IN THE SUPREME COURT OF THE STATE OF VERMONT
Docket No. 2017-284

Gregory Zullo,
Appellant

v.

State of Vermont,
Appellee

Appeal from Vermont Superior Court, Civil Division, Rutland Unit
Docket No. 555-9-14 Rdcv

Reply Brief of the Appellant

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I. Article 11 Provides a Private Right of Action for Which Mr. Zullo May Seek Damages.

In *Bivens v. Six Unknown Named Agents*, 403 U.S. 388, 395-97 (1971), the U.S. Supreme Court "held that federal courts have the inherent authority to recognize a private damage remedy for violations of the federal constitution." *In re Town Highway No. 20*, 2012 VT 17, ¶ 27. Relying on *Bivens*, "the great majority of state courts," including Vermont's, have "recognized a corresponding authority to infer a private cause of action under various state constitutional provisions." *Id.* In determining whether a constitutional provision provides a private right of action, courts ask whether the provision is self-executing, applying a test articulated by the U.S. Supreme Court:

> A constitutional provision may be said to be self-executing if it supplies a sufficient rule by means of which the right given may be enjoyed and protected, or the duty imposed may be enforced; and it is not self-executing when it merely indicates principles, without laying down rules by means of which those principles may be given the force of law.

Davis v. Burke, 179 U.S. 399, 403 (1900) (citation and internal quotation marks omitted). This Court has "expanded on this definition," *Town Highway*, 2012 VT 17, ¶ 29, describing four additional considerations: (1) "a self-executing provision should do more than express only general principles; it may describe the right in detail, including the means for its enjoyment and protection"; (2) "[o]rdinarily a self-executing provision does not contain a directive to the legislature for further action"; (3) "legislative history may be particularly informative as to the provision's intended operation"; and (4) "a decision for or against self-execution must harmonize with the scheme of rights established in the constitution as a whole," *Shields v. Gerhart*, 163 Vt. 219, 224 (1995).

Essentially, the question is whether the rights are sufficiently specified for courts to enforce them.[1]

Applying these factors, this Court has held that the Common Benefits, Free Speech, and Due Process Clauses of the Vermont Constitution are self-executing, *see Town Highway*, 2012 VT 17, ¶¶ 30-34; *Shields*, 163 Vt. at 226-27; *Nelson v. Town of St. Johnsbury Selectboard*, 2015 VT 5, ¶¶ 49-52, and that Articles 1 and 6 are not, *Shields*, 163 Vt. at 224-26; *Welch v. Seery*, 138 Vt. 126, 128 (1980).

The reasoning in these cases demonstrates that Article 11 is self-executing. Article 11 provides in relevant part that "the people have a right to hold themselves, their houses, papers, and possessions, free from search or seizure." Vt. Const. ch. 1, art. 11. Article 11 sets forth an "affirmative and unequivocal mandate" that imposes "a clear restriction on government behavior," *Town Highway*, 2012 VT 17, ¶ 30, and protects the "single, specific right of the people," *Shields*, 163 Vt. at 227, to hold themselves free from search or seizure. The large body of Article 11 and Fourth Amendment caselaw makes clear that it is sufficiently "certain and definite of character as to form rules for judicial decision," *Town Highway*, 2012 VT 17, ¶ 32; *see also Nelson*, 2015 VT 5, ¶ 51. The absence of a specific remedy for its violation does not "defeat that contention that [it] is self-executing" because "the law will provide a remedy for any right amenable to legal enforcement," *Town Highway*, 2012 VT 17, ¶ 33 (citation and internal quotation marks omitted). And, because the right is sufficiently specified, "the absence of a

[1] In its briefing below and on appeal, the State did not contest Mr. Zullo's argument or the superior court's conclusion that Article 11 is self-executing. Mr. Zullo does therefore not repeat that analysis in full here, but, to the extent more comprehensive argument is desired, respectfully refers the Court to the analyses below. Amicus Curiae ODG's Supplemental Printed Case (S.P.C.) 10-15, 266-271.

legislative directive supports a conclusion that the provision is self-executing." *Shields*, 163 Vt. at 227. Indeed, *Bivens*—the case from which all these decisions flow—was a search and seizure case. 403 U.S. at 389.

Once a provision is found self-executing, courts next examine whether it supports a damages remedy. Damages remedies are appropriate where the legislature has fashioned no alternative remedies that can meaningfully redress the plaintiff's specific injury. *Shields*, 163 Vt. at 234-35. The State is correct that this analysis requires a fact-specific, case-by-case assessment of the availability of alternatives to remedy the plaintiff's specific injuries. *See* Br. of Appellee 18 (citing *Town Highway*, 2012 VT 17, ¶ 36). But this case-by-case assessment is absent from the State's discussion of proposed alternatives, each of which is utterly divorced from Mr. Zullo's actual claims and injuries. The superior court correctly ruled that none of these alternatives is adequate. *See* S.P.C. 15-18.

The State first suggests that Mr. Zullo could have brought federal constitutional claims under 42 U.S.C. § 1983. But this Court has already rejected § 1983 as an adequate alternative to state constitutional claims: "[T]he federal statutory remedy under 42 U.S.C. § 1983 generally creates no impediment to judicial recognition of a damages remedy under the state constitution, as the civil rights statute is limited to violations of federal law, and the state constitution may protect broader interests than those under the federal constitution." *Town Highway*, 2012 VT 17, ¶ 54 n.6 (citation and internal quotation marks omitted). This remedy is particularly inadequate in this case, where Mr. Zullo asserts rights that are not equally protected under the Fourth Amendment. For example, he seeks to vindicate his right not to be ordered from his vehicle absent reasonable suspicion of a crime separate from the purported traffic violation—a right

that finds no parallel in Fourth Amendment jurisprudence. *Compare Pennsylvania v. Mimms*, 434 U.S. 106 (1977) (holding that, under the Fourth Amendment, exit order does not effect further seizure requiring additional suspicion beyond that which justified the stop), *with State v. Sprague*, 2003 VT 20, ¶¶ 16-20 (rejecting *Mimms* under Article 11. The State's § 1983 suggestion ignores the "the inherent and independent value in the rights and protections enshrined in our own constitution," *Town Highway*, 2012 VT 17, ¶ 27—the value that led this Court to adopt a *Bivens*-type analysis for state constitutional rights rather than outsourcing their protection to the federal constitution.

Next, the State posits that Mr. Zullo could have sought injunctive relief. But the inability of injunctive relief to provide any remedy for completed search and seizure violations was what motivated the *Bivens* decision to begin with: "[S]ome form of damages is the only possible remedy for someone in Bivens' alleged position. It will be a rare case indeed in which an individual in Bivens' position will be able to obviate the harm by securing injunctive relief from any court." 403 U.S. at 410-11 (Harlan, J., concurring in judgment); *see also Brown v. State*, 674 N.E.2d 1129, 1141 (N.Y. 1996). Injunctive relief is appropriate when the plaintiff complains of ongoing or anticipated harm caused by the practice sought to be enjoined, an injunction would substantially remedy or prevent those harms, and no significant damages were incurred before the action was enjoined. Here, though, assurance that officers would not do again what Trooper Hatch already did to Mr. Zullo would do nothing to redress the completed violations of his constitutional rights.

The State next suggests an action for reclamation of property under V.R.Cr.P. 41 or seek return of forfeited property under 18 V.S.A. § 4241 et seq. As Mr. Zullo brought

no claim for seizure of property, these procedures are not relevant to and do not remedy his claims.

The State, citing 20 V.S.A. § 1923, submits that Mr. Zullo's constitutional injuries could be remedied by filing a complaint and triggering an internal affairs investigation against Trooper Hatch. Due to § 1923 (d)'s confidentiality provision, however, this process would provide him nothing besides the speculative prospect of discipline he may never learn about. Disciplinary action may remedy harm to the State when its officials act improperly, but it does nothing for those subjected to that misconduct. Also, if a complaint procedure and possibility of discipline were deemed an adequate alternative to damages claims, it's hard to imagine that a damages claim for any constitutional claim would ever lie against the vast majority of public officials.

Finally, the State notes that, if Mr. Zullo had been charged with a crime, he could have filed a suppression motion. Regardless of whether suppression in a criminal case forecloses a subsequent civil damages claim (a doubtful proposition), that remedy is irrelevant in this case, where Mr. Zullo was not and could not have been charged with a crime.

Notwithstanding the inadequacy of any alternative remedy, the State suggests that special factors counsel against affording Mr. Zullo a damages remedy. First, it suggests that, as in *Town Highway*, the Court should impose "stringent additional requirements" on any damages claim. However, *Town Highway* imposed that heightened requirement specifically because the constitutional right in question, equal treatment of the law, "may be raised in so many circumstances," and these requirements were "necessary to bar routine suits aimed merely at forcing a political body to change its decision, not through representative politics, but through judicial action." 2012 VT

17, ¶¶ 36-38. These requirements were derived from federal courts' treatment of "class-of-one" equal protection claims, which, absent sufficient limitations, could constitutionalize any adverse zoning, permitting, licensing, or other decision. *Id.* ¶ 39; *see also* Pl.'s Supp. Mem. 7 n.3 (Mar. 14, 2017); S.P.C. 15 n.9. The superior court correctly held that no heightened standard is necessary or warranted for search and seizure violations.

