COMMONWEALTH OF MASSACHUSETTS
SUPERIOR COURT DEPARTMENT OF THE TRIAL COURT

WORCESTER, ss. CIVIL ACTION NO. 2285-CV-00555

NEW ENGLAND POLICE BENEVOLENT ASSOC., INC., AND DANIEL GILBERT,
Plaintiffs

v.

MASSACHUSETTS PEACE OFFICER STANDARDS AND TRAINING COMMISSION,
Defendant

PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION FOR PRELIMINARY INJUNCTION

Now come the Plaintiffs and move this Court for a Preliminary Injunction enjoining the Defendant, Massachusetts Peace Officer Standards and Training Commission ("POST"), from continuing to engage in the unlawful conduct alleged in the Complaint.

DETAILED GROUNDS FOR PLAINTIFFS' MOTION[1]

The Plaintiff New England Police Benevolent Association, Inc. ("NEPBA") is a labor organization that, pursuant to G.L. c. 150E, acts as collective bargaining representative for approximately 3,500 Massachusetts law enforcement officers, more than 2,000 of which are part of some 80 different state and municipal bargaining units, including the City of Worcester's police patrol officers unit. The Plaintiff Daniel Gilbert ("Gilbert"), a police officer employed by the City of Worcester, is an NEPBA member, President of the Worcester Police Patrol Officers' Association, NEPBA Local 911, and an Executive Vice President of the NEPBA.

[1] These facts are gleaned from the Plaintiffs' Verified Complaint.

The defendant, POST, is a commission within the Commonwealth's Executive Branch, which was established pursuant to Chapter 253 of the Acts of 2020. Massachusetts has more than 350 law enforcement agencies and many thousands of individual officers who are now subject to the jurisdiction of POST. The Plaintiff Gilbert is one such officer, as are hundreds of his fellow Worcester police officers, and thousands of his fellow NEPBA members who work as law enforcement officers in communities throughout Massachusetts.[2]

Chapter 253 of the Acts of 2020 created G.L. c. 6E, sec. 4(a)(1), which establishes a Division of Police Certification within POST. Together with the Municipal Police Training Committee ("MPTC"), the Division of Police Certification is charged with setting minimum certification standards for law enforcement officers. Among such standards within G.L. c. 6E are attaining the age of 21 (sec. 4(f)(i)); completing a high school education or equivalent (sec. 4(f)(ii)); and completing a basic training program (sec. 4(f)(iii)).

In addition to the objective minimum standards listed above, some additional standards are also required for certification. For example, an officer must demonstrate "successful completion of an oral interview administered by the commission." G.L. c. 6E, sec. 4(f)(1)(viii). Also, an officer must be "of good moral character and fit for employment in law enforcement, as determined by the commission." G.L. c. 6E, sec. 4(f)(1)(ix). An officer's certification is not permanent, as recertification on a regular basis is required (a certification shall expire three (3) years after the date of issuance). G.L. c. 6E, sec. 4(f)(3)). Officers are required to "remain in compliance with the requirements of this chapter and all rules and regulations promulgated by the commission for the duration of their employment as an officer." G.L. c. 6E, sec. 4(f)(4).

[2] By virtue of his last name beginning with "G", Gilbert must apply for POST "recertification" prior to July 1, 2022. As explained in detail *infra*, WPD is directing its officers, including Gilbert, to respond to a "POST questionnaire" by June 1, 2022, to comply with the POST submission deadline of June 15, 2022. Officers with names beginning with letters found later in the alphabet need not be certified for up to two more years.

Consequently, any given officer's ability to remain employed, and likewise an agency's ability to staff its police department, is contingent on POST certification, as such agencies are now prohibited from employing officers who fail to be certified by POST. G.L. c. 6E, sec. 4(g).

Regarding the certification standard that an officer complete an oral interview administered by POST, the Defendant has concluded that the word "administer" empowers it to delegate such authority to the heads of hundreds of local law enforcement agencies - or their designees - and even, in some cases, others who are appointed or elected in city or town government. In turn, such designees must require that their employees provide *written answers* to a *written questionnaire* (agencies may also add their own additional questions). POST has directed that such local agencies designate an "Evaluator" to perform tasks the legislature expressly assigned to POST. The "POST questionnaire" sets forth the following questions, required to be answered *in writing under the pains and penalties of perjury*:

1. Are you current in all tax payments? This includes federal and state taxes as well as property and excise taxes. (Note: if you are subject to and in compliance with a payment plan established by the federal or state government, you may answer "yes" to this question.) If no, please explain.

2. Have you ever received a license or permit to possess or carry a firearm of any type? If so, for each such license or permit, please indicate the issuing jurisdiction or official; indicate whether any such license or permit has ever been revoked or suspended; and if it has been revoked or suspended, provide details.

