City and County Government Seminar
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"Back the Blue"

David J. Canupp

Lanier Ford Shaver & Payne P.C.

2101 West Clinton Avenue, Suite 102

Huntsville, AL 35805

256-535-1100

DJC@LanierFord.com

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Agenda

- Overview of existing immunities applicable to state and local governments and their employees.
- Review of pending legislation, *i.e.* "**Back the Blue**" (**HB202**)
- Potential impacts on existing immunity protections, discovery, Open Records requests, etc.

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Overview of Pertinent State Law Immunities

“State” Immunity

Art. I, § 14, Alabama Constitution of 1901 (now 2022):

“The State of Alabama shall never be made a defendant in any court of law or equity.”

- The State’s immunity is not subject to waiver and is a “jurisdictional bar – it strips courts of all power to adjudicate claims against the State, even if the State has not raised immunity as a defense.” Ex parte Pinkard, 33 So. 3d 192, 198-99 (Ala. 2022).

Art. V, § 112, Alabama Constitution of 1901 (now 2022):

“The executive department shall consist of a governor, lieutenant governor, attorney general, state auditor, secretary of state, state treasurer, superintendent of education, commissioner of agriculture and industries, and a sheriff for each county.”

- The state’s sovereign immunity also extends to all state officials and officers. Ex parte Troy University, 961 So. 2d 105, 108 (Ala. 2006).

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State Immunity Extended to Sheriffs and their Deputies

- Because a county sheriff is an executive officer of the State of Alabama, he is entitled to "unwaivable, absolute immunity from suit in any court." Ex parte Burnell, 90 So. 2d 708, 710 (Ala. 2012).
- Absolute immunity extends to actions against a sheriff in his individual capacity for acts performed in the line and scope of his duty. Suttles v. Roy, 75 So. 3d 90, 94 (Ala. 2010).
- State sheriff's immunity extends to a **deputy sheriff** because he operates as the sheriff's "alter ego". Gaines v. Smith, 379 So.3d 411, 418 (Ala. 2022); see also Wright v. Bailey, 611 So. 2d 300, 303 (Ala. 1992) (because the sheriff was immune for alleged failure to arrest the deputies were immune as well).
- "Because a sheriff is a state officer and thus immune from suit," any statute or decree making "a sheriff civilly liable for acts of his jailer" would be unconstitutional. Parker v. Amerson, 519 So. 2d 442, 446 (Ala. 1987).

No State Immunity for Jailers

The Sheriff's constitutional immunity does NOT apply to an unsworn **jailer**.

- "None of this Court's cases have extended the State immunity afforded a sheriff to any sheriff's employees other than deputy sheriffs. We decline to extend State immunity beyond that limit in this case."

Ex parte Shelley, 53 So. 3d 887, 897 (Ala. 2009).

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Jailer Liability Protection Act

- In 2011, the Alabama Legislature adopted the Jailer Liability Protection Act to extend immunity denied by Ex parte Shelley.
- The law purports to extend the Sheriff's ***state*** immunity to jailers subject to the jailer "acting in compliance with the law."
- Ala. Code § 14-6-1 provides that jailers acting

  "under the direction and supervision of the sheriff . . . shall be entitled to the same immunities and legal protections granted to the sheriff under the general laws and the Constitution of Alabama of 1901, as long as such persons are acting within the line and scope of their duties and are acting in compliance with the law."

  Ala. Code § 14-6-1

Jailer Liability (cont.)

- As the Eleventh Circuit noted earlier this year:
  - **"State immunity—at least as previously applied to sheriffs and their deputies—carries no similar requirement"** to that imposed by the Jailer Liability Act codified at Ala. Code 14-6-1.

Donald v. Norris, 131 F.4th 1255, 1268 (11th Cir. 2025) (citing Poiroux v. Rich, 150 So. 3d 1027, 1038 (Ala. 2014) ("Suits against [sheriffs] for actions taken in the line and scope of their employment inherently constitute actions against the State, and such actions are prohibited by § 14.") (quoting Ex parte Donaldson, 80 So. 3d 895, 898 (Ala. 2011).

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Purported Limitations on Liability of Deputies

- In 2011, the Legislature enacted Ala. Code 36-22-3, which purported to recognize the longstanding extension of the Sheriff's Section 14 absolute sovereign immunity to deputies, but added this notable limitation:
  - "Persons undertaking such duties for and under the direction and supervision of the sheriff shall be entitled to the same immunities and legal protections granted to the sheriff under the general laws and the Constitution of Alabama of 1901, as long as he or she is acting within the line and scope of his or her duties and is acting in compliance with the law." Ala. Code § 36-22-3(b).
  - It is questionable, ***at best***, whether the Legislature can remove constitutional immunity by statutory enactment.

Further Cracks in the Section 14 Wall

- Currently before the Alabama Supreme Court is a challenge to the absolute immunity conferred upon deputies pursuant to Section 14.
- The plaintiffs and the Alabama Association for Justice have argued that "Section 14 of the Alabama Constitution does not provide super immunity." See Amicus Brief of Alabama Association for Justice, Underwood v. Long, SC-2024-0263.
- The case was orally argued on April 2.
- ADLA submitted a brief in support of Sheriff Underwood and his deputy.

