IMPORTANT PUBLIC POLICY CONSIDERATIONS REGARDING QUALIFIED IMMUNITY AND SOVEREIGN IMMUNITY IN LIGHT OF H.B. 2045

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.

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.

III. 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.