

IN THE  
**Supreme Court of New Jersey**

A-26/27/28/29/30-20  
(085017)

**IN RE ATTORNEY GENERAL LAW  
ENFORCEMENT DIRECTIVE NOS.  
2020-5 AND 2020-6**

:  
:  
: **CIVIL ACTION**  
:

: ON PETITIONS FOR CERTIFICATION TO  
: THE SUPERIOR COURT OF NEW  
: JERSEY, APPELLATE DIVISION  
:

: DOCKET NOS. A-3950-19T4; A-3975-  
: 19T4; A-3985-19T4; A-3987-19T4; and  
: A-4002-19T4  
:

: *Sat Below:* JUDGES MITCHEL E. OSTRER,  
: P.J.A.D, ALLISON E. ACCURSO, J.A.D. AND  
: FRANCIS J. VERNOIA, J.A.D.  
:

: ON REVIEW OF FINAL AGENCY  
: ACTION FROM THE OFFICE OF THE  
: ATTORNEY GENERAL  
:

**BRIEF OF *AMICI CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION OF NEW  
JERSEY, NEW JERSEY STATE CONFERENCE OF THE NATIONAL ASSOCIATION  
FOR THE ADVANCEMENT OF COLORED PEOPLE, LIBERTARIANS FOR  
TRANSPARENT GOVERNMENT AND 24 OTHER ORGANIZATIONS IN SUPPORT  
OF TRANSPARENCY IN POLICE DISCIPLINARY RECORDS**

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## **INTEREST OF *AMICI***

Proposed *amici* are 27 organizations that believe that public trust in law enforcement can only be achieved where police disciplinary records are made available to the public, and that this is an urgent policy priority. A shared belief in transparency unites this diverse group of organizations. Among the *amici* are civil rights organizations, immigrants' rights organizations, faith-based organizations, women's health organizations, Libertarian organizations, housing organizations, workers' rights organizations, and organizations that represent or advocate on behalf of a wide range of New Jersey communities, including parents, youth, and families, survivors of intimate partner violence and sexual assault, people with disabilities, individuals identifying as LGBTQ+, and survivors of isolated confinement and detention.

The organizations signing on to this brief include:  
American Civil Liberties Union of New Jersey; Bayard Rustin Center for Social Justice; Cherry Hill Women's Center; Ethical Culture Society of Bergen County; Fair Share Housing Center; Faith in New Jersey; Housing & Community Development Network of New Jersey; Latino Action Network; LatinoJustice PRLDEF; Legal Advocacy Project of UU FaithAction New Jersey; Libertarians for Transparent Government; National Association for the Advancement

of Colored People ("NAACP") New Jersey State Conference; NAACP Newark; National Organization for Women of New Jersey; Newark Communities for Accountable Policing; New Jersey Alliance for Immigrant Justice; New Jersey Clergy Coalition for Justice; New Jersey Coalition Against Sexual Assault; New Jersey Institute for Social Justice; New Jersey Prison Justice Watch; Partners for Women and Justice; People's Organization for Progress; Salvation and Social Justice; Service Employees International Union 32BJ; SPAN Parent Advocacy Network; Volunteer Lawyers for Justice; and Women Who Never Give Up.

## **PRELIMINARY STATEMENT**

Petitioner unions frame this case as a bilateral disagreement between police officers (through their unions) and the Attorney General about whether some police disciplinary records should be made public. They ignore a critical third party implicated by the dispute: the public.

New Jerseyans have access to knowledge about disciplinary action taken against a wide range of professionals from manicurists to judges. Police officers - entrusted to carry weapons and use force - stand in a unique position in our society. To ensure accountability, that distinctive status requires additional transparency, not less. (Point I, A).

For more than a decade, advocates in New Jersey and nationally have urged leaders to reform police disciplinary systems that operate in secret and deprive the public of critical information about law enforcement officers. (Point I, B).

For years, even decades, law enforcement executives under pressure from police unions have resisted calls for increased transparency in the disciplinary process. The tragic and well-documented murder of George Floyd by police officers in Minneapolis, Minnesota, has served as an impetus for change around the nation. Communities are heeding the call to act upon a broad range of police reforms, and police executives have



begun to realize that police discipline cannot remain secretive.  
(Point I, C).

The police unions oppose all steps toward greater transparency, assuring the Court that the system is already sufficiently transparent and seeking to halt the momentum for meaningful change. The police unions raise particular concerns about officers who received harsh discipline for less serious misconduct and those officers who left the police force after receiving discipline. But the public's interest in knowing about officer discipline is not only to assure itself that rogue officers are not walking the beat; people also want to have confidence that policing systems are fair. If officers receive harsh discipline for minor misbehavior, but avoid sanctions for major violations of public trust, communities want to know. Also, absent a system for the licensing of police officers, officers who leave one department may soon be hired in another or seek other roles of public trust. People therefore have an ongoing need for information about complaints levied and discipline imposed against all officers, whether retired or not, to prevent officers from evading accountability for prior misconduct. (Point II, A).

Those who recognize the critical need for change appreciate that transparency in the disciplinary process promotes confidence in police. There exists a direct link between trust

in police and improved public safety outcomes. But communities that distrust the police are less likely to cooperate with law enforcement, harming the ability of police to investigate and prosecute serious crimes. In this historic moment, the public has made clear that building this trust and confidence is an imperative. (Point II, B).

The police unions warn that a more transparent disciplinary process will lead to harassment of police officers and the revelation of medical information and other private material. But more than a dozen other states already allow for public access to police disciplinary records. There exists no evidence that police officers in those states are harassed or unable to safeguard legitimately private information. (Point II, C).

Indeed, the privacy concerns raised by the police unions - concerns to which *amici* are sensitive - to the extent they exist, pale in comparison to the countervailing public interest in transparency. Where there exist legitimate privacy concerns, they can be addressed through redaction rather than blanket withholding of information. (Point II, D).

The vital question of the public availability of police disciplinary records involves far more than a collective bargaining agreement: it implicates the relationship between police and the communities they serve; indeed, it implicates the very legitimacy of a police force. *Amici* urge the Court to

consider the interests of the public in evaluating, and act quickly to reject, the police union's request to strike down the Attorney General's modest step toward transparency, which has already been delayed for months.

#### **STATEMENT OF FACTS AND PROCEDURAL HISTORY**

*Amici* accept the Statement of Facts and Procedural History contained in the published Appellate Division decision dated October 16, 2020. *In re Att'y Gen. Law Enf't Directive Nos. 2020-5 & 2020-6*, 465 N.J. Super. 111 (App. Div. 2020). Petitioner unions filed Petitions for Certification. On November 25, 2020, the Court granted the Petitions and set a peremptory, expedited briefing schedule. This brief follows. R. 1:13-9.

#### **ARGUMENT**

##### **I. NEW JERSEY COMMUNITIES, LIKE COMMUNITIES AROUND THE COUNTRY, RECOGNIZE THAT POLICE ACCOUNTABILITY REQUIRES TRANSPARENCY OF POLICE DISCIPLINE.**

There is no legitimate reason to limit transparency regarding police disciplinary records. New Jerseyans have been waiting for decades for a transparent, accountable process that ensures that police officers who engage in misconduct do not escape accountability and that our law enforcement agencies are treating people fairly and holding themselves to the same standards to which they hold communities. Attorney General Directives 2020-5 and 2020-6 move the state in the right direction, towards accountability, and communities can no longer

wait in demanding these changes. As the Reverend Dr. Martin Luther King, Jr. observed, in the struggle for civil rights, “‘Wait’ has almost always meant ‘Never.’ We must come to see, . . . that ‘justice too long delayed is justice denied.’” Martin Luther King, Jr., *Letter from Birmingham Jail* (Apr. 16, 1963). The Attorney General issued these critical directives in June, 2020. Argument in this matter is now scheduled for March, 2021. New Jerseyans cannot afford to wait any longer.

