Bulletin

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Introduction

Although the circumstances, including even the manner of how it conducts its business, are different for this year's General Assembly, what remains true in 2021 like every year prior is that the session is chock-full of issues and legislation of interest to local governments.

This bulletin is a distillation of the most important issues and legislation that, as of today, merit scrutiny by Virginia's local governments.

The VML staff hopes that this resource will help you better understand the legislation in play and provide you with the information you need when you call, email, or otherwise communicate your concerns (or support) to your General Assembly members.

To help, we have created a "Working with Legislators – A Year Round Guide" specifically to help our members meet the challenges of the 2021 session.

The 2021 General Assembly Session is a "short" session and despite (or perhaps because of) the social distancing and remote meeting requirements, things are moving quickly. So quickly, in fact, that while the issues outlined herein will persist, the specific legislation can change on a daily or even hourly basis.

As such, we encourage all our members to check our regular *eNews* bulletins that publish every Friday afternoon (including tomorrow) where we track this and other legislation of concern. Also look for updates and Action Alerts throughout the week while the General Assembly is in session.

You can view current and past *eNews* editions, and subscribe to receive them via email, at www.vml.org/publications/enews/.

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Qualified and Sovereign Immunity for Law Enforcement

VML urges our members to oppose two pieces of legislation being considered by the 2021 General Assembly which would erode qualified and sovereign immunity for law enforcement.

HB 2045 (Bourne) creates a state civil cause of action for depravation of any person's constitutional rights, privileges, or immunities by a law enforcement officer, including failure to intervene. The bill also:

- Creates liability for the law enforcement officer and any public or private employer that employs or contracts with the law enforcement officer.
- Provides for compensatory damages, punitive damages, attorney's fees and other types of relief and penalties. The bill also provides for individual liability of up to $25,000 for the law enforcement officer in certain situations.
- Prohibits the use of both sovereign immunity and qualified immunity defenses and prohibits any limitation of liability or damages.
- Creates liability for hiring, supervision, training, retention and use of police officers. The resulting effect of HB 2045 is that it creates a cause of action for every action or interaction a law enforcement officer has.

***** This bill will be heard in a subcommittee of House Courts of Justice either tomorrow (Friday) or next week.

SB 1440 (Surovell) creates a civil cause of action for the unlawful use of force or failure to intervene by a correctional officer or law enforcement officer who violates Chapter 7.1 of Title 19.2 (regarding use of force, failure to intervene, prohibited practices etc.) during the performance of their duties. An officer's public or private employer is liable if the events occur in the ordinary course of the employers' business. The bill provides for recovery of compensatory damages, punitive damages and attorney's fees and costs, and the language of the bill essentially negates the sovereign immunity defense.

The effect of this bill is that a law enforcement officer may be sued for reasonable actions.

Concerns / Key Points:

- **Law Enforcement Hiring, Retention, and Training**
  - This would have a chilling effect on the hiring and retention of law enforcement/correctional officers.
  - It will be impossible to train for an unspecified standard of care.
- **Drastic Increases in Costs**
  - Local Government would be vicariously liable for law enforcement and be subject to greater financial risk and increased frivolous litigation.
  - Law enforcement officers would have personal liability.
  - It will be extremely costly if not impossible to insure for this new unlimited liability.
- **Rippling Effects in the Community**
  - There would be a chilling effect on use of law enforcement for private or community events and businesses.
    - This includes private security at churches, high school sporting events, concerts, raceways, etc.
    - The Virginia Restaurant Lodging Travel Association and the Virginia Retail Federation oppose this bill as well.
  - Substantial obstacle to the provision of needed public services.
    - In terms of officers doing their jobs, maintaining staffing #s, etc.
    - Officers will be less likely to initiate an encounter with a citizen because of the potential for personal liability.
  - Officers cannot be expected to be legal scholars or think through legal arguments when attempting to perform their duties.
- **Dramatic erosion of existing laws, which already provide the protections sought by these bills.**
  - Officers do not have absolute immunity, and they can be held personally wliable when they violate a clearly established constitutional right.

Additional Resources

For more information, refer to **Appendix A: "Important public policy considerations regarding Qualified Immunity and Sovereign Immunity in light of HB 2045".** **[See page 16]**

Action Requested:

We urge local officials to contact your legislators to let them know that their locality opposes the erosion of qualified and sovereign immunity for law enforcement.

