

# 20-2789

20-3177 (XAP)

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United States Court of Appeals  
Second Circuit

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UNIFORMED FIRE OFFICERS' ASSOCIATION, *ET AL.*,  
*Plaintiffs-Appellants, Cross-Appellees*

*v.*

BILL DE BLASIO, *ET AL.*,  
*Defendants-Appellees,*

COMMUNITIES UNITED FOR POLICE REFORM,  
*Intervenor-Defendant, Cross-Appellant.*

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE  
SOUTHERN DISTRICT OF NEW YORK, NO. 20 CIV. 5441  
(KPF)(RWL)

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**BRIEF AMICUS CURIAE OF  
LAW ENFORCEMENT ACTION PARTNERSHIP  
IN SUPPORT OF DEFENDANTS-APPELLEES**

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**Full Caption:**

UNIFORMED FIRE OFFICERS ASSOCIATION, UNIFORMED FIREFIGHTERS ASSOCIATION OF GREATER NEW YORK, CORRECTION OFFICERS' BENEVOLENT ASSOCIATION OF THE CITY OF NEW YORK, POLICE BENEVOLENT ASSOCIATION OF THE CITY OF NEW YORK, INC., SERGEANTS BENEVOLENT ASSOCIATION, LIEUTENANTS BENEVOLENT ASSOCIATION INC., CAPTAINS ENDOWMENT ASSOCIATION, and DETECTIVES' ENDOWMENT ASSOCIATION,

Plaintiffs-Appellants,

v.

BILL DE BLASIO, in his official capacity as Mayor of the City of New York, CITY OF NEW YORK, FIRE DEPARTMENT OF THE CITY OF NEW YORK, DANIEL A. NIGRO, in his official capacity as the Commissioner of the Fire Department of the City of New York, NEW YORK CITY DEPARTMENT OF CORRECTIONS, CYNTHIA BRANN, in her official capacity as the Commissioner of the New York City Department of Correction, DERMOT F. SHEA, in his official capacity as the Commissioner of the New York City Police Department, NEW YORK CITY POLICE DEPARTMENT, FREDERICK DAVIE, in his official capacity as the Chair of the Civilian Complaint Review Board, and CIVILIAN COMPLAINT REVIEW BOARD,

Defendants-Appellees,

COMMUNITIES UNITED FOR POLICE REFORM,

Intervenor-Defendant-Appellee.

**CORPORATE DISCLOSURE STATEMENT**

Pursuant to Federal Rule of Appellate Procedure 26.1, Law Enforcement Action Partnership has no parent company, and no publicly held company owns 10% or more of the Law Enforcement Action Partnership.

By:  /s/ Joel D. Bertocchi  
Joel D. Bertocchi

**STATEMENT REGARDING CONSENT**

Pursuant to Fed. R. App. P. 29(a)(2), counsel for Appellants, Appellees and Intervenor have consented to the filing of this brief.

By:  /s/ Joel D. Bertocchi  
Joel D. Bertocchi

**TABLE OF CONTENTS**

	<u>Page</u>
CORPORATE DISCLOSURE STATEMENT.....	iii
STATEMENT REGARDING CONSENT.....	iii
I. INTEREST OF THE <i>AMICUS CURIAE</i> .....	1
II. SUMMARY OF THE ARGUMENT.....	5
III. ARGUMENT .....	6
A. Public Disclosure of Accusations And Investigations Of Police Misconduct Will Reduce The Risk Of Harm To Officers And Promote Effective Policing. ....	10
1. Transparency Furthers Officer Safety, And Lack Of Transparency Places Their Safety At Greater Risk. ....	11
2. Transparency is Critical to Effective and Safe Policing.....	28
IV. CONCLUSION .....	37
CERTIFICATE OF COMPLIANCE .....	38

**TABLE OF AUTHORITIES**

Page(s)

**Cases**

*Dunnigan v. Waverly Police Dep’t*, 279 A.D.2d 833, 719 N.Y.S.2d 399 (2001) ..... 14

*New York v. United States Dep’t of Homeland Sec.*, 969 F.3d 42 (2d Cir. 2020) ..... 10

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**Rules**

Federal Rule of Appellate Procedure 29(a)(2)..... 4

**BRIEF AMICUS CURIAE OF  
LAW ENFORCEMENT ACTION PARTNERSHIP**

*Amicus curiae* Law Enforcement Action Partnership (“LEAP”) hereby submits its brief *amicus curiae* in support of the position of the Defendants-Appellees, and of giving full effect to the repeal of Section 50-a of the New York Civil Rights Law by the New York Legislature, as follows:

**I. INTEREST OF THE AMICUS CURIAE**

LEAP is a nonprofit organization composed of current and former police officers, prosecutors, judges, corrections officials, and others from around the country with law enforcement backgrounds. Its mission is to unite and mobilize the voice of law enforcement in support of reform of the criminal justice system, with the aims of making law enforcement more effective and communities safer. LEAP advocates for these goals by urging law enforcement agencies to channel their resources toward the greatest threats to public safety, by promoting alternatives to arrest and incarceration, by addressing the root causes of crime and, perhaps as most relevant here, by working to improve the relationships between police officers and police departments and the communities they serve.

LEAP draws on the considerable experience and knowledge of its members and associates in all phases of the law enforcement process to propose, promote and advocate for criminal justice, sound drug enforcement policy and community relations reforms that will make our communities safer and our system fairer and more constructive—and thus more just. Founded by five police officers in 2002 with an original focus on drug policy, today LEAP boasts a speakers bureau that numbers more than 250 current and former criminal justice professionals<sup>1</sup> who write, speak and advise, in the U.S. and abroad, on a host of related issues, including police-community relations, incarceration and its alternatives, strategies to reduce harm and changes to drug enforcement policies.<sup>2</sup> As examples of its work, LEAP has: advocated for the passage of Proposition 1 in Michigan, which legalized and regulated adult use of marijuana in the state; provided support for Amendment 4 in Florida,

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<sup>1</sup> A list of speakers associated with LEAP can be found at <https://lawenforcementactionpartnership.org/category/speakers/>.

