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Court of Appeals
of the
State of New York

In the Matter of the Application of

NEW YORK CIVIL LIBERTIES UNION,

Petitioner-Respondent,

– against –

CITY OF ROCHESTER and ROCHESTER POLICE DEPARTMENT,

Respondents-Appellants.

BRIEF FOR *AMICUS CURIAE* ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK IN SUPPORT OF PETITIONER-RESPONDENT

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DISCLOSURE STATEMENT PURSUANT TO RULE 500.1(f)

Pursuant to Court of Appeals Rule 500.1(f), the Association of the Bar of the City of New York, also known as the New York City Bar Association, states that it is a voluntary bar association with no parent corporation or subsidiaries. The New York City Bar Association has one affiliate, the Association of the Bar of the City of New York Fund, Inc.

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STATEMENT OF INTEREST

The New York City Bar Association (the "City Bar"), through its Civil Rights Committee, Task Force on the Rule of Law, and Communications and Media Law Committee, respectfully submits this amicus curiae brief to urge the Court to reject the City of Rochester and Rochester Police Department's (collectively, Rochester's) argument that "unsubstantiated" complaints against police officers are exempt from disclosure under the Freedom of Information Law (FOIL) and to affirm the decision of the Appellate Division, Fourth Department.

Founded in 1870, the City Bar is one of the oldest bar associations in the United States. It has approximately 23,000 members and 150 committees. The City Bar seeks to promote legal reform and to improve the administration of justice by commenting on proposed legislation, publishing reports on legal issues, and participating as amicus curiae in litigation. In these and other ways, the City Bar serves as a voice for the legal profession in promoting the equitable administration of justice in New York.

The City Bar supported the repeal of Civil Rights Law § 50-a.[1] The City Bar's Civil Rights Committee addresses issues pertaining to, *inter alia*, First Amendment rights and the civil rights of New Yorkers who interact with the police; the Task

[1] New York City Bar Assn., *Report on Legislation by the Civil Rights Committee et al.* [June 2020], available at https://s3.amazonaws.com/documents.nycbar.org/files/2017285-50aPoliceRecordsTransparency.pdf [last accessed Jan. 25, 2024].

Force on the Rule of Law addresses the framework for decision-making in a constitutional democracy, including, among other issues, due process of law, separation of powers utilizing checks and balances, and protection of fundamental rights; and the Communications and Media Law Committee addresses issues surrounding media law such as access to government information, defamation, legislative proposals, and the role of the courts in promoting free and uninhibited discussion and exchange of ideas and information. Given the City Bar's legal expertise and interest in the administration of justice, it is well positioned to submit an amicus curiae brief in this matter. And because the Police Department of the City of New York (NYPD) is orders of magnitude larger than any other police force in New York, the decision in this case will disproportionately affect New York City.

The Civil Rights Committee, Task Force on the Rule of Law, and Communications and Media Law Committee submit this brief on behalf of the City Bar, as amicus curiae, in support of Petitioner-Respondent in this case. No party contributed content to this brief. No party, party's counsel, person, or entity other than the City Bar contributed money to fund preparation or submission of the brief.

PRELIMINARY STATEMENT

The Freedom of Information Law (FOIL) is founded on the "right to know," including the public's right to receive information regarding governmental

functions. This right has constitutional implications, as it underpins First Amendment rights. It is also essential for governmental accountability.

The same ideas that underlie the right to know motivated the repeal of Civil Rights Law § 50-a and the concurrent amendment of FOIL. Given that law enforcement agents possess a unique and immense power over the public, the public has a concomitant right to obtain information regarding these agents' exercise of their duties. The recognition of a blanket exemption for "unsubstantiated" complaints would negate the public's right to know with respect to law enforcement agencies. Moreover, there is no support for such an exemption in FOIL itself or the legislative history of the 2020 FOIL amendments and the repeal of Civil Rights Law § 50-a.

New York City is a hotbed of First Amendment activity, including protests. A robust conception of FOIL with respect to law enforcement agencies promotes First Amendment activity. Armed with information regarding law enforcement's actions, either directly or through media sources, the public can make targeted demands for reform. And when these demands take the form of public protest, those engaging in the protest can be assured that they have the means to hold accountable any law enforcement agents who respond to the protest in an unlawful manner.

