Searching for Judges Who Hear: Analyzing the Effects of Colorado's Abolition of Qualified Immunity on Civil Rights Litigation

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CONTENTS

"Judges, having ears to hear, hear not. . . . All the processes of justice, skulk away as if government and justice were crimes and feared detection. Among the most dangerous things an injured party can do is to appeal to justice."[1]

INTRODUCTION

On January 31, 2014, Clear Creek County Deputy Don Wilson was in pursuit of a Toyota pickup driving recklessly down an icy Colorado interstate.[2] In the truck, Cody Cox was drunk, weaving through traffic at "speeds between 5 and 15 miles per hour," and ignoring the officer's orders to stop his vehicle.[3] But as Deputy Wilson pulled up to the right of the truck, Cody Cox was blocked in by traffic, unable to move.[4] Wilson stepped out of his patrol car and "almost immediately, he shot Cox through the open passenger window, striking Cox in the neck."[5] That shot rendered Cox quadriplegic.[6]

Cox filed suit against Wilson under Section 1983 in federal district court claiming that Wilson's shooting constituted excessive force in violation of the Fourth Amendment.[7] On summary judgment, Wilson asserted qualified immunity—a doctrine that protects public officials, including police officers, from lawsuits alleging violations of someone's civil rights unless those rights were clearly established. But the district court denied Wilson's claim to qualified immunity, the Tenth Circuit dismissed his interlocutory appeal, and the case moved ahead.[8] After two trials, a jury returned a verdict in favor of Wilson.[9] At the second trial, however, the district court failed to properly instruct the jury and

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1. CONG. GLOBE APP., 42d Cong., 1st Sess. 78 (1871) (statement of Rep. Perry condemning the failures of Southern state courts to protect the rights of Black people from terroristic violence) (cleaned up).

2. *See* Cox v. Wilson, 971 F.3d 1159, 1166 (10th Cir. 2020).

3. *See id.* at 1167.

4. *See id.*

5. *Id.*

6. *See id.* at 1167–68.

7. *See id.* at 1168; 42 U.S.C. § 1983 ("Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law. . . .").

8. *See Cox*, 971 F.3d at 1161.

9. *See id.*

Cox brought an appeal to the Tenth Circuit.[10] Rather than simply correcting the "squarely presented trial error," the Tenth Circuit opted to resurrect Wilson's previously denied, dismissed, and unappealed qualified immunity defense to affirm the judgment below.[11] Dissenting, Judge Lucero lambasted the panel for taking "yet another step down the road of mutating [qualified immunity] doctrine into an 'absolute shield'" that allows federal courts to "finesse ambiguities to avoid confronting the hard issues presented."[12] Cox's appeal to justice in the federal courts went unheard.

In 2020, more than six years after Cox was paralyzed, Glendale police officers blocked in and surrounded a Dodge pickup that had come to a stop on a busy Colorado Boulevard.[13] Inside the truck, John Pacheaco sat unconscious in the driver's seat, his foot resting on the brake.[14] The officers shined their flashlights into the truck and attempted to wake Pacheaco up.[15] Disoriented and confused, Pacheaco awoke and lifted his foot off the brake causing the truck to lurch forward into the unoccupied patrol car parked in front of him.[16] As he moved to grab the gear shift, the officers "opened fire on Mr. Pacheaco at close range, firing nineteen rounds" into Pacheaco's chest, face, neck, and arm, killing him.[17]

While Pacheaco's estate could have sued the officers under Section 1983 in federal court, as Cox did, Colorado's recent establishment of a landmark civil cause of action under the Enhance Law Enforcement Integrity Act ("ELEIA")[18] allowed Pacheaco's estate to bring suit against the officers in Colorado state court instead.[19] Critically, ELEIA made Colorado the first state to remove qualified immunity as a defense for police

10. *See id.* at 1162 (Lucero, J., dissenting from the denial of rehearing *en banc*) (noting that "the district court misinterpreted Supreme Court precedent and our own in denying Cox's requested instruction. . . .").

11. *See id.* at 1164.

12. *See id.* at 1165.

13. *See* Michael Roberts, *Why John Pacheaco Police Shooting Is Primed to Make Colorado Legal History*, WESTWORD (Aug. 5, 2022), https://www.westword.com/news/john-pacheaco-glendale-police-shooting-primed-to-make-legal-history-14618422.

14. *See id.*

15. *See id.*

16. *See id.*

17. *See id.*; *see also* Michael Roberts, *Glendale Cop Turns Controversial Police Killing Into a Joke*, WESTWORD (Dec. 9, 2020), https://www.westword.com/news/john-pacheaco-glendale-police-shooting-and-joke-gone-wrong-update-11844998.

18. S.B. 20-217, 72d Gen. Assemb., 2d Reg. Sess. (Colo. 2020).

19. *See* Roberts, *supra* note 13.

officers.[20] ELEIA also required the decertification of officers found civilly liable for the use of excessive force resulting in death.[21] Vulnerable to losing their livelihood and without the shield of qualified immunity, the police officers quickly settled.[22] Though Pacheaco did not live to see it, his family's appeal to justice in the state courts was heard.

In a post-ELEIA Colorado, cases like Pacheaco's challenge the role federal courts' play for victims of police violence. Section 1983 was premised on the notion that state courts had failed and could not be trusted to secure the people's constitutional rights in the aftermath of the Civil War. Its purpose was to "interpose the federal courts between the States and the people, as guardians of the people's federal rights."[23] But through a series of decisions, the Supreme Court has winnowed down that promise by shielding officers and municipalities from liability.[24] In a bit of historical irony, ELEIA proposes that today—as federal courts have failed and cannot be trusted to secure the rights of victims of police violence—state courts will step up to serve as the guardians of constitutional rights.

To assess the early results of that proposal, this Comment aims to evaluate the impact of ELEIA on police misconduct litigation in Colorado's state and federal courts. Part I discusses the legal and historical context that led to the enactment of ELEIA and the bill's structure. Part II evaluates the effect of Colorado's abolition of qualified immunity by looking at trends in state and federal filings against Colorado police officers from 2018 to 2023. It examines the hypothesis that ELEIA would reduce the dependence on federal courts and shows that it has not. Finally, Part III explores why Colorado's civil rights practitioners continue to rely on federal courts to litigate against police violence. It proposes that other

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20. *See* Elise Schmelzer and Seth Klamann, *3 Years After Colorado's Landmark Police Accountability Bill, What's Changed? And Has Push For Further Reform Slowed?*, DENVER POST (July 2, 2023), https://www.denverpost.com/2023/07/02/colorado-police-reform-body-cameras-george-floyd/.

21. *See* Colo. Rev. Stat. Ann. § 24-31-904 (West).

22. *See* Michael Roberts, *Hush Money? Glendale Quietly Settles Historic Case About Police Killing*, WESTWORD (Aug. 31, 2022), https://www.westword.com/news/glendale-police-confidential-settlement-in-john-pacheaco-killing-14892136.

23. Mitchum v. Foster, 407 U.S. 225, 242 (1972).

24. *See, e.g.*, Monell v. Dep't of Soc. Servs. of City of New York, 436 U.S. 658 (1978); City of Canton, Ohio v. Harris, 489 U.S. 378 (1989); Pierson v. Ray, 386 U.S. 547 (1967); Harlow v. Fitzgerald, 457 U.S. 800 (1982); Reichle v. Howards, 566 U.S. 658 (2012); Ashcroft v. al-Kidd, 563 U.S. 731 (2011); Pearson v. Callahan, 555 U.S. 223 (2009).

states follow Colorado's example while also further expanding the availability of remedies by allowing suits against municipalities and other local officials.

