Council 4 AFSCME Public Safety Chapter Testimony before the Police Transparency & Accountability Task Force December 1, 2020

Chairman Hall and members of the Logistics Subcommittee:

My name is Jeff Reimer. I am a Sergeant in the East Windsor Police Department, President of the East Windsor Police Union and president of the Council 4 AFSCME Public Safety Council. With me is Attorney Lorin Dafoe, a long-time and knowledgeable police union staff attorney.

Thank you for this opportunity to speak before you. Attorney Dafoe and I want to raise some concerns with the recently passed police accountability law, some recommendations to improve it and some suggestions for recommendations that you intend to send to the state legislature. We have heard that you do not wish for us to relitigate the whole bill before you. We will resist doing that and try to touch on the main problems.

There are several areas of the bill which attempt to preempt established constitutional law, and Attorney Dafoe will be addressing those areas with you shortly. I am going to focus on the practical effects and problems with this bill.

The first area of the bill I would like to discuss is section 16, which tasks the administrative head of each law enforcement unit to require officers to undergo a mental health examination every 5 years. The Bill seems to allow an officer to be fired if the test results come back poor. In a country that is trying to destigmatize mental health care, this is a step backwards. This will create a situation where officers are focused on passing, rather than getting help for issues they may be experiencing. Further, there is no language offering assistance, counseling, a dignified retirement or a rebuttable worker's compensation presumption for officers whose results are not perfect. This test was added to the new law because an officer's job is deemed so strenuous that psychological injury is deemed common. We urge you to recommend a rebuttable worker's compensation presumption for officers who fail their mental health or substance abuse test. This is important, because no one can become an officer in Connecticut without first passing a psychological evaluation. If they then fail an evaluation later in their career, there should be a presumption that their issues are a direct result of their job, thus enabling them to obtain the help they need to heal quickly and efficiently.

Another area of the bill which causes us concern is Section 30, which requires that a police officer or correction officer can be charged with a felony for failing to stop or report an act by a fellow officer that could be judged as "unreasonable" but not illegal. We urge that this be corrected. It makes more sense and is far easier for an officer to understand that they should move to stop or report an illegal act by another officer. The "unreasonable" standard is not defined. It is far too vague, and there is no place for vagueness in a statute.

In discussion, this subcommittee has raised recommendations that we find troubling. One such recommendation is to compile and study citizen complaints against officers. We see no indicators that this is needed. The Penn Act was passed because there was a belief that there was broad based racial discrimination in traffic stops. Our understanding is that the findings of the Penn Act show that this was a perception but not reality. We believe that the results of a citizen complaint study will show the same.

Should you undertake such a study, we urge that you do not identify officers by name to the public. There are existing laws shielding officer, and other state and municipal officials' identities to protect them and their families. Shielding laws were passed because retaliation against officers for doing their lawful duty has occurred. To identify pending complaints, or unsubstantiated complaints, is unfair and jeopardizes officers' reputations and safety, as well as the safety of the officers' families.

Another area of concern we would like to address is the myth that police union local contracts somehow unfairly hide citizen complaints against officers and shield officers from discipline. Our police union contracts have no special language shielding officers from complaints and discipline. We have standard discipline language in all our municipal contracts, whether the contracts are for police or for custodians, public works, librarians or administrators. This language only provides our members with due process throughout the discipline process, nothing more and nothing less.

The task force has also been charged with examining or recommending an immediate revocation of an officer's certification in some cases of a violation. We urge you to use the POST process for this. POST is composed heavily of police management. It operates under stringent rules that you are likely familiar with. There seems to be no reason to override the due process apparatus already set up through POST.

We thank you for rejecting the recommendation to bar officers from being able to appeal a POST decertification to superior court. It is highly unlikely that an officer would be able to appeal to superior court, as it is a prohibitively expensive process. But still, as we pursue more fairness in our judicial system, it is important to afford the same to police officers.

We do urge you to consider the effect that your work has on our officers and the way that the public perceives them. We know that many of you do consider this. Although the Penn Act has shown that there is not some vast racial targeting of minority citizens for traffic stops by police officers, the perception continues. When a horrific incident, such as the killing of George Floyd in Minnesota occurs, it seems that many Connecticut citizens perceive that it or something similar is happening here. The available information shows that it is not. The Washington Post database on police use of deadly force shows that Connecticut has a low rate of deadly force use. In our state of 3.5 million citizens there have been about four people per year killed during interactions with police. While every death is undoubtedly a tragedy, this shows that the problems which may be facing our country at large are not facing Connecticut, and we should carefully consider this when analyzing this bill.

We believe that the negative public perception of police officers, unfairly caused by out of state incidents and an overemphasis on negatives, has resulted in increased retirements of officers and a problem in attracting new young officers. This adds an increased burden to existing officers, who perform a job under stressful circumstances that are inherent to the job.

Anything that you can do to show that Connecticut police officers do their job well and professionally, which we think current evidence shows, we appreciate. We are always willing to listen to suggestions that you wish to offer us.

Thank you for your consideration. We would be happy to answer any questions or provide further information.

Chairman Hall and members of the Logistics Subcommittee:

My name is Lorin Dafoe and I am attorney at AFSCME Council 4. I am here tonight to discuss some of the constitutional defects in the new police accountability bill with you.