For these reasons, the Court should affirm the decision of the Appellate Division, Fourth Department.

I. The Freedom of Information Law is founded on the public's right to know.

> A popular government, without popular information or the means of acquiring it, is but a prologue to a farce or a tragedy; or perhaps both. Knowledge will forever govern ignorance. And a people who mean to be their own governors, must arm themselves with the power knowledge gives.[2]

At its core, the right to know is "the right to obtain information as a basis for transmitting ideas or facts to others" (*Legal Foundations of the Right to Know* 2). The right to know has constitutional dimensions: "[t]ogether [the components of the right to know] constitute the reverse side of the coin from the right to communicate. But the coin is one piece, namely the system of freedom of expression" (*id.*). Put simply, for First Amendment rights to have any value, would-be speakers[3] must have access to the information and ideas needed to inform and inspire their speech (*cf. Branzburg v Hayes*, 408 US 665, 714 [1972] [Douglas, J., dissenting], quoting Alexander Meiklejohn, *The First Amendment is an Absolute*, 1961 Sup Ct Rev 245, 255 ["Self-government can exist only insofar as the voters acquire the intelligence,

[2] Thomas L. Emerson, *Legal Foundations of the Right to Know*, 1976 Wash U LQ 1, 1 [1976], quoting Letter from James Madison to W. T. Barry, August 4, 1822, in 9 Writings of James Madison 103 [G. Hurst ed. 1910], available at https://openscholarship.wustl.edu/law_lawreview/vol1976/iss1/6 [last accessed Jan. 25, 2024] [hereinafter *Legal Foundations of the Right to Know*]; *see also Houchins v KQED, Inc.*, 438 US 1, 31-32 [1978] [Stevens, J., dissenting] [including the same quotation].

[3] Or voters, petitioners, etc.

integrity, sensitivity, and generous devotion to the general welfare that, in theory, casting a ballot is assumed to express . . . ."]).

While the right to know is not limited to the right to obtain information from the government, the ability to access such information is intimately connected to First Amendment values and our constitutional system. This is because the right to know drives two main democratic functions: governmental accountability and citizen participation (Barry Sullivan, *FOIA and the First Amendment: Representative Democracy and the People's Exclusive "Right to Know,"* 72 Md L Rev 1, 9, 11 [2012] [hereinafter *FOIA and the First Amendment*]).[4] "[W]ithout an informed citizenry and a corresponding open public debate, democratic participation and supervision would be impossible" (Tao Huang, *Freedom of Speech as a Right to Know*, 89 U Cin L Rev 106, 113 [2020] [hereinafter *Freedom of Speech*]).[5]

As the quotation from James Madison indicates, the right to know has been recognized as integral to our constitutional system from the outset. However, in the 1960s and 1970s, scholars and litigants made a concerted effort to establish an enforceable First Amendment right to access governmental information, encapsulated as the right to know (*see generally FOIA and the First Amendment* 11-

[4] Available at https://lawecommons.luc.edu/cgi/viewcontent.cgi?article=1429&context=facpubs [last accessed Jan. 25, 2024].

[5] Available at https://scholarship.law.uc.edu/cgi/viewcontent.cgi?article=1376&context=uclr [last accessed Jan. 25, 2024].

16]). The right to know requires a broad right of access to such information, which is needed for the public to hold governmental actors accountable and make informed decisions (*see, e.g.*, David Mitchell Ivester, *The Constitutional Right to Know*, 4 Hastings Const LQ 109, 109-110 n 3 [1977];[6] *see also Branzburg*, 408 US at 721 [Douglas, J., dissenting]; *Pell v Procunier*, 417 US 817, 840 [1974] [Douglas, J., dissenting] ["[P]eople have the right and the necessity to know not only of the incidence of crime but of the effectiveness of the system designed to control it."]; *Saxbe v Wash. Post Co.*, 417 US 843, 871 [1974] [Powell, J., dissenting]).

