

20-2789 (L),

No. 20-3177-cv(XAP)

**IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

UNIFORMED FIRE OFFICERS ASSOCIATION, UNIFORMED
FIREFIGHTERS ASSOCIATION OF GREATER NEW YORK, POLICE
BENEVOLENT ASSOCIATION OF THE CITY OF NEW YORK, INC.,

(Caption continued on inside cover)

On Appeal From The United States District
Court For The Southern District Of New York, No. 20-cv-05441-KPF
Hon. Katherine Polk Failla

**BRIEF OF *AMICI CURIAE* GIRLS FOR GENDER EQUITY AND
TRANSGENDER LAW CENTER IN SUPPORT OF INTERVENOR-
DEFENDANT-APPELLEE-CROSS-APPELLANT AND URGING
AFFIRMANCE IN PART AND REVERSAL IN PART**

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ASSOCIATION, DETECTIVES' ENDOWMENT
ASSOCIATION,
Plaintiffs-Appellants-Cross-Appellees,

v.

BILL DE BLASIO, IN HIS OFFICIAL CAPACITY AS
MAYOR OF THE CITY OF NEW YORK, CITY OF NEW
YORK, NEW YORK CITY FIRE DEPARTMENT, DANIEL
A. NIGRO, IN HIS OFFICIAL CAPACITY AS THE
COMMISSIONER OF THE FIRE DEPARTMENT OF THE
CITY OF NEW YORK, NEW YORK CITY DEPARTMENT
OF CORRECTIONS, CYNTHIA BRANN, IN HER OFFICIAL
CAPACITY AS THE COMMISSIONER OF THE NEW YORK
CITY DEPARTMENT OF CORRECTIONS, DERMOT F.
SHEA, IN HIS OFFICIAL CAPACITY AS THE
COMMISSIONER OF THE NEW YORK CITY POLICE
DEPARTMENT, NEW YORK CITY POLICE
DEPARTMENT, FREDERICK DAVIE, IN HIS OFFICIAL
CAPACITY AS THE CHAIR OF THE CIVILIAN
COMPLAINT REVIEW BOARD, CIVILIAN COMPLAINT
REVIEW BOARD,
Defendants-Appellees,

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

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Gender for Girls Equity states that it is a non-profit intergenerational advocacy and youth development organization with no parent company and no stock.

Pursuant to Federal Rule of Appellate Procedure 26.1, Transgender Law Center states that it is the largest national trans-led organization with no parent company and no stock.

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INTRODUCTION¹

For 47 years, N.Y. C.R.L. § 50-a (“Section 50-a”) shielded law enforcement in New York from accountability for their misconduct. That changed on June 9, 2020, when the New York Legislature voted to repeal Section 50-a at the urging of, among others, relatives of New Yorkers who died at the hands of the police; the Legal Aid Society; the New York Civil Liberties Union; the Black, Puerto Rican, Hispanic and Asian Legislative Caucus; a diverse coalition of more than 200 nonprofits, labor unions, police officer affinity groups, victims’ rights advocates, faith institutions, think tanks, legal services providers, and grassroots advocacy groups; and leaders of 30 major New York law firms, including the undersigned.² With the ink barely dry on the repeal of Section 50-a, Plaintiffs-Appellants-Cross-

¹ In accordance with Local Rule 29(1)(b), no party’s counsel authored this brief in whole or in part, nor did any person contribute money intended to fund its preparation other than *amicus curiae*.

² See Tom Robbins, *How a Coalition of New York Activists Revealed Police-Department Secrets*, The New Yorker, July 17, 2020, <https://www.newyorker.com/news/our-local-correspondents/how-a-coalition-of-new-york-activists-revealed-police-department-secrets>; see also Press Release, N.Y. Senate, Senate Majority Advances Policing Reforms Legislative Package (June 8, 2020), <https://www.nysenate.gov/newsroom/press-releases/senate-majority-advances-policing-reforms-legislative-package>; Communities United for Police Reform, *Right to Know Act Endorsers*, <https://www.changethenypd.org/RightToKnowAct/endorsers>; Elizabeth Olson, *Law Firms Push New York to Drop Police Misconduct Report Shield*, Bloomberg, June 8, 2020, <https://news.bloomberglaw.com/us-law-week/law-firms-push-new-york-to-drop-police-misconduct-report-shield>.

Appellees (the “Unions”) filed a lawsuit in the Southern District of New York, seeking to prevent Defendants-Appellees New York City Mayor Bill de Blasio, the City of New York, the New York City Fire Department and its Commissioner Daniel A. Nigro, the New York City Department of Corrections and its Commissioner Cynthia Brann, the New York City Police Department and its Commissioner Dermont F. Shea, and the Civilian Complaint Review Board and its Chair Frederick Davie (collectively, the “City”) from disclosing certain records that the Unions argue “implicate[d] the privacy and safety concerns of officers.”³ In particular, the Unions focused on records they characterized as “Unsubstantiated and Non-Final Allegations”⁴ that, in fact, are simply databases containing metrics regarding the allegations and outcomes of disciplinary matters against New York City police officers, firefighters, and corrections officers. The Unions asked the District Court to permanently shield this information from public view.⁵

³ *Uniformed Fire Officers Ass’n v. De Blasio*, No. 20-Civ.-05441-KPF, Dkt. 10-2 ¶¶ 1, 92, 102, 108, 112, 117.

