CITY OF NORWALK

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Judiciary Committee
Connecticut General Assembly

Re: LCO No. 3471 (An Act Concerning Police Accountability)

Members of the Judiciary Committee:

I am writing to address a portion of the proposed legislation before you in LCO No. 3471 ('An Act Concerning Police Accountability'). Specifically I wish to comment on Section 41 of this Bill (Civil Cause of Action Against Certain Police Officers).

As the Deputy Corporation Counsel for the City of Norwalk I have been on the front line in representing the City of Norwalk, its Police Department and the citizens and residents of the City for more than thirty (30) years. It must be stated that in defending the rights of the police officers to use reasonable means to keep order within our community we are also safeguarding the rights of the others in our community to live safely and peacefully.

It is the goal of Section 41 of the Act to remove the defenses of 'governmental immunity' and 'qualified immunity' as they might be applied under the law in civil litigation. It is my belief that these defenses, that have been developed and/or passed as laws as the result of public policy considerations, are widely misunderstood and misconstrued. These immunities are not designed to allow police officers to 'get away with' illegal acts. Instead, they are designed to allow the officers to perform their jobs effectively and reasonably in order to protect the members of our community.

We all know that the defense of governmental immunity is based on a balance between allowing for recovery and unnecessarily (and dangerously) 'handcuffing' (no pun intended) our municipal officials in the effective performance of their duties. The Court explained this balance in *Thivierge v. Witham*, 150 Conn. App. 769, 774-775 and in countless other the decisions as follows:

> *"Affording immunity to municipal officers performing discretionary acts serves the policy goal of avoiding expansive exposure to liability, which would cramp the exercise of official discretion beyond the limits desirable in our society....*

Discretionary act immunity reflects a value judgment that—despite injury to a member of the public—the broader interest in having government officers and employees free to exercise judgment and discretion in their official functions, unhampered by fear of second-guessing and retaliatory lawsuits, outweighs the benefits to be had from imposing liability for that injury.... In contrast, municipal officers are not immune from liability for negligence arising out of their ministerial acts, defined as acts to be performed in a prescribed manner without the exercise of judgment or discretion.... This is because society has no analogous interest in permitting municipal officers to exercise judgment in the performance of ministerial acts."

It needs to be made clear that governmental immunity (CGS Sect. 52-557n/Common Law) does not protect the officer against conduct that is intentional or reckless (only negligence). Thus, if there is a claim that an officer intentionally harmed someone and/or engaged in "criminal conduct, fraud, actual malice or willful misconduct", that officer can be held individually liable. In addition, that officer can be prosecuted criminally.

All of this means that there is no 'free pass' for an officer who so clearly violates someone's rights or who acts maliciously or criminally. See also CGS Sect. 7-101a that requires a City to indemnify and hold harmless any officer for any claim alleging negligence or an infringement of another's civil rights -- unless it is later determined that the officer acted maliciously, wantonly or wilfully (in which case the City is to be reimbursed by the officer).

Further, as we all know, the concept of "Qualified Immunity" in federal matters is completely misunderstood. Rather than making a police officer 'bulletproof' (or at least liability proof), this immunity only provides protection from liability when the right they have been accused of violating is not 'clearly established'. That is, once the contours of a right have been made clear, any violation of that right can lead to liability. I do not think that most people (including, with all due respect, the Legislators who are considering this matter) understand that.

For example, it is 'clearly established' that an officer may not use 'unreasonable force' in the performance of his duties. Accordingly, 'qualified immunity' will not be a shield against a claim made alleging 'unreasonable force' when that level used has been clearly established as unreasonable. What does or does not constitute unreasonable force is a determination that is highly situational. No less than our United States Supreme Court has observed that when judging the actions of our officers we should not employ the use of 20/20 hindsight and must make "allowance for the fact that police officers are often forced to make split-second judgments – in circumstances that are tense, uncertain, and rapidly evolving", *Graham v. Connor*, 490 US 386, 396-397.

Courts have opined that when reviewing the level of force used by an officer "(t)he court's focus should be on the circumstances at the moment force was used and on the fact that officers on the beat are not often afforded the luxury of armchair reflections", (*Elliott v. Leavitt*, 99 F. 3d 640, 642). If the officers are aware that their split-second decisions may later be judged harshly in the warmth and safety of the court's chambers, they might hesitate ever-so-slightly in the performance of their duties such that their health and safety (and that of citizens like ourselves) is jeopardized.

In listening to the 'live testimony' regarding this Bill (as I write this) it is clear that the magnitude and the impact of the passage of this Bill's Section 41 is clearly not understood or appreciated. It seems to be the feeling that the removal of the defenses of 'governmental immunity' leave the police protected from claims of negligence and only subject to punishment/liability for claims of alleged willful or malicious conduct. Nothing could be further from the truth.

It is a terrible mistake for the Legislature to remove these provisions across the board by legislative fiat. Due to the fact that these cases are all so fact intensive, the determination of whether or not the officer acted appropriately must be left for the jury/court to decide on a case-by-case basis (and that includes the consideration of whether or not the officer is entitled to receive the understanding and protection of either governmental or qualified immunity).

Further, the provision in the Act that a prevailing Plaintiff is entitled to be awarded their attorneys' fees and costs is uncalled for. As it stands now, if a prevailing Plaintiff commences an action in the District court alleging that their civil rights have been violated, they will be entitled to recover their attorneys' fees and costs already.

It should also be noted that in the federal law, the possibility of recovering attorneys' fees is extended to the 'prevailing party' whether it is the Plaintiff or the Defendant (though prevailing defendants are almost always denied such recovery in the absence of demonstrable bad faith in filing the complaint by the Plaintiff). In this Act the award of fees and costs is only available to a 'prevailing plaintiff'. There is not even a pretense that the filing of baseless claims should bear similar consequences.

In addition, any attorney practicing in this field will tell you that such a provision leads to the settling of even the most baseless or fraudulent claims to the detriment of the City, Department and officers. That is, even in a valid case where a Plaintiff wins minor or even nominal damages, their attorney can then prepare a feast for themselves by submitting bills for amounts grossly in excess of what might be won by the Plaintiff. Further, the very threat of this circumstance leads (as a practical matter of fact) to the settling of even the most baseless claims all to the great detriment of the defender.

In conclusion, it is my strong feeling that the idea to remove the doctrines of governmental immunity and qualified immunity is a knee jerk reaction and one that is not well thought out. While Plaintiffs' attorneys will certainly salivate at this prospect (and that of getting a fee award), this occurrence will not make our community safer or better protected. In fact, it may lead to the opposite result overall.

Respectfully Submitted,

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MJS:bbt