Specifically, we ask that you contact the members of the following committees:

House Courts of Justice, subcommittee: Civil (which has HB 2045)

- Bourne (Chair)
- Hope
- Simon
- Sullivan
- Heretick
- Kilgore
- Leftwich
- Miyares
- Herring

Senate Judiciary Committee (which has SB 1440)

- Edwards (Chair)
- Saslaw
- Norment
- Lucas
- Obenshain
- McDougle
- Stuart
- Stanley
- Deeds
- Petersen
- Surovell
- McClellan
- Boysko
- Morrissey
- Peake

Marijuana Legalization

The Northam Administration has House (HB2312 - Herring) and Senate (SB1406 – Ebbin) sponsored bills to legalize the retail sale of recreational marijuana to adults over 21.

In each chamber, the legislation is being heard by multiple committees, each focusing on specific aspects such as social equity and regulatory concerns, criminal justice impacts, and financial and revenue impacts. In the process, these bills have grown longer as they make their way to the floors of their respective chambers of the General Assembly.

Status

This legislation is moving quickly through committees and amendments have added hundreds of pages to each bill. Currently:

- SB1406 (Ebbin) has advanced out of the Senate Committee on Rehabilitation and Social Services on an 8-7 vote.
- HB2312 (Herring) is still in subcommittee for consideration and has incorporated Delegate Heretick's legalization bill HB1815.

Details

The specifics of these bills are still extremely fluid, so any descriptions are subject to change. Presently, the following can be gleaned:

- **Agency.** This legislation will require creating a new mission for an existing agency (such as the Virginia ABC) or an entirely new agency.
- **Process.** Both SB1406 and HB2312 chart out the process necessary to establish boards and agencies to develop regulations before considering applications from licensees to grow, process before the first sales of retail marijuana can occur. It is expected that this process could take 2-3 years after enactment to occur.
- **Local opt-in vs. opt-out.** Yet to be determined is whether localities will be allowed to authorize retail marijuana sales by ordinance or citizen-initiated referendum or be required to opt out of retail sales solely by referendum or ordinance. Current drafts envision an opt out by a citizen-initiated referendum during 2022.
- **Zoning.** The House version provides localities with greater authority over the zoning of retail facilities while the Senate version does not.
- **Tax revenue.** Both bills currently propose a local option tax on retail sales of 3 percent with revenue collected by the state and distributed to the locality.

Action / Talking points

We encourage our members to emphasize the following three essential points to your legislative delegation:

1. Localities should be given the opportunity to opt-in to the retail sale of marijuana by ordinance.
2. There should not be any penalties for how a locality decides to allow retail sales.
3. It is vital that localities retain control over local zoning.

The sponsors of each bill have already made changes in response to feedback from local governments and we believe emphasizing and reiterating these points essential to local governments can make a difference as the bills make their way to conference committees.

Full bill description

HB2312 (Herring) and SB1406 (Ebbin) have the same description:

Eliminates criminal penalties for possession of marijuana for persons who are 21 years of age or older. The bill also modifies several other criminal penalties related to marijuana and provides for an automatic expungement process for those convicted of certain marijuana-related crimes. The bill establishes a regulatory scheme for the regulation of

marijuana cultivation facilities, marijuana manufacturing facilities, marijuana testing facilities, marijuana wholesalers, and retail marijuana stores by the Virginia Alcoholic Beverage Control Authority, renamed as the Virginia Alcoholic Beverage and Cannabis Control Authority. The bill imposes a tax on retail marijuana, retail marijuana products, and marijuana paraphernalia sold by a retail marijuana store, as well as non-retail marijuana and non-retail marijuana products at a rate of 21 percent and provides that localities may by ordinance levy a three percent tax on any such marijuana or marijuana products. The bill provides that net profits attributable to regulatory activities of the Authority's Board of Directors pursuant to this bill shall be appropriated as follows: (i) 40 percent to pre-kindergarten programs for at-risk three and four year olds, (ii) 30 percent to the Cannabis Equity Reinvestment Fund, established in the bill, (iii) 25 percent to substance use disorder prevention and treatment programs, and (iv) five percent to public health programs. The bill creates the Cannabis Control Advisory Board, the Cannabis Equity Reinvestment Board, and the Cannabis Public Health Advisory Council. The bill has a delayed effective date of January 1, 2023, with provisions for the Authority's Board of Directors to promulgate regulations for the implementation of the bill and for implementation of the automatic expungement process to begin in due course. In addition, the bill establishes three work groups to begin their efforts in due course: one focused on public health and safety issues, one focused on providing resources for teachers in elementary and secondary schools, and one focused on college-aged individuals.