⁴ Defined by the Unions as “[R]ecords concerning disciplinary matters against retired and active individual New York City police officers, firefighters, and corrections officers, including those guilty.” *Id.* ¶ 1.

⁵ The New York City Police Department (“NYPD” or the “Department”) and the Civilian Complaint Review Board (“CCRB,” and together with the City and NYPD, the “Defendants-Appellees”), who have created or are in the process of creating publicly available registries of police misconduct records in accordance with Section 50-a, are also named Defendant-Appellees. The nonprofit

On August 14, 2020, *amici curiae* Girls for Gender Equity, Inc. (“Girls for Gender Equity”) and Transgender Law Center (collectively, “*Amici*”) filed an amicus brief before the District Court in this action.⁶ After hearing oral argument, the District Court (Failla, J.) largely rejected the Unions’ request for an injunction barring the release of Unsubstantiated and Non-Final police misconduct records, granting their request only as to a very limited set of records.⁷ The Court ruled that the Unions’ injunction request was contrary to the public interest in a statement that resonates powerfully:

More broadly, I find that injunction disserves the public interests. After years of discussion and debate, New York’s legislature determined to repeal Section 50-a, and thereby bring themselves in line with most of the other states in their treatment of disciplinary records. . . . [T]he decision to amend Section 50-a was not made haphazardly. It was designed to promote transparency and accountability, to improve relations between New York’s law enforcement

Communities United for Police Reform (“Communities United” or “Intervenor”) intervened to oppose the Unions’ suit and cross-appealed in the instant matter.

⁶ Brief for Girls for Gender Equity, Inc. and Transgender Law Center as Amici Curiae Supporting Respondents/Defendants’ Opposition to Petitioners/Plaintiffs’ Motion for Preliminary Injunctive Relief, No. 1:20-05441 (S.D.N.Y. Aug. 14, 2020).

⁷ See Br. & Special App. for Pls.-Appellants-Cross-Appellees, ECF No. 204 (“SPA”). In an oral decision principally in favor of Defendants-Appellees, Judge Failla granted a “very limited injunction” that NYPD and CCRB “may not disclose records of Schedule A command discipline violations for cases heard in the trial room, for which the ultimate disposition of the charge at trial, or on review or appeal, is ‘other than guilty,’ which records have been, or are currently, or could be in the future the subject of a request to expunge the record of the case pursuant to Section 8, for those officers covered by the PBA, the SBA, and the LBA, collective bargaining agreements.” SPA 24 at 23:1–23:10.

communities and their first-responders and the actual communities of people that they serve, to aid law makers in arriving at policy-making decisions, to aid underserved elements of New York's population and ultimately, to better protect the officers themselves. The decision to amend was also made with due regard for the safety and privacy interests of the affected officers. Amendments were made to the Public Officers' Law that mandated the redaction of certain categories of information that permitted the withholding of other categories of information. And I reject the foundational argument that no one – law enforcement or civilian – can appreciate the distinctions between substantiated, unsubstantiated, exonerated, unfounded and non-final claims.⁸

On August 24, 2020, the Unions filed the instant appeal from the District Court's reasoned determination.

Amici again write to underscore the urgency and importance of providing the public with access to law enforcement disciplinary records, including the Unsubstantiated and Non-Final Allegations that the Unions seek to enjoin. Such access is particularly important for communities such as those served by *Amici*—communities that experience disproportionate mistreatment by law enforcement, including sexual violence. As discussed herein, these marginalized groups continue to be denied disciplinary records of police officers who have assaulted them, which ultimately perpetuates the mistreatment by law enforcement of girls and women of

⁸ SPA 42–43 at 41:11–42:11.

color⁹ and transgender and gender nonconforming (“TGNC”) people¹⁰ in New York. Furthermore, barring the public’s access to this information exacerbates the chilling effect on girls and women of color and transgender people reporting mistreatment they have suffered at the hands of police, which eviscerates the ability to hold police officers responsible for their actions. Finally, access to law enforcement disciplinary records, including the types of records at issue, is critical to exposing *patterns* of sexual violence, in addition to isolated incidents. It is only through the release of all records of police misconduct, including non-final and exonerated allegations, that the breadth and scope of misconduct can be understood and addressed. Access to such records enables the victims and the public to hold accountable not only specific officers, but also departments and policymakers, who may be more likely to effectuate change when faced with data showing persistent wrongdoing.

⁹ *Amici* use the term “girls and women of color” throughout this brief to refer to girls and women who are Black, Hispanic, Latinx, Asian, Native American, Pacific Islander, Muslim, and multiracial. Where data or studies referenced do not also include the full set of these peoples, the individual term is used.

