

**Written Testimony of Keith Neely  
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February 2, 2022**

**Courts of Justice Committee  
Subcommittee #2**

**Testimony in Support of HB609**

My name is Keith Neely, and I am an attorney at the Institute for Justice (IJ). IJ is a nonprofit law firm based in Arlington that works all over the country and here in Virginia to defend individual rights.

Thank you for the opportunity to testify today regarding HB609, which waives sovereign immunity and creates a civil cause of action for violations of the constitutions of the United States and the Commonwealth of Virginia.

My testimony today will focus on the importance of modifying the doctrine of sovereign immunity to permit victims of government misconduct to be made whole through civil litigation. This is important not just for victims of government misconduct, but also for proponents of responsible government generally.

Laudably, this legislation accomplishes this objective while providing robust safe harbor protections for individual government workers. By holding government employers accountable for the constitutional violations of their employees, victims of government misconduct can be made whole without bankrupting government workers.

In support of HB609 and as an exhibit to my testimony, I include an excerpt from IJ's recently released report, *50 Shades of Government Immunity*. In that report, IJ carefully documented and evaluated the ability of individuals to vindicate their constitutional rights under state law in all 50 states. Based on our research and standardized grading methodology, Virginia received a D grade. Grades for the other 49 states are also attached.

HB609, by providing an express statutory remedy for violations of Virginians' constitutional rights, would go a long way towards improving Virginia's grade. Indeed, its passage would instantly make Virginia a national leader on the protection and vindication of constitutional rights.

For these reasons, and for the reasons I mention in my oral testimony, I wholeheartedly encourage the committee to move forward with HB609.

# Virginia

D

Virginia earns a D for its immunity and accountability practices.

## QUICK FACTS



**Can you sue for damages directly under the state constitution?**

**Yes.**

If it's a damages action against the taking of private property without just compensation. *Kitchen v. City of Newport News*, 657 S.E.2d 132, 140 (Va. 2008).



**Can you sue under a state civil rights statute?**

**No.**

There is no Section 1983 analogue in Virginia.



**Can you sue under a state tort claims act?**

**Yes.**

The Virginia Tort Claims Act waives sovereign immunity for damage to or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee while acting within the scope of his employment.



## Are there exceptions to the state tort claims act?

# Yes.

Virginia counties and municipalities enjoy broad immunity. Government employees are personally liable for their intentional torts but enjoy common-law discretionary immunity for negligence torts.

## Virginia Tort Claims Act

The Virginia Tort Claims Act (“VTCA”) waives sovereign immunity for “damage to or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee while acting within the scope of his employment under circumstances where the Commonwealth or transportation district, if a private person, would be liable to the claimant for such damage, loss, injury or death.”<sup>1</sup> The VTCA goes on to provide an enumerated list of exceptions to this waiver.<sup>2</sup> By its express terms, the VTCA excludes counties, cities, and towns from its limited abrogation of immunity.<sup>3</sup> Virginia counties and municipalities generally remain immune for the torts of their employees.<sup>4</sup> Virginia is in the dwindling minority of jurisdictions that continue to immunize municipalities in the exercise of governmental functions.<sup>5</sup>

## Think Intentional Torts, Not Constitutional Rights

Government employees may be personally liable for their intentional torts, but they enjoy common-law discretionary immunity for negligence claims.<sup>6</sup> To determine whether this discretionary immunity applies, Virginia courts weigh the following factors: “(1) the nature of the function performed by the employee; (2) the extent of the state’s interest and involvement in the function; (3) the degree of control and direction exercised by the state over the employee; and (4) whether the act complained of involved the use of judgment and discretion.”<sup>7</sup>

Virginia offers yet another layer of immunity for emergency situations by providing immunity for government entities and employees “complying with or attempting to comply with” its emergency services law.<sup>8</sup> Note, however, that government employees can be liable in these situations when there is “willful misconduct.”<sup>9</sup>

1. Va. Code Ann. § 8.01-195.3.[↑\[Back to Text\]](#)

2. Id.[↑\[Back to Text\]](#)

3. Id. (“[N]or shall any provision of this article be applicable to any county, city or town in the Commonwealth or be so construed as to remove or in any way diminish the sovereign immunity of any county, city or town in the Commonwealth.”).[↑\[Back to Text\]](#)

