

# 20-2789

No. 20-3177 (XAP)

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**In the United States Court of Appeals for the  
Second Circuit**

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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, DETECTIVES'  
ENDOWMENT ASSOCIATION,

*Plaintiffs-Appellants-Cross Appellees,*

v.

BILL DE BLASIO, IN HIS OFFICIAL CAPACITY AS MAYOR OF THE CITY OF NEW YORK,

*Defendants-Appellees.*

*(See inside cover for continuation of caption)*

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF NEW YORK

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**BRIEF OF *AMICI CURIAE* NAACP LEGAL DEFENSE AND  
EDUCATIONAL FUND, INC., LAWYERS' COMMITTEE FOR CIVIL  
RIGHTS UNDER LAW, LATINOJUSTICE PRLDEF, AND LAW FOR  
BLACK LIVES IN SUPPORT OF DEFENDANTS-APPELLEES AND  
INTERVENOR-DEFENDANT-APPELLEE-CROSS-APPELLANT**

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THE 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, CIVILIAN COMPLAINT REVIEW BOARD,

*Defendants-Appellees.*

COMMUNITIES UNITED FOR POLICE REFORM

*Intervenor-Defendant-Appellee-Cross-Appellant.*

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## INTRODUCTION<sup>1</sup>

*Amici curiae* – NAACP Legal Defense and Educational Fund, Inc., Lawyers’ Committee for Civil Rights Under Law, LatinoJustice PRLDEF, and Law for Black Lives – are national legal advocacy organizations committed to eradicating the pernicious influence of racial discrimination in the criminal justice system. They are deeply familiar with the impact of police abuse and violence on communities of color through their work and from the communities they serve. In this brief, *amici* address a limited, but vitally important, issue raised by the instant appeal: whether the District Court abused its discretion in determining that the preliminary injunction requested by Plaintiffs-Appellants-Cross-Appellees (“Appellants”), which seeks to prevent the full implementation of the repeal of New York Civil Rights Law Section 50-a, was contrary to the “public interest.” As demonstrated below, the District Court did not abuse its discretion.

Rather, the District Court’s decision recognized the vital importance of the demands of untold millions across the country, including New York State, in response to countless incidents of police killings, violence, and other abuses.

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<sup>1</sup> Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), counsel for *amici curiae* 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. Additionally, this brief is filed with the affirmative consent of all parties as permitted by Federal Rule of Appellate Procedure 29(a)(2).

America's deeply flawed systems of police accountability need to change dramatically. Existing oversight mechanisms too often conclude with cursory investigations that absolve flagrant misconduct or trivial punishments out-of-step with the severity of the infraction. And the secrecy surrounding these mechanisms prevents meaningful public scrutiny of how police departments address and prevent misconduct by their own. As a result, police officers' abuses of power remain unchecked, leaving the distinct impression that officers can violate the law with impunity. Communities of color, which are disproportionately targeted for abusive policing, bear the brunt of these failures in accountability.

New York State's repeal of Section 50-a – which was among the most secretive laws of its kind in the country – directly responded to the demands of the people of New York for racial justice, transparency, and accountability in law enforcement in the wake of the killing of George Floyd, Eric Garner, Breonna Taylor, and so many others. The repeal reflected a commonsense understanding that sunlight is the best disinfectant: public disclosure of police misconduct provides citizens and legislators with access to necessary information about flaws in existing systems of accountability, deters future misconduct, and makes clear to the public that police misconduct should not be tolerated. And in repealing Section 50-a, the New York State Legislature emphatically rejected the same arguments that the police unions and other Appellants make here.

The District Court’s decision reflected a sober appreciation of the Legislature’s judgment. *See* Order, 20-cv-05441-KPF, Dkt. No. 197 (Aug. 21, 2020), Transcript of Decision, 20-cv-05441-KPF, Dkt. No. 197, at 41:2-42:11 (Aug. 21, 2020) (noting that the Appellants’ requested injunction would have disserved the “public[] interests” in “transparency and accountability”). Consistent with the Legislature’s judgment, the people of New York must no longer be kept in the dark about police misconduct in their communities – even where the misconduct claims are “unsubstantiated,” or the claims are the subject of “non-final” investigations.

Appellants’ appeal is predicated on the implicit assertion that their parochial interests in certain aspects of their collective bargaining agreements and individual contracts with their employers should somehow trump the overwhelming public interest in racial justice, transparency, and accountability in law enforcement. Although Appellants categorically fail to acknowledge these public interests (*see, e.g.,* Appellants’ Br. Dkt. No. 204 at 22, 60-61), this Court cannot do so. The Supreme Court has long recognized the “paramount public interest in a free flow of information to the people concerning public officials, their servants,” *Garrison v. Louisiana*, 379 U.S. 64, 77 (1964), and this Court must not employ Appellants’ willful blindness to disregard the paramount public interests which animated the repeal of Section 50-a.

The people of New York have spoken. The Legislature has spoken. They have unequivocally declared that it is time for New York to provide public access to records of police misconduct.<sup>2</sup> The repeal of Section 50-a must be fully effectuated, and all records related to claims of police misconduct – even “unsubstantiated” claims and claims that are the subject of “non-final” investigations – must be made public. The people of New York, especially its communities of color, deserve no less.

## **ARGUMENT**

### **I. Public Disclosure Of Police Misconduct And Discipline Records Is Essential For Transparency And Police Accountability.**

#### **A. Inadequate Internal Oversight Facilitates Police Discrimination And Abuse Against Communities Of Color.**

Police violence is a tragic and unacceptable feature of American life, and communities of color suffer disproportionately from that violence. For young men, police violence is a leading cause of death. But that violence is not color-blind: about 1 in every 1,000 Black men can expect to be killed by police – a rate 2.5 times higher than for white men.<sup>3</sup> Black people killed by police are more than

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<sup>2</sup> In Section II.A, *amici* discuss the police transparency/accountability laws throughout the United States in order to provide context for New York’s repeal of Section 50-a. That discussion, which is more extended than in *amici*’s prior briefing, is also intended to clarify some apparent misconceptions which emerged during the hearing on the motion to stay in this matter.