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Cracks in the Section 14 Wall (cont.)

- The argument tracks a recent decision of Judge Anne Marie Axon in the NDAL, in which she held that –
  - "Nothing in the text of Article I, § 14 distinguishes between "constitutional officers" and other state agents, officers, and employees. And nothing in the text of Article V, § 112's enumeration of the members of the State's executive department supports this "super" immunity to which other state officials are not entitled. There is no constitutional basis for broadening state immunity for "constitutional officers" in claims brought against them in their individual capacity." **King v. Moon, 697 F. Supp. 3d 1273, 1277–79 (N.D. Ala. 2023)**
  - She further held that following the Alabama Supreme Court's opinion in Ex parte Pinkard, "a state officer's entitlement to state immunity depends on whether the plaintiff seeks relief from the State. Ex parte Pinkard, 373 So.3d at 199–200; *see also Ex parte Cooper*, —— So. 3d ——, ——, 2023 WL 5492465, at *4 (Ala. 2023). Ms. King seeks money damages from these defendants in their individual capacities. Accordingly, they are not entitled to state immunity." **King, 697 F. Supp. 3d at 1279-80.**

"Municipal" Immunity

- Ala. Code 11-47-190
- Enacted in its current form in 1994 (with roots back many years prior.
- Not widely recognized as an "immunity" per se until Ex parte City of Muscle Shoals, 257 So. 3d 850, 855 (Ala. 2018).
- In fact, in its early years, 11-47-190 was recognized as the *abolition* of another, purer form of "municipal immunity."
- Now, the understanding of 11-47-190 is entrenched in the case law.
  - Ex parte City of Muscle Shoals, No. SC-2024-0524, 2025 WL 939487, at *8 (Ala. Mar. 28, 2025)
  - Ex parte City of Huntsville, 399 So. 3d 1020, 1031 (Ala. 2024)
  - Ex parte City of Tuskegee, 295 So. 3d 625, 627 (Ala. 2019)

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“Municipal” Immunity (cont.)

In Ex parte City of Huntsville, 399 So. 3d 1020, 1026 (Ala. 2024), we recently stated:

“This Court explained in Ex parte City of Muscle Shoals[, 257 So. 3d 850 (Ala. 2018),] that this statute has long been held to limit municipal liability to two situations. 257 So. 3d at 855. **First**, municipalities may be liable for injuries caused by the wrongful conduct of their agents performed in the line of duty. **Second**, municipalities may be liable for injuries caused by their failure, upon notice, to remedy defects in public streets or buildings. Id.”

Therefore, under § 11-47-190, the City may not be liable for the plaintiffs’ injuries unless their claims fall within one of these two situations.

Ex parte City of Muscle Shoals, No. SC-2024-0524, 2025 WL 939487, at *8 (Ala. Mar. 28, 2025)

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County Immunity

- **Nope, sorry!**
  - "There is no county counterpart statute to § 11-47-190 which limits the liability of counties to negligence-based claims. Accordingly, unlike municipalities, Alabama counties may have liability for intentional, as well as negligence based, claims of county employees."

    George W. Royer, Jr., **State Law Local Governmental Liability A Primer**, 61 Ala. Law. 256, 257 (2000)

  - However, bear in mind that under **Parker v. Amerson**, "[a] sheriff is not an employee of a county for purposes of imposing liability on the county under a theory of *respondent superior*."

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County Immunity (cont.)

- Substantive immunity applies to cities and counties.
- *Ante litem* notice of claim requirements exist for cities and counties.
- Damages caps exist for cities and counties (but not for employees sued in their individual capacities, see Suttles v. Roy, Morrow v. Caldwell, and Ex parte Pinkard)
- Discretionary function immunity (immunity derived by virtue of the *respondeat superior* doctrine, which recognizes a master cannot be held liable when the servant is immune, see Hollis v. City of Brighton)

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“State-Agent” / Discretionary Function Immunity

- State-agent immunity is often referred to as “discretionary function” immunity.
- “Discretionary function immunity is just what its label implies: immunity from tort liability afforded to public officials acting within the general scope of their authority in performing functions that involve a degree of discretion.”

  Ex parte Estate of Reynolds, 946 So. 2d 450, 454 (Ala. 2006).

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"State-Agent" Immunity (cont.)

- Historically, under Alabama law, "'discretionary function' immunity from tort liability is afforded to public officials acting within the general scope of their authority in performing functions that involve a degree of discretion. The source of this doctrine of discretionary function immunity is § 895D *Restatement (Second) of Torts* which governs immunity from tort liability of public officers."

  George W. Royer, Jr., **State Law Local Governmental Liability A Primer**, 61 Ala. Law. 256, 259 (2000)

“Peace Officer” Immunity

- Ala. Code 6-5-338(a) confers immunity upon law enforcement officers and “tactical medics” employed by any governmental entity authorized to so employ these officers, including the state, municipalities, and counties (even though counties don’t have law enforcement officers).
- Ala. Code 6-5-338(b) extends that immunity to the state, municipalities, and counties.
- The immunity extends to “performance of any discretionary function within the line and scope of his or her law enforcement duties.” 6-5-338(a).