¹⁰ *Amici* use the term “transgender and gender nonconforming” or “TGNC” throughout this brief to refer to people who identify as transgender (people whose gender identities and expressions differ from those typically associated with the sex they were assigned at birth), gender nonconforming (people whose behavior or appearance does not conform to prevailing cultural and societal expectations about what is appropriate to their gender), and nonbinary people (people whose gender identity is not exclusively male or female). Where data or studies referenced do not also include the full set of these peoples, the individual term is used.

For these reasons and as explained further below, *Amici* urge this Court to affirm in part and reverse in part the order of the United States District Court for the Southern District of New York denying in part and granting in part a preliminary injunction that restrains the release of some public records related to law enforcement officers' misconduct. Hundreds of thousands of girls and women of color and transgender people in New York should not have to wait any longer for this simple yet critical step toward justice.

All parties consent to the filing of this brief. Fed. R. App. P. 29(a)(2).

INTERESTS OF *AMICI CURIAE*

Amici have a profound interest in protecting the rights of girls and women of color and TGNC people. Access to law enforcement disciplinary records will advance *Amici's* shared mission of supporting survivors of law enforcement harassment and abuse, identifying and understanding patterns of police sexual and other violence against these groups, and deploying resources strategically and effectively to combat such mistreatment.

Girls for Gender Equity is a non-profit intergenerational advocacy and youth development organization dedicated to the physical, psychological, social, and economic development of girls and women. The organization seeks to support, mobilize, and elevate the voices of transgender and cisgender young girls and women of color and gender non-conforming youth, working locally and nationally

to disrupt the patterns of policing, interpersonal violence, and institutional violence faced by these groups in their schools and communities. Girls for Gender Equity participates in policy advocacy across a number of areas including police transparency and accountability, organizes community campaigns, and engages directly with youth groups to support the development of self-advocacy skills.

Transgender Law Center is the largest national trans-led organization advocating self-determination for all people. Grounded in legal expertise and committed to racial justice, Transgender Law Center employs a variety of community-driven strategies to keep TGNC people alive, thriving, and fighting for liberation. The organization believes that TGNC people hold the resilience, brilliance, and power to transform society at its root, and that the people most impacted by the systems Transgender Law Center fights must lead this work. Transgender Law Center builds power within TGNC communities, particularly communities of color and those most marginalized, and lays the groundwork for a society in which all people can live safely, freely, and authentically regardless of gender identity or expression. The organization works to achieve this goal through leadership development and by connecting TGNC people to legal resources. Transgender Law Center also effects its mission through impactful litigation, policy advocacy, educational efforts, movement building, and the creation of model

programs, including around issues of profiling, targeting, and abuse of TGNC people by law enforcement.

BACKGROUND

Statistical evidence and personal accounts demonstrate that girls and women of color and TGNC people in New York and across this country experience disproportionate and pervasive mistreatment and sexual violence at the hands of law enforcement. Indeed, police intentionally target, profile, and harass girls and women of color and TGNC people in New York precisely because they belong to these vulnerable, marginalized groups.¹¹ However, up until recently, the full scope and

¹¹ See generally Clarissa-Jan Lim, *A Black Trans Man Is Suing The NYPD And Correction Department For How They “Dehumanized” Him In Custody*, BuzzFeed News, July 24, 2020, <https://www.buzzfeednews.com/article/clarissajanlim/Black-trans-man-sued-nypd-treatment-in-custody> (describing how NYPD officers “misgendered, assaulted, and sexualized” a trans man after he identified himself as transgender). New York is not the only jurisdiction that faces this problem, of course. For example, one survey of queer and trans youth of color in New Orleans found that 59% of transgender youth reported being asked for sexual favors by New Orleans police, as compared to 12% of cisgender youth. See BreakOUT!, *We Deserve Better: A Report of Policing in New Orleans by and for Queer and Trans Youth of Color* (2014), <http://www.equityproject.org/wp-content/uploads/2014/12/WE-DESERVE-BETTER-REPORT.pdf>. Likewise, 24% of 220 surveyed Latina transgender women in Los Angeles County reported being sexually assaulted by police. See Frank H. Galvan & Mohsen Bazargan, *Bienestar L.A., Interactions of Latina Transgender Women with Law Enforcement* at 1 (April 2012), <http://williamsinstitute.seemysite.us/wp-content/uploads/Galvan-Bazargan-Interactions-April-2012.pdf>. The vulnerability is much higher for transgender people of color. For example, nationwide, Black transgender people were three times as likely to be sexually assaulted by police officers, and even more likely to be forced to perform sexual

scale of misconduct toward these targeted groups was shrouded in secrecy by Section 50-a. By repealing Section 50-a, the New York Legislature lifted this regulatory veil, thus permitting full disclosure of the range of disciplinary proceedings against New York State officers, and enabling public scrutiny of a more complete record necessary to properly evaluate the scope of such disproportionate mistreatment. The Unions' requested relief would reinstate the shield blocking access to critical information—a shield that the public and leaders in this state have clearly and forcefully determined should be lifted.

