20-2789 (L)

20-3177 (XAP)

In the

United States Court of Appeals

For the Second Circuit

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

Plaintiffs-Appellants-Cross-Appellees,

– v. –

BILL DE BLASIO, in his official capacity as Mayor of the City of New York,

Defendant-Appellee,

(See inside cover for continuation of caption)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK, No. 20-CV-05441-KPF

BRIEF OF *AMICI CURIAE* FORMER PROSECUTORS IN SUPPORT OF INTERVENOR-DEFENDANT-APPELLEE-CROSS-APPELLANT AND URGING AFFIRMANCE

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– and –

CITY OF NEW YORK, NEW YORK CITY FIRE DEPARTMENT, 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 Corrections, 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,

– and –

COMMUNITIES UNITED FOR POLICE REFORM,

Intervenor-Defendant-Appellee-Cross-Appellant.

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INTRODUCTION

Amici are former prosecutors who worked in the federal or state criminal justice systems (or both). This brief is submitted on their behalf, in support of Intervenor-Defendant-Appellee-Cross-Appellant Communities United for Police Reform and in opposition to the appeal of Plaintiffs-Appellants-Cross-Appellees ("Appellants").[1]

Amicus Alvin Bragg was the Chief Deputy Attorney General of New York, where he oversaw a wide array of criminal matters, including investigations of deaths of unarmed persons caused by police officers. He also served as an Assistant United States Attorney in the Southern District of New York, where he prosecuted, among other matters, law enforcement misconduct. He currently serves as a Visiting Professor of Law at New York Law School and is a co-director of the Racial Justice Project.

Amicus Taryn Merkl is Senior Counsel at Law Enforcement Leaders to Reduce Crime & Incarceration, a coalition group project of the Brennan Center for Justice at NYU Law School. Previously, she served as an Assistant United

[1] Appellants have consented to the filing of this brief. Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), counsel for *amici* state that no party's counsel authored this brief in whole or in part, and that no person other than *amici* or counsel for *amici* contributed money which was intended for preparing or submitting this brief.

States Attorney in the Eastern District of New York, where she was Deputy Chief of the Criminal Division, and Chief of the Criminal Civil Rights and Organized Crime and Gangs Sections. As Chief of Civil Rights, she was responsible for supervising all human trafficking, hate crime, and criminal civil rights matters.

Amicus Chiraag Bains was Senior Counsel to the Assistant Attorney General for the Justice Department's Civil Rights Division and a federal prosecutor of civil rights crimes, including police excessive use of force and hate crimes. He also served as a Special Assistant United States Attorney in the sex offense and domestic violence unit in the District of Columbia.

Amicus Nathaniel Akerman was an Assistant United States Attorney in the Southern District of New York, where he prosecuted a wide array of criminal matters, including organized crime cases. He also served as an Assistant Special Watergate Prosecutor with the Watergate Special Prosecution Force under Archibald Cox and Leon Jaworski.

Amicus G. Michael Bellinger was an Assistant District Attorney in the Kings County District Attorney's Office under Elizabeth Holtzman. He investigated and prosecuted illegal activities by police officers and corrections officers.

Amicus Richard F. Albert was an Assistant United States Attorney in the Southern District of New York from 1994 to 1999, where he prosecuted a wide array of criminal matters, including cases that involved large scale narcotics

transactions and gang violence. He is co-author of a criminal law column in the New York Law Journal.

Amicus Roland G. Riopelle was an Assistant United States Attorney in the Southern District of New York from 1992 to 1998, where he prosecuted a wide array of criminal matters, including cases that involved police misconduct. He is a past president of the New York Council of Defense Lawyers, and a Member of the American College of Trial Lawyers and the International Association of Trial Lawyers.

Amicus Isabelle A. Kirshner was an Assistant District Attorney in the New York County District Attorney's Office in the 1980s. She worked primarily in the Narcotics Division and the Special Investigations Division, which specialized in organized crime's involvement in the narcotics trade.

Amicus Alexander Rias was an Assistant District Attorney in the New York County District Attorney's Office. He investigated and prosecuted a wide variety of crimes, including domestic violence, sex abuse, identity theft, and felony assaults, among others. He investigated police conduct as a matter of course in his investigations. He previously served as Executive Director of the Black, Latino, and Asian Caucus of the New York City Council where his work supported a number of police accountability measures, including a New York City Charter

revision to create the Office of the Inspector General for the NYPD to investigate, review and audit NYPD policies (Local Law 70).

