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Members of the House Committee on the Judiciary

Re: H. 145 Standards for Use of Force by Law Enforcement Officers

Dear Representatives:

I write to follow up on my initial comments of last week regarding H.145. As you will recall, I raised the issue of enforceability in the present draft, or more accurately the absence of same. In contrast to the federal law, 42 U.S.C Sec. 1983 (known as the Ku Klux Klan Act passed in 1871, for a quick and dirty synopsis, see https://en.wikipedia.org/wiki/Third_Enforcement_Act , Vermont has no statutory cause of action for violations of our constitutional provision Ch. I Art. 11 prohibiting unreasonable, and therefore unlawful, searches and seizures. Any police action that interferes with a person's freedom of movement is a seizure under constitutional analysis. The question then becomes whether that seizure, absent a warrant issued by a judicial officer, is reasonable under the totality of the circumstances test presently embedded in H. 145.

Our state Supreme Court recently joined a growing trend among states' highest courts (reported to be fourteen at last count)[1] in recognizing an *implied private right* of action under limited circumstances in which an officer unlawfully seizes a person or

[1] See, *Wagner v. State,* 952 N.W.2d 843, 868 (Iowa 2020) At least fourteen states have recognized direct causes of action under their state constitutional provisions that are self-executing and require no legislative action for their enforcement. *See, e.g.*, *Gay L. Students Ass'n v. Pac. Tel. & Tel. Co.*, 24 Cal.3d 458, 156 Cal.Rptr. 14, 595 P.2d 592, 602 (1979); *Laguna Publ'g Co. v. Golden Rain Found. of Laguna Hills*, 131 Cal. App.3d 816, 182 Cal. Rptr. 813, 851–54 (1982); *Binette v. Sabo*, 244 Conn. 23, 710 A.2d 688, 693 (1998); *Newell v. City of Elgin*, 34 Ill.App.3d 719, 340 N.E.2d 344, 349 (1976); *Moresi v. State*, 567 So. 2d 1081, 1092-93 (La. 1990); *Manikhi v. Mass Transit Admin.*, 360 Md. 333, 758 A.2d 95, 110–11 (2000); *Widgeon v. E. Shore Hosp. Ctr.*, 300 Md. 520, 479 A.2d 921, 925–28 (1984); *Phillips v. Youth Dev. Program, Inc.*, 390 Mass. 652, 459 N.E.2d 453, 457–58 (1983); *Johnson v. Wayne Cnty.*, 213 Mich.App. 143, 540 N.W.2d 66, 69–70 (1995); *Mayes v. Till*, 266 So. 2d 578, 580–81 (Miss. 1972); *Dorwart v. Caraway*, 312 Mont. 1, 58 P.3d 128, 135–37 (2002); *Jackson v. Consol. Rail Corp.*, 223 N.J.Super. 467, 538 A.2d 1310, 1319–20 (N.J. Super. Ct. App. Div. 1988); *Strauss v. State*, 131 N.J.Super. 571, 330 A.2d 646, 648–50 (N.J. Super. Ct. Law Div. 1974); *Brown v. State*, 89 N.Y.2d 172, 652 N.Y.S.2d 223, 674 N.E.2d 1129, 1143–44 (1996); *Corum v. Univ. of N.C.*, 330 N.C. 761, 413 S.E.2d 276, 290 (1992); *Jones v. Mem'l Hosp. Sys.*, 746 S.W.2d 891, 893–94 (Tex. App. 1988); *Zullo v. State*, 209 Vt. 298, 205 A.3d 466, 482 (2019); *Old Tuckaway Assocs. Ltd. P'ship v. City of Greenfield*, 180 Wis.2d 254, 509 N.W.2d 323, 328 n.4 (Wis. Ct. App. 1993).

presumably unreasonably conducts a warrantless search of a person or her property without sufficient legal justification.

Although finding an implied private right of action is a positive step forward, it's impact is far more limited than a clear expression of the legislative body that such a private right of action exists and spells out the scope of remedy available including actual and compensatory damages, attorney fees and costs and potentially punitive damages.

The Vermont case to which I refer is *Zullo v. State,* 2019 VT 1, 205 A.3d 466, 488 (2019), a unanimous decision of the full court which for the first time recognized that a private right of action inures from a unlawful acts by police officers even in the absence of an enabling statute like the federal 1983 law. However, and most pertinent to your consideration, is that this implied cause of action arises SOLELY in circumstances in which the subject of the unconstitutional act HAS NO OTHER REMEDY AT LAW. See *Zullo* at ¶ 47.