In the end, while recognizing that the right to know was a constitutional ideal, the Supreme Court rejected the argument that the public had a concrete First Amendment right of access to governmental information (*FOIA and the First Amendment* at 17; *see Houchins*, 438 US at 15). However, despite the Court's ruling, those advocating for the recognition of the right to know succeeded. This is because the right to know was enshrined in statutes: the federal Freedom of Information Act (FOIA)[7] and, later, state-level analogues such as FOIL explicitly recognized that the

[6] Available at https://repository.uclawsf.edu/cgi/viewcontent.cgi?article=1096&context=hastings_constitutional_law_quaterly [last accessed Jan. 25, 2024].

[7] *FOIA and the First Amendment at* 17-18, 18 n 42 ["When Congress enacted FOIA in 1966, it acted on the same conviction that animated the *Houchins* dissenters, namely, that access to information is essential to citizenship in a representative democracy and that ordinary political processes do not necessarily produce an adequate flow of information to the people or their representatives."].

laws were intended to effectuate the right to know (Public Officers Law § 84 ["The people's right to know the process of governmental decision-making and to review the documents and statistics leading to determinations is basic to our society."]; Governor's Approval Mem, Bill Jacket, L. 1974, ch. 580 at 62-63 ["[G]overnment is the people's business and . . . the people have a right to know the processes by which government decisions are made and actions taken."]; *Capital Newspapers Div. of Hearst Corp. v Burns*, 67 NY2d 562, 565-66 [1986]).

In sum, the statutory rights granted by FOIL have constitutional underpinnings. Read in light of the constitutional dimensions of the right to know and its importance to the effective exercise of First Amendment rights and the functioning of our democracy, FOIL embodies a strong policy in favor of disclosure (*see Burns*, 67 NY2d at 565-66;[8] *see also Gould v New York City Police Dept.*, 89 NY2d 267, 274-75 [1996]). Indeed, FOIL, like FOIA, "was intended to enforce the constitutional 'right to know' by creating a presumption in favor of disclosure" (*FOIA and the First Amendment* 21).

[8] "The [FOIL] statute, enacted in furtherance of the public's vested and inherent 'right to know,' affords all citizens the means to obtain information concerning the day-to-day functioning of State and local government thus providing the electorate with sufficient information to 'make intelligent, informed choices with respect to both the direction and scope of governmental activities' and with an effective tool for exposing waste, negligence and abuse on the part of government officers" (*Burns*, 67 NY2d at 565-66 [citations omitted]).

II. The right to know has a special character with respect to law enforcement agencies.

Given the instrumental purpose of the right to know in enabling democratic participation and supervision (*Freedom of Speech* 113), it follows that a robust conception of the right is especially important with respect to certain governmental functions. Policing is a paramount example.

First, law enforcement agencies are unique among governmental agencies in the potentially fatal or injurious consequences of their employees' interactions with the public (*see, e.g.*, Assembly Floor Debate Transcript [June 9, 2020], Bill Jacket, L 2020, ch 96 at 80 [remarks of Assembly Member Ramos] ["And when someone has the power to take a human life, I believe that there should be more light shining on that person and what he does."]). This alone counsels in favor of increased public oversight and transparency.

Second, the nature of law enforcement agents' interactions with the public—ranging from speaking to residents of neighborhoods they patrol and issuing verbal orders to investigating crimes and making arrests—mean that they "interact with the public on a day-to-day basis in a more visceral and tangible way than any other public employees" (NY Dept. of State, Comm. on Open Govt., *Annual Report to the Governor and State Legislature* 3 [2014]).[9] Of course, even non-violent interactions

[9] Available at https://opengovernment.ny.gov/system/files/documents/2021/12/2014-annual-report.pdf [last accessed Jan. 25, 2024]. Indeed, given law enforcement agencies' size, resources,

with law enforcement are often incredibly consequential for the civilians involved and the communities in which they live, and they are of great concern to the public. For instance, the public has an interest in ensuring that racial bias in policing is eradicated (*see, e.g.*, Alan Feuer, *Black New Yorkers Are Twice as Likely to Be Stopped by the Police, Data Shows*, NY Times, Sept. 23, 2020).[10] Public supervision of these "visceral and tangible" interactions is not possible without the disclosure of granular data, including documents related to individual incidents or complaints.