Amicus Lauren-Brooke Eisen served as an Assistant District Attorney for the Richmond County District Attorney's Office, where she worked in the Appeals Bureau, the Criminal Court Bureau, and the Sex Crimes Special Victims Bureau. She is now the director of the justice program at the Brennan Center for Justice at NYU School of Law and serves as an adjunct instructor at the John Jay College of Criminal Justice.

Amicus Xavier Donaldson served as an Assistant District Attorney in the Bronx District Attorney's Office and handled a broad range of cases. He worked extensively with the NYPD in the investigation of narcotics investigations, presented numerous cases to the grand jury and worked extensively to establish and maintain working community relationships between the District Attorney's Office and the community.

Amici have extensive experience prosecuting a wide range of serious criminal activity and have had considerable dealings with crime victims and witnesses. As a result, *amici* are well aware of the necessity for community cooperation in the prosecution of many forms of criminal activity and the factors that can make such cooperation more or less likely.

A critical factor in securing cooperation is the development of a relationship of trust with victims and witnesses. For many years, the lack of transparency regarding the conduct of police officers in New York—due largely to the highly secretive N.Y. Civil Rights Law Section 50-a ("§ 50-a")—has hindered prosecutors in developing such relationships. Thus, the recent repeal of § 50-a promises to bring tangible benefits for prosecutors in their day-to-day work. *Amici* believe this is a critical, if often overlooked, result of the repeal of § 50-a, and these benefits fully support the district court's decision to deny the preliminary injunction Appellants seek.

ARGUMENT

I. The District Court Properly Assessed the Benefits of Transparency That Will Result From the Repeal of § 50-a

The district court denied Appellants' application for a preliminary injunction based on an evaluation of the relevant factors, including the balance of hardships. In discussing that factor, the district court addressed the process by which § 50-a was repealed. It noted that the repeal came "[a]fter years of discussion and debate" and brought New York State "in line with most of the other states in their treatment of disciplinary records." SPA-42:13-16 (Transcript of Decision, 20-cv-05441-KPF, Dkt. No. 197 (Aug. 21, 2020)). The district court also discussed the motivation that underpinned the repeal, finding that:

> …the decision to amend Section 50-a was not made haphazardly. It was designed to promote *transparency and accountability*, to *improve relations between New York's law enforcement communities* and their first-responders *and the actual communities* of people that they serve, to aid lawmakers in arriving at policy-making decisions, to aid underserved elements of New York's population and ultimately, to better protect the officers themselves.

SPA 42:20-43:2 (emphasis added).

As former prosecutors, *amici* played critical roles in the law enforcement community, one of the groups that the district court found would benefit from the repeal of § 50-a. To do their jobs effectively, *amici* had an interest in addressing—and in fact a duty to address—police misconduct. For the reasons set forth below, *amici* believe the district court was correct in finding that increasing "transparency and accountability" with respect to police officers will improve the relationship between law enforcement (including, specifically, prosecutors) and the New Yorkers they serve.

II. The Repeal of § 50-a Will Facilitate the Work of Prosecutors, Specifically, by Improving Transparency

It is axiomatic that prosecutors have to establish trust with victims and witnesses during investigations and prosecutions. Prosecutors must rely greatly on those individuals to provide information about criminal activities they have been victimized by or have witnessed. Building trust is not a feel-good activity nor a bonus; it is an indispensable part of prosecutors' work.

Due to their experience with law enforcement, communities of color and other constituencies have lacked trust in police and prosecutors (who are often seen as one and the same), which creates obstacles for prosecutors in building and bringing cases. When those communities perceive that the government, including law enforcement agencies, withhold information about the armed officers who patrol their neighborhoods, that perception decreases trust and makes community members less likely to serve in the critical roles they play in prosecuting crime, whether as victims or witnesses.

Amici have observed that § 50-a has been used by police departments and municipalities as a primary tool to withhold information about police officers, who wield substantial power in the public square, undermining trust and effective law enforcement. When records of past officer misconduct are kept from the public, prosecutors have to work harder to find witnesses who will help them to build cases, successfully prosecute crime, and secure justice. Therefore, the repeal of § 50-a should greatly improve transparency and resultantly facilitate the work of prosecutors.