Elections

Mandated shift from May to November local elections

SB1157 (Spruill) would remove any local option for the timing of elections and force all localities to shift from a May to a November election cycle.

Context

Virginia localities have traditionally had the option to determine the dates of their own elections. This allows them to consider the needs of their individual communities when scheduling their council and mayoral elections for either May or November. There are pros and cons to each option; the point, however, is that localities have the freedom to choose the option that best matches their residents' interests.

The differing preferences of localities is borne out by the fact that, statewide, there is a roughly even split between localities with May elections and those with November elections.

Considerations / Talking Points

Arguments against holding elections in November include:

- Increased barriers to campaigning and election for new candidates; including the higher expense of running and building awareness among local residents amid state and national campaigns.
- Introduction of general election partisan positions into local, nonpartisan issues.
- Dilution of community-focused topics by state and national policy.
- Heightened difficulty of informing the voting public about local issues and candidates.
- Decreased likelihood that federal employees will have the ability to run for local office, as stipulated by the Hatch Act.

Position

VML opposes this bill and supports maintaining the local option for the timing of elections.

Proposed Voting Rights Act imposes preclearance requirements

HB1890 (Price) / SB1395 (McClellan) covers a variety of areas of election administration, including requiring all localities – not just those who were previously subject to Section 5 – to undergo an even more extensive preclearance process before implementing any change to local elections.

Context

Under Section 5 of the Voting Rights Act of 1965, specific states and localities with a history of imposing discriminatory election practices were identified and subjected to more stringent federal oversight to ensure the protection of individuals' ability to vote. Virginia and many of its localities were required to apply for preclearance of any changes in district boundaries, election timing, or polling places. The Supreme Court ultimately found Section 5 to be unconstitutional in 2013's *Shelby County v. Holder*. Nonetheless, localities across Virginia have continued to act in good faith when making changes to the implementation of their local elections.

Concerns / Talking Points

- Forcing localities to undergo either an additional 90-day public comment and hearing process or a 60-day waiting period for approval from the Attorney General could result in delays in holding elections.
- This is especially true in a year with heightened uncertainty around the pending release of Census data.
- The phrasing of the legislation renders localities even more susceptible to causes of action from the public, which could impose even more delays on local electoral processes in addition to additional expense.

Position

VML opposes this legislation in its current form.

Environment

Enhanced Nutrient Removal Certainty Program.

SB1354 (Sen. Hanger) / HB2129 (Del. Lopez) eliminates the floating cap proposed in the third Watershed Implementation Program released by the Northam Administration while ensuring that nitrogen and phosphorous reductions are achieved by 2025 to meet Virginia's commitments to clean up the Chesapeake Bay while providing increased certainty to local wastewater treatment facilities for an estimated cost savings of at least $150 million.

Background

This legislation has been developed in consultation with the Administration, Environmental Conservation organizations, and significant input from local wastewater facilities and their representatives across the Commonwealth.

Position

VML encourages members to support this legislation but to be aware that further amendments are likely.

Details

These bills, which are identical, require the State Water Control Board to adopt by June 30, 2022, regulations establishing a Phase III Watershed Implementation Plan Enhanced Nutrient Removal Certainty Program (ENRC Program), consisting of a number of total nitrogen and total phosphorous waste load allocation reductions assigned to particular water treatment facilities with schedules for compliance.

Furthermore, the legislation:

- Provides that the ENRC Program shall operate in lieu of certain Chesapeake Bay waste load regulations.
- Directs the Board to modify affected discharge permits to incorporate the provisions of the ENRC Program and requires certain compliance plans due from treatment works by February 1, 2023, to address the requirements of the ENRC Program.
- Provides that the funding of certain design and installation costs for implementing nutrient upgrades pursuant to the ENRC Program shall be eligible for grants from the Water Quality Improvement Fund. The ENRC Program is required to proceed regardless of whether such grants will exceed the available funds in the Fund for a given fiscal year.
- Lists the projects and the total nitrogen or total phosphorus waste load allocation reductions that specified facilities are to complete.
- Provides that when grants to finance nutrient removal technology reach a sum sufficient to fund the completion of the ENRC Program at all publicly owned treatment works, certain General Assembly committees shall review funding needs and mechanisms.