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Cranman Immunity

- In 2000, the Supreme Court decided Ex parte Cranman, 792 So. 2d 392 (Ala. 2000). The decision re-affirmed state-agent / discretionary function immunity and attempted to summarize the doctrine into an almost-statute-like series of rules.
- Because Cranman was a plurality decision, the Supreme Court adopted its new rubric in Ex parte Butts, 775 So. 2d 173, 177-78 (Ala. 2000).
- The Supreme Court has further held that "[t]he restatement of State-agent immunity as set out by this Court in Ex parte Cranman ... governs the determination of whether a **peace officer** is entitled to immunity under § 6-5-338(a)." Ex parte City of Montgomery, 99 So.3d 282, 292 (Ala. 2012).

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Cranman Immunity (cont.)

A State agent *shall* be immune from civil liability in his or her personal capacity when the conduct made the basis of the claim against the agent is based upon the agent's

(1) formulating plans, policies, or designs; or

(2) exercising his or her judgment in the administration of a department or agency of government, including, but not limited to, examples such as:

(a) making administrative adjudications;

(b) allocating resources;

(c) negotiating contracts;

(d) hiring, firing, transferring, assigning, or supervising personnel; or

(3) discharging duties imposed on a department or agency by statute, rule, or regulation, insofar as the statute, rule, or regulation prescribes the manner for performing the duties and the State agent performs the duties in that manner; or

(4) exercising judgment in the enforcement of the criminal laws of the State, including, but not limited to, law-enforcement officers' arresting or attempting to arrest persons; or

(5) exercising judgment in the discharge of duties imposed by statute, rule, or regulation in releasing prisoners, counseling or releasing persons of unsound mind, or educating students.

Ex parte Cranman, 792 So. 2d 392, 405 (Ala. 2000), holding modified by Hollis v. City of Brighton, 950 So. 2d 300 (Ala. 2006)

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Cranman Immunity (cont.)

Notwithstanding anything to the contrary in the foregoing statement of the rule, a State agent *shall not* be immune from civil liability in his or her personal capacity

(1) when the Constitution or laws of the United States, or the Constitution of this State, or laws, rules, or regulations of this State enacted or promulgated for the purpose of regulating the activities of a governmental agency require otherwise; or

(2) when the State agent acts willfully, maliciously, fraudulently, in bad faith, beyond his or her authority, or under a mistaken interpretation of the law.

Ex parte Cranman, 792 So. 2d 392, 405 (Ala. 2000), holding modified by Hollis v. City of Brighton, 950 So. 2d 300 (Ala. 2006)

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Cranman Immunity (cont.)

- Despite all appearances, the Supreme Court has repeatedly cautioned that "Cranman is a restatement of the law of immunity, **not a statute**." Howard v. City of Atmore, 887 So. 2d 201, 206 (Ala. 2003).
- In theory, the so-called Cranman categories are flexible and encompass a broad suite of enumerated and unenumerated discretionary actions." Garcia v. Casey, 75 F.4th 1176, 1191 (11th Cir. 2023).
  - Side note: I've written separately in the ADLA Journal about my issues with Cranman. More here - https://lanierford.com/images/NewsPDFs/Beyond-Authority-Exception-to-Cranman-Immunity.pdf

Cranman Immunity (cont.)

" 'This Court has established a "burden-shifting" process when a party raises the defense of State-agent immunity.' Ex parte Estate of Reynolds, 946 So. 2d 450, 452 (Ala. 2006).

A State agent asserting State-agent immunity 'bears the burden of demonstrating that the plaintiff's claims arise from a function that would entitle the State agent to immunity.' 946 So. 2d at 452.

Should the State agent make such a showing, the burden then shifts to the plaintiff to show that one of the two categories of exceptions to State-agent immunity recognized in Cranman is applicable."

Ex parte Kennedy, 992 So. 2d 1276, 1282 (Ala. 2008).

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Cranman Immunity (cont.)

- Cranman litigation has for the past 25 years centered on two basic requirements:
  - Is the function one that arises from some level of **discretion** granted to the employee as a part of their job?
  - Did the employee violate some sort of **policy, procedure, or rule** imposed by their employer?
  - Did the employee act "**beyond their authority**" or **willfully/intentionally** in violation of the law?

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Cranman Immunity (cont.)

- A few basic premises have emerged from that litigation:
  - An employee is unlikely to receive immunity for non-discretionary activities such as driving an automobile.
    - Ex parte City of Huntsville ("Because Lewis has cited no authority indicating that, by obeying traffic laws, a municipal bus driver is properly considered a State agent performing her duties in the manner prescribed by statutes, rules, or regulations imposed on a State department or agency, we conclude that she has not" established entitlement to immunity)
    - But see Ex parte City of Montgomery (police officers entitled to immunity in connection with discretionary decisions as to how to utilize the emergency vehicle driving privileges conferred by Ala. Code 32-5A-7)
  - The commission of an ***intentional*** tort such as defamation will likely result in denial of immunity.
    - Ex parte Pinkard, Gary v. Crouch, Garcia v. Casey

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Cranman Immunity (cont.)