<sup>3</sup> See Frank Edwards, Hedwig Lee & Michael Esposito, *Risk of being killed by police use of force in the United States by age, race-ethnicity, and sex*, 116 Proc. of



twice as likely to be unarmed as white people.<sup>4</sup> Even when not fatal, police use of force against Black people occurs 3.6 times more often than it does against white people.<sup>5</sup>

Police also enforce laws disproportionately against communities of color. In San Francisco, for example, Black people represented 26% of all police stops in the second half of 2018 even though they represented just 5% of the city's population.<sup>6</sup> In California as a whole, police are more likely to search Black, Latinx, and Native American people, and they are less likely to find drugs or weapons than when they search white people.<sup>7</sup> Moreover, police officers in California are 9.7 times more likely to issue criminal non-traffic infraction citations to Black adults, and 5.8 times more likely to issue such citations to Latinx

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the Nat'l Acad. of Sci. 16793, 16793-94 (Aug. 2019),  
<https://www.pnas.org/content/pnas/116/34/16793.full.pdf>.

<sup>4</sup> Justin Nix, Bradley A. Campbell, Edward H. Byers & Geoffrey P. Alpert, *A Bird's Eye View of Civilians Killed by Police in 2015*, 16 *Criminology & Pub. Pol'y* 309, 309 (Feb. 2017).

<sup>5</sup> Center for Policing Equity, *The Science of Justice: Race, Arrests, and Police Use of Force* 15 (July 2016), [https://policingequity.org/images/pdfs-doc/CPE\\_SoJ\\_Race-Arrests-UoF\\_2016-07-08-1130.pdf](https://policingequity.org/images/pdfs-doc/CPE_SoJ_Race-Arrests-UoF_2016-07-08-1130.pdf).

<sup>6</sup> Darwin Bond Graham, *Black people in California are stopped far more often by police, major study proves*, *The Guardian* (Jan. 3, 2020), <https://www.theguardian.com/us-news/2020/jan/02/california-police-black-stops-force>.

<sup>7</sup> *Id.*

adults, than to white adults.<sup>8</sup> In Washington, D.C., while there is little difference in rates of drug use, there are significant disparities between white and Black people in drug arrests: almost 9 out of 10 arrests for drug possession are of Black people.<sup>9</sup>

Disparities in police violence and misconduct are similarly present in New York. For decades, the New York City Police Department (“NYPD”) engaged in widespread racial profiling against Black and Latinx residents. In *Floyd v. City of New York*, the district court expressly found that “the NYPD implements its policies regarding stop and frisk in a manner that intentionally discriminates based on race,” and that “the use of race is sufficiently integral to the policy of targeting ‘the right people’ that the policy depends on express racial classifications.” *Floyd v. City of New York*, 959 F. Supp. 2d 540, 663 (S.D.N.Y. 2013). The district court subsequently appointed a monitor, *see id.* at 668, and the monitoring encompasses two additional class actions: *Davis v. New York*, 10-cv-0699-AT (S.D.N.Y.), challenging the NYPD’s racially discriminatory trespass-enforcement practices in public housing; and *Ligon v. City of New York*, 12-cv-2274-AT (S.D.N.Y.),

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<sup>8</sup> Lawyers’ Committee for Civil Rights of the San Francisco Bay Area, *Cited for Being in Plain Sight: How California Polices Being Black, Brown, and Unhoused in Public*, at 5-7 (Sept. 2020), [https://lccrsf.org/wp-content/uploads/LCCR\\_CA\\_Infraction\\_report\\_4WEB-1.pdf](https://lccrsf.org/wp-content/uploads/LCCR_CA_Infraction_report_4WEB-1.pdf).

<sup>9</sup> Washington Lawyers’ Committee for Civil Rights and Urban Affairs, *Racial Disparities in Arrests in the District of Columbia, 2009-2011*, 2-3 (July 2013), [https://www.washlaw.org/pdf/wlc\\_report\\_racial\\_disparities.pdf](https://www.washlaw.org/pdf/wlc_report_racial_disparities.pdf).

challenging the NYPD’s discriminatory stops and arrests for trespass in private buildings.<sup>10</sup>

Additionally, recent reporting has revealed that officers of the Suffolk County Police Department “pulled over Black drivers almost four times more often than white drivers, and Hispanic drivers twice as often” over the past two years.<sup>11</sup> And once they were stopped, Black drivers were more than three times as likely to be searched – and Hispanic drivers almost twice as likely to be searched – as their white counterparts, although such searches were *less* likely to uncover contraband, such as drugs or firearms, than on white drivers.<sup>12</sup> These disparities have grown more severe over the past four years.<sup>13</sup>

Police misconduct and violence endure, in substantial part, because officers who violate the public trust often face little to no accountability for their actions. Criminal prosecution of police officers is exceedingly rare. Of the roughly 15,000 fatal police shootings in the United States since 2005, just 110 (0.73%) resulted in

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<sup>10</sup> *Amicus* NAACP Legal Defense and Educational Fund, Inc. serves as co-counsel in *Davis*; *amicus* LatinoJustice PRLDEF served as co-counsel in *Ligon*.