> In sum, none of the alternative remedies proffered by the State can substitute as a viable remedy for someone subjected to an allegedly unconstitutional search or seizure, ***most particularly in a case like this where plaintiff was not charged with a crime***. In addition to providing a compensatory remedy for particular individuals whose constitutional rights have been violated by state officials, the adjudication of constitutional torts has played a critical role in establishing specific constitutional limits on governmental power in a way that could not be provided by injunctive relief or common law actions. [Citation omitted]. For the reasons discussed above, we conclude that a private right of action seeking money damages for violations of Article 11 is available directly under that constitutional provision ***absent any adequate alternative legislatively enacted remedy.***

(Emphases added.) It would certainly appear that our Supreme Court is inviting your action in this regard.

It is critical to briefly review the facts involved in this matter, see ¶¶ 5-8 of the decision. Mr. Zullo, a young African-American man, was stopped by (now former) VSP Tpr. Hatch on March 6, 2014 at 3 PM coming from work in Wallingford after Zullo had driven by the VSP cruiser then in a gas station on Rt. 7. Although the officer initially thought that Zullo might have been impaired and he swore to a faint odor of burnt marijuana in his warrant application,

> … the trooper told plaintiff for the first time that he had stopped him because there was snow partially obscuring the registration sticker affixed to his car's license plate. Plaintiff consented to Trooper Hatch's request that he submit to a search of his person, which did not reveal any evidence of contraband or a crime. Trooper Hatch then read plaintiff a consent card, advising him that if he did not

> agree to have his car searched, the car would be towed to the state police barracks while the trooper applied for a search warrant. Plaintiff refused to consent to a search of his car. Approximately twenty minutes after the initial stop, Trooper Hatch radioed for a tow truck.

The trooper's warrant application was approved but a search of Mr. Zullo's now impounded vehicle yielded no criminal contraband. Mr. Zullo ended up walking and hitchhiking eight miles home and then was responsible for paying the $150 impound fee.

As a result no referral was made to a prosecutor for any alleged crime committed by Mr. Zullo. This component of the tale is of critical import given that the Court found that since Mr. Zullo could not avail himself of the remedy of suppression of unconstitutionally obtained evidence in a criminal prosecution. It was this fact, and apparently this fact alone, on which the Court reached the implied private right of action for the constitutional violations committed by Tpr. Hatch. In many, many ways, absent a statutory private right of action, many persons aggrieved by unlawful police conduct would be precluded from seeking the remedy that is guaranteed by the Vermont Constitution, Ch. I, Art. 4:

> [Remedy at law secured to all] Every person within this state ought to find a certain remedy, by having recourse to the laws, for all injuries or wrongs which one may receive in person, property or character; every person ought to obtain right and justice, freely, and without being obliged to purchase it; completely and without any denial; promptly and without delay; comformably to the laws.

The *Zullo* Court addressed this concern at ¶ 30 of its decision while also distancing itself from the concept of sovereign (and presumably, qualified) immunities now so embraced by the United States Supreme Court while apparently again inviting your action on this matter.

> Absent legislation providing a meaningful remedy for constitutional tort violations, in determining the scope and limits of sovereign immunity, we conclude that the judge-made doctrine does not supersede the right of the people to seek redress from the State for violations of fundamental constitutional rights. Invoking absolute sovereign immunity to prevent a remedy for significant breaches of constitutional rights would undermine the fundamental protections provided by our state constitution, which exists "to dictate certain boundaries to the government." J. Friesen, *supra*, § 8.08[1], at 51 (citing "strong policy argument" that invoking sovereign immunity for breaches of bill of rights aimed at curtailing government power "would make a mockery of constitutional democracy"). The theory that one cannot assert a wrong against the government that created the law upon which the asserted rights depend has no force with respect to constitutional rights, which "are created by the citizenry to govern the government." *Id*. at 52.

I would be remiss if I did not bring to your attention the following provisions of Chapter I of our state Constitution which bear heavily on the issues which you are presently considering in H. 145.

> Article 5. [Internal police]
> That the people of this state by their legal representatives, have the sole, inherent, and exclusive right of governing and regulating the internal police of the same.
>
> Article 6. [Officers servants of the people]
> That all power being originally inherent in and co[n]sequently derived from the people, therefore, all officers of government, whether legislative or executive, are their trustees and servants; and at all times, in a legal way, accountable to them.

Absent inserting a statutory private right of action either into H. 145 or in a separate committee bill, as I said last week, all of the good work that you are doing may well be for naught. Such an omission may well be also in contravention of your duties pursuant to Articles 5 and 6 above which clearly set forth the principles that all officers, including police officers, are both subservient and fully accountable to the people of the state. Again, absent full accountability under the law, unconstitutional acts by our “internal police” will not be deterred and may well be rewarded with regard to the fruits of these acts being admissible in criminal prosecutions absent a successful motion to suppress such evidence.

Thank you for considering these comments and I look forward to attending your committee meeting tomorrow.

Respectfully submitted,

l/s

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Attorney at Law