I. OLD AND NEW HORIZONS IN CIVIL RIGHTS LITIGATION

This section surveys federal courts' failures to address constitutional rights violations and Colorado's historic response to those failures. First, it reviews the origins and reemergence of Section 1983 litigation in federal courts. Next, it provides an overview of the Supreme Court's efforts to limit Section 1983 claims by restricting their use against municipalities and shielding government officers through qualified immunity. Finally, it evaluates ELEIA's novel use of state courts to address police violence.

A. THE HISTORY OF SECTION 1983 SUITS IN FEDERAL COURTS

Hoping to lead plaintiffs out of the backwaters of Southern state courts, Section 1983 opened the doors of the federal court system to claims against local officers' unconstitutional conduct. But over time, the Supreme Court has raised legal barriers to recovery including limits on municipal liability and the doctrine of qualified immunity.[25] By creating a state court cause of action that removes qualified immunity as a defense, ELEIA calls into question Section 1983's foundational premise—that state courts could not be trusted to enforce civil rights against local officers.

1. *Section 1983's Origins and Revival*

Against the backdrop of racialized violence playing out across the Reconstruction South, Congress passed Section 1983 as part of the Ku Klux Klan Act.[26] The failures of Southern state courts and law enforcement to protect the newly established rights of Black people drove Congress to act.[27] Their passage of Section 1983

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25. *See infra* Sec. I.A.ii.

26. An Act to Enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States, and for Other Purposes, ch. 22, 17 Stat. 13 (1871) (codified as amended at 42 U.S.C. § 1983 (2018)).

27. *See* Monroe v. Pape, 365 U.S. 167, 174–75 (1961) ("It was not the unavailability of state remedies but the failure of certain States to enforce the laws with an equal hand that furnished the powerful momentum behind this 'force bill'." For instance, Representative

created a mechanism for individuals to sue state and local government officials in federal court for violations of their constitutional rights.[28] Supporters believed that federal courts would prove more capable, independent, and willing to protect constitutional and federal rights than the state courts which had proven vulnerable to provincial prejudices and influence.[29] Yet despite its expansive language and original purpose, Section 1983 remained largely unused for nearly a hundred years.[30]

That changed, however, when the Warren Court "revived it as a tool of civil rights litigation during the Second Reconstruction."[31] In *Monroe v. Pape*, the Supreme Court reestablished federal courts as guardians for the enforcement of civil rights against violations by local officials. In 1958, thirteen Chicago police officers broke into James Monroe's home, took him and his wife out of bed naked, ransacked his house, and held and interrogated him about a murder for ten hours with no search or arrest warrants.[32] Monroe sued the officers under Section 1983 for violations of his Fourth and Fourteenth Amendment rights, arguing that the officer's misconduct was action taken "under color of" state law and thereby

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David P. Lowe said: "While murder is stalking abroad in disguise, while whippings and lynchings and banishment have been visited upon unoffending American citizens, the local administrations have been found inadequate or unwilling to apply the proper corrective. . . . the records of the public tribunals are searched in vain for any evidence of effective redress." *Id.* at 175 (quoting CONG. GLOBE, 42d Cong., 1st Sess., App. 374).

28. The Act reads: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . ." 42 U.S.C. § 1983 (2018).

29. *See*, *e.g.*, CONG. GLOBE, 42d Cong., 1st Sess., 460 (1871) (statement of Representative Coburn) ('The United States courts are further above mere local influence than the county courts; their judges can act with more independence, cannot be put under terror, as local judges can; their sympathies are not so nearly identified with those of the vicinage; the jurors are taken from the State, and not the neighborhood; they will be able to rise above prejudices or bad passions or terror more easily. . . .").

30. *See* JOHN C. JEFFRIES, JR. ET AL., CIVIL RIGHTS ACTIONS: ENFORCING THE CONSTITUTION 9 (3d ed. 2013) (citing Comment, *The Civil Rights Act: Emergence of an Adequate Federal Civil Remedy?*, 26 IND. L. J. 361, 363 (1951)) (noting that before "*Monroe v. Pape*, § 1983 was remarkable for its insignificance. Indeed, one commentator found only 21 suits brought under this provision in the years between 1871 and 1920.").

31. Alexander Reinert, Joanna C. Schwartz, James E. Pfander, *New Federalism and Civil Rights Enforcement*, 116 NW. UNIV. L. REV. 737, 750 (2021).

32. *See* Myriam E. Gilles, *Police, Race and Crime in 1950s Chicago:* Monroe v. Pape *as Legal Noir, in* CIVIL RIGHTS STORIES 41, 59 (Myriam E. Gilles & Risa L. Goluboff eds., 2008).

subject to liability under the statute.[33] The Supreme Court agreed, concluding that an officer's "[m]isuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken 'under color of' state law."[34] In *Mitchum v. Foster*, the Court further reaffirmed Section 1983 as the product of a "vast transformation" in federalism meant "to interpose the federal courts between the States and the people, as guardians of the people's federal rights. . . ."[35] The Supreme Court's decision in *Monroe* opened the federal courts to litigants seeking remedies for civil rights violations.[36] But just as soon as they had opened the door, the Court began to close it.

2. *Limits on Section 1983 Liability*

Since *Monroe*, the Supreme Court has repeatedly narrowed Section 1983 to restrict the availability of remedies to civil rights plaintiffs. Those restrictions have come in two broad forms.[37] First, the Court has limited municipal liability by requiring plaintiffs to demonstrate that the deprivation of their rights resulted from a policy, custom, or practice of the municipality. Second, the Court has created the doctrine of qualified immunity to shield officers from liability for violating constitutional rights unless those rights were "clearly established." Together, these restrictions operate to shut out individuals whose constitutional rights have been violated.

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33. Monroe v. Pape, 365 U.S. 167, 171 (1961), *overruled in part by* Monell v. Dep't of Soc. Servs. of City of New York, 436 U.S. 658 (1978).

34. *Monroe*, 365 U.S. at 184, 187 (quoting U.S. v. Classic, 313 U.S. 299 (1941)) (holding that the meaning given to "under color of" law in the *Classic* case applied to § 1983 cases).

35. Mitchum v. Foster, 407 U.S. 225, 242 (1972).

36. *See* Brian P. Owensby, *Is the Section 1983 Civil Rights Statute Overworked? Expanded Use of Magistrates—An Alternative to Exhaustion*, 17 UNIV. MICH. J. L. REFORM 361 (1984) (noting how the number of civil rights claims had risen dramatically. "When Monroe came down in 1961, only 296 private civil rights actions were brought in federal district courts. By 1972, with the widespread use of section 1983 in civil rights actions, 6,133 nonprisoner claims were filed. By 1983, that number had grown to 18,4061.").

37. In addition, the Supreme Court has found that states, state agencies, and state officers cannot be sued under Section 1983. *See* Quern v. Jordan, 440 U.S. 332, 338 (1979) (Section 1983 could not overcome state's sovereign immunity under Eleventh Amendment); Will v. Mich. Dep't of State Police, 491 U.S. 58, 67 (1989) ("We cannot conclude that § 1983 was intended to disregard the well-established immunity of a State from being sued without its consent.").

a. *Municipal Liability Claims*

In 1978, the Supreme Court found in *Monell* that claims against local government entities could be brought under Section 1983 but only under limited circumstances.[38] In its view, "Congress did not intend municipalities to be held liable unless action pursuant to official municipal policy of some nature caused a constitutional tort."[39] Thus, a municipality cannot be held liable on a *respondeat superior* theory "simply because they employed a tortfeasor."[40] In other words, if a plaintiff cannot show that their injury was the result of a municipal policy, custom, practice, or usage, their claim against the municipality fails. And where the plaintiff can only allege that their injury was the result of the municipality's failure to train its officers, they bear the burden of showing that the municipality's "failure to train amounts to deliberate indifference to the rights of persons with whom the police come into contact."[41] *Monell*'s causation requirement and its progeny operate as a shield against municipal liability, providing local governments with a form of local sovereign immunity.[42]

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38. Monell v. Dep't of Soc. Servs. of City of New York, 436 U.S. 658, 690 (1978) ("Our analysis of the legislative history of the Civil Rights Act of 1871 compels the conclusion that Congress did intend municipalities and other local government units to be included among those persons to whom § 1983 applies.").