<sup>11</sup> David M. Schwartz & Matt Clark, *Newsday analysis: Suffolk police stopped, searched minority drivers at higher rates*, *Newsday* (Oct. 20, 2020), <https://www.newsday.com/long-island/investigations/police-traffic-stops-1.50041710>.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

murder or manslaughter charges against the responsible officers – and only 42 (0.28%) ended in convictions.<sup>14</sup>

The system of civil liability further separates police officers' misconduct from any individual accountability. The doctrine of qualified immunity "operates like absolute immunity" and "protect[s] law enforcement officers from having to face any consequences for wrongdoing." *Jamison v. McClendon*, 2020 WL 4497723, at \*2 (S.D. Miss. Aug. 4, 2020). And on the rare occasion when civil liability is imposed, local governments generally indemnify individual officers against awards for monetary damages. As a result, 99.8% of the dollars recovered by plaintiffs in lawsuits alleging civil rights violations by law enforcement are paid by the public, and not the officers who actually violated the law.<sup>15</sup> In New York City, NYPD claims accounted for \$220.1 million, or 36%, of the total overall cost of fiscal year 2019 tort claims paid by the city government.<sup>16</sup>

The limitations of these external legal mechanisms highlight the importance of internal investigations as vehicles for police accountability. But time and again,

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<sup>14</sup> Amelia Thomson-DeVeaux, Nathaniel Rakich & Likhitha Butchireddygar, *Why It's So Rare For Police Officers To Face Legal Consequences*, FiveThirtyEight (June 4, 2020), <https://fivethirtyeight.com/features/why-its-still-so-rare-for-police-officers-to-face-legal-consequences-for-misconduct/>.

<sup>15</sup> Joanna C. Schwartz, *Police Indemnification*, 89 N.Y.U. L. Rev. 885, 1004 (2014).

<sup>16</sup> NYC Comptroller, Fiscal Year 2019 Annual Claims Report 18-20 (2020), <https://comptroller.nyc.gov/wp-content/uploads/documents/Claims-Report-FY-2019.pdf>.

when the United States Department of Justice (“DOJ”) and other third parties examine local law enforcement’s internal disciplinary processes, they find rampant abuses of power, bias in favor of officers, inaccurate and incomplete records and investigations, and obstructionist policies designed to thwart accountability. For example, a 2017 DOJ report found that the Chicago Police Department’s internal disciplinary system was “broken” and “seldom h[eld] officers accountable for misconduct.”<sup>17</sup> Over a five-year period, the Chicago Police Department investigated 409 police shootings and concluded that just two (0.49%) were unjustified.<sup>18</sup> Such a low rate of “substantiated” complaints did not track with the pay-outs to plaintiffs suing Chicago for the misconduct and violence of its officers: “the City paid *over half a billion dollars* to settle or pay judgments in police misconduct cases” between 2004 and 2017 – “without even conducting a disciplinary investigation in over half of those cases, and . . . recommend[ing] discipline in fewer than 4% of those cases it did examine.”<sup>19</sup> Clearly, then, “unsubstantiated” complaints of police misconduct are not necessarily meritless.

Again, police departments within New York State are no exception. In Buffalo, only 5 out of 106 (4.7%) complaints for excessive force from 2019 and

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<sup>17</sup> U.S. Dep’t of Justice, Investigation of the Chicago Police Department 46 (Jan. 13, 2017), <https://www.justice.gov/opa/file/925846/download>.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.* (emphasis added).

2020 were “sustained.”<sup>20</sup> And, even in the rare case where charges are “sustained” or police officers are prosecuted, grand juries may be unwilling to indict – as happened with Buffalo police officers Karl Schultz and Jason Whitenight, whose shooting of Wilson Morales ultimately resulted in a multi-million dollar settlement funded by taxpayer money.<sup>21</sup> Instead of disciplining the officers involved in Mr. Morales’s shooting, the Buffalo Police Department promoted them – including one to captain.<sup>22</sup>

In New York City, the district court in *Floyd* recognized that reforming the NYPD’s system of “monitoring, supervision, and discipline” of police officers was “[a]n essential aspect” of remedying the NYPD’s practice of unconstitutional stops-and-frisks. Opinion and Order, 08-cv-1034, Dkt. No. 372, at 23 (S.D.N.Y. Aug. 12, 2013). The court relied on expert testimony demonstrating that, without “improved citizen complaint procedures” and “improved disciplinary procedures,” “the entire accountability system begins to collapse.” *Id.* Yet, according to a

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<sup>20</sup> Charlie Specht, *I-Team: Buffalo Police’s Internal Affairs System Debated*, WKBW Buffalo (July 22, 2020), <https://www.wkbw.com/news/i-team/i-team-buffalo-polices-internal-affairs-system-debated>.

<sup>21</sup> Matt Gryta, *3 Officers Cleared of Wrongdoing in On-Duty Shootings*, The Buffalo News (Nov. 17, 2012), [https://buffalonews.com/news/3-officers-cleared-of-wrongdoing-in-on-duty-shootings/article\\_b655563c-a989-5cfc-adbc-42608cb20784.html](https://buffalonews.com/news/3-officers-cleared-of-wrongdoing-in-on-duty-shootings/article_b655563c-a989-5cfc-adbc-42608cb20784.html).

<sup>22</sup> Geoff Kelly, *Buffalo’s Police Brutality Didn’t Start With Martin Gugino*, The Nation (June 16, 2020), <https://www.thenation.com/article/society/buffalo-police-brutality-gugino>.

report by the court’s independent monitor, the NYPD’s Internal Affairs Bureau investigated 2,947 civilian complaints related to race and bias-based policing from 2014-2019 – and ***did not substantiate a single complaint.***<sup>23</sup> At the same time, the monitor identified a number of problems with the NYPD’s investigations, such as “[n]ot interviewing the complainant, or witness, or subject and witness officers”; asking questions which “suggested the investigator had already reached a conclusion” and/or “doubted the validity of the complaint or the credibility of the complainant”; and “[n]ot following up on leads.”<sup>24</sup> The Office of the Inspector General for the NYPD likewise found serious deficiencies in the NYPD’s investigation of complaints of biased policing and noted that, “[a]lthough low substantiation rates for biased policing complaints exist in other large U.S. cities, NYPD’s zero substantiation rate stands out.”<sup>25</sup>

To a similar effect, a DOJ investigation of the Suffolk County Police Department (“SCPD”) from 2011 – which uncovered racial biases against Latinx people, including discriminatory traffic stops and failures to timely complete

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<sup>23</sup> Tenth Report of Independent Monitor, *Davis v. City of New York*, 10-cv-0699-AT, Dkt. No. 496, at 73 (S.D.N.Y.).

