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Via Email

Hon. Aaron M. Michelwitz
Chair
House Committee on Ways and Means
State House, Room 243
Boston, MA 02133

Hon. Claire Cronin
Chair
Joint Committee on the Judiciary
State House, Room 136
Boston, MA 02133

Re: *Testimony of the Boston Police Patrolmen's Association on S.2820, §10 (Changes to the Massachusetts Civil Rights Act and the Judicial Doctrine of Qualified Immunity)*

Dear Ms. Cronin and Mr. Michelwitz:

This testimony is being provided by **Leonard Kesten, Evan Ouellette, and Thomas Donohue of Brody Hardoon Perkins & Kesten, LLP on behalf of the Boston Police Patrolmen's Association**. Between them, they have over 65 years of experience representing municipalities and public officials. Mr. Kesten is considered one of the leading defenders of police officers in Massachusetts. He has litigated hundreds of cases involving the application of Qualified Immunity and has conducted over 150 jury trials in his career.

WHAT IS QUALIFIED IMMUNITY

The reality of Qualified immunity is often misunderstood. Qualified immunity does not serve to protect illegal actions by police officers or other governmental actors. Rather, it safeguards all public officials in situations where the law is unclear and does not give them

adequate guidance. The doctrine allows lawsuits to proceed if a government official had fair notice that his or her conduct was unlawful but acted anyway. As addressed below, abolishing or modifying qualified immunity along with the other proposed changes to the Massachusetts Civil Rights Act will have important negative unintended consequences for all Massachusetts citizens, courts, and public employees, not just police officers.

Civil rights actions brought against public officials such as police officers, including those alleging excessive force, are premised on the Fourth Amendment to the Constitution, which decrees that the people shall "be secure" against "unreasonable seizures." Congress passed the Civil Rights Act of 1871 which allows individuals to bring lawsuits against public officials. 42 U.S. Code § 1983 is the modern analogue of that Act and lawsuits alleging civil rights violations by public officials are frequently brought under this Act and litigated in the federal courts.

In 1979, the Massachusetts Legislature enacted G.L. c. 12, §§ 11H and 11I, better known as the Massachusetts Civil Rights Act ("MCRA"), The MCRA is broader than § 1983 in that it allows individuals to bring civil actions against any individuals, not just public officials, who interfere with the exercise and enjoyment of their constitutional rights as well as "rights secured by the constitution or laws of the commonwealth." However, the MCRA includes an additional requirement not included in §1983, that this interference with constitutional or statutory rights be achieved or attempted through "threats, intimidation or coercion." As a result of this heightened requirement, virtually all Civil Rights lawsuits brought against public officials are currently litigated under § 1983 in the federal courts.

A plaintiff alleging that excessive force was used must prove that the force used was "unreasonable under the circumstances." Obviously, the courts would be overwhelmed if the question as to what is "reasonable" was allowed to proceed to a jury trial in each case. Likewise, police officers could be faced with inconsistent verdicts involving similar actions. Thus, judges serve as gatekeepers in weeding out meritless claims. The Court has to decide whether, based on the facts alleged by the plaintiff, no reasonable jury could find against the officer. Many cases are dismissed at this point.

The doctrine of qualified immunity ("QI") was first recognized by the United States Supreme Court in 1967. In 1989, the Supreme Judicial Court of Massachusetts decided that QI applied equally to the MCRA as it does to § 1983. QI is not an absolute immunity from suit. Rather, the basics of the doctrine are that a public official cannot be found personally liable for a violation of civil rights unless he or she is on notice that the conduct complained of violates "clearly established" law.

The test as to whether the official is "on notice" is based on what the "objectively reasonable official" could have known, not the subjective belief of that particular person. Thus, even if a police officer subjectively believes that what she or he is doing is legal, this will not protect them from liability. They would be shielded only if a "reasonable" police officer would not be aware that the conduct violated the law. The premise of this theory is that it is not fair to find a public official personally liable if, at the time she or he acted, a reasonable public official would not be on clear notice that what she or he was doing was illegal.

In determining whether QI applies, a court normally first decides whether the action taken violated the law at the time of the court's decision. If the court decides that it would, then it moves on to the question of "whether a reasonable official could have believed his actions were lawful in light of clearly established law and the information that the official possessed at the time of his allegedly unlawful conduct." QI protects officials whose actions were lawful based on the state of the law at the time they acted or where the law was not so clearly established as to put a reasonable person on notice that their actions were unlawful.