Third, law enforcement agencies are among the largest government agencies, which heightens the prior two concerns. The New York City Police Department has over 35,000 uniformed officers and a budget of over $5 billion (NY City Council Finance Div., *Report to the Committee on Finance and the Committee on Public Safety on the Fiscal 2024 Executive Plan and the Fiscal 2024 Executive Capital Commitment for the New York Police Department* 1 [May 18, 2023]).[11]

FOIL embodies the ideal of popular sovereignty: "government is the people's business" (Governor's Approval Mem, Bill Jacket, L. 1974, ch. 580 at 62-63; *see*

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and powers, their agents are many residents' primary and most significant contact with the administrative state, the growth of which spurred the development of the right to know (*Freedom of Speech* 106).

[10] Available at https://www.nytimes.com/2020/09/23/nyregion/nypd-arrests-race.html [last accessed Jan. 25, 2024].

[11] Available at https://council.nyc.gov/budget/wp-content/uploads/sites/54/2023/05/NYPD.pdf [last accessed Jan. 25, 2024].

also Freedom of Speech 107 n 4, quoting Anthony Lewis, *A Public Right to Know about Public Institutions: The First Amendment as Sword*, 1980 Sup Ct Rev 1, 2-3 ["If citizens are the ultimate sovereigns, as the Constitution presupposes, they must have access to the information needed for intelligent decision."]). Considering the powers of a law enforcement agency, the public has a special interest in having a full picture of the agency's activities. Limiting the public's information would insulate the agency from review and democratic control, a dangerous result.

III. A blanket exemption for "unsubstantiated" complaints is contrary to FOIL's broad disclosure policy.

Against this backdrop, Rochester claims that the "personal privacy" exemption contained in Public Officers Law § 87 [2][b] relieves it from the obligation to release records related to any "unsubstantiated" complaints. This argument is antithetical to the right to know principles embodied in FOIL.

As described above, the right to know is an instrument of governmental supervision and accountability. Allowing a law enforcement agency to withhold information regarding complaints because the complaints are "unsubstantiated" would severely undermine the public's ability to advocate for changes to the agency's practices and policies. Rochester's position is incompatible with FOIL's fulsome disclosure requirements (*see, e.g., Matter of Newsday, LLC v Nassau County Police Dept.*, 2023 NY App Div LEXIS 6091, *4-5 [2d Dept Nov. 22, 2023, 2021-08455]; *Schenectady Police Benev. Assn. v City of Schenectady*, 2020 WL

7978093, *5 [Sup Ct, Schenectady County, Dec. 29, 2020, No. 2020-1411]; *Buffalo Police Benevolent Assn., Inc. v Brown*, 69 Misc 3d 998, 1004 [Sup Ct, Erie County 2020]).

First, if a law enforcement agency could prevent disclosure and public review of serious complaints because they are "unsubstantiated," the agency could avoid disclosing complaints simply by not substantiating or acting on them in the first instance. This would create a perverse incentive and diminish internal, as well as public, accountability. The concern that a law enforcement agency would not substantiate complaints is not an idle one: between 2014 and 2018, the New York City Police Department (NYPD) did not "substantiate" a single one of the 2,945 complaints it received regarding biased policing (Office of the Inspector General for the NYPD, *Complaints of Biased Policing in New York City: An Assessment of NYPD's Investigations, Policies, and Training* 17-18 [2019]).[12]

Second, requiring the disclosure of only "substantiated" complaints would remove public oversight of other important aspects of the complaint process, including the law enforcement agency's conclusion about whether a particular complaint is "substantiated" or not and the standard that the agency uses to make that determination.

[12] Available at https://a860-gpp.nyc.gov/concern/nyc_government_publications/4t64gp90p?locale=en [last accessed Jan. 25, 2024]).

