

**National Police
Accountability Project**

*A Project of the National
Lawyers Guild*

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January 18, 2023

By electronic mail

Honorable Carl E. Heastie
New York State Assembly
Legislative Office Building, Room 932
Albany, NY 12248

Honorable Andrea Stewart-Cousins
New York State Senate
Legislative Office Building, Room 310
Albany, NY 12247

RE: S182/A710

Dear Speaker Heastie and Majority Leader Stewart-Cousins:

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.

Far 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. Individuals whose rights have been violated by law enforcement face exceptionally difficult barriers in federal court.

The doctrine of qualified immunity has effectively insulated police officers from individual liability. 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. The Supreme Court has interpreted the “clearly established” law requirement to mean a plaintiff must be able to identify a case from the Second Circuit Court of Appeals or Supreme Court with nearly identical facts in order to recover.¹

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

This requirement severely undermines civil rights protections by shielding inventive, grossly incompetent, and uniquely egregious officers. There are many cases where an officer's patently unlawful conduct was shielded by qualified immunity because no prior defendant had been sued for similar behavior.

For instance, the Second Circuit found a corrections officer who sexually assaulted an inmate was entitled to qualified immunity.² Even though the Court found that the officer's conduct was repugnant, intolerable, and unconstitutional, there was no prior case in the jurisdiction clearly establishing sexual abuse of an inmate violated the Eighth Amendment.³

Outside of the Second Circuit, a court granted immunity to police officers who stole over \$225,000 in cash and rare coins while executing a search warrant.⁴ The court said that while "the theft [of] personal property by police officers sworn to uphold the law" may be "morally wrong," the officers could not be sued for the theft because the circuit court had never specifically decided "whether the theft of property" violates the Fourth Amendment.⁵ There are hundreds of other equally ludicrous outcomes that have resulted from the doctrine of qualified immunity.

The New York legislature cannot eliminate qualified immunity in federal courts, but it can provide New Yorkers with an alternative method to vindicate their rights in state court. S.182/A.710 will create a state cause of action to sue police officers for civil rights violations without the shield of qualified immunity.

New York will not be the first state eliminate to qualified immunity. Montana,⁶ Colorado,⁷ New Mexico,⁸ and Nevada,⁹ have all rejected qualified immunity defenses for state constitutional actions. New York City also eliminated qualified immunity and provides its residents with municipal court alternative to sue for search and seizure violations.¹⁰ The changes contemplated by S.182/A.710 are not unprecedented and have already been successfully implemented in other states.

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.¹¹ Crime rates in Denver also

² *Crawford v. Cuomo*, 721 Fed. Appx. 57 (2d Cir. 2018)

³ *Id.* at 59

⁴ *Jessop v. City of Fresno*, 936 F.3d 937, 943 (9th Cir. 2019)

⁵ *Id.*

⁶ *Dorwat v. Caraway*, 58 P.3d 128, 131, 137 (Mont. 2002)

⁷ COLO. REV. STAT. ANN. § 13-21-131

⁸ New Mexico Civil Rights Act, 2021Bill Text NM HB 4

⁹ *Mack v. Williams et. al.*, 22-40819 (Dec. 29, 2022), <https://ij.org/wp-content/uploads/2021/09/MACK-Opinion.pdf>.

¹⁰ Press Release, Council Votes to End Qualified Immunity and Seven Other Measures to Reform NYPD (March 25, 2021), <https://council.nyc.gov/press/2021/03/25/2079/>

¹¹ See Exhibit A (attached).

remained consistent with cities with similar populations and demographics.¹²

Another argument typically cited in opposition to ending qualified immunity is that it will lead to an influx of new lawsuits that will bankrupt municipalities. However, that has not been in the case in New Mexico following the elimination of qualified immunity where civil rights attorneys have reported that they have added state law claims to their Section 1983 cases but only filed a handful of cases that they otherwise would not have filed.¹³