- **Mere negligence or wantonness** will not deprive a state-agent of immunity.
  - "This Court has previously held that poor judgment or wanton misconduct, an aggravated form of negligence, does not rise to the level of willfulness and maliciousness necessary to put the State agent beyond the immunity recognized in Cranman. See Giambrone [v. Douglas], 874 So.2d [1046,] 1057 [(Ala. 2003)](holding that State-agent immunity 'is not abrogated for negligent and wanton behavior; instead, immunity is withheld only upon a showing that the State agent acted willfully, maliciously, fraudulently, in bad faith, or beyond his or her authority')."

    Ex parte Randall, 971 So.2d 652, 664 (Ala. 2007).

- Likewise, even **recklessness** will not deprive a state-agent of Cranman immunity.
  - Ex parte Pinkard, 373 So.3d 192, 202 (Ala. 2022) (holding that the "malice exception to State-agent immunity cannot be triggered merely because the agent acted negligently **or even recklessly; instead, the agent must have acted 'with a design or purpose of inflict injury without reasonable justification**").

Critiques of Cranman

- While mere negligence or even recklessness or wantonness will not erase entitlement to state-agent immunity, the "beyond authority" exception removes immunity any time a departmental rule is violated, even if innocently or negligently.
  - Ex parte Watson, 37 So. 3d 752, 761 (Ala. 2009) (denying immunity to DHR child abuse investigator who failed to conduct home visit but argued that she checked on child in other ways, where rule required home visit)
  - Compare to qualified immunity, in which the federal courts recognize that "arguable" probable cause is enough for immunity – meaning "close enough" applies, and a measure of grace is given to officers.

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Critiques of Cranman (cont.)

- While Cranman purports to be flexible in terms of what acts are discretionary, it doesn't always seem that way in practice.
  - Ex parte City of Huntsville, 399 So.3d 1020 (Ala. 2024) (rejecting bus driver's argument that she had discretion conferred by *advisory* speed sign and confining analysis to "the applicability of the third Cranman category")
- Cranman seems to place much more emphasis on whether an act is "discretionary" than does the law of qualified immunity.
  - Under federal law, "[t]he inquiry is not whether it was within the defendant's authority to commit the allegedly illegal act. Framed that way, the inquiry is no more than an 'untenable' tautology. Instead, a court must ask whether the act complained of, if done for a proper purpose, would be within, or reasonably related to, the outer perimeter of an official's discretionary duties." Harbert Int'l, Inc. v. James, 157 F.3d 1271, 1282 (11th Cir. 1998)
  - Alabama's greater emphasis on the existence of discretion on the specific task in question calls into question the Eleventh Circuit's pronouncement that "[t]he Alabama Supreme Court has largely equated qualified immunity with discretionary-function immunity." Hunter v. City of Leeds, 941 F.3d 1265, 1284 (11th Cir. 2019).

Critiques of Cranman (cont.)

- The Eleventh Circuit has held that: "Under both Alabama law and federal law, the core issue is whether a defendant violated clearly established law." Cantu v. City of Dothan, 974 F.3d 1217, 1236 (11th Cir. 2020) –
  - But Alabama cases rarely focus on "clearly established law."
  - Instead the analysis often looks only to whether a departmental rule was violated, or whether the state agent acted willfully or in "bad faith," which is much more subjective than looking to whether on point case law ruled the specific type of conduct unlawful in the situation at hand.
    - Compare Spencer v. Benison, 5 F.4th 1222, 1230 (11th Cir. 2021) ("After a government official establishes that he was acting within the scope of his discretionary authority, the burden shifts to the plaintiff to show that the official's conduct (1) violated federal law (2) that was clearly established at the relevant time.")

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Critiques of Cranman (cont.)

- Under federal law, the "clearly established" inquiry is much more objective –

A right may be clearly established for qualified immunity purposes in one of three ways: (1) case law with indistinguishable facts clearly establishing the constitutional right; (2) a broad statement of principle within the Constitution, statute, or case law that clearly establishes a constitutional right, or (3) conduct so egregious that a constitutional right was clearly violated, even in the total absence of case law.

***Lewis v. City of West Palm Beach*, 561 F.3d 1288, 1291-92 (11th Cir. 2009)**

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Critiques of Cranman (cont.)

- And under federal law, immunity is resolved at the beginning of a case, BEFORE discovery.
  - "Facial challenges to the legal sufficiency of a claim or defense, such as a motion to dismiss based on failure to state a claim for relief, should . . . be resolved *before* discovery begins." Chudasama v. Mazda Motor Corp., 123 F.3d 1353, 1367 (11th Cir. 1997) (emphasis added).
  - "[I]f the defendant does plead the immunity defense, the district court should resolve that threshold question before permitting discovery." Crawford-El v. Britton, 523 U.S. 574, 598 (1998).
- But many plaintiffs' lawyers attempt to circumvent Cranman immunity by stating that they need discovery into relevant internal policies or procedures, or by simply alleging the conduct was "in bad faith."
  - The Alabama Supreme Court has held that "it is the rare case involving the defense of State-agent immunity that would be properly disposed of by a dismissal pursuant to Rule 12(b)(6)." Ex parte Gilland, 274 So. 3d 976, 985 (Ala. 2018).