39. *Id.* at 691.

40. *Id. Respondeat superior* liability makes employers vicariously liable for the tortious conduct of their employees acting within the scope of employment even where the employer may not have acted negligently.

41. City of Canton, Ohio v. Harris, 489 U.S. 378, 388 (1989).

42. *See* Fred Smith, *Local Sovereign Immunity*, 116 COLUM. L. REV. 409, 464 (2016) (arguing that qualified "immunities and the municipal causation requirement conspire to immunize local governments and their officials for conduct that violates the Constitution"). *See also* Richard H. Fallon, Jr., *Asking the Right Questions about Officer Immunity*, 80 FORDHAM L. REV. 479, 507 n.11 (2011) ("Under cases decided subsequent to *Monell*, the standards for establishing the liability of local governmental entities for constitutional violations committed by their officials are exceedingly difficult to satisfy."); Pamela S. Karlan, *The Paradoxical Structure of Constitutional Litigation*, 75 FORDHAM L. REV. 1913, 1920–21 (2007) (examining how "even if a particular violation occurs sufficiently often that a fact finder aware of the government's behavior over time could infer that there is an unconstitutional 'custom' sufficient to trigger entity-level liability, individual plaintiffs may be unlikely to have sufficient information to plead, let alone to prove without substantial discovery, such a de facto policy").

b. *Qualified Immunity Doctrine*

The Supreme Court's creation of qualified immunity doctrine protects law enforcement officers from otherwise viable constitutional claims, leaving victims of police violence without a meaningful remedy. In 1967, the Court first introduced the doctrine in *Pierson v. Ray*, where it held that Section 1983 should be read against the background of tort liability to allow officers an immunity defense on a showing of good faith and probable cause.[43] But in 1982, the Court did away with *Pierson*'s subjective test to focus instead on the objective unreasonableness of the officer's conduct.[44] *Harlow v. Fitzgerald* held that government officials "are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."[45]

The Court's precedent on what constitutes a "clearly established" right acts as a further barrier for victims of police violence. A clearly established right must be "sufficiently clear [such] that *every* reasonable official would have understood that what he is doing violates that right."[46] In other words, "existing precedent must have placed the statutory or constitutional question beyond debate."[47] Furthermore, lower courts are instructed "not to define clearly established law at a high level of generality."[48] The clearly established law must, therefore, "be 'particularized' to the facts of the case."[49] As a result, courts will typically grant qualified immunity to officers so long as the facts of prior precedents are not exceedingly similar to the facts of the case at hand.[50] For example, in *Baxter v. Bracy*, the Sixth Circuit found qualified immunity for officers who released a police dog on a suspect who was sitting down with his hands up despite Circuit

43. *See* Pierson v. Ray, 386 U.S. 547, 557 (1967) (holding that the defense of good faith and probable cause is available to officers sued under Section 1983).

44. *See* Joanna C. Schwartz, *The Case Against Qualified Immunity*, 93 NOTRE DAME L. REV. 1797, 1802 (2018)

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

46. Reichle v. Howards, 566 U.S. 658, 664 (2012) (quoting Ashcroft v. al-Kidd, 563 U.S. 731, 741 (2011)) (emphasis added) (cleaned up).

47. Ashcroft v. al-Kidd, 563 U.S. 731, 741 (2011).

48. *Id.* at 742.

49. White v. Pauly, 580 U.S. 73, 79 (2017) (quoting Anderson v. Creighton, 483 U.S. 635, 640, (1987)).

50. *See* Schwartz, *supra* n. 44 ("[T]he Supreme Court's qualified immunity decisions require that the prior precedent clearly establishing the law have facts exceedingly similar to those in the instant case.").

Court precedent establishing that releasing a dog on a suspect lying down was unconstitutional.[51] Consequently, the Court's demanding interpretation of "clearly established" law often shields police officers from liability, even in cases where their actions appear to violate established constitutional rights.

The barrier to defeating qualified immunity is further compounded by the Court's decision in *Pearson v. Callahan*.[52] Prior to *Pearson*, lower courts were required to determine whether the officer's conduct violated a constitutional right before deciding whether that right was clearly established.[53] The Supreme Court reasoned that this two-step process was "necessary to support the Constitution's 'elaboration from case to case' and to prevent constitutional stagnation."[54] But in *Pearson,* the Court changed its tune and gave lower courts the discretion to grant qualified immunity to officers without establishing whether or not there was a constitutional violation.[55] Unfortunately, this holding has reduced the number of cases in which courts reach the constitutional question to establish the law that plaintiffs must rely on to defeat qualified immunity.[56]

The Court's qualified immunity decisions march in lockstep to keep plaintiffs whose rights have been violated out of federal

51. *See* 751 F. App'x 869, 871–72 (6th Cir. 2018); *see also* Joanna C. Schwartz, *Qualified Immunity's Boldest Lie*, 88 UNIV. CHI. L. REV. 605, 617–18 (2021).

52. Pearson v. Callahan, 555 U.S. 223, 232 (2009).

53. *See* Saucier v. Katz, 533 U.S. 194 (2001) (receded from by Pearson v. Callahan, 555 U.S. 223, 232 (2009)).

54. Pearson v. Callahan, 555 U.S. 223, 232 (2009) (quoting Saucier v. Katz, 533 U.S. 194, 201 (2001)).

55. *See id.* at 236 (holding that *Saucier*'s "mandatory, two-step rule for resolving all qualified immunity claims should not be retained").

56. *See* Aaron L. Nielson & Christopher J. Walker, *The New Qualified Immunity*, 89 S. CAL. L. REV. 1 (2015) (concluding that post-*Pearson*, "the finding of constitutional violations (when granting qualified immunity) . . . has decreased" providing "some support for the post-*Pearson* constitutional stagnation theory. . . .").

courts. Jurists,[57] legal scholars,[58] and the public[59] have all engaged in widespread criticism of the doctrine. But emerging from this quagmire was a vision of state courts as an alternative venue for remedying constitutional rights violations.

B. STATE COURT CAUSES OF ACTION AS A SOLUTION TO FEDERAL COURT BARRIERS

Whereas Section 1983 was originally intended as Congress' answer to the historic failings of southern state courts, ELEIA is Colorado's answer to the contemporary failings of federal courts. ELEIA made Colorado the first state to remove qualified immunity as a defense for state court suits against police deprivation of rights.[60] In its wake, many states tried to follow Colorado's example but have so far encountered substantial resistance and limited success.[61]

1. *Origins and Passage of ELEIA*

On May 25, 2020, Minneapolis Police Officer Derek Chauvin murdered George Floyd.[62] One of the largest mass demonstrations in American history followed in the wake of Floyd's death.[63] By

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57. *See*, *e.g.*, Baxter v. Bracey, 140 S. Ct. 1862, 1865 (2020) (Thomas, J., dissenting from denial of certiorari) ("I continue to have strong doubts about our § 1983 qualified immunity doctrine."); N. S. v. Kansas City Bd. of Police Comm'rs, 143 S. Ct. 2422, 2424 (2023) (Sotomayor, J., dissenting) (arguing that result of majority's decision "is that a purportedly 'qualified' immunity becomes an absolute shield for unjustified killings, serious bodily harm, and other grave constitutional violations"); Kisela v. Hughes, 138 S. Ct. 1148, 1162 (2018) (Sotomayor, J., dissenting) (arguing that majority's grant of qualified immunity "tells officers that they can shoot first and think later, and it tells the public that palpably unreasonable conduct will go unpunished").