Status

- HB2129 passed out of Committee on a 7-1 vote and has been referred to the House Appropriations Committee where it is awaiting action.
- SB1354 has not yet been heard and is awaiting action by the Senate Committee on Agriculture and Natural Resources.

Interagency Environmental Justice Working Group

HB2074 (Simonds) establishes the Interagency Environmental Justice Working Group as an advisory council in the executive branch of state government to further environmental justice in the Commonwealth.

Details

This legislation has been amended and further amendments are possible. Currently, the legislation:

- Directs each of the Governor's Secretaries to designate at least one environmental justice coordinator to represent the secretariat as a member of the Working Group.
- Directs the Working Group to focus its work during its first year on the environmental justice of current air quality monitoring practices in Virginia and provides that the Working Group shall expire on July 1, 2031.
- Requires localities to include Environmental Justice concerns and potential impacts on identified communities in the comprehensive plan during each amendment of the comprehensive plan.

Concerns

VML has concerns about this mandate on localities and would ask that you let your legislators know we do not support unfunded mandates. In addition, this legislation adds items to the comprehensive plan that are not appropriate. Lastly should this legislation pass, please ask that the state fully fund this mandate.

Position

VML encourages our members to review this legislation, consider the impact it would have on your locality, and to ask your members of the General Assembly to provide assistance to localities if this legislation is to take effect.

Status

HB2074 is currently in the House Appropriations Sub-Committee: Commerce Agriculture & Natural Resources.

Transportation

There are a variety of bills focused on transportation making their way through the 2021 General Assembly. Those listed below have been identified by VML staff as of particular interest for local governments. VML supports the expanded authority for localities proposed by HB1903 (Carr) to allow localities to lower the speed limit below 25 mph in residential and business districts and the expanded authority proposed by HB2318 (Roem) to allow localities to limit the impacts of car dealership test drives.

Local authority to reduce speed limit

HB1903 (Carr) authorizes local governing bodies to reduce the speed limit to less than 25 miles per hour, but not less than 15 miles per hour, in a business district or residence district.

Position

VML supports this local tool and asks that you please let your Senators know!

Status

This bill passed the House 93-6 and is awaiting action by the Senate Committee on Transportation.

Notification regarding test driving motor vehicles in increased fine districts

HB2318 (Roem) expands local authority by authorizing localities to adopt an ordinance to require motor vehicle dealers in the locality to notify a buyer or potential buyer that test driving a motor vehicle in a residential district is prohibited unless the buyer or potential driver is driving to or from his residence. Furthermore, the bill:

- Requires the locality to notify licensed motor vehicle dealers located within the locality of the enactment of such ordinance and send a copy of such notification to the Motor Vehicle Dealer Board.
- Authorizes the locality to notify the Board if a buyer or potential buyer is convicted of a traffic infraction while conducting a test drive in a prohibited location.
- Provides that the Board may determine if the proper notice was given and impose a civil penalty if such notice was not given.

Position

VML supports this bill; please let your House members know to support!

Status

This bill reported from subcommittee on a vote of 9-1 and is awaiting further action by the House Transportation Committee today (Jan. 28).

Health & Human Services

Children Services Act

SB1313 (Mason) – a substitute to this bill would allow some use of Children Services Act (CSA) funds to help pay for services necessary to transition a child from a private special education placement to a public-school setting. The CSA funds would be limited to 12 months (the services could continue after that but without use of CSA funds). A public school would be allowed to contract for these services in a school; it appears that CSA funds could only be used for the 12-month period – if a private provider is used after that time the same restriction would apply.

The bill incorporates components of SB1099 (Stuart) and SB1114 (Peake) that address the use of CSA funds in certain public school settings.

Another bill addressing the use of CSA funds, SB1133 (Sutterlein) was also approved and was referred to Senate Finance and Appropriations for further consideration. This bill also calls for creation of a workgroup to address the transition of private day special education responsibility from CSA to the Virginia Department of Education with a report and legislative proposals due by the end of 2021.