Although incomplete, the information currently available on the subject evidences a clear pattern of violence and misconduct against young girls and women of color and TGNC people. For example, data has shown that while Black girls make up only 14% of the female student population across the country, they account for approximately 33% of girls referred to law enforcement or arrested on school grounds.¹² In one survey of New York City youth, two out of every five young

acts to avoid arrest, as Caucasian transgender people. See Nat'l Ctr. for Transgender Equal., *2015 U.S. Transgender Survey: Report on the Experiences of Black Respondents* 16, Table 8 (2017) (hereinafter "NCTE, *Report of the 2015 U.S. Transgender Survey—Black Respondents*"), <https://www.transequality.org/sites/default/files/docs/usts/USTSBlackRespondentsReport-Nov17.pdf>.

¹² Yasmin Vafa et al., Rights4Girls & Georgetown Juv. Just. Initiative, *Beyond The Walls: A Look At Girls In D.C.'s Juvenile Justice System* 3 (2018), <https://rights4girls.org/wp-content/uploads/r4g/2018/03/BeyondTheWalls-Final.pdf>.

women reported sexual harassment at the hands of the police; nearly 40% were young girls and women of color.¹³ A review of New York City Civilian Complaint Review Board (“CCRB”) data shows that, despite the chronic underreporting of cases of police misconduct against young Black girls and women, these groups nevertheless are heavily *overrepresented* among police complaints: Out of 1,083 complaints filed with the CCRB between 1999 and 2019 in which the complainant was a girl or young woman under the age of 24, 60% of complainants were Black, even though only 25% of young women and girls in New York are Black.¹⁴ Among complaints of sexual humiliation by police, one-third were from girls and women of color.¹⁵

The picture painted by existing data is equally alarming for TGNC people, with studies of police interactions with TGNC people revealing similarly high levels of harassment and sexual misconduct. In one study, 49% of transgender people reported being misgendered by police officers, 20% reported verbal harassment, and

¹³ Michelle Fine et al., “*Anything Can Happen With Police Around*”: *Urban Youth Evaluate Strategies of Surveillance in Public Places*, 59 J. Soc. Issues 141, 153 (2003).

¹⁴ *Civilian Complaints Against New York City Police Officers*, ProPublica (July 2020), <https://www.propublica.org/datastore/dataset/civilian-complaints-against-new-york-city-police-officers>.

¹⁵ *Abuse of Authority: Sexual Misconduct (Sexual Humiliation)*, ProPublica, <https://projects.propublica.org/nypd-ccrb/allegations/abuse-of-authority-sexual-misconduct-sexual-humiliation>.

19% reported being asked inappropriate questions about their gender transition.¹⁶ Not surprisingly, race is also a factor. Black transgender people are about six times as likely as white transgender people to report being physically attacked by officers, and about three times as likely to report being sexually assaulted by officers.¹⁷ A significant number of transgender survivors of violence and harassment also experience hostility, intimidation, or other misconduct by police, often by officers responding to the survivors' own reports.¹⁸ Transgender sex workers, in particular, face egregious police profiling and misconduct.¹⁹ And TGNC people of all races

¹⁶ See Nat'l Ctr. for Transgender Equal., *The Report of the 2015 U.S. Transgender Survey* 186 (2016) (hereinafter "NCTE, *Report of the 2015 U.S. Transgender Survey*"), <https://transequality.org/sites/default/files/docs/usts/USTS-Full-Report-Dec17.pdf>.

¹⁷ See NCTE, *Report of the 2015 U.S. Transgender Survey—Black Respondents* at 16.

¹⁸ See Nat'l Coal. of Anti-Violence Programs, *Lesbian, Gay, Bisexual, Transgender, Queer and HIV-Affected Hate and Intimate Partner Violence in 2017* 22 (2018), <http://avp.org/wp-content/uploads/2019/01/NCAVP-HV-IPV-2017-report.pdf> (reporting that the majority of LGBTQ violence survivors who interacted with police reported police indifference or hostility). This source defines LGBTQ to include "lesbian, gay, bisexual, transgender, [and] queer . . . communities," *id.* at 5, therefore, gender nonconforming and nonbinary gender people may not be captured by the analysis.

¹⁹ Catherine Hanssens et al., N.Y. Ctr. for Gender & Sexuality L. at Columbia L. Sch., *A Roadmap for Change: Federal Policy Recommendations for Addressing the Criminalization of LGBT People and People Living with HIV, Making the Case for Federal Policy Change: Essays and Excerpts* 4–5 (2014) (hereinafter "Hanssens et al., *A Roadmap for Change*"), https://www.hivlawandpolicy.org/sites/default/files/Roadmap_For_Change_Essays_and_Excerpts.pdf.

and ethnicities are at an especially high risk of misconduct from corrections officers. In a 2015 survey, one in five transgender inmates reported being sexually assaulted by facility staff while incarcerated.²⁰ The survey found that transgender people are five to six times more likely than the general population to be sexually assaulted by facilities staff.²¹

The critical backdrop to this lawsuit and to the relief at issue is the fact that police officers are rarely held accountable for their misconduct. This is largely because *they are the adjudicators of their own misconduct*. The NYPD's role in investigating civilian complaints is inherently biased in favor of its officers.²² In any context, this would raise significant red flags; there is a blaring conflict of interest here. This conflict of interest affects the outcomes, according to the data: In one investigation based on hundreds of pages of leaked internal files, from 2011 to 2015, the Department failed to terminate at least 319 NYPD employees who committed fireable offenses.²³ Further, there is no transparency regarding the Department's

²⁰ NCTE, *Report of the 2015 U.S. Transgender Survey* at 191.