58. *See*, *e.g.*, Stephen R. Reinhardt, *The Demise of Habeas Corpus and the Rise of Qualified Immunity: The Court's Ever Increasing Limitations on the Development and Enforcement of Constitutional Rights and Some Particularly Unfortunate Consequences*, 113 MICH. L. REV. 1219 (2015).

59. *See Majority of Public Favors Giving Civilians the Power to Sue Police Officers for Misconduct*, PEW RSCH. CTR. (July 9, 2020), https://www.pewresearch.org/politics/2020/07/09/majority-of-public-favors-giving-civilians-the-power-to-sue-police-officers-for-misconduct/.

60. *See* Schmelzer & Klamann, *supra* n. 20.

61. *See infra* Sec. I.B.iii.

62. *See* Derrick B. Taylor, *George Floyd Protests: A Timeline*, N.Y. TIMES (Nov. 5, 2021), https://www.nytimes.com/article/george-floyd-protests-timeline.html.

63. *See* Larry Buchanan et al., *Black Lives Matter May Be the Largest Movement in U.S. History*, N.Y. TIMES (Jul. 3, 2020), https://www.nytimes.com/interactive/2020/07/03/us/george-floyd-protests-crowd-size.html

May 28th, protests had erupted in Denver, Colorado, where police met demonstrators outside the state capitol with pepper balls, pepper spray, and tear gas.[64] Meanwhile, inside the capitol, organizers, civil rights litigators, and lawmakers were planning to seize the historic moment by passing wide-ranging legislation to prevent police brutality by holding officers accountable in state courts.[65] Only a few months before, similar efforts to allow civil lawsuits in state courts for violations of state constitutional rights had died in committee.[66] But this time the lawmakers were confronted by thousands of protestors on the capitol steps marching and shouting for change.[67] After sixteen days of intense negotiations between Black Lives Matter activists, the ACLU, police, law enforcement lobbyists, and lawmakers from both parties, the state legislature passed Colorado Senate Bill 20-217, known as the Enhance Law Enforcement Integrity Act ("ELEIA").[68] And on June 19, 2020, Governor Jared Polis signed ELEIA into law.[69] Less than a month after George Floyd's death, policing and police accountability in Colorado had been transformed.

(suggesting that the George Floyd Protests may have attracted between fifteen and twenty-six million Americans).

64. *See* David Sachs, *Denver Police Use Chemicals to Deter People Protesting Police Violence as Downtown Erupts in Chaos*, DENVERITE (May 28, 2020), https://denverite.com/2020/05/28/denver-police-use-chemicals-to-deter-people-protesting-police-violence-as-downtown-erupts-in-chaos/.

65. *See* Leslie Herod & Mari Newman, *Colorado Took a Revolutionary Step to Reform Policing. Here's How We Did It*, USA TODAY (Oct. 28, 2021), https://www.usatoday.com/story/opinion/2021/10/28/colorado-hold-cops-accountable-qualified-immunity/6101915001/.

66. Jeffrey A. Roberts, *Legislators Kill Measure to Allow Civil Claims for Violating Colorado Constitutional Rights, Including Free Speech and Free Press*, COLO. FREEDOM OF INFO. CTR. (Mar. 6, 2020), https://coloradofoic.org/legislators-kill-measure-to-allow-civil-claims-for-violating-colorado-constitutional-rights-including-free-speech-and-free-press/ (discussing failure of HB 20-1287, which "would have allowed anyone whose Colorado constitutional rights are infringed upon to bring a civil action in state court" while also "prohibit[ing] governments from defending against such suits by using qualified immunity").

67. *See* Telephone Interview with Mari Newman, Partner, Newman, McNulty, LLC (Dec. 20, 2023) (sharing how hearing the protests going on outside the state capitol created an atmosphere where lawmakers could not ignore the issues).

68. *See* Herod & Newman, *supra* note 65.

69. *See* Francie Swidler, *Here's How Colorado Changed Its Policing After George Floyd's Murder*, COLO. PUB. RADIO (Apr. 27, 2021), https://www.cpr.org/2021/04/27/colorado-tried-to-reform-police-after-last-summers-protests-heres-how/.

2. *Structure of ELEIA*

ELEIA contains a variety of policy reforms to state and local police departments. It requires all police and sheriff's departments to equip their officers with body-worn cameras for use during all interactions with the public.[70] It mandates the public release of body-worn camera footage during incidents of police misconduct within twenty-one days of request.[71] It calls for the collection and public reporting of data regarding use-of-force incidents, resignations of officers under investigation, and demographics of those subjected to stop-and-frisks.[72] It developed standards for the decertification of officers by the Peace Officer Standards and Training Board (P.O.S.T.) and established a P.O.S.T. database publishing officers' records of untruthfulness, decertification, and termination.[73] It restricts the use of less-than-lethal projectiles and chemical irritants, like pepper spray and tear gas, during protests.[74] It bans chokeholds,[75] as well as the use of deadly force against (1) suspects of minor or nonviolent offenses,[76] and (2) suspects who do not pose an immediate threat of death or bodily injury to other persons.[77] It imposes a duty on officers, under penalty of law and decertification, to report and intervene to prevent fellow officers' misconduct.[78] And it grants the state attorney general authority to file civil suits against police departments engaged in patterns and practices of conduct resulting in the deprivation of federal or state constitutional rights.[79] But perhaps most notably, ELEIA establishes a state civil cause of action for the deprivation of rights that removes qualified immunity as a defense.[80]

Like Section 1983 before it, the state civil cause of action enacted under ELEIA threw open the doors of state courts for civil rights claims against Colorado police officers. The statute provides:

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70. *See* Colo. Rev. Stat. Ann. § 24-31-902(1) (West).
71. *See id.* at § 24-31-902(2).
72. *See* Colo. Rev. Stat. Ann. § 24-31-903 (West).
73. *See* Colo. Rev. Stat. Ann. §§ 24-31-904 *and* 24-31-303 (West).
74. *See* Colo. Rev. Stat. Ann. § 24-31-905 (West).
75. *See* Colo. Rev. Stat. Ann. § 18-1-707(2.5)(a) (West).
76. *See* Colo. Rev. Stat. Ann. § 18-1-707(2)(a).
77. *See* Colo. Rev. Stat. Ann. § 18-1-707(3).
78. *See* Colo. Rev. Stat. Ann. § 18-8-802 (West).
79. *See* Colo. Rev. Stat. Ann. § 24-31-113 (West).
80. *See* Colo. Rev. Stat. Ann. § 13-21-131 (West).

> (1) A peace officer . . . who, under color of law, subjects or causes to be subjected, including failing to intervene, any other person to the deprivation of any individual rights that create binding obligations on government actors secured by the bill of rights, article II of the state constitution, is liable to the injured party for legal or equitable relief or any other appropriate relief.[81]

This means that any individual whose state constitutional rights have been violated by a Colorado peace officer[82] can bring a civil action in state court to secure a remedy for the violation. But unlike Section 1983 claims in federal court, "qualified immunity is not a defense" for claims brought under ELEIA in state court.[83] In addition, while departments can typically indemnify officers found liable, they cannot do so if they determine that "the officer did not act upon a good faith and reasonable belief that the action was lawful."[84] In those cases, the officers may be personally liable for up to $25,000 of the judgment or settlement.[85] Finally, if officers are found civilly liable for the use of unlawful force, ELEIA mandates that the P.O.S.T. board permanently revoke their certification.[86]

The cause of action has two notable shortcomings due to its restrictive application to peace officers.[87] First, plaintiffs cannot bring lawsuits against non-police government officials who might be either involved in officers' misconduct or independently responsible for rights violations themselves. Second, unlike Section 1983—where plaintiffs can, in theory, recover additional damages by pursuing claims against both officers and the municipality—plaintiffs can only pursue claims against officers

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81. *Id.*

82. "'Peace officer' means any person employed by a political subdivision of the state required to be certified by the P.O.S.T. board pursuant to section 16-2.5-102, a Colorado state patrol officer as described in section 16-2.5-114, and any noncertified deputy sheriff as described in section 16-2.5-103(2)." Colo. Rev. Stat. Ann. § 24-31-901(3) (West).