**A. Complaints made against other regulated professionals are public records in New Jersey; the public requires more transparency for police officers, not less.**

All licensed and otherwise regulated professionals recognize that complaints against them may, at some stage, be made public. Indeed, consumers who seek to file complaints against service providers licensed by regulatory boards are explicitly told that “[a]ny information you supply may be subject to public disclosure pursuant to New Jersey’s Open Public Records Act.” New Jersey Division of Consumer Affairs, *To File a Complaint*.<sup>1</sup> As a result, potential complainants are urged “not [to] submit sensitive personal information” on the complaint forms provided on the Division’s website. *Id.*

Indeed, the Division of Consumer Affairs makes public significant information about complaints filed and disciplinary

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<sup>1</sup> Available at <https://www.njconsumeraffairs.gov/Pages/Consumer-Complaints.aspx> (last accessed Dec. 14, 2020).

action taken. New Jersey Division of Consumer Affairs, *Person Search*.<sup>2</sup> Where regulatory boards have taken action - including the mere act of *receiving* complaints - there is a public-facing indication of that action. *Id.* Specifically, the public learns when a Board has issued "a Consent Order, Cease and Desist Order, Interim Order, Reprimand, a finalized Uniform Penalty Letter, agreed upon Settlement Letter or Final Order." *Id.* (search "Master Plumbers" for "Michael Perri", for an example). The public can learn from a simple web search when there exists a "pending matter such as an Administrative Complaint or a Provisional Order of Discipline. . . ." *Id.* In those instances, the website tells the public that the pending matter only "represent[s] the filing of allegations by the Attorney General, and do[es] not represent a finding of misconduct until the matter is adjudicated by the Board." *Id.* Members of the public can "obtain a copy of [any] such documents" by "[c]ontact[ing] the Board/Committee directly. . . ." *Id.*

In short, for dozens<sup>3</sup> of regulated professions in New Jersey, transparency in the disciplinary process is the norm.

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<sup>2</sup> Available at <https://newjersey.mylicense.com/verification/Search.aspx> (last accessed Dec. 14, 2020).

<sup>3</sup> New Jersey regulates more than 75 professions. See New Jersey Division of Consumer Affairs, *Licensed Professions and Occupations*, available at <https://www.njconsumeraffairs.gov/Pages/Licensed-Professions->

The police unions contend that making some police disciplinary records public defies existing law, which the police unions mistakenly conclude prohibits the release of all public employee records. NCOBr at 9-10.<sup>4</sup> Their claim is undermined by the existing public access to disciplinary records for non-law enforcement licensed professionals.

For more than the last quarter century, when lawyers, who are regulated by the Judiciary, have faced allegations of misconduct, the public has had access to the complaints as soon as the chair of the District Ethics Committee determines that "there is a 'reasonable prospect of a finding of unethical conduct by clear and convincing evidence.'" *R.M. v. Supreme*

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[and-Occupations.aspx](#) (last accessed Dec. 14, 2020). Notably, as discussed below (Point II, C), New Jersey is an outlier among states that does not require licenses for police officers.

<sup>4</sup> The following abbreviations are used in this brief:

"NCOBr" refers to the Appellate Division brief filed by the Non-Commissioned Officers and Superior Officers Association filed on July 1, 2020.

"NCO Pa" refers to the appendix accompanying the Non-Commissioned Officers and Superior Officers Association Appellate Division brief. *Amici* use the Bates-stamped references contained therein.

"STFABr" refers to the Appellate Division brief filed by the State Trooper Fraternal Association filed on July 2, 2020. The Appendices that accompany it are labeled but not Bates stamped.

*Court of N.J.*, 185 N.J. 208, 214, 216 (2005) (quoting R. 1:20-4(a)).

In adopting this scheme for transparency of attorney discipline - after years of keeping such proceedings secret - the Court explained that "[t]he confidential nature of initial complaints and initial determinations generate the risk of public distrust. . . . We deal with the risk or perception of distrust . . . by opening up the system, eliminating its secrecy, and substantially increasing public participation in the disciplinary process." Mark E. Hopkins, Note, *Open Attorney Discipline: New Jersey Supreme Court's Decision to Make Attorney Disciplinary Procedures Public - What it Means to Attorneys and to the Public*, 27 Rutgers L. J. 757, 763 (1996).<sup>5</sup>

The Court has also explained how criticism of judges, though perhaps unpleasant, uncomfortable, and unwelcome, actually serves as a test of the strength of democratic institutions:

[P]ublic criticism [of judges] will in fact improve, rather than prejudice, the administration of justice. It will remind judges that they are officials of the state and that their actions, like those of other

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<sup>5</sup> *Amici* sought to obtain the original document, Supreme Court of New Jersey, *Administrative Determinations Relating to the 1993 Report of the New Jersey Ethics Commission*, July 14, 1994. The document is not available online and the State Law Library could not provide a hard copy as a result of COVID-19-related closures. Thus, *amici* cite to secondary sources describing the Report.

officials, will be reviewed and judged by the citizenry. There is no reason to believe that public statements about the official behavior of judges, even when not accurate, reduce the ability of our legal system to protect rights and do justice. There is every reason to believe that public scrutiny and debate about the conduct of public officials is a necessary element of our system of government. Unlike authoritarian governments that stifle both participation in politics and public debate, our system of government encourages citizens to speak their minds on issues of public importance. We do not fear criticism of officials. We welcome it and we expect it to be vigorous and forthright. We want active and informed citizens, not timid subjects.

[*In re Hinds*, 90 N.J. 604, 639-640 (1982).]

If the public benefits from access to complaints about manicurists, dentists, court reporters, master plumbers, lawyers, and judges, why are police officers treated differently?

There can be no doubt that police officers, who are regulated by the Attorney General, are "a special kind of public employee." *In re Carter*, 191 N.J. 474, 486 (2007) (quoting *Twp. of Moorestown v. Armstrong*, 89 N.J. Super. 560, 566 (App. Div. 1965), *certif. denied*, 47 N.J. 80 (1966)). Entrusted to carry weapons and use force, police officers recognize that they may be held to different standards than the general public. Law enforcement "undertakes [this elevated expectation] upon voluntary entry into the public service." *In re Phillips*, 117



N.J. 567, 577 (1990) (*quoting In re Emmons*, 63 N.J. Super. 136, 142 (App. Div. 1960)).

But the unique role of police in our society counsels in favor of more transparency, not less. As the Supreme Court of Oregon has explained:

[T]he public interest in the transparency of government operations is particularly significant when it comes to the operation of its police departments and the review of allegations of officer misconduct. Every day we, the public, ask police officers to patrol our streets and sidewalks to protect us and to enforce our laws. Those officers carry weapons and have immense power. Some members of the public fear the abuse of that power. By the same token, police officers are themselves vulnerable. Many of those who drive our streets and walk our sidewalks also carry weapons. Some officers fear their use of those weapons and their resistance to legal authority. When our system of justice works as we expect it to, officers use their authority legitimately, members of the public comply with their instructions, and the dangers of escalating violence are avoided. But for our system to work as we expect it to, the public must trust that officers are using their authority legitimately, and officers must trust that the people they stop will respond appropriately. Without mutual trust, the police cannot do their work effectively and the public cannot feel safe.

One way to promote that necessary mutual trust is to make police practices and procedures transparent and to make complaints about police misconduct and the discipline that is or is not meted out open to public inspection. It is important for the public to know when the police overstep; it is important for the public to know when

they do not. And it is important that the basis for differing results be known and understood.

[*Am. Civil Liberties Union of Oregon, Inc. v. City of Eugene*, 380 P.3d 281, 297–98 (Or. 2016).]

This Court's observation about attorney discipline applies with equal force to police discipline: "Public scrutiny is essential to every aspect of the justice system . . . . Public scrutiny assures the system's excellence, for no flawed system of justice will survive in a democracy when subjected to public scrutiny." *Asbury Park Press, Lawyer discipline: Supreme Court opens ethics process to public*, July 20, 1994.