²¹ *Id.* at 192.

²² See generally Brief of The New York Civil Liberties Union and the American Civil Liberties Union as *Amici Curiae* Supporting Defendants-Respondents, *Patrick J. Lynch v. N.Y.C. Civilian Compl. Review Bd.*, Index. No. 152235/18 (N.Y. Sup. Ct. 2018) (hereinafter "*NYCLU & ACLU Br.*").

²³ See Kendall Taggart & Mike Hayes, *Secret NYPD Files: Officers Who Lie And Brutally Beat People Can Keep Their Jobs*, BuzzFeed News, Mar. 5, 2018,

investigations.²⁴ What the Department does or does not do to corroborate claims of misconduct and determine that they are unsubstantiated, for instance, is a black box.

These failures to hold law enforcement accountable are particularly acute in cases involving alleged sexual misconduct. Service providers and victim advocates have reported instances in which officers and detectives “responded insensitively, dismissively, or incredulously” during interviews with victims of sexual misconduct,²⁵ and there have been reports of overt intimidation of complainants by members of law enforcement.²⁶ The system frequently enables police officers accused of sex crimes to escape penalties simply by moving those officers from one jurisdiction to another.²⁷ For example, one study reported that “in 41 percent of

<https://www.buzzfeednews.com/article/kendalltaggart/secret-nypd-files-hundreds-of-officers-committed-serious>.

²⁴ See, e.g., N.Y. Police Dep’t, *Internal Affairs*, <https://www1.nyc.gov/site/nypd/bureaus/investigative/internal-affairs.page> (stating that the Internal Affairs Bureau’s “investigations are not made available to the public”).

²⁵ See New York City Dep’t of Investigation’s Inspector General for the NYPD, *An Investigation of NYPD’s Special Victims Division—Adult Sex Crimes* at 28 (2018).

²⁶ See NYSCEF Doc. No. 56, *Patrick J. Lynch v. N.Y.C. Civilian Compl. Review Bd.*, Index. No. 152235/18 (N.Y. Sup. Ct. 2018) (transcript of October 2016 CCRB Meeting, discussing reports of intimidation); see also NYCLU & ACLU Br. at 16-17 (summarizing reports of intimidation of police sexual misconduct victims).

²⁷ See Stinson et al., *Police sexual misconduct: A national scale study of arrested officers*, 30 *Crim. Just. Fac. Publ’ns* 7 (2014) (hereinafter “Stinson et al., *Police sexual misconduct*”), <https://scholarworks.bgsu.edu/cgi/viewcontent.cgi?>

cases, officers charged with sexual violence had been previously accused of sexual misconduct—between two and 21 prior allegations—but had remained on the force.”²⁸

Two simple truths underscore *Amici*’s need to come forward and be heard. Girls and women of color and TGNC people historically have suffered, and continue to suffer, pervasive misconduct at the hands of the police, and the officers who commit these crimes and acts of misconduct are not held accountable for their transgressions.

article=1029&context=crim_just_pub (internal citation omitted); Andrea J. Ritchie, *Invisible No More* 120 (2017) (hereinafter “Ritchie, *Invisible No More*”); see also *id.* at 109 (referencing the “seemingly impenetrable veil shrouding sexual abuse by officers”); John Kelly & Mark Nichols, *We found 85,000 cops who’ve been investigated for misconduct. Now you can read their records.*, USA Today, June 11, 2020, <https://www.usatoday.com/in-depth/news/investigations/2019/04/24/usa-today-revealing-misconduct-records-police-cops/3223984002/> (“Traditionally, we would say for sure that policing has not been a transparent entity in the U.S. Transparency is just a very key step along the way to repairing our relationships.” (quoting Laurie Robinson, co-chair of the 2014 White House Task Force on 21st Century Policing)).

²⁸ Andrea J. Ritchie, *How Some Cops Use the Badge to Commit Sex Crimes*, The Washington Post, Jan. 12, 2018 (hereinafter “Ritchie, *How Some Cops Use the Badge*”), https://www.washingtonpost.com/outlook/how-some-cops-use-the-badge-to-commit-sex-crimes/2018/01/11/5606fb26-eff3-11e7-b390-a36dc3fa2842_story.html.