3. Have you ever been a defendant in a civil suit in which it was alleged that you acted violently or abusively, or utilized excessive force, towards another person? If so, please provide details as to each such suit.

4. Have you ever been the subject of a restraining order or any other court order that restricted, or imposed consequences based on, your conduct? Have you ever been found in violation of either? If so, please give the details regarding each order, including the time frame in which it was issued and the identity of the court that issued it.

5. Have you ever been subjected to disciplinary action, consisting of a suspension of more than 5 days with or without pay, OR where bias or excessive force was found by investigation, in connection with any employment, including employment by your current law enforcement

agency? If yes, please give details as to each such incident and the nature of the disciplinary action taken.

(*Officers must then certify as follows*): To my knowledge, all disciplinary records, if any, have been submitted to POST.

6. In the last five years, have you ever sent or displayed a public communication on social media that you believe could be perceived as biased against anyone based on their actual or perceived race, ethnicity, sex, gender identity, sexual orientation, religion, mental or physical disability, immigration status, or socioeconomic or professional level, provided you were at least 18 years old at the time? If yes, please provide each such public communication, and details. For these purposes, "communications" include, without limitation, posts, comments, and messages; and "public" communications are those that were made available to three or more people other than you.

7. Do you currently belong, or have you ever belonged, to any organization that, at the time you belonged, unlawfully discriminated (including by limiting membership) on the basis of actual or perceived race, ethnicity, sex, gender identity, sexual orientation, religion, mental or physical disability, immigration status, age or socioeconomic or professional level? If so, please provide details regarding each such organization.

8. Thinking broadly, do you have any knowledge or information, in addition to that specifically addressed in the preceding questions, which may be relevant, directly or indirectly, to your eligibility or fitness to be recertified as a law enforcement officer with this law enforcement agency? This would include, but is not limited to, knowledge or information concerning your character, temperament, habits, employment, education, criminal records, traffic violations, residence, or otherwise. If so, please provide details.

Pursuant to POST's directive, a local law enforcement officer – designated by his or her agency as an "Evaluator" – is tasked with gathering and corroborating information to provide a recommendation for or against recertification.[3] POST's directive, however, tasks the ultimate responsibility for attesting to an officer's good moral character and fitness for duty with the various local agency heads. In doing so, POST has in essence delegated its statutory authority to hundreds of different local department heads, employed by different municipal and state

[3] POST has also authorized non-sworn officials, including the "Town Administrator or the Chair of the Board of Selectmen, or the Vice President of the College – the appointing/hiring authority" to attest to some officers' moral character. Ex. 3.

governments, each free to interpret and apply as they see fit. POST has, in fact, required that the Agency Head must attest to one of the following regarding each officer seeking recertification:

> I attest that, to the best of my knowledge, the Officers named on the Submission Template (that have not been listed in Submission 2 of this section) are of good moral character and fit for employment in law enforcement.
>
> [*or*]
>
> Based on the information considered, and the requirements of the statute, I believe the Officer named above and identified on the Submission Template as not attested to, does not possess the required good moral character and/or is not fit for employment as a law enforcement officer.

In cases where the various local agencies are attesting to an officer's good moral character, POST has further directed that agencies need not, and in fact must not, submit officers' completed POST questionnaires to POST. POST has advised that agencies retain officers' completed POST questionnaires in the officers' personnel files.[4] Absent from POST's directives, however, is any guidance as to what the standard for moral character or fitness for duty is.

Instead, local law enforcement agencies have been left with the responsibility to administer their own processes, using their own particular standards. The Worcester Police Department ("WPD"), for example, notified its officers, including the Plaintiff Gilbert, that the POST questionnaire "is the basis for the 'Evaluator' to assess your fitness for recertification," and that officers "must" fill it out by June 1, 2022. The WPD advised that (1) the Worcester Police Chief would decide if an officer would be approved for recertification or not, (2) a lieutenant would be assigned to administer the process, and suggested that (3) officers' completed responses (to the POST questionnaires) would likely be disclosed in response to public records requests. Ex. 4.

[4] Without explanation, POST noted that it "presently intends to use such questions, the answers it received, and related materials for other assessment instruments."

On April 13, 2022, Plaintiff Gilbert notified both the City of Worcester ("City") and the WPD that obligations created by the POST questionnaire constituted a substantial change in his members' working conditions. On behalf of NEPBA Local 911, Gilbert demanded the City and WPD (1) bargain with the union pursuant to G.L. c. 150E, (2) maintain the *status quo* during such bargaining, and (3) respond to the union's detailed request for information regarding officers' rights and obligations *vis-a-vis* the POST questionnaire. Gilbert requested the City and WPD provide the union members information regarding the new "moral character" requirement, as well as information related to the protection of his members' privacy rights.[5] Ex. 5.