It is not only in our experience that these dynamics have been observed. The empirical research supports the conclusion that transparency in connection with the work of police contributes to greater trust between civilians and police, thereby leading to greater cooperation between community members and prosecutors, as

law enforcement officials. *See*, *e.g.*, JA 2082-84 (declaration of Delores Jones-Brown, academic who has researched police practices for decades) ("[T]he lack of transparency makes it harder for the police to solve crime."); Rick Trinker & Tom R. Tyler, *Bounded Authority: Expanding "Appropriate" Police Behavior Beyond Procedural Justice*, 42 Law & Human Behavior 280, 289 (2018) ("[T]he public has a set of legal values concerning how they should behave when interacting with the law as well. When the police hold up their end of the relationship by wielding their power in appropriate ways, citizens in turn feel a sense of responsibility as members of society to comply with the law, cooperate with law enforcement, and participate in the legal system."); Monica C. Bell, *Police Reform and the Dismantling of Legal Estrangement*, 126 Yale L.J. 2054, 2059 (2017) ("Empirical evidence suggests that feelings of distrust manifest themselves in a reduced likelihood among African Americans to accept law enforcement officers' directives and cooperate with their crime-fighting efforts."); Tom R. Tyler, *Procedural Justice*, *Legitimacy*, *and the Effective Rule of Law*, 30 Crime & Just. 283, 291 (2003) ("It has always been recognized that the police and courts benefit when those in the communities they regulate cooperate with them in a joint effort to enforce the law and to fight crime and criminal behavior. Recent research emphasizes this point and even raises questions about whether legal authorities can

effectively manage the problems of community crime control without public cooperation.") (quotation omitted).

Others with practical experience in the field agree, too. *See*, *e.g.*, Ali Watkins & Ali Winston, *After Critical Report, Police Commissioner Pushes for More Sunlight on Disciplinary Files*, N.Y. Times (Feb. 1, 2019), https://www.nytimes.com/2019/02/01/nyregion/nypd-discipline-transparency.html (former NYPD Commissioner, James O'Neil, stated, "I believe that [50-a] must change…We need to put out names, charges, documents and outcomes."); JA 2063-66 (declaration of former Police Chief of Albany Police Department) ("[W]hen the community believes that police departments are withholding information regarding police misconduct, the community will not report crimes or come forward as witnesses in open investigations. . . . Once the community saw that we were open about investigating complaints of all scale and that we were not trying to hide misconduct, the community became more receptive to forging relations with the department. Members of the community more readily came forward to report crime or to provide witness information, because the trust with the community had been repaired."); JA 2073-75 (declaration of New York City Councilmember Donovan Richards) ("Transparency is key to building trust so that, one day, we may reach a point where more members of the community may one day feel safe reporting crime directly to the police."); JA 2154-55 (declaration of

Michael J. Gennaco, expert in field of independent police oversight) ("Lacking confidence that a given department will 'police itself' appropriately, and prevented from knowing the outcomes of misconduct investigations, aggrieved individuals sometimes decline to file complaints in the first place."); JA 2171-72 (declaration of Jumaane D. Williams, Public Advocate for the City of New York) ("My extensive experience working closely with law enforcement and New York City communities at large has informed my belief that greater transparency and accountability will improve the relationship between the community and the police. Citizens will have more trust in the police if they believe wrongdoers will be punished appropriately.").

A. Effect of § 50-a in Criminal Cases Relating to Potential Police Misconduct

It is particularly challenging for prosecutors to develop relationships of trust with victims and witnesses in cases that involve allegations of wrongful conduct by police. In addition to the basic lack of trust that exists in some communities with respect to law enforcement, numerous cases involving police-caused deaths have not resulted in charges against officers, even when publicly available evidence suggests there was malfeasance by police. Critically, the results of the investigations in such cases have been shrouded in mystery due to § 50-a (as well as grand jury rules). Beyond the fact that information about the actions of police officers often is not disclosed in such cases, the media frequently publishes leaked

information about victims' past alleged transgressions, no matter how minor, outdated, or irrelevant.

The manner in which police misconduct cases have been handled only exacerbates the often pre-existing lack of trust between prosecutors and witnesses or victims. Indeed, when prosecutors are unable to disclose information about police officers to victims or witnesses due to § 50-a, it creates the impression that they are simply cogs in a system designed to protect officers regardless of what the officers have done. As a result, victims and witnesses are more likely to view prosecutors with suspicion and not fully cooperate, hamstringing prosecutors' ability to properly develop cases and get convictions.

