

LEGISLATIVE BULLETIN

Immunity Bill Is Back

HB 111, the dangerous bill that would strip municipalities of many immunities and defenses in tort claims, is back, but sporting a new number. Although the House already defeated the bill once, a bare majority of the House Judiciary Committee voted this week to consider the substance of the bill as an amendment to **SB 96**, an unrelated Senate bill. The committee has scheduled a hearing on [non-germane Amendment #2021-1244h](#) for next **Tuesday, May 18, at 9:00 a.m.** *Please sign in opposition to the non-germane amendment to SB 96.* (Instructions at the end of this article.)

In support of the amendment, Vermont ice cream magnates Ben Cohen and Jerry Greenfield spoke at a press conference this week in Concord. According to [InDepthNH.org](#):

Cohen said he supports New Hampshire’s efforts to end qualified immunity, explaining what it means.

“That’s a legal doctrine that essentially says cops are above the law,” Cohen said. “We want to make it so that cops are accountable for their actions just like any other person.”

Cohen said if he punched someone in the face, he could be sued, [but] “If a cop hauls off and punches you in the face, your case will be thrown out of court on the basis of qualified immunity which essentially says cops cannot be held accountable.”

We are not sure why the legal analysis of an out-of-state ice cream vendor should carry any weight in the New Hampshire legislature. Everything Mr. Cohen said is incorrect. Qualified immunity does not say that “cops are above the law.” Police officers are *more* accountable for their actions than “any other person.” Here is what will happen “if a cop hauls off and punches you in the face”:

- The cop will face criminal prosecution for simple assault, just like “any other person.”

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- You can file a common-law tort action for assault against the cop and recover damages for your injuries, just as you could against “any other person.”
- *In addition*, you may be able to sue the cop for damages and attorney fees under a federal statute, 42 U.S.C. § 1983, for violating your federal constitutional rights, which you can *not* do against “any other person.” *Only* police officers and other government agents are subject to liability under section 1983.

The dreaded “qualified immunity” that has been the subject of endless, uninformed condemnation is a federal doctrine that applies only in section 1983 actions. It does not protect police officers, or anyone else, from criminal prosecution or from a common-law tort claim under New Hampshire law; nor would it protect a police officer from liability under section 1983 for punching someone in the face without provocation.

The law may be different in Vermont, but in New Hampshire, if a police officer is charged with criminal assault, he or she has no defense that that any other person would not have. If the injured person files a tort claim, the officer is subject to liability for damages, just like anyone else, *unless* it can be established that the officer did not act in a “wanton or reckless manner.”

What, then, is the problem in New Hampshire that so urgently requires a legislative fix? Well, even some of the bill’s supporters acknowledge that *there is none*. According to former supreme court justice and trial lawyer Chuck Douglas, the one person with a background in New Hampshire law who spoke in support of the amendment at this week’s press conference, “Fortunately in New Hampshire, this is not a widespread problem; there is not systemic police abuse.” Further, in the three months that this issue has been debated in the legislature, in the press, and on social media, no one has cited a single case in New Hampshire in which qualified immunity or any other immunity led to a bad result.

Rather, **HB 111**, like so many other bills this year, is part of a national agenda. That may explain why most of the support has come from out-of-state advocacy groups (and ice cream vendors). (See “Arlington Comes to Concord,” below.) We believe the legislature should focus on New Hampshire problems. Dismantling tort law in New Hampshire is not going to curb police misconduct in Minnesota.

Getting back to the proposed amendment—it is no better than the original bill, **HB 111**, which we discussed at length in [Legislative Bulletin #14](#). The amendment makes a few changes, but they do not help. Strangely, the amendment says that in a claim for violation of constitutional rights by a police officer or other government agent, the individual agent “shall not be named as a defendant” and shall not be financially liable—only the government *employer* will be liable. This makes no sense—it *reduces* accountability for government agents and makes the employer (read, the taxpayers) an insurer for the actions of the few rogue employees who do exist.

As with the original bill, the fundamental problem is that the amendment eliminates existing immunities and defenses (not just qualified immunity) so that the state or a municipal employer may be forced to pay damages, and attorney fees, when an employee’s conduct results in a claimed constitutional violation, even though the employee acted in good faith and even though a reasonable person in the same position would have believed the conduct was lawful. This puts municipalities at risk of liability for every-day decisions made not only by police officers, but by firefighters, other emergency responders, building inspectors, town managers, recreation personnel, library employees, election workers, and just about anyone else imaginable.

Finally, by attaching the amendment to an unrelated bill, **SB 96**, the House would be jeopardizing that bill. We do not have a position on the underlying bill, but those who support it are concerned about the amendment. **SB 96** implements several recommendations of the governor’s Commission on Law Enforcement Accountability, Community, and Transparency (LEACT), and it has broad bipartisan support, having passed the Senate 24-0 with strong backing from the governor. Attaching this controversial amendment puts the entire bill at risk—which is highly ironic, given that the underlying bill is about police accountability.