Status: These bills are with Senate Finance and Appropriations to consider the financial implications of the legislation.

Position / Concerns: VML supports components of the legislation but remains concerned with language that would allow CSA funds to be used for staff training and professional development (which would increase costs for state and local governments) and with the exclusion of CSA coordinators and other stakeholders from the list of workgroup members.

Marcus Alert system

SB1302 (McPike) would incorporate language regarding establishment of a suicide prevention and mental health crisis hotline (9-8-8 system) on the federal level into the Code of Virginia.

Context. This would be a major part of the implementation of the Marcus alert system legislation that was passed during the 2020 Special Session. The Department of Behavioral Health and Developmental Services (DBHDS) would be responsible for the statewide crisis call center that would provide intervention and crisis care coordination to individuals accessing the 9-8-8 hotline from any place in the Commonwealth; those services would come through community teams and other local or regional services.

Details. The bill would establish a fund for this crisis hotline and would increase the E-911 fee from $.75 to $.94 cents and the prepaid wireless card/service fee from $.50 to $.63 per transaction, with part of the funding going toward administration of the crisis hotline and part for the current grant program for PSAPs.

It would amend Code language regarding grants to give highest priority to grants that support regional or multijurisdictional deployment/sustaining of NG 9-1-1 and second priority to grants that support deployment and sustaining of NG 9-1-1 in a single jurisdiction and in-building repeaters that improve public safety radio coverage within buildings with impaired radio coverage.

Status: This bill was reported from Finance and Appropriations on a 14-2 vote.

Education

HB1915 (Mugler) would require that all public-school teachers be compensated at or above the national average salary. Under current law, compensation at such rate is aspirational.

**Data source: National Education Association, June 2020.*

Context. While teacher salaries in and around District 8 have been more competitive – and brought the state to 33rd nationally for teacher compensation* -- the vast majority of public-school teachers across the state receive well below the national average teacher salary.

Details. The bill requires state funding to be provided pursuant to the general appropriation act in a sum sufficient to fund a 4.5 percent annual increase for public school teacher salaries, effective from the 2022-23 school year through the 2026-27 school year. The bill has a delayed effective date of July 1, 2022.

Status. The bill is currently in the House Committee on Appropriations

Procurements

Public works contracts; subcontractor workforce requirements

We urge our members to contact Senators to **oppose** **SB1305** **(McPike)** which would require public bodies to include in every public works contract of more than $500,000 the following:

- Contractor must use subcontractors that certify in writing to the contractor that they will not outsource more than 10 percent of the cost of the work (excluding provision of materials).
    - There is an exception if the subcontractor submits to contractor in writing a request to exceed the outsource limit.
- The contractor must then approve or deny if there is work of a specialized nature that cannot be performed by the subcontractor.
- This decision must be communicated to the public body and reviewed for compliance with this code section.
- The public body may exercise the appropriate contract terms and conditions to enforce the outsource requirements.

Concerns / Talking Points

- Local procurement officials will have to spend time reviewing requests any time a contractor decides not to use his own personnel and then spend additional time enforcing the contract.
- Public projects will take longer to complete and cost more money (i.e., By restricting a subcontractor's ability to subcontract more than 10 percent of the work, general contractors will have to spend more time and resources managing and coordinating directly with a variety of subcontractors).
- Hampers the ability of localities to use Small, Woman-owned, and Minority Owned businesses because many of them are subcontractors with specific skills.
- Leaves unaddressed the question as to how a public body will "review the contractor's decision" to request a waiver; is there a standard for the review?
- Raises the cost of local construction projects.
- Unduly burdens localities by making them the "subcontractor police" – adds onerous requirements and restrictions without addressing the few bad actors.
- Construction contracts will have to be amended to include language that addresses subcontractors and the ability to enforce.

Status

On January 27, the bill was reported out of the Senate Finance and Appropriations Committee on a 9-6 vote.

Action

Please contact all your SENATORS to OPPOSE before MONDAY!

Budget and Taxation

State constitutional amendment targets local property taxes

According to data collected by Virginia's Commissioners of the Revenue, statewide property tax exemptions hovered near $48.1 million in 2018 for the surviving spouses whose husbands or wives were killed in action as well as for totally disabled veterans suffering from wounds experienced in theaters of war.

