

AMENDED INCORPORATED COUNTY OF LOS ALAMOS RESOLUTION NO. 21-04

**A RESOLUTION OPPOSING THE HOUSE JUDICIARY COMMITTEE SUBSTITUTE FOR
HOUSE BILL 4 OF THE FIRST SESSION OF THE 55TH LEGISLATURE**

WHEREAS, in Laws 2020, 1st Special Session, Chapter 1 (HB 5) and in response to certain high-profile civil rights violations by law enforcement officers in other states, the New Mexico Legislature created the New Mexico Civil Rights Commission (the “Commission”) to develop policy proposals for laws for the creation of a civil right of action for the deprivation, by a public body or a person acting on behalf of or under the authority of a public body, of any right, privilege or immunity secured by the Constitution of New Mexico; and

WHEREAS, the Los Alamos County Council robustly supports civil and human rights for all however the HJC Substitute for HB 4 as proposed fails to remedy the harms it claims to address warranting opposition to the adoption of any form of the bill into New Mexico Law, but if the bill proceeds regardless, making needed amendments to minimize the harm to taxpayers of Los Alamos County and the State of New Mexico; and

WHEREAS, a divided Commission voted 5-4 to recommend that the Legislature create a new State law cause of action for violations of the New Mexico Constitution that, among other things, would:

- NOT include a cap on compensatory damages, which is a break from the long-standing balance struck in the New Mexico Tort Claims Act (the “NMTCA”) between compensating those harmed by government action and the need for government to provide essential services for all;
- mandate the award of litigation expenses and attorney fees for prevailing plaintiffs, which can exceed the amount of damages awarded to plaintiffs and are based upon hourly rates of hundreds of dollars per hour; and
- be available against any public body, defined as a “state or local government, an advisory board, a commission, an agency or an entity created by the constitution of New Mexico or any branch of government that receives public funding, including political subdivisions, special tax districts, school districts and institutions of higher education”, and any person acting on behalf of, under color of or within the course and scope of the authority of a public body; and

WHEREAS, the Commission’s recommended legislation was largely introduced into the First Session of the 55th Legislature of the State of New Mexico as House Bill 4 (“HB 4”); and

WHEREAS, the House Judiciary Committee recommended that HB 4 do not pass, but instead, recommended that its substitute do pass; and

WHEREAS, the House Judiciary Committee Substitute for House Bill 4 (the “HJC Substitute”) makes significant changes to HB 4 that ameliorate but do not eliminate concerns with HB 4; and

WHEREAS, the HJC Substitute, among other things, would:

- be limited to claims for the deprivation of any rights, privileges or immunities secured pursuant to the Bill of Rights of the New Mexico Constitution;
- have a per claim cap, inclusive of the claimant's costs of action and reasonable attorney fees, of Two Million Dollars (\$2,000,000.);
- require the cap to be adjusted upward annually based upon the percentage increase as of August of the immediately preceding year over the level as of August of the previous year of the consumer price index for all urban consumers, United States city average for all items but prohibit any downward adjustment due to deflation;
- preserve common law judicial, legislative, or other established immunity (but prohibit qualified immunity); and
- prohibit individuals employed by a public body from using the New Mexico Civil Rights Act to pursue a claim arising from the individual's employment by the public body; and

WHEREAS, the HJC Substitute for HB4 has now been passed by the House and is due for consideration by the Senate; and

WHEREAS, a new cause of action is not necessary to address New Mexico Constitutional deprivations by law enforcement officers (including detention officers at county jails), since the NMTCA already waives sovereign immunity for such claims and qualified immunity is not a defense to such claims (NMSA 1978, § 41-4-12); and

WHEREAS, the NMTCA allows plaintiffs to recover damage awards up to One Million Fifty Thousand Dollars (\$1,050,000.) depending upon the type of damages suffered and does not allow for the recovery of litigation expenses and attorney fees; and

WHEREAS, the NMTCA includes a per occurrence cap for non-medical damages of Seven Hundred Fifty Thousand Dollars (\$750,000.) regardless of the number of claimants (NMSA 1978, § 41-4-19(B)); and

WHEREAS, the NMTCA also requires plaintiffs to (1) give timely notice of their claims, so that they can be promptly investigated while evidence is available and fresh, and (2) bring their claims within two years, a reasonable period that affords plaintiffs time to investigate and bring their claims while allowing governments to better manage risk and plan their budgets; and