If a law enforcement agency were only required to produce "substantiated" complaints in response to a FOIL request, the agency's complaint and disciplinary processes would remain closed to the public. The agency would have considerable discretion regarding what disciplinary records to produce and would generally be the sole arbiter of whether a complaint was "substantiated" or not. The public would have no means to take informed positions regarding the agency's complaint and disciplinary processes and no ability to evaluate its performance. This result could not be squared with the right to know.

IV. The legislative history of the repeal of Civil Rights Law § 50-a and the legislative history and text of the 2020 FOIL amendments foreclose the argument that a law enforcement agency may withhold "unsubstantiated" complaints on a wholesale basis.

From Civil Rights Law § 50-a (Section 50-a)'s enactment in 1977 until its repeal on June 12, 2020, all "personnel records used to evaluate performance toward [the] continued employment or promotion" of police officers were shielded from disclosure. Section 50-a was originally intended to prevent criminal defense counsel from using the contents of personnel records, including "unsubstantiated" complaints, to embarrass police officers during cross-examination. (*See Carpenter v City of Plattsburgh*, 105 AD2d 295, 298 [3d Dept 1985], *affd* 488 NE2d 839 [1985].)[13] However, Section 50-a was later construed to bar even the disclosure of a

[13] Therefore, at the time of the enactment of Section 50-a in 1977, defense counsel must have had access to "unsubstantiated" complaints against police officers, undermining the argument that FOIL's personal privacy exemption has always prevented the release of these complaints.

law enforcement agency's final disciplinary determinations (*see Matter of New York Civil Liberties Union v New York City Police Department*, 32 NY3d 556 [2018]). Section 50-a significantly limited the public's right to know information regarding law enforcement personnel records. With the repeal of Section 50-a in June 2020, the public's right to know must now be given full effect. This is borne out by the legislative history of the repeal of Section 50-a and the text and legislative history of the accompanying FOIL amendments.

During the floor debates on the repeal of Section 50-a, there was much discussion regarding whether records related to "unsubstantiated" complaints would now be subject to disclosure. Remarks by both proponents and opponents of the legislation make clear that all involved understood the repeal of Section 50-a to mean that "unsubstantiated" complaints could and would be disclosed in response to FOIL requests. (Assembly Floor Debate Transcript [June 9, 2020], Bill Jacket, L 2020, ch 96 at 48-62, 78-84.) Moreover, as noted by Assembly Member Reilly (*id.* at 53), the Legislature has granted privacy rights to a certain class of public employees: tenured educators have the right to confidential disciplinary proceedings (*see* Education Law § 3020-a [3] [c] [i] [C]). By repealing Section 50-a and deciding not to enact any protective legislation similar to the Education Law provision in its stead, the Legislature chose to make law enforcement agencies' records, including records related to "unsubstantiated" complaints, fully subject to FOIL (*see Matter of*

Newsday, 2023 NY App Div LEXIS 6091 at *7, quoting *Matter of Friedman v Rice*, 30 NY3d 461, 478 [2017] ["If the Legislature had intended to exclude from disclosure complaints and allegations that were not substantiated, 'it would simply have stated as much.'"]).

Contemporaneously with Section 50-a's repeal, the Legislature amended FOIL to enable and govern access to law enforcement agents' personnel records. In its amendments, the Legislature delineated which disciplinary records could be obtained through FOIL requests and added measures to protect the legitimate privacy interests of agents whose records could now be accessed (2020 NY Senate Bill S8496). The FOIL amendments were designed to support the aims of transparency and accountability by expanding the types of law enforcement records that could be publicly obtained, while sanctioning only a few narrowly tailored redactions (*see* Letter from NY St Assembly Member Daniel O'Donnell, June 25, 2020, at 5, Bill Jacket, L 2020, ch 96 ["By repealing section 50-a, this bill remedies a long-standing situation in which section 50-a has been used—by virtue of court decisions that have been interpreted and applied it far beyond the original legislative intent—to impede FOIL's goal of providing the public with access to records in a way that is transparent and provides for public accountability."]).

