



National Police Accountability Project

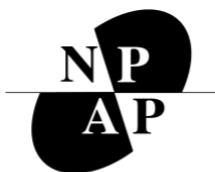
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SUPPORT FOR HB 1025 – Creating a private right of action for harm from violations of the state Constitution or state law by peace officers
Written and Oral Testimony of National Lawyers Guild-National Police Accountability Project, Eliana Machefsky, Legal Fellow
House Committee on Civil Rights & Judiciary – Wednesday, January 25, 2023

Chairman Hansen and Members of the Committee,

Thank you for the opportunity to provide testimony on this issue. The National Lawyers Guild National Police Accountability Project (“NPAP”) is a nonprofit organization dedicated to holding law enforcement officers accountable to constitutional and professional standards. Because of our work, we have a first-hand understanding of the unjustifiable barrier that qualified immunity creates for individuals seeking redress for the constitutional violations of law enforcement officers. We urge you to pass HB 1025, which would create a path for victims of police misconduct to hold officers accountable in state court by eliminating the obstacle 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 an individual plaintiff to show not only that her constitutional rights were violated, but also 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 court of appeals or Supreme Court with nearly identical facts in order to bring a lawsuit.



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This is a very tall order, leading courts to regularly dispose of otherwise-meritorious lawsuits because of qualified immunity alone. For instance, the Ninth Circuit, where Washington is located, granted qualified immunity to officers who stole over \$225,000 in cash and rare coins while executing a search warrant.¹ Although the court reasoned that “the theft [of] personal property by police officers sworn to uphold the law” may be “morally wrong,” it concluded that the officers could not be sued for the theft because the court had never specifically decided “whether the theft of property” violated the Fourth Amendment.² There are dozens of other equally ludicrous and unjust outcomes that have resulted from the doctrine of qualified immunity.

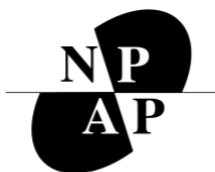
Although the Washington legislature cannot eliminate qualified immunity in federal courts, it can provide people in this state with an alternative method to vindicate their rights in state court. HB 1025 will do just that.

Some opponents of HB 1025 have voiced concerns that eliminating qualified immunity will leave police officers vulnerable to a barrage of lawsuits. But anecdotal data from states that have already eliminated qualified immunity show that these concerns are unfounded. For example, civil rights attorneys in New Mexico have not seen an increase in civil suits against the police since the state’s law eliminating qualified immunity went into effect in July 2021.³ Civil rights attorneys in Colorado, where the state legislature eliminated qualified immunity in 2020, have reported similar observations. This consistency is to be expected, because the existence of qualified immunity did not deter

¹ *Jessop v. City of Fresno*, 936 F.3d 937, 943 (9th Cir. 2019).

² *Id.*

³ See Exhibit A (attached).



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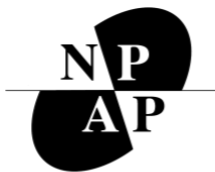
many attorneys from filing viable cases; it simply caused otherwise-meritorious cases to be disposed of on technical immunity grounds. Rather than opening the floodgates of litigation, state legislation eliminating qualified immunity has simply enabled the truly viable lawsuits, with strong claims of egregious misconduct, to survive to the jury trial stage.

It is also critical to note that eliminating qualified immunity will not require police officers to defend themselves against frivolous lawsuits. Even in the absence of qualified immunity, plaintiffs will still have to prove that the officers named as defendants violated their constitutional rights. And in many cases where officers have raised qualified immunity as a defense in their motions to dismiss, the cases have been dismissed for failure to identify a constitutional violation—not because of a grant of qualified immunity. HB 1025 will leave untouched the many tools judges have at their disposal to dismiss frivolous lawsuits, including the power to dismiss a suit for failure to state a claim.

We urge you to pass HB 1025 and finally enable individuals whose civil rights have been violated by the police to hold those officers accountable in court for their misconduct.

Sincerely,

Eliana Machefsky
National Police Accountability Project



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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.