

## Here's a look at the police reform bills sweeping the New Mexico statehouse

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A year of tumult over race and policing is coming to a head in New Mexico's busy legislative session.

With just weeks to go before it ends on March 20, lawmakers have introduced dozens of bills aimed at reforming law enforcement and several have progressed through committees. As a share of total introduced legislation, bills related to policing doubled this year over previous sessions, according to data from Legislative Council Service.

But it's uncertain whether the state, which has one of the highest rates of fatal police shootings in the country, will take significant action. Save a requirement passed in last July's special session that law enforcement statewide wear body cameras, the Legislature hasn't enacted any major legislation related to policing in years.

According to Rep. Antonio Maestas, D-Albuquerque, the quantity of proposals this year reflects the urgency of the moment. "The national outcry regarding police accountability forced our hand."

Law enforcement sees it differently. Shaun Willoughby, President of the Albuquerque Police Officers' Association, said the proposals display a fundamental ignorance about policing and shouldn't be passed over the objections of law enforcement. "Reform is something you do with your officers, not to your officers."

The path the bills take in the remaining weeks will test lawmakers' perceptions of the level of continuing public upset about policing. It's difficult to gauge sentiment during a virtual session, with the Roundhouse emptied of its typical throngs of onlookers. Virtual meetings have opened the hearings to people across the state to voice comments from home, but also insulated lawmakers from their constituents.

Although last year's mass protests have dwindled, for now, the family members of people who died at the hands of police or while detained or incarcerated have continued to show up at committee meetings, grappling with their grief in front of lawmakers and keeping the stories of their loved ones alive. Elaine Maestas has faithfully phoned in to hearing after hearing to tell the story of her sister Elisha Lucero, who was in the throes of a mental health crisis when she was shot and killed by Bernalillo County Sheriff's deputies in July 2019.

Maestas implored one group of legislators, "You have the power to say to New Mexicans that we hear you, and are doing something about it."

This year's bills range in focus, from better ensuring that public servants who violate people's civil rights are held to account, to investigating law enforcement shootings with independence and transparency, to setting a higher bar for when officers are permitted to use force.

### **Paying the price for civil rights violations**

The bill with the most momentum appeared to be the Civil Rights Act, which is meant to effectively end "qualified immunity," a judicial doctrine that has helped shield police and other public officials from accountability for federal civil rights violations for decades.

Addressing qualified immunity through state law is complicated, and demands some historical context.

The U.S. Constitution grants every American rights, but to secure them, in 1871 Congress passed a federal law allowing people deprived of those rights to sue for monetary damages. Beginning in the 1960s, however, when people began using the statute to sue for violations of their civil rights, the Supreme Court protected from lawsuits any public officials who mistakenly believed that their actions had been permitted. The court eventually carved out an even larger exception for any misconduct that hadn't already been established as unconstitutional by previous litigation. Injured parties now face an exceptionally high bar to bringing a civil lawsuit against a public official that deprived them of their rights, and this discourages lawyers from even contemplating bringing such cases.

Last summer following the death of George Floyd, a Black man who suffocated under the knee of white police officer Derek Chauvin, advocates around the country focused on eliminating this procedural roadblock. Although Chauvin will face criminal charges, qualified immunity makes it less likely the Floyd family can successfully sue the officer or the city of Minneapolis for compensation.

From opposite ends of the political spectrum, Supreme Court justices Clarence Thomas and Sonia Sotomayor have both criticized qualified immunity, but the court recently declined opportunities to reexamine the doctrine. Two sets of federal lawmakers recently introduced bills to prohibit qualified immunity as a legal defense, but their fate is uncertain. Now, New Mexico and other states are considering whether to allow such lawsuits in state courts.

In New Mexico last summer, the Legislature empaneled a Civil Rights Commission, which thoroughly studied the issue and published a report in November recommending the state enact a Civil Rights Act.