<sup>2</sup> LEAP's principal issues of concern include police-community relations, incarceration, drug policy, harm reduction, and global issues. See Law Enforcement Action Partnership Press Kit, *available at* <https://lawenforcementactionpartnership.org/wp-content/uploads/2018/01/2018-LEAP-Press-Kit.pdf>.

which was aimed at restoring the voting rights of more than one million people who have served their time for felony convictions; spoke out in favor of Louisiana's Amendment 2, which ended the State's use of non-unanimous juries in felony trials, a change that took a significant step in correcting disproportionate racial impact on juries; helped defeat Measure 105 in Oregon, and thus ensuring that state and local law enforcement would not be compelled to enforce federal immigration laws and policies; and worked to pass Initiative 940 in Washington, which will require law enforcement officers to receive violence de-escalation, mental-health, and first-aid training, and will also change standards for use of deadly force.

When LEAP has addressed these issues, it has done so as a voice for law enforcement professionals at all levels. The deep experience of its members and speakers allows LEAP to weigh in with credibility and insight. Through speaking engagements, media appearances, court and legislative testimony, and support of allied efforts LEAP has been able to reach audiences across a wide spectrum of affiliations and beliefs, calling for more practical and ethical policies designed to enhance public and law enforcement safety.

Given the backgrounds and experiences of its members and speakers, and because the improvement of police-community relations is a core concern for us, LEAP is keenly interested in, and uniquely positioned to address, some of the issues raised in this case. We see as our primary responsibility supporting the safety of police officers and of the communities in which they serve. The issues raised in this case, including the effect of the repeal of Section 50-a of the New York Civil Rights Law, bear directly on this concern. The parties and other *amici* will no doubt fully address relevant case law on the constitutional and other legal issues raised in this case. But the Appellants' arguments are also grounded in factual assertions about the realities of policing. It is those realities, and how they affect the public interest and officer safety, that LEAP hopes to help the Court understand.<sup>3</sup>

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<sup>3</sup> This brief was not authored, in whole or in part, nor was money contributed for its preparation or submission, by any party, a party's counsel, or any person other than the *amicus curiae*, its members, or its counsel. Pursuant to Federal Rule of Appellate procedure 29(a)(2), all parties have consented to the filing of this brief.

## **II. SUMMARY OF THE ARGUMENT**

Appellants seek injunctive relief that would significantly curtail, if not outright nullify, the New York legislature's repeal of Section 50-a of the New York Civil Rights Law. But an injunction requires—among other things—a showing that the requested relief is in the public interest and that it will increase the risk of harm. Appellants argue that it is in the public's interest to prevent Section 50-a from taking full effect because general disclosure of the records of police misconduct and disciplinary investigations would put officers in danger and tarnish their reputations. But LEAP knows from its considerable experience that transparency with respect to these matters will have the exact opposite effect; it will increase the public's trust in the police, and will actually reduce the risks officers face.

More transparency will also discredit baseless allegations rather than ruin the reputations of good officers. When allegations of misconduct are met by silence and secrecy, LEAP's experience is that the public is inclined to believe them, even if they are in fact false. Appellants argue that less transparency will help law enforcement, but LEAP, from the years of experience and expertise of its law enforcement professionals in all parts of the criminal justice system,

can say with confidence that the opacity Appellants argue for is contrary to the interests of both the police and the public they serve. The Court, therefore, should affirm the District Court's decision denying a preliminary injunction because Appellants cannot demonstrate that injunctive relief preventing the repeal of Section 50-a from taking effect is in the public interest and because the denial of the requested injunction will not increase the risk of harm.

### **III. ARGUMENT**

For more than 40 years, New York had one of the most restrictive secrecy laws in the country related to police disciplinary records.<sup>4</sup> In the aftermath of the killing of George Floyd by Minneapolis police officers on Memorial Day of 2020 the New York state legislature approved, and the Governor signed, Senate Bill S8496. It repealed former Section 50-a of the New York Civil Rights Law, which had generally shielded from public view the records of

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<sup>4</sup> See Mara Gray, Opinion, *Good Riddance to One of America's Strongest Police Secrecy Laws*, N.Y. Times (June 9, 2020), <https://www.nytimes.com/2020/06/09/opinion/repeal-50a-ny-police.html>; Michael O'Keeffe, *Advocates Cheer 50-a Reform While Officials Urge Caution*, Newsday (June 10, 2020), <https://www.newsday.com/long-island/50-a-police-misconduct-records-1.45523648>.

investigative and disciplinary proceedings involving New York law enforcement officers. Prior efforts to repeal Section 50-a, like other bills aimed at increasing transparency and curbing police misconduct, had failed to garner enough legislative support, especially in light of the persistent, significant and seemingly knee-jerk opposition from powerful police unions.<sup>5</sup> In the aftermath of Mr. Floyd's death, and of other regrettably similar incidents, the groundswell of activism seen in New York and across the country, including some of the largest protests in the country's history, finally propelled the bill through the Legislature.<sup>6</sup> In seeking their injunction Appellants ask the Court to undo the legislature's well-considered action—essentially to repeal the repeal.

To what should be no one's surprise, the position of the Appellants in this case is the same as it has always been: a reflexive

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<sup>5</sup> See Reade Levinson, *Across the U.S., police contracts shield officers from scrutiny*, REUTERS UK (Jan. 13, 2017), <https://uk.reuters.com/article/uk-usa-police-unions-specialreport/special-report-across-the-u-s-police-contracts-shield-officers-from-scrutiny-idUKKBN14X1SO?il=0>.