The first section I would like to discuss is the deadly force standard under the bill, which preempts decades of Supreme Court law that is well established. The case Graham v. Connor states that in cases of use of excessive force, the Courts are ordered to identify the specific constitutional right allegedly being infringed upon and judge the claim by the specific constitutional standard which governs that right. This is very specific and clear that the standard for claims of excessive force during an arrest, or other seizure of a free citizen invoke the fourth amendment which guarantees citizens the right "to be secure in their persons….against unreasonable seizures" and must be judged using the fourth amendment's reasonableness standard. This standard is whether the officer's actions are "objectively reasonable" considering the facts and circumstances confronting them, without regard to their underlying intent or motivation. The reasonableness must be judged based on the perspective of the officer on scene, and 20/20 hindsight can NOT be used. This Bill attempts to undue decades of law by stating that the standard is now not determined by the fourth amendment reasonableness standard, but instead requires an objectively reasonable belief based on the circumstances using 20/20 hindsight. The Bill specifies that the fact finder should consider whether the person subjected to force used, possessed, or appeared to possess a deadly weapon, whether the officer engaged in reasonable de-escalation measures, and whether the officers conduct contributed to the need to use force. These directives all require the use of 20/20 hindsight, which is prevented by our long-standing supreme court rulings. As I am sure you are aware, states are not allowed to implement laws which preempt supreme court or constitutional law under the Supremacy Clause of the US Constitution.

We would like to see this section of the law repealed, as it is unconstitutional and it creates a very real officer safety issue. Unfortunately, we are aware that this law is unlikely to be repealed until it is challenged in federal court. In light of that, we are asking for face to face training for our officers to be certain they are clear when they are allowed to utilize force. This training should be comprehensive with a knowledgeable instructor. If the goal is accountability and protection of our citizens, then we should be prepared to invest the money required to educate our officers on what is being required of them.

Because officers, and even training experts, are currently unsure of what the new language of the law means in terms of real life situations, we request that the use of force section of the law be put off until all officers can be effectively trained in the use and nuance of the new law.

Officers are re-certified every three years. Our thought is that it makes sense to put off the effective date until re-certification is accomplished. That would be roughly January 1, 2024. We also urge that POST, DESPP and municipal police departments (Assoc of CT Police Chiefs) be consulted on what resources are needed for training.

The second section of the bill which is constitutionally faulty is section 41 which deals with qualified immunity. First, I want to clarify what exactly qualified immunity is and what it is not. Qualified immunity protects government employees who are tasked with making decisions while in their official capacity, from being sued in CIVIL court by a citizen who believes their constitutional rights have been violated. Qualified immunity originated to protect presidential aides under the Nixon administration from frivolous lawsuits. It was not drafted to protect police, police just happen to fall under the law because they are also governmental employees making decisions while doing their job. Qualified immunity does not protect police from internal affairs investigations, nor does it protect them from criminal prosecution. It very narrowly protects from civil suit by citizens who claim their constitutional rights were violated when in fact, they were not.

The Court in *Harlow v. Fitzgerald, 457 U.S. 800* (1982) stated that government officials are entitled to some form of immunity from suits for damages to shield them from undue interference with their duties. The Court recognized there are competing values at stake:

1. The need for Citizens to have a remedy available to them when their rights have been violated and

2. The need to protect officials who are required to use discretion and the related public interest in these officials being confident exercising official authority when needed.

The Harlow Court identified qualified immunity as the best possible accommodation of these two competing values, as it would allow frivolous lawsuits to be quickly terminated. This is important because frivolous lawsuits against government officials incur costs to society as well as to the individual defendant.

Qualified Immunity protects government officials, including law enforcement officers, as well as the public from frivolous civil lawsuits. This bill removes that protection and overrules the Supreme Court in violation of the Supremacy Clause by rolling back the standard for qualified immunity to a “good faith standard” and removing the requirement that a constitutional right must be “clearly established” to defeat qualified immunity.

The Supreme Court has ruled, in no uncertain terms, that the “good faith” standard this bill requires is incompatible with the principle that frivolous lawsuits should not proceed to

trial. *Harlow v. Fitzgerald*, 457 at 801. Instead, the Court has explicitly stated that to defeat qualified immunity, the right being violated must be clearly established.

In addition, the bill changes the standard by which qualified immunity is evaluated from the current, subjective standard to a good faith objective standard. This good faith, objective standard has also been explicitly rejected by the Supreme Court, as this is a question for the jury.

The Court stated that a standard which requires resolution by a jury defeats the intent behind creating qualified immunity in the first place, namely to avoid frivolous lawsuits which create litigation expenses, distract officials from their governmental duties, inhibit discretionary action, and deter able people from public service.

The bill also removes the right to interlocutory appeal. This further goes against the Supreme Court's attempts to free the Courts from frivolous lawsuits as the case must be heard to completion, even if it is later determined that the defendant was entitled to qualified immunity. It uses resources which could be reserved for those cases which have merit and deserve to go forward.

This bill not only creates serious officer safety issues, but it will overburden the Courts in exactly the way the Supreme Court sought to avoid. For these reasons, the Union strongly opposes section 41 as unlawful, dangerous to our law enforcement officers, and in violation of public interest. The Union further opposes a recent recommendation that has been raised to increase the statute of limitations for these claims from one year to three years. This change will allow the opportunity for more suits to clog our already overburdened courts and cost the municipalities more money. We urge you to give this bill some time to how significant the increase in lawsuits is before extending this SOL.

I am going to shift gears a bit and discuss POST for a moment. One piece of misinformation keeps resurfacing in the discussion around POST and officer decertification. When a Union fights to get a terminated officer their job back, the DOL rules on that issue and decides whether to return the officer to work. Despite the DOL ability to rule on this, the DOL lacks the authority to overrule a POST determination to decertify an officer. Even if the Union is successful at the DOL, POST can still refuse to return the officer to work. This has always been the case, and it provides a check and balance system where two state agencies are tasked with ensuring an officer should be working as an officer.

Thank you for giving me the opportunity to address you here tonight.