Please sign in to oppose the amendment to SB 96. You can do this anytime between now and Tuesday at 8:00 a.m. Here’s how:

- Go to the [House remote testimony sign-in sheet](#).
- Click on the date of the hearing (May 18).
- Select “House Judiciary.”
- Choose “9:00—SB 96.”
- Indicate your status and who you represent. (If you are an appointed official or municipal employee, you will need to indicate “a member of the public.”)
- Indicate “I oppose this bill.”
- Check the box that says, “Testimony is for non-germane amendment.”
- Continue to the next page, enter the required information, continue to the next page, and submit the form.

Also, please contact members of the [Judiciary Committee](#) and ask them to vote against the amendment. As always, let us know if you have any questions. Thank you!

Attorney Communications Bill Pending

The Senate Judiciary Committee this week heard testimony on [Amendment 1251s](#) to **HB 108**, which would correct last month’s astonishing ruling by the New Hampshire Supreme Court that privileged communications between a municipality or other governmental client and its attorney may be subject to disclosure under the Right-to-Know Law. Two in-house city attorneys, one attorney who represents many towns, a representative of the attorney general’s office, and a representative from NHMA explained the devastating effect the ruling would have on municipal and state government.

If you have not yet weighed in on the issue, it is not too late. You can send an email to [the entire committee](#) and explain why it is important for local officials to be able to communicate with their attorneys in confidence. Failure to fix this problem would be disastrous, and if it is not done now, it will be another year before it can be addressed. ***In addition to the Judiciary Committee, please contact your own senator and ask that he or she support Amendment 1251s to HB 108.***

Gunfire on Town Property

The [Judiciary Committee](#) also heard testimony on **HB 307**, the bill that would prohibit municipalities from regulating the discharge of firearms on their own property. The committee heard from several city and town managers, a police chief, a representative of Manchester Water Works, and others about the bill’s bizarre consequences. Senators seemed to appreciate the problems that would arise if, for example, Manchester

Water Works had to allow target shooting and the attendant lead contamination on the thousands of acres it owns in the Lake Massabesic Watershed.

The bill's sponsor said the bill was needed to prevent municipalities from adopting a "patchwork" of gun regulations, but then said a municipality should be required to go to the legislature and request special legislation if it wants authority to prohibit shooting on a particular property. That would seem to create its own patchwork. Committee members expressed concern, and rightly so, about the prospect of having 234 municipalities petition the legislature for authority to manage their own properties.

We are cautiously optimistic that the committee will find the bill inexpedient to legislate, but it would not hurt for them to hear from more local officials. If you have not already done so, ***please ask committee members and your own senator to oppose HB 307.***

Two Right-to-Know Bills: One Good, One Bad

On Tuesday the Senate Judiciary Committee heard testimony on two bills affecting RSA 91-A:3, II(d), the Right-to-Know Law's "real estate transaction" exception. The first bill, [HB 566](#), changes the time period for which minutes of a nonpublic session for discussion of a real estate transaction are sealed (as well as clarifies that a board may enter nonpublic session for the purpose of discussing whether to unseal any sealed minutes). **HB 566** would automatically unseal the sealed minutes upon the close of the real estate transaction. This makes sense, and we support **HB 566**.

[HB 232](#), in contrast, changes the wording of the "real estate transaction" exception and, as we wrote in [Legislative Bulletin #13](#), we oppose it. The problem is that it creates a hole in the exception.

Currently, the exception allows a board to meet in nonpublic session to discuss the acquisition, sale, or lease of property which, if that discussion were to occur in public session, would benefit a party whose interests are adverse. A good example is the select board meeting to discuss the possible purchase or sale of a parcel of property. While a general discussion of the desire to explore the possibility of purchasing a parcel of property, or even the need to purchase property in order to, *e.g.*, build a new town hall would not qualify for discussion in nonpublic session, there are certain aspects that may. For example, if it became known that the select board could cobble together \$1 million to purchase a parcel, any reasonable person with a parcel meeting that description and willing to sell would not take a penny less than \$1 million. Therefore, it is appropriate and permissible for the board to have that discussion in nonpublic session.

Unfortunately, the way **HB 232** rewrites the exemption, it seems to require that an actual offer be on the table before the public body may enter nonpublic session. That means the preliminaries – how much do we have available, should we make an offer, *etc.* – do not qualify for discussion in nonpublic session. Thus, the board must, in essence, put the cart before the horse to protect that information: make an offer on a property – apparently without actually disclosing a dollar figure – in order to enter nonpublic session to discuss how much to offer. It's a bit silly to require a board to say, "we want to buy it, but we'll get back to you on the amount," but that's exactly what **HB 232** would require.