**B. The murder of George Floyd has redoubled the long-standing efforts of New Jersey advocates to make police discipline records public as a prerequisite for meaningful police accountability.**

New Jerseyans, unfortunately, are all too familiar with misconduct by law enforcement officers. Yet, because of the secrecy around police disciplinary records, residents only learn about police misconduct in limited circumstances: when it spills out into the public through the posting of phone videos or body camera footage, reports of court cases, or leaks, and occasionally, through government reports. Previous police reform efforts have failed to make discipline records public, and have thereby failed to adequately address police misconduct while leaving communities most impacted by that misconduct in the dark.

By way of example, twenty-one years ago, Governor Whitman admitted that state troopers racially-profiled Black and Latino drivers by targeting them for stops and searches, and that there was a toxic, hostile workplace culture fostered by white male officers. Iver Peterson, *Whitman Says Troopers Used Racial Profiling*, N.Y. Times (Apr. 21, 1999);<sup>6</sup> see also David Kocieniewski, *Bias Permeates the State Police, Whitman Admits*, N.Y. Times (July 3, 1999).<sup>7</sup> In spite of years of complaints against the State Police, and a successful motion to suppress drug evidence that documented that state troopers stopped people of color nearly five times more frequently than white drivers, *State v. Soto*, 324 N.J. Super. 66, 71, 84-85 (Law Div. 1996), the reckoning of racial profiling only began in the aftermath of a high profile shooting of three Black men by white troopers in April 1998 which resulted in the return of indictments for attempted murder against the troopers.

Even in 1999, at the beginning of state police reforms that would include 10 years of federal oversight, advocates understood that secrecy would hinder accountability, and it most certainly did. Indeed, following the revelations of profiling,

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<sup>6</sup> <https://www.nytimes.com/1999/04/21/nyregion/whitman-says-troopers-used-racial-profiling.html>

<sup>7</sup> <https://www.nytimes.com/1999/07/03/nyregion/bias-permeates-the-state-police-whitman-admits.html>

Governor Whitman released a report by the Attorney General on the toxic internal culture of the state police. Rev. Reginald T. Jackson “complained that the report failed to name anyone who tolerated or participated in discrimination or harassment.” Kocieniewski, *Bias Permeates the State Police, Whitman Admits*. Attorney William Buckman noted that historically “the state police discipline system was veiled in secrecy, the good ol’ boys protected each other and it turned into a civil rights disaster. If they are allowed to continue that secrecy, there’s no reason to believe that anything will change.” *Id.* In fact, during the reorganization of the State Police in the months that followed, many of the supervisors who were responsible for racial profiling as well as racial and gender discrimination remained in positions of authority. David Kocieniewski, *After Profiling Scandal, Tough Choices for New Jersey Police Leader*, N.Y. Times (Mar. 5, 2000).<sup>8</sup> In one “noteworthy” instance, an officer who had been named as a defendant in three discrimination suits with significant allegations of workplace misconduct was promoted to deputy superintendent. *Id.*

A decade later, advocates continued to push for transparency around complaints and any subsequent disciplinary

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<sup>8</sup> <https://www.nytimes.com/2000/03/05/nyregion/after-profiling-scandal-tough-choices-for-new-jersey-police-leader.html>

efforts. A 2009 report by the ACLU-NJ called for police agencies to publish citizen complaints, outcomes, and the disciplinary action taken. ACLU-NJ, *The Crisis Inside Police Internal Affairs*, 22 (June 2009).<sup>9</sup> The report described the secretive process in which public officials refused to confirm or deny when an investigation is taking place, and noted that even where an investigation is publicly reported, the outcome of that investigation usually is not: "the lack of transparency means that the community is left with speculation rather than facts." *Id.* at 20.

The ACLU-NJ followed up in 2010 with then-Attorney General Paula Dow, urging for a statewide review of internal affairs practices, including public reporting. Deborah Jacobs, Letter to Attorney General Paula Dow, Sept. 15, 2010.<sup>10</sup> The following year, the ACLU-NJ called on Mayor Cory Booker to release the internal affairs records of candidates for the Newark Police Director, a key position in the wake of the 2011 announcement that the U.S. Department of Justice ("DOJ") would be investigating the Newark Police Department for civil rights abuses. Deborah Jacobs,

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<sup>9</sup> Available at <https://www.aclu-nj.org/files/3013/1540/4573/060409IA2.pdf>.

<sup>10</sup> Available at [https://www.aclu-nj.org/files/7013/2447/7133/Letter\\_to\\_Dow\\_re\\_IA\\_Stats\\_9-15-10\\_v\\_2\\_2\\_with\\_attachment.pdf](https://www.aclu-nj.org/files/7013/2447/7133/Letter_to_Dow_re_IA_Stats_9-15-10_v_2_2_with_attachment.pdf).

*Release Newark Police Director's Disciplinary Records*, The Star Ledger (May 10, 2011).<sup>11</sup> Advocating for "the release of police disciplinary records in all circumstances," Jacobs explained that police officers' unique authority makes the public's need for information critical to determine whether the disciplinary systems are functioning appropriately. *Id.*

In 2014, the DOJ released its investigative report and entered into a consent decree with the city of Newark, confirming that the Newark Police Department had been engaging in patterns and practices of unconstitutional conduct. U.S. Dept. of Justice, *Investigation of the Newark Police Department*, July 22, 2014 (hereinafter "DOJ report").<sup>12</sup> The DOJ report revealed widespread, systemic problems with the NPD's internal affairs system, concluding that the "NPD ha[d] neither a functioning early warning system nor an effective internal affairs structure[.]" *Id.* at 3. Over a five-year period, the NPD only made one finding that an officer had used unreasonable force, even though the public had made hundreds of complaints over that period. *Id.* at 23. In contrast, the DOJ reviewed a

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[https://www.nj.com/njv\\_guest\\_blog/2011/05/release\\_newark\\_police\\_director.html](https://www.nj.com/njv_guest_blog/2011/05/release_newark_police_director.html)

<sup>12</sup> Available at

[https://www.justice.gov/sites/default/files/crt/legacy/2014/07/22/newark\\_findings\\_7-22-14.pdf](https://www.justice.gov/sites/default/files/crt/legacy/2014/07/22/newark_findings_7-22-14.pdf).

subset of 67 complaints and found that 14 incidents involved unreasonable force and 27 files did not have sufficient information to make a determination. *Id.* The public was only able to learn about Newark's broken, unaccountable internal affairs system that was failing residents because of this external federal review, conducted only after the ACLU-NJ filed a petition seeking federal assistance, James Queally, *Newark police to be monitored by federal watchdog, sources say*, The Star Ledger (Feb. 9, 2014),<sup>13</sup> a route that has been unavailable since 2018.<sup>14</sup>

All forms of misconduct by law enforcement officers, including discriminatory conduct, remains hidden from the public. For example, the public only learned of rank anti-Semitism in the Haddonfield Police Department through litigation. *Cutler v. Dorn*, 196 N.J. 419 (2008) (jury found officer was subject to a discriminatory hostile work

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<sup>13</sup>[https://www.nj.com/essex/2014/02/justice\\_department\\_will\\_place\\_federal\\_monitor\\_over\\_newark\\_police\\_sources\\_say.html](https://www.nj.com/essex/2014/02/justice_department_will_place_federal_monitor_over_newark_police_sources_say.html)

<sup>14</sup> In 2018, the United States Department of Justice implemented a policy that all but eliminates federal oversight of police departments. See Jacey Fortin, *Jeff Sessions Limited Consent Decrees. What About the Police Departments Already Under Reform?*, N.Y. Times (Nov. 15, 2018), <https://www.nytimes.com/2018/11/15/us/sessions-consent-decrees-police.html>. Although the next United States Attorney General might reverse that policy, pattern and practice investigations are sufficiently rare that they cannot serve as a replacement for other accountability measures.