A proposal before the 2021 Session would expand the eligibility for these exemptions beyond spouses of those killed in action or severely wounded in a theater of war. HJ614 would amend the Virginia Constitution to expand the real property tax exemption to include survivors whose spouses died while serving in the armed forces or who died as veterans of the armed forces from a service-connected injury or illness.

Current Status: The bill has not been assigned to a House committee. There is no Senate companion measure.

Position: VML opposes passage of the proposal. If enacted, it would reduce property tax collections, and likely serve to open the doorway for more preferential tax proposals.

Budget amendments offered by Delegates and Senators – Good, Bad and Ugly

The House Appropriations Committee and the Senate Finance and Appropriations Committee will report out their respective budget amendments on Sunday, February 7. Both committees are reviewing the state revenue situation and pondering recent (and future) congressional actions to stimulate the economy and confront the pandemic.

Now is the time for members to contact their delegations! Let them know which initiatives you support and which initiatives you would rather see put back in the desk drawer.

Below is a sample of the amendments offered last week by General Assembly members.

Budget Item	Description
C-70 #1h C-70 #2h C-70 #1s C-70 #2s	These House and Senate amendments boost spending for the Stormwater Local Assistance Fund and the Water Quality Improvement Fund by $50.9 million and $39.8 million, respectively. **Good to know:** The state would issue bonds to pay for the appropriation.
Item 273#1h Item 273 #1s	Holds harmless localities not served by Hampton Roads Transit with $20.0 million from recordation taxes. **Good to know:** Actions taken in the 2020 Session redirected these funds away from several localities who previously received them.
Item 451 #1s	Increase urban road maintenance funding by $4.1 million each year from transportation taxes and federal funds. **Good to know:** There is no House companion amendment.
Item 442 #4h	$500,000 from non-general funds to study transit equity and modernization. **Good to know:** There is no Senate companion amendment.
Item 408 #1h	Increases funding for the "599" program for local police departments by $1.7 million in FY21 and $7.9 million in FY22 from the state general fund. **Good to know:** No Senate amendment was introduced.
Item 113 #3h	Increases funding for the Housing Trust Fund with state general fund dollars by $9.3 million in FY21 and $15.0 million in FY22. **Good to know:** There is no Senate companion amendment.

Budget Item	Description
Item 114 #7h Item 114 #4s	Policy language requiring the Commission on Local Government to study the impact of state-imposed property tax exemptions on local finances and local services.
Item 115 #1s Item 115 #1h	Increases state general fund support for the Enterprise Zone Program by $250,000 each year.
Item 351 #1s Item 353 #1s	Increases state general fund support for local Departments of Social Services by $2.2 million each year and provides $3.0 million in additional funding for the auxiliary grant program. **Good to know:** There are no House companion amendments.
Item 322 #1h Item 321 #2s	Restores state funding for Community Service Boards by $9.3 million. Senate amendment restores funding by transferring funds of $8.8 million from the central office of the Behavioral Health state agency.
Item 145 #18h Item 145 #9s	The House amendment provides $418.4 million and the Senate amendment provides $414.5 million, respectively, to remove the cap on support positions for local school divisions. **Good to know:** The cap was imposed during the Great Recession and has been in place for some ten years.
Item 145 #29h	Provides $12.6 million to convert the Northam proposed bonus for SOQ-recognized instructional and support position to a permanent salary increase in FY22. **Good to know:** There is no companion Senate amendment.
Item 145 #12s	Establishes an Equity Fund for At-Risk Students with $61.9 million in state general fund support. **Good to know:** There is no House companion budget amendment.

Additional Resources:

- **Legislative Information System:** House and Senate amendments.
- **VML:** Presentations and recordings from VML's 2021 State Budget Overview Session

Appendix A.

Important public policy considerations regarding Qualified Immunity and Sovereign Immunity in light of HB 2045

Note – The below information was borrowed from Local Law Enforcement.

I. SOVEREIGN IMMUNITY IS ENTRENCHED IN THE PUBLIC POLICY OF VIRGINIA AND A COST ANALYSIS BY THE DIVISION OF RISK MANAGEMENT WILL ESTABLISH THAT ANY UNWARRANTED CHANGES WILL COST VIRGINIANS MILLIONS DEFENDING FRIVOLOUS LITIGATION.