WHEREAS, the NMTCA strikes a balance between compensating those damaged by government action and the need for government to provide essential services for all, since insurance premiums and uninsured claim costs take money that would otherwise be available for essential government services; and

WHEREAS, research by New Mexico Counties presented to the Commission demonstrated that New Mexico – one of the poorest states in the Union – already allows for some of the highest damage awards in the Country for State law claims against law enforcement officers; and

WHEREAS, a Two Million Dollar (\$2,000,000.) cap on each claim (as opposed to all claims arising out of a single occurrence) and mandating the award of litigation expenses and attorney fees will increase the costs of State law claims and will likely encourage more claims to be filed; and

WHEREAS, New Mexico Counties and other governmental entities also demonstrated that a new cause of action with total exposure in excess of Two Million Dollars (\$2,000,000.) per claim would cause reinsurance and other insurance coverage to no longer be available to the New Mexico County Insurance Authority and/or local governments at all or at reasonable rates; and

WHEREAS, the unavailability of reasonably-priced insurance will cause local governments to self-insure significant amounts of risk, which will divert scarce resources from the very services that proponents of the new cause of action are trying to improve to individual claimants and their attorneys; and

WHEREAS, the new cause of action carries the risk of unintended, negative consequences, including the elimination of services or the privatization of services; and

WHEREAS, uninsured judgments that cannot be satisfied through existing resources will be paid by our citizens, through property taxes levied to meet the judgment (N.M. Const., art. 8, Section 7; NMSA 1978, §.7-37-7(C)(3)); and

WHEREAS, many of the challenges faced by local law enforcement and county jails stem from co-occurring substance abuse and mental health disorders in the population with which they interact; and

WHEREAS, instead of diverting resources to individual claims, the Legislature should be providing more resources to serve this population, which would minimize their interactions with law enforcement and keep them out of county jails; and

WHEREAS, information presented to the Commission demonstrated that the New Mexico Law Enforcement Academy needs additional resources to better train law enforcement officers and timely discharge its goal of investigating law enforcement officers accused of misconduct; and

WHEREAS, timely removal of the certification of so-called “bad cops” would more effectively and quickly meet the goal of improving law enforcement by avoiding the recycling of such bad actors among law enforcement departments,

NOW, THEREFORE, BE IT RESOLVED by the Council of the Incorporated County of Los Alamos ("County Council") that:

1. The HJC Substitute:

- a. is unnecessary because victims of State constitutional violations by law enforcement officers (including detention officers) can already bring lawsuits for money damages for violations of their New Mexico Constitutional rights under existing State law;
- b. will not address the root cause of many claims against local governments – namely, (1) the lack of adequate State resources to prevent and treat substance abuse and mental health disorders in our community and (2) an underfunded New Mexico Law Enforcement Academy;
- c. will further harden the public liability insurance market, requiring local governments to self-insure more risk and creating the real possibility that property taxes will need to be imposed to meet uninsured judgments;
- d. will likely be ineffective at driving reform or otherwise improving law enforcement or other services, because it will divert resources from law enforcement and detention officer recruitment, retention, and training and other critical services to claims; and
- e. may have unintended, negative consequences, such as eliminating critical high-risk services and returning to the privatization of detention facilities to transfer risk to private companies.

2. To address the deficiencies noted above, the Board urges the Legislature to amend the HJC Substitute to replicate the thoughtful Legislative balance struck in the NMTCA by:

- a. including caps on compensatory damages and other procedural safeguards, such as requiring notice of claims and a shorter statute of limitations, comparable to those in the NMTCA; and
- b. not allow the award of litigation expenses and attorney fees to prevailing plaintiffs, since such awards will increase the costs of all claims and will likely encourage more claims to be filed, including those with minimal damages.

3. Regardless of the fate of the HJC Substitute, it urges the Legislature to dedicate adequate resources to:

- a. behavioral health prevention and treatment in our communities, so as to provide much-needed services while addressing the root cause of many law enforcement claims against local governments; and

- b. improve the operations of the New Mexico Law Enforcement Academy.

PASSED AND ADOPTED this 23rd day of February, 2021.

**COUNCIL OF THE INCORPORATED
COUNTY OF LOS ALAMOS, NEW MEXICO**

Randall T. Rytí,
Council Chair

ATTEST:

Naomi D. Maestas,
Los Alamos County Clerk