Please contact members of the [Senate Judiciary Committee](#) and ask them to vote for **HB 566** and against **HB 232**.

ARPA Funding for Cities and Towns

On Monday the United States Treasury Department issued its [guidance](#) (Interim Final Rule—“IFR”) and [FAQs](#) relative to funding for cities and towns from the American Rescue Plan Act (ARPA). There are a few important things to know about that guidance:

1. The direct funds from ARPA for cities and towns, counties, and the state are referred to as the State and Local Fiscal Recovery Funds (SLFRF).
2. New Hampshire’s five “entitlement cities” (also referred to under ARPA as “metropolitan communities”)—Manchester, Nashua, Dover, Rochester, and Portsmouth—must sign onto the Treasury’s online portal to request their SLFRF funds directly from the Treasury Department.
 - All other (229) cities and towns (referred to in ARPA as “non-entitlement units of local government”—“NEUs”) must wait for their money from the State of New Hampshire and wait for the receiving instructions (where/how to certify and who needs to certify). The Treasury Department has not yet completed the final NEU allocations or guidance. On a White House briefing earlier this week, we were told that those final allocations would be done by next week. You can use [NLC’s estimated allocation tool](#) on our website to see the amount your municipality is *estimated* to receive.
 - The state was due to receive the first installment, 50% of the SLFRF, on or by May 11. The state has 30 days to distribute the allocations to the NEUs. The balance (second installment) will be delivered 12 months later.
 - The state may not change or put additional conditions on the SLFRF for cities and towns; municipalities are entitled to their allocation, as set by the Treasury Department.
 - Eligible uses include:
 - pandemic response or its negative economic impacts
 - workforce/personnel, including payroll and hazard/premium pay
 - provision of government services to the extent of reduced revenue
 - necessary water, sewer, and broadband investment
 - Ineligible uses include:
 - deposit into a pension fund
 - deposit into rainy day funds/reserves
 - outstanding debt service
 - legal settlements
 - federal match requirements
 - Funds must be “obligated” for spending by December 30, 2024. Obligated funds must be expended by December 30, 2026.

Right now, we recommend that cities and towns get ready for receipt of their allocations by taking the following steps:

1. Start reading and digesting the 151 page [IFR](#).
2. Ensure that your municipality has a [DUNS number](#).
3. Visit the [NHMA](#), [U.S. Treasury](#), and [NLC](#) websites regularly.

NHMA’s [ARPA Information Page](#) is constantly evolving. Please check regularly for new updates and information. NHMA will be inviting NLC staff to a virtual informational webinar on SLFRF for our members in the next few weeks.

Arlington Comes to Concord

This week’s visit to Concord by Ben and Jerry (see first article) to offer their wisdom on New Hampshire legal doctrines was symptomatic of a trend that has been quite prominent this year: the nationalization of state legislation. From both sides of the political spectrum, much of the advocacy has come from out-of-state interlopers who are interested not in solving New Hampshire problems, but in advancing a national agenda, one state at a time.

This trend has been facilitated, unintentionally but unavoidably, by the remote hearing process. While that process has had the beneficial effect of allowing for participation by New Hampshire residents who might have trouble getting to Concord, it has also enabled participation by those who are far removed from New Hampshire, both in geography and in relevance. (To their credit, at least Ben and Jerry traveled to Concord in person.)

Thus, for example, at the House hearing on [HB 83](#), the bill prohibiting non-disparagement clauses in settlement agreements, the lead witness in support of the bill was a representative of the Institute for Justice, a libertarian organization based in Arlington, Virginia. On [HB 111](#)—now making a comeback as [SB 96](#), see the first article above—testimony in support came primarily from, again, the Institute for Justice and from Americans for Prosperity, also based in Arlington, Virginia (although it does have a New Hampshire chapter—and, to be fair, a representative of ACLU of New Hampshire also spoke in support).

There’s something about Arlington. On [HB 341](#), which would have required that municipalities allow certain single-family dwellings to be configured into four units, a House committee heard from yet another organization based in Arlington, Virginia—the Mercatus Center at George Mason University. It also heard from an urban planner in Portland, Oregon. (In contrast to the other bills, there were also several New Hampshire residents who testified in support of the bill.)

On [HB 544](#), the “divisive concepts” bill, the principal testimony in support came from a self-described expert on “critical race theory”—domicile not given, but definitely not in New Hampshire—who was testifying from a hotel room in Los Angeles. On [HB 266](#), the so-called “sanctuary policies” bill, testimony in support came primarily from the Federation for American Immigration Reform, based in Washington, D.C. (just outside Arlington!).