The act would create an avenue for aggrieved people to sue, by making cities and counties newly liable for civil rights abuses committed by their police and other public employees, and explicitly prohibiting qualified immunity as a defense. (Plaintiffs would still have to prove the misconduct was unconstitutional, so it wouldn't expose the government to a barrage of negligence lawsuits, as some opponents have claimed). New Mexico would be among the first states to do this, but similar bills are under consideration in a dozen states, from New Hampshire to Washington state.

The New Mexico bill was shaped and shepherded, in part, by an assortment of strange bedfellows, including libertarian organizations such as the Washington, D.C.-based Cato

Institute and Institute for Justice, and progressive criminal justice reformers such as the American Civil Liberties Union and the Innocence Project. (Some of these organizations had worked together in New Mexico in 2015 to prohibit civil asset forfeiture, what they saw as another kind of government overreach.)

Despite the national zeitgeist for police reform, and mass protests throughout New Mexico in 2020, the effort has faced opposition at every step.

Four commission members who dissented from its conclusions — including two law enforcement officers and a prosecutor — issued a minority report calling instead for changes in law enforcement training and certification. A retired judge filed an ethics complaint against the bill’s sponsor Speaker Brian Egolf, D-Santa Fe, accusing him of advancing the legislation to expand his personal civil rights law practice, claims that he dismissed as frivolous and unsubstantiated. On Feb. 17 when the bill reached the House floor for a vote, it passed over the nays of every Republican lawmaker (and a handful of rural Democrats).

The New Mexico Municipal League and New Mexico Association of Counties are among the bill’s most prominent opponents. On their urging, the sponsors amended the bill with a \$2 million cap on damages, but local governments maintain that it would still expose them to costly litigation, imperil their insurance coverage, and threaten their solvency.

Proponents counter that the bill’s financial impact is a feature, not a bug; policymakers will only curb civil rights violations when they have a strong financial incentive to do so. “You’d think telling the government that torturing people would be enough to stop it,” said Matthew Coyte, a local attorney who successfully sued the state to stop its unconstitutional use of solitary confinement. “If you don’t have a lawsuit, a problem never gets fixed.”

Joanna Schwartz, a law school professor at UCLA and one of the country’s foremost experts on qualified immunity, said the claim that the bill would bankrupt local governments was being offered without empirical support. “In my research and experience, I don’t see evidence that this is the case,” she said.

Colorado, which passed a similar civil rights bill last June, only just saw its first lawsuit filed under the new statute — by a woman who police mistook for a car thief and removed from her vehicle, along with her six- and 12-year-old daughters, at gunpoint. “Fears of cases flooding the courthouse are not coming true,” Schwartz added.

The Legislature is now in reach of passing the measure. It advanced out of the Senate Health and Public Affairs Committee and faces just one more hearing in the Senate Judiciary Committee, whose chair Sen. Joe Cervantes, a Democrat from Las Cruces, is a sponsor, before advancing to a vote on the Senate floor.

### **Alternatively, strengthen internal accountability**

As if to demonstrate they weren’t averse to all police reforms, municipalities have instead rallied for legislation that would shake up the New Mexico Law Enforcement Academy Board. Currently, the board sets statewide standards for training and reviews allegations of officer misconduct. But a recent KOB-4 investigation found it had a two- to three-year backlog of cases, and the chair of the board itself, Attorney General Hector Balderas, described the process as “an absolute train wreck.” Two bills would put authority to decertify officers in new hands.

Republican Sen. Stuart Ingle, a 35-year veteran of the Legislature who has scarcely sponsored any police-related bills in recent memory, introduced SB 375 to the Senate Judiciary Committee. In addition to establishing a new independent certification board, it would require that officers be trained in crisis intervention and de-escalation techniques. Ingle then handed the floor to A.J. Forte, executive director of the New Mexico Municipal League, who spoke in favor. “Make the changes on the front-end to give them the tools they need for a holistic approach,” Forte urged.

Rep. Maestas sponsored another bill, aimed at reforming the Law Enforcement Academy Board, HB 286. It would transfer responsibility for suspending and revoking officers’ licenses to the state’s Regulation and Licensing Department.