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“Back the Blue”

HB 202

Gov. Ivey's "Safe Alabama" Package

- Announced by Gov. Ivey at the February 2025 State of the State Address as a part of her "Safe Alabama" package of bills.
- Introduced by Representative Rex Reynolds, former Chief of Police for the City of Huntsville.
- Would replace the Cranman judicial doctrine with a statutory framework specific to law enforcement officers, and would repeal and replace Ala. Code 6-5-338 (the peace officer immunity statute), but also apparently retain common law immunity protections.
- Would NOT affect Cranman as it applies to **non-law enforcement** personnel.
- As summarized by the Governor's Office, the Back the Blue bill would –
  - Repeal the existing peace-officer immunity law and replace it with expanded civil liability protections for law enforcement officers performing their official duties, including detention officers and public safety dispatchers.
  - Under this new protection, a law enforcement officer would be shielded from a lawsuit unless he or she was acting "recklessly without law enforcement justification" or he or she was violating a person's clearly established rights.
  - Immunize a police officer from criminal prosecution for on-the-job use of force unless his or her conduct violates a person's constitutional rights against excessive force.
  - Establish civil and criminal procedures designed to stay legal proceedings while the officer seeks to establish the protections afforded under the new law.

Overview of Back the Blue

- Repeals Ala. Code 6-5-338 and replaces it with four code sections:
  - 6-5-338.1 – definitions
  - 6-5-338.2 – immunity protections
  - 6-5-338.3 – appellate remedies
  - 6-5-338.4 – limitations on immunity, and reservation of common law immunity preserved
- Re-writes criminal immunity protections from Stand Your Ground law in sections 13A-3-20, 13A-3-27, and 13A-3-28.
- Modifies 14-6-1 and 36-22-6 (both relating to Sheriffs' Jailers and Deputies) to improve constitutional and statutory immunity protections.

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* All Text Subject to Change *

- This analysis tracks HB 202, which is now before the Senate for further consideration and potential changes.
- Alabama Association for Justice, as well as the League of Municipalities and the Association of County Commissions, have been involved in discussions surrounding the bill.
- Last publicly-available update to law is HB 202, which has a date of March 6, 2025.

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Section 6-5-338.1 – More Inclusive

- Updates the definition of ”peace officer” to the broader “law enforcement officer” and specifically includes:
  - **Detention facility officers**
    - Any peace officer, guard, or detention or jail officer employed in a facility used for the confinement, pursuant to law.
    - Whether sworn or NOT, correcting a previous gap in the law for municipal jailers.
  - **Public safety dispatchers**
    - Undefined, but included in the definition of law enforcement, correcting a previous gap in the law for unsworn dispatchers.

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Section 6-5-338.2 – the Heart of Back the Blue

(a) Except as provided in subsection (b), a law enforcement officer shall be immune from any claim that seeks to impose civil liability on the law enforcement officer for conduct performed within a law enforcement officer's discretionary authority.

(b) A law enforcement officer shall **not** be immune in either of the following circumstances:

(1) The conduct constitutes a tort against the plaintiff that is actionable under the laws of this State and the law enforcement officer acted recklessly without law enforcement justification.

(2) The conduct constitutes a tort against the plaintiff that is actionable under the laws of this State and the conduct violated a clearly established state statutory or constitutional right of the plaintiff of which every reasonable law enforcement officer would have known at the time of the law enforcement officer's conduct.

(c) Notwithstanding the exceptions to immunity provided in subsection (b), the immunity provided in Section 36-1-12(c) remains available to a law enforcement officer subject to the exceptions set forth in Section 36-1-12(d) and subject to the provisions of this section, Section 6-5-338.3, and Section 6-5-338.4. A law enforcement officer is an officer, agent, or employee of the state for purposes of Section 36-1-12.

Discretionary Authority

- Section 6-5-338.1(2) finally brings us in line with federal case law, clarifying that "government conduct by a law enforcement officer performing a legitimate job-related function or pursuing a legitimate job-related goal through means that were within the law enforcement officer's plausible power to utilize" are discretionary acts.
- Tells courts that in applying the test, they "must temporarily put aside that the conduct may have been committed for an improper or unconstitutional purpose, in an improper or unconstitutional manner, to an improper or unconstitutional extent, or under improper or constitutionally inappropriate circumstances."
- All that matters is whether the conduct, assuming "done for a proper purpose," would fall "within, or reasonably related to, the outer perimeter of the law enforcement officer's government discretion in performing his official duties."

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Recklessly without law enforcement justification

- Per the definitions in Section 6-5-338.1:
  - A law enforcement officer acts recklessly without law enforcement justification if he or she is aware of, and consciously disregards, a risk of death or substantial bodily injury without reasonable law enforcement justification.
  - A law enforcement officer who creates a risk of death or substantial bodily injury in the absence of reasonable law enforcement justification but is unaware of that risk by reason of voluntary intoxication, as defined in subdivision (e)(2) of Section 13A-3-2, acts recklessly with respect thereto.
  - Whether a law enforcement officer acts recklessly without law enforcement justification is a **question of law to be decided by the court**, taking into account the wide range of a law enforcement officer's duties.
  - A law enforcement officer acts without law enforcement justification when the law enforcement officer **harms** the plaintiff by failing, in an objectively unreasonable manner, to comply with written policies of the law enforcement officer's employer or appointing authority or when the law enforcement officer **harms** the plaintiff through conduct premised on the law enforcement officer's objectively unreasonable interpretation of such a policy.

