AGAWAM POLICE DEPARTMENT

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July 17, 2020

Via e-mail to: Testimony.HWMJudiciary@mahouse.gov

Re: Concerns to Senate 2820 as Amended

Dear Chairwoman Cronin and Chairman Michlewitz:

Please accept the following testimony with regard to **SB2820** – An Act to reform police standards and shift resources to build a more equitable, fair and just commonwealth that values Black lives and communities of color.

Over the recent months and weeks, I, like you and most other Americans, have followed the news at the national, statewide, and local level. As a taxpayer, a husband, a father of two, a Chief of Police, the President of the Western Massachusetts Chiefs of Police Association, and the Sergeant at Arms of the Massachusetts Chiefs of Police Association, I have been utterly stunned by the attacks on law and order, and law enforcement officers at all levels. It is from those multiple viewpoints that I offer my testimony to you today.

As a dedicated and committed police leader, I can assure you that my colleagues and I will continue to embrace all of the challenges that lay ahead for our profession. We will continue to instill strong values into our respective agencies at all levels of rank, hold ourselves and the members of our agencies accountable for our actions, and work through these difficult times to build cohesive relationships with the broader communities we serve. Like most others in my professional capacity, I would like to be a part of the conversation as we travel this road of change in policing. To that end, there are a number of concerns that I have regarding the Bill that was passed earlier this week by the senate, and I will address those concerns in similar fashion to the bullet points that you have received from the Massachusetts Chiefs of Police Association and the Massachusetts Major City Chiefs of Police:

- **SECTION 4 (line 230):** Under (iv), the provision states that there shall be training in the area of the "*history of slavery, lynching, racist institutions and racism in the United States*." To mandate that police officers alone are in need of this training to the exclusion of all other public employees sends the message to the public and all police officers, that the police are racist and in need of mandated education regarding the "*history of slavery, lynching, racist institutions and racism in the United States*." This is incredibly inaccurate and an affront to the men and women of this profession.

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- **SECTION 6 (line 272)**: In terms of the establishment of a POST (Peace Officer Standards and Training) Program, the various police chief's organizations here in our state wholeheartedly support the general concept. That said, the acronym of POSAC (Police Officer Standards Accreditation and Accreditation Committee) is causing significant confusion both in this bill and in the Governor's Bill. POST has nothing to do with *Accreditation* per se but has everything to do with *Certification* – and by implication "De-certification". In this state, there currently exists a *Massachusetts Police Accreditation Commission* (MPAC) for over 20 years which is made up of members of Law Enforcement (Chiefs, Ranking Officers), Municipal Government, and Colleges/Universities (Chiefs) in which currently 93 police agencies are accredited based on the attainment of national standards modeled from the *Commission on Accreditation for Law Enforcement Agencies* (CALEA). By utilizing the word "Accreditation" in the title is definitely misleading and should be eliminated. To the best of our knowledge 46 other states use the acronym POST which seems to work without any problems or a need to create a new description of the important program.

- **SECTION 6 (line 282):** The Senate Bill states that POSAC shall be comprised of "14 members", however as outlined there are actually 15 positions. The MCOPA is strongly advocating for two (2) seats on the POSAC to be appointed by the MCOPA Executive Committee.

- **SECTION 6 (line 321)** : It appears from the language of the POSAC provision that the committee shall have the power to conduct what is referred to as "*independent investigations and adjudications of complaints of officer misconduct*" without any qualifying language as to how that would be implemented in terms of what type of alleged misconduct (law violations, use of force, injury, rude complaints, etc.) and when and under what circumstances will adjudications be subject to review resulting in an proposed oversight system that could go down the slippery slope of becoming arbitrary and capricious at some point and subject to a high level of scrutiny and criticism.

- **SECTION 10(c) (line 570):** Section 10 of "*An Act to Reform Police Standards and Shift Resources to Build a more Equitable, Fair and Just Commonwealth that Values Black Lives and Communities of Color*" (the Act) is problematic, not only for law enforcement in the Commonwealth, but all public employees. In particular, Section 10 calls for a re-write of the existing provisions in Chapter 12, section 11I, pertaining to violations of constitutional rights, commonly referred to as the Massachusetts Civil Rights Act (MCRA). The MCRA is similar to the provisions of 42 U.S.C. § 1983 (setting for a federal cause of action for a deprivation of statutory or constitutional rights by one acting under color of law), except however, that the provisions of the MCRA as it exists today, does not require that the action be taken under color of state law, as section 1983 does. See G.L. c. 12, § 11H. Most notably, Section 10 of the Act would change that, and permit a person to file suit against an individual, acting under color of law, who *inter alia* deprives them of the exercise or enjoyment of rights secured by the constitution or laws of the United States

or the Commonwealth of Massachusetts. By doing so, the Senate is attempting to draw the parallel between the federal section 1983 claim and the state based MCRA claims.