The one thing everyone agrees on, Maestas said, is that the board doesn’t have the independence or the resources to run misconduct investigations. “It shouldn’t have this dual role.” Despite seeming consensus that the board needs reform, these two bills have had just one committee hearing a piece heading into the final weeks of the session.

In the most severe cases of police conduct, when an officer kills someone, it is exceedingly rare they are prosecuted, both nationwide and in New Mexico. Of over 100 such deaths in New Mexico since 2015, the Legislative Finance Committee could identify only one completed prosecution — that of officers charges in the killing of James Boyd, which ended in a mistrial — although a Las Cruces police officer was also recently indicted for allegedly choking a man to death. This session, a pair of lawmakers introduced legislation to create more independence in the investigation and prosecution of police use of deadly force, and more transparency in the process.

SB 274, introduced by Sen. Antoinette Sedillo López, D-Albuquerque (and its companion bill in the House, HB 254, introduced by Rep. Patricia Roybal Caballero, D-Albuquerque), would require law enforcement to report use-of-force incidents that involve death or grave bodily harm to a statewide database; make the State Police the default agency for investigating these incidents (except for a shooting by State Police, when another department would do so); and give the state attorney general concurrent authority to prosecute the case, and mandate publicly issued quarterly updates on its status. But the Legislative Finance Committee identified major technical issues with the legislation and it has only passed out of one committee in each chamber.

### **Raising the threshold when force is permissible: a heavier lift**

In contrast to efforts to strengthen accountability for misconduct, another bill would attempt to prevent harm from occurring in the first place by putting certain law enforcement practices off-limits, and making use of physical force a last resort. The bill, SB 227, was one of the ACLU’s top priorities, but was sharply criticized by law enforcement groups. Having only been reviewed by one Senate committee by the end of February, its prospects for passage were less clear.

Introduced by Sen. Linda Lopez, who represents a heavily Hispanic district in Albuquerque’s South Valley and is part of the Democrats’ leadership team, the bill would make a raft of changes to law enforcement policies across the state. Most significantly, it would limit law enforcement from using force beyond the Supreme Court’s standard of when it is “objectively reasonable,” to just those circumstances when it is proportionate and necessary to prevent imminent harm and only after de-escalation practices have been exhausted.

The Albuquerque Police Department adopted such a standard last year as a part of their federal consent agreement, so the bill would extend statewide an approach that the largest police force has already accepted.

But Willoughby said it had been “a disaster” there, and criticized the legislators for failing to reach out to police in developing the proposal. “Policing policy is not supposed to be legislated by people who are not police officers.”

SB 227 would also oblige law enforcement to intervene if they are present when others use excessive force, establish a statewide database of incidents in which police seriously harm or kill someone, and require agencies around the state to ban no-knock warrants and chokeholds. The initial version of the bill also barred police use of tear gas, rubber bullets, and canines — less lethal means of applying force that have been misused in recent high-profile cases but some of which are associated with lower rates of injury to suspects.

The ACLU said that the bill reflected public sentiment, citing a poll it commissioned in December 2020 that found 72% of registered voters supportive of a law “to place clear limits on when force can be used and require that police try to use alternatives before resorting to force.”

But there was intensifying grassroots opposition. On Feb. 4, just two days after the bill was introduced, New Mexico State Police officer Darion Jarrott was shot and killed by a man he had pulled over, the first fatal shooting of an officer in the department in 30 years. Still visibly emotional about the loss, the president of the New Mexico State Police Association Jose Carrasco posted a heartfelt video to Facebook entitled “Vote NO on SB 227” in which he criticized the bill for depriving officers of less-lethal options for detaining suspects. An anonymous online petition against both SB 227 and the Civil Rights Act quickly attracted more than 8,800 signers.

Citing subsequent conversations with police officers, Lopez introduced a revised bill that dropped the limitations on tear gas, rubber bullets, and canines. She said she expected further amendments but wasn’t deterred. “If it doesn’t pass, quite honest, we’ll bring it back again.”

Advocates remained optimistic. On her way to testify in support of Lopez’s bill, Maestas wrote in a text message: “It is not easy to keep speaking, but until things change, it is necessary.”