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TO: The Qualified Immunity Commission

RE: *Testimony of the Boston Police Patrolmen's Association
regarding the Judicial Doctrine of Qualified Immunity*

Dear Commissioners:

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 68 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?

In order to prevail, a plaintiff alleging that excessive force was used against him 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 instant. Likewise, police officers could be faced with inconsistent verdicts involving similar actions. Thus, judges serve as gatekeepers in weeding out meritless claims before the case is allowed to go to trial through Motions to Dismiss or Motions for

Summary Judgment. Once such a Motion is filed, the court has to decide whether, based on the facts alleged by the plaintiff, no reasonable jury could find against the officer. To make that determination, the Courts are always guided by prior court decisions.

Qualified Immunity 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 Qualified Immunity 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.” Qualified Immunity 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.

It is also important to note that even if the Court grants Qualified Immunity 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 can recover their attorneys' fees for a violation.

UNINTENDED CONSEQUENCES

1. The elimination of Qualified Immunity could 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 Qualified Immunity defense remains viable under federal law, and is eliminated under state law, we expect that the plaintiffs' bar would file a substantial number of civil rights cases in state – as opposed to 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 Qualified Immunity rather than defend against them.

2. State courts will have to interpret the new Qualified Immunity language.

Currently, judges and lawyers rely on decades of jurisprudence in the federal courts interpreting Qualified Immunity. 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.

3. Police morale will continue to decline.

Police officers nationwide are experiencing psychic trauma for the constant attacks on them as a result of the actions of a few bad apples and the public perception that all police officers are bad. Stripping the QI from them will continue the erosion of morale; the trend of fewer applicants for police employment shrinking; and retirements will continue increasing. We need to support our police officers, not attack them.

CONCLUSION

Changes to the doctrine of Qualified Immunity should be carefully evaluated before they are enacted. We ask you to keep in mind that the doctrine ensures fairness to the police officers accused of violations. It is eminently unfair to hold an officer liable if she is not on notice that the action chosen may be unconstitutional. 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.

Very truly yours,

**BRODY, HARDOON, PERKINS &
KESTEN, LLP**

A handwritten signature in blue ink, appearing to be 'R. H. M.', located at the top center of the page.

Leonard Kesten
Evan Ouellette
Thomas Donohue