<sup>24</sup> *Id.* at 75.

<sup>25</sup> N.Y.C. Dep’t of Investigation, *Complaints of Biased Policing in New York City: An Assessment of NYPD’s Investigations, Policies, and Training*, 22-34, 20 (June 2019), [https://www1.nyc.gov/assets/doi/reports/pdf/2019/Jun/19BiasRpt\\_62619.pdf](https://www1.nyc.gov/assets/doi/reports/pdf/2019/Jun/19BiasRpt_62619.pdf).

investigations of hate crimes – also found serious flaws in the SCPD’s investigation of police misconduct allegations, including failures to consistently investigate and track complaints.<sup>26</sup> In conducting a 2015 assessment of the SCPD’s investigations into allegations of racial profiling and biased policing, the DOJ noted that the SCPD’s then-existing investigation procedures were “highly problematic.”<sup>27</sup> Individuals who sought to make complaints were forced to wait long periods of time and given confusing or incomplete information.<sup>28</sup> Even when individuals were able to successfully lodge complaints, in many cases, “investigators did not make inquiries that the facts at hand seemed to warrant,” such as a complete failure to follow up on obvious lies told by officers subject to investigation.<sup>29</sup> And, although the DOJ accepted SCPD reports of marked improvements by 2018, the DOJ nevertheless found that “investigations still

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<sup>26</sup> U.S. Dep’t of Justice, Suffolk County Police Department Technical Assistance Letter, at 11 (Sept. 13, 2011), [https://www.justice.gov/sites/default/files/crt/legacy/2011/09/14/suffolkPD\\_TA\\_9-13-11.pdf](https://www.justice.gov/sites/default/files/crt/legacy/2011/09/14/suffolkPD_TA_9-13-11.pdf).

<sup>27</sup> U.S. Dep’t of Justice, Assessment of SCPD’s Compliance with the Settlement Agreement 40-41 (Dec. 14, 2015), *available online at* <https://www.justice.gov/crt/file/800746/download>.

<sup>28</sup> *Id.*

<sup>29</sup> *See id.* at 47 (“In another case, the involved officers reported using electronic control devices in a manner inconsistent with the actual usage as reported by Taser. Nevertheless, this was not a focus of the investigator’s inquiries.”).



suffer[ed] from unnecessary delays at different stages of the investigation process.”<sup>30</sup>

When disciplinary systems do not hold officers accountable, officers who have previously endangered public safety continue to abuse their authority. Officers with a history of shooting civilians are 51% more likely to do so again.<sup>31</sup> A study of shootings by the NYPD showed that the “accumulation [of] negative marks” in an officer’s personnel file was “a leading indicator for shooting risk.”<sup>32</sup>

The failure to discipline officers who abuse their authority not only leaves those particular officers free to repeat and escalate their misconduct, it promotes a culture of impunity in which their fellow officers are more likely to engage in violence and other unlawful behavior. As one study put it, “police violence is contagious”: officers’ exposure to colleagues who previously shot civilians

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<sup>30</sup> U.S. Dep’t of Justice, Sixth Report Assessing Settlement Agreement Compliance By Suffolk County Police Department 17 (Mar. 13, 2018), *available online at* [https://www.suffolkpd.org/Portals/59/scpd\\_pdfs/infoandpolicies/DOJCompliance3\\_13\\_2018.pdf/](https://www.suffolkpd.org/Portals/59/scpd_pdfs/infoandpolicies/DOJCompliance3_13_2018.pdf/).

<sup>31</sup> James P. McElvain & Augustine J. Kposowa, *Police Officer Characteristics and the Likelihood of Using Deadly Force*, 35 *Crim. Just. & Behavior* 505, 515 (Apr. 2008).

<sup>32</sup> Greg Ridgeway, *Officer Risk Factors Associated with Police Shootings: A Matched Case-Control Study*, 3 *Stat. & Pub. Pol’y* 1, 5 (2016), <https://www.tandfonline.com/doi/full/10.1080/2330443X.2015.1129918?scroll=top&needAccess=true>.

increases the risk that these officers themselves would likewise shoot civilians.<sup>33</sup>

“[W]ithin two years, exposure to a single shooting more than doubles a [peer officer’s] probability of a future shooting.”<sup>34</sup>

In sum, public disclosure of information related to police misconduct is a necessary step to transform a system which, for far too long, has discriminated against communities of color through police violence and other abuses.

**B. Public Disclosure Of “Unsubstantiated” Misconduct Complaints, As Well As Complaints Subject To “Non-Final” Investigations, Is Crucial To Scrutinize Internal Investigation And Discipline Systems In Furtherance Of Police Accountability.**

There is a “paramount public interest in a free flow of information to the people concerning public officials, their servants.” *Garrison v. Louisiana*, 379 U.S. 64, 77 (1964). This “paramount public interest” manifestly extends to information about whether police officers behave properly when acting under color of law and being paid with taxpayer money. *Id.*

Yet, this country’s systems of police accountability too often operate in the dark. In many states, police misconduct records are generally not available to the public. *See supra* at 22-23. As a result, the public cannot know whether a law

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<sup>33</sup> Thibaut Horel, *et al.*, *The Contagiousness of Police Violence*, 1 (Nov. 2018), [https://www.law.uchicago.edu/files/2018-11/chicago\\_contagiousness\\_of\\_violence.pdf](https://www.law.uchicago.edu/files/2018-11/chicago_contagiousness_of_violence.pdf).