<sup>6</sup> Larry Buchanan et al., *Black Lives Matter May Be the Largest Movement in U.S. History*, N.Y. TIMES (July 3, 2020), <https://www.nytimes.com/interactive/2020/07/03/us/george-floyd-protests-crowd-size.html>.



opposition to transparency where the conduct, and misconduct, of police officers is concerned. They should not be allowed to thwart the democratic will and legislative judgment of the New York State Legislature, its Governor and the people who elected them on this issue of grave public concern.

Because LEAP knows the value of transparency in matters of police conduct, it supports the legislature's complete repeal of Section 50-a of the New York Civil Rights Law, which will allow the public disclosure of records relating to law enforcement officers, including information about accusations of misconduct, investigations of complaints and their results. Contrary to Appellants' contentions, LEAP's members know that public access to this kind of information actually *promotes* the goals of effective law enforcement, including—indeed, especially—both effective policing and officer safety. The transparency fostered by the repeal of Section 50-a is necessary to effective policing because it supports and promotes police accountability. And accountability, in turn, is the key to what is absolutely critical to the goals of policing: trust between police officers and police departments and the citizens and communities they serve.

In short, trust is critical to effective and cooperative policing. But it is just as important to note that the antithesis is also true: lack of trust between police officers and departments and the communities they serve, as is seen in so many communities, leads to less effective policing *and* heightens risk to police officers. Where trust is absent, officers and departments are, not surprisingly, viewed categorically with suspicion and even seen as enemies. This creates more hazardous environments in which officers operate, and also reduces the level of cooperation between police and citizens that is often the key to effective policing.

The complete repeal of Section 50-a achieves the goal of fostering trust between the police and their communities, not to mention the will of the elected representatives of the people of New York. In an effort to undo those actions, Appellants advocate for judge-made limitations on the disclosure of law enforcement officers' disciplinary records. They do so in part by arguing, among other things, that the release of these records would invade the officers' privacy. This argument fails on its face; for example, the claims regarding officer privacy fail to account for the fact that Section 3 of Senate Bill S8496 requires a law enforcement agency responding to

a request for law enforcement disciplinary records to redact specific categories of personal information from the record before disclosing the record, and allows the agency to redact portions of the record that only contain “minor, technical infractions that do not involve interactions with the public, are not of public concern, and are not connected to the officer’s investigative, enforcement, training, supervision, or reporting responsibilities.” Further, Section 4 provides the specific types of personal information that must be redacted from a law enforcement agency’s response to a request for disciplinary records.

**A. Public Disclosure of Accusations And Investigations Of Police Misconduct Will Reduce The Risk Of Harm To Officers And Promote Effective Policing.**

Appellants maintain that the District Court erroneously denied their motion for a preliminary injunction. (Appellant’s Br. at 4.) Such a request requires, *inter alia*, a showing that the plaintiff would likely suffer irreparable harm absent the requested injunction, and that granting the injunction would be in the public interest. *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008); *New York v. United States Dep’t of Homeland Sec.*, 969 F.3d 42, 58 (2d Cir. 2020). LEAP

asks the Court to see that the opposite is true; the repeal of Section 50-a, by raising transparency and thus fostering trust, will both reduce the risk of harm to Appellants' members and advance the public interest in both effective policing and police officer safety. By contrast, Appellants did not – and cannot – present any persuasive evidence that repealing Section 50-a will ruin officers' reputations with false allegations or put them in harm's way. Without such a demonstration, the District Court correctly concluded that Appellants did not carry their burden as to either factor.

1. ***Transparency Furthers Officer Safety, And Lack Of Transparency Places Their Safety At Greater Risk.***

On June 12, 2020, responding to the calls from the community locally and elsewhere, the New York State Legislature and the Governor repealed Section 50-a. Luis Ferré-Sadurní & Jesse McKinley, *New York State Moves to Check Police Conduct*, N.Y. TIMES, June 13, 2020, at A1, <https://www.nytimes.com/2020/06/12/nyregion/50a-repeal-police-floyd.html>. While prior efforts to increase transparency had failed over the years, this one succeeded, no doubt in part as a result of an increased level of awareness of issues raised by the use of force,

and especially deadly force, by police officers in recent months. See *id.*

In the face of significant support and public sentiment for the repeal of Section 50-a,<sup>7</sup> and contrary to the goals of increased transparency and accountability for law enforcement officers, Appellants ask this Court to undo the legislature’s work and bar the disclosure of substantial categories of disciplinary records. Specifically, Appellants ask the courts to enjoin the disclosure of records of police disciplinary matters that are non-final, unsubstantiated, unfounded, exonerated, or resulted in a finding of not guilty, (“Unsubstantiated and Non-Final Allegations”) or that regard settlement agreements entered into prior to June 12, 2020. Dkt. 204, Appellant’s Br. at 9-12. They argue that the District Court wrongly denied injunctive relief, “above all by improperly minimizing evidence of irreparable harm to professional reputation, privacy

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<sup>7</sup> See Jake Bittle, *The state legislature may repeal 50-a. Here’s what that means.*, QUEENS DAILY EAGLE (June 4, 2020), <https://queenseagle.com/all/50a-repeal-new-york-police-records-queens> (listing supporters of the repeal measure).

interests, and *the safety of officers and their families.*” *Id.* at 11 (emphasis added).

LEAP has heard the claim that transparency with respect to these matters puts officers in greater danger before, and in the past it has usually succeeded. But it is wrong, and indeed the opposite is true. It is continued suppression of these records from public view that raises risks to officers, while transparency will actually reduce those risks.

The safety of law enforcement officers is not placed at greater risk by the repeal of Section 50-a. This is true for both specific and general reasons. Particular concerns about disclosures of officers’ personal identifying information are unfounded, in part because the authors of Senate Bill S8496 anticipated these concerns by requiring, in the same bill, the redaction of such information from released records. *Memorandum in Support of Legislation Submitted in Accordance with Assembly Rule III, Sec 1(f), Bill Number: A2513*, [https://assembly.state.ny.us/leg/?default\\_fld=&leg\\_video=&bn=A02513&term=2019&Summary=Y&Memo=Y](https://assembly.state.ny.us/leg/?default_fld=&leg_video=&bn=A02513&term=2019&Summary=Y&Memo=Y). In addition, New York law provides other legal protections, unaffected by the repeal of Section 50-a, that will protect the officers’ privacy and safety. *See Dunnigan*

*v. Waverly Police Dep't*, 279 A.D.2d 833, 834, 719 N.Y.S.2d 399, 400 (2001) (“Under Public Officers Law § 87(2)(a), an agency may deny access to public records which ‘are specifically exempted from disclosure by state or federal statute.’”).