83. Colo. Rev. Stat. Ann. § 13-21-131(2)(b) (West).

84. Colo. Rev. Stat. Ann. § 13-21-131(4)(a) (West).

85. *See id.* at § 13-21-131(4)(a).

86. *See* Colo. Rev. Stat. Ann. § 24-31-904 (West) (providing that "the P.O.S.T. board shall permanently revoke a peace officer's certification if: . . . (II) The P.O.S.T. certified peace officer is found civilly liable for the use of unlawful physical force, or is found civilly liable for failure to intervene in the use of unlawful force and the incident resulted in serious bodily injury or death to another person. . . .").

87. *See supra* n. 82.

under ELEIA.[88] These limitations mean that ELEIA does not cover the entire universe of claims possible under Section 1983.

3. *Qualified Immunity Reform in Other States*

Since Colorado became the first state to abolish qualified immunity in its state courts,[89] dozens of states have attempted to adopt similar measures of their own.[90] But almost none were successful in passing a bill as expansive as Colorado's.[91] Most states have failed to pass any legislation introduced to remove or limit qualified immunity as a defense for state causes of action.[92] For instance, in California, efforts to remove immunity provisions collapsed in the face of immense law enforcement pushback.[93] Beyond these attempts, Connecticut, Massachusetts, and New York City have each marginally restricted qualified immunity. Connecticut's HB 6004 provides a civil cause of action but grants immunity to officers who "had an objectively good faith belief that [their] conduct did not violate the law."[94] Massachusetts removed qualified immunity for decertified officers but only in the narrow set of cases in which the civil rights violation is a result of "threats, intimidation, or coercion."[95] The New York City Council bill only

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88. *See* Ditirro v. Sando, 520 P.3d 1203, 1209 (Colo. App. 2022) (concluding, "based on the plain language of the statute, that [ELEIA] grants plaintiffs . . . the right to assert the specified civil rights actions only against individual peace officers, and not against the peace officers' employers.").

89. *See* Schmelzer & Klamann, *supra* n. 20.

90. *See* Kimberly Kindy, *Dozens of States Have Tried To End Qualified Immunity. Police Officers and Unions Helped Beat Nearly Every Bill*, WASH. POST (Oct. 7, 2021), https://www.washingtonpost.com/politics/qualified-immunity-police-lobbying-state-legislatures/2021/10/06/60e546bc-0cdf-11ec-aea1-42a8138f132a_story.html.

91. Iowa has even gone in the other direction by codifying qualified immunity into state statute. *See* Iowa Code Ann. § 670.4A (West).

92. *See, e.g.*, H.B. 1727 (Ill. 2021) (remains pending); H.B. 149 (Me. 2021) (failed); H.B. 1049 (Md. 2021) (failed); H.B. 531 (Mt. 2021) (failed); H.B. 1640 (N.H. 2024) (remains pending); S.B. 4260 (N.J. 2024) (remains pending); S.B. 2887 (N.Y. 2023) (remains pending); H.B. 332 (Ohio 2021) (remains pending); H.B. 1631 (Okla. 2023) (remains pending); H.B. 1237 (Tenn. 2023) (remains pending); H.B. 367 (Utah 2021) (failed).

93. *See* Kindy, *supra* n. 90 ("[A] California Peace Officers' Association official boasted about how the group's year-long effort was 'able to chip away' at efforts to make it easier to sue.").

94. Ilya Somin, *Connecticut Passes Law Curbing Qualified Immunity—but with Loopholes*, REASON: VOLOKH CONSPIRACY (Aug. 2, 2020), https://reason.com/volokh/2020/08/02/connecticut-passes-law-curbing-back-qualified-immunity-but-with-loopholes/.

95. Nick Sibila, *New Massachusetts Law Will Decertify Rogue Cops, Revoke Their Immunity*, FORBES (Jan. 9, 2021), https://www.forbes.com/sites/nicksibilla/2021/01/09/new-massachusetts-law-will-decertify-rogue-cops-revoke-their-immunity/?sh=3eb4dec5297f.

removes qualified immunity for claims of unreasonable searches and seizures and excessive force.[96]

These carve-outs and loopholes leave only one state with a law as broad as Colorado's ELEIA. Less than a year after the passage of ELEIA, New Mexico passed HB 4, known as the New Mexico Civil Rights Act.[97] Like ELEIA, HB 4 provides a state cause of action to sue for violations of state constitutional rights[98] and removes qualified immunity as a defense for suits.[99] But New Mexico's bill goes further than Colorado's in several ways. First, it allows individuals to sue any government official, not just peace officers.[100] Second, it allows for suits against public bodies, such as municipalities.[101] It does not, however, allow for any personal liability against defendants.[102] Instead, municipalities will indemnify individual defendants found liable.[103]

This legislative landscape makes Colorado and New Mexico unique among the states. Both states' experiments raise new questions about federal courts' role in civil rights litigation and may provide models or warnings to other states seeking to reform

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96. *See* Jeffrey C. Mays and Ashley Southall, *It May Soon Be Easier to Sue the N.Y.P.D. for Misconduct*, N.Y. TIMES (Mar. 25, 2021), https://www.nytimes.com/2021/03/25/nyregion/nyc-qualified-immunity-police-reform.html.

97. *See* Nick Sibila, *New Mexico Bans Qualified Immunity for All Government Workers, Including Police*, FORBES (Apr. 7, 2021), https://www.forbes.com/sites/nicksibilla/2021/04/07/new-mexico-prohibits-qualified-immunity-for-all-government-workers-including-police/?sh=57adb65b79ad.

98. *See* N.M. Stat. Ann. § 41-4A-3 (West) ("A person who claims to have suffered a deprivation of any rights, privileges or immunities pursuant to the bill of rights of the constitution of New Mexico due to acts or omissions of a public body or person acting on behalf of, under color of or within the course and scope of the authority of a public body may maintain an action to establish liability and recover actual damages and equitable or injunctive relief in any New Mexico district court.").

99. *See* N.M. Stat. Ann. § 41-4A-4(B) (West) ("In any claim for damages or relief under the New Mexico Civil Rights Act, no public body or person acting on behalf of, under color of or within the course and scope of the authority of a public body shall enjoy the defense of qualified immunity for causing the deprivation of any rights, privileges or immunities secured by the bill of rights of the constitution of New Mexico.").

100. *See id.*

101. In fact, New Mexico requires that plaintiffs bring suits against public bodies, even where the claims only arise from the conduct of a government official. *See* N.M. Stat. Ann. § 41-4A-4(B) ("Claims brought pursuant to the New Mexico Civil Rights Act shall be brought exclusively against a public body. Any public body named in an action filed pursuant to the New Mexico Civil Rights Act shall be held liable for conduct of individuals acting on behalf of, under color of or within the course and scope of the authority of the public body.").

102. *See* Jay Schweikert, *New Mexico's Landmark Qualified Immunity Reform Gets It Mostly Right*, CATO INST. (Apr. 11, 2021), https://www.cato.org/commentary/new-mexicos-landmark-qualified-immunity-reform-gets-it-mostly-right.

103. *See id.*

qualified immunity. This Comment focuses on ELEIA's impact on civil rights litigation in Colorado.

II. ELEIA'S IMPACT ON FEDERAL AND STATE CIVIL RIGHTS LITIGATION

With the passage of ELEIA, Colorado opened a fresh avenue for civil rights litigation in the state courts. Given the hurdle of qualified immunity in federal court, civil rights practitioners in Colorado anticipated that ELEIA's arrival was "certain to move a significant volume of civil rights litigation from federal to state court."[104] This section aims to provide an early look at whether filings of Section 1983 claims that could have been brought under ELEIA have decreased in the United States District Court for the District of Colorado ("District of Colorado") since ELEIA's enactment. Despite practitioners' expectations, the results show that the federal filings have not decreased but rather increased.