There are many high-profile incidents of non-disclosure that have eroded the public's trust in law enforcement, including prosecutors. We discuss a few key examples here.

1. Eric Garner Case

On July 27, 2014, NYPD Officer Daniel Pantaleo placed Eric Garner in a chokehold that, even as determined by an NYPD Deputy Commissioner, led to his death. In response to the lack of disclosure of critical information regarding Mr. Garner's death in the months that followed, on December 18, 2014, a FOIL request was filed with the Civilian Complaint Review Board ("CCRB"), seeking records concerning Officer Pantaleo. *Luongo v. Records Access Officer*, 49 Misc. 3d 708,

709-10 (Sup. Ct. N.Y. Cnty. 2015). On December 24, 2014, the CCRB denied the request, citing, *inter alia*, § 50-a. An Article 78 proceeding ensued. *Luongo v. Records Access Officer*, 150 A.D.3d 13, 15-16 (1st Dep't 2017).

The trial court in that proceeding held that a summary of records regarding a police officer was not the same as "personnel records" under § 50-a and could properly be released. *Luongo*, 49 Misc. 3d at 715-16. However, the First Department reversed, holding that essentially all documents relating to complaints against Officer Pantaleo constituted "personnel records" for the purposes of § 50-a and were not subject to disclosure. *Luongo*, 150 A.D.3d at 22-23 (1st Dep't 2017).

Subsequently, records were leaked that showed seven disciplinary complaints and 14 individual allegations had been lodged against Officer Pantaleo.[2] Putting aside that such information should be available without resort to a leak, the fact remains that critical information about Officer Pantaleo and the death of Mr. Garner remains hidden. In addition, other than one supervisor losing vacation days, it is unclear if there have been disciplinary proceedings involving other officers present at the scene.[3]

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[2] Carimah Townes & Jack Jenkins, *EXCLUSIVE DOCUMENTS: The disturbing secret history of the NYPD officer who killed Eric Garner*, ThinkProgress, https://archive.thinkprogress.org/daniel-pantaleo-records-75833e6168f3/.

[3] Testimony Submitted By Gwen Carr, Mother of Eric Garner, submitted to New York State Senate Committee on Codes in support of S.3695-Bailey/A 2513 – O'Donnell, Repealing CRL Section 50-a,

Given this lack of transparency, Mr. Garner's family was forced to bring a lawsuit in August 2019, seeking a summary inquiry into a range of topics, including alleged violations and neglect of duty in connection with his arrest and the use of force against him, the filing of official documents concerning his arrest, the leaking of his arrest and medical history, and the lack of medical care provided to him. Even though the litigation did not arise out of a request for documents, Respondents invoked § 50-a, among other bases, in moving to dismiss. Respondents' Memorandum of Law in Support of Their Motion to Dismiss the Proceeding at 31–33, *Carr v. de Blasio*, No. 101332/2019, No. 9 (Sup. Ct. N.Y. Cnty. Dec. 13, 2019). The court largely denied the City's motion, in a decision that followed the repeal of § 50-a. *See Carr v. de Blasio*, No. 101332/2019, 2020 WL 5852062, at *17-18 (Sup. Ct. N.Y. Cnty. Sept. 24, 2020).

Beyond the non-disclosure of information regarding the police officers involved in the Garner case, the NYPD edited and deleted Wikipedia entries for Mr. Garner (and Sean Bell, whose case is discussed below).[4] Furthermore,

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https://www.changethenypd.org/sites/default/files/docs/gwen_carr_repeal_50-a_testimony_10-24-19.pdf. *See Carr v. de Blasio*, No. 101332/2019, 2020 WL 5852062, at *10 n.9 (Sup. Ct. N.Y. Cnty. Sept. 24, 2020) (citation omitted) (supervisor lost vacation days).

[4] David Kravets, *NYPD caught red-handed sanitizing police brutality Wikipedia entries*, ARS Technica (Mar. 13, 2015 12:09PM), https://arstechnica.com/tech-policy/2015/03/nypd-caught-red-handed-sanitizing-police-brutality-wikipedia-entries/ ("As many as 85 IP addresses connected to 1 Police Plaza altered entries

confidential information about Mr. Garner's sealed arrest history and medical condition was leaked. Petition at 15, *Carr v. De Blasio*, No. 101332/2019, No. 3 (Sup. Ct. N.Y. Cnty. June 30, 2019).