environment). More recently, the Attorney General successfully resisted releasing information under the Open Public Records Act that would reveal the name of a state trooper who engaged in "racially offensive behavior." *Libertarians for Transparent Gov't v. N.J. State Police*, 2019 N.J. Super. Unpub. LEXIS 1156 (App. Div., May 20, 2019), *certif. granted*. 239 N.J. 518 (2019), *appeal dismissed*, 243 N.J. 515 (2020).<sup>15</sup> Likewise, the Union County Prosecutor's office was successful in its appeal seeking to reverse a trial court order requiring it to release internal affairs documents about the city of Elizabeth's police chief who was forced out for using racist and sexist slurs. *Rivera v. Union Cnty. Prosecutor's Off.*, 2020 N.J. Super. Unpub. LEXIS 1192 (App. Div. June 19, 2020).<sup>16</sup> The only reason why the public learned about the hostile work environment created by the chief - and was able to exert pressure to remove him from office - was because the person who filed an internal affairs complaint decided to share the results with the media. Ali Watkins, *Police*

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<sup>15</sup> The unpublished opinion is attached to the STFA brief before the Appellate Division. STFABr at Exhibit A. Pursuant to R. 1:36-3, counsel knows of no contrary precedent. After the Attorney General modified the policy at issue in the case, the Attorney General provided the identity of the trooper and the parties agreed that the appeal was moot and entered a consent dismissal.

<sup>16</sup> The unpublished opinion is attached to the STFA brief before the Appellate Division. STFABr at Exhibit B. Pursuant to R. 1:36-3, counsel knows of no contrary precedent.



*Director in New Jersey Resigns After Inquiry Finds He Used Racist and Sexist Slurs*, N.Y. Times (Apr. 29, 2019).<sup>17</sup>

Even as political leaders have learned of these and other additional systemic failures with internal affairs systems, there were no meaningful improvements to accountability and transparency until the directives that are the subject of this appeal were issued. See, e.g., Mark Mueller, NJ Advance Media for NJ.com, *Law and disorder: Edison's police force plagued by infighting, lawsuits*, NJ.com (Dec. 9, 2012) (reporting deep and troubling dysfunction at the Edison Police Department including the use of internal affairs to retaliate against fellow officers);<sup>18</sup> Sergio Bichao, *Central Jersey police uphold just 1% of force complaints*, My Central Jersey (Aug. 10, 2014) (reporting that internal affairs investigations are one of the most controversial topics in law enforcement and that law enforcement resists reform efforts: "police enjoy a level of workplace confidentiality not granted to private-sector professionals in the state").<sup>19</sup> With access to information about police misconduct, the public can seek accountability for

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<sup>17</sup> <https://www.nytimes.com/2019/04/29/nyregion/elizabeth-police-racism-james-cosgrove.html>

<sup>18</sup> [https://www.nj.com/middlesex/2012/12/edison\\_police\\_lawsuit\\_intimida.html](https://www.nj.com/middlesex/2012/12/edison_police_lawsuit_intimida.html)

<sup>19</sup> <https://www.mycentraljersey.com/story/news/2014/08/10/nj-use-of-force-internal-affairs-investigations/13822965/>

misconduct from lawmakers and law enforcement leaders, and ensure that police are operating in ways that are consistent with the values of the communities they serve. (See, Point II, A, *infra*).

When explaining why legislative efforts to reform internal affairs failed, one advocate noted that the public is “up against an entity that doesn’t want to have a spotlight put on it and that’s our law enforcement.” Ken Serrano, *Police opposed law aimed to fix Edison department with criminal cops*, Asbury Park Press (Jan. 18, 2019).<sup>20</sup> That remains the case today, as some law enforcement executives and officer unions, including Petitioner unions in this case, continue to resist efforts to increase transparency.

**C. The murder of George Floyd has caused many Americans, including the law enforcement executives, to reexamine long-held beliefs about policing.**

On May 25, 2020, Derek Chauvin, a white police officer in Minneapolis, Minnesota with 18 complaints on his record, killed George Floyd, a Black man, when he knelt on Mr. Floyd’s neck for almost nine minutes. Associated Press, *Minneapolis cop who knelt on George Floyd’s neck charged with murder*, NJ.com (May 29, 2020).<sup>21</sup> The video of that heinous incident has caused

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<sup>20</sup><https://www.app.com/story/news/investigations/watchdog/shield/2018/01/22/edison-police-department-criminal-cops/1039312001/>

<sup>21</sup> <https://www.nj.com/crime/2020/05/minneapolis-cop-who-knelt-on-george-floyds-neck-charged-with-murder.html>

Americans, and people around the world, to seriously examine the role of policing in society. For many white people, the incident has served to unavoidably illustrate what people of color, and Black people in particular, have long known about the deeply-ingrained racism in law enforcement systems.<sup>22</sup> Jill Lawless, Associated Press, *George Floyd's death an American tragedy with global echoes*, The Philadelphia Tribune (June 5, 2020).<sup>23</sup>

As they have done in the wake of similar police brutalities for decades, in the months since Mr. Floyd's death, Black people and people of color have led multiracial protests and driven conversations nationally and in New Jersey about systemic racism, its effects on Black communities and psyches, and how racism itself manifests in police violence and misconduct. See,

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<sup>22</sup> During this time, many have also been grieving and responding to recent killings of other Black people where there has been little, if any, accountability, including the killings of Breonna Taylor and Ahmaud Arbery, to, sadly, only name two. See Richard Hall, *'Say her name': Breonna Taylor and the underreported scourge of police violence against black women*, The Independent (June 5, 2020), <https://www.independent.co.uk/news/world/americas/breonna-taylor-birthday-george-floyd-protests-louisville-a9551946.html>; Richard Fausset, *What We Know About the Shooting Death of Ahmaud Arbery*, N.Y. Times (June 24, 2020), <https://www.nytimes.com/article/ahmaud-arbery-shooting-georgia.html>.

<sup>23</sup> [https://www.phillytrib.com/news/george-floyds-death-an-american-tragedy-with-global-echoes/article\\_01cc190f-d902-505f-9b39-4a752d195c67.html](https://www.phillytrib.com/news/george-floyds-death-an-american-tragedy-with-global-echoes/article_01cc190f-d902-505f-9b39-4a752d195c67.html)

e.g., Keeanga-Yamahtta Taylor, *Of Course There Are Protests. The State Is Failing Black People*, N.Y. Times (May 29, 2020)

(linking the protests to intersecting injustices exposed by the COVID-19 crisis and disparities in policing during the pandemic);<sup>24</sup> Tré Moore, *On the Murders of George Floyd and Ahmaud Arbery*, The Star Ledger (June 4, 2020) (“How are we supposed to feel safe knowing that people who are supposed to protect us are killing us?”).<sup>25</sup>

Due to the public’s clear view of the violence used by Derek Chauvin to kill Mr. Floyd, immediately after the killing, public views on racism in general and racial discrimination in policing in particular shifted significantly, with polls showing that people were more open to saying that police engage in racial bias. A June 2020 Monmouth University poll revealed that 76 percent of Americans agreed that racial and ethnic discrimination is a “big problem” – an increase of 25 points since 2015. Giovanni Russonello, *A ‘Seismic Shift’ in the Views on Racism in America*, N.Y. Times (June 6, 2020).<sup>26</sup> The

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<sup>24</sup> <https://www.nytimes.com/2020/05/29/opinion/george-floyd-minneapolis.html>

<sup>25</sup> <https://www.nj.com/opinion/2020/06/on-the-murders-of-george-floyd-and-ahmaud-arbery-that-could-be-me.html>