Appellants’ more general assertions that officer safety is placed at greater risk by public disclosure of disciplinary records are also unsupported by empirical data; indeed, what data there is seems to suggest the opposite.<sup>8</sup> While privacy, generally and as relates to officer safety, is certainly a valid and important concern, it is one for which protective measures are in place,<sup>9</sup> and there is no evidence

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<sup>8</sup> Stephanie Wykstra, *The fight for transparency in police misconduct, explained: New York’s repeal of section 50-a — which allowed police to shield misconduct records — is a big win for activists, but there is more work to be done.*, VOX (Jun 16, 2020, 7:30am EDT), <https://www.vox.com/2020/6/16/21291595/new-york-section-50-a-police-misconduct> (“But advocates and researchers point out that there’s no evidence that disclosing records will lead to physical harm against officers. In a recent survey of 344 police and sheriff offices in the 12 most transparent states, legal scholars Rachel Moran and Jessica Hodge saw scant evidence of physical harm to officers. As one criminologist put it, there’s a ‘total lack of data’ when it comes to the claim that officers will be harmed as a result of disclosures.”).

<sup>9</sup> Jason Tidd, *Should Wichita Police Name Cops Who Shoot People? Citing Death Threats, Board Says No*, WICHITA EAGLE (May 29, 2019), <https://www.kansas.com/news/local/crime/article228859984.html> (“When officers receive threats, the department investigates and

that they do not work. Rachel Moran, *Police Privacy*, 10 UC IRVINE L. REV. 153, 196-97 (2019) (“No credible evidence exists to indicate that providing access to misconduct records statistically increases the likelihood of physical harm to officers, and thus this concern should hold little weight.”); Tom Jackman, *Secret Police? Virginia Considers Bill to Withhold All Officers’ Names*, WASH. POST (Feb. 24, 2016), [https://www.washingtonpost.com/news/true-crime/wp/2016/02/24/secret-police-virginia-considers-bill-to-withhold-all-officers-names.](https://www.washingtonpost.com/news/true-crime/wp/2016/02/24/secret-police-virginia-considers-bill-to-withhold-all-officers-names/); Matt Lait and Scott Glover, *Opponents of efforts to restore public access to disciplinary reports offer no examples of actual harm to officers*, L.A. TIMES (July 3, 2007), <https://www.latimes.com/la-me-privacy030707-story.html> (in response to a legislative effort to provide public access to disciplinary files, police unions were unable to identify a case in which information in disciplinary proceedings was used to harm an officer or his or her family members).

Perhaps more to the point, though, the truth, as LEAP’s members and speakers have learned through experience, is just the

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performs a threat assessment, Ramsay said. Some investigations result in criminal charges.”).



opposite. Because shielding these records from public view has long promoted distrust between police and communities, that very lack of transparency has put officers in greater danger and will continue to do so if Appellants prevail in this case. See Brendan J. Lyons, *State committee urges Cuomo, legislators to open police files*, TIMES UNION (Dec. 18, 2014), <https://www.timesunion.com/local/article/Report-says-police-files-should-be-open-to-public-5967527.php> (New York's Committee on Open Government found that Section 50-a "defeats accountability, increases public skepticism and foments distrust"); see also Kim Hart, *The lessons from Cincinnati's 2001 protests against police brutality*, AXIOS, June 4, 2020, 2020 WLNR 15670574 ("Cincinnati Mayor John Cranley, who was a member of the city council during the 2001 riots, said these actions [including increased police transparency] have instilled more trust and transparency between the police force and the public - and he said it's also reduced both arrests and serious crimes by 50%."); Terrence T. McDonald, *NJ law enforcement agencies must name police officers who face serious*

*discipline, AG says*, NORTHJERSEY.COM (June 16, 2020)<sup>10</sup> (hereinafter “McDonald”) (New Jersey State Police Superintendent Patrick Callahan stating that the police “cannot build trust with the public unless we’re candid about the shortcomings of our own officers”).

The lack of transparency about police disciplinary matters enshrined by Section 50-a has made law enforcement officers’ jobs harder and less safe because it fostered a lack of trust between police officers and the communities they serve.<sup>11</sup> LEAP’s members and speakers, and especially those who have served as police officers or

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<sup>10</sup> <https://www.northjersey.com/story/news/new-jersey/2020/06/15/nj-police-disciplined-names-soon-disclosed-annually-ag-gurbir-grewal-says/3192368001>.

<sup>11</sup> See Michael O’Keeffe, *Advocates Cheer 50-a Reform While Officials Urge Caution*, NEWSDAY (June 10, 2020), <https://www.newsday.com/long-island/50-a-police-misconduct-records-1.45523648> (“Department executives have spoken publicly about the need for fairness and transparency in the law and have testified in Albany in support of an amendment to accomplish that.”); Mike Hayes & Kendall Taggart, “Responding To BUZZFEED NEWS, March 17, 2018, NYPD Investigation, Top Officials Call For Change”, BUZZFEED NEWS (MARCH 7, 2018), <https://www.buzzfeednews.com/article/mikehayes/nypd-police-de-blasio-investigation?bfsource=relatedmanual> (with respect to Section 50-a, former NYPD commissioner James O’Neill supporting transparency and stating that “[t]his is an issue of trust,” and that “[o]ur disciplinary system has to become more transparent”).

administrators, know this firsthand.