The State next faults the purported inconsistency of allowing suits against the State with "more lenient standards than would apply in a suit against individual state troopers." Br. of Appellee 20. Presumably, the State here refers to the official immunities available to individuals but not the State. But any inconsistency is the result of the legislative choice to substitute the State for its employees via § 5602.And, because the primary justification for official immunity is to spare government employees from facing personal financial liability, lest they become inhibited in the exercise of their duties, *see Murray v. White*, 155 Vt. 621, 626 (1991); *see also Anderson v. Creighton*, 483 U.S. 635, 638 (1987), it is unnecessary when the employee is shielded from suit.

Below and on appeal, the State has ignored the large body of case law deeming search and seizure violations the paradigmatic case requiring a damages remedy. In *Town Highway*, for example, the Court cited favorably several cases allowing damages claims for search and seizure violations. 2012 VT 17, ¶ 43 (citing Connecticut, Maryland, and New York cases); *id.* ¶ 50 ("In *Bivens,* as the dissent notes, the Supreme Court found that civil damages were appropriate to compensate for the intangible harm occasioned by the Fourth Amendment violation at issue."); *id.* ¶ 86 (Dooley, J., concurring and dissenting) ("[T]he deprivation of the constitutional right to be protected against unreasonable searches could not be undone or remedied through any

other means and therefore a monetary award was appropriate."). In *Shields*, the Court noted that "the *Bivens* rationale is most likely to be followed" in cases "[w]here damages must be recognized to give a plaintiff some remedy." 163 Vt. at 233. It cited as "[a]n example of this kind of case" a Louisiana decision recognizing a damages remedy "for breach of the search and seizure section of the Louisiana Constitution." *Id.* (citing *Moresi v. Dep't of Wildlife & Fisheries*, 567 So. 2d 1081, 1093 (La. 1990)). There, "[r]ecovery of damages [was] the only realistic remedy for a person deprived of his right to be free from unreasonable searches or seizures." *Id.* (citation and internal quotation marks omitted).

So too here: no alternative remedy can redress Mr. Zullo's injuries; as in *Bivens*, it "is damages or nothing." 403 U.S. at 410 (Harlan, J., concurring in the judgment). And our Constitution requires more than "nothing" in response to violations of its fundamental protections.

II. Sovereign Immunity Does Not Bar Mr. Zullo's Claims.

A. Self-Executing Constitutional Provisions Are Enforceable Against the State.

The Superior Court correctly held that, because Article 11 is self-executing and Mr. Zullo's claims support a damages remedy, Mr. Zullo can seek enforcement of those claims against the State. Mr. Zullo, the State, and the superior court all agree that constitutional damages claims should not proceed through the Vermont Tort Claims Act, 12 V.S.A. § 5601 (VTCA). But the State asks this Court to find that these claims therefore may not be brought against the State or its employees at all, precluding any

meaningful remedy for certain constitutional violations. This Court's precedent and our constitutional traditions demand otherwise.

The exclusivity provision of 12 V.S.A. § 5602(a) provides that, "[w]hen the act or omission of an employee of the State acting within the scope of employment is believed to have caused damage to property, injury to persons, or death, the exclusive right of action shall lie against the State of Vermont; and no such action may be maintained against the employee . . . ." Mr. Zullo was therefore required to bring his constitutional claims against the State rather than Trooper Hatch.[2]

Unlike the exclusivity provision, the VTCA does not apply to constitutional claims. The VTCA provides, in relevant part, that the State "shall be liable for injury to persons or property or loss of life caused by the negligent or wrongful act or omission of an employee of the State while acting within the scope of employment, under the same circumstances, in the same manner, and to the same extent as a private person would be liable to the claimant." § 5601(a). Thus, from the universe of claims that § 5602 requires be brought against the State, § 5601 carves out one type of claim—those common-law tort claims as to which the employee's status as a state actor is irrelevant—and waives its sovereign immunity to those claims, subject to limitations and exceptions. But no statutory waiver is needed for constitutional claims against the State, for the Constitution itself dictates what claims may be brought under it. *See supra* Part I.

This Court has held that municipal immunity is fundamentally inconsistent with these constitutional commands and has cited with approval a North Carolina case

[2] This Court has held that identical language in the municipal immunity statute encompasses constitutional claims. *See* 24 V.S.A. § 901a(b) (exclusive right of action against municipality for claims that employee's act or omission "caused damage to property, injury to persons, or death"); *Town Highway*, 2012 VT 17, ¶ 55 n.7 (noting that § 901a required plaintiff to bring constitutional claims against the town rather than individual officers).

holding the same regarding state sovereign immunity. *Town Highway*, 2012 VT 17, ¶ 58. In *Town Highway*, the Court first held that the plaintiff could bring a damages action under the Common Benefits Clause based on the selectboard's years of discrimination against him and in favor of another property owner. *Id.* ¶¶ 46-47. The Court next rejected the town's assertion of municipal immunity, "discern[ing] no logic or policy purpose in recognizing a constitutional tort derived from our fundamental charter of rights while simultaneously granting the Town immunity because it was performing a 'governmental' function." *Id.* ¶ 58. Nor is there logic or policy purpose in immunizing the State from such claims, as the Court recognized: "'It would indeed be a fanciful gesture to say on the one hand that citizens have constitutional individual civil rights that are protected from encroachment actions by the State, while on the other hand saying that individuals whose constitutional rights have been violated by the State cannot sue because of the doctrine of sovereign immunity.'" *Id.* (quoting *Corum v. Univ. of N.C.*, 413 S.E. 2d 276, 291 (N.C. 1992)).

The State's invocation of sovereign immunity is particularly lacking in logic or policy purpose in light of its policy choice to block plaintiffs from bringing these claims against its officials, requiring via § 5602 that such suits instead be brought against the State. The legislature cannot accomplish by statute what is forbidden by the Constitution. Both the Constitution and the common-law backdrop against which it was framed guarantee access to the courts to seek remedies for constitutional violations. *See* Vt. Const. ch. I, art. 4 ("Every person within this state ought to find a certain remedy, by having recourse to the laws, for all injuries or wrongs which he may receive in his person, property or character . . . ."); *Shields*, 163 Vt. at 223 ("The common law, which provides a remedy for every wrong, provides a remedy for violation of a constitutional

right."). As the Court stated in *Shields*, "[t]o deprive individuals of a means by which to vindicate their constitutional rights would negate the will of the people in ratifying the constitution, and neither this Court nor the Legislature has the power to do so." 163 Vt. at 223; *see also* Vt. Const. ch. II, § 6 ("[The Legislative bodies] may prepare bills and enact them into laws . . . ; and they shall have all other powers necessary for the Legislature of a free and sovereign State; but they shall have no power to add to, alter, abolish, or infringe any part of this Constitution."). The legislature has no power to do what the State claims it did in enacting §§ 5601 and 5602.

The *Bivens* remedy was created to provide a pathway to vindicate constitutional claims by authorizing suits against federal officers, and the federal government expressly excluded constitutional claims from the ambit of its exclusivity provision. *See* 28 U.S.C. § 2679(b)(2)(A). Thus, federal *Bivens* claims are brought against the employee, not the United States. But Vermont made a different policy choice; with the enactment of the exclusivity provision in 1989,[3] the State decided to substitute itself for its employees when sued on most claims, meaning that, where a *Bivens*-type claim exists, a suit against a state employee is redirected to the State. The State did not—and could not—thereby "deprive individuals of a means by which to vindicate their constitutional rights," *Shields*, 163 Vt. at 223. The State's choice is further evidence that sovereign immunity is no bar to constitutional claims.

B. Mr. Zullo's Claims Have Private Analogs and Are Not Barred by the VTCA's Discretionary-Function Exception.

[3] The VTCA was enacted in 1961, with the waiver of immunity appearing in 12 V.S.A. § 5601 and the exceptions to that waiver appearing in § 5602. The 1989 amendments moved the exceptions into § 5601 and, for the first time, introduced an exclusivity provision. 1989 Acts & Resolves No. 114.

Even if the VTCA did apply to constitutional claims, it would not bar Mr. Zullo's claims here. The VTCA waives sovereign immunity "under the same circumstances, in the same manner and to the same extent as a private person would be liable" to a plaintiff. § 5601(a). This Court has never required a VTCA claim to be identical to one against a private party, only "comparable," *Denis Bail Bonds, Inc. v. State*, 159 Vt. 481, 487 (1993), cautioning against construing a complaint "too narrowly" when determining whether a claim has private analogs, *Sabia v. State*, 164 Vt. 293, 301-06 (1995) (even though only the State could remove children from home, claim that State failed to protect child from sexual abuse after that abuse had been reported to it had many private analogs in claims for failure to protect when having a duty to do so); *see also Hebert v. State*, 165 Vt. 557, 558 (1996) (even though incarceration is "uniquely governmental," claim based on suicide of inmate in State custody had private analogs because many "private persons and institutions are charged with the care of persons in their custody").