<sup>34</sup> *Id.*

enforcement agency properly investigates serious charges of police misconduct or whether it imposes proportional discipline when abuses are confirmed.<sup>35</sup> Without insight into how systems of police accountability function, or fail to function, the public can only guess at the right solutions to end police violence and misconduct.

The important goals served by transparency are severely undermined when the public is deprived of access to so-called “unsubstantiated” complaints of misconduct. When a complaint has been deemed “unsubstantiated,” it merely means that the investigating entity concluded there is not enough evidence to prove that misconduct did occur or did not occur. However, carefully examining patterns of “unsubstantiated” complaints, whether for a particular officer or across squads, units or commands, can reveal systemic problems with officer behavior and supervision, as well as deficiencies in how complaints of misconduct are investigated.

And because police accountability systems are deeply flawed, *see infra* at 7-14, the bare fact that a misconduct complaint has been deemed “unsubstantiated” tells the public little to nothing about the credibility of the underlying charges or the thoroughness of the investigation. To begin with, there may be burdensome

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<sup>35</sup> Kendall Taggart, Mike Hayes, *The NYPD’s Secret Files*, BuzzFeed News (Apr. 16, 2018), <https://www.buzzfeednews.com/article/kendalltaggart/nypd-police-misconduct-database-explainer>.

evidentiary requirements on complainants, such as rules which require complaints to be in writing or allow departments to disregard or dismiss allegations of serious misconduct on technical grounds.<sup>36</sup> Additionally, police officials may cast aside complaints as “meritless” without so much as a cursory investigation. In Baltimore, for example, police officials systematically misclassified complaints – including charges that officers committed criminal assault, theft, domestic violence, and sexual assault – as “supervisor complaints,” a designation which allowed them to close the complaint without any investigation at all.<sup>37</sup>

As a result, shielding records pertaining to “unsubstantiated” complaints prevents the public from knowing *why* civilian complaints result in no finding of misconduct and no discipline. Such dispositions may reflect nothing more than a failure to follow basic investigative procedures, such as interviewing witnesses, crediting uncontested witness testimony, and gathering and reviewing available evidence. Indeed, the more flawed the system of accountability, the less likely it is to thoroughly investigate and substantiate complaints. Shielding “unsubstantiated” complaints from public scrutiny, therefore, has the perverse effect of allowing the most abysmal systems to operate under the highest levels of secrecy.

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<sup>36</sup> United States Dep’t of Justice, Investigation of the Baltimore City Police Department, 140 (Aug. 10, 2016), <https://www.justice.gov/opa/file/883366/download>.

<sup>37</sup> *Id.* at 141-42.

The value of information about unsubstantiated complaints is clear from police departments' own "early-intervention systems," which are "data-based tool[s] . . . to identify officers whose behavior is problematic and provide a form of intervention to correct that performance."<sup>38</sup> A key input for these systems is civilian complaints, and the NYPD itself has long considered both substantiated and unsubstantiated complaints when determining whether officers should enter performance monitoring.<sup>39</sup> It is therefore disingenuous of the Appellants to contend that civilian complaints lack informational value unless they are "substantiated."

Preventing the disclosure of records related to "non-final" investigations would likewise impede the public's understanding of how law enforcement and its accountability systems operate. Experience from across the country shows that internal disciplinary investigations can drag on for years – often under circumstances suggesting the delay is designed to thwart accountability altogether. After Chicago police officer Bruce Asken cracked Greg Larkins' skull with a

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<sup>38</sup> Samuel Walker, Geoffrey P. Alpert & Dennis J. Kenney, *Early Warning Systems: Responding to the Problem Police Officer*, National Institute of Justice: Research in Brief, at 1 (July 2001), <https://www.ncjrs.gov/pdffiles1/nij/188565.pdf>.

<sup>39</sup> See *Floyd v. City of New York*, Resp. to Pls.' Submissions on Department's Response to Court Order Regarding Facilitator's Recommendation No. 1, 1:08-cv-01034-AT, Doc. No. 729-1, at 9.

baton, more than five years passed before the Independent Police Review Authority filed charges of excessive force against Officer Asken – just long enough for Illinois’ five-year statute of limitations on disciplinary actions to expire.<sup>40</sup>

Similar problems persist within New York’s police departments. The Suffolk County Police Department has historically taken as long as one to two years to complete misconduct investigations.<sup>41</sup> In Syracuse, at least 47 officers have evaded discipline in the last three years because the police department failed to complete misconduct investigations within the 18-month period required by law.<sup>42</sup> And, in Rochester, the police department used a “pending investigation” excuse to justify its delay in the disclosure of information related to the killing of Daniel Prude – a Black man in the midst of a mental health crisis and in obvious need of assistance. The Rochester Police Department used that extra time to instruct officers on how to file reports characterizing Mr. Prude as a “suspect” or

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<sup>40</sup> Annie Sweeney & Jeremy Gerner, *Police misconduct cases drag on for years*, Chi. Tribune (June 17, 2012), <https://www.chicagotribune.com/news/ct-met-cop-investigations-delayed-20120617-story.html>.

<sup>41</sup> U.S. Dep’t of Justice, Sixth Report Assessing Settlement Agreement Compliance By Suffolk County Police Department, *supra* n.30, at 17.

<sup>42</sup> Patrick Lohmann & Chris Libonati, *Syracuse police took so long on misconduct investigations that some officers can’t be disciplined*, Syracuse.com (July 13, 2020), <https://www.syracuse.com/news/2020/07/syracuse-police-took-so-long-on-misconduct-investigations-that-some-officers-cant-be-disciplined.html>.

an “offender,” instead of just an “individual,” presumably to attempt to justify Mr. Prude’s asphyxiation at the hands of the officers.<sup>43</sup>

Allowing police departments to withhold records so long as an investigation is unfinished would create pernicious incentives to postpone resolution of investigations.