<sup>26</sup> <https://www.nytimes.com/2020/06/05/us/politics/polling-george-floyd-protests-racism.html>

percentage of people who believe that police officers are more likely to use excessive force against Black people than to mistreat white people has also increased dramatically, reaching 57 percent, with about half of white people in agreement. *Id.* With an overwhelming majority of the public - 78 percent - saying that protesters' anger is fully or somewhat justified, *id.*, it is not surprising that communities and their elected leaders are reconsidering the role of police and how to hold them accountable for misconduct. *See, e.g.,* Mark Berman & Tom Jackman, *After a summer of protest, Americans voted for policing and criminal justice changes*, Wash. Post (Nov. 14, 2020);<sup>27</sup> Sam Levin, *Minneapolis lawmakers vow to disband police department in historic move*, The Guardian (June 7, 2020);<sup>28</sup> Paul D'Auria, *Could Jersey City get a police oversight board?*, The Jersey Journal (May 31, 2020).<sup>29</sup>

While Black people and people of color have identified systemic racism and police brutality in their communities for

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<sup>27</sup> [https://www.washingtonpost.com/national/criminal-justice-election/2020/11/13/20186380-25d6-11eb-8672-c281c7a2c96e\\_story.html](https://www.washingtonpost.com/national/criminal-justice-election/2020/11/13/20186380-25d6-11eb-8672-c281c7a2c96e_story.html)

<sup>28</sup> <https://www.theguardian.com/us-news/2020/jun/07/minneapolis-city-council-defund-police-george-floyd>

<sup>29</sup> <https://www.nj.com/hudson/2020/05/could-jersey-city-get-a-police-oversight-board.html>

decades and led calls for reform,<sup>30</sup> the current moment has forced many white Americans to examine their own role in contributing to racial injustice. Tyrone Beason, '*Something is not right.*' *George Floyd protests push white Americans to think about their privilege*, L.A. Times (June 28, 2020) (reporting that Floyd's death was "another blow to the illusions of safety, security and equality that many white people harbor about America" and have forced a recognition of the horrors of police brutality and the panic Black people experience in the presence of officers).<sup>31</sup> There is a new understanding among some white people that joining marches or being well-intentioned is not enough to root out systemic racism. *Id.*; see also Nancy Armour, *Noose in Bubba Wallace's garage strengthens resolve to fight racism*, USA Today (June 22, 2020).<sup>32</sup>

Amidst this national reckoning, police themselves have recognized the need to root out misconduct in their midst. In a

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<sup>30</sup> Indeed, the 1968 Newark rebellion was touched off by police brutally beating John Smith, a black cab driver. See Nancy Solomon, *40 Years On, Newark Re-Examines Painful Riot Past*, NPR News (July 14, 2007), <https://www.npr.org/templates/story/story.php?storyId=11966375>.

<sup>31</sup> <https://www.latimes.com/politics/story/2020-06-28/white-voters-racism-reckoning-george-floyd-killing>

<sup>32</sup> <https://www.usatoday.com/story/sports/columnist/nancy-armour/2020/06/22/noose-bubba-wallaces-garage-strengthens-resolve-fight-racism/3234107001/>

break from past practice, police officers and agencies around the country quickly condemned the actions of the Minneapolis police officers involved in the incident. Stefanie Dazio, *Police across US speak out against Minneapolis custody death*, Associated Press (May 29, 2020).<sup>33</sup> Previously, in response to deaths of Black people at the hands of police, law enforcement officers were reluctant to be critical. *Id.*

For their part, New Jersey law enforcement officials joined their colleagues across the country in expressing an eagerness to "reassess how cops do their jobs" and transform police culture. See, e.g., Steve Janoski & Richard Cowen, *Policing must evolve after George Floyd killing, NJ cops say. But into what?*, NorthJersey.com (June 18, 2020);<sup>34</sup> see also, Edgardo Garcia, William Scott & Michel Moore, *After George Floyd Protests, Police Chiefs Say, "We Hear You"*, The Mercury News (June 21, 2020) (California police chiefs embrace discussion on alternatives "to sending police officers into situations where mental health, violence interruption, and harm reduction

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<sup>33</sup> <https://apnews.com/1fdb3e251898e1ca6285053304dfe8cf>

<sup>34</sup> <https://www.northjersey.com/story/news/new-jersey/2020/06/18/nj-cops-say-policing-must-evolve-after-george-floyd-killing/5338788002/>

approaches by trained professionals in those disciplines may offer more effective community-centered resolutions").<sup>35</sup>

The Attorney General has responded to this historical moment by reaffirming his commitment to transforming policing in New Jersey. See, e.g., Press Release, Office of the Attorney General, AG Grewal Outlines Process for Revising New Jersey's Use of Force Policy, (June 12, 2020) (referring to efforts to promote a culture of professionalism, accountability, and transparency).<sup>36</sup> He has signaled an interest in collaborating across constituencies to update the state's Use of Force policy and committed to listening to varied perspectives: "police officers, civil rights advocates, religious leaders, victims' rights organizations, and community members . . . [and] . . . those that have had negative experiences with law enforcement officers[,] because we are committed to getting this right." *Id.*

In light of neighboring New York's repeal of decades old statutory protections for police discipline records,<sup>37</sup> it follows

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<sup>35</sup> <https://www.mercurynews.com/2020/06/21/opinion-after-george-floyd-protests-police-chiefs-say-we-hear-you/>

<sup>36</sup> Available at <https://www.nj.gov/oag/newsreleases20/pr20200612a.html>.

<sup>37</sup> New York lawmakers have repealed "50-a," the state's statutory chapter that has shielded police misconduct from the public. For years, advocates have campaigned for its repeal, but had not been able to overcome the police union's opposition until the recent protests prompted legislative action. See Luis Ferre-Sadurni & Jesse McKinnley, *N.Y. State Moves to Check Police*



that New Jersey's chief law enforcement officer - whom advocates have called upon for greater transparency and accountability for decades, *supra*, Point I.B. - would reexamine this state's approach to transparency.

When Attorney General Grewal issued the directives at issue in this matter, he acknowledged that the longstanding practice of shielding the identity of police officers subject to major discipline "protect[ed] the few to the detriment of the many." Press Release, Office of the Attorney General, AG Grewal Issues Statewide Order Requiring Law Enforcement Agencies to Identify Officers Who Commit Serious Disciplinary Violations, (June 15, 2020).<sup>38</sup> As his office contended with the public's newly focused scrutiny on policing people of color, it was forced to reconsider its longstanding practice of allowing secrecy in police discipline. In response to the newest movement ignited by the deaths of Mr. Floyd and other Black individuals at the hands of police, the Attorney General has begun to shift away from secrecy and towards transparency, recognizing that community trust is undermined when police officers are able to hide their misconduct, their bias, and their violence from the public.

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*Conduct*, N.Y. Times (June 13, 2020), <https://www.nytimes.com/2020/06/12/nyregion/50a-repeal-police-floyd.html>.

<sup>38</sup> Available at <https://www.nj.gov/oag/newsreleases20/pr20200615a.html>.

## II. TRANSPARENCY IN POLICE DISCIPLINE PROMOTES PUBLIC SAFETY.

### A. Discipline records, including historical records, provide the public with critical information about both officers and departments.

The police unions oppose the release of any disciplinary records, but focus on two particular concerns: first, that “major discipline” is often meted out merely for “administrative violations[.]” *State Troopers Fraternal Association, et al., Open Letter to All New Jersey Citizens* (June 19, 2020) 2 (“*Open Letter*”).<sup>39</sup> Second, although retired officers will suffer prejudice as a result of the release of disciplinary records, there exists no associated benefit for such disclosures. *Id.*; see also NCOBr 23 (arguing that transparency goals of the Attorney General are not advanced by releasing disciplinary records of retired troopers). Both claims appear overstated or false and certainly ignore the significant ways in which the public benefits from robust information about police misconduct.

A sampling of the discipline meted out in 2017 debunks the idea that “administrative violations” yield major discipline. New Jersey State Police Office of Professional Standards, *Internal Investigation and Disciplinary Process Annual Report*

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<sup>39</sup> Available at <http://nco1921.org/pdf/State-Police-Unions-Open-public-letter-6-19-20.pdf>.

