

To: Richmond Selectboard
From: The Vermont chapters of the ACLU and the NLG
Re: Proposed Fair and Impartial Policing Policy
Date: December 7, 2020

Dear Richmond Selectboard:

We write to you on behalf of a group of Richmond residents who have asked for a letter clarifying the ability of this Board to pass an enhanced Fair and Impartial Policing Policy. Our organizations are well-versed with this process, having assisted with the drafting and adoption of similar and identical policies by municipal lawmakers across this state, including: Winooski, Burlington, Norwich, and Hartford. With appreciation for the diligence you put into the decisions you make on behalf of your constituents, we would like to offer the following clarifications of a few misconceptions that some members of the Richmond community seem to have regarding the Board's authority to pass this document.

- 1. Both the Selectboard and the Police Chief may adopt policing policies, but the ultimate source of municipal Police authority comes from the Selectboard and thus the Police Chief may only draft policies within the bounds of the grant of authority from the Selectboard.**

The State legislature decreed that local lawmaking bodies are the ultimate source of authority over municipal police departments, subject to state legislative limitations. 24 V.S.A. § 1931(a) ("The legislative body ... of a municipality ... may establish a police department and ... shall specify the term and duties of such officers").

Within the limits and subject to the directives that the state and local lawmakers place on police authority, police are then free to adopt their own regulations. 24 V.S.A. § 1931(b) provides that "[t]he direction and control of the entire police force, *except as otherwise provided*, shall be vested in the chief of police." The "except as otherwise provided" limitation encompasses any limits or specifications from state and local lawmakers, for example regarding what laws exist and how police should enforce them.

The municipality sets the "term and duties" of these officers, and the police chief may establish policies to carry out the duties prescribed by the legislative body. The police department's authority comes *from* the state and municipal legislative bodies and thus any policies or procedures the police chief passes must comply with any enabling or limiting legislation from the source of this authority.

For example, while 20 V.S.A. § 2366 mandates that police pass the state minimum Fair and Impartial Policing Policy and permits police to pass more protective policies if they so choose, this statute does not by any means remove the inherent authority of a municipality to prescribe the duties and terms of its police, including by prohibiting unfair or biased policing. Permitting police to pass additional regulations in line with the intent of 20 V.S.A. § 2366 does not equate to giving police the authority to override state and local regulations or to refuse to abide by other lawful municipal legislation limiting the scope or duties of police.

Police chiefs cannot supersede state or municipal legislative authority when adopting department policy. This would elevate the police chief to a position of universal authority to both create *and* enforce laws - an egregious violation of the Separation of Powers doctrine¹ that this country was built on.

¹ "The Legislative, Executive, and Judiciary departments, shall be separate and distinct, so that neither exercise the powers properly belonging to the others." VT Const. Ch. 2 § 5.

2. Complying with an enhanced Fair and Impartial Policing Policy would not subject Richmond law enforcement officers to any state or federal penalties because the federal government cannot impose a duty on state or local officers to enforce federal law.

Law enforcement officers would **not** violate any state or federal law by complying with an enhanced Fair and Impartial Policing Policy prohibiting police from assisting in civil or criminal federal immigration enforcement. No federal or Vermont law exists *requiring* local police to enforce federal immigration laws.

State law establishes criminal penalties for any “officer who willfully neglects to perform the duties imposed upon them by law, either express or implied.” 13 V.S.A. § 3006. In order for an officer’s compliance with a FIPP to violate 13 V.S.A. § 3006, the FIPP must prohibit that officer from performing duties expressly or implicitly assigned and required by law. The FIPP prohibits no duty that any law requires state or municipal law enforcement to perform.

In fact, the federal constitution *guarantees* that state and local governments cannot be given a legal duty to enforce areas of purely federal law such as immigration.² While a state or local police officer *may* permissibly enforce federal *criminal* immigration laws under certain circumstances, local and state officers lack authority to enforce federal *civil* immigration laws. Most importantly, regardless of whether a federal law is civil or criminal, *the federal government cannot impose a duty on state and local government agents to enforce federal laws*. This is a foundational tenet of constitutional law, derived from the 10th Amendment and affirmed by ample Supreme Court precedent outlining the Anti-commandeering Doctrine.

Furthermore, police have a generalized duty to enforce the law, but this duty does not require police to enforce every single violation of a law for which they have probable cause or reasonable suspicion. This would be ludicrous, and would result in police arresting hundreds of people for jaywalking or other nominal offenses. Ample precedent exists for the principle that the municipal law-making body, as the source of governing authority for the law enforcement in that jurisdiction, may pass laws to regulate police conduct that otherwise might be within the scope of law enforcement discretion. See, for example, scores of policies in response to the COVID-19 pandemic removing police officers’ prior discretion over whether to make arrests and replacing that with a mandate to cite and release people for certain offenses.³ Police, when abiding by a policy which restricts their authority over whether to make arrests, do not now “neglect their duty” when previously the decision to cite or arrest was a matter of their own discretion.

No law or duty obliges a police officer to arrest every single person who might otherwise be cited or not apprehended at all. A police officer does not break a law simply for not arresting someone else who does.

² The anti-commandeering doctrine of the 10th Amendment to the United States Constitution **prohibits** the federal government from harnessing the power of the states (including municipal governments and government officials) to enforce federal statutory schemes. Immigration is exclusively a matter of federal law. See, e.g. *Printz v. United States*, 521 U.S. 898 (1997) and *New York v. United States*, 505 U.S. 144 (1992).

³ E.g. [www.statesman.com/news/20200422/san-marcos-becomes-1st-texas-city-to-ok-cite-and-release-law](http://www.statesman.com/news/20200422/san-marcos-becomes-1st-texas-city-to-ok-cite-and-release-law;);
<https://abcnews.go.com/US/police-implement-sweeping-policy-prepare-coronavirus-spread/story?id=69672368>

Please do not hesitate to reach out if you have any further questions.

Sincerely,

/s/ Kira Kelley

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A handwritten signature in black ink, appearing to read 'LE', with a stylized flourish at the end.

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