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**Written Testimony of
New Hampshire Police Association
Regarding the Preservation of Qualified Immunity /Official Immunity
For Police Officers**

**Before
The Governor's Commission on Law Enforcement Accountability, Community and
Transparency
on
August 18, 2020**

Policemen, like teachers and lawyers, are not relegated to a watered-down version of constitutional rights. Garrity v. New Jersey, 385 U.S. 493, 500, 87 S.Ct. 616, 620, 17 L.Ed.2d 562 (1967)

RECOMMENDATION:

Qualified/Official Immunity should not be abolished for Police Officers in New Hampshire.

SUMMARY:

1. The purpose and definition of Qualified/Official Immunity
2. The abolition of Qualified/Official Immunity would treat Police Officer's
disparately

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3. The negative consequences of the abolition of Qualified/Official Immunity
4. Conclusion

I. INTRODUCTION

Greetings Chairman Gordon McDonald and members of the Governor's Commission on Law Enforcement Accountability, Community and Transparency.

The New Hampshire Police Association is a domestic non-profit corporation and fraternal organization representing active and retired members of the law enforcement community throughout the State of New Hampshire (hereinafter "NHPA"). The membership in the NHPA covers a cross section of our State from Berlin in the North, to Salem in the South, to Hampton in the East and Hanover in the West. We represent law enforcement in large cities, small towns, State institutions, and county facilities. We would like to begin by thanking the people serving on this Commission for their time, energy and expertise in these important matters. We are grateful for the opportunity to provide our input into a very important issue concerning the continuation of qualified/official immunity for police officers and hope you will carefully consider our position as you struggle with the task you have been given by the Honorable Governor Christopher Sununu.

II. QUALIFIED/OFFICIAL IMMUNITY

The terms qualified immunity and official immunity are often used on an interchangeable basis however they are distinct doctrines.

a) Rational supporting the adoption of official immunity for police officers

'Police officers are trusted with one of the most basic and necessary functions of civilized society, securing and preserving public safety. This essential and inherently governmental task is not shared with the private sector. Police officers are regularly called upon to utilize judgment and discretion in the performance of their duties. They must make decisions and take actions which have serious consequences and repercussions to the individuals immediately involved, to the public at large and to themselves. On any given day, they are required to employ their training, experience, measured judgment and prudence in a variety of volatile situations, such as investigatory stops, investigations of

crime, arrests and high speed pursuits, to name a few. Even routine traffic stops can be unpredictable and can escalate into dangerous, and sometimes deadly, affairs.

Further, law enforcement by its nature is susceptible to provoking the hostilities and hindsight second-guessing by those directly interacting with police as well as by the citizenry at large. Police officers, as frontline agents for the executive branch, are particularly vulnerable to lawsuits, whether the underlying police conduct or decision was errant or not. Unbridled exposure to personal liability and hindsight review of their decisions would undoubtedly compromise effective law enforcement and unfairly expose officers to personal liability for performing inherently governmental tasks. The public safety entrusted to police officers demand that they remain diligent in their duties and independent in their judgments, without fear of personal liability when someone is injured and claims an officer's decision or conduct was to blame. The public simply cannot afford for those individuals charged with securing and preserving community safety to have their judgment shaded out of fear of subsequent lawsuits or to have their energies otherwise deflected by litigation, at times a lengthy and cumbersome process.' Everitt v GE, 156 N.H. 202. 217-218 (2007)

The goal of official immunity is to protect public officials from the fear of personal liability which would deter independent action and reduce effectiveness on duty performance. A police officer must be able to perform their duties without fear of reprisal, personal liability and vexatious lawsuits. "It would be manifestly unfair to place any public official in a position in which he is required to exercise his judgment and at the same time is held responsible according to the judgment of others, who may have no experience in the area and may be much less qualified than he to pass judgment in a discerning fashion or who may now be acting largely on the basis of hindsight" Conrad v N.H. Department of Safety, 167 N.H. 59, 69-70 (2014).

The "evils" meant to be avoided by official immunity are detailed as follows:

- 1) Unwanted timidity in the application of public employment discretionary functions;
- 2) Failure to attract talented candidates who would be dissuaded from employment;
- 3) Unwillingness to protect public due to fear of reprisal
- 4) Fear of vexatious lawsuits and loss of productivity

b) Qualified Immunity

The doctrine provides an affirmative defense to actions pled under the federal constitution for a constitutional tort or a statutory act under 42 U.S.C. § 1983. Courts will employ a three-part test to determine whether a public official is entitled to qualified immunity:

(1) whether the plaintiff has established a constitutional violation; (2) whether the right claimed by the plaintiff was clearly established at the time of the violation and (3) whether a reasonable official in a similar situation would have understood that the challenged action violated the constitutional right.