A. METHODOLOGY

To measure the impact of ELEIA on filings in federal and state courts, I gathered filings data from publicly available reports. Colorado publishes its state court caseload statistics each fiscal year (including data for deprivation of rights claims) in the Colorado Judicial Branch's Annual Statistical Report.[105] Statistics for deprivation of rights claims in Colorado state courts were available for fiscal years 2021–23.[106] I compiled the county totals

104. Matthew J. Cron et al., *Section 1983, Senate Bill 217, and the Future of Civil Rights Practice in Colorado*, COLO. TRIAL LAWS. ASS'N: TRIAL TALK, October/November 2020, at 21, 28 (available at https://rmlawyers.com/wp-content/uploads/2020/12/Cron-Bonner-Gomez-Lutz-Trial-Talk-OCT-NOV-2020.pdf).

105. *See Research and Data*, COLO. JUD. BRANCH https://www.courts.state.co.us/Administration/Unit.cfm?Unit=annrep (last visited Dec. 10, 2023).

106. *Annual Statistical Report, Fiscal Year 2021*, COLO. JUD. BRANCH, https://www.courts.state.co.us/userfiles/file/Administration/Planning_and_Analysis/Annual_Statistical_Reports/2021/FY2021%20Annual%20Statistical%20Report.pdf (last visited Dec. 10, 2023); *Annual Statistical Report, Fiscal Year 2022*, COLO. JUD. BRANCH, https://www.courts.state.co.us/userfiles/file/Administration/Planning_and_Analysis/Annual_Statistical_Reports/2022/FY2022%20Annual%20Report.pdf (last visited Dec. 10, 2023); *Annual Statistical Report, Fiscal Year 2023*, COLO. JUD. BRANCH, https://www.courts.state.co.us/userfiles/file/Administration/Planning_and_Analysis/Annual_Statistical_Reports/2023/FY2023%20Annual%20Report%20FINAL.pdf (last visited Dec. 10, 2023).

from the reports to provide a total annual number of statewide claims for each fiscal year.[107]

Accurately measuring ELEIA's impact on federal court filings required more care and effort. The Federal Judicial Center's Integrated Database (IDB) publishes federal court caseload statistics.[108] To track the caseload trends before and after ELEIA was passed, I pulled a table from January 2018 to June 2023 containing all Section 1983 suits filed by represented parties in the District of Colorado.[109] This resulted in a total of 475 suits.[110] However, because not all Section 1983 claims are brought against Colorado's peace officers for violation of constitutional rights as ELEIA requires, I coded the suits individually to determine whether or not they could have potentially been brought under ELEIA.[111] To do so, I pulled each case's docket from Bloomberg Law and reviewed the complaints to determine whether or not the suit could have been brought against any of the defendants under ELEIA. After reviewing the 475 suits, I found that 281 contained constitutional rights violation claims against Colorado peace officers, while 173 did not.[112] I then sorted the 281 responsive suits by date in a pivot table and plotted in a chart by month.[113]

B. RESULTS

107. *See* Exhibit A.

108. *See Integrated Database (IDB)*, FED. JUD. CTR., https://www.fjc.gov/research/idb (last visited Nov. 18, 2023).

109. I excluded pro-se plaintiffs to better account for the aim of the analysis: measuring the impact of ELEIA on civil rights practitioner's choice between federal and state courts.

110. *See IDB Civil 1988-present*, FED. JUD. CTR., https://www.fjc.gov/research/idb/interactive/21/IDB-civil-since-1988?districts%5B%5D=82&nos%5B%5D=440&prose=0&DOCKET=&classact=All&TITLE=&SECTION=1983&FILEDATE_op=%3E&FILEDATE%5Bvalue%5D=01%2F01%2F2018&FILEDATE%5Bmin%5D=&FILEDATE%5Bmax%5D=&TERMDATE_op=%3E&TERMDATE%5Bvalue%5D=&TERMDATE%5Bmin%5D=&TERMDATE%5Bmax%5D=&items_per_page=25&antibot_key=f6b99bce6cc751c6716e2f0b89773e15 (last visited Nov. 18, 2023).

111. For instance, plaintiffs bring some Section 1983 suits against county commissioners alone for violations of constitutional rights while others are brought against a police officer for violations of federal statutory rights alone. By coding the suits for constitutional rights violation claims against Colorado peace officers, I excluded these kinds of suits from the results.

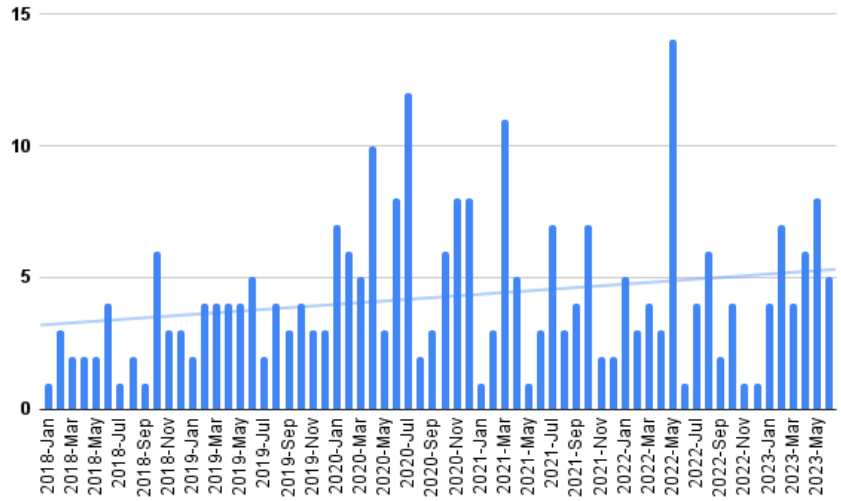
112. The remaining twenty-one suits were duplicates, outside of the date range, or by pro-se plaintiffs not excluded by IDB's filtering tool.

113. *See* Exhibit B.

ELEIA Suits Brought in Colorado State Courts

	Fiscal Year 2021	Fiscal Year 2022	Fiscal Year 2023	Fiscal Years 2021-2023
Total Deprivation of Rights Suits	21	18	43	82
Percentage of Total State Filings	0.03%	0.02%	0.07%	N/A
Average Suits Per County	0.33	0.28	0.67	0.43
Median Suits Per County	0	0	0	0

Responsive Section 1983 Suits Brought in U.S. District Court of Colorado



2018	2019	2020	2021	2022	2023 (Jan.–June)
30	42	78	49	48	34

These data show that while litigants are taking increasing advantage of state courts, federal court filings have not decreased, but rather moderately increased. In state courts, deprivation of rights filings have increased from twenty-one in FY 2021 to forty-three in FY 2023. This means that there were more suits in Colorado state courts in FY 2023 (forty-three suits) than there were responsive Section 1983 suits the year before ELEIA was passed (forty-two suits). It does not mean, however, that ELEIA has brought significant additional litigation against police to Colorado's court system. ELEIA suits make up less than a tenth of a percent of state court civil filings and amount to fewer annual suits than one per county. Meanwhile, in the District Court of Colorado, from January 2018 to June 2020, an average of 3.7 Section 1983 suits were filed each month for rights violations against peace officers. After the passage of ELEIA, from July 2020 to June 2023, the average number of responsive suits filed each month increased to 4.72. Thus, ELEIA has neither flooded the state courts with suits against police nor sapped the federal courts dry of Section 1983 claims.

III. THEORIES FOR FEDERAL COURTS' PERSISTING RELEVANCE IN A POST-ELEIA COLORADO

This section explores why the passage of ELEIA has not led to decreased reliance on Section 1983 claims in federal court based in part on the experiences of civil rights practitioners in Colorado.[114] It also provides recommendations for policymakers considering reforms to qualified immunity through state courts.