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Recklessly without law enforcement justification (cont.)

- Defines “written policy” as follows:
  - A written rule, regulation, instruction, or directive issued by a law enforcement officer's employer or appointing authority, and applicable to conduct within a law enforcement officer's discretionary authority, specifying the particular manner in which a law enforcement officer should exercise discretion in specific situations or scenarios.
  - The written rule, regulation, instruction, or directive must have been issued before the occurrence of the relevant conduct, and must have been made available to the law enforcement officer.
  - Whether the law enforcement officer actually read the written rule, regulation, instruction, or directive is not determinative.

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Clearly Established Law

- Second exception to immunity, borrowed from federal law.
- The right may be clearly established by "state statutory **or constitutional** law"
- Per 6-5-338.1(1), a right may be clear from –
  - A materially similar case decided by the SCOTUS, Ala. S.Ct., or Eleventh Circuit decided before the occurrence at issue
  - A broad statement of principle established with "obvious clarity" by one of those courts such that "every objectively reasonable law enforcement officer" would have known of the violation
  - Text of some state constitutional provision or statute existing before the relevant event that reveals a right "so obvious that . . . no objectively reasonable law enforcement officer would have required case law to be put on notice that the relevant conduct violated the right"

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Burden-Shifting

- Under 6-5-338.2(h)(1), a law enforcement officer carries the initial burden of showing that the claim is premised upon conduct performed in the officer's discretionary authority.
- Under 6-5-338(h)(2), the burden then shifts to the plaintiff to establish that the officer committed a tort against the plaintiff that is actionable and that the officer is not immune.
- This is largely the same method as endorsed by Cranman.

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Immunity Also Applies to Employer

- Section 6-5-338.4 continues to provide immunity to the law enforcement officer's employer or appointing authority.
- Does not provide immunity to any private non-governmental employer.
  - This includes off-duty assignments.

Motions to Dismiss

- Motions to dismiss, which are specifically **disfavored** by Cranman, appear to be welcomed as **routine** under Back the Blue.

Heightened Pleading Requirement

- Section 6-5-338.2 introduces what should be a very welcome heightened pleading rule, which brings this aspect of Alabama practice in line with federal practice.
- Section (d) provides that in complaints against law enforcement officers in their individual capacity for discretionary conduct, “the complaint must identify with particularly, for each defendant and for each claim”
  - The legal authority that creates the claim
  - Specific factual allegations to satisfy each element of the claim
  - Specific factual allegations demonstrating the lack of immunity

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Discovery Requests

- Section 6-5-338.2(e) provides that the court shall "promptly dismiss" any complaint that lacks the "legal and factual particularity required under subsection (d)" subject to a few exceptions.
  - The officer or his employer **are** required to comply with any "**valid discovery requests** made pursuant to subdivision (f)(2)" and served within 14 days after the officer "first appears *or otherwise defends* against the lawsuit."
  - However, the **only** "valid discovery requests" HB 202 permits under (f)(2) are requests for **written policies** governing the officer's conduct at the time of the events described in the complaint.

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Discovery Requests (cont.)

- The filing of a motion to dismiss automatically **stays** any other discovery per 6-5-338(f)(1) unless:
  - The motion to dismiss is frivolous
  - A response to the discovery request is “necessary to preserve evidence”
  - An exception is “necessary to prevent undue prejudice to prevent a failure r delay of justice within the meaning gof Alabama Rule of Civil Procedure 27(a)(3).”

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Mandamus and Stays

- Mandamus relief may be obtained following denial of motion to dismiss, motion for judgment as a matter of law, or summary judgment (apparently not motion for judgment on the pleadings) per 6-5-338.3(a).
- Filing of mandamus shall **automatically** stay trial court proceedings unless "the court validly finds upon motion of any party that further proceedings are necessary to prevent irreparable harm to the plaintiff."

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Sheriffs' Jailers

- Amends **Ala. Code 14-6-1** (pertaining to jailers) to **DELETE** the previous language stating that immunity is dependent upon the jailers "**acting in compliance with the law.**"
- New version says jailers have the Sheriff's Section 14 immunity (such as it may be) so long as their conduct is "**performed within his or her discretionary authority as defined in Section 1 of the Act adding this amendment**."
  - This ties back to the new discretionary authority standard, which matches the federal standard.
  - Confusion continues, though, as 14-6-1 still says that the Sheriff shall be "civilly responsible" for the acts of those s/he employs to operate the jail and supervise the inmates.

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Sheriffs' Deputies

- Amends Ala. Code 36-22-3 to **DELETE** the previous language stating that immunity is dependent upon deputy "**acting within the line and scope of his or her duties and in compliance with the law.**"
- New version says jailers have the Sheriff's Section 14 immunity (such as it may be) so long as their conduct is "**performed within his or her discretionary authority as defined in Section 6-5-338.1**."