The Legislature modified FOIL by adding four new subdivisions that define the contours of law enforcement disciplinary records available under the statute

(Public Officers Law § 86 [6]-[9]). "Law enforcement disciplinary records" are broadly defined to include

> [A]ny record created in furtherance of a law enforcement disciplinary proceeding, including, but not limited to: (a) complaints, allegations, and charges against the employee; (b) the name of the employee complained of or charged; (c) the transcript of any disciplinary trial or hearing, including any exhibits introduced at such trial or hearing; (d) the disposition of any disciplinary proceeding; and (e) the final written opinion or memorandum supporting the disposition and discipline imposed including the agency's complete factual findings and its analysis of the conduct and appropriate discipline of the covered employee (Public Officers Law § 86 [6]).

This section does not make any distinction between the status or outcome of disciplinary proceedings—including whether any complaints, allegations or charges are substantiated, unsubstantiated, or pending. Indeed, the Legislature's inclusion of "complaints, allegations, and charges against an employee" and "the disposition of any disciplinary proceeding" as two of the listed types of records demonstrates its intent to require the disclosure of information related to proceedings with various statuses or outcomes. Put differently, if only substantiated disciplinary proceedings were accessible under FOIL, it would not make sense to include the allegations against an employee or a proceeding's disposition as separate categories of records covered by the section.

In addition to defining law enforcement disciplinary records, the Legislature amended FOIL to instruct agencies about the required and permissible redactions that pertain to these types of records. These redactions supplement the personal

privacy exemption that applies to all FOIL requests (Public Officers Law §§ 87, 89; *see also* Assembly Mem in Support of 2020 NY Assembly Bill 8496, Bill Jacket, L 2020, ch 96 at 8 ["FOIL already provides that agencies may redact or withhold information whose disclosure would constitute an unwarranted invasion of privacy . . . . Furthermore, this bill adds additional safeguards in the FOIL statute."]). The FOIL redaction provisions shield officers' legitimate privacy interests and ensure that only that information necessary to protect those legitimate interests is concealed from the public.

A law enforcement agency responding to a request for disciplinary records must redact the officer's 1) medical records or medical history unless relevant to investigations of misconduct; 2) home address and personal contact information; 3) social security number; and 4) use of an employee assistance program, mental health services, or substance abuse services (Public Officers Law §§ 87 [4-a], 89 [2-b]).

Post-amendment, FOIL permits, but does not require, the redaction of "technical infractions" contained in disciplinary records (Public Officers Law §§ 87 [4-b], 89 [2-c]). Technical infractions refer to a "minor rule violation" related to the enforcement of departmental rules, do not "involve interactions with members of the public," "are not of public concern," and "are not otherwise connected to such person's investigative, enforcement, training, supervision, or reporting responsibilities" (Public Officers Law § 86 [9]).

Nothing in the FOIL sections governing law enforcement disciplinary records suggests that allegations of misconduct, other than technical infractions, should or may be generally redacted. And permitting the redaction of other categories of disciplinary records would contravene the Legislature's clear intent (*see, e.g.*, *Colon v Martin*, 35 NY3d 75, 78 [2020] [internal citations and quotation marks omitted] ["The maxim *expressio unius est exclusio alterius* applies in the construction of the statutes and instructs that the inclusion of a particular thing in a statute implies an intent to exclude other things not included."]). The FOIL statute now specifically defines the law enforcement disciplinary records that agencies must produce to include the "complaints, allegations, and charges against an employee" and "the name of the employee complained of or charged" (Public Officers Law § 86 [6] [a], [b]). Rochester claims that it may withhold both "unsubstantiated" complaints and the name of the complained-of employee. Such a construction does not only run afoul of the requirement that all FOIL exemptions be narrowly construed (*see Gould*, 89 NY2d at 275)—it would nullify a substantial portion of the definition of law enforcement disciplinary records that the Legislature chose to include.