114. To better understand ELEIA's impact on real world practice, I interviewed Mathew Haltzman, Felipe Behnet-Gomez, and Mari Newman. Matthew Haltzman is the founder of Haltzman Law Firm, P.C., where he focuses on criminal defense, personal injury, and civil rights. Haltzman also served as counsel for the estate of Mr. Pacheaco. Felipe Behnet-Gomez is a partner at Rathod Mohamedbhai LLC, where he focuses on civil rights and employment discrimination. Mari Newman is a founding lawyer of Newman, McNulty, LLC, where she focuses on civil rights and employment discrimination.

A. POSSIBILITY OF DELAYED IMPACT

A practical explanation for the lack of reduction in federal suits is that this analysis may be premature. Many potential plaintiffs and practitioners may not yet be aware of ELEIA as a vehicle for litigation. The legal profession is famously loathsome of change and results several years from now may show a different picture.

Another reason that the earliness of this analysis could explain the results is the fact that the law is not retroactive: parties cannot bring suits under ELEIA challenging conduct that occurred before its passage. This means that some of the Section 1983 suits brought after ELEIA's passage could not have been filed in state court as the actions being litigated occurred prior to the law's enactment. Without further coding the suits to determine the date of the challenged conduct, it is difficult to identify how much of an effect this may have had on the data. However, the statute of limitations for Section 1983 actions in Colorado is two years.[115] This means that, at a minimum, no ELEIA-eligible suit was filed in federal court until after July 2022. The average number of Section 1983 suits each month after July 2022 was 4.3—still higher than the pre-ELEIA filings of 3.7 suits per month. Thus, the impact of lawsuits challenging conduct from *before* ELEIA cannot fully explain the lack of a reduction in federal filings.

B. IMPACT OF THE GEORGE FLOYD PROTESTS

The George Floyd protests in Colorado resulted in widespread police violence that created Section 1983 claims and increased interest among lawyers in Section 1983 litigation. During the protests, police indiscriminately threw flash grenades and smoke bombs and shot pepper balls, gravely injuring several protestors.[116] These incidents of police brutality resulted in a significant number of Section 1983 claims against officers and municipalities.[117] These claims may partly explain the outlier figure of the seventy-eight Section 1983 suits brought in 2020. They may also explain the

115. *See* Fogle v. Pierson, 435 F.3d 1252, 1258 (10th Cir. 2006).

116. *See* Elaine Tassy, *After Historic Win Over City, Denver Protesters' Fight Is Far from Over*, COLO. PUB. RADIO (May 25, 2022), https://www.cpr.org/2022/05/25/denver-protests-police-violence/.

117. *See* Elise Schmelzer, *Denver Is Set to Pay $1.4 Million to Settle Another Lawsuit against Denver Police for 2020 Protests*, DENVER POST (Oct. 6, 2023), https://www.denverpost.com/2023/10/06/denver-protest-lawsuit-settlement-again/.

outlier figure of the fourteen suits filed in May 2022—right before the statute of limitations for the claims expired.

Another explanation lies in the widespread media attention given to both the issue of police violence in 2020 and the potential for winning large settlements through Section 1983 cases. For instance, the City of Denver alone has paid out more than $11 million in settlements to protestors injured during the George Floyd protests.[118] When numbers like that lead in the headlines, some lawyers will likely follow them into federal court. [119]

C. SELECTION BIAS AND OVERFLOW CASES

The lack of reduction in federal suits may also reflect the possible existence of a screening effect in filing decisions where plaintiffs decline to file suits they believe likely to fail on qualified immunity grounds. In practice, the percentage of Section 1983 cases dismissed on qualified immunity grounds is very small. In one study of over a thousand Section 1983 cases filed against law enforcement officers, fewer than 4% of the cases in which qualified immunity could be raised ultimately resulted in dismissal on qualified immunity grounds.[120] Although qualified immunity accounts for a small number of dismissals, the doctrine also works to dissuade plaintiffs and practitioners from filing suit in the first place.[121] Thus, a selection bias in Section 1983 filings may screen out claims likely to be dismissed or too costly or complex to litigate under the specter of qualified immunity.[122] If this selection bias

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118. *See id.*

119. *See* Telephone Interview with Mari Newman, Partner, Newman, McNulty, LLC (Dec. 20, 2023) (noting how while some Colorado civil rights practitioners have pursued § 1983 throughout their careers, in the post-George Floyd era other practitioners have become sensitized to the issue and aware of the fact that these kinds of cases can be lucrative).

120. *See* Joanna C. Schwartz, *How Qualified Immunity Fails*, 127 YALE L. J. 2, 10 (2017).

121. *See* Telephone Interview with Felipe Bohnet-Gomez, Partner, Rathod, Mohamedbhai, LLC (Dec. 20, 2023) (explaining that much of the qualified immunity analysis occurs before a case is filed); Schwartz, *supra* n. 120 ("The threat of a qualified immunity motion may cause a person never to file suit, or to settle or withdraw her claims before discovery or trial."); Alexander A. Reinert, *Does Qualified Immunity Matter?*, 8 UNIV. ST. THOMAS L. J. 477, 492 (2011) (interviews with practitioners showed that "concerns about the qualified immunity defense play a substantial role at the screening stage").

122. *But see* Joanna C. Schwartz, *Qualified Immunity's Selection Effects*, 114 NW. UNIV. L. REV. 1101, 1101 (2020) ("Attorneys do not reliably decline cases vulnerable to attack or dismissal on qualified immunity grounds. And when lawyers do decline cases because of qualified immunity, they do not appear to be screening out 'insubstantial' cases under any plausible definition of the term.").

exists, then practitioners may choose to go to state court for the riskier "overflow" claims but willing to remain in federal court for the screened claims they would have brought before ELEIA.

D. PATH DEPENDENCY

Civil rights practitioners' familiarity and comfort litigating in the federal courts may also drive sustained Section 1983 filings. In contrast to state civil court practice—with its dozens of districts and hundreds of judges—the federal civil rights bar in Colorado contains a handful of repeat players practicing in front of the same few federal judges and magistrate judges.[123] Some practitioners have also clerked with judges in the district.[124] In addition, while they have extensive knowledge of federal civil procedure, these practitioners may lack the same level of experience in state civil litigation. These social networks and the costs and effort required to build up experience with state-court litigation could play a limited role in the civil rights bar's continued presence in the federal courts.

E. VENUE

Perhaps the most important factor when deciding whether to file in state or federal court is venue. ELEIA cases must be filed in the state district in which the alleged rights violation occurred. Practitioners believe that plaintiffs with claims in liberal jurisdictions, such as Denver or Boulder, will likely have more favorable jury pools than plaintiffs with claims in conservative jurisdictions, such as El Paso or Mesa.[125] Thus, a plaintiff from El Paso County may prefer to file their claims in federal court where the jury pool pulls mostly from Colorado's liberal population centers.[126] Such considerations may drive a number of plaintiffs from rural and conservative counties into federal courts.

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123. *See* Telephone Interview with Felipe Bohnet-Gomez, Partner, Rathod, Mohamedbhai, LLC (Dec. 20, 2023) (acknowledging a sense of familiarity he and his colleagues have developed with the federal judges).

124. *See id.*

125. *See* Telephone Interview with Matthew Haltzman, Haltzman Law Firm (Dec. 20, 2023); Telephone Interview with Felipe Bohnet-Gomez, Partner, Rathod, Mohamedbhai, LLC (Dec. 20, 2023).

126. *See* Telephone Interview with Matthew Haltzman, Haltzman Law Firm (Dec. 20, 2023).