Mr. Zullo argued below that his claims were comparable to false imprisonment and trespass to chattels. S.P.C. 274-75. The superior court disagreed, holding that, because Trooper Hatch acted as a law enforcement officer, he acted with authority that a private citizen would lack. S.P.C. 9. The court stated that, if Trooper Hatch's "actions complied with law, there would be no tort." *Id.* But Mr. Zullo brought this action precisely because Trooper Hatch's actions did not comply with the law; the fact that he was acting without lawful authority was what made his actions unconstitutional.

The gravamen of false imprisonment is a restraint on liberty absent lawful authority. *See Goodell v. Tower*, 58 A. 790, 791-92 (1904) (officer liable for false imprisonment when acting on warrant that justice lacked authority to issue, even if he

did not place plaintiff into custody, for "[e]very restraint upon a man's liberty is, in the eye of the law, an imprisonment); *cf. State v. Cunningham*, 2008 VT 43, ¶ 15 (for purposes of Article 11, a driver is seized during a traffic stop, even if it involves no force). And the gravamen of trespass to chattels is dispossession or interference with possession of one's property without consent or taking it "into the custody of law" without lawful authority. *See* Restatement (Second) of Torts §§ 217, 221, & 265; *P.F. Jurgs & Co. v. O'Brien*, 160 Vt. 294, 300 (1993) (defendant's mistaken belief that he was privileged to act is no defense to liability for trespass to chattels). Because Trooper Hatch did not act with consent or lawful authority, these torts are analogous to Mr. Zullo's claims.

The State briefly suggests that Mr. Zullo's claims would be barred by the discretionary-function exception of § 5601(e)(1), Br. of Appellee 12, ignoring that federal courts have almost universally held that this exception in the FTCA does not apply to unconstitutional or unlawful conduct.[4] *See, e.g.*, *Thames Shipyard & Repair Co. v. United States*, 350 F.3d 247, 254-55 (1st Cir. 2003) (collecting cases); *Loumiet v. United States*, 828 F.3d 935, 944 (D.C. Cir. 2016) (following "clear weight of circuit authority" in holding that, because "the government lacks discretion to make unconstitutional policy choices," the discretionary-function exception does not apply to unconstitutional conduct); *see also* Pl.'s Supp. Mem. 14-18 (Mar. 14, 2017).

Because Mr. Zullo's claims are analogous to the common-law torts of false imprisonment and trespass to chattels, and because the discretionary-function

[4] Vermont's discretionary-function exception is modeled on the FTCA's, and Vermont courts look to federal decisions interpreting that provision when analyzing § 5601(e)(1). *See Lane v. State*, 174 Vt. 219, 223 n.2 (2002).

exception does not apply to unconstitutional conduct, they are within the VTCA's waiver of sovereign immunity.

III. Trooper Hatch Violated Article 11 When He Stopped Mr. Zullo on Suspicion of Conduct that Violated No Law.

Mr. Zullo's opening brief and supporting amicus briefs detailed how the new rule articulated in *Heien v. North Carolina*, 135 S. Ct. 530 (2014), conflicts with Vermont jurisprudence, impairs our constitutional values, and invites other preventable injuries. The State and its amicus have offered both reasons they deem certain of these harms unimportant and means by which courts might mitigate other harms, but neither has advanced an affirmative argument that the *Heien* rule is right for Vermont or consistent with our constitutional traditions. In urging rejection of *Heien*, Mr. Zullo largely rests on his opening and supporting amicus briefs, but does wish to address certain assertions in the State's and its amicus's briefs.

First, the State's amicus characterizes the current state of Vermont law as penalizing officers notwithstanding their good-faith mistakes of law. But enforcement of constitutional rights "does no more disservice to law enforcement officers than the existence of the rights themselves." *State v. Lussier*, 171 Vt. 19, 33 (2000). The risk of mistake must remain on the government, not the citizens whose rights Article 11 zealously protects.

Second, the State is correct that the reasonable-suspicion inquiry asks whether the facts justify a reasonable belief—not a certainty—that crime was afoot. Br. of Appellee 23. This tolerance for uncertainty is built into the constitution's probable-cause standard: officers cannot take certain investigative steps on a mere hunch, but they need

not *know* that a person committed a crime before taking those steps to determine *if* she did. The cases the State cites to support extending under Article 11 this tolerance for uncertainty to an officer's understanding of law do nothing of the sort. *State v. Roberts*, 160 Vt. 385 (1993), involved a mistake of fact about whether a home was occupied or abandoned, and *State v. Hurley*, 2015 VT 46, applied *Heien* under the Fourth Amendment; as the Court noted, the defendant did not raise a separate challenge under Article 11, *id.* ¶ 21 n.7.

Finally, the State's amicus claims that *Heien* does not permit post hoc rationalizations of police conduct—but *Heien* encourages exactly that. Under *Heien*, courts ask whether the mistake of law was objectively reasonable; they "do not examine the subjective understanding of the particular officer involved." 135 S. Ct. at 539. Likewise, in urging the superior court to adopt *Heien*, the State emphasized an "officer's actual subjective motivation for making the stop" is irrelevant. S.P.C. 281 (quoting *State v. Manning*, 2015 VT 124, ¶ 12). So, applying *Heien*, a court asks not whether the officer subjectively believed the law prohibited the observed conduct, but rather whether *any* law on the books could be reasonably, but incorrectly, interpreted to encompass it. For example, in *Baldwin v. Estherville, Iowa*, 218 F. Supp. 3d 987, 999-1001 (N.D. Iowa 2016), the court ruled that an officer's mistake was unreasonable when he arrested a man for violating a law that was not incorporated into city code of ordinances (that is, a violation that didn't exist), but nevertheless no found constitutional violation because an amended charge cited a different ordinance that the officer would have been reasonable, but incorrect, in thinking applied. Thus, prosecutors are invited to scour the criminal and motor vehicle codes to discover a post hoc, incorrect-but-not-too-much justification that was unrelated to the reason for the stop. This sort of legal fiction would erode

Article 11's protections and is at odds with this Court's precedent. For example, in *State v. Bauder*, 2007 VT 16, ¶ 29, the Court rejected a "constructive plain-view standard" that would justify a warrantless search whenever the officer was lawfully in a place from which he *could* have plainly viewed the evidence in question, even if he didn't actually see it. But adoption of *Heien* would lead to a "constructive reasonable-mistake-of-law standard" that would find a stop justified based on an incorrect interpretation of a law that the officer had never even considered when making the stop.

Vermont jurisprudence to date has proceeded just fine without the *Heien* doctrine; neither the State nor its amicus has presented any reason to change course now, nor have they rebutted Mr. Zullo's reasons why not to.[5]

IV. Under Article 11 and Vermont's Decriminalization Statute, Searches and Seizures for Civil Violations Are Not Permitted.

Regarding counts 2-4, the State's central argument is fundamentally flawed. It argues that 18 V.S.A. § 4230a(c)(2) deems any amount of marijuana to be "contraband," and the requisite suspicion of any amount of marijuana permits exit orders and vehicle seizures regardless of the penalty attached. This argument assumes, without support or comment, that Article 11 allows criminal investigatory seizures whether searching for a violation of civil or criminal law. But, as Mr. Zullo's opening brief explained, the opposite is true: Article 11 protects Vermonters from exit orders and vehicle seizures

[5] In arguing that the stop was justified even without *Heien*, the State claims that officers may stop vehicles for violations of the motor vehicle inspection manual. As Mr. Zullo pointed out below, this is incorrect. S.P.C. 187-89. Officers may stop vehicles for the traffic offense of driving without the valid inspection certification required by 23 V.S.A. § 1222(c), and some violations of the motor vehicle code may support reasonable suspicion of that violation. *See State v. Thompson*, 175 Vt. 470, 471-72 (2002) (mem.); *State v. Corbeil*, No. 2012-194, 2012 WL 6633579, at *2 (Vt. Dec. 13, 2012) (mem.). The purported presence of a temporary, seasonally ordinary obstruction caused by a smattering of snow does not give rise to any suspicion, reasonable or otherwise, that his vehicle would have failed inspection.

upon reasonable suspicion or probable cause of a civil violation because such seizures are unreasonable. Br. of Appellant 24-31. Further, the State's statutory argument misses the § 4230a forest for the (c)(2) tree, while imbuing (c)(2) with an uncorroborated power and intent. The State fails to contest Mr. Zullo's Article 11 arguments and misinterprets (c)(2)'s statutory meaning. These flaws are fatal.