2017, 13-16.<sup>40</sup> An examination of the first listed behavior that produced major discipline is illustrative:

Member admitted to acting in an official capacity to the discredit of the Division while on-duty for entering false information into the e-Daily system, displaying improper attitude and demeanor during a motor vehicle stop, operating troop transportation in an unsafe manner, and disobeying written and verbal orders by unauthorized changes to their schedule and improperly editing an e-Daily system entry. In addition the member used profanity during both a crash investigation and the processing of arrested subjects, and made improper entries into an evidence ledger. The member received a 60 day suspension.

[*Id.* at 13.]

Within that synopsis one finds some behaviors that could plausibly be dismissed as “administrative violations”: arguably, improper attitude and demeanor, unsafe driving, and the use of profanity do not diminish public confidence in law enforcement’s ability to legitimately and fairly enforce the law. But members of the public have an unquestionable interest in learning about

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<sup>40</sup> Available at [https://www.njsp.org/information/pdf/2017\\_OPS\\_Annual\\_Report.pdf](https://www.njsp.org/information/pdf/2017_OPS_Annual_Report.pdf). Although Attorney General Guidelines call for the public release of this information on an annual basis, the 2017 report is the most recent one available online. Office of the Attorney General, *Internal Affairs Policy and Procedure* 61 (Dec. 2019), (“[E]very agency shall submit to the County Prosecutor and publish on the agency’s public website a brief synopsis of all complaints where a fine or suspension of ten days or more was assessed to an agency member.”) This document is available at NCO Pa39-66.

officers who falsify records and taint evidence. Further, in light of proven racial bias in policing, "displaying improper attitude and demeanor during a motor vehicle stop," could indicate racist treatment by the officer based on the race of the motorist.<sup>41</sup>

Moreover, the police unions understate the significance of several incidents. For example, the police unions describe the troopers who provided certifications as "NJSP members who have had off-duty marital discord, [NCO ]Pa177-78, 191-93; suffered from addiction while off-duty, [NCO ]Pa173-74. . . ." NCOBr 22. A closer read of the certifications makes clear that the troopers were not sanctioned for "off-duty marital discord" but for acts of domestic violence and property damage (NCO Pa177; NCO Pa192); they were reprimanded not because they "suffered from addiction while off-duty" but because they drove under the influence (NCO Pa173; NCO Pa181-182). These are actions that can result in arrest for members of the public.

However, even if the police unions' basic contention - that some officers receive significant suspensions for minor

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<sup>41</sup> Indeed, studies have shown that police officers are significantly less respectful and consistently ruder toward Black motorists during routine traffic stops than they are toward white drivers. See Rob Voight, *et al.*, *Language from police body camera footage shows racial disparities in officer respect*, Proceedings of the National Academy of Sciences of the United States of America (June 20, 2017), available at <https://www.pnas.org/content/114/25/6521>.

misbehavior, which they call "innocuous performance issues" (NCOBr 23) - were correct, the police unions' conclusion that the public has no interest in learning the details of those cases would be mistaken. If some troopers receive 90-day suspensions for the significant misbehavior characterized above and other troopers received similar suspensions for simple administrative violations - bad language, and the like - it might not serve as a condemnation of the foul-mouthed troopers, but it would signal a disciplinary system that failed to identify and punish officers exhibiting the most problematic behavior. The public maintains an interest in learning about how departments punish officers for both serious misbehavior and for trivial rule violations so it can properly assess whether disciplinary systems are fair and effective.

The police unions also suggest that the public has no interest in learning about discipline imposed on retired officers. As discussed above, disciplinary information shines a light on both individual officers and institution-wide issues of fairness in discipline. The latter concern applies with equal force to retired officers. But, critically, the police unions ignore an important feature of New Jersey's law enforcement employment scheme: unlike almost every other state, our state does not have a mechanism for the licensing or decertification of police officers. Alex Napoliello & S.P. Sullivan, NJ Advance

Media for NJ.com, *N.J. will track police use of force, require licensing cops, AG says as protests roil nation*, NJ.com (June 2, 2020) (acknowledging that “at least 43 other states [have] a licensing program for law enforcement officers”).<sup>42</sup> As a result, officers who leave employment in one department are frequently hired in other departments. See Rukmini Callimachi, 9 *Departments and Multiple Infractions for One New Jersey Police Officer*, N.Y. Times (June 24, 2020) (describing how, without licensing schemes, problematic officers can bounce from department to department).<sup>43</sup> In addition, retired law enforcement officers may rely on their experience to seek other positions of public trust, such as a sheriff, public safety director, or corrections administrator. In these roles it is critical for the public to understand the full scope of the individuals’ history in law enforcement. This makes the public availability of police disciplinary records particularly important.

The affidavit of “Trooper 5” filed with the Appellate Division in the *State Troopers Non-Commissioned Officers Association* matter is instructive. That trooper, who received

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<sup>42</sup> <https://www.nj.com/politics/2020/06/nj-will-track-police-use-of-force-require-licensing-cops-ag-says-as-protests-roil-nation.html>

<sup>43</sup> <https://www.nytimes.com/2020/06/24/nyregion/new-jersey-police.html>. Although the Attorney General has indicated a willingness to move forward with a licensing scheme, none has been created yet.

major discipline as a result of an alcohol-fueled verbal argument with his wife, where he damaged property and operated troop transportation after consuming alcohol, has since resigned from the New Jersey State Police to pursue a private sector job. Affidavit of Trooper 5 ¶¶ 4, 14; NCO Pa191-192. He certifies that he "was assured that by entering a plea, the matter would remain confidential and have no impact on [him] in the future, unless [he] returned to the employment of the New Jersey State Police." *Id.* at ¶ 10. If the State Police keeps secret disciplinary records of troopers no longer employed by them, communities will have no assurance that former troopers hired into other positions of trust do not have records of past misconduct.

A system for licensing police officers helps build accountability. *See generally* Candice Norwood, *Can States Tackle Police Misconduct With Certification Systems?*, *The Atlantic* (Apr. 9, 2017);<sup>44</sup> Roger L. Goldman & Steven Puro, *Revocation of Police Officer Certification: A Viable Remedy for Police Misconduct?*, 45 *St. Louis Univ. L. J.* 541-579 (2001).

Even where past misconduct is insufficient to justify decertification, and perhaps also not enough to warrant a decision not to hire a police officer, communities still deserve

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<sup>44</sup> <https://www.theatlantic.com/politics/archive/2017/04/police-misconduct-decertification/522246/>

to understand the disciplinary records of officers who patrol their neighborhoods. Information about the discipline of police officers - retired or not - serves to enlighten people about key functions of their government. After all, our state has long recognized that "knowledge is power in a democracy, and that without access to information contained in records maintained by public agencies citizens cannot monitor the operation of our government or hold public officials accountable for their actions." *Fair Share Hous. Ctr., Inc. v. N.J. State League of Municipalities*, 207 N.J. 489, 502 (2011).

**B. Although police unions resist it, transparency promotes confidence in police, which in turn promotes community trust in law enforcement institutions.**

Recently, the U.S. Commission on Civil Rights called together policing experts to explore, among other issues, oversight and accountability of law enforcement. U.S. Commission on Civil Rights, *Police Use of Force: An Examination of Modern Policing Practices* (Nov. 2018) ("U.S. Commission on Civil Rights").<sup>45</sup> Scholars testified that the "absence of public information [about discipline] allows negative perceptions, and the belief that the police generally are not responsive to the complaints[,] to fester." *Id.* at 61. Ultimately, "the public has a right to know what our public officials are doing, and this is

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<sup>45</sup> Available at <https://www.usccr.gov/pubs/2018/11-15-Police-Force.pdf>.



especially true with our police officers, who have the power to shoot to kill, use force, and deprive people of their liberty through stop or arrest." *Id.*

Transparency serves as a necessary (though not sufficient) element of efforts to build public trust. Trust for the police as an institution, which is low among all Americans, reaches its nadir among Black Americans. Congressional Research Service, *Public Trust and Law Enforcement: A Discussion for Policymakers* (Dec. 13, 2018), Page 2, Table 1 ("Congressional Research Service").<sup>46</sup> According to Gallup, which has been tracking confidence in institutions for decades, in July 2020, only 56 percent of white Americans reported having "quite a lot" or "a great deal" of confidence in police. Jeffrey M. Jones, *Black, White Adults' Confidence Diverges Most on Police*, Gallup (Aug. 12, 2020).<sup>47</sup> Among Black Americans, that number drops to a mere 19 percent. *Id.*

This distrust comes with profound consequences. Community trust "is the key to effective policing" and the lack of it undermines the ability of police officers to do their jobs successfully. See International Association of Chiefs of Police, *Building Trust Between the Police and the Citizens They Serve*, 7

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<sup>46</sup> Available at <https://fas.org/sgp/crs/misc/R43904.pdf>.