F. STATE COURT CAPACITY, UNPREDICTABILITY, AND JUDICIAL ACTIVISM

State courts also have disadvantages in their capacity to handle deprivation of rights claims. Due to their caseloads state court judges cannot spend the same time, energy, and focus on pre-trial motions and discovery disputes as a federal magistrate judge can.[127] Many state court judges also lack experience with civil rights litigation. Out of Colorado's 198 district court judges, approximately 42% were former prosecutors, while around 20% were former public defenders.[128] These legal backgrounds in state criminal law may reflect a lack of judicial experience managing the complex issues arising in civil rights litigation. The skew towards former prosecutors statewide and especially in rural counties may also factor into considerations of venue. A plaintiff in rural Mesa County, for instance, might seek to avoid having their case heard in state court considering that 83% of the county's sitting judges are former prosecutors.[129] These concerns may drive practitioners towards a more experienced and capable set of hands in federal court.

The current lack of state appellate law also means that ELEIA rulings can be unpredictable. In federal court, practitioners can often rely on a relative wealth of established precedents to craft arguments and draw predictions on the merits of their claims.[130] This level of guidance is not yet available in state courts where only one ELEIA decision has so far reached the state appellate courts.[131] Decisions on the substantive elements and standards for various Colorado constitutional claims are up in the air.[132] And while federal district court decisions are routinely published or otherwise available in legal databases, many state trial court

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127. *See* Telephone Interview with Felipe Bohnet-Gomez, Partner, Rathod, Mohamedbhai, LLC (Dec. 20, 2023) (describing difficulties, delays, and unpredictability of pre-trial litigation in state courts).

128. *See* Shelly Bradbury, *Among Colorado Judges, Former Prosecutors Outnumber Public Defenders 2-To-1*, DENVER POST (Aug. 20, 2023), https://www.denverpost.com/2023/08/20/colorado-judges-former-prosecutors-public-defenders-qualifications/.

129. *See id.*

130. *See* Telephone Interview with Felipe Bohnet-Gomez, Partner, Rathod, Mohamedbhai, LLC (Dec. 20, 2023).

131. *See* Ditirro v. Sando, 520 P.3d 1203, 1209 (Colo. App. 2022).

132. *See id.*

decisions are not as easily accessible, leaving practitioners and state court judges in the dark.[133]

Absent an established body of state law, some state court judges have issued adverse rulings going against the text and intent of ELEIA. For instance, a state trial court judge in Boulder County recently held that while ELEIA eliminated qualified immunity, it "does not prohibit Common Law Public Official Immunity as a defense."[134] This ruling would allow the officers to assert good faith as a defense against claims brought under ELEIA.[135] Civil rights practitioner Mari Newman suggests that state courts' failure to follow the text and purpose of ELEIA shows evidence of judicial activism in the state trial courts.[136] Without correction and guidance from the state appellate courts, practitioners may feel cautious to bring claims into the uncharted waters of state courts and instead choose to pursue litigation in federal court where they at least know what to expect.

G. LACK OF MUNICIPAL AND NON-PEACE OFFICER LIABILITY

One final explanation for the continued reliance on federal courts is ELEIA's restriction to peace officers.[137] Due to this restriction, plaintiffs seeking to bring *Monell* style claims against a municipality must resort to federal court.[138] In addition, when plaintiffs' claims arise from conduct by both peace officers and non-peace officers, federal court may be the only avenue for litigation. For example, persons detained in county jails may have claims against both deputies and correctional health care providers but would be unable to bring rights deprivation claims against both in state court. Restrictions on municipal liability and suits against non-peace officers limit the number of suits plaintiffs can bring

133. *See id.*

134. Order at 8, Termin v. Johnson, No. 2022CV30614 (Boulder Dist. Ct., Nov. 12, 2023).

135. *See id.*

136. *See* Telephone Interview with Mari Newman, Partner, Newman, McNulty, LLC (Dec. 20, 2023)

137. *See* Ditirro v. Sando, 520 P.3d 1203, 1209 (Colo. App. 2022) (concluding, "based on the plain language of the statute, that [ELEIA] grants plaintiffs . . . the right to assert the specified civil rights actions only against individual peace officers, and not against the peace officers' employers").

138. *See* Telephone Interview with Matthew Haltzman, Haltzman Law Firm (Dec. 20, 2023) (discussing how in cases with viable *Monell* claims, federal court is the only avenue for litigation).

under ELEIA and force plaintiffs into federal court where they may face hurdles to obtaining a remedy.

H. SUMMARY AND RECOMMENDATIONS

The factors listed above help explain why federal courts still matter to Colorado's civil rights litigants. ELEIA's removal of qualified immunity has not made federal courts irrelevant in this arena. Instead, some qualities of federal courts continue to drive civil rights litigants through their doors despite the obstacles plaintiffs may face inside. Most notably, federal courts can provide more preferable venues and predictable outcomes in some cases and allow for suits against all state officers and municipalities. Still, ELEIA represents a meaningful expansion of suits targeting police misconduct and violence. Within three years, state court filings have roughly equaled Section 1983 filings without a concurrent reduction in Section 1983 filings. These results show both the limits and the possibility of ELEIA as a tool to provide additional avenues to justice for victims of police misconduct and violence.

Other states should follow Colorado's example and provide meaningful access to remedy violations of state constitutional rights in state courts. Given the substantial criticism of qualified immunity, public opinion against it, and the need to deter and remedy police violence and misconduct, ELEIA provides a solid blueprint for states to follow. And against the frequent hand wringing of law enforcement,[139] ELEIA has not caused a flood of litigation against police so far—most counties have no state court suits brought against officers in a given year.[140] Instead, for now, ELEIA captures a limited number of suits that plaintiffs could otherwise not bring in federal court due to qualified immunity. But as a state analogue to Section 1983, ELEIA has two shortcomings that New Mexico's law does not. The New Mexico Civil Rights Act provides for suits against all government officers (not just police)

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139. *See, e.g.*, Nell Salzman, *George Brauchler, Patrick Neville Warn of Coming Crime Wave in Colorado*, WESTWORD (July 6, 2020) https://www.westword.com/news/colorado-crime-police-reform-neville-brauchler-elijah-mcclain-11737323 (District Attorney George Brauchler "called the removal of a qualified defense as [sic] an 'I hate cops approach. . . . We're going to have to fend off a lot more lawsuits. . . . My guess is that 99 percent of those things are going to be bogus.'").

140. *See supra* Section II.B (showing per-county average of 0.43 suits and a per-county median of zero suits).

and allows for *Monell*-like liability against municipalities.[141] In these two respects, New Mexico's bill offers a more holistic state substitute for Section 1983 claims than ELEIA and may provide a model for future reforms in Colorado and other states. Despite this, Colorado's activists, policymakers, and politicians have set a bold example in ELEIA of the potential for state courts to fill a void left by federal courts' abandonment of Section 1983's original purpose.

CONCLUSION

Section 1983 was born out of the failures of state courts. Over a hundred years later, ELEIA was born out of the failures of federal courts to protect individuals from civil rights violations committed by local law enforcement. By removing qualified immunity as a defense, ELEIA challenged federal courts' continued relevance in addressing police violence in Colorado. But as this Comment shows, Colorado's federal district court remains an active scene for litigating against officers who violate constitutional rights. While there are many possible explanations for this result, ELEIA should not be taken as a failure. On the contrary, eighty-two claims that might otherwise have gone unheard in federal courts now can be heard in state courts. For victims of police violence, ELEIA provides a meaningful source of "ears to hear" their appeals for accountability, remedy, and justice.[142]

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141. *See supra* nn. 100 and 101.

142. *See supra* n. 1 ("Judges, having ears to hear, hear not. . . . All the processes of justice, skulk away as if government and justice were crimes and feared detection. Among the most dangerous things an injured party can do is to appeal to justice.") (statement of Rep. Perry condemning the failures of Southern state courts to protect the rights of Black people from terroristic violence).