These are just a few examples of many. At least one committee chair took note of all the out-of-state speakers and kept them on a fairly short leash. We would love to see more of that, as we believe New Hampshire residents are perfectly competent to speak about matters of New Hampshire law. There are times when a national expert may have something useful to say; but if the only real support for these bills comes from out of state, maybe they really are not addressing New Hampshire problems.

HOUSE CALENDAR

All hearings will be held remotely. See the [House calendar](#) for links to join each hearing.

MONDAY, MAY 17, 2021

MUNICIPAL AND COUNTY GOVERNMENT

- 9:00 a.m. [SB 52](#), relative to municipal charter provisions for tax caps.
- 9:45 a.m. [SB 87](#), adopting omnibus legislation relative to municipal finance.
- 10:45 a.m. [SB 102](#), adopting omnibus legislation on property taxation.

TUESDAY, MAY 18, 2021

EXECUTIVE DEPARTMENTS AND ADMINISTRATION

1:30 p.m. Public Hearing on non-germane amendment #2021-1443h to **SB 155**, codifying provisions included in select emergency orders issued by the governor in response to the COVID-19 pandemic. The amendment adds a section to the bill prohibiting discrimination based on vaccination status. Copies of the amendment are available in the Sergeant-at-Arms office, Room 318, State House and on the General Court website.

JUDICIARY

9:00 a.m. Public Hearing on non-germane amendment #2021-1244h to **SB 96**, relative to implicit bias training for judges; establishing a body-worn and in-car camera fund and making an appropriation therefor; amending juvenile delinquency proceedings and transfers to superior court; and establishing committees to study the role and scope of authority of school resource officers and the collection of race and ethnicity data on state identification cards. This amendment creates a cause of action in state court for an injury to an individual caused by an agent of the state of New Hampshire, or any of its political subdivisions, which constitutes the violation of a right under state or federal law and waives the state's sovereign immunity for deprivations of an individual's rights under state or federal law. Copies of this amendment are available in the Sergeant-at-Arms office, Room 318, State House, or on the General Court website.

TRANSPORTATION

9:00 a.m. Public Hearing on non-germane amendment #2021-1442h to **SB 131-FN**, an act adopting omnibus legislation relative to vehicles, municipal water maintenance certificates, nondriver's picture identification, and firefighter and emergency medical services decals. The amendment provides the maximum weight of motor vehicles. Copies of the amendment are available in the Sergeant-at-Arms office, Room 318, State House or on the General Court website

WEDNESDAY, MAY 19, 2021

ELECTION LAW

9:30 a.m. Public Hearing on non-germane amendment #2021-1445h to **SB 89**, adopting omnibus legislation relative to election procedures and registers of probate. The amendment adds a section to the bill affirming that all procedures and requirements relating to elections conducted pursuant to the NH Constitution and state law shall remain in effect for all state and county officers notwithstanding the adoption of the 'For the People Act of 2021.' Copies of the amendment are available in the Sergeant-at-Arms office, Room 318, State House and on the General Court website.

SENATE CALENDAR

All hearings will be held remotely. See the [Senate calendar](#) for links to join each hearing.

MONDAY, MAY 17, 2021

ELECTION LAW AND MUNICIPAL AFFAIRS

9:30 a.m. **HB 291**, relative to public inspection of absentee ballot lists

SENATE FLOOR ACTION

Thursday, May 13, 2021

HB 77, requiring town and city clerks to provide daily notification to the secretary of state of any filings for elected office. **Passed with Amendment.**

HB 235, addressing impacts to other water users from new sources of water for community water systems. **Passed with Amendment.**

HB 315, relative to the aggregation of electric customers. **Passed with Amendment.**

HB 385-FN, relative to workers' compensation for heart and lung disease in firefighters. **Passed; referred to F-S.**

HB 448, establishing a committee to study and compare federal Occupational Safety and Health Act standards with the safety and health standards the New Hampshire department of labor uses for public sector employees. **Passed with Amendment.**

HB 476, relative to election officers at additional polling places. **Passed with Amendment.**

2021 NHMA UPCOMING MEMBER <u>VIRTUAL</u> EVENTS	
Weekly	Friday Membership call (1:00 – 2:00)
May 19	Webinar: Intersect: New Traffic Technology (12:00 – 1:00)
May 20	Code Enforcement (9:00 – 12:00)
May 26	ARPA Informational Session (1:30 – 2:30)
June 9	The Academy for Good Governance (5:00 – 7:00)
June 10	Municipal Trustee Introduction (9:00 – 3:00)
June 17	2021 Art of Welfare (9:00 – 1:15)
June 29	Collective Bargaining (9:00 – 12:00)
Please visit www.nhmunicipal.org for the most up-to-date information regarding our upcoming virtual events. Click on the Events and Training tab to view the calendar. For more information, please call NHMA's Workshop registration line: (603) 230-3350.	