## **II. In Response To A National Conversation About Police Misconduct, The New York State Legislature Repealed Section 50-a.**

### **A. Prior To The Repeal Of Section 50-a, New York Was A National Outlier With Respect To The Secrecy Of Police Misconduct Records.**

Until 2020, New York was one of only two states with a statute that specifically exempted law enforcement officers’ personnel records from public disclosure.<sup>44</sup> As the New York State Committee on Open Government observed, Section 50-a made “New York . . . virtually unique among the states in its refusal

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<sup>43</sup> Troy Closson & Sheelagh McNeill, *Officials in Rochester, N.Y., tried to withhold information about Daniel Prude’s death, documents show*, Wash. Post (Sept. 16, 2020), <https://www.washingtonpost.com/nation/2020/09/15/daniel-prude-death-documents/> (describing presence of a note on a draft police report to “[m]ake him a suspect”).

<sup>44</sup> Robert Lewis, et al., *Is Police Misconduct a Secret in Your State?*, WNYC (Oct. 15, 2015), <https://www.wnyc.org/story/police-misconduct-records/>. “Delaware is the only other state in the country that also has a law comparable to CRL 50-a that restricts the scope of law enforcement information available to the public.” New York City Bar, *Report on Legislation by the Civil Rights Committee*, at 2, <https://s3.amazonaws.com/documents.nycbar.org/files/2017285-50aPoliceRecordsTransparency.pdf>; *see also* Del. Code Ann. tit. 11, ch. 92, § 9200(d) (2018).

to apply the same transparency to police and other uniformed services as applies to all other public employees.”<sup>45</sup> By contrast, in 28 states across the country, the public has access to police misconduct records – 12 states (13 including New York after the repeal of Section 50-a) presume public access to these records, and 16 states allow for intermediate levels of access through various administrative procedures.

Among the 12 states (13, counting New York) with the greatest transparency<sup>46</sup> is Minnesota, where the public has access to “the existence and status of any complaints or charges against” an officer, “regardless of whether the complaint or charge resulted in a disciplinary action,” as well as “the final disposition of any disciplinary action together with the specific reasons for the action and data documenting the basis of the action.” Minn. Stat. § 13.43(2). In North Dakota and Ohio, discipline records are similarly public. N.D. Cent. Code § 44-04-18; Ohio Rev. Code § 149.43. In some of these states, public access to records is presumed but there are narrow exemptions from disclosure based on considerations of personal privacy. *See, e.g.*, Wash. Rev. Code § 42.56.050.

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<sup>45</sup> Comm. on Open Gov’t, State of New York, Dep’t of State, *Annual Report to the Governor and State Legislature* (Dec. 2014), <https://www.dos.ny.gov/coog/pdfs/2014AnnualReport.pdf>.

<sup>46</sup> Alabama, Arizona, Connecticut, Georgia, Florida, Ohio, Maine, Minnesota, North Dakota, Utah, Washington, and Wisconsin. Lewis et al., *supra* n.44.



In the 16 states with intermediate levels of transparency,<sup>47</sup> many of the same categories of records that are generally available to the public in New York (after the repeal of Section 50-a) are available if certain conditions are satisfied. For example, in South Carolina, police disciplinary records can be withheld where disclosure would amount to an “unreasonable” invasion of privacy, S.C. Code Ann. § 30-4-40, but the South Carolina Court of Appeals has ruled that the “large and vital public interest” in police misconduct outweighs law enforcement officers’ privacy interests in certain circumstances, *see Burton v. York Cty. Sheriff’s Dep’t*, 358 S.C. 339, 352 (Ct. App. 2004). Likewise, in Kentucky, “[p]ublic records containing information of a personal nature where the public disclosure thereof would constitute a clearly unwarranted invasion of personal privacy” are exempt from disclosure, Ky. Rev. Stat. Ann. § 61.878, but the Kentucky Attorney General has repeatedly affirmed that “reprimands to employees regarding job-related misconduct, and disciplinary records generally, have traditionally been treated as open records,” *see Ky. Op. Att’y Gen. 08-ORD-170* (2008). And, in New Mexico, civilian complaints against a law enforcement officer “are available to the public

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<sup>47</sup> Arkansas, California, Hawaii, Illinois, Indiana, Kentucky, Louisiana, Massachusetts, Michigan, New Mexico, Oklahoma, South Carolina, Tennessee, Texas, Vermont, and West Virginia. Lewis et al., *supra* n.44. In the Lewis article (published in 2015), this category consisted of 15 states. California joined this category in 2018. *See Rachel Moran, Police Privacy*, 10 U.C. Irvine L. Rev. 153, 155 (2019), <https://scholarship.law.uci.edu/ucilr/vol10/iss1/6>.

for inspection under IPRA [i.e., the Inspection of Public Records Act] unless an exception protects their disclosure.” *See Cox v. New Mexico Dep’t of Pub. Safety*, 148 N.M. 934, 938 (2010).

Even among the remaining 21 states, where police misconduct records have traditionally been shielded from public scrutiny,<sup>48</sup> circumstances are changing. In New Jersey, for example, the Appellate Division of the Superior Court recently upheld two directives from the state’s attorney general mandating additional public disclosures of information regarding disciplinary actions against law enforcement officers. *See In re Attorney Gen. Law Enf’t Directive Nos. 2020-5 & 2020-6*, 2020 WL 6106925, at \*1 (N.J. Super. Ct. App. Div. Oct. 16, 2020). The court noted that the “erosion of confidence in our law enforcement agencies is a serious problem, and it is enough that the Attorney General, New Jersey’s chief law enforcement officer tasked with the general supervision of criminal justice in our State, has determined that publishing the names of officers incurring major discipline for misconduct will increase public trust in those agencies and make