Neither the WPD nor the City responded to Plaintiff Gilbert's requests for information. On April 19, 2022, however, the WPD again provided Gilbert and his membership with notice that (1) they are required to fill out the POST questionnaire, (2) the responses to the questionnaire will be used by the WPD Police Chief to make a recommendation to POST about whether or not officers should be recertified, and (3) the WPD would move forward with the POST questionnaire process "absent an injunction issued by the courts to stop this line of inquiry" so that WPD officers do not "risk being decertified and unable to work."

Plaintiff NEPBA is the certified collective bargaining agent for thousands of other Massachusetts law enforcement officers whose employers, like the City of Worcester, have ordered them to provide written, sworn answers to the POST questionnaire as a condition of

[5] Among the specific information requested by Gilbert was (1) the Department's process for determining whether an officer is of good moral character and fit for duty, (2) the standard that will be used and all factors that will be considered in such determinations, and in particular what would be the impact of an officers' answers or refusal to answer the POST questionnaire, (3) all circumstances that could result in or justify a negative recommendation by the Department regarding moral character or fitness for duty, (4) the efforts the Department would take to protect the confidentiality of the officers' questionnaire responses, including the notes and records of the interviews, (5) whether such materials would be produced in response to a public records request, (6) whether such records would be maintained, and if so, for how long, and (7) whether the Department consider the records exempt from public records disclosure, and if so, why?

continued employment. Other NEPBA bargaining unit officials have, like Gilbert, demanded information from their employers pursuant to G.L. c. 150E, to which law enforcement agencies have issued inconsistent and non-uniform replies. Compare Complaint, Ex. 6 (City of Everett notified its officers that negative recommendations regarding moral character or fitness for duty "would always be determined on an informed and reasoned basis dependent on the specific facts and circumstances of each such question or issue"); Ex. 7 (Town of Billerica advised officers that the Billerica Police department's rules and regulations would be the basis of negative recommendations regarding moral character and fitness for duty, as well as the POST questionnaire responses, officers' personnel files and disciplinary records, and other undefined factors, and also directed its officers to a website, *lawinsider.com,* for answers on when an officer may assert a privilege or legal protection or right); Ex. 8 (Town of Carver declined to provide the criteria upon which it would determine a positive or negative recommendation as to an officer's moral character; however, the town was clear that it cannot attest to moral character unless officers complete the POST questionnaire and that "the completion of the questionnaire is a requirement of officers' continued service as a law enforcement officer"); Ex. 9 (City of Northampton informed its officers will be suspended for 3-days if they decline to fill out the POST questionnaire, and, as to its standard for judging moral character, stated that the department will use a "totality of the circumstances," standard, including "disciplinary records," "what is currently known about those employees;" and any new information that is learned from the questionnaire and any resulting internal investigation that results in sustained findings "would also need to be considered." Northampton also confirmed that officers could be disciplined for their answers to the POST questionnaires; that they could not answer the questions orally but were ordered to answer in writing and under oath; that POST has not

provided guidance on when an officer might assert a privilege or legal right not to answer; that in certain circumstances officers might be subject to criminal prosecution based on their answers to the POST questionnaire; and, that POST has not provided any guidance on "the definition of good moral character and fitness for duty" and the the department is not at liberty to provide a definition for the officers).

ARGUMENT

THIS COURT SHOULD ENJOIN POST FROM REQUIRING LAW ENFORCEMENT OFFICERS SEEKING RECERTIFICATION TO BE SUBJECT TO THE PROCESS AND PROCEDURES ADOPTED BY POST THAT ARE UNCONSTITUTIONAL AND OTHERWISE INCONSISTENT WITH G.L. C. 6E.

In order to succeed on their motion for a preliminary injunction, the Plaintiffs bear the burden of proving "(1) a likelihood of success on the merits at trial; (2) that irreparable harm will result from the denial of the injunction; and (3) that the plaintiffs irreparable harm outweighs any harm the opposing party would suffer if the injunction were granted." Tri-Nel Mgmt., Inc. v. Bd. of Health of Barnstable, 433 Mass. 217, 219 (2001); Packaging Indus. Group Inc. v. Cheney, 380 Mass. 609, 617 (1980). In appropriate cases, the court also considers the risk of harm to the public interest. GTE Products Corp. v. Stewart, 414 Mass. 721, 723 (1993).

I. PLAINTIFFS' COMPLAINT DEMONSTRATES A LIKELIHOOD OF SUCCESS ON MERITS

A. THE PRACTICE AND PROCEDURE ADOPTED BY POST IS INCONSISTENT WITH THE LEGISLATIVE MANDATE OF G.L. C. 6E, SEC. 4(F)(1)(VIII) AND ULTRA VIRES.