ARGUMENT

Shielding evidence of police misconduct is deeply problematic for New Yorkers and for society as a whole. In repealing Section 50-a, the New York Legislature has spoken on the issue. In denying their request for permanent injunctive relief, the Southern District of New York affirmed that the Legislature's repeal needs no qualification or adjustment. And yet, the Unions ask the Court to chip away at this legislative determination by blocking a critical portion of the records the Legislature and the District Court already determined can and should be made public. Shielding these law enforcement records from public view perpetuates the lack of transparency and accountability within law enforcement that has created a chilling effect on victim reporting, exacerbating the disproportionate treatment that TGNC people and girls and women of color already receive.²⁹

Transparency and accountability are exactly why the records at issue in this case must be publicly available along with the rest of the records. The determinations that the records at issue here are "unsubstantiated" or "non-final" reflect the prejudicial conclusions of a conflicted party. To conceal records from the public simply by designating them as "non-final" would create a loophole large

²⁹ See Nat'l Coal. of Anti-Violence Programs, *Lesbian, Gay, Bisexual, Transgender, Queer, and HIV-Affected Hate Violence in 2014* 45 (2015), http://avp.org/wp-content/uploads/2017/04/2014_HV_Report-Final.pdf; Michelle S. Jacobs, *The Violent State: Black Women's Invisible Struggle Against Police Violence*, 24 Wm. & Mary J. Women & L. 39, 69 (2017).

enough to eviscerate the important gains made in repealing Section 50-a in the first place. A system for investigating and redressing police misconduct that *simultaneously prevents access* to a portion of information on such misconduct is woefully defective and inadequate. If the Unions succeed here, girls and women of color and TGNC people in New York will continue to suffer mistreatment by law enforcement and underreport instances of mistreatment, police officers will continue to evade punishment for their transgressions, and we will be unable to identify and demand larger-scale reform efforts in departments and units with patterns of abuse and misconduct.

I. Shielding Police Misconduct from Public View Exacerbates the Chilling Effect on Girls and Women of Color and TGNC People from Reporting Their Abusers.

Public access to the full scope of disciplinary records is essential to protecting civilians—and, in particular, girls and women of color and TGNC people—from police misconduct and to addressing police misconduct when it occurs. Access to disciplinary records, including unsubstantiated and non-final complaints, has the potential to change the chronic underreporting of sexual violence against women and TGNC people by police. Such access would incentivize law enforcement to conduct more careful investigations into complaints made by women and TGNC people. This would, in turn, instill greater faith that police who commit acts of abuse will be held accountable, potentially leading to an increase in shared information and an

incremental lifting of the veil. Knowledge is power. As long as official data and information remains inaccessible to the public and shrouded in secrecy, patterns of abuse can be obfuscated, disciplinary measures can be exaggerated, and underreporting is likely to continue.

Incidents of sexual misconduct by police are chronically and dramatically underreported, and such underreporting will only be exacerbated by an incomplete record. Underreporting exists because of the nature of the acts, the position of power held by the perpetrators,³⁰ and the marginalization of the societal groups to which the victims belong. Because sexual violence is by “its very nature . . . hidden away from public view,” and because “officers can [] rely on threats of force or arrest, there are often no injuries requiring immediate medical attention and therefore no ‘evidence’ beyond a [victim’s] word,” making the substantiation of any reported complaints even less likely.³¹ As a result, in the past decade, “a law enforcement official was caught in a case of sexual abuse or misconduct at least every five

³⁰ Andrea Ritchie captures this sentiment in her book, *Invisible No More*: “As [the] former Portland chief of police[] points out, ‘The women are terrified. Who are they going to call? It’s the police who are abusing them.’” Ritchie, *Invisible No More* at 109.

³¹ *Id.* at 110; *see also* Stinson et al., *Police sexual misconduct* at 2 (“Police commonly encounter citizens who are vulnerable . . . in the late-night hours that provide low public visibility and ample opportunities to those officers who are able and willing to take advantage of citizens to commit acts of sexual deviance and to perpetrate sex crimes.”).

days.”³² To be sure, the actual frequency of misconduct is even higher. “Sex offenses go widely unreported even when cops are not suspects[, and v]ictims may be even less likely to report offenses when they fear it will be their word versus an officer’s.”³³

Immigration status is another factor that can discourage reporting by these groups. The National Immigrant Justice Center has noted that LGBT people—including TGNC people—make up a significant percentage of immigration facility detainees.³⁴ According to an analysis conducted in 2016, Immigration and Customs Enforcement detained 90% of LGBT immigrants, even though an automated system on which the agency relies recommended detention for only 18% of those immigrants.³⁵ TGNC immigrants regularly live in fear of deportation, especially

³² Matthew Spina, *When a Protector Becomes a Predator*, Buffalo News, Nov. 22, 2015, <https://s3.amazonaws.com/bncore/projects/abusing-the-law/index.html>.

³³ *Id.*; see also Stinson et al., *Police sexual misconduct* at 3, https://scholarworks.bgsu.edu/cgi/viewcontent.cgi?article=1029&context=crim_just_pub (“Cases of sex-related misconduct and crime have been described as hidden offenses that are likely to go unreported and, hence, difficult to document and study.”).

³⁴ See Hanssens et al., *A Roadmap for Change* at 28–29 (quoting a source from the National Immigrant Justice Center regarding LGBT people in immigration facilities, and earlier defining LGBT as “lesbian, gay, bisexual, transgender, Two Spirit, queer, questioning and gender non-conforming”).