A. Article 11 Does Not Permit Searches and Seizures to Criminally Investigate Civil Violations.

As Mr. Zullo argued in his opening brief, Vermont precedent, statutes, and criminal procedure rules, as well as precedent from states with similarly strong search and seizure rights, mandate an Article 11 prohibition on seizures and searches to investigate civil violations. Article 11's reasonableness criterion requires the state interest in seizure to outweigh an individual's liberty interest. Here, no facts supported objective reasonable suspicion or probable cause that Mr. Zullo was committing a crime.[6] Therefore, the seizures could only be permissible if the state's interest in finding a civil penalty's worth of marijuana outweighed Mr. Zullo's liberty interests. But it does not because such seizures are unnecessary to levy the decriminalization statute's civil penalty. The trooper could have provided Mr. Zullo a ticket up to the $200 maximum upon reasonable suspicion that he was violating the statute, and needed do no more.

Article 11 protects Vermonters from exit orders and vehicle seizures to investigate such minor non-traffic civil violations. This is because Article 11 requires a requisite level of suspicion of a presently occurring *crime* requiring further investigation to justify

[6] The only conceivable crime is 18 V.S.A. § 4230(a)(1)(A) ("No person shall knowingly and unlawfully possess *more than one ounce* of marijuana . . . .") (emphasis added). However, the State has abandoned any contention that reasonable suspicion or probable cause of this crime existed.

further seizures – a higher standard than under the Fourth Amendment. *State v. Cunningham*, 2008 VT 43, ¶ 22; *State v. Manning*, 2015 VT 124, ¶ 12; *State v. Bauder*, 2007 VT 16, ¶ 11; *State v. Sprague*, 2003 VT 20, ¶ 22. *Cunningham* specifically suggests Article 11 bans all civil violation-related seizures beyond the time necessary to issue a civil ticket for the violation. 2008 VT 43, ¶ 19; s*ee also id.* ¶ 40 (Skoglund, J., concurring) (a driver lawfully stopped could be further seized upon reasonable suspicion of another civil offense, but no longer than necessary to issue a civil ticket).

Three states that also provide strong constitutional search and seizure protections, Massachusetts, Hawaii, and Washington, have all held that seizures upon civil violations are unconstitutional. *See State v. Vallesteros*, 84 Haw. 295, 302 (1997) (Hawaii Constitution requires reasonable suspicion of a crime to justify exit orders (citing *State v. Kim*, 68 Haw. 286, 290 (1985))); *Commonwealth v. Cruz*, 945 N.E.2d 899. 908, 910 (Mass. 2011) (self-evident that reasonable suspicion is tied to suspicion of a criminal, not infractionary, conduct);[7] *State v. Duncan*, 146 Wash. 2d 166, 181-82 (2002) (unreasonable to detain a civil violator beyond the time necessary to issue a ticket; requiring reasonable suspicion of crime to justify non-traffic *Terry* seizures).

This Court should hold the same. Its Article 11 precedent repeatedly references the requirement that officers suspect a *crime* to justify invasive seizures. Our criminal procedure rules favor expanding protection from warrantless seizures as potential penalties decrease. *See* V.R.Cr.P. 3(c). And, Vermont statutes only permit civil violation detentions until the detained is "properly identified." 4 V.S.A. § 1111. Article 11's

[7] The State implies that the holding in *Cruz* is inapplicable because Massachusetts law does not include "contraband" as a search warrant justification. *See* Br. of Appellee 36. However, the Supreme Judicial Court explicitly ruled that officers lacked "probable cause to believe that a *criminal* amount of contraband was present." *Cruz*, 945 N.E.2d at 913-14 (emphasis in original). *Cruz* was decided on a constitiutional standard, not because the statute did or did not reference "contraband."

underlying reasonableness criterion must view liberty interests as more important than the State's interest in investigating a low-level civil penalty.

Instead of engaging these arguments, the State implicitly argues, without applicable citations, that civil and criminal violations are the same for Article 11 purposes. For example, the State cites pre-decriminalization search-and-seizure decisions that do not address Mr. Zullo's constitutional question. In *State v. Guzman*, the defendant was lawfully arrested upon a surfeit of facts providing probable cause that he possessed criminal amounts of marijuana. 2008 VT 116, ¶¶ 3, 15 (strong marijuana odor on defendant and car; pockets appeared full; defendant was sweating, nervous, fidgeting, and unsure of destination). In *State v. Greenslit*, probable cause to arrest for criminal possession existed because the officers witnessed smoke coming out of the car and smelled burning marijuana. 151 Vt. 225, 228 (1989). In *State v. Ford*, a *Terry* frisk was upheld because it was initiated upon the smell of marijuana *and* an eyewitness tip that Ford was seen smoking/possessing marijuana, a crime. 2007 VT 107, ¶ 2. Other than the repeated references to officers' justified suspicion of *crime*, these decisions are irrelevant to whether Article 11 permits seizures on suspicion of civil marijuana possession.[8]

Similarly, the State's citations to medical marijuana cases do not support its implicit argument because medical marijuana statutes did not decriminalize marijuana. For example, in *State v. Senna*, a search pursuant to a warrant was upheld because even though "[s]ome individuals were exempt from prosecution [as registered medical

[8] The State cites Fourth-Amendment-based search-and-seizure cases from states where *any* marijuana possession is a crime. *See* Br. of Appellee 30-31 (citing *Edmond v. State,* 951 N.E.2d 585, 589 n.3 (Ind. Ct. App. 2011); *People v. Kazmierczak,* 605 N.W.2d 667, 671-74 (Mich. 2000); *State v. Moore,* 734 N.E.2d 804, 806-08 (Ohio 2000). They are equally inapposite.

marijuana patients]. . . , cultivation [of marijuana] was still a crime." 2013 VT 67, ¶ 13. It is unclear how *Senna* could be read to erase the distinction between civil and criminal violations because it specifically notes that "at the time of the search in question, cultivation of marijuana was a *crime* in Vermont." *Id.* (emphasis added). "Vermont's 'medical marijuana' law is readily distinguishable from Massachusetts's law decriminalizing the possession of small amounts of marijuana." And, "Vermont's 'medical marijuana' law does not purport to decriminalize the possession of marijuana." *Id.* ¶ 11. In direct contrast, § 4230a did exactly that – decriminalized marijuana possession of one ounce or less, for everyone of age.[9]

The State's three post-decriminalization citations are inapposite because they each viewed the constitutional question through a Fourth Amendment lens, inapplicable in this case. *State v. Barclay* mentioned the constitutional question, but without much discussion because of prior Maine precedent.[10] 398 A.2d 794, 796 (Me. 1979). According to the Maine Supreme Court, the U.S. Supreme Court decision permitting police

[9] For similar reasons, the State's citations to other medical marijuana decisions in Michigan, California, and Washington are equally inapposite. *See* Br. of Appellee 33-34. As in *Senna*, these cases were decided based on underlying *criminal* suspicion and that medical marijuana statutes only created a limited defense. *People v. Brown,* 825 N.W.2d 91, 94 (Mich. Ct. App. 2012) (medical marijuana statute "does not abrogate state criminal prohibitions related to marijuana"); *State v. Fry,* 228 P.3d 1, 7-8 (Wash. 2010) (medical marijuana exemption "does not [] result in making the act of possessing and using marijuana noncriminal"); *People v. Clark,* 178 Cal. Rptr. 3d 649, 655-56 (Ct. App. 2014) (medical marijuana statute did not create immunity from arrest).

[10] *Barclay*'s reasoning centers on specific Maine statutes and civil court rules that explicitly permit criminal warrants upon suspicion of a civil violation for possessing contraband. *See Barclay*, 398 A.2d at 797. At the time, Maine designated marijuana a "schedule Z drug." *Id.* Schedule Z drugs, "the unauthorized possession of which constitutes a civil violation," are "contraband, and may be seized and confiscated by the State." *Id.* (quoting 17-A M.R.S.A. § 1114). And, Maine Rule of Civil Procedure 80I has a specific provision for issuance of warrants for schedule Z drugs subject to 17-A M.R.S.A. § 1114. Me.R.Civ.P. 80I(a) (1976 Advisory Committee's Note makes clear that this rule was specifically promulgated to allow seizures and searches for civil amounts of marijuana).

searches on suspicion of civil regulatory violations required it to uphold a warrantless search of a vehicle upon suspicion of potentially noncriminal contraband.[11] *Id.*

State v. Smalley, 225 P.3d 844, 848 (Or. Ct. App. 2010),[12] and *State v. Bowling*, 134 A.3d 388, 396 (Md. Ct. Spec. App. 2016),[13] reference the constitutional issue, but only to note their states' earlier determinations that the Fourth Amendment's "*per se* exigency rule" permits warrantless vehicle searches with probable cause of "contraband or crime evidence." This phrasing "signaled [the Oregon Supreme Court's] understanding that the two things were not identical and that probable cause to believe in the presence of either could justify an automobile search." *Smalley*, 225 P.3d at 271. Importantly, because Smalley did not argue that marijuana was not contraband unless in quantities of more than one ounce, the high court's signal was dispositive.