The Plaintiffs acknowledge that a party challenging the validity and enforceability of a governmental regulation in this Commonwealth bears a heavy burden. Massachusetts Fed'n of Teachers, AFT, AFL-CIO v. Bd. of Educ., 436 Mass. 763, 771 (2002) ("A highly deferential standard of review governs a racial challenge to regulations promulgated by a government

agency," and that "a properly promulgated regulation has the force of law . . . and must be accorded all the deference due to a statute"). It first must be acknowledged, however, that the POST practice and procedure at issue here has not been codified into a properly promulgated regulation. See generally, G.L. c. 30A, sec. 2-6E. It is, instead, an *ad hoc* pronouncement and directive to the various heads of Massachusetts law enforcement agencies to complete tasks that POST has no authority to require and is entitled to limited deference from this Court.

Moreover, even if the process were "properly promulgated," "the principle of [judicial] deference is not one of abdication," and a governmental regulation "that is irreconcilable with an agency's enabling legislation cannot stand." Quincy v. Massachusetts Water Resources Auth., 421 Mass. 463, 468 (1995); see also Greater Boston Real Estate Bd. v. Dept. of Telecommunications & Energy, 438 Mass. 197, 204 (2002) (agency regulations that were "designed to regulate private property owners who do not fall within the class of persons that the Legislature has authorized the department to regulate . . . are ultra vires of the enabling legislation"); Berrios v. Dept. of Pub. Welfare, 411 Mass. 587, 596 (1992) (enforcement of regulations should be refused only if they are "plainly in excess of legislative power"). Accordingly, "[w]hen an agency's interpretation of its regulation cannot be reconciled with the governing legislation, that interpretation must be rejected." Nuclear Metals, Inc. v. Low-Level Radioactive Waste Mgmt. Bd., 421 Mass. 196, 211 (1995).

Pursuant to G.L. c. 6E, sec. 4(f)(1)(viii), in order to be certified, an officer must demonstrate "successful completion of an oral interview administered by the commission." The term "oral" means "spoken rather than written." American Heritage Dictionary, 5th Ed. (2022) https://ahdictionary.com/word/search.html?q=oral (accessed May 13, 2022). The practice and procedure of having the head of each local law enforcement agency distribute a written

questionnaire, which officers must then answer in writing and sign under penalty of perjury, "cannot, by any reasonable construction, be interpreted in harmony with the legislative mandate" that POST administer an "oral interview," and is therefore illegal. See Massachusetts Eye and Ear Infirmary v. Comm'r of Div. of Med. Assistance, 428 Mass. 805, 817-17 (1999) (citations omitted).

Importantly, nowhere in the statute is there a requirement that any interview of an officer seeking recertification be conducted under the pains and penalties of perjury. The legislature, of course, is well aware of the consequences of requiring a statement be made under the pains and penalties of perjury and has expressly required that condition in numerous statutes. See, e.g., McKenney v. Comm'n on Judicial Conduct, 377 Mass. 790, 796-97 n.6, n.7 and n.8 (1979) (overruled on other grounds) (annotating the various statutory provisions requiring signature under pains and penalties of perjury). That it did not choose to require the oral interview be conducted under pains and penalties of perjury is convincing evidence that it did not intend to so formalize the requirement, much less authorize POST to administer a series of written questions (delegated for others to administer, evaluate and maintain custody of) to be answered in writing under the pains and penalties of perjury. Doe v. Bd. of Registration in Med., 151 N.E.3d 829, 837 (Mass. 2020) ("The omission of particular language from a statute is deemed deliberate where the Legislature included such omitted language in related or similar statutes.") The procedure adopted is ultra vires and should be enjoined.

B. THE PRACTICE AND PROCEDURE AUTHORIZED BY POST IS IMPERMISSIBLY VAGUE AND VIOLATES DUE PROCESS

A law is void for vagueness if persons of common intelligence must necessarily guess at its meaning and differ as to its application. Strasnick v. Bd. of Registration in Pharmacy, 408 Mass. 654, 664 (1990); Solimeno v. State Race Comm'n, 400 Mass. 397, 404 (1987). Vague

laws violate due process because individuals do not receive fair notice of the conduct proscribed by the law, and vague laws that do not limit the exercise of discretion by officials engender the possibility of arbitrary and discriminatory enforcement. Caswell v. Licensing Comm'n for Brockton, 387 Mass. 864, 873 (1983); see also Brookline v. Comm'r of the Dept. of Environmental Quality Engg, 387 Mass. 372, 376 (1982) (regulation that fails to give fair warning as to what the standards for an agency decision will be is void for vagueness).

"A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application." Grayned v. Rockford, 408 U.S. 104, 108-109 (1972). Importantly, "[w]here a statute's literal scope, unaided by a narrowing state court interpretation, is capable of reaching expression sheltered by the First Amendment, the (vagueness) doctrine demands a greater degree of specificity than in other contexts." Smith v. Goguen, 415 U.S. 566, 573 (1994).

