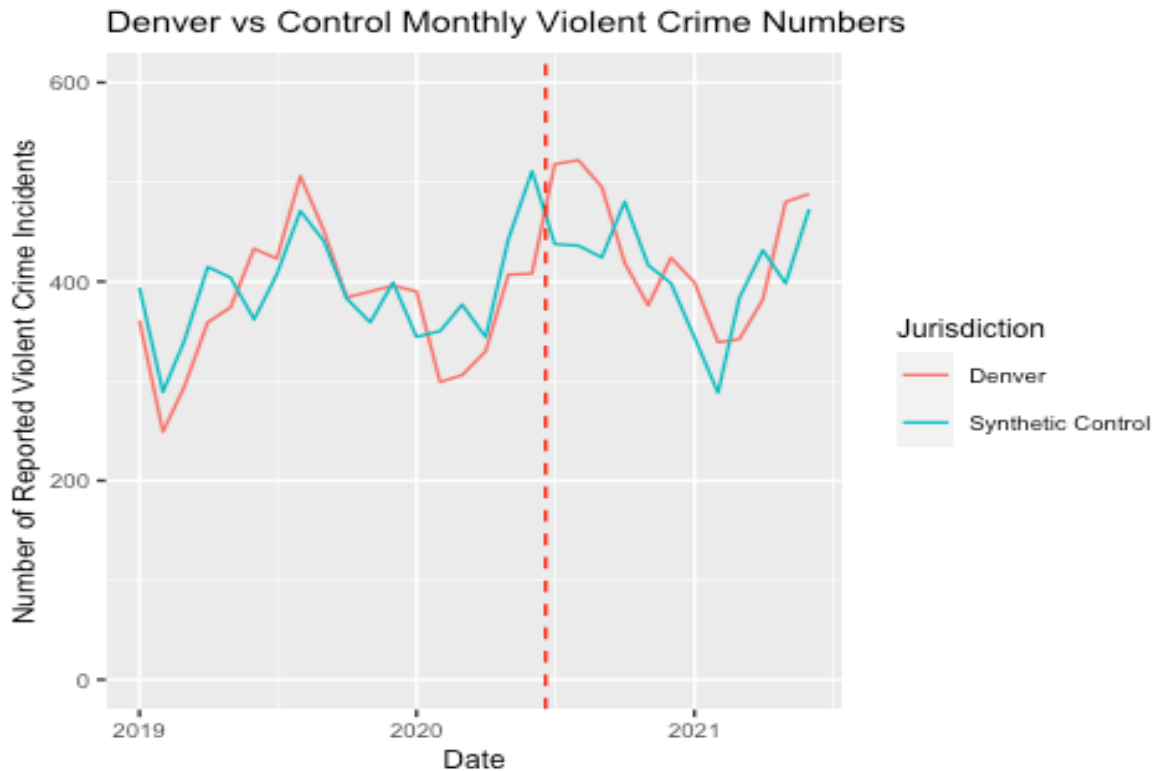
**Monthly Violent Crime Numbers 2016-2021:** Each bar represents the number of reported incidents in a single month. Red bars represent the months following the passage of the police accountability legislation in June 19, 2020. Data from June 20-30 is included in the month immediately preceding the red 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,<sup>1</sup> CSPD,<sup>2</sup> and DPD.<sup>3</sup>

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

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

<sup>3</sup> <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.