This is both objective and subjective in the application and applies only for the violation of federal constitution, the more common immunity is the doctrine known as “official” immunity.

c) Official Immunity

Official immunity is designed to encourage and safeguard the ability of public officials to act properly in the exercise of the discretion required by their official duties to the benefit of the public on whose behalf the officials act. The doctrine provides immunity for wrongful acts committed within the scope of their government employment. Official immunity, today, encourages independent police judgment for the protection and welfare of the citizenry at large and must prevail over ensuring common law civil recourse for individuals who may be injured by errant police decisions. “We adopt parameters for official immunity, as informed by our case law, the law in foreign jurisdictions as well as the scope of official immunity identified by the legislature in RSA 99-D:1. Accordingly, we hold that municipal police officers are immune from personal liability for decisions, acts or omissions that are: (1) made within the scope of their official duties while in the course of their employment; (2) discretionary, rather than ministerial; and (3) not made in a wanton or reckless manner.” See, Everitt at 219.

A discretionary decision is one that involves personal deliberation and individual professional judgment that necessarily reflects the fact of the situation and the goals to be attained. Id.

III. THE ABOLITION OF QUALIFIED IMMUNITY FOR POLICE WOULD CONSTITUTE DISPARATE TREATMENT

All State employees are provided with immunity and indemnification. RSA 99-D provides,

99-D:1 Statement of Policy. – It is the intent of this chapter to protect state officers, trustees, officials, employees, and members of the general court who are subject to claims and civil actions arising from acts committed within the scope of their official duty while in the course of their employment for the state and not in a wanton or reckless manner. It is not intended to create a new remedy for injured persons or to waive the state's sovereign immunity which is extended by law to state officers, trustees, officials, and employees. The doctrine of sovereign immunity of the state, and by the extension of that doctrine, the official immunity of officers, trustees, officials, or employees of the state or any agency thereof acting within the scope of official duty and not in a wanton or reckless manner, except as otherwise expressly provided by statute, is hereby adopted as the law of the state. The immunity of the state's officers, trustees, officials, and employees as set forth herein shall be applicable to all claims and civil actions, which claims or actions arise against such officers, trustees, officials, and employees in their personal capacity or official capacity, or both such capacities, from acts or omissions within the scope of their official duty while in the course of their employment for the state and not in a wanton or reckless manner.

Source. 1978, 43:1. 1985, 412:1, eff. July 3, 1985.

Section 99-D:2

99-D:2 Defense and Indemnification. – If any claim is made or any civil action is commenced against a present or former officer, trustee, official, or employee of the state or any agency thereof, including members of the New Hampshire national guard and any justice of the district, municipal, probate, superior, or supreme court, or the clerks or bail commissioners thereof, or any harbor master appointed by the Pease development authority, division of ports and harbors, or officials and employees of the New Hampshire housing finance authority, or directors, officers, and employees of the Pease development authority, members and employees of the lakeshore redevelopment planning commission, or directors, officers, and employees of the land and community heritage investment authority seeking equitable relief or claiming damages for the negligent or wrongful acts and the officer, trustee, official, or employee requests the state to provide representation for him or her, and the attorney general, or, in the case of a claim or civil action commenced against the attorney general, the governor and council, determines that the acts complained of were committed by the officer, trustee, official, or employee while acting within the scope of official duty for the state and that such acts were not wanton or reckless, the attorney general shall represent and defend such person with respect to such claim or throughout such action, or shall retain outside counsel to represent or defend such person, and the state shall defray all costs of such representation

or defense, to be paid from funds not otherwise appropriated. In such case the state shall also protect, indemnify, and hold harmless such person from any costs, damages, awards, judgments, or settlements arising from the claim or suit. The attorney general or governor and council shall not be required to consider the request of such person that representation be provided for him or her unless within 7 days of the time such person is served with any summons, complaint, process, notice, demand, or pleading the person shall deliver the original or a copy thereof to the attorney general or, in the case of an action against the attorney general, to the governor and council. As a condition to the continued representation by the attorney general and to the obligation of the state to indemnify and hold harmless, such officer, trustee, official, or employee shall cooperate with the attorney general in the defense of such claim or civil action. No property either real or personal of the state of New Hampshire shall be subject to attachment or execution to secure payment of or to satisfy any obligations of the state created under this chapter. Upon the entry of final judgment in any action brought under this chapter, the governor shall draw a warrant for said payment out of any money in the treasury not otherwise appropriated, and said sums are hereby appropriated. The attorney general shall have the authority to settle any claim brought under this chapter by compromise and the amount of any such settlement shall be paid as if the amount were awarded as a judgment under this chapter. Indemnification by the state under this section shall be for the actual amount of costs, damages, awards, judgments, or settlements personally incurred by any such officer, trustee, official, or employee, and the state shall not pay any amounts for which payment is the obligation of any insurance carrier or company under a policy or policies of insurance or any other third party under a similar obligation.