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Stand Your Ground

- Clarifies that detention facility officers are law enforcement officers for purposes of criminal immunities to prosecution.
- Revamps the criminal immunities provided to law enforcement by installing the new discretionary authority test
  - May be of particular consequences in cases like State v. Mac Marquette, pending in Decatur and involving the shooting of Steven Perkins.
- Amends Ala. Code 13-3-27 to clarify and simplify the immunity provisions:
  - New version provides that immunity will be conferred unless the force used "violates [the victim's] rights, under the Constitution of Alabama or the Constitution of the United States, to be free from excessive force."

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Big Wins in Back the Blue

- Includes dispatchers and municipal jailers, and *might* be construed to include reserve officers (since definition of law enforcement does not seem to require they have arrest powers).
- Addresses potential issues with deputies and jailers claiming state immunity under Section 14.
- "Beyond authority" exception (which former Justice Murdock wrote negatively about several times) appears to have been subsumed within the discretionary function test, where it belongs.
- Heightened pleading standard and specific contemplation of motions to dismiss brings Alabama in line with Iqbal and Twombly at least on peace officer immunity complaints.
- Legislature recognizes proper test for discretionary function focuses on the nature of job, and not the conduct at issue.
  - Section 6-5-338.1(2) properly and powerfully recognizes that discretionary authority should extend to "the outer perimeter of a law enforcement officer's governmental discretion," while "a court must temporarily put aside that the conduct may have been committed for an improper or unconstitutional purpose, [or] in an improper or unconstitutional manner"
- The Cranman "bad faith," willful, malicious, fraudulent, and "mistaken interpretation of the law" exceptions are either erased entirely for law enforcement, or at least minimized.

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Big Wins (cont.)

- With Cranman, courts often found jury questions when faced with arguments over whether the exception to immunity (e.g., failure to follow a written policy) caused the plaintiff's harm.
  - With Back the Blue, a plaintiff must show that an officer's failure to comply with written policies "harms the plaintiff."

- Based upon Alabama's mandamus standard of review, the Supreme Court cannot review whether the plaintiff has set out an underlying tort while on an immunity appeal.
  - Under Back the Blue, whether there was an underlying "tort against the plaintiff that is actionable under the laws of this State" is a part of the immunity analysis, and should be reviewable on appeal.

Notable Omissions in Back the Blue

- No changes to damages caps or their inapplicability to individual capacity claims.
- No changes for non-law enforcement personnel
  - Cranman will live on for any state-agent who is not a dispatcher, detention officer, jailer, or peace officer.
  - Cranman will also still be a backup immunity argument for peace officers under the language of 6-5-338.4(b) (preserving immunities for law enforcement under "any other source of law unless expressly repealed or modified by this act")
- HB 202 includes no recognition that body cam can be utilized at motion to dismiss stage, though this may change in the Senate version of the bill.
- Appeal is still via mandamus, rather than the more preferable collateral order doctrine used to allow interlocutory qualified immunity appeals in federal court, which does not impose upon appellants the same extremely demanding standard of review as mandamus.
- Misses the chance to clearly reject a recent federal court opinion suggesting that Section 14 immunity does not apply to individual capacity claims asserted against Sheriffs or their deputies, though the law certainly lends some assistance to Section 14 arguments.
  - Amends 36-22-3 to correct a longstanding inconsistency with Section 14.
  - 6-5-338.4(b) specifically states that the protections available to law enforcement officers set forth in Back the Blue are "in addition to, and supplemental of, any protections available . . . Pursuant to. . . . Article I, Section 14 of the Alabama Constitution of 2022."

Notable omissions (cont.)

- The requirement of a "**law enforcement justification**" calls into question whether officers will be protected when simply serving as community caretakers, or providing emergency aid (medical or otherwise). Officers do more than make arrests and use force.
- Still stuck with **written policies**, but we do get clarification that only policies explaining how to use discretion are relevant – and, even then, only where the policies govern some "specific situations or scenarios"
  - Will departments will simply find it more advantageous not to have any policies at al, as some do now (which is certainly not in the public interest)?
  - Note that federal courts do not deprive officers of immunity for mere policy violations. Knight v. Miami-Dade County, 856 F.3d 795, 813 (11th Cir. 2017).
- The continued use of more than one standard for immunity (**recklessness OR clearly established law**) keeps our immunity law a bit murkier than at the federal level, and injects subjectivity into the equation.
  - Moreover, Cranman actually **immunized** "reckless" conduct, whereas this bill makes it one of the two main **EXCEPTIONS** to immunity. Some could argue it lessens the threshold.
  - A better choice may have been to focus solely on clearly established law.