³⁵ Sharita Gruberg, Ctr. for Am. Progress, *ICE Officers Overwhelmingly Use Their Discretion to Detain LGBT Immigrants* (Oct. 26, 2016), <https://www.americanprogress.org/issues/lgbtq-rights/reports/2016/10/26/291115/ice-officers-overwhelmingly-use-their-discretion-to-detain-lgbt->

because they, like TGNC people generally, are so often the victims of discriminatory policing.³⁶ Even the act of carrying condoms can result, and in too many cases *has* resulted, in a transgender person’s arrest for alleged suspicion of sex work.³⁷ The Loitering for the Purpose of Prostitution law in New York has contributed to this fear among transgender immigrants. The law, which is colloquially known as the “Walking While Trans” law, allows police officers to “apprehend anyone they assume to be engaging in sex work, and with essentially no evidence.”³⁸ Accordingly, this inherently vague law gives law enforcement the power to “decide, for instance, that a woman’s skirt is too short, or that she’s been lingering too long on one street corner, and to apprehend her based on suspicion that she’s ‘loitering for the purpose of prostitution.’”³⁹ The law disproportionately targets transgender women—particularly transgender girls and women of color—and contributes to the profiling, wrongful arrests, and mistreatment these populations encounter from law

immigrants/. The study defines LGBT as “lesbian, gay, bisexual, and transgender”; therefore, it is possible these figures do not capture detention of gender nonconforming and nonbinary gender people.

³⁶ See generally Hanssens et al., *A Roadmap for Change* at 7, 10, 12.

³⁷ *Id.* at 5, 7, 10–11, 18–19.

³⁸ Amanda Arnold, *A Guide to the ‘Walking While Trans’ Ban*, *The Cut*, July 22, 2020, <https://www.thecut.com/2020/07/walking-while-trans-law-in-new-york-explained.html>.

³⁹ *Id.*

enforcement.⁴⁰ This policing practice not only endangers transgender peoples' health, but also serves as yet another form of sexualized misconduct by police that discourages TGNC people from reporting police misconduct for fear of being criminalized themselves. Relatedly, TGNC victims of police sexual misconduct also may choose not to report violations for fear of exposing their sexual orientation or gender identity.⁴¹

Police officers inclined to mistreat the communities represented by *Amici* count on these groups underreporting to avoid getting caught, targeting “women they don't think would be believed if they came forward, including girls and women of color, transgender women, women who use drugs or alcohol, and women involved in the sex trade.”⁴² Historically, these groups have been marginalized and disbelieved, which leads to a belief that reporting police misconduct is futile or could lead to additional harm. Marginalized victims often decline to report sexual

⁴⁰ See *id.*; see also Human Rights Campaign Staff, *Urge the New York State Assembly to Repeal the Walking While Trans Ban and Hold Police Accountable* (June 9, 2020), <https://www.hrc.org/news/urge-the-new-york-state-assembly-to-repeal-the-walking-while-trans-ban-and>.

⁴¹ See Ritchie, *Invisible No More* at 109–10. In a 2015 survey of 1,779 transgender people in New York, 58% reported feeling uncomfortable asking the police for help if they needed it. Nat'l Ctr. for Transgender Equal., *2015 U.S. Transgender Survey: New York State Report 2* (October 2017), <https://www.transequality.org/sites/default/files/USTS%20NY%20State%20Report%20%281017%29.pdf>.

⁴² Ritchie, *How Some Cops Use the Badge*.

victimization by law enforcement, as a result of, among other factors, thinking that no one will believe their accounts, particularly if there is no corroborating witness; the offender or other police officers will harm them; the offender's colleagues will not protect them from retaliatory harassment; they will be subjected to extremely harsh interrogations; or they will be charged with a crime themselves if they report misconduct.⁴³ Indeed, victims have reported being sexually assaulted by *the same police officers* that responded to their calls for help, being *arrested after reporting* sexually abusive police officers, or being *threatened at the police station* by the very same police officers they reported.⁴⁴ To allow victims to seek the full extent of justice after experiencing such misconduct, and to provide vulnerable communities with evidence necessary to substantiate their claims (even if such evidence does not exist for a particular incident, but rather, can be shown through a series of incidences), it is imperative that a particular officer's complete disciplinary record is available and disclosed.

The information that *Amici* and other organizations can access regarding the experiences of its constituents with police officers is dramatically lacking. *Amici* cannot advocate properly and effectively for girls and women of color and TGNC

⁴³ Samuel Vincent Jones, *Police, Heroes, and Child Trafficking: Who Cries When Her Attacker Wears Blue?*, 18 Nev. L.J. 1007, 1024 (2018).

⁴⁴ *Id.*

people without knowing the full extent of these problems and patterns of police behavior, including those behaviors deemed “unsubstantiated” and “uncorroborated” by the NYPD. The Court should therefore allow all of these records to be made accessible to the public.

II. Access to Disciplinary Records Is Essential to Promoting Police Accountability for Acts of Sexual and Other Violence against Girls and Women of Color and TGNC People.

