The Commonwealth of Massachusetts
HOUSE OF REPRESENTATIVES
STATE HOUSE, BOSTON 02133-1054

KENNETH I. GORDON
STATE REPRESENTATIVE
21st MIDDLESEX DISTRICT

Vice Chair
Joint Committee on Economic Development and Emerging Technologies

Committees:
Municipalities and Regional Government
Personnel and Administration

STATE HOUSE, ROOM 146
TEL: (617) 722-2575
FAX: (617) 722-2238
Kenneth.Gordon@MAhouse.gov

July 17, 2020

RE: S2820; Mass. G.L c. 12, Qualified Immunity

Chairs Michlewitz and Cronin,

Please accept this letter as my testimony concerning S.2820, which includes important and necessary policies that make Massachusetts more inclusive, welcoming and safe for all of our citizens and residents. I appreciate that the House has taken the time to consider public testimony, and I have made my constituents aware of their opportunity to share their views. I am mindful that the vast majority of our police officers and departments operate in a respectful, professional manner, but I have heard from constituents and others among the Black, Latino and Native communities that their experience with law enforcement is not the same as those of white residents. With few exceptions, we have not experienced the horrific episodes we have seen around the country, but we are not insulated from them.

I am especially interested in supporting the issues of improved training and oversight of police officers, and the creation of an advisory board that will help advise on any disparate impact on policing on any marginalized group. I am also supportive of certification consistent with the police officer standards and accreditation committee, including certification and ramification for municipalities that do not ensure proper compliance of police officers. Of course, we should ban the use of excessive force, choke holds as defined in S.2820, and limit the use of non-lethal weapons unless absolutely necessary.

However, I am concerned that we weaken the concept of "Qualified Immunity" (hereinafter ("QI"), because doing so would chill an officer's ability to make split-second decisions, and because QI has been so rarely used as a defense in Massachusetts or elsewhere that I do not think it poses an impediment to good policing or to victims of bad policing obtaining civil remedies if they are harmed.

QI was fully adopted in Massachusetts when the Supreme Judicial Court, in *Gonzalez v. Furtado*, 410 Mass. 878 (1991) held that the standard of qualified immunity concerning those acting under color of law in a case brought under section 1983 would apply to a case brought under the Massachusetts Civil Rights Act (c. 12, Sect. 11I). The *Furtado* court, relying on language from the U.S. Supreme Court in *Harlow v. Fitzgerald*, described the principle of QI this way: "government officials performing discretionary functions, generally are shielded 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." S.2820 proposes to codify QI, essentially codifying the language of Furtado but shifting the burden of proof to the defendant and adding an additional, albeit quite confusing, legal standard.

I recommend that we amend the language of S.2820 from lines 570-573, and replace it with language borrowed from Furtado: "In an action under this section, a government official performing discretionary functions shall be immune if, and only if, their conduct at the time of the act complained of occurred did not violate clearly established statutory or constitutional rights of which a reasonable person would have known." If we must bring forward the standard included in S.2820, then at least I recommend that we strike the language "could have had reason to believe" and replace it with "believe."

The "no reason to believe" standard is confusing, vague and should not be carried forward to the House language. This test is used in limited instances in Massachusetts statute, it is uncommon and would call upon government officials to engage in an impossible exercise at a time of crisis. Our office has reviewed the 159 cases in Massachusetts courts in the last 20 years when the QI defense was raised. It was raised by police officers only 45 times, as the majority of cases involved other government workers such as teachers, social workers, and others. Of those 45 instances, it was rarely, if ever, successful.

The admirable training, oversight, certification and disciplinary measures proposed in S.2820 will help protect our residents from poor policing. Adding a layer of personal civil liability is so indirect that I do not see how it would add any greater incentive for an officer. In most cases, an officer would be indemnified by the employer anyway. Academic research from UCLA School of Law finds that this is the case in most instances. From the point of view of a victim, that person already has an avenue for civil redress with the municipality that employs the police officer.

I also point out that beginning on line 876, Section 2IIIII, S.2820 creates a jail diversion and restoration trust fund. This fund would be crucial in allowing centers that reduce jail populations and properly treat many people who have interactions with police in a fair and productive manner. I hope this section is carried forward to our bill.

I know you will consider the voluminous testimony you will receive this week and I hope I did not unjustly add to your work. The responsibility of this Committee is vast and the effect it will have on the Commonwealth immense. With the amendment I propose to these specific lines, I believe we will produce a historic piece of legislation.

Thank you for taking the time to consider my testimony.

Respectfully,

Ken Gordon