4. Seabolt v. County of Albemarle, 724 S.E.2d 715 (Va. 2012).[↑\[Back to Text\]](#)

5. City of Chesapeake v. Cunningham, 604 S.E.2d 420 (Va. 2004).[↑\[Back to Text\]](#)

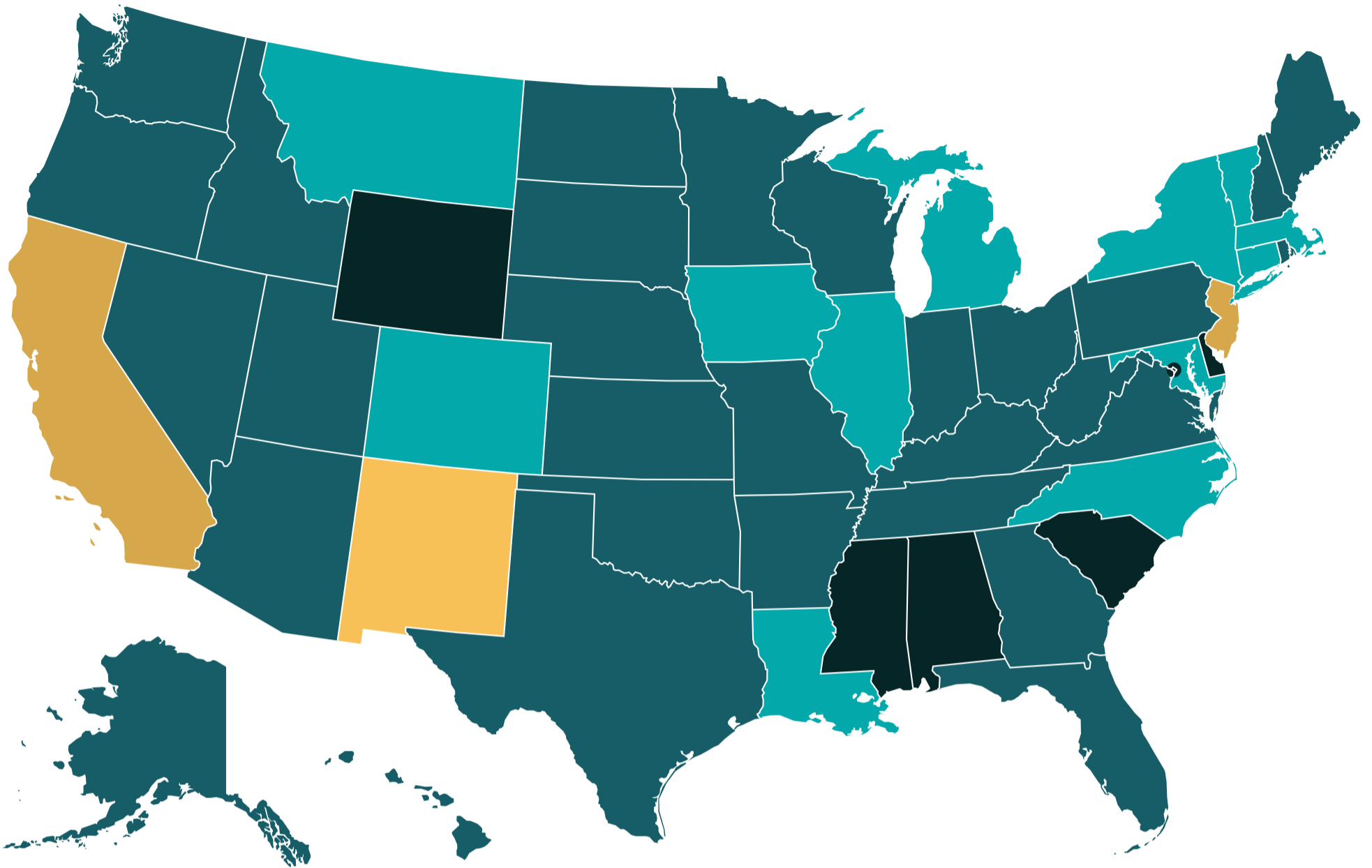
6. Tomlin v. McKenzie, 468 S.E.2d 882, 884 (Va. 1996); see also Cunningham v. Rossman, No. CL10–014 2010 WL 7373694, at \*4 (Va. Cir. Ct. 2010).[↑\[Back to Text\]](#)

7. Cunningham, 2010 WL 7373694, at \*4.[↑\[Back to Text\]](#)

8. Va. Code Ann. § 44-146.23.[↑\[Back to Text\]](#)

9. Id.[↑\[Back to Text\]](#)

# State Grades



As Bs Cs Ds Fs

## State and Territory Grades

State	Grade
<a href="#">Alabama</a>	F
<a href="#">Alaska</a>	D
<a href="#">Arizona</a>	D
<a href="#">Arkansas</a>	D
<a href="#">California</a>	B -
<a href="#">Colorado</a>	C +
<a href="#">Connecticut</a>	C
<a href="#">Delaware</a>	F
<a href="#">District of Columbia</a>	F
<a href="#">Florida</a>	D -

<b>State</b>	<b>Grade</b>
<a href="#">Georgia</a>	D -
<a href="#">Guam</a>	D -
<a href="#">Hawaii</a>	D -
<a href="#">Idaho</a>	D -
<a href="#">Illinois</a>	C -
<a href="#">Indiana</a>	D +
<a href="#">Iowa</a>	C -
<a href="#">Kansas</a>	D +
<a href="#">Kentucky</a>	D -
<a href="#">Louisiana</a>	C -
<a href="#">Maine</a>	D +
<a href="#">Maryland</a>	C -
<a href="#">Massachusetts</a>	C +
<a href="#">Michigan</a>	C -
<a href="#">Minnesota</a>	D
<a href="#">Mississippi</a>	F
<a href="#">Missouri</a>	D -
<a href="#">Montana</a>	C +
<a href="#">Nebraska</a>	D -
<a href="#">Nevada</a>	D
<a href="#">New Hampshire</a>	D -
<a href="#">New Jersey</a>	B -
<a href="#">New Mexico</a>	A -
<a href="#">New York</a>	C
<a href="#">North Carolina</a>	C +
<a href="#">North Dakota</a>	D -
<a href="#">Northern Mariana Islands</a>	F
<a href="#">Ohio</a>	D
<a href="#">Oklahoma</a>	D -
<a href="#">Oregon</a>	D +
<a href="#">Pennsylvania</a>	D +
<a href="#">Puerto Rico</a>	D -
<a href="#">Rhode Island</a>	D +

<b>State</b>	<b>Grade</b>
<a href="#">South Carolina</a>	F
<a href="#">South Dakota</a>	D -
<a href="#">Tennessee</a>	D -
<a href="#">Texas</a>	D
<a href="#">Utah</a>	D +
<a href="#">Vermont</a>	C -
<a href="#">Virgin Islands</a>	D
<a href="#">Virginia</a>	D
<a href="#">Washington</a>	D +
<a href="#">West Virginia</a>	D
<a href="#">Wisconsin</a>	D
<a href="#">Wyoming</a>	F