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<sup>48</sup> At present, in approximately 21 states, police misconduct records are generally unavailable through public records requests. *See Lewis, et al., supra* n.44 (cataloguing the 50 state approaches to disclosure of police misconduct records). Those states are: Alaska; Colorado; Delaware; Idaho; Iowa; Kansas; Maryland; Mississippi; Missouri; Montana; Nebraska; Nevada; New Hampshire; New Jersey; North Carolina; Oregon; Pennsylvania; Rhode Island; South Dakota; Virginia; and Wyoming. The Lewis article, which was published in 2015, listed 23 states – but since publication of the article, New York and California have changed their laws in a pro-transparency direction. *See Moran, supra* n.47, at 155.

them more accountable to the communities they serve.” *Id.* at \*3. The New Jersey Attorney General’s directives followed in the footsteps of other changes to increase transparency and accountability in law enforcement, including the creation of civilian oversight boards. *See generally Fraternal Order of Police, Newark Lodge No. 12 v. City of Newark*, 236 A.3d 965, 984-85 (N.J. Aug. 19, 2020) (upholding city’s creation of civilian complaint review board to investigate allegations of police misconduct in certain circumstances). New Jersey has also made police officer use-of-force reports available under the state’s Open Public Records Act and dashcam video available pursuant to the state’s common-law right of access. *See N. Jersey Media Grp., Inc. v. Twp. of Lyndhurst*, 163 A.3d 887, 900-01, 908-10 (N.J. 2017).

New Jersey is not alone. Colorado enacted H.B. 19-1119, effective April 12, 2019, which allowed for public disclosure of internal affairs investigations files under certain circumstances.<sup>49</sup> This past May, the New Hampshire Supreme Court dramatically narrowed the scope of exceptions to the state’s public records law for police departments, paving the way for more fulsome public disclosures, *see*

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<sup>49</sup> *See* Jeffrey Roberts, *Guest Post: A groundbreaking 2019 law opened records on police internal affairs investigations. The legislature could make the disciplinary process even more transparent*, *The Colorado Independent* (July 15, 2020), <https://www.coloradoindependent.com/2020/07/15/open-records-colorado-police-internal-affairs-investigations>.

*Seacoast Newspapers, Inc. v. City of Portsmouth*, 2020 WL 2791849, at \*3-6 (N.H. May 29, 2020).<sup>50</sup> And, over the summer, the District of Columbia passed legislation requiring the public disclosure of the names of officers involved in civilian killings and serious uses of force, as well as body-worn camera footage from those officers.<sup>51</sup>

The chasm between New York’s hyper-secretive approach under Section 50-a and the more transparent approaches adopted by a majority of states is stark. After former Minneapolis police officer Derrick Chauvin killed George Floyd, the public discovered – as a result of Minnesota’s transparent approach – that Chauvin had been the subject of at least 17 prior complaints, including a complaint for shooting a civilian.<sup>52</sup> The revelation that only two of those complaints had resulted in discipline, and that the stiffest punishment was a letter of reprimand, fueled calls

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<sup>50</sup> In light of the developments in New Jersey, Colorado, and New Hampshire since publication of the Lewis article, there is a valid argument that the correct number of “secret” states is now 18 and the correct number of “intermediate” states is now 19.

<sup>51</sup> Keith Alexander, *D.C. police union seeks court injunction to stop release of body-worn camera footage, officers’ identity following fatal interactions*, Wash. Post, Aug 10, 2020, [https://www.washingtonpost.com/local/public-safety/dc-police-union-seeks-court-injunction-to-stop-release-of-body-worn-camera-footage-officers-identity-following-fatal-interactions/2020/08/10/deb8785a-db28-11ea-8051-d5f887d73381\\_story.html](https://www.washingtonpost.com/local/public-safety/dc-police-union-seeks-court-injunction-to-stop-release-of-body-worn-camera-footage-officers-identity-following-fatal-interactions/2020/08/10/deb8785a-db28-11ea-8051-d5f887d73381_story.html).

<sup>52</sup> Shaila Dewan & Serge F. Kovalski, *Thousands of Complaints Do Little to Change Police Ways*, N.Y. Times (May 30, 2020), <https://www.nytimes.com/2020/05/30/us/derek-chauvin-george-floyd.html>.

for immediate reform of the Minneapolis Police Department's disciplinary system.<sup>53</sup>

In contrast, after former NYPD Officer Daniel Pantaleo choked Eric Garner to death, not even Mr. Garner's family could obtain access to Officer Pantaleo's disciplinary records. It was not until after the repeal of Section 50-a that the Civilian Complaint Review Board released the records, and the public finally learned that Pantaleo had been the subject of no fewer than 17 complaints in the five years before he killed Mr. Garner. And, in Buffalo, it was not until the repeal of Section 50-a that the public was allowed to see the disciplinary records of some of the city's most notorious police officers when, pursuant to the repeal, the Buffalo Police Department released the disciplinary records of the 10% of officers with the most misconduct complaints.<sup>54</sup> Among them were the disciplinary records of the officer who shot Wilson Morales in 2012, resulting in a \$4.5 million settlement with the City of Buffalo, and another officer who intimidated a citizen for filming an incident of potential police misconduct.<sup>55</sup>

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<sup>53</sup> *Id.*

<sup>54</sup> Ali Ingersoll, *Buffalo Police Release Disciplinary Records*, InvestigativePost (July 20, 2020), <https://www.investigativepost.org/2020/07/20/buffalo-police-release-disciplinary-records/>; see also Jim Heaney & Ali Ingersoll, *Suspended Cop Has Been Disciplined a Lot*, InvestigativePost (July 7, 2020), <https://www.investigativepost.org/2020/07/07/suspended-cop-has-been-disciplined-a-lot/>.

<sup>55</sup> *Id.*

To be sure, the absence of transparency into police misconduct records is a national problem. But the extent to which New York's draconian approach blocked access to records prior to the repeal of Section 50-a made it an outlier among the outliers and contributed to the impression that police officers could violate the law with impunity. Now, with the repeal of Section 50-a, New York not only joined the majority of states by allowing for relatively robust public access to police misconduct records, but it went a step further by aligning with 12 other states taking the lead in ensuring full transparency and accountability with respect to police misconduct. If this Court were to find in favor of Appellants, it would reinstate some of the barriers to transparency which the people of New York, through their elected legislators, have rejected so resoundingly. *See* Section II.B, *infra*.