Trust between officers and citizens, between police departments and communities, is so critical to all the goals of effective policing—including officer safety—that its importance is nearly impossible to overstate. Where there is trust, where police officers are seen as protectors and not threats or adversaries, officers are at less risk because people feel less hostility toward police officers. See Stephanos Bibas, *Transparency and Participation in Criminal Procedure*, 81 N.Y.U. L. REV. 911, 949 (2006) (“Procedural fairness, process control, and trust in insider’s motives contribute greatly to the criminal justice system’s legitimacy.”); Heungsik Park & John Blenkinsopp, *The roles of transparency and trust in the relationship between corruption and citizen satisfaction*, 77 INT’L REV. ADMIN SCIS. 254, 270 (2011) (“Our findings show that transparency and trust play a substantial role... in curtailing corruption and enhancing citizen satisfaction.”); PRESIDENT’S TASK FORCE ON 21ST CENTURY POLICING, FINAL REPORT OF THE PRESIDENT’S TASK FORCE ON 21ST CENTURY POLICING 1 (2015) (hereinafter the “PRESIDENT’S TASK FORCE REPORT”), [https://cops.usdoj.gov/pdf/taskforce/taskforce\\_finalreport.pdf](https://cops.usdoj.gov/pdf/taskforce/taskforce_finalreport.pdf) (“[L]aw enforcement cannot build community trust if it is seen as an

occupying force coming in from outside to impose control on the community.”). Transparency thus fosters a sense of legitimacy on the part of the police, which improves the community’s view of officers and thus reduces risks to them. *See* E. ALLAN LIND & TOM R. TYLER, WHY PEOPLE OBEY THE LAW 5 (2006) (discussing citizens’ concerns with legal authorities); E. ALAN LIND & TOM R. TYLER, THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE 64 (1988) (describing the effect of community perceptions of police legitimacy).

“Trust-building is not an optional, feel-good extracurricular activity for police, it is a core responsibility with a direct link to public safety.” Brendan Cox, Commentary: Open misconduct records to improve public trust in police, TIMES UNION (Jan. 3, 2020), <https://www.timesunion.com/opinion/article/Commentary-Open-misconduct-records-to-improve-14948648.php>. “Trust between law enforcement agencies and the people they protect and serve is essential in a democracy... It is key to the stability of our communities, the integrity of our criminal justice system, and the safe and effective delivery of policing services.” PRESIDENT’S TASK FORCE REPORT 1.

The experience of LEAP's members and speakers, at all levels of law enforcement, tells us that where individuals and communities trust police officers and police departments to act fairly and responsibly, and to be transparent about what they do, the police are seen as less threatening and more protective, whether on a block, in a neighborhood, or in a city, county or State as a whole.<sup>12</sup> And communities that feel less threatened are, not surprisingly, also less threatening. Monica C. Bell, *Police Reform and the Dismantling of Legal Estrangement*, 126 YALE L.J. 2054, 2103 (2017) (youth who feel

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<sup>12</sup> See *An open book*, L.A. TIMES (April 17, 2007), [https://www.latimes.com/archives/la-xpm-2007-apr-17-ed-bratton17-story.html?\\_amp=true](https://www.latimes.com/archives/la-xpm-2007-apr-17-ed-bratton17-story.html?_amp=true)

(“[Los Angeles police chief and former New York commissioner William Bratton] knows that police who appear to work under a cloak of secrecy can never win the trust and respect of residents -- a lesson this city has learned the hard way.”). For example, the perception of police is more cynical and unfavorable in minority and disadvantaged neighborhoods, which ultimately hampers law enforcement's initiatives in those neighborhoods. Patrick J. Carr et al., *We Never Call the Cops and Here is Why: A Qualitative Examination of Legal Cynicism in Three Philadelphia Neighborhoods*, 45 CRIMINOLOGY 445, 446 (2007) (“[O]ther research has demonstrated that legal cynicism is very high among residents of disadvantaged neighborhoods.”); Ronald Weitzer, *White, Black, or Blue Cops? Race and Citizen Assessments of Police Officers*, 28 J. CRIM. JUST. 313, 321-22 (2000) (containing a study that “shows a statistically significant neighborhood-class effect on perceptions of how Black and White police act in the neighborhood”).

unprotected and constantly under surveillance would rather pursue extralegal help for neighborhood concerns than trust in the police); Tom R. Tyler & Jeffrey Fagan, *Legitimacy and Cooperation: Why Do People Help the Police Fight Crime in Their Communities?*, 6 OHIO ST. J. CRIM. L. 231, 233-35 (2008) (contrasting two models of community cooperation with police, and concluding that increased perception of police decisions as legitimate promotes cooperation more than sanctions and incentives do).<sup>13</sup> Officers who operate in communities where there is trust between citizens and the police simply face fewer risks to their safety.

Trust does not just arise, though; it must be earned. See Bell, 126 YALE L.J. at 2073, 2100. And where police officers and departments are concerned, the route to trust between them and their communities is to a great extent through accountability. See David Mason, *et al.*, *Are Informed Citizens More Trusting?*

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<sup>13</sup> See also Wesley G. Skogan, *Advocate: Community Policing*, in POLICE INNOVATION: CONTRASTING PERSPECTIVES 27, 39 (David Weisburg and Anthony Braga, Ed. 2019) (discussing evidence that community policing is effective and “had clear effects on quality-of-life and ‘citizen-focused’ outcomes that research suggests could have longer-term effects on crime through [police] community-building effects, if they could be tracked over time”).