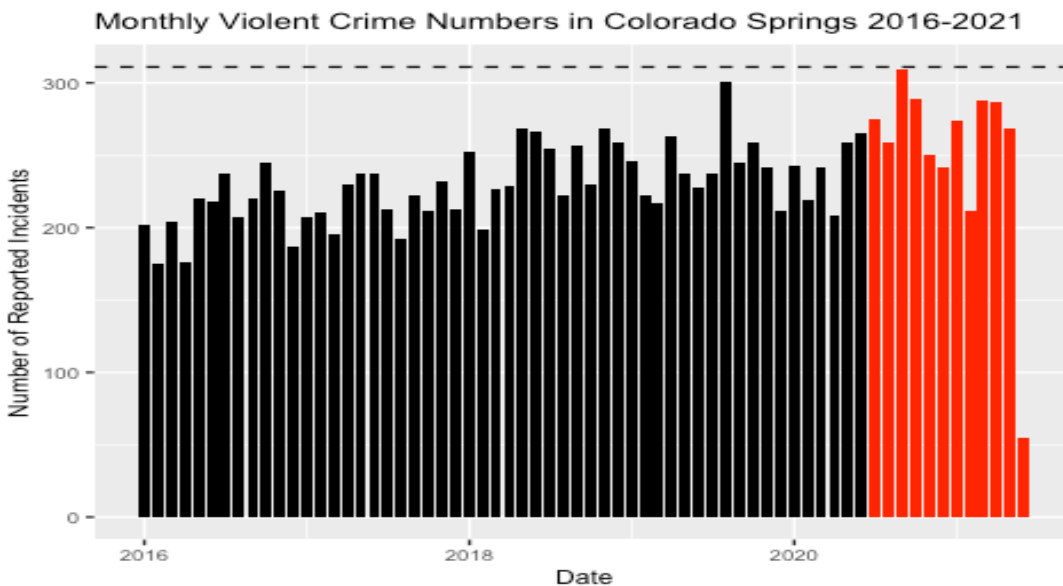
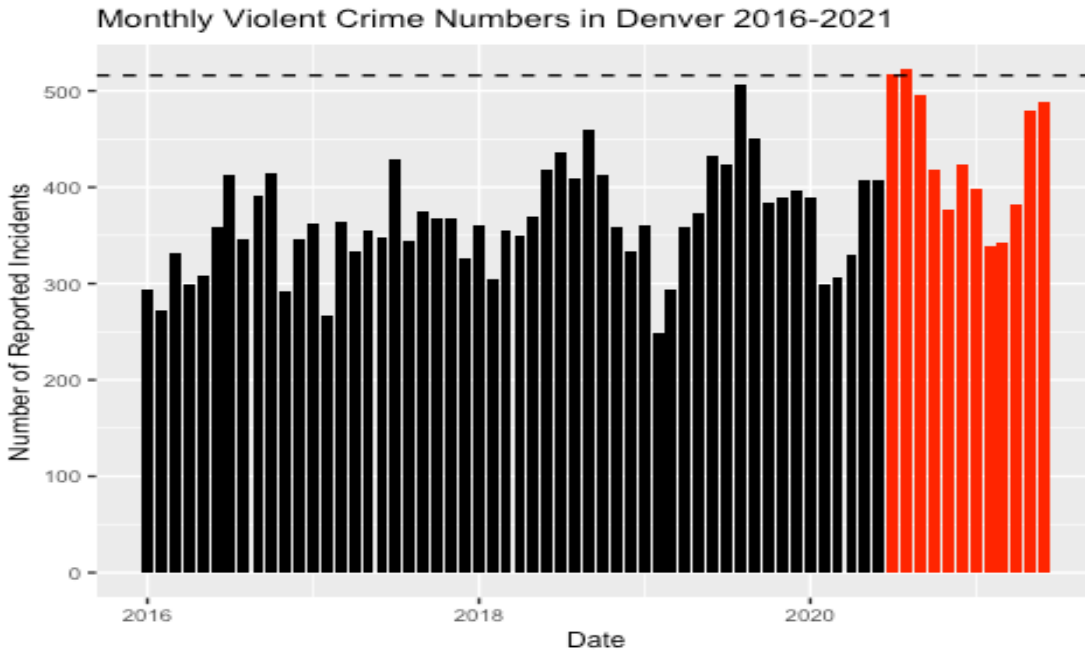
We urge you to pass S.182/A.710 and remove the immunities that undermine police accountability. If you have any questions, please do not hesitate to contact Lauren Bonds at legal.npap@nlg.org or (620) 664-8584.

Sincerely,

Lauren Bonds
National Police Accountability Project

¹² See Exhibit B (attached).

¹³ 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

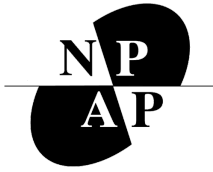
¹ <https://crime-data-explorer.app.cloud.gov/pages/explorer/crime/crime-trend>

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.