Here, neither the legislature in promulgating the statute, nor POST in setting forth the procedure to establish compliance, has attempted – in any way – to provide ascertainable standards defining what constitutes "being of good moral character and fit for employment in law enforcement . . ." Cf. Alaska Police Standards Council v. Parcell, 348 P.3d 882, 887 (Alaska 2015) (noting that the Alaskan Police Standard Council had "defined good moral character as: the absence of acts or conduct that would cause a reasonable person to have substantial doubts about an individual's honesty, fairness, and respect for the rights of others and for the laws of this state and the United States; for purposes of this standard, a determination of lack of 'good moral

character' may be based upon all aspects of a person's character . . .").[6] As the United States Supreme Court has stated in reference to the term "good moral character":

> [T]he term, by itself, is unusually ambiguous. It can be defined in an almost unlimited number of ways for any definition will necessarily reflect the attitudes, experiences, and prejudices of the definer. Such a vague qualification, which is easily adapted to fit personal views and predilections, can be a dangerous instrument for arbitrary and discriminatory denial of the right to practice law.

Konigsberg v. State B. of Cal., 353 U.S. 252, 263 (1957).

Moreover, the procedure adopted by POST – effectively allowing the approximately 350 separate agency heads to adopt and enforce their own standard of what is morally acceptable – ensures that decisions regarding good moral character will not be made pursuant to a uniform standard.[7] Instead of uniformity, the requirement will be subject to the "personal predilections" of each agency head as to what qualifies an individual for certification. Kolender v. Lawson, 461 U.S. 352, 358 (1983) ("[T]he more important aspect of vagueness doctrine is not actual notice, but the other principal element of the doctrine—the requirement that a legislature establish minimal guidelines to govern law enforcement."). Conduct deemed innocuous to one police chief may very well be found to be a sign of poor character by another. See People v. Bright,

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[6] That a similar standard guards the entrance to licensure in, for instance, the legal profession is not dispositive. Presumably, the same standard and requirement of "moral character" will not apply to every profession. See, e.g., Matter of Keenan, 314 Mass. 544, 546-47 (1943) ("The right to practice law is not one of the inherent rights of every citizen, as is the right to carry on an ordinary trade or business. It is a peculiar privilege granted and continued only to those who demonstrate special fitness in intellectual attainment and in moral character."). The point is not that one profession is inherently of higher moral character than another but simply that the Supreme Judicial Court has recognized granularity in the standard to be applied to certain professions.

[7] This, of course, is borne out by the varied responses by agencies to the Union's request for information as to what criteria would be used to determine good moral character.

520 N.E.2d 1355 (N.Y. 1988) (prohibition on loitering "in any transportation facility" unconstitutionally vague).[8]

Finally, *at least* one of the questions from the POST questionnaire is itself impermissibly vague. The questionnaire requires officers to answer the following question:

> 8. *Thinking broadly*, do you have *any knowledge or information*, in addition to that specifically addressed in the preceding questions, *which may be relevant, directly or indirectly*, to your eligibility or fitness to be recertified as a law enforcement officer with this law enforcement agency? *This would include, but is not limited to, knowledge or information concerning your character, temperament, habits, employment, education, criminal records, traffic violations, residence, or otherwise.* If so, please provide details. [emphasis added]

The above interrogatory is deliberately vague, undefined and requests the officer to determine information that "may" be germane either "directly and indirectly" to the individual's fitness or eligibility to be a police officer. In its attempt to make the question as broad as possible, POST has gutted the question of any determinable scope and left the officer to guesswork. The Plaintiffs submit that it is constitutionally infirm for a governmental entity such as POST to demand, *under pains and penalties of perjury*, a "broadly" encompassed answer to a question essentially asking what some other unidentified, unknown, individual "may" find "directly or indirectly" relevant to some undefined criteria. Because persons of ordinary intelligence must necessarily guess – under criminal penalty of perjury – at what the scope of the question might be, this Court should enjoin POST from requiring officers to answer it in lieu of recertification.

C. THE PRACTICE ADOPTED AND QUESTIONS POSED BY POST VIOLATE THE PLAINTIFFS' RIGHTS TO ASSOCIATIONAL PRIVACY, CONVERSATIONAL PRIVACY AND GENERAL PRIVACY.

[8] Indeed, POST itself has acknowledged the need for uniformity and consistent application. See POST Requirements and Plan for Recertification of Certain Law Enforcement Officers, available at https://www.mass.gov/doc/proposed-plan-for-recertification-of-officers/download (accessed May 10, 2022) (noting that one goal of the POST recertification plan was to achieve "consistency and uniformity in the standards applied to law enforcement officers.").