*Transparency of Performance Data and Trust Towards a British Police Force*, 122 J. BUS. ETHICS 321, 321-41 (2014) (study finding that being informed of police performance data affects citizens' trust significantly).<sup>14</sup> LEAP's members and speakers can attest that where officers and departments are seen as accountable, as answerable for errors and for misconduct when they occur, they are simply trusted more. To some degree this is just human nature. When an incident involving the use of force by police occurs, and especially (though by no means exclusively) when someone's life is lost, it is not reasonable to expect communities to react to monolithic silence in any way other

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<sup>14</sup> See also Terrence T. McDonald, *NJ law enforcement agencies must name police officers who face serious discipline, AG says*, NORTHJERSEY.COM (June 16, 2020) (New Jersey police Superintendent stating that “[b]y releasing the names of state troopers who committed serious disciplinary violations, we are continuing the long, hard work of earning and maintaining the trust of the communities we serve”).

than to be distrustful. Bell, *supra*, 126 YALE L.J. at 2100.<sup>15</sup> But even where misconduct does occur police can build trust by being transparent about it, by making the community feel that they share their respect for the law and that the police, who work to hold citizens accountable for their actions, are also accountable for their own. See PRESIDENT’S TASK FORCE REPORT 10 (“Research demonstrates that these principles [which include transparency] lead to relationships in which the community trusts that officers are honest, unbiased, benevolent, and lawful.”).<sup>16</sup>

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<sup>15</sup> Ari Shapiro & Dermot Shea, *NYPD Commissioner Talks About Police Response To The Protests In New York*, NPR, June 20, 2020, 2020 WLNR 15355406 (NYPD commissioner: “We’ve strived in recent years here in New York City to be as transparent - to post what we are doing, to inform the public of what we are doing and to make sure that that’s done in a way that then the public holds the police department accountable as well. So for all of these things, you know, what we don’t want to happen is what we’re seeing now, not only in New York but across the country”).

<sup>16</sup> See also Justin Fenton, *Baltimore Police disciplinary records remain shielded despite revelations of misconduct*, BALTIMORE SUN (Feb. 17, 2018), <https://www.baltimoresun.com/news/crime/bs-md-ci-police-records-transparency-20180214-story.html> (past president of the Florida State Lodge of the Fraternal Order of Police observing that “I think right now, especially these days, people want more accountability, and agency heads strive to do just that, to show that they do investigate any complaint that comes in against an officer”).



While transparency builds trust and thus promotes officer safety, the opposite practice—which Appellants advocate—yields the opposite result. Section 50-a, when it was in force, encouraged false narratives that themselves increased risks to officers. This, again, is human nature: when an accusation is greeted by silence, people naturally assume the worst. See James O’Neill, OpEd, *The Right Transparency*, N.Y. POST, April 27, 2019, 2019 WLNR 13281905 (former police chief observing that “the NYPD can’t effectively dispute [that the police disciplinary system does not discipline the most serious offenders] so long as Section 50[-]a is in place in its current form”).

Lack of transparency on incidents involving the use of force by police officers encourages false narratives by suggesting that the police are hiding or misrepresenting the facts. Erik Luna, *Transparent Policing*, 85 IOWA L. REV. 1107, 1193 (2000) (encouraging greater transparency to help dispel harmful misconceptions). In many cases police officers’ use of force is justified, and many of the records Appellants would shield from view would demonstrate this. But Section 50-a shielded *all* records from view, practically inviting citizens and communities to come to the worst conclusion every time.

*See id.*; *see also* Kyle Rozema & Max Schanzenbach, *Good Cop, Bad Cop: Using Civilian Allegations to Predict Police Misconduct*, 11 AM. ECON. J. 225, 227 (2019) (“research results suggest that the investigation of civilian allegations should be taken more seriously,” given that a “more serious investigatory process would have the benefit of screening out frivolous allegations, improving the signal quality contained in allegations”). In this respect it is ironic that the Appellants assert, as grounds for *less* transparency, that one reason to keep records of misconduct claims private is that accusations against police officers are easy to make and inevitably will include accusations that are “completely fabricated.” *See, e.g.*, Dkt. 204, Appellant’s Br. at 8-9.

This argument insults the intelligence of the communities that police officers serve. If the police do not have enough faith in the people they serve and protect to expect them to be able to evaluate the results of investigations fairly if they are made public, why would

those communities in turn have any trust in the police?<sup>17</sup> And why would telling people nothing do a better job of promoting trust between police and communities?<sup>18</sup>

The police work for the communities they serve. Shielding the disciplinary records of officers, including the Unsubstantiated and Non-Final Allegations, does a disservice to the law enforcement community because “what 50-a actually does is lump the honest, hard-working police officers in with those officers who have betrayed the public trust by allowing their misconduct to be shielded by outdated legislation.” B. Cox, *supra*; see also Phillip Hayden,

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<sup>17</sup> See Damien Fisher, *Attorney: Police-involved shootings need civilian review*, MANCHESTER LINK (Aug. 23, 2020), (former Cheshire County, New Hampshire department of correction superintendent observing that “[i]f the public felt confident the complaints were addressed in a sober, meaningful, serious way, there would be a lot more faith in police”).

<sup>18</sup> The public generally has a positive view of police officers, but it is less trusting when they are charged with holding fellow officers accountable for misconduct. See Dartunorro Clark, *Law A Barrier to Files on Cops*, ALBANY TIMES UNION, March 16, 2015, 2015 WLNR 7698734 (reporting, in an article considering Section 50-a, that according to national polls, most Americans have a fair amount of confidence in the performance of their police departments, but a majority believes local police departments do a poor job of holding police accountable for misconduct, a percentage that increases among minorities and those under the age of 50).

Opinion, *Why an ex-FBI agent decided to break through the blue wall of silence*, USA TODAY (Jan. 31, 2019)<sup>19</sup> (“The bad decisions made by a few officers can undo many of the good decisions made by the rest of us.”); Patrick Lohmann, *A few city cops generate many complaints*, POST STANDARD, April 14, 2016, 2016 WLNR 11427489.