The Supreme Court of Virginia has consistently stated that sovereign immunity is a rule of social policy that protects the state from burdensome interference with the performance of its governmental functions and preserves its control over state funds, property, and instrumentalities. *Pike v. Hagaman*, 292 Va. 209 (2016), *Hinchey v. Ogden*, 262 Va. 234 (1983).

a. Because government can only function through its servants, certain of those servants must enjoy the same immunity in the performance of their discretionary duties as the government enjoys. The burden to establish sovereign immunity is on the state employee.

b. The application of sovereign immunity is very fact-specific and involves an analysis of several factors to determine if any particular act is entitled to sovereign immunity. The operation of an automobile by a Deputy Sheriff who had finished serving civil process and collided with Plaintiff's motor vehicle did not receive sovereign immunity protection and the citizen was able to recover. *Heider v. Clemons*, 241 Va. 143 (1991).

c. However, where a Deputy Sheriff was engaged in commencing a vehicular pursuit necessitating the exercise of discretion on the best way to respond, sovereign immunity was applied to protect the actions of the Deputy Sheriff and his employer. *Colby v. Boyden*, 241 Va. 124 (1991)

d. Sovereign immunity protects a multitude of state actors who engage in the exercise of judgment or discretion when executing their governmental purpose, and is not available when such employee is only acting in a ministerial capacity. *Messina v. Burden*, 228 Va. 301 (1984). These include state employed physicians and scores of other state actors exercising discretion.

e. The Virginia Supreme Court has repeatedly stated that sovereign immunity is alive and well and in an appropriate case would protect the discretionary actions of Deputy Sheriffs, discourage frivolous litigation, preserve the public treasury, and still provide an avenue for recovery where appropriate. An example of this analysis is set forth as follows:

The holding and principle announced fifty years ago in *Wynn* remain viable today. While every person driving a car must make myriad decisions, in ordinary driving situations the duty of due care is a ministerial obligation. The defense of sovereign immunity applies only to acts of judgment and discretion which are necessary to the performance of the governmental function itself. In some instances, the operation of an automobile may fall into this category, such as the discretionary judgment involved in vehicular pursuit by a law enforcement officer. *See, e.g., Colby v. Boyden*, 241 Va. 125, 400 S.E.2d 184 (1991)

II. QUALIFIED IMMUNITY AND SOVEREIGN IMMUNITY ARE TWO DIFFERENT CONCEPTS. SOVEREIGN IMMUNITY IS APPLIED TO ACTIONS ARISING UNDER STATE LAW, AND QUALIFIED IMMUNITY IS APPLIED TO CASES ARISING UNDER FEDERAL LAW. THE TWO SHOULD NOT BE CONFUSED.

a. In January of 2020, a ruling of the Supreme Court of Virginia establishes a framework that does NOT require any legislative abrogation of well-settled immunities in the chief areas of concern - excessive force, vehicle stops and warrantless searches. The plaintiff recovered and the immunities are intact. THERE IS NO NEED TO CHANGE WELL-SETTLED LAW.

i. In *Cromartie v. Billings*, 837 S.E.2d 247 (2020), the Virginia Supreme Court examined a case filed in state court that considered both qualified and sovereign immunity where a police officer was alleged to have engaged in an unlawful vehicle stop, search and excessive force in interacting with the driver;

ii. *Cromartie* involved claims sounding in 42 U.S.C. § 1983 as well as state law claims arising from Code of Virginia §19.2-59 for unlawful search and seizure. These would be pled under the new proposed statute, § 8.01-42.6. Virginia already has in place a statute that makes a state actor personally liable

for a warrantless seizure not supported by the facts or law. See § 19.2-59. The Supreme Court reiterated that it is sovereign immunity that must be used to analyze the state law claims, and qualified immunity is utilized to analyze the federal claims. THE PROPOSED NEW STATUTE WOULD ELIMINATE BOTH UNNECESSARILY.

iii. The police officer's clear use of excessive force was viewed under the sovereign immunity analysis as actions consistent with gross negligence in violation of his training as well as a conscious disregard of another's rights providing a remedy for the plaintiff;

iv. Under the qualified immunity analysis, the court found that the Fourth Amendment right to be free from a search without probable or reasonable cause was clearly established also allowing the plaintiff to recover. ANY excessive force case would NOT BE LIKELY TO BE PROTECTED BY SUCH IMMUNITIES ON SIMILAR FACTS.