2. Ramarley Graham Case

On February 2, 2012, Ramarley Graham, an unarmed 18-year-old, was shot and killed in his home by NYPD Officer Richard Haste in front of his grandmother and 6-year-old brother. *Malcolm v. NYPD*, 2017 N.Y. Misc. LEXIS 5349, at *1–2 (Sup. Ct. N.Y. Cnty. Dec. 22, 2017). Officer Haste and other officers at the scene claimed to have believed Mr. Graham had a gun. *Id.* at *1-2. Mr. Graham's grandmother was taken to a police precinct for hours, where she was interrogated "about the location of the nonexistent gun." *Id.*

On September 29, 2016, Mr. Graham's mother filed a FOIL request seeking records compiled by the NYPD regarding the incident, "to find out first-hand the events of February 2, 2012 and correct any public mischaracterizations of Ramarley Graham." *Malcolm v. NYPD*, No. 100466/17, 2018 N.Y.L.J. LEXIS 2874, at *4–5 (Sup. Ct. N.Y. Cnty. July 31, 2018). The NYPD denied the request. *Malcolm v. NYPD*, 2017 N.Y. Misc. LEXIS 5349, at *4–5. On administrative

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for some of the most high-profile police abuse cases, including those for victims Eric Garner, Sean Bell, and Amadou Diallo, Capital New York said. Edits have also been made to other entries covering NYPD scandals, its stop-and-frisk program, and the department leadership.").

appeal, the NYPD invoked § 50-a to deny access to several categories of records, including investigative records. *Id.* at *17–22.

A subsequent civil suit resulted in the disclosure of some information after nearly two years of litigation. However, the court ruled that over 100 records were exempt from disclosure based on § 50-a. *Malcolm v. NYPD*, No. 100466/17, 2018 N.Y.L.J. LEXIS 2874, at *7–9. Among these were records relating to investigations conducted in connection with the killing of Mr. Graham. *See Malcolm v. NYPD*, 2017 N.Y. Misc. LEXIS 5349, at *11–12, 14, 16, 18, 20–22, 25, 27–30, 32; *Malcolm v. NYPD*, No. 100466/17, 2018 N.Y.L.J. LEXIS 2874, at *9–70.

Again underscoring the improper limitations that § 50-a imposed, Mr. Graham's family eventually learned of Officer Haste's significant history of misconduct only through a whistleblower's leak to the media.[5] Specifically, the family (and the public) learned that Officer "Haste had 6 CCRB complaints [and] 10 allegations in just 13 months – less than 9% of the NYPD had that many complaints in their entire career – and almost none of them have so many

[5] Testimony Submitted By Constance Malcolm, Mother of Ramarley Graham, submitted to New York State Senate Committee on Code in support of S.3695-Bailey/A 2513 – O'Donnell, Repealing CRL Section 50-a. https://www.changethenypd.org/sites/default/files/docs/constance_malcolm_repeal_50-a_testimony_10-24-19.pdf.

complaints in such a short time-frame."[6] However, the disciplinary history of other officers who were identified as being involved in the incident was never disclosed and the identities of all officers at the scene are still unknown because of Section 50-a.[7]

We note that, almost five years after Mr. Graham was killed, Officer Haste was subjected to a departmental trial, which found him guilty on disciplinary charges and recommended his dismissal, after which he resigned. *Malcolm v. NYPD*, No. 100466/17, 2018 N.Y.L.J. LEXIS 2874, at *3. Although Officer Haste was initially indicted on criminal charges in state court, the indictment was "dismissed on the grounds that the prosecution had improperly instructed the grand jury." *Malcolm v. NYPD,* No. 100466/17, Petition at 13 (Apr. 12, 2017). A second attempt to indict him was unsuccessful and no federal civil rights charges were brought. *Malcolm v. NYPD*, 2017 N.Y. Misc. LEXIS 5349, at *2–3.

3. Sean Bell Case

On November 25, 2006, the morning of what was to be Sean Bell's wedding day, multiple NYPD officers fired 50 bullets in his direction, killing him. The officers thought Mr. Bell had a gun, but they were mistaken. Valerie Bell, Mr.