Therefore, a law enforcement agency's general withholding or redaction of unsubstantiated or pending disciplinary records pursuant to the Public Officers Law § 89 [2][b]'s personal privacy exemption both exceeds the authority entrusted to it and frustrates the legislative intent of the 2020 FOIL amendments. Instead, post-

amendment, a law enforcement agency must fully disclose a record subject to Public Officers Law § 86 [6] unless a pre-existing exception applies. In the vast majority of cases, the fact that a complaint is "unsubstantiated" should not prevent disclosure (*see, e.g.*, *Schenectady Police Benev. Assn.*, 2020 WL 7978093, *4-5 ["In terms of public access, it is of little consequence that records contain unsubstantiated charges or mere allegations of misconduct . . . . Public employees have less entitlement to privacy than do non-public employees, at least where job performance is concerned. This is due to the high priority placed on accountability."]).

V. A robust conception of FOIL promotes and safeguards First Amendment activity.

The right to know is frequently connected to the freedom of the press (*see, e.g.*, *Branzburg*, 408 US at 721 [Douglas, J., dissenting]). However, the right to know, effectuated through FOIL, is equally tied to other First Amendment rights, including the right to assemble and engage in public protest. The protest example illustrates how First Amendment rights are both promoted and safeguarded by broad public access to law enforcement agency records.

New York City is the "nation's capital city of social activism" (Steven Jaffe, Activist New York 7 [NYU Press 2018] [foreword by Eric Foner]). The reasons for this are social and spatial—New York City's social history, its status as a financial capital, the presence of important international institutions, and its physical geography all contribute to its status as a site of protest (*see id.* at 12-15). The Crowd

Counting Consortium counted over 150 protests in September 2023 and 180 protests in October 2023 in New York City (Crowd Counting Consortium, Monthly Sheets, Sept. & Oct. 2023).[14] Over the years, certain protests have been particularly large, swelling to tens of thousands of people in some cases.[15]

Protests are an important manifestation of how the right to know operates. In the first instance, information obtained from the government can inform or inspire protestors' message and demands. Then, protestors engage in protests to amplify their message and communicate information about an issue or desired political outcome to others. Finally, protests serve an important democratic function, as protests that gain broad public support can spur governmental action. (*See, e.g.*, Robin Lipp, *Protest Policing in New York City*: *Balancing Safety and Expression*, 9 Harv L & Poly Rev 275, 291 [2015] [hereinafter *Protest Policing*] [discussing the value of protest].) Indeed, the repeal of Section 50-a was the direct result of protests

[14] Available at https://sites.google.com/view/crowdcountingconsortium/view-download-the-data [last accessed Jan. 25, 2024] [download monthly sheets for September and October 2023, filter locality by "New York"].

[15] *See* Somini Sengupta et al., *Climate Protesters March on New York, calling for End to Fossil Fuels*, NY Times, Sept. 17, 2023, available at https://www.nytimes.com/2023/09/17/climate/climate-protests-new-york.html [last accessed Jan. 25, 2024] [describing the tens of thousands of protesters demonstrating for climate action]; Benjamin Mueller et al., *25,000 March in New York to Protest Police Violence*, NY Times, Dec. 13, 2014, available at https://www.nytimes.com/2014/12/14/nyregion/in-new-york-thousands-march-in-continuing-protests-over-garner-case.html [last accessed Jan. 25, 2024] ["More than 25,000 people marched through Manhattan on Saturday, police officials said, in the largest protest in New York City since a grand jury declined this month to indict an officer in the death of an unarmed black man on Staten Island."].

following the murder of George Floyd (*see* Letter from NY St Assembly Member Daniel O'Donnell, June 25, 2020, at 5, Bill Jacket, L 2020, ch 96).[16]

There is a clear initial connection between protests and the full disclosure of law enforcement disciplinary records: protest organizers can sift through disciplinary records, whether related to "substantiated" complaints or not, and use protests to seek public support for the conclusions they draw from these records and the demands that flow from these conclusions (*cf.* Assembly Floor Debate Transcript [June 9, 2020], Bill Jacket, L 2020, ch 96 at 82 [remarks of Assembly Member Ramos] ["The point is that this raw data is relevant and it's important and it goes towards trying to create a situation where we can help people of color in this country . . . ."]).