G. L. c. 214, sec. 1B, codifies a general right to privacy in the Commonwealth and provides in relevant part: "A person shall have a right against unreasonable, substantial or serious interference with his privacy." To prevail, a plaintiff must show that there was "[1] a gathering and dissemination of facts of a private nature that [2] resulted in an unreasonable, substantial or serious interference with his privacy." Branyan v. Southwest Airlines Co., 105 F. Supp. 3d 120, 126 (D. Mass. 2015). In the employment context, "[i]n determining whether there is a violation of § 1B, it is necessary to balance the employer's legitimate business interest in obtaining and publishing the information against the substantiality of the intrusion on the employee's privacy resulting from the disclosure." Bratt v. Int'l Business Machs. Corp., 392 Mass. 508, 521 (1984). The principle applies to public as well as private employment. Gauthier v. Police Comm'r of Boston, 408 Mass. 335, 338 (1990).

Ultimately, POST's written question number 8 – which requires the officer to think "broadly" about "knowledge or information" which could possibly be "directly or indirectly" related to the individual's ability to be a police officer – impermissibly invades the individual's privacy. The question would purport to require an officer to disclose any self-critical thought or evaluation that "may" (to some undefined and unknowable calculation) be relevant "directly or indirectly" to the ability to be a law enforcement officer. Because the scope of the question is deliberately undefined, non-specific, panoptic and all-encompassing, it leaves no room for any thought that is at all self-evaluative. Any self-criticism, analysis, thought, event, relationship, or action – no matter how trivial to the officer – could arguably be within the scope of the question as it "may or may not" be relevant to some undefined standard and relevant to some undefined person. The inquiry leaves no place for the most basic, longest recognized bastion of individual privacy – *private thought* – and must therefore violate section 1B. See Com. v. Blood, 400 Mass.

61, 69 (Mass. 1987) (noting that "Article 14, like the Fourth Amendment, was intended by its drafters not merely to protect the citizen against the breaking of his doors, and the rummaging of his drawers . . . but also to protect Americans in their beliefs, their thoughts, their emotions and their sensations by conferring, as against the government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men.") (quotations and internal citations omitted); Samuel D. Warren & Louis D. Brandeis, The Right to Privacy, 4 Harv. L. Rev. 193, 198, 206 (1890) ("If, then, the decisions indicate a general right to privacy for thoughts, emotions, and sensations, these should receive the same protection, whether expressed in writing, or in conduct, in conversation, in attitudes, or in facial expression."); Millar v. Taylor, 4 Burr. 2303, 2379 (1769) (Yates, J) ("It is certain every man has a right to keep his own sentiments, if he pleases. He has certainly a right to judge whether he will make them public, or commit them only to the sight of his friends.").

Disclosure of the information gleaned from the balance of the questions set forth in the POST questionnaire also triggers a violation of the officers' general right to privacy. Importantly, disclosure of private information to the broad public is not necessary for a valid privacy claim. The disclosure of facts between coworkers is sufficient to violate privacy. Wagner v. City of Holyoke, 241 F. Supp. 2d 78, 100 (D. Mass. 2003), aff'd sub nom. Wagner v. City Of Holyoke, Massachusetts, 404 F.3d 504 (1st Cir. 2005); see Bratt v. Int'l Bus. Mach. Corp., 392 Mass. 508, (1984) ("[T]he disclosure of private facts about an employee among other employees in the same corporation can constitute sufficient publication under the Massachusetts right of privacy statute."). Where, as here, there are no proper protections in place to prevent disclosure of private information (even if the gathering of that information is necessary for a legitimate governmental purpose), an injunction is warranted until the "appropriate official establishes

written, explicit, and binding rules that contain adequate safeguards against unnecessary disclosure of the confidential information elicited in response to a questionnaire directed at public employees. Fraternal Order of Police, Lodge No. 5 v. City of Philadelphia, 812 F.2d 105, 118 (3d Cir. 1987).

The information sought by the POST questionnaire is all extremely sensitive information that – at least prior to the adoption of the current procedure by POST – would not be subject to public disclosure from an officer's personnel record. See G. L. c. 4, § 7, Twenty-sixth [j] (exempting the names and addresses of any persons contained in, or referred to in, any applications for any licenses to carry or possess firearms); G.L. c. 4, § 7(26)(a); G.L. c. 6, §§167A, 172) (criminal offender record information ("CORI") exempt from disclosure); 26 U.S.C. sec. 6103 ("tax [r]eturns and return information shall be confidential"); Attorney Gen. v. School Comm. of Northampton, 375 Mass. 127, 132 (1978) (disclosure of fact of job application may be an "invasion of personal privacy" under G. L. c. 4, § 7, Twenty-sixth [c]); 42 U.S.C. 12112(d)(4)(A) ("A covered entity shall not require a medical examination and shall not make inquiries of an employee as to whether such employee is an individual with a disability); G. L. c. 41, § 97D; G. L. c. 41, § 98F; G.L. c. 209A, § 8 (laws regarding the confidentiality of domestic violence records).[9]