As the Supreme Court has stated in support of QI, "[b]y defining the limits of qualified immunity essentially in objective terms, **we provide no license to lawless conduct**. The public interest in deterrence of unlawful conduct and in compensation of victims remains protected by a test that focuses on the objective legal reasonableness of an official's acts. Where an official could be expected to know that certain conduct would violate statutory or constitutional rights, he should be made to hesitate; and a person who suffers injury caused by such conduct may have a cause of action. But where an official's duties legitimately require action in which clearly established rights are not implicated, the public interest may be better served by action taken with independence and without fear of consequences."

It is also important to note that even if the Court grants QI to the individual police officer, the plaintiff can still move forward with state tort claims, such as assault and battery and false arrest in an excessive force case. The only difference between a Civil Rights claim and the State Tort is that the plaintiff cannot recover their attorneys' fees for a violation of a tort.

Under the proposed statutory changes to the MCRA (§10 of S.2800), QI would never apply to claims against public officials without a finding that *every* reasonable defendant would have known that his conduct was lawful. This language would likely render the protections QI much weaker. This change will only effect cases brought pursuant to the MCRA, not § 1983. Significantly, §10(b) of S.2800 would also amend the MCRA by removing the requirement of "threats, intimidation, and coercion" in state court actions brought against government officials such as police officers. If these changes are enacted, there will be many negative consequences.

UNINTENDED CONSEQUENCES

1. These changes will result in a flood of state court actions

Currently, the majority of civil rights actions against police officers are litigated in the Federal Courts pursuant to § 1983. These cases are not brought in state court pursuant to the MCRA because of the heightened requirement to prove "threats, intimidation, and coercion" as well as a violation of Civil Rights. However, if the proposed amendments are enacted, we expect that plaintiffs will file most, if not all, of these cases in the state court pursuant to the MCRA. This will be a sea change in this litigation.

2. Financial impact on municipalities

The proposed modification of QI, combined with the elimination of the "threats, intimidation, and coercion" requirement as to public officials, will result in an increased number of lawsuits filed in Massachusetts state courts against public officials under the MCRA, rather than federal court. The state court system will be overburdened and will require added resources. Municipalities will be forced to shoulder the costs of defending these cases and will, in almost all cases be required to indemnify the defendant public official for any judgment against him or her.

Under the MCRA, if a plaintiff is successful in his or her claim, municipalities will also be required to pay the costs of litigation and reasonable attorneys' fees incurred by the *plaintiff* in pursuing his or her claim. The economic burden of paying its own litigation costs, combined with the prospect of potentially having to fund the plaintiff's costs and attorneys' fees (which in many cases greatly exceed the amount of the plaintiff's potential damages) may also force municipalities to settle meritless claims against officials which would have been weeded out by QI rather than defend against them.

3. State Courts will have to interpret the new QI language

Currently, Judges and lawyers rely on decades of jurisprudence in the federal courts interpreting QI. This is not a simple doctrine and has required judicial analysis in many different situations. If Massachusetts modifies the doctrine, our state courts will have to begin interpreting the meaning of the new language. This is not a simple task and will place first responders in a position of uncertainty about their exposure to civil litigation for years to come.

4. Changes to QI will affect all public officials, not just police

QI under the MCRA does not just apply to police but applies to all "government officials, in the course of performing discretionary tasks, from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." All public officials, not just police officers, benefit from this doctrine. A large percentage of claims under MCRA are brought against non-law enforcement officials such as town managers, selectmen, fire chiefs, municipal commission members, and lower level employees of the commonwealth. Also, many, if not the majority of MCRA claims are based on interference with constitutional rights unrelated to police misconduct. Section 10 of S. 2800 would limit QI in all claims made under the MCRA against any "person or entity acting under color of any statute, ordinance, regulation, custom or usage of the commonwealth or, or a subdivision thereof." Therefore, weakening or eliminating QI will put all government officials, not just police officers, in greater jeopardy of individual personal liability based on their official actions.

CONCLUSION

Changes to the doctrine of Qualified Immunity should be carefully evaluated before they are enacted. The Senate's stated attempt to "tweak" qualified immunity may not have that effect but will have wide-ranging, unintended consequences. The issues as to whether any change is needed and if so, what effect any change would have on the citizens of the Commonwealth require careful consideration. S2800 should not be passed at this time.

Very truly yours,

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