**B. The New York State Legislature Repealed Section 50-a To Promote Police Transparency And Accountability.**

For years, advocates and family members of New Yorkers killed or injured by police tried, unsuccessfully, to persuade the Legislature to repeal Section 50-a.<sup>56</sup> Mothers like Gwen Carr and Iris Baez, both of whom lost their sons to deadly and

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<sup>56</sup> Rachel Silberstein, *Advocates push for repeal of 50-a ahead of session*, Times Union (Dec. 24, 2018), <https://www.timesunion.com/news/article/NYS-50-a-13488713.php>.

unlawful chokeholds, cried out for reform that did not come.<sup>57</sup> But the national movement following the killings of George Floyd and Breonna Taylor spurred renewed and intense focus on New York’s flawed system of police discipline. This year, tens of millions have taken to the streets to rise up against police abuse and violence, particularly against communities of color.<sup>58</sup> By some estimates, it has been the largest protest movement in the history of this country.<sup>59</sup>

In New York, public focus quickly turned to Section 50-a. Marchers held signs calling for the law’s repeal,<sup>60</sup> and “Repeal 50-a” became a “rallying cr[y]” at protests.<sup>61</sup> And this time, the public calls were answered. After a supermajority in both the New York State Assembly and the Senate voted to repeal Section 50-a,

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<sup>57</sup> Dean Meminger, *Advocacy rally to repeal 50a law*, NY1 (Oct. 17, 2019), <https://www.ny1.com/nyc/all-boroughs/news/2019/10/17/advocates-rally-to-repeal-50a-law>.

<sup>58</sup> Larry Buchanan, Quoc Trung Bui & Jugal K. Patel, *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>.

<sup>59</sup> *Id.*

<sup>60</sup> Andrew Flanagan, *Over 750 Artists, Companies Call for Repeal of N.Y. Law Shielding Police Records*, NPR (June 9, 2020), <https://www.npr.org/sections/live-updates-protests-for-racial-justice/2020/06/09/872899147/over-750-artists-companies-call-for-repeal-of-ny-law-shielding-police-records>.

<sup>61</sup> Annie McDonough, *Police reform activists and experts react to 50-a repeal*, City & State New York (June 12, 2020), <https://www.cityandstateny.com/articles/policy/criminal-justice/police-reform-activists-and-experts-react-50-repeal.html>.

Governor Andrew Cuomo swiftly signed the repeal into law.<sup>62</sup> As Senator Jamaal Bailey explained on the floor of the New York State Senate, “[t]he silver lining on this incredibly dark cloud is that the sun is finally starting to shine on injustice. Maybe it’s the unmistakable . . . video evidence that we saw a live murder on TV, but it’s done something to the consciousness of America.”<sup>63</sup> Governor Cuomo likewise explained that the repeal of Section 50-a reflected New York’s judgment that “[p]olice reform is long overdue, [as] Mr. Floyd’s murder is just the most recent murder.”<sup>64</sup>

Granting Appellants’ extraordinary request for a preliminary injunction, which would undo the will of New Yorkers as expressed through their elected governmental officials, would run directly counter to the public interest in the enforcement of duly enacted laws. *Cf. Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, 734 F.3d 406, 419 (5th Cir. 2013) (noting that

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<sup>62</sup> See Denis Slattery, *New York lawmakers vote to repeal 50-a, making police disciplinary records public*, N.Y. Daily News (June 10, 2020), <https://www.nydailynews.com/news/politics/ny-legislature-50a-transparency-george-floyd-20200609-yew7soogazfmdg3cr3xlsbmwye-story.html>; see also Luis Ferré-Sadurní & Jesse McKinley, *N.Y. Bans Chokeholds and Approves Other Measures to Restrict Police*, N.Y. Times (June 12, 2020), <https://www.nytimes.com/2020/06/12/nyregion/50a-repeal-police-floyd.html>.

<sup>63</sup> Slattery, *supra* n.62.

<sup>64</sup> Ellen Moynihan, Denis Slattery & Chris Sommerfeldt, *Cuomo signs historic 50-a repeal bill, making N.Y. police disciplinary records public after decades of secrecy*, N.Y. Daily News (June 12, 2020), <https://www.nydailynews.com/news/politics/ny-cuomo-police-reform-disciplinary-records-20200612-5zryohkuwjew7ksjowhtswmsk4-story.html>.



injunctions against state legislative decisions “necessarily [cause] the irreparable harm of denying the public interest in the enforcement of [state] laws”) (*citing Maryland v. King*, 133 S. Ct. 1, 3 (2012)). Substantively, it would also undermine the compelling public interests in racial justice, transparency, and accountability in law enforcement that were at the heart of the Legislature’s decision to repeal Section 50-a.

Enjoining the full implementation of the repeal of Section 50-a would be a significant setback to racial justice, and to the public’s efforts to hold the NYPD accountable for abuses in New York City’s communities of color, by sending a message that not even the most important state reform to arise out of one of the largest mass demonstrations in our country’s history can rein in police secrecy. And it would deprive New Yorkers of critical information necessary to transform police departments that have violated the rights of communities of color time and time again.

## CONCLUSION

For the reasons stated above, *amici curiae* respectfully urge this Court to affirm the District Court's denial of Appellants' motion for a preliminary injunction concerning the disclosure of "unsubstantiated" claims of police misconduct and misconduct claims subject to "non-final" investigations.

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations of Second Circuit Local Rule 29.1(c) because the brief contains 6,390 words. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type styles requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in Times New Roman 14-point font (14-point for footnotes).

Date: November 5, 2020

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