Potential Setbacks with Back the Blue

- Seems to subtly give rise to potential causes of action for money damages for violations of the Alabama Constitution, which heretofore have not existed.
  - Section 6-5-338.2(b)(2) provides that immunity must be denied where the conduct constitutes a tort "and the conduct violated a clearly established state statutory **or constitutional right of the plaintiff** of which every reasonable law enforcement officer would have known."
  - Alabama law has long prevented suits for damages for violations of the Alabama Constitution. Matthews v. Alabama Agric. & Mech. Univ., 787 So. 2d 691, 698 (Ala. 2000)

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More Potential Setbacks

- Allows the U.S. Supreme Court and an intermediate federal appeals court to establish clearly established law for purposes of **state law** immunities.
  - See 6-5-338.1(1)(a) ("The right is clear from a materially similar case decided . . . by the United States Supreme Court, the Eleventh Circuit Court of Appeals, or the Alabama Supreme Court.")
    - At least the Court of Civil Appeals and Court of Criminal Appeals are out.
- Also recognizes the dubious concept of "**obvious clarity**" as a method of establishing clearly established law, something the U.S. Supreme Court has arguably rejected (though it is a commonly utilized concept in the Eleventh Circuit).

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Impact on Discovery

- I am not yet convinced by the automatic stay provision. Previously, it was commonplace to move for stays when motions to dismiss were pending, as is allowed in federal court.
- Now, discovery may be allowed in every case under Back the Blue, **at least** as to written policies (and maybe as to video as well).
  - The exception for "frivolous" motions to dismiss and the other exceptions to the automatic stay for "a failure or delay of justice" may swallow the rule.
  - This is directly contrary to federal law. Howe v. City of Enter., 861 F.3d 1300, 1302–03 (11th Cir. 2017) ("Brady and Perry argue that the district court erred by deferring its ruling on their qualified-immunity defenses until after discovery is completed. We agree.")

Carter says, nevertheless, that he should have had an opportunity to conduct discovery to uncover the actions each police officer took that day. As the Supreme Court has noted, however, "the doors of discovery" do not unlock "for a plaintiff armed with nothing more than conclusions." *Ashcroft v. Iqbal,* 556 U.S. 662, 678–79, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009). Rather, discovery *follows* "the filing of a well-pleaded complaint. It is not a device to enable the plaintiff to make a case when his complaint has failed to state a claim." *Chudasama v. Mazda Motor Corp.,* 123 F.3d 1353, 1367 (11th Cir.1997) (quotation omitted). . . . This is especially true in a case like this, involving the qualified immunity doctrine, which gives "complete protection for government officials sued in their individual capacities as long as their conduct violates no clearly established statutory or constitutional rights of which a reasonable person would have known."

Carter v. DeKalb Cnty., Ga., 521 F. App'x 725, 728 (11th Cir. 2013)

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Impact on Motion to Dismiss Practice

- The Back the Blue bill specifically contemplates motions to dismiss and provides for a stay of litigation during a mandamus proceeding.
- There appears to be the potential for videos to be discoverable in every case, though this may actually prove useful.
  - If videos are to be disclosed, there needs to be a clear recognition that videos depicting the incidents set forth in the complaint may ALWAYS be considered, as they now are in federal court, without conversion of the MTD. **Johnson v. City of Atlanta**, 107 F.4th 1292, 1300 (11th Cir. 2024).
  - Currently, Alabama's incorporation by reference doctrine requires the "document" be referred to in the complaint explicitly in order to be considered without conversion. **Bell v. Smith**, 281 So. 3d 1247, 1252 (Ala. 2019) ("[I]if a plaintiff does not incorporate by reference or attach a document to its complaint, but the document is referred to in the complaint and is central to the plaintiff's claim, a defendant may submit an indisputably authentic copy to the court to be considered on a motion to dismiss.").
  - ***If*** Alabama will allow consideration of videos at the MTD stage, the law is already clear that the video trumps conflicting testimony or allegations. **Ex parte City of Vestavia Hills**, 372 So. 3d 1143, 1147–48 (Ala. 2022) (citing Scott v. Harris); **Ex parte City of Huntsville**, 399 So. 3d 1020, 1029 (Ala. 2024) (same).

Unknowns

- Final text of discovery provisions.
- Impact on Section 14 immunity for Sheriffs.
- How will Back the Blue be construed in relation to Ala. Code 36-21-212, which provides for something shy of mandatory disclosure of body cam video?
- How will it be construed in relation to Ala. Code 12-21-3.1, which the Supreme Court has held renders such video privileged from Open Records Act requests?
  - **Something Extra Publ'g, Inc. v. Mack**, 350 So. 3d 663, 667 (Ala. 2021) (interpreting § 12-21-3.1 to cover "video recordings or documentary evidence relevant to the crime being investigated")
  - **Ala. Op. Att'y Gen. No. 2025-023** (Mar. 12, 2025) (the Supreme Court of Alabama has stated that the phrase "related investigative material" is broad and encompasses not only officer work product but also any materials related to a particular investigation. That would include items of substantive evidence that existed before the investigation began, such as video recordings or documentary evidence relevant to the crime being investigated. Indeed, related investigative materials, even if not specifically generated by law-enforcement officers during or for the purpose of a systematic inquiry into a criminal incident, nonetheless fall into the broader related investigative material label that the legislature purposefully designated as not public records.) (quotations and citation omitted).

Questions?

David J. Canupp

Lanier Ford Shaver & Payne P.C.

2101 West Clinton Avenue, Suite 102

Huntsville, AL 35805

256-535-1100

DJC@LanierFord.com