<sup>47</sup> <https://news.gallup.com/poll/317114/black-white-adults-confidence-diverges-police.aspx>.

(Jan. 2014).<sup>48</sup> "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 the legitimate authority to tell them what to do." President's Taskforce on 21st Century Policing, *Final Report*, 9-10 (May 2015).<sup>49</sup> Perceptions of legitimacy only attach when the public "believe[s] police] are acting in procedurally just ways." *Id.* Put differently, a community "is more willing to cooperate with and engage those [legal] authorities because it believes that it shares a common set of interests and values with the police." *Id.* at 10, citing Tom Tyler, Jonathon Jackson & Ben Bradford, *Procedural Justice and Cooperation*, Encyclopedia of Criminology and Criminal Justice 4011-4024 (Gerben Bruinsma & David Weisburd eds., Springer 2014); see also Jeffrey Fagan, *Legitimacy and Criminal Justice*, 6 Ohio St. J. Crim. L. 123-140 (2008) (discussing relationship between perceptions of legitimacy and efficacy in the policing context). "Although organizations can be more or less dependent on legitimacy and public trust for their effectiveness and survival, police departments would appear to

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<sup>48</sup> Available at <https://www.theiacp.org/sites/default/files/all/b/BuildingTrust.pdf>.

<sup>49</sup> Available at [https://cops.usdoj.gov/pdf/taskforce/taskforce\\_finalreport.pdf](https://cops.usdoj.gov/pdf/taskforce/taskforce_finalreport.pdf).

be particularly sensitive, given the often very high visibility of their actions and their dependence on public support.” Brian Jackson, *Respect and Legitimacy – A Two-Way Street: Strengthening Trust Between Police and the Public in an Era of Increasing Transparency*, RAND Corp. 4 (2015).<sup>50</sup>

In response to the Attorney General’s June 15, 2020, decision to allow for the release of disciplinary records in instances where major discipline had been imposed, Petitioner law enforcement unions put out a statement explaining their position: “The retrospective attachment of Troopers’ names and republishing old annual reports serves absolutely no legitimate purpose other than to harass, embarrass, and rehash past incidents during a time of severe anti-law enforcement sentiment.” *Open Letter* at 2. The police unions are wrong. The Attorney General’s policy changes represents a small, but important step forward in providing transparency.

Where the public cannot learn about disciplinary action, it cannot serve its vital role as a “check” on government. See *Worcester Telegram & Gazette Corp. v. Chief of Police of Worcester*, 787 N.E.2d 602, 607 (Mass. Ct. App. 2003) (“A citizenry’s full and fair assessment of a police department’s internal investigation of its officer’s actions promotes the

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<sup>50</sup> Available at <https://www.rand.org/pubs/perspectives/PE154.html>.

core value of trust between citizens and police essential to law enforcement and the protection of constitutional rights."); *Welsh v. City & Cty. of San Francisco*, 887 F. Supp. 1293, 1302 (N.D. Cal. 1995) ("The public has a strong interest in assessing . . . whether agencies that are responsible for investigating and adjudicating complaints of misconduct have acted properly and wisely.").

The converse is also true: if police discipline processes are transparent and fair, then people are more likely to cooperate with police officers; that, of course, promotes public safety. Scholars confirm that transparency advances trust, which in turn improves safety. See, e.g., Rachel Macht, *Should Police Misconduct Files be Public Record? Why Internal Affairs Investigations and Citizen Complaints Should be Open to Public Scrutiny*, 45 No. 6 Crim. L. Bulletin Art (2009) ("Making information about police misconduct public ensures trust in law enforcement agencies"); Katharine J. Bies, *Let the Sunshine In: Illuminating the Powerful Role Police Unions Play in Shielding Officer Misconduct*, 28 Stan. L. & Pol'y Rev. 109, 120 (2017) ("[I]ncreasing transparency by publicly disclosing misconduct records should increase community faith and make police officers more effective in protecting their community."); Cynthia H. Conti-Cook, *A New Balance: Weighing Harms of Hiding Police Misconduct Information From the Public*, 22 CUNY L. Rev. 148, 166

(Winter 2019) (“[W]hen police processes are perceived as procedurally just, communities are more likely to cooperate with the police, and policing, in turn, is more effective.”).

Broad distrust of police officers, particularly in the Black community, will not dissipate with requests from law enforcement to “trust us.” After all, “[s]unlight is the greatest disinfectant when the government acts in dark corners.” *Paff v. Ocean Cnty. Prosecutor’s Off.*, 235 N.J. 1, 34 (2018) (Albin, J., dissenting) (citing *Buckley v. Valeo*, 424 U.S. 1, 67 (1976), (quoting Louis Brandeis, *What Publicity Can Do, in Other People’s Money and How the Bankers Use It* 62 (National Home Library Foundation ed. 1933)). Justice Albin’s explanation that, “[t]he public – particularly marginalized communities – will have greater trust in the police when law enforcement activities are transparent. . . .” *Paff*, 235 N.J. at 36 (Albin, J., dissenting), applies with equal force to disciplinary records.

**C. Other states have successfully made police discipline records public without inviting the negative consequences about which the police unions warn.**

Appellant union and the police unions in the other cases suggest that their members will suffer invasions of privacy, and even risks to their personal safety, if disciplinary records are made public. As discussed above (Point II, A, *supra*), the police unions ignore the societal benefits that flow from transparency.

As evidenced by experience in other states, the police unions also overstate the risk of negative consequences.

Even before the murder of George Floyd, and the increased attention to police transparency, thirteen states made records of police discipline generally available to the public. For years, these states have struck an appropriate balance - allowing disclosure of discipline records, while protecting information about medical conditions and the identity of victims.

For example, in Alabama, then-State Attorney General Jeff Sessions explained that "in general, applications, disciplinary actions, and memoranda of reprimand are documents reasonably necessary to conduct business, and thus subject to disclosure. . . ." Alabama Attorney General Opinion 96-00003, 4(1996).<sup>51</sup> On the other hand, "[a]n employee's medical history, confidential recommendations for employment, and drug or alcohol testing results will, in most cases, fall under the sensitive personnel records exception set out in [case law]." *Id.* Under Alabama's public record law, public officials are not to disclose documents that are "expected to be detrimental to the public safety or welfare, and records the disclosure of which would otherwise be detrimental to the best interests of the public. .

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<sup>51</sup> Available at <https://www.alabamaag.gov/Documents/opin/96-00003.pdf>.

. ." Code of Ala. § 36-12-40. Thus, the Attorney General in Alabama decided almost 25 years ago that the disclosure of disciplinary records was not detrimental to the public interest.

In Arizona, once an investigation is complete, Ariz. Rev. Stat. § 38-1109(A), and the officer has exhausted any appeals, Ariz. Rev. Stat. § 38-1109(B), records "that are reasonably necessary or appropriate to maintain an accurate knowledge of disciplinary actions, including the employee responses to all disciplinary actions, involving public officers or employees of the public body" shall generally "be open to inspection and copying." Ariz. Rev. Stat. § 39-128(A).

