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November 29, 2022

***Via Electronic & U.S. Mail***

Brian Marvel, PORAC President  
Peace Officers Research Association of California (PORAC)  
2940 Advantage Way  
Sacramento, CA 95834

**Re: Reaffirming PORAC's position on California's heightened use-of-force standard**

Dear Brian,

We write in response to your request for a reaffirmation of PORAC's reading of the law as it relates to recent use of force legislation. On Tuesday, November 22, the ACLU issued a press release misconstruing PORAC's position on recent use of force legislation and the impact of an out-of-court non-monetary settlement with the City of Pomona.

First, it is important to understand what the settlement in Pomona does and does not effect. Tellingly, this settlement involves no monetary compensation and primarily requires the City to implement policies that comport with AB 392 and SB 230. While this settlement is being touted by the ACLU as a legal determination over the scope and requirements of AB 392, the settlement does no such thing. Private parties cannot enter into settlement binding anyone other than the parties to the agreement. The settlement does not involve any legal interpretation from any court and has no precedential effect on anyone other than the City of Pomona.

While the ACLU is marketing this settlement as a determination of the justification standards under the penal code, agencies actually have an obligation to implement policies under SB 230 that exceed the justification standards for deadly force in Penal Code Section 832a. In fact, SB 230 – rather than AB 392 – requires implementation of polices and training on alternative tactics to deadly force, including de-escalation. Importantly, SB 230 sets minimum requirements for use of force polices and agencies have discretion to adopt policies that exceed the SB 230 standards so long as they do not impinge Constitutional self-defense rights. (See, *New York State Rifle & Pistol Association, Inc. v. Bruen* (2022)142 S.Ct. 2111, 2131, *holding*, the Second Amendment “surely elevates above all other interests the right of law-abiding, responsible citizens to use arms for self-defense” and only regulations consistent with this nation's historical tradition are Constitutional.)

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Thus, the settlement agreement in Pomona encompasses the agency's obligations to comply with both laws and its discretion to adopt policies that exceed the requirements of those laws. Lastly, the settlement agreement appears to focus on political statements and criticism of PORAC while merely restating the longstanding Constitutional requirements to only use deadly force when necessary to prevent an imminent threat of death or serious bodily injury, and to consider the totality of circumstances.

### Penal Code Justification for Deadly Force

PORAC President Marvel's comments regarding deadly force and AB 392 have been misconstrued to malign PORAC's contributions to police reform in California, including the enactment of SB 230 over the vociferous objections of the ACLU. SB 230 requires training on de-escalation tactics and alternatives to deadly force, which the ACLU challenged in part based on their opposition to police funding, even for training. Now, according to news reports the ACLU is criticizing POST over its implementation of SB 230's requirements.

PORAC has long supported modernizing California's 200-year-old justification standards (Penal Code Sections 197 and 835a) to comport with the Constitutional standards set forth in *Graham* and *Garner* that deadly force is only to be used when necessary to protect human life or to prevent the escape of a violent felon who poses a significant risk to the public if not immediately apprehended. In fact, the early version of SB 230 included language that mirrored AB 392's Penal Code § 835a(c)(1). **PORAC stands behind our legal analysis that AB 392's changes to the Penal Code largely codified the Constitutional standards established by the courts and modernized the antiquated statutes in California.**

In fact, published appellate case law supports PORAC's conclusion. *Koussaya v. City of Stockton* (2020) 54 Cal.App.5th 909, 936, interpreted AB 392 and concluded, "as long as an officer's conduct falls within the range of conduct that is reasonable under the circumstances, there is no requirement that he or she choose the 'most reasonable' action or the conduct that is the least likely to cause harm and at the same time the most likely to result in the successful apprehension of a violent suspect, in order to avoid liability law enforcement personnel have a degree of discretion as to how they choose to address a particular situation." (citations omitted.) The court recognized that "although an officer's pre-shooting conduct must be considered as part of the totality of circumstances surrounding the use of force, the reasonableness of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." (*Id.*)

AB 392 also codifies definitions of other important use of force terms, such as imminent, deadly force, and totality of the circumstances. PORAC has consistently supported codifying these important standards and included additional definitions such as "feasible" in the bill it sponsored, SB 230. AB 392 also includes PORAC supported restrictions on the use of force against individuals who are only a threat to themselves. In short, PORAC is proud to have worked with the Governor and the Legislative leadership to enact balanced and workable legal standards for deadly force, and more importantly for training and uniform statewide use of force standards that exceed the Penal Code.

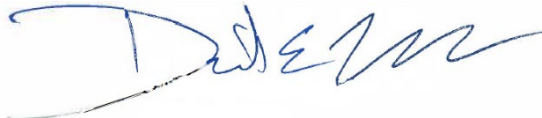
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As you are aware, the enactment of SB 230 delivered the most significant policy improvements, resulting in better outcomes for everyone. Ironically, the ACLU testified against SB 230 in the public safety committee and was admonished by the Chair for throwing "last-minute firebombs" on this important legislation.

We trust this letter addresses the concerns that have been raised. Please do not hesitate to contact the undersigned if we can be of further assistance.

Sincerely,

**MASTAGNI HOLSTEDT, A.P.C.**

A handwritten signature in blue ink, appearing to read "David E. Mastagni".

DAVID E. MASTAGNI  
Attorney at Law

**RAINS, LUCIA, STERN, ST. PHALLE  
& SILVER, P.C.**

A handwritten signature in blue ink, appearing to read "Timothy K. Talbot".

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