[6] *Id.*

[7] *Id.*

Bell's mother, was unable to learn critical information regarding her son's death and in fact did not even know who the officers were who fired the shots at Mr. Bell until a trial that took place several years later. In her words, "[n]ot being able to get answers [because of the NYPD's invocation of Section 50-a] was like losing Sean over and over again."[8]

On October 22, 2007, the New York Civil Liberties Union ("NYCLU") submitted a FOIL request to the NYPD for information about the race of persons intentionally shot by members of the NYPD. The NYCLU cited "the debate about the role of race in NYPD shootings that rekindled when officers fired 50 shots and killed Sean Bell, an unarmed black man" as a basis for its request.[9] In denying the request, the NYPD "asserted the information was contained in shooting reports that were categorically exempt from disclosure," pursuant to several provisions of the Public Officers Law, as well as Section 50-a.[10]

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[8] Testimony Submitted By Valerie Bell, Mother of Sean Bell, submitted to New York State Senate Committee on Code in support of S.3695-Bailey/A 2513 – O'Donnell, Repealing CRL Section 50-a, https://www.changethenypd.org/sites/default/files/docs/valerie_bell_repeal_50-a_testimony_10-24-19.pdf.

[9] Petition at 2, 5, *New York Civil Liberties Union v. NYPD, et al.*, No. 110557/08 (Sup. Ct. N.Y. Cnty. Aug. 4, 2008), https://www.nyclu.org/sites/default/files/releases/Shooting_FOIL_08.04.08.pdf.

[10] *Id.* at 6–7. After the commencement of an Article 78 proceeding, the NYPD agreed to provide the NYCLU with data as to the race of persons shots and struck by NYPD officers between 1997 and 2006; however, the NYPD refused to produce

Three officers who were indicted in connection with the killing were acquitted on all counts after a bench trial in New York State court. The U.S. Department of Justice declined to bring civil rights charges against the officers. After a departmental trial, the officer who fired the first shot at Mr. Bell was dismissed. The two detectives who also fired shots were forced to resign.[11]

4. Patrick Dorismond Case

On March 16, 2000, Patrick Dorismond—a security guard and father of two—was shot and killed by an undercover police officer, Detective Anthony Vasquez. Office Vasquez and two other undercover officers had approached Mr. Dorismond and his friend and fellow security guard, Kevin Kaiser. *Green v. Giuliani*, 187 Misc. 2d 138, 139 (Sup. Ct. N.Y. Cnty. 2000). The three officers asked Mr. Dorismond if he knew where they could buy marijuana. Mr. Dorismond was unarmed, and neither he nor Mr. Kaiser had any indication that the officers who approached them were police officers. "Detective Vasquez, who was one of

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information regarding the race of persons shots at, but not struck by NYPD officers during that timeframe. Ultimately, the court directed the NYPD to produce the information and the decision was upheld by the First Department. *New York Civil Liberties Union v. NYPD, et al.*, No. 110557/08 (Sup. Ct. N.Y. Cnty. Dec. 15, 2009), *aff'd*, 74 A.D.3d 632 (1st Dep't 2010).

[11] Jonathan Allen, *NYPD forces out four officers in Sean Bell shooting*, Reuters (Mar. 24, 2012 8:25PM), https://www.reuters.com/article/us-newyork-police/nypd-forces-out-four-officers-in-sean-bell-shooting-idUSBRE82O00G20120325.

the backup officers, known as ghosts in police parlance because they shadow the undercover officer to protect him, shot Mr. Dorismond once in the chest from close range."[12]

Then-Police Commissioner Howard Safir responded to the killing of Mr. Dorismond with public statements about Mr. Dorismond's criminal record. Safir cited three arrests, the most recent in 1996. "In two cases, Mr. Dorismond pleaded guilty to disorderly conduct, a low-level offense. The disposition of the third [case] was sealed because it occurred when [Mr. Dorismond] was 13." Commissioner Safir released this disparaging information—some of which was sealed—while remaining silent on Detective Vasquez's record.