The qualified immunity principles developed under section 1983 apply equally to claims under the MCRA. See Duarte v. Healy, 405 Mass. 43, 46-48, 537 N.E.2d 1230 (1989). "The doctrine of qualified immunity shields public officials who are performing discretionary functions, not ministerial in nature, from civil liability in § 1983 [and MCRA] actions if at the time of the performance of the discretionary act, the constitutional or statutory right allegedly infringed was not 'clearly established.'" Laubinger v. Department of Rev., 41 Mass. App. Ct. 598, 603, 672 N.E.2d 554 (1996), citing Harlow v. Fitzgerald, 457 U.S. 800, 818, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982); see Breault v. Chairman of the Bd. of Fire Commrs. of Springfield, 401 Mass. 26, 31-32, 513 N.E.2d 1277 (1987), *cert. denied sub nom.* Forastiere v. Breault, 485 U.S. 906, 108 S.Ct. 1078, 99 L.Ed.2d 237 (1988); Duarte v. Healy, supra at 47-48, 537 N.E.2d 1230.

In enacting the Massachusetts Civil Rights Act, the Legislature intended to adopt the standard of immunity for public officials developed under section 1983, that is, public officials who exercised discretionary functions are entitled to qualified immunity from liability for damages. Howcroft v. City of Peabody, 747 N.E.2d 729, Mass. App. 2001. Public officials are not liable under the Massachusetts Civil Rights Act for their discretionary acts unless they have violated a right under federal or state constitutional or statutory law that was "clearly established" at the time. Rodriguez v. Furtado, 410 Mass. 878, 575 N.E.2d 1124 (1991); Duarte v. Healy, 405 Mass. 43, 537 N.E.2d 1230 (1989).

Section 1983 do not only implicate law enforcement personnel. The jurisprudence in this realm has also involved departments of social services, school boards and committees, fire personnel, a various other public employees. That being said, if the intent of the Senate is to bring the MCRA more in line with section 1983, anyone implicated by section 1983, will likewise be continued to be implicated by the provisions of the MCRA. Notably, the provisions of the MCRA are far broader, which should be even more cause for concern for those so implicated.

Section 10 of the Act further sets for a new standard for the so-called defense of "qualified immunity." Section 10(c) states that

> "In an action under this section, qualified immunity shall not apply to claims for monetary damages except upon a finding that, at the time the conduct complained of occurred, no reasonable defendant could have had reason to believe that such conduct would violate the law"

This definition represents a departure from the federal standard for qualified immunity, although the exact extent to which is departs from the federal standard is up for debate, at least until the SJC provides clarification on it. The federal doctrine of qualified immunity shields public officials of all types from liability under section 1983 so long as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable

person would have known. Harlow v. Fitzgerald, 457 U.S. 800 (1982). Stated differently, in order to conclude that the right which the official allegedly violated is "clearly established," the contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. Anderson v. Creighton, 483 U.S. 635 (1987). It protects all but the plainly incompetent and those who knowingly violate the law. Malley v. Briggs, 475 U.S. 335 (1986). As a result, the standard sought to be created under Section 10 of the Act would provide public employees with substantially less protection than that afforded under the federal standard. "Qualified immunity balances two important interests – the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably." Pearson v. Callahan, 555 U.S. 223 (2009).

Furthermore, although the Senate's version of "qualified immunity" would only apply to state-based claims under the MCRA, what Section 10 proposes is fairly similar to that proposed by the 9th Circuit Court of Appeals in various decisions. In those instances where the 9th Circuit sought to lower the standard applicable to qualified immunity, the U.S. Supreme Court has squarely reversed the 9th Circuit, going so far as scolding it for its attempts to do so. See Kisela v. Hughes, 138 S.Ct. 1148 (2018); City of Escondido v. Emmons, 139 S.Ct. 500 (2019).

Although legal scholars and practitioners have a grasp as to the meaning of qualified immunity as it exists today, uncertainty will abound if this standard is re-written, upending nearly fifty years of jurisprudence. Uncertainty in the law can only guarantee an influx in litigation as plaintiffs seek to test the new waters as the new standard is expounded upon by the courts. Furthermore, many officers will leave the profession out of concern that their family's financial future may be jeopardized just by virtue of the fact that they went to work and did their jobs. Communities will soon recognize that recruitment of future qualified officers to replace those that have left the profession over these concerns, will be virtually impossible as well.