Municipal officials are provided immunity by Statute.

RSA 31:104 provides,

31:104 Liability of Municipal Executives. – Notwithstanding any provisions of law to the contrary, no member of the governing board of any municipal corporation or political subdivision, no member of any other board, commission, or bureau of any municipal corporation or political subdivision created or existing pursuant to a statute or charter, and no chief executive officer of such municipal corporation or political subdivision, including but not limited to city councilors and aldermen, selectmen, county convention members, members of boards of adjustment, members of planning boards, school board members, mayors, city managers, town managers, county commissioners, regional planning commissioners, town and city health officers, overseers of public welfare, and school superintendents shall be held liable for civil damages for any vote, resolution, or decision made by said person acting in his or her official capacity in good faith and within the scope of his or her authority.

Other public officials have also been granted “official or discretionary” immunity by the courts:

Immunity exists for: a planning board's approval of a subdivision plan without adequate drainage, Hurley v. Hudson, 112 N.H. 365, 369, 296 A.2d 905 (1972); a town selectmen's decision not to lay out certain roads, Rockhouse Mt. Property Owners Assoc. v. Town of Conway, 127 N.H. 593, 600, 503 A.2d 1385 (1986); traffic control and parking regulations, Sorenson v. City of Manchester, 136 N.H. 692, 694, 621 A.2d 438 (1993); setting of road maintenance standards and construction of a sidewalk when based upon a city's faulty plan or design, Gardner, 137 N.H. at 258, 259; traffic control and management of roadway safety, Bergeron v. City of Manchester, 140 N.H. 417, 422, 424, 666 A.2d 982 (1995); a decision whether to enact maintenance and inspection regulations, Mahan, 141 N.H. at 751; and the training and supervision of coaches and referees at a school basketball game, Hacking, at 550.

In fact, other members of the criminal justice system enjoy ABSOLUTE Immunity in performing their judicial functions, including judges and prosecuting individuals. Police officers receive the least amount of immunity protection in the criminal system. In the event that qualified immunity was abolished for police officers it would treat them disparately from other public officials and punish NH officers without any justification for providing this to NH.

V. BEWARE THE DOCTRINE OF UNINTENDED CONSEQUENCES

We believe that there would be a significant adverse impact to the citizenry if immunity was abolished for police officers.

- a) We would like to remind the Commission that we still maintain the “New Hampshire Advantage”. In a recent survey conducted by St. Anselm College in June of this year, of a cross section of the NH electorate, found that 85% of those polled rated their departments as “professional” and 61% provided their police department was very professional and only 7% rated the departments as unprofessional. New Hampshire has consistently been rated as having one of the lowest crime rates by US News #3 out of 50 for 2019 and 2018. We must be doing some things right.
- b) We believe there would be a chilling effect on the willingness of the officer to engage criminals in critical situations due to fear of litigation creating a moment of hesitancy which could prove fatal for police and innocent civilians.
- c) We believe that the accused may attempt to utilize civil litigation to leverage prosecutors from not vigorously pursuing charges.

- d) We believe it would empower the rich and powerful to utilize the civil judicial system to make them unaccountable to the public.
- e) We believe it would inundate departments with vexatious litigation which would render departments ineffective.
- f) We believe it would increase costs on the state and local level by increase time off work, indemnification costs, and loss of productivity.
- g) We believe that it would exacerbate the attraction and retention problem faced by law enforcement today across all of New Hampshire. We estimate that over 10% of the certified full time officers could retire tomorrow. They would if immunity was abolished by recommendation of this council. To be illustrative, last year Manchester lost 26 officers. Currently, Manchester has 21 officers eligible for retirement of which approximately 1/3 of the ranks are sergeant and above. In a recent request for the filling of 18 positions only 60 people have applied most of which will not pass the vetting process. Londonderry has 67 positions and 7 are currently unfilled. Six officers could retire tomorrow. This story could be told throughout the state. In fact, there are approximately 620 officers eligible for retirement statewide, amounting to almost 15% of the total full-time police officers in New Hampshire.
- h) We believe while officers are willing to put their lives in danger for the public they are not willing to place their families' financial well-being at risk.
- i) We believe that the abolition may have the opposite effect of the goals of this commission which is to have understanding and racial and economic harmony. This type of adversarial process will drive people apart and polarize parties into the "we vs. them" mentality; and
- j) We believe that the abolishment of official immunity for police officers is not supported by actual evidence of abuse in NH.

V. CONCLUSION

The abolition of qualified/ sovereign immunity for police officers is not right for New Hampshire.