The Vermont Supreme Court has never ruled, nor should it, that suspicion of amounts of contraband subject only to a small civil penalty permits exit orders, vehicle seizures, or criminal searches, especially on such limited facts. Article 11 is far more

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[11] *Barclay* attempts to justify this conclusion by citing *State v. Richards*, 296 A.2d 129 (Me. 1972), even while noting *Richards*'s legally significant differences. *See Barclay*, 398 A.2d at 798 n. 2. While the *Barclay* defendant asked to overturn a warrantless search because no evidence of a crime existed, *Richards* only reviewed whether the fruits of warrantless searches done for non-law-enforcement reasons can be suppressed. *Richards* based its ruling on U.S. Supreme Court precedent regarding warrantless regulatory searches. *See id.* at 139 (citing *Camara v. Municipal Court*, 387 U.S.523 (1967)). But, *Camara* held that administrative searches do not require probable cause in the traditional sense because they "are neither personal in nature nor aimed at the discovery of evidence of crime." *Id.* at 537. In Vermont, police investigation is distinct from regulatory enforcement unless specifically permitted in statute. As discussed at length below, it is wrong and dangerous to permit police, absent statutory directive, to engage in regulatory searches and seizures. *See* S.P.C. 259-263.

[12] It is worth noting that the facts in *Smalley* overwhelmingly supporting probable cause of crime. The officer smelled marijuana coming from the vehicle, the odor became stronger as he got closer. Eventually, it became "obvious" to him that there was a large amount present. After opening a backpack in the car, the officer discovered 62 ounces of marijuana. *Smalley*, 225 P.3d at 268.

[13] The *Bowling* court permitted a Fourth Amendment vehicle search upon a K-9 alert for marijuana based on a combination of Maryland precedent, legislative intent supported by a significant historical record, and a clear statute. *Id.* at 398.

protective than the Fourth Amendment or the Oregon Constitution's analog. *State v. Bauder*, 2007 VT 16, ¶ 10 ("[T]raditional Vermont values of privacy and individual freedom – embodied in Article 11 – may require greater protection than that afforded by the federal Constitution."). The State's citations to *Barclay*, *Smalley*, and *Bowling* cannot rebut Vermont search and seizure decisions' repeated reference to the requisite suspicion of *crime* for seizures and searches. *Manning*, 2015 VT 124, ¶ 12. Nor can they overcome the persuasiveness of *Cruz*, *Vallesteros*, *Kim*, and *Duncan* – on-point decisions from jurisdictions with search and seizure jurisprudence more similar to Vermont's.

Mr. Zullo has repeatedly raised the unreasonableness of Trooper Hatch's search and seizures given the meager state interest involved and the lack of reasonable suspicion that he possessed a criminal amount of marijuana. The State has not even argued a state interest justifying Trooper Hatch's intrusion into Mr. Zullo's liberty. It was unreasonable for Mr. Zullo to be ordered from his vehicle upon, at most, reasonable suspicion that he committed a civil violation subject to a maximum $200 fine.

B. The State's Statutory Argument Misses the Forest for One Tree: Vermont's Decriminalization Statute Prevents the Seizure of Civil Violators.

Even if Article 11 does not prevent the seizures here, § 4230a supports a finding that subdivision (c)(2) was meant to permit searches and seizures only for criminal amounts of contraband. Subdivision (c)(2) is neither directive nor limiting. It merely states what it is "not intended to affect . . . under the laws of [Vermont]." It starkly contrasts with Maine's and Maryland's prescriptive statutes. *See Barclay*, 398 A.2d at 797; *Bowling*, 134 A.3d at 397 (Maryland statute said that "making the possession of marijuana a civil offense *may not be construed* to affect the laws relating to . . . seizure

and forfeiture."). Additionally, without Vermont statutes or decisions deciding the issue beforehand, (c)(2)'s reference to the "laws of [Vermont]" is meaningless – statutes cannot freeze constitutional interpretation that has not happened. *See State v. Read*, 165 Vt. 141, 153 (1996) (court is the "final interpreter of the Vermont Constitution").

Section (c)(2) also deems marijuana "contraband" pursuant to § 4242, a civil forfeiture law, *not* V.R.Cr.P. 41.[14] Section 4242 says "all regulated drugs the possession of which is prohibited under this chapter are contraband and shall be automatically forfeited." *See* 18 V.S.A. § 4242(d). Although its relevance is unclear, § 4242(b) permits process-less property seizures where the actions are "incident to . . . a search under a valid search warrant," or "incident to a valid warrantless search." These are distinct from seizures pursuant to applying for a criminal search warrant. *See* 18 V.S.A. § 4242(b). By reading §§ 4230a and 4242 together, the statutes can only be understood to leave ample breathing room for this Court to determine when a warrantless seizure of a person or vehicle, under 18 V.S.A. § 4230a, would be reasonable.

Even if (c)(2) could arguably provide any direction, the Legislature's statutorily evidenced intent is that § 4230a violators be treated as traffic offenders, not criminals. As Mr. Zullo notes in his opening brief, § 4230a includes multiple references to the civil nature of the violation, it is a ticketable offense under Judicial Bureau civil jurisdiction, and it cannot create a criminal record. *See generally* § 4230a. Subject to the rest of the statute, subdivision (b)(1) says civil violators "shall not be penalized or sanctioned in any manner . . . or denied any right or privilege." Subdivision (e) limits officer detention authority to only civil violators who do not identify themselves – copying the exact

[14] Although conspicuously excluded from § 4230a, the Legislature has referenced Rule 41 in statute when seeking to clarify law enforcement's duties. *See, e.g.*, 6 V.S.A. § 12(b); 18 V.S.A. § 121(c); 20 V.S.A. § 4622(b)(1)(B), (c)(2)(A).

statutory language limiting detention for other civil violations. *Compare* 18 V.S.A. § 4230a(e), *with* 4 V.S.A. § 1111. And, although explicitly permitting the automatic forfeiture of discovered marijuana, the statute is silent as to exit orders, vehicle seizures, searches, and arrests. In contrast to the prescriptive statute and lengthy legislative record relied on in *Bowling*, the State has failed to provide meaningful statutory language or record evidence of legislative intent supporting its argument.

Vermont's decriminalization of marijuana was an initial and momentous departure from the failed "war on drugs" mindset. With § 4230a, the Legislature proactively chose to reclassify possession of small amounts of marijuana as a civil matter. It was much more than just reducing criminal penalties or creating affirmative defenses. It was meant to stop low-level possessors from being treated as criminals. The rules of statutory interpretation require this Court to fulfill that evidenced intent. Subdivision (c)(2) does not provide authority for searches and seizures upon suspicion of a civil violation.

CONCLUSION

The Court should decline the State's invitation to ignore Vermonters' Article 11 rights or to pretend that the Legislative and Executive branches never enacted the decriminalization statute. On review, the Court must find that Mr. Zullo's Article 11 rights were violated, reverse the judgment below, and grant him summary judgment on Counts 1, 2, 3, and 4.

Dated: May 7, 2018

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief totals 7349 words, excluding table of contents, table of cited authorities, signature blocks, and this certificate as permitted by V.R.A.P. 32(a)(7)(C). I have relied on the word processor used to produce this brief, Microsoft Word 2016, to calculate the word count.

I additionally certify that the electronic copy of this brief submitted to the Court via email was scanned for viruses, and that no viruses were detected.

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Appendix

TITLE 4

CHAPTER 29: JUDICIAL BUREAU

§ 1111. Civil violation; failure to produce identification

(a) A law enforcement officer is authorized to detain a person if:
(1) the officer has reasonable grounds to believe the person has committed a civil violation of Title 7, 10, 13, 18, or 23; and
(2) the person refuses to identify himself or herself satisfactorily to the officer when requested by the officer.

(b) The person may be detained under this section only until the person identifies himself or herself satisfactorily to the officer or is properly identified. If the officer is unable to obtain the identification information, the person shall forthwith be brought before a judge in the Criminal Division of the Superior Court for that purpose. A person who refuses to identify himself or herself to the court on request shall immediately and without service of an order on the person be subject to civil contempt proceedings pursuant to 12 V.S.A. § 122.

TITLE 12

CHAPTER 189: TORT CLAIMS AGAINST THE STATE

§ 5601. Liability of State

(a) The State of Vermont shall be liable for injury to persons or property or loss of life caused by the negligent or wrongful act or omission of an employee of the State while acting within the scope of employment, under the same circumstances, in the same manner, and to the same extent as a private person would be liable to the claimant except that the claimant shall not have the right to levy execution on any property of the State to satisfy any judgment. The Superior Courts of the State shall have exclusive jurisdiction of any actions brought hereunder

* * * * *

(e) This section shall not apply to:

(1) Any claim based upon an act or omission of an employee of the State exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation is valid, or based upon the exercise or performance or failure to exercise or perform a discretionary function or duty on the part of a State agency or an employee of the State, whether or not the discretion involved is abused.