- **SECTION 39 (line 1025)**: The provision to inform both the appointing authority and the local legislative body of the acquisition of any equipment and/or property that serves to enhance public safety makes perfect sense. That said, to have a public hearing available for all in the general public to know exactly what equipment the police departments may or may not possess serves to put communities in jeopardy in that those with nefarious motives will be informed as to what equipment that the department has at its disposal. This is very dangerous.

- **SECTION 49 (line 1101-1115):** This provision prevents school department personnel and school resource officers (who actually work for police departments), from sharing information with law enforcement officers – including their own agency – when there are ongoing specific unlawful incidents involving violence or otherwise. This quite frankly defies commonsense. School shootings have been on the rise since 2017. Did the Senate quickly forget about what occurred in Parkland, Florida on February 14, 2018? The

learning environment in our schools must continue to be safe and secure as possible and information sharing is critical to ensuring that this takes place. Public Safety 101.

- **SECTION 50 (line 1116)**: There seems to be a slight nuance to the amended language to Section 37P of Chapter 71 replacing "*in consultation with*" to "*at the request of.*" Many police departments have had school resource officer programs in this state for 25 years or longer. The only reason why officers are assigned to the schools are because they have been "requested" to be there by the school superintendents - period. The reality is that many school districts even reimburse the police budgets for the salaries of these officers who serve as mentors for these young middle and high school students. If the Senate is being told that police chiefs are arbitrarily assigning officers to schools without first receiving a specific request from the school superintendents they are being misled. The 2018 Criminal Justice Reform Act has very specific language that outlines the qualifications of an SRO, the joint performance evaluations that are to be conducted each year, the training that they shall have and the language specific MOUs that must exist between the Schools and the Police Department.

- **SECTION 52 (lines 1138-1251**: There are several recommended changes to data collection and analysis as it pertains to motor stopped motor vehicles and pedestrians in this section. The Hands Free/Data Collection Law was signed into law only a few months ago before the onset of the pandemic. The new law contains a comprehensive system of data collection, benchmarking, review, analyses and potential consequences. While we continue to welcome data that is both accurate and reliable, the issue pertaining to the classification of an operator's race has still yet to be resolved. Before any data from calendar year 2020 has yet to be collected by the RMV and subsequently analyzed by a College/University selected by the Secretary of EOPSS, these provisions now look to complicate the matter even further before a determination has actually been made as to whether any problem of racial or gender profiling actually exists here in our state. This language appears to be what did not make its way into the Hands Free Law which as you know was heavily debated for several months based strictly on the data collection component.

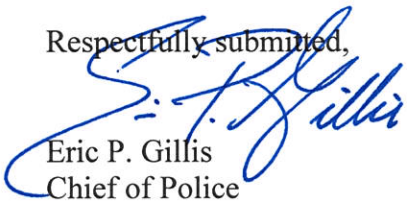
- **SECTION 55 (line 1272)**: To be clear, we do not teach, train, authorize, advocate or condone in any way that choke holds or any type of neck restraint that impedes an individual's ability to breathe be used during the course of an arrest or physical restraint situation. That said, we respect the discussion and concern pertaining to what is now a national issue based on the tragedy in Minneapolis. Under part (d) the language states that "[a] law enforcement officer shall not use a choke hold. [...]." What should also be included is a commonsensical, reasonable and rational provision that states "unless the officer reasonably believes that his/her life is in immediate jeopardy of imminent death or serious bodily injury." There needs to be a deadly force exception to eliminate any possible confusion that this could cause for an officer who is in the midst of struggling for their life

and needs to avail themselves of any and all means that may exist to survive and to control the subject. This is a reasonable and fairly straightforward recommendation.

I appreciate the opportunity provide you with my concerns and recommendations, and hope that you will carefully consider what I and other law enforcement professionals across the Commonwealth have had to say about these efforts of reform. Like all other police leaders, I stand ready to assist you in any way that I can if you deem such assistance necessary.

Please know that I will continue to serve this community and Commonwealth, and remain just as committed to the preservation of life and liberty for all as the day I embarked on this career path. I thank you for your diligent efforts in drafting this far-reaching legislation, and look forward to a cooperative relationship in service to our fellow citizens.

Respectfully submitted,



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