[9] Here the procedure adopted by POST threatens a greater invasion of privacy because it appears likely that the completed POST questionnaires may – in the eyes of some – be subject to public dissemination pursuant to the modifications made to the public records law as part of police reform legislation. This is because G.L. c. 4, sec. 7 (c), as amended by the POST statute (St. 2020, c. 253, § 2, eff. Dec. 31, 2020) provides that "personnel and medical files or information and any other materials or data relating to a specifically named individual, the disclosure of which may constitute an unwarranted invasion of personal privacy; *provided, however, that this subclause shall not apply to records related to a law enforcement misconduct investigation.*" (emphasis on amendment). The Plaintiffs maintain that such records should not be subject to public disclosure, but it is clear that some law enforcement agencies believe differently. The WPD, for instance, has instructed officers to assume that all of the information will be available to the public. In addition, POST has indicated that it intends to use the materials for other, as yet

Moreover, questions 6, 7 and 8 go beyond invasion of the general right of privacy and invade the Plaintiffs' rights to conversational privacy and associational privacy. The Supreme Judicial Court has very recently, and very thoughtfully, opined as follows:

> Conversational privacy protects private conversations from unreasonable government surveillance. See United States v. United States Dist. Court for the E. Dist. of Mich., 407 U.S. 297, 313, 92 S.Ct. 2125, 32 L.Ed.2d 752 (1972); Blood, 400 Mass. at 69, 507 N.E.2d 1029 ("the right to bring thoughts and emotions forth from the self in company with others doing likewise" is protected by art. 14). Conversational privacy serves not only the Fourth Amendment's and art. 14's interests in "secur[ing] the privacies of life against arbitrary power," McCarthy, 484 Mass. at 498, 142 N.E.3d 1090, quoting Almonor, 482 Mass. at 53, 120 N.E.3d 1183 (Lenk, J., concurring), but also the interests protected by the First Amendment to the United States Constitution and art. 16 of the Massachusetts Declaration of rights in enabling and guarding free speech, see First Amendment (protecting "freedom of speech"); art. 16 ("The right of free speech shall not be abridged"). See Bartnicki v. Vopper, 532 U.S. 514, 533, 121 S.Ct. 1753, 149 L.Ed.2d 787 (2001). Indeed, "[i]n a democratic society privacy of communication is essential if citizens are to think and act creatively and constructively." Id.[]. The erosion of conversational privacy therefore risks imposing a "seriously inhibiting effect upon the willingness to voice critical and constructive ideas."[]
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> Relatedly, associational privacy protects the ability to develop and maintain personal relationships. See Roberts v. United States Jaycees, 468 U.S. 609, 617-618, 104 S.Ct. 3244, 82 L.Ed.2d 462 (1984) ("choices to enter into and maintain certain intimate human relationships must be secured against undue intrusion by the State"); Blood, 400 Mass. at 69, 507 N.E.2d 1029 ("the right to be known to others and to know them, and thus to be whole as a free member of a free society" is protected by art. 14). Given the "vital relationship between freedom to associate and privacy in one's associations," associational privacy is necessary in order for the associations protected by the First Amendment and art. 19 of the Massachusetts Declaration of Rights to flourish. See First Amendment (protecting freedom of association); art. 19 of the Massachusetts Declaration of Rights (protecting peaceable right to assemble). [] Associational privacy "safeguards the ability independently to define one's identity" by relating to and engaging with others. Roberts, supra at 618-619, 104 S.Ct. 3244. Protection of associational privacy also plays a crucial role in maintaining a democracy; for instance, it enables individuals to amplify their voices by joining with like-minded others, and encourages civic participation by reducing isolation without fear of government interference or reprisal. See Fisher, Guilt by Expressive Association: Political Profiling, Surveillance and the Privacy of Groups, 46 Ariz. L. Rev. 621, 639 (2004). Accordingly, both the Federal and State Constitutions "must afford the formation and preservation of certain kinds of highly personal relationships a substantial measure of sanctuary from unjustified interference by the State." Roberts, supra at 618, 104 S.Ct. 3244.[]

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undisclosed, purposes. For all of these reasons, the questionnaire and the dissemination of the responses poses an extreme threat to the privacy of Plaintiffs.