Under Connecticut's Freedom of Information Act, Conn. Gen. Stat. § 1-210, custodians need not disclose "[p]ersonnel or medical files and similar files the disclosure of which would constitute an invasion of personal privacy." Conn. Gen. Stat. § 1-210(b)(2). That exception to transparency has been narrowly construed. To claim that exemption, custodians "must meet a twofold burden of proof . . . . First, they must establish that the files in question are within the categories of files protected by the exemption, that is, personnel, medical or 'similar' files." *Perkins v. Freedom of Info. Comm'n*, 228 Conn. 158, 168 (Conn. 1993). Custodians must also demonstrate "that disclosure of the records would constitute an invasion of personal privacy." *Id.* (internal quotations omitted). The

Supreme Court of Connecticut determined that "the invasion of personal privacy exception . . . precludes disclosure . . . only when the information sought by a request does not pertain to legitimate matters of public concern and is highly offensive to a reasonable person." *Id.* at 175. Thus, police discipline records are routinely released under Connecticut law. WNYC, *Is Police Misconduct a Secret in Your State?*<sup>52</sup>

Washington takes a similar approach. Under their public records law, a person's "right to privacy," is "violated only if disclosure of information about the person: (1) Would be highly offensive to a reasonable person, and (2) is not of legitimate concern to the public." Rev. Code Wash. (ARCW) § 42.56.050. Although the State exempts from disclosure "unsubstantiated or false accusation[s]" of, for example, sexual misconduct that did not "result[] in any form of discipline" *Bellevue John Does 1-11 v. Bellevue Sch. Dist. No. 405*, 164 Wn.2d 199 (Wash. 2008), it allows the disclosure of less-incendiary allegations - such as the creation of a hostile work-place environment - and those that are substantiated. *Morgan v. City of Federal Way*, 166 Wn.2d 747, 756 (Wash. 2009).

Statutes in Florida, Georgia, Maine, North Dakota and Wisconsin make disciplinary records public once an investigation

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<sup>52</sup> <https://project.wnyc.org/disciplinary-records/> (last accessed Dec. 14, 2020).



has been completed. See Fla. Stat. § 119.071(k) ("A complaint of misconduct . . . is confidential and exempt . . . [from disclosure] until the investigation ceases to be active. . . ."); Ga. Code Ann. § 50-18-72(a)(8) ("Records . . . related to the suspension, firing, or investigation of complaints against public officers or employees [shall not be made public] until . . . the investigation is . . . concluded or terminated"); Maine Rev. Stat. § 503(1)(B)(5) (making public "final written decision relating to [disciplinary] action [for county employees]. . . after the decision is completed if it imposes or upholds discipline" and explaining that the "decision must state the conduct or other facts on the basis of which disciplinary action is being imposed"); Maine Rev. Stat. § 2702(1)(B)(5) (same, for municipal employees); Maine Rev. Stat. § 7070(2)(E) (same, for state employees); N.D. Cent. Code, § 44-04-18.1(6) ("Records relating to a public entity's internal investigation of a complaint against a public entity or employee for misconduct are exempt until the investigation of the complaint is complete, but no longer than seventy-five calendar days from the date of the complaint."); Wis. Stat. § 19.36(10)(b) (exempting from public disclosure only "[i]nformation relating to the *current* investigation of a possible criminal offense or possible misconduct connected with employment by an employee *prior to disposition* of the investigation") (emphasis added).

In Minnesota, Minn. Stat. § 13.43(a)(4) provides that "the existence and status of any complaints or charges against the employee, regardless of whether the complaint or charge resulted in a disciplinary action" is a public record subject to disclosure. *Id.* Additionally, statutes make public "the final disposition of any disciplinary action together with the specific reasons for the action and data documenting the basis of the action, excluding data that would identify confidential sources who are employees of the public body." Minn. Stat. § 13.43(a)(5).

In Ohio, case law confirms that police disciplinary records are public records subject to disclosure under Ohio's public records law. *State ex rel. Dispatch Printing Co. v. City of Columbus*, 90 Ohio St. 3d 39, 41 (Ohio 2000).

Finally, in Utah, their public records law provides that "records that would disclose information relating to formal charges or disciplinary actions against a past or present governmental entity employee[,]" Utah Code Ann. 63G-2-301(3)(o), shall be public if "the disciplinary action has been completed and all time periods for administrative appeal have expired; and . . . the charges on which the disciplinary action was based were sustained[.]" Utah Code Ann. 63G-2-301(3)(o)(i) and (ii).

Additionally, in at least 15 other states, some disciplinary records are available for public inspection. See

WNYC, *Is Police Misconduct a Secret in Your State?* In short, despite the police unions' suggestion that the sky will fall if the public gets access to some police disciplinary files, there exists no evidence from the dozens of states that do allow access to suggest that such a result is likely. Indeed, as the U.S. Commission on Civil Rights noted, despite concerns about the "implications for individual privacy of the officers and complainants . . . , some states, such as Florida and Illinois, regularly release officer disciplinary files to the public without violating the complainants' or victims' rights." U.S. Commission on Civil Rights at 61.

**D. The Public Interest in Disclosure of Police Misconduct Records Outweighs Any Purported Privacy Interests.**

As discussed throughout this brief, the public's interest in transparency regarding police discipline is overwhelming because transparency is fundamental to public safety and community trust. The public's interest in transparency reaches its peak when it seeks accountability from those it has entrusted with the power to use force - including lethal force - against fellow residents.

In addition to advocating for police transparency, several of the *amici* also advocate for privacy, including regarding information related to health and other sensitive information. When weighing the interests at stake in the release of disciplinary records, *amici* are united in their belief that the

public's enormous interest dwarfs any speculative rights to privacy.

Importantly, there is no substantive due process right to shield information about one's misconduct. Several of the Petitioners suggest that revealing their identities implicates the disclosure of health information.<sup>53</sup> *Amici* note that some of the examples demonstrate that officers were charged with alcohol-related offenses and thus their problematic use of alcohol has already been publicly revealed.<sup>54</sup> See, e.g., Affidavit of Trooper 3, NCO Pa173 (noting that the trooper "pleaded guilty to driving while intoxicated and failure to take a breathalyzer"). In any event, if the information that is to be

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<sup>53</sup> Before the Appellate Division, the State Troopers Fraternal Association makes unsupported claims that "medical records" could be revealed. STFABr 48. "Medical records" typically are in the possession of healthcare providers, health insurers, or the individual. See generally 45 CFR § 164.501, -524. Even if an officer shared medical records with the New Jersey State Police, *amici* have identified nothing in the directives that suggest the release of such records is an issue before the Court.

<sup>54</sup> While several police unions argue that the release of this information will reveal alcohol dependency, *amici* note that it is not necessarily clear that all alcohol-related misconduct stems from alcohol dependency. "Alcohol dependence" was a psychiatric diagnosis that is now referred to as Alcohol Use Disorder. See National Institute of Alcohol Abuse and Alcoholism, *Alcohol Use Disorder: A Comparison Between DSM-IV and DSM-5*, available at <https://www.niaaa.nih.gov/sites/default/files/DSMfact.pdf>. If an officer was charged with operating a vehicle while under the influence, the public has no way of discerning whether it was a result of a diagnosis or an isolated incident.

released pursuant to the directive identifies a health condition, that does not justify a decision to shield identities from the public; it only counsels that a redaction may be appropriate, a process that the Office of Attorney General is familiar with through its obligations under the Open Public Records Act.

## CONCLUSION

For decades, communities have pushed for transparency regarding police misconduct and police unions have successfully used their political power to thwart it. Now, the Attorney General has offered a small step towards accountability. The public should not be required to wait any longer. The Court should reject the police unions' request that law enforcement officers be treated differently than other regulated professions. And the Court certainly should consider the profound harm that comes to the public when police avoid transparency.

Respectfully submitted,



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