[remainder omitted]

TITLE 12

CHAPTER 189: TORT CLAIMS AGAINST THE STATE

§ 5602. Exclusive right of action

(a) When the act or omission of an employee of the State acting within the scope of employment is believed to have caused damage to property, injury to persons, or death, the exclusive right of action shall lie against the State of Vermont; and no such action may be maintained against the employee or the estate of the employee.

(b) This section does not apply to gross negligence or willful misconduct.

(c) As used in this chapter, "employee" means any person defined as a State employee by 3 V.S.A. § 1101.

TITLE 24

CHAPTER 33: MUNICIPAL OFFICERS GENERALLY

Subchapter 4: Actions by or Against Officers; Liability; Penalties

§ 901a. Tort claims against municipal employees

(b) When the act or omission of a municipal employee acting within the scope of employment is alleged to have caused damage to property, injury to persons, or death, the exclusive right of action shall lie against the municipality that employed the employee at the time of the act or omission; and no such action may be maintained against the municipal employee or the estate of the municipal employee.

[remainder omitted]

TITLE 18

CHAPTER 84: POSSESSION AND CONTROL OF REGULATED DRUGS

Subchapter 1: Regulated Drugs

§ 4230a. Marijuana possession by a person 21 years of age or older; civil violation[1]

[1] This is the version of the statute that was in effect at the time of the traffic stop. Effective July 1, 2018, it is amended by 2017 Acts & Resolves, No. 86 (Adj. Sess.).

(a) A person 21 years of age or older who knowingly and unlawfully possesses one ounce or less of marijuana or five grams or less of hashish commits a civil violation and shall be assessed a civil penalty as follows:

(1) not more than $200.00 for a first offense;
(2) not more than $300.00 for a second offense;
(3) not more than $500.00 for a third or subsequent offense.

(b) (1) Except as otherwise provided in this section, a person 21 years of age or older who possesses one ounce or less of marijuana or five grams or less of hashish or who possesses paraphernalia for marijuana use shall not be penalized or sanctioned in any manner by the State or any of its political subdivisions or denied any right or privilege under State law.

(2) A violation of this section shall not result in the creation of a criminal history record of any kind.

(c) (1) This section does not exempt any person from arrest or prosecution for being under the influence of marijuana while operating a vehicle of any kind and shall not be construed to repeal or modify existing laws or policies concerning the operation of vehicles of any kind while under the influence of marijuana.

(2) This section is not intended to affect the search and seizure laws afforded to duly authorized law enforcement officers under the laws of this State. Marijuana is contraband pursuant to section 4242 of this title and subject to seizure and forfeiture unless possessed in compliance with chapter 86 of this title (therapeutic use of cannabis).

(3) This section shall not be construed to prohibit a municipality from regulating, prohibiting, or providing additional penalties for the use of marijuana in public places.

(d) If a person suspected of violating this section contests the presence of cannabinoids within 10 days of receiving a civil citation, the person may request that the State Crime Laboratory test the substance at the person's expense. If the substance tests negative for the presence of cannabinoids, the State shall reimburse the person at State expense.

(e) (1) A law enforcement officer is authorized to detain a person if:

(A) the officer has reasonable grounds to believe the person has violated this section; and

(B) the person refuses to identify himself or herself satisfactorily to the officer when requested by the officer.

(2) The person may be detained only until the person identifies himself or herself satisfactorily to the officer or is properly identified. If the officer is unable to obtain the identification information, the person shall forthwith be brought before a judge in the Criminal Division of the Superior Court for that purpose. A person who refuses to identify himself or herself to the Court on request shall immediately and without service of an order on the person be subject to civil contempt proceedings pursuant to 12 V.S.A. § 122.

[remainder omitted]

TITLE 18

CHAPTER 84: POSSESSION AND CONTROL OF REGULATED DRUGS

Subchapter 2: Forfeiture[2]

§ 4242. Seizure[3]

(a) The court may issue at the request of the State ex parte a preliminary order or process to seize or secure property for which forfeiture is sought and to provide for its custody. Process for seizure of such property shall issue only upon a showing of probable cause that the property is subject to forfeiture. Application therefor and issuance, execution, and return shall be subject to provisions of applicable law.

(b) Any property subject to forfeiture under this subchapter may be seized upon process. Seizure without process may be made when:

(1) the seizure is incident to an arrest with probable cause or a search under a valid search warrant;

(2) the property subject to seizure has been the subject of a prior judgment in favor of the state in a forfeiture proceeding under this subchapter; or

(3) the seizure is incident to a valid warrantless search.

(c) If property is seized without process under subdivision (b)(1) or (3) of this section, the state shall forthwith petition the court for a preliminary order or process under subsection (a) of this section.

(d) All regulated drugs the possession of which is prohibited under this chapter are contraband and shall be automatically forfeited to the state and destroyed.

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[2] The State's appendix mislabeled this subchapter as "seizure."

[3] This is the version of the statute that was in effect at the time of the traffic stop. It has since been amended by 2015 Acts & Resolves, No. 53, § 4. The State's statutory appendix mistakenly cites the current version.

TITLE 6

CHAPTER 1: GENERAL POWERS; SECRETARY OF AGRICULTURE, FOOD AND MARKETS

§ 12. Search warrants

(c) The provisions of Rule 41(c) and (d) of the Vermont Rules of Criminal Procedure shall apply to warrants issued under this section.

[remainder omitted]

TITLE 18

CHAPTER 3: STATE BOARD OF HEALTH

§ 121. Issuance of search warrants

(c) The provisions of the Vermont Rules of Criminal Procedure 41(c) shall apply to warrants issued under this section.

[remainder omitted]

TITLE 20

CHAPTER 205: DRONES

§ 4622. Law enforcement use of drones

(b)(1) A law enforcement agency shall not use a drone to gather or retain data on private citizens peacefully exercising their constitutional rights of free speech and assembly.

(2) This subsection shall not be construed to prohibit a law enforcement agency from using a drone:

(A) for observational, public safety purposes that do not involve gathering or retaining data; or

(B) pursuant to a warrant obtained under Rule 41 of the Vermont Rules of Criminal Procedure.

(c) A law enforcement agency may use a drone and may disclose or receive information acquired through the operation of a drone if the drone is operated:

(1) for a purpose other than the investigation, detection, or prosecution of crime, including search and rescue operations and aerial photography for the assessment of accidents, forest fires and other fire scenes, flood stages, and storm damage; or

(2) pursuant to:

(A) a warrant obtained under Rule 41 of the Vermont Rules of Criminal Procedure; or

(B) a judicially recognized exception to the warrant requirement.

[remainder omitted]

VERMONT RULES OF CRIMINAL PROCEDURE

RULE 3. ARREST WITHOUT A WARRANT; CITATION TO APPEAR

(a) **Arrest Without a Warrant for a Felony Offense.** A law enforcement officer may arrest without warrant a person whom the officer has probable cause to believe has committed or is committing a felony.

(b) **Arrest Without a Warrant for a Misdemeanor Offense Committed in the Presence of an Officer.** A law enforcement officer may arrest without a warrant a person whom the officer has probable cause to believe has committed or is committing a misdemeanor in the presence of the officer. Such an arrest shall be made while the crime is being committed or without unreasonable delay.

(c) **Nonwitnessed Misdemeanor Offenses.** If an officer has probable cause to believe a person has committed or is committing a misdemeanor outside the presence of the officer, the officer may issue a citation to appear before a judicial officer in lieu of arrest. The officer may arrest the person without a warrant if the officer has probable cause to believe:

[remainder omitted]

VERMONT RULES OF CRIMINAL PROCEDURE

RULE 41. SEARCH AND SEIZURE

(a) **Authority to Issue a Warrant.** A search warrant authorized by this rule may be issued only by a judicial officer upon request of a law enforcement officer, an attorney for the state, or any other person authorized by law.

(b) **Grounds for Issuance.** A warrant may be issued under this rule to

(1) search for and seize any

(A) evidence of the commission of a criminal offense, or

(B) contraband, the fruits of crime, or things otherwise criminally possessed, or

(C) weapons or other things by which a crime has been committed or is about to be committed, or

(D) person who has been kidnapped or unlawfully imprisoned or restrained in violation of the laws of this state, or who has been kidnapped in another jurisdiction and is now concealed within this state, or any human fetus or human corpse, or

[remainder omitted]

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(A) the benefits of the succeeding carrier's policy or contract determined without application of the pre-existing conditions limitation; or

(B) the benefits of the prior carrier's policy or contract.