In press conferences, then-Mayor Rudy Giuliani also disclosed additional details of Mr. Dorismond's sealed juvenile criminal record. *Green*, 187 Misc. 2d at 139. "At one point, Giuliani declared that Dorismond had been no 'altar boy'—although in fact Mr. Dorismond actually *had* been an altar boy, and he attended the same Catholic high school as Mayor Giuliani himself."[13] At least some of the

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[12] William K. Rashbaum, *Undercover Police in Manhattan Kill an Unarmed Man in a Scuffle*, N.Y. TIMES (March 17, 2000), https://www.nytimes.com/2000/03/17/nyregion/undercover-police-in-manhattan-kill-an-unarmed-man-in-a-scuffle.html.

[13] Elizabeth Kolbert, *Personal and Political*, THE NEW YORKER (May 1, 2000), https://www.newyorker.com/magazine/2000/05/08/personal-and-political.

information in Mayor Giuliani's public statements to the press related to "records which had been sealed pursuant to Criminal Procedure Law and/or the Family Court Act." *Id.*

About a week after Commissioner Safir's disclosure of Mr. Dorismond's sealed juvenile record, the New York Times reported that, "while still in training at the police academy, [Detective Vasquez] shot a dog in his yard in Shirley, N.Y., that he pulled his gun in a bar fight in Pennsylvania, and that his wife at the time made a domestic-abuse complaint against him in 1997, taking out an order of protection."[14] (Ultimately, a grand jury declined to indict Detective Vasquez.)

Safir eventually testified before the New York State Assembly in an apparent attempt to justify the leaks of Mr. Dorismond's sealed record. He stated:

> [A] person's prior actions can illuminate his or her personality and help to explain behavior that may otherwise be inexplicable, and thereby serve to ameliorate what might become an incident jeopardizing the safety of the public. *That is why pertinent information regarding a police officer's history is routinely released to the public when a controversial event occurs. I would also point out that in doing so, no judgment is made on the outcome; the facts determine the outcome.* Therefore, in my opinion, it would have been irresponsible to the community to release incomplete information when accurate information is available. Public safety often requires disclosure and action must be taken quickly.

[14] William L. Rashbaum, *Detective in Fatal Shooting Is Said to Be Misjudged, Too*, N.Y. TIMES (March 23, 2000), https://www.nytimes.com/2000/03/23/nyregion/detective-in-fatal-shooting-is-said-to-be-misjudged-too.html.

Statement of Police Commissioner Howard Safir at 5 (Mar. 31, 2000) (emphasis added).

Even while attempting to justify the unlawful leaking of the *victim*'s criminal history, Commissioner Safir made the case for precisely why the repeal of § 50-a was proper. Disclosure and transparency, he testified, are necessary to "preserve and nurture the trust the majority of New Yorkers [should] have in their Police Department." *Id.* at 6.

There are many other examples of similar cases.[15]

B. Effect of § 50-a in Other Serious Criminal Cases

Community trust is also critical in other serious cases involving crimes such murder, attempted murder, human trafficking, and assault. When victims and witnesses do not provide information or otherwise cooperate in such cases, it leaves law enforcement unable to apprehend and prosecute individuals who have proven themselves willing to use violence against community members. Such individuals constitute an obvious risk to the public. *See, e.g.,* President Obama's Task Force on 21st Century Policing ("Decades of research and practice support the

[15] Rachel Silberstein, *Advocates push for repeal of 50-a ahead of session*, Times Union, Dec. 24, 2018, *available at* https://www.timesunion.com/news/article/NYS-50-a-13488713.php; Dean Meminger, *Advocacy rally to repeal 50a law*, NY1 (Oct. 17, 2019) *available at* https://www.ny1.com/nyc/all-boroughs/news/2019/10/17/advocates-rally-to-repeal-50a-law.

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. The public confers legitimacy only on those whom they believe are acting in procedurally just ways. . . . Toward that end, law enforcement agencies should adopt procedural justice as the guiding principle for internal and external policies and practices to guide their interactions with rank and file officers and with the citizens they serve. Law enforcement agencies should also establish a culture of transparency and accountability to build public trust and legitimacy.") (https://cops.usdoj.gov/pdf/taskforce/taskforce_finalreport.pdf).

CONCLUSION

Appellants' motion for a preliminary injunction was properly denied and their appeal should be dismissed, including for the reasons set forth above.

Dated: New York, New York
November 5, 2020

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a) and 2d Cir. R. 29.1(c) and R. 32.1(a), I certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B)(i) because it contains 5,349 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface in 14-point Times New Roman font.

Dated: November 5, 2020

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