> Government surveillance of social media, for instance, implicates conversational and associational privacy because of the increasingly important role that social media plays in human connection and interaction in the Commonwealth and around the world. For many, social media is an indispensable feature of social life through which they develop and nourish deeply personal and meaningful relationships. For better or worse, the momentous joys, profound sorrows, and minutiae of everyday life that previously would have been discussed with friends in the privacy of each others' homes now generally are shared electronically using social media connections. Government surveillance of this activity therefore risks chilling the conversational and associational privacy rights that the Fourth Amendment and art. 14 seek to protect. See Jones, 565 U.S. at 416, 132 S.Ct. 945 (Sotomayor, J., concurring) ("Awareness that the government may be watching chills associational and expressive freedoms"); Bedi, Social Networks, Government Surveillance, and the Fourth Amendment Mosaic Theory, 94 B.U. L. Rev. 1809, 1851 (2014) ("Allowing [government monitoring of an individual] could deter an individual from exercising [his or] her rights to engage in various associational activities -- whether they are social, professional, political, or religious -- for fear the government may be watching"). Accordingly, the constitutional solicitude for conversational and associational privacy extends to the realm of social media.

Cmmw. v. Carrasquillo, 409 Mass. 107, 113-114 (2022).

POST questionnaire questions 6 ("have you ever sent or displayed a public communication on social media that you believe could be perceived as biased against anyone based on their actual or perceived race, ethnicity, sex, gender identity, sexual orientation, religion, mental or physical disability, immigration status, or socioeconomic or professional level" and defining "public" communication as that available to at least 3 people); and 7 ("Do you currently belong, or have you ever belonged, to any organization that, at the time you belonged, unlawfully discriminated (including by limiting membership) on the basis of actual or perceived race, ethnicity, sex, gender identity, sexual orientation, religion, mental or physical disability, immigration status, age or socioeconomic or professional level?"), impermissibly tread upon rights to associational and conversational privacy.

Question 7 conceivably compels disclosure of every organization that a responder could be a member of as virtually every major organization or association is susceptible to a claim of some type of unlawful discrimination. See, e.g., "Red Cross General Counsel Resigns over His

Handling of Sexual Harassment" Pro Publica, February 1, 2018; "Women's lawsuit seeks at least $15M for NAACP, former boss" ABC News, February 3, 2020; "Catholic Charities Settles EEOC Age Discrimination Suit", EEOC Press Release, June 18, 2009; "Boy Scouts reach $850 million sellement with tens of thousands of seual abuse victims" U.S News, July 1, 2021. There can be no legitimate interest to justify such an overbroad inquiry in the associational memberships. See, e.g., Americans for Prosperity Found. v. Bonta, 141 S. Ct. 2373, 2383 (2021) (compelled disclosure of affiliation with groups engaged in advocacy was subject to "exacting scrutiny" and constituted impermissible restraint on freedom of association); Fraternal Order of Police, Lodge 7, 812 F.2d at 119-120 (compelled disclosure of memberships on questionnaire to police officers seeking specialty position was impermissible infringement upon privacy of association and belief guaranteed by the First Amendment).

Question 6 threatens to chill even private text communications among a small group of friends for fear that a statement, joke, inquiry or observation may be scrutinized and then publicized as some evidence of impermissible bias. For instance, would an observation, joke or lament about how one grew up with love but not much money in the household evidence some impermissible bias towards a certain socioeconomic or professional level? The question ignores the recognized right of individuals to use social media – and limit connections thereon – in order to maintain relative privacy even while communicating within self- approved friend groups. See Carrasquillo, 489 Mass. at 116-118 (acknowledging that an individual could have a subjective expectation of privacy based upon his or her use of social media privacy controls). Question 6's broad, unrestrained inquiry into the private communications of those answering the Questionnaire is facially invalid and the question should be enjoined.

II. THE REMAINING ELEMENTS NECESSARY TO SECURE AN INJUNCTION ARE SATISFIED.

The remaining elements require little discussion. The requirement of a showing of irreparable harm is satisfied in this case by the fact that the infringement of the Plaintiffs' rights is of constitutional dimension. See, e.g., Elrod v. Burns, 427 U.S. 347, 373-74 (1976); 11A C. Wright and A.Miller, Federal Practice and Procedure, sec. 2948.1 (3rd Ed. 2022) ("When an alleged deprivation of a constitutional right is involved, such as the right to free speech or freedom of religion, most courts hold that no further showing of irreparable injury is necessary."). Conversely, POST would suffer no harm by the enjoining of its unconstitutional behavior as it must be assumed that the agency seeks to act and move forward after this initial foray into recertification - without violating the rights of the officers it regulates. Similarly, the public interest is best served in this matter by having the POST recertification process properly comport with constitutional and statutory requirements moving forward.

CONCLUSION

For the foregoing reasons, the Plaintiffs respectfully request that this Motion be granted and that the Defendant POST be enjoined from requiring that police agencies require that officers seeking recertification complete the written POST questionnaire under the pains and penalties of perjury.

Respectfully submitted, Plaintiffs
By their lawyers,

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