(5) The succeeding carrier, in applying a deductible or waiting-period provision in its policy or contract, shall give credit for the satisfaction of the same or similar provisions under the prior carrier's policy or contract.

(6) At the succeeding carrier's request the prior carrier shall furnish all information needed to determine the benefits available under the prior carrier's policy or contract.

(d) Rules. The commissioner shall adopt rules necessary to carry out the purposes of this section.

Sec. 3. 8 V.S.A. § 4992 is amended to read:

§ 4992. TERMINATION

The authority granted to the commissioner to establish a joint underwriting association under this chapter shall *[terminate on July 1, 1989 unless this date is extended]* continue indefinitely unless the authority is terminated by act of the general assembly. *[Any]* In the event authority is so terminated, any association established prior to *[July 1, 1989]* the termination date may continue to exist for a period of one year from the date it commences underwriting activities. All obligations incurred by the association or by policyholders during this period shall be honored and binding until discharged, and any association shall remain in effect for the purpose of discharging any obligations incurred. The plan of operation shall provide for the orderly dissolution of the association at its termination. Upon termination of the association and the discharge of all its liabilities and at any such other time as may be specified in the plan, any excess funds of the association shall be distributed to the policyholders of the association in an equitable manner as set forth in the plan of operation.

Approved: June 20, 1989

NO. 114. AN ACT RELATING TO STATE EMPLOYEE LIABILITY.

(H.323)

It is hereby enacted by the General Assembly of the State of Vermont:

Sec. 1. 12 V.S.A. § 5601 is amended to read:

§ 5601. LIABILITY OF STATE

(a) The state of Vermont shall be liable for injury to persons or property or loss of life caused by the negligent or wrongful act or omission of an employee of the state while acting within the scope of *[his office or]* employment *[after October 1, 1961]* , under the same circumstances, in the same manner and to the same extent as a private person would be liable to the claimant except that the claimant shall not have the right to levy execution on any property of the state to satisfy any judgment. The *[county]* superior courts of the state shall have exclusive jurisdiction of any actions brought hereunder.

(b) *[The maximum liability of the state of Vermont hereunder shall be $75,000.00 to any one person and $300,000.00 to all persons arising out of each negligent or

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wrongful act or omission.] maximum liability of the s $250,000.00 to any one p liability shall be $500,000 each occurrence. Effecti liability of the state $250,000.00 to any one p liability shall be $1,000,(of each occurrence.

(c) If the claimant is Vermont, *[he]* the claim section]* in any *[county court. The agent for the statute]* shall be the a attorney general's duly aut

(d) This *[act shall no does not allow any insur recover against the state of any private insurance c state employee.

(e) This section shall n

(1) Any claim based employee of the state exer of a statute or regulation regulation is valid, o performance or failure discretionary function or or an employee of the sta involved is abused.

(2) Any claim arising collection of any tax or detention of any goods or officer.

(3) Any claim for dam a quarantine by the state.

(4) Any claim for operations of any state of

(5) Any claim arisin of the National Guard duri

(6) Any claim arising false imprisonment, fals abuse of process, libel, s fraud, interference with the right to privacy.

(7) Any claim for wh is governed specifically b

(f) The limitations in not apply to claims aga extent that there exis liability insurance purcha services.

(g) Nothing in this state under the Eleventh Constitution.

Sec. 2. 12 V.S.A. § 5602

§ 5602. *[EXCEPTIONS]* EX

*[The provisions of this

[(1) Any claim bas employee of the state exe of a statute or regulati regulation be valid, performance or failur discretionary function or or an employee of the st involved be abused;]

wrongful act or omission.]* Effective July 1, 1989, the maximum liability of the state under this section shall be $250,000.00 to any one person and the maximum aggregate liability shall be $500,000.00 to all persons arising out of each occurrence. Effective July 1, 1990, the maximum liability of the state under this section shall be $250,000.00 to any one person and the maximum aggregate liability shall be $1,000,000.00 to all persons arising out of each occurrence.

(c) If the claimant is not a resident of the state of Vermont, *[he]* the claimant may bring suit *[under this section]* in any *[county court in the state]* superior court. The agent for the service of process *[under this statute]* shall be the attorney general or *[his]* the attorney general's duly authorized representative.

(d) This *[act shall not be construed so as to]* chapter does not allow any insurance carrier to bring action or recover against the state for any payments made as a result of any private insurance contract between the carrier and a state employee.

(e) This section shall not apply to:

(1) Any claim based upon an act or omission of an employee of the state exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation is valid, or based upon the exercise or performance or failure to exercise or perform a discretionary function or duty on the part of a state agency or an employee of the state, whether or not the discretion involved is abused.

(2) Any claim arising in respect to the assessment or collection of any tax or customs duty, or the levy upon or detention of any goods or merchandise by any law enforcement officer.

(3) Any claim for damages caused by the impositions of a quarantine by the state.

(4) Any claim for damages caused by the fiscal operations of any state officer or department.

(5) Any claim arising out of the combatant activities of the National Guard during time of war.

(6) Any claim arising out of alleged assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, fraud, interference with contractual rights or invasion of the right to privacy.

(7) Any claim for which a remedy is provided or which is governed specifically by other statutory enactment.

(f) The limitations in subsection (e) of this section do not apply to claims against the state of Vermont to the extent that there exists coverage under a policy of liability insurance purchased by the commissioner of general services.

(g) Nothing in this chapter waives the rights of the state under the Eleventh Amendment of the United States Constitution.

Sec. 2. 12 V.S.A. § 5602 is amended to read:

§ 5602. *[EXCEPTIONS]* EXCLUSIVE RIGHT OF ACTION

[The provisions of this chapter shall not apply to:]

[(1) Any claim based upon an act or omission of an employee of the state exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or failure to exercise or perform a discretionary function or duty on the part of a state agency or an employee of the state, whether or not the discretion involved be abused;]

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[(2) Any claim arising in respect to the assessment or collection of any tax or customs duty, or the levy upon or detention of any goods or merchandise by any law enforcement officer;]

[(3) Any claim for damages caused by the impositions of a quarantine by the state;]

[(4) Any claim for damages caused by the fiscal operations of any state officer or department;]

[(5) Any claim arising out of the combatant activities of the National Guard during time of war;]

[(6) Any claim arising out of alleged assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, fraud, interference with contractual rights or invasion of the right to privacy; or]

[(7) Any other claim for which a remedy is provided or which is governed specifically by other statutory enactment.]

(a) When the act or omission of an employee of the state acting within the scope of employment is believed to have caused damage to property, injury to persons, or death, the exclusive right of action shall lie against the state of Vermont; and no such action may be maintained against the employee or the estate of the employee.

(b) This section does not apply to gross negligence or willful misconduct.

(c) As used in this chapter "employee" means any person defined as a state employee by section 1101 of Title 3.

Sec. 3. 12 V.S.A. § 5603 is amended to read:

§ 5603. SETTLEMENT OF CLAIMS

(a) The attorney general may consider, adjust, determine and settle any claim for damages against the state of Vermont resulting from the *[alleged negligence]* acts or omissions of an employee *[under section 5601 of this title up to the amount of $500.00]* as provided under section 159 of Title 3. *[The attorney general may, with the approval of the court in which the action is pending under this chapter, or with the approval of any superior judge if no action is pending, arbitrate, compromise or settle any other claim. If the claim or action is covered by a policy of liability insurance, the powers granted to the attorney general shall be governed by the terms of the policy to the extent of the coverage.]*

(b) If the state of Vermont has undertaken the defense of a claim against a state employee as required by section 1101 of Title 3, the acceptance by the claimant of any award, compromise or settlement shall be final and conclusive on the claimant and shall constitute a complete release of any claim against the state of Vermont and all of its employees.

(c) Notwithstanding the provisions of subsection (b) of this section, if the employee has purchased a policy of liability insurance which covers claims based on gross negligence or willful misconduct in the operation of a motor vehicle, the acceptance of an award, compromise or settlement shall not bar a claim for gross negligence or willful misconduct covered by that policy.

Sec. 4. 12 V.S.A. § 5604 is amended to read:

§ 5604. PAYMENT

Any award made or compromise or settlement against the state of Vermont agreed upon by the attorney general, shall be paid by the state treasurer out of the appropriations of the department concerned. In the event an award is made or a compromise or settlement is agreed upon as the result of the *[alleged negligence]* acts or omissions of a state *[official or]* employee not connected with or employed by

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any department, such awar
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reimburse *[him]* the state
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is covered by a policy
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Sec. 5. 12 V.S.A. § 5606 i
§ 5606. INDEMNIFICATION OF
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(b) The maximum liabilit
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(3) if the employee
general had timely notice
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(d) Upon certification
commissioner of finance a
eligible for indemnifica
commissioner shall issue a
available to the employee
attorney general believes
whether the officer
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to the labor relations bo
The decision of the board
Sec. 6. 3 V.S.A. § 1101 i
§ 1101. OBLIGATION OF STA
(a) In any civil acti
alleged damage, injury,
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the employee's official du
the state to defend the ac
to provide legal represen
expense, except to the e
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The term includes, without
(1) sheriffs and st
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(2) guardians ad lite
(3) any member of th
service pursuant to sectio

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any department, such award shall be paid by the state treasurer out of the treasury, and the emergency board shall reimburse *[him]* the state treasurer therefor from time to time. In the event that the award, compromise or settlement is covered by a policy of liability insurance, payment *[thereof]* shall be governed by the terms of the policy.