Communities know that law enforcement officers, when effective, protect them, and they also understand that officers are human and that mistakes, and sometimes even intentional misconduct, will happen. Moran, 10 UC IRVINE L. REV. at 187-88 (the public does not demand infallibility, but it is difficult for the public to accept law enforcement actions or policies that are shielded from view). Officers and departments should be able to explain how and why something went wrong, and when they do not, their silence will be perceived as an inability to do so, and thus a reason not to trust officers generally. *See, e.g.*, MICHAEL PALMIOTTO, COMMUNITY POLICING: A POLICE-CITIZEN PARTNERSHIP 13 (2011) (“Often [in the 1960s] police actions would precipitate a riot because of exaggerated rumors.”).

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<sup>19</sup> <https://www.usatoday.com/story/opinion/policing/2019/01/31/blue-wall-of-silence-policing-the-usa-cops-community/2604929002/>.

Conversely, when citizens see that their police will be open about such incidents, even when an officer has made a mistake or worse, they will become more open to communicating with officers and developing constructive relationships with officers and police departments. Bell, 126 YALE L.J. at 2144 (“If one suspects that most police interactions go the way that they should, data and transparency can potentially be a boon to solidarity between officers and communities.”). We do an injustice not only to the community, but to police officers themselves, by shielding from everyone the results of these inquiries.<sup>20</sup> And that lack of transparency breeds hostility, which places officers in more, not less, danger. *See, e.g.*, Bell, 126 YALE L.J. at 2103; Hart, *supra*.

## **2. Transparency is Critical to Effective and Safe Policing.**

Effective policing is a critical public interest. Trust between the police and their communities not only makes police officers safer; it

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<sup>20</sup> See Evan Allen et al., *In policing its own, Boston has a light touch and a one-sided record*, July 19, 2020, 2020 WLNR 20070374 (attorney who represents Boston Police Patrolmen’s Association advises, “Run out every ground ball, talk to everyone.... If they’re a bad police officer, no one wants to work with them..... I think a thorough investigation benefits everybody”).

also makes them better at their jobs. See PRESIDENT’S TASK FORCE REPORT 1 (“Decades of research and practice support the premise that people are more likely to obey the law when they believe that those who are enforcing it have authority that is perceived as legitimate by those subject to the authority.”); Aliya Schneider, *Police cut, reform budget proposed*, REGISTER-STAR, Oct. 17, 2020, 2020 WLNR 29558005.

When there is a lack of police accountability, which is how silence about police misconduct claims is inevitably perceived, law enforcement officers lose legitimacy in the eyes of those they serve. See Luna, 85 IOWA L. REV. at 1193; PRESIDENT’S TASK FORCE REPORT 10; see also Bell, 126 YALE L.J. at 2074; Barry Friedman & Maria Ponomarenko, *Democratic Policing*, 90 N.Y.U. L. REV. 1827, 1848 (2015) (“Transparency is critical to accountability--the people cannot supervise their officials unless they know what the officials are up to.”). Another result of this loss of trust is a substantial reduction in police-community engagement that is an important part of any sensible policing strategy. Skogan, *supra* n. 14, at 39; Seth W. Stoughton, *Police Body-Worn Cameras*, 96 N.C. L. REV. 1363, 1379-80 (2018) (“Distrust can handicap officers’ efforts in the very

environments that are most in need of policing services.”); Joshua Channin & Jacob Courts, *Examining the Determinants of Police Department Online Transparency*, 18 CRIMINOLOGY, CRIM. JUST., L. & SOC’Y 52, 53 (2017) (hereinafter “Channin I”) (“Withholding information from the public may further feelings of mistrust . . . with worrisome criminological implications.”).

“To prevent and solve crime, police need community members to cooperate and provide information about what they have witnessed. Folks will only cooperate if they trust us.” B. Cox, *supra*. Where trust is absent, the chances of such cooperation are substantially diminished. Luna, 85 IOWA L. REV. at 1119 (“[M]istrusting community members are less likely to cooperate with law enforcement, less likely to voluntarily provide information to police, and less likely to comply with legal commands.”); Joseph A. Schafer, *The role of trust and transparency in the pursuit of procedural and organisational justice*, 8 J. POLICING, INTELLIGENCE AND COUNTER TERRORISM 131, 135 (2013) (“When citizens believe in local police officials and their efforts to improve community conditions, they might be expected to participate more in efforts to solve crimes, reduce disorder and enhance quality of life.”); Channin I at 53 (“A

citizenry lacking confidence in law enforcement has proved less willing to cooperate with ongoing investigations and less likely to voluntarily comply with the law itself.”).

LEAP’s experience tells us that this is true on both a macro and micro level. Records of the investigations of police incidents contain information that advocates on behalf of public safety and communities alike need in order to hold public safety officers accountable to the communities they serve. See Luna, 85 IOWA L. REV. at 1131 (“It is difficult to argue that government officials are accessible to the citizenry in any meaningful sense if they deny public access to the materials upon which their decisions are made or suppress subsequent measurements of those judgments.”); see also Moran, 10 UC IRVINE L. REV. at 198; Stephen Rushin, *Using Data to Reduce Police Violence*, 57 B.C. L. REV. 117, 134 (2016) (“Transparency will also empower the public, the press, and interest groups to oversee local police conduct.”); *A Timeline of the Shooting, Fallout, and Officer Van Dyke's Trial*, CBS NEWS (Sep. 4, 2018), <https://chicago.cbslocal.com/2018/09/04/laquan-mcdonald-shooting-timeline-cpd-officer-jason-van-dyke-trial/> (Chicago police



officer who murdered Laquan McDonald would not have been apprehended but for reporter's lawsuit seeking body camera footage).