There is a secondary connection, however, that provides an additional rationale for full disclosure of law enforcement disciplinary records, creates a "positive feedback loop" of First Amendment activity, and helps to effectuate the right to know. The right of access to complaints regarding misconduct and other disciplinary records helps to ensure accountability regarding law enforcement's

[16] While this brief focuses on New York City, these protests occurred throughout the state, including in Rochester (*see, e.g.*, Will Cleveland et al., *Hundreds Peacefully Protest Against Police Brutality in Rochester*, Democrat & Chronicle, May 30, 2020, available at https://www.democratandchronicle.com/story/news/2020/05/30/rochester-ny-black-lives-matter-dont-shoot-us-rally-police-brutality-george-floyd/5290523002/ [last accessed Jan. 25, 2024]). The right to know is no less important to people exercising their First Amendment rights in Rochester or other municipalities.

response to protests and thereby tends to remove a potential disincentive to engaging in protest and exercising First Amendment rights.

During protests, protestors often come into contact with law enforcement agents. Unfortunately, law enforcement agents sometimes respond to protests in a violent, illegal, or repressive manner (*see, e.g.*, *Protest Policing* at 284-285 [reviewing literature regarding repressive responses to protests]; *see generally* Alex Vitale, *From Negotiated Management to Command and Control: How the New York Police Department Polices Protests,* 15 Policing Socy: Intl J Res Poly 283 [2005] [analyzing case studies of "command and control" approach to policing protests]). For example, on June 4, 2020, NYPD officers boxed in hundreds of protesters who had peacefully gathered in the Bronx to protest George Floyd's murder, assailed them with batons and pepper spray, and zip-tied legal observers and protesters (NYC Civilian Complaint Review Board (CCRB), *2020 NYC Protests* 23-24 [hereinafter *2020 NYC Protests*] [describing police indiscriminately pepper-spraying protesters, striking them with bicycles, and kettling them]).[17] And at various other protests, NYPD officers employed the same tactics, kettling protesters, hitting them with

[17] Available at https://www.nyc.gov/assets/ccrb/downloads/pdf/policy_pdf/issue_based/2020NYCProtestReport.pdf [last accessed Jan. 25, 2024]).

batons, and pushing protesters to the ground.[18] Investigations into around 600 allegations of police misconduct during the 2020 protests had to be closed because the officer could not be identified. The CCRB concluded that this was in substantial part because of individual and departmental failures, including purposeful actions taken by officers such as obscuring badges and the NYPD's failure to track deployments (*2020 NYC Protests* 8, 12-15).

While access to disciplinary and other law enforcement records would not guarantee that agents who commit misconduct during protests are held accountable, an analysis of the full slate of complaints—whether "substantiated" or not—would certainly aid these efforts. For instance, a protestor who views records related to a protest may find that an officer who had acted illegally towards them was identified by another complainant. Similarly, a protestor may use the records to get a fuller picture of law enforcement's response to a protest and show that various officers committed illegal acts pursuant to a direction or policy.

First Amendment rights are diminished if the public cannot obtain the information necessary to inform their viewpoints on important societal issues. First

[18] *See, e.g.*, PIX11 Web Team, *Peaceful Protesters Stranded on Manhattan Bridge with NYPD Blockades on Either Side*, PIX 11, June 3, 2020, available at https://pix11.com/news/unrest-in-america/peaceful-protesters-stranded-on-manhattan-bridge-with-nypd-blockades-on-either-side/ [last accessed Jan. 25, 2024]; *see also* New York City Bar Assn., *Statement on Detention of Legal Observers* [June 17, 2020], available at https://s3.amazonaws.com/documents.nycbar.org/files/Legal_Observers_Statement_190617.pdf [last accessed Jan. 25, 2024] [describing the detention of legal observers at 2020 protests].

Amendment rights are also hindered if exercising them exposes one to violence. The legislature wisely repealed Civil Rights Law § 50-a, as the repeal promotes First Amendment activity and governmental accountability by helping to address both of these concerns. The Court should ensure that the Legislature's intent is effectuated, recognize the strong policy in favor of the disclosure of law enforcement records, and reject Rochester's attempt to establish a rule that categorically excludes "unsubstantiated" complaints.

CONCLUSION

For the foregoing reasons, the Court should affirm the decision of the Appellate Division, Fourth Department.

Respectfully submitted,

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