Sec. 5. 12 V.S.A. § 5606 is added to read:

§ 5606. INDEMNIFICATION OF EMPLOYEES

(a) In any action defended by the attorney general or the attorney general's designee in which a judgment is rendered against an employee of the state for acts or omissions within the scope of his or her employment, or a settlement requires payment by such a person, and the right of action is based upon Title 42, United States Code, Section 1983, or under a similar federal statute where state law is incapable of establishing employee immunity, the state shall indemnify the employee for the amount of the employee's liability.

(b) The maximum liability of the state under this section shall be $250,000.00 to any one person and the maximum aggregate liability shall be $1,000,000.00 to all persons arising out of each occurrence.

(c) Notwithstanding subsection (a) of this section, no indemnification shall be paid:

(1) for a judgment or settlement which results from gross negligence or willful misconduct; or

(2) for a settlement not approved by the attorney general or the attorney general's designee; or

(3) if the employee did not ensure that the attorney general had timely notice of the action or the employee did not cooperate in the defense of the action.

(d) Upon certification by the attorney general to the commissioner of finance and management that an employee is eligible for indemnification under this section, the commissioner shall issue a warrant for payment against funds available to the employee's department or agency. If the attorney general believes there is reasonable doubt about whether the officer or employee is eligible for indemnification, the attorney general shall refer the matter to the labor relations board which may decide the matter. The decision of the board shall not be subject to appeal.

Sec. 6. 3 V.S.A. § 1101 is amended to read:

§ 1101. OBLIGATION OF STATE TO DEFEND EMPLOYEES; DEFINITION

(a) In any civil action against a state employee for alleged damage, injury, loss or deprivation of rights arising from an act or omission to act in the performance of the employee's official duties it shall be the obligation of the state to defend the action on behalf of the employee and to provide legal representation for that purpose at state expense, except to the extent that such representation is provided by an insurance carrier, or except in an action resulting from *[:]* the service of civil process.

[(1) the operation of a motor vehicle or]

[(2) the service of civil process.]

(b) For purposes of this chapter, "state employee" includes any elective or appointive officer or employee within the legislative, executive or judicial branches of state government or any former such employee or officer. The term includes, without limitation:

(1) sheriffs and state's attorneys and their deputies and former sheriffs and state's attorneys and their deputies *[and includes]* ;

(2) guardians ad litem *[. The term includes]* ;

(3) any member of the National Guard ordered into state service pursuant to section 601 of Title 20;

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(4) any person who volunteers for a state agency by providing services at the request of that agency and under the direction and control of that agency, but who does not receive hourly or salary compensation; and

(5) any person performing juvenile or adult diversion services under section 163 or 164 of this title.

Sec. 7. 29 V.S.A. § 1403 is amended to read:

§ 1403. WAIVER OF IMMUNITY BY *[STATE,]* MUNICIPAL CORPORATIONS AND COUNTIES

Notwithstanding the provisions of section 5602 of Title 12 *[,]* or any other statute, *[when the state or a department or board purchases a policy of liability insurance under the provisions of section 1401 of this title, and]* when a municipal corporation purchases a policy of liability insurance under section 1092 of Title 24, and when a county purchases a policy of liability insurance under the provisions of section 131 of Title 24, it waives its sovereign immunity from liability to the extent of the coverage of the policy and consents to be sued.

Sec. 8. 29 V.S.A. § 1404 is amended to read:

§ 1404. JUDGMENTS, MAXIMUM LIABILITY OF MUNICIPAL CORPORATIONS AND COUNTIES

Upon trial of any action in which sovereign immunity has been waived, as provided in section 1403 of this title, a judgment shall not be rendered against *[the state of Vermont, a department or board thereof or]* a municipal corporation or county for more than the maximum amount of liability insurance carried by it and applicable to the subject matter of the action.

Sec. 9. 29 V.S.A. § 1406(a) is amended to read:

§ 1406. LIABILITY INSURANCE *[FOR STATE EMPLOYEES]*

(a) The *[governor, the state treasurer and the auditor of accounts]* commissioner of general services, on behalf of the state, may contract or enter into agreements with any insurance company or companies or insurance corporation or corporations licensed to do business within the state for the purpose of insuring *[state employees against personal liability relative to civil claims and actions arising from the performance of their duties and while engaged within the scope of their employment or official duties. Notwithstanding the provisions of section 5602 of Title 12, or any other statute, when the state purchases a policy of liability insurance under the provisions of this section, it waives its sovereign immunity from liability to the extent of the coverage of the policy and consents to be sued]* the state against liability.

Sec. 10. TRANSITIONAL PROVISIONS; EFFECTIVE DATE

This act shall take effect on passage. It shall not affect pending suits, except that state employees against whom judgment or settlement is entered from pending suits may be indemnified from agency funds in the amount of their liability upon warrant issued by the commissioner of finance and management.

Sec. 11. REPEALS

(a) Effective July 1, 1989, the following are repealed:

(1) 3 V.S.A. § 207(b)(4) (treatment of volunteers under defense statutes, immunity statutes, and workers' compensation statutes);

(2) 3 V.S.A. § 1103 (indemnification of employees and settlement of claims);

(3) 12 V.S.A. § 5605 (releases in tort claims against the state).

(b) Effective March 1, 1994, 12 V.S.A. §§ 5601(b) and 5606(b) are repealed in order to assure that the administration reviews and reports to the legislature on the

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adequacy of the dolla
act, and to assure
opportunity to adjust
Approved: June 20, 19

NO. 115. AN ACT RELAT

It is hereby enacted
Vermont:
Sec. 1. 33 V.S.A. § 3
§ 3308. COMPREHENSIVE
Payment for service
guardians shall be
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secretary and reviewe
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guardians have eligib
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modify the percentag
for continuing pe
treatment.
Approved: June 20, 19

NO. 116. AN ACT R
TREATMENT CAPACITY.

It is hereby enacted
Vermont:
Sec. 1. 24 V.S.A. § 3
§ 3625. ALLOCATION O
(a) When capacity
permit under 10 V.S.A
municipality, as defi
town school districts
capacity shall be al
municipality's obliga
rates and apply the p
this title, pursuant
effect by July 1, 199
(1) an ordinance
of this title;
(2) bylaws adopt
title; or

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adequacy of the dollar limits on liability imposed by this act, and to assure that the legislature will have the opportunity to adjust those limits, as appropriate.
Approved: June 20, 1989

NO. 115. AN ACT RELATING TO THE TOOTH FAIRY PROGRAM.

(H.335)

It is hereby enacted by the General Assembly of the State of Vermont:
Sec. 1. 33 V.S.A. § 3308 is amended to read:
§ 3308. COMPREHENSIVE DENTAL HEALTH
Payment for services by the legally liable relatives or guardians shall be made to the provider of services in accordance with a schedule to be established by the secretary and reviewed annually. The schedule shall provide that Medicaid eligible persons shall pay no part of the cost of the services, that legally liable relatives or guardians whose income disqualifies them for Medicaid but whose income is still below an eligible income of $8,500.00 per year shall pay no more than 25 percent of the cost of the services and that legally liable relatives or guardians with eligible incomes between $8,500.00 and *[$12,500.00]* $16,000.00 shall pay no more than 50 percent of the cost of services. No payments shall be provided under this chapter for services to children whose legally liable relatives or guardians have eligible incomes in excess of *[$12,500.00]* $16,000.00 per year. The secretary may, by regulation, modify the percentage participation to provide incentives for continuing periodic incremental examination and treatment.
Approved: June 20, 1989

NO. 116. AN ACT RELATING TO THE ALLOCATION OF SEWAGE TREATMENT CAPACITY.

(H.371)

It is hereby enacted by the General Assembly of the State of Vermont:
Sec. 1. 24 V.S.A. § 3625 is added to read:
§ 3625. ALLOCATION OF SEWAGE CAPACITY
(a) When capacity under an original or amended discharge permit under 10 V.S.A. § 1263 is or has been granted to any municipality, as defined in 1 V.S.A. § 126, except existing town school districts or incorporated school districts, that capacity shall be allocated, in a manner consistent with a municipality's obligation to its bondholders to establish rates and apply the proceeds as set forth in section 3616 of this title, pursuant to one of the following, adopted and in effect by July 1, 1990:
(1) an ordinance adopted under sections 1972 and 1973 of this title;
(2) bylaws adopted under sections 4403 and 4404 of this title; or