The State Committee on Open Government has stated that Section 50-a "creates a legal shield that prohibits disclosure, even when it is known that misconduct has occurred." *Memorandum in Support of Legislation Submitted in Accordance with Assembly Rule III, Sec 1(f), Bill Number: A2513 available at [https://assembly.state.ny.us/leg/?default\\_fld=&leg\\_video=&bn=A02513&term=2019&Summary=Y&Memo=Y](https://assembly.state.ny.us/leg/?default_fld=&leg_video=&bn=A02513&term=2019&Summary=Y&Memo=Y)*. Through the disclosure of these records, the public learns not only about past complaints and disciplinary records, but also gains a sense of the kind of officers who are policing their communities. Moreover, and even beyond what public disclosure may say about a particular incident, a climate of transparency helps the community view the police in general as a partner in public safety. *See* Bell, 126 YALE L.J. at 2144; Schafer, 8 J. POLICING, INTELLIGENCE AND COUNTER TERRORISM at 135; PRESIDENT'S TASK FORCE REPORT 10. By contrast, lack of transparency encourages communities to view the police as monolithic and unwilling to subject themselves to review, which (as noted) fosters distrust. Joshua Channin & Salvador Espinosa, *Examining the Determinants of Police*

*Department Transparency: The View of Police Executives*, 18 CRIM. J. POL. REV. 52, 53 (2015) (hereinafter “Channin II”).

The disclosure of law enforcement disciplinary records bears on more than public safety and policing efficacy. Public disclosure of these records is also in the public interest because taxpayers have shouldered a significant economic toll due to the lack of transparency and the public’s inability to discover and prevent the most serious offenders from engaging in further police misconduct. The 20 U.S. cities and counties with the largest police forces have paid more than \$2 billion since 2015 to resolve claims of misconduct and civil rights violations. Scott Calvert & Dan Frosch, *Police Rethink Policies as Cities Pay Millions to Settle Misconduct Claims*, WALL. ST. J. (Oct. 22, 2020), <https://www.wsj.com/articles/police-rethink-policies-as-cities-pay-millions-to-settle-misconduct-claims-11603368002>. The money lost in litigation related to police misconduct could fund entire programs for education, affordable housing, adult shelters, after school programs, senior centers, and much more. *Id.* (police officers and departments rarely feel the economic effect, and that taxpayers are “footing the bill”). The problem is so concerning that Houston’s police chief has not only examined the issue internally, but has also

looked at police departments across the nation for a solution. *Id.* Examinations like these would be impossible without transparency with regard to these records.

Among our number LEAP is proud to count many who have helped run police stations, districts and departments. We know that police departments and their managers have a responsibility to their officers to do everything they can, and give them every tool available, to make them more effective. In addition to promoting safety, trust is also an important tool in furthering these goals. The view that these records should be publicly available may seem counterintuitive coming from law enforcement officers, and indeed it is not a view many in the law enforcement community, including many of us at LEAP, would have taken some years ago. But time and experience have changed our view. *See Cox, supra*; John Sullivan et al., *In fatal shootings by police, 1 in 5 officers' names go undisclosed*, WASH. POST (April 1, 2016)<sup>21</sup> (“Ramsey, who retired last year, has been on both sides of the disclosure debate over a long career. He said his views

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<sup>21</sup> [https://www.washingtonpost.com/investigations/in-fatal-shootings-by-police-1-in-5-officers-names-go-undisclosed/2016/03/31/4bb08bc8-ea10-11e5-b0fd-073d5930a7b7\\_story.html](https://www.washingtonpost.com/investigations/in-fatal-shootings-by-police-1-in-5-officers-names-go-undisclosed/2016/03/31/4bb08bc8-ea10-11e5-b0fd-073d5930a7b7_story.html).

evolved while he was chairing President Obama’s task force on policing and heard citizens talk about high-profile shootings by police.”); Hayden, *supra*.

Increased transparency furthers the goal of safe and effective policing. Moran, 10 UC IRVINE L. REV. at 186; Channin II at 53; Luna, 85 IOWA L. REV. at 1119; Schafer, 8 J. POLICING, INTELLIGENCE AND COUNTER TERRORISM at 135. This is what LEAP’s members and speakers have heard from communities they serve as they have tried, in various ways, to build trust with them after excessive use of force incidents. Silence in the wake of an incident involving use of force has harmed relationships with these communities, and this is true whether or not there were indications of fault on the part of officers. *See* Schafer, 8 J. POLICING, INTELLIGENCE AND COUNTER TERRORISM at 135 (“Perhaps worst of all, agencies and individuals may seek to protect their image by covering up misdeeds[, and] . . .the fall-out from the cover up is frequently more dramatic than it would have been[.]”).

The restoration and nurturing of the trust between police officers and citizens has long been a goal of LEAP, and that goal has never been more important than in these difficult times. For that

reason, LEAP recently made increased transparency with regard to issues of police misconduct and increased accountability for police officers for use of deadly force the first items in its National Policing Recommendations, released on June 3, 2020 and available at <https://lawenforcementactionpartnership.org/national-policing-recommendations/>.

#### **IV. CONCLUSION**

LEAP respectfully urges the Court to affirm the District Court's ruling and to allow the repeal of Section 50-a of the New York Civil Rights Law by the New York Legislature to take effect. Doing so will be good for both police officers and the citizens and communities they serve.

Respectfully submitted

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## **CERTIFICATE OF COMPLIANCE**

This document complies with the word limit of Fed. R. App. P. 27(d)(2)(A), Second Circuit Local Rule 29.1(c) and Second Circuit Local Rule 27.1(a)(3), because, excluding the parts of the brief exempted by Fed. R. App. P. 32(f), the brief contains 6,890 words, as counted by the Microsoft Word processing system used to prepare the brief. This word count is no more than one half the maximum length of 14,000 words for a party's principal brief, and therefore complies with the *amicus* brief limitation set forth in Second Circuit Local Rule 29.1(c).

Pursuant to Fed. R. App. P. 27(d)(1)(e) and 32(a)(5) and (6) and Second Circuit Local Rule 27.1(a)(1), I hereby certify that this brief has been prepared in a proportionally spaced typeface using Microsoft Word in Bookman Old Style 14-point font.

/s/ Joel D. Bertocchi

**CERTIFICATE OF SERVICE**

I certify that on November 5, 2020 the foregoing brief was filed electronically through the Court's CM/ECF system, which caused service to be accomplished on counsel for all parties and *amici curiae*.

/s/ Joel D. Bertocchi