III. QUALIFIED IMMUNITY IS A FEDERAL DOCTRINE THAT IS COEXTENSIVE WITH FEDERAL CAUSES OF ACTION. IT NOT SUBJECT TO STATUTORY MODIFICATION BY THE GENERAL ASSEMBLY OF VIRGINIA AND IS APPLIED STRICTLY TO CASES ARISING UNDER FEDERAL LAW. SOVEREIGN IMMUNITY IS AN IMPORTANT COMPONENT OF THE PUBLIC POLICY OF VIRGINIA AND PROVIDES DECADES WORTH OF JURISPRUDENCE, WHICH BALANCES THE RIGHTS OF THE PUBLIC WITH PRESERVATION OF THE PUBLIC TREASURY AND THE FUNCTIONS OF GOVERNMENT WITHOUT FRIVOLOUS INTRUSION

(i) The proposed § 8.01-42.6 creates a civil action incorporating the "laws and constitution of the United States" and is a thinly veiled state version of 42 U.S.C. 1983. Long ago the United States Supreme Court held that such actions are defined by federal law and the elements of and defenses to such actions are SOLELY defined in federal law. Qualified immunity is part and parcel of any claim under federal law and must be part of the court's analysis. In short the General Assembly cannot cherry pick what parts of federal law it wishes to recognize, Howlett v. Rose 496 U.S. 356 (1990). In short the provision violates the Supremacy Clause of the Constitution.

- Qualified immunity has been used to protect Sheriffs and their employees from a variety of claims filed in both state and federal courts sounding in the Fourth, Fifth and Eighth Amendments, and such doctrine is alive and well as the United States Supreme Court in its recent session has declined to grant certiorari to review cases effected by the application of the doctrine, leaving it in place for courts to determine if the right was "clearly established" at the time of its alleged violation. Cases where Sheriffs have attempted in good faith to protect inmates from self-harm, provide medical and mental health care as well as protecting the safety of the facility have all resulted in an appropriate analysis of the right involved. EFFORTS TO ABATE COVID 19 IN GOOD FAITH SHOULD BE SUBJECT TO THIS PROTECTION. The provision would guarantee a state court jury despite good faith efforts to abate the virus. This should not stand.

- Virginia federal courts have used qualified immunity to protect Sheriffs and Deputy Sheriffs from liability when acting in good faith, in areas other than excessive force. For instance, when holding ICE detainees for a reasonable period of time based on the issuance of federal detainers establishing probable cause. In *Rios v. Jenkins*, 390 F3d 714 (2019) a senior United States District Judge held that the Sheriff of Culpeper County would be entitled to qualified immunity based upon his good faith reliance upon an ICE detainer containing a recitation of probable cause and holding such detainee for a reasonable time after the disposition of state charges.

- In any case where a United States District Court or a state court considering a federal cause of action holds that a constitutional right was not "clearly established" at the time of the alleged tort, any state employee to include Deputy Sheriffs would enjoy such immunity.

- The *Cromartie* case is an excellent example of the application of both qualified and sovereign immunities, and establishes that in excessive force cases, which seems to be the driving focus of any legislative initiative to amend existing law, it is very clear that liability COULD be imposed on state actors, and the current state of the law is in sufficient stasis to protect both the public, the Treasury, as well as Virginia Police Departments, Sheriffs' Offices, and their respective employees.

IV. CONCLUSION

Changes to the doctrine of qualified immunity are beyond the ability of the General Assembly to amend or reform and will continue to be applied by both state and federal courts considering federal causes of action. The doctrine of sovereign immunity which could properly be the subject of consideration for amendment or reform, has been shown to allow recovery by the public under circumstances where the actions of a state actor are ministerial or undertaken with gross negligence or conscious disregard for established rights. In an excessive force scenario, liability could be imposed while protecting the doctrine for application in cases involving myriad state actors including doctors employed by the state, medical officials employed by the state, myriad state actors at the state and local level, and other actions of government that require judgment and discretion. There is no need to change decades of well-settled jurisprudence.

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BETTER COMMUNITIES THROUGH SOUND GOVERNMENT