Individual disciplinary records are the best—and often the sole—source of evidence of the pattern and practice of police sexual misconduct in New York at both the individual officer and the departmental level. Without access to officers’ entire disciplinary records, most victims cannot know—let alone present to a court or fact finder—the full story, and the already arduous task of bringing an attacker to justice becomes insurmountable. Further, the lack of information regarding police misconduct and discipline, which will be even more deficient if the Court enjoins the release of the Unsubstantiated and Non-Final Allegations, undermines the ability of the public, and *Amici*, to understand existing disparities and patterns of abuse in law enforcement. In particular, Unsubstantiated and Non-Final Allegations are key pieces of information that shed light on patterns of misconduct by certain officers in departments, in specific neighborhoods and not others, or more. The act itself of releasing these records will incentivize the NYPD to be more forthcoming about its investigatory process and the fairness with which it makes its determinations about

which allegations are unsubstantiated or uncorroborated, and why. Shielding these records from view prevents any meaningful assessment of the efficacy of internal disciplinary processes in addressing and abating police misconduct and the disproportionate impact that such misconduct has on certain groups.

A. Access to Disciplinary Records Provides a Critical Source of Evidence.

Disciplinary records serve as key evidence in a complaint against a police officer. In evaluating the strength or weakness of a claim against a police officer, a relevant consideration for anyone considering whether to bring a case is the availability of evidence demonstrating the officer's prior misconduct, or evidence that would speak to the character of that officer, especially with respect to acts of violence—sexual or otherwise—against girls and women of color or TGNC people. The NYPD disciplinary records at issue in this case contain that very information—that is, details otherwise unavailable to the public, including the number of unsubstantiated complaints, information on the investigation undertaken by the NYPD (if any), the reasoning behind the NYPD's determinations on the allegations, and what punishment (if any) the accused officer received. These details can help establish that a particular officer has a history or pattern of misconduct, and although courts can, of course, balance the probative value and prejudicial impact of admitting such records in subsequent actions involving or against officers, no advocate can

even consider, let alone argue for, the relevance of such critical information without access to the underlying disciplinary records.

While this is true for all types of police misconduct cases, the danger in blocking access to the full record of disciplinary evidence is perhaps most dangerous in cases involving police sexual misconduct. Given that sexual assault cases are already notoriously difficult to prove, the evidence contained in disciplinary reports, including prior Unsubstantiated and Non-Final Allegations, may well be the only evidence in the case aside from statements from the victim and the police officer. Without access to a complete record, many victims, including girls and women of color and TGNC people, will once more be left without the evidence they need to fight back against their attackers and keep communities safe.

B. Access to a Complete Disciplinary Record Shines a Light on Patterns of Misconduct That Must Be Addressed.

Access to a complete disciplinary record, including Unsubstantiated and Non-Final Allegations, would shine an overdue light on officers and departments who have displayed patterns of abuse against girls and women of color and TGNC people. Armed with this information, marginalized victims of police misconduct, critical advocates such as *Amici*, and the public at large would have access to the information they need to better understand and fight against historical disparities in treatment of certain groups, such as girls and women of color and TGNC people, and the impact of police misconduct on those groups. Given the aforementioned obstacles of

underreporting and lack of information generally, a complete disciplinary record is crucial evidence that can support victims' claims in lawsuits against New York police departments or in civil claims against police supervisors or other members of police leadership. Complete disciplinary records, *especially* those that were deemed unsubstantiated or non-final, can be used to identify the departments where patterns of abuse continue unchecked. And evidence of recurrent claims of misconduct by one officer or widespread claims of misconduct among officers in a department could be used to show a pattern of inadequate training or law enforcement leadership's indifference to the pervasive issue of sexual harassment of girls and women of color and TGNC people. Indeed, records obtained since the repeal of Section 50-a show that such failures at the departmental level are common.⁴⁵ The full scope of these deficiencies will never come to light if the release of crucial portions of disciplinary records are enjoined.

Unsubstantiated claims provide critical data points in this context because such claims can show whether a department is investigating complaints, the thoroughness of any such investigation, and the reasoning behind any disciplinary actions (or lack thereof). If departments are required to publicly reveal such

⁴⁵ See, e.g., Tana Ganeva, *NYPD's Culture of Impunity Sees an Officer Repeatedly Accused of Physical and Sexual Abuse Rising Through the Ranks*, The Intercept, July 6, 2020, <https://theintercept.com/2020/07/06/nypd-culture-of-impunity/>.

information, there will be a greater incentive to investigate such complaints more thoroughly and seriously, thus increasing accountability. This can lead to a decreased rate of recidivism, whereas the absence of sufficiently severe retributions can promulgate repeated sexual offenses.⁴⁶

Preventing the release of the records at issue would obfuscate meaningful assessment of the efficacy of internal disciplinary processes and allow New York police to continue to sweep issues of misconduct under the rug by, for example, claiming, without showing, that corrective actions have been taken. This Court should affirm the lower court's decision denying a permanent injunction, and reverse the lower court's decision as to its grant of a permanent injunction, to help hold not only officers but also their departments and policymakers accountable.

CONCLUSION

Grappling with the issue of police misconduct is a critical piece of the larger missions of Girls for Gender Equity and Transgender Law Center. The public release of records on police misconduct in their entirety, including Unsubstantiated and Non-Final Allegations, will allow *Amici*, and many other important

⁴⁶ See Cara E. Rabe-Hemp & Jeremy Braithwaite, *An Exploration of Recidivism and the Officer Shuffle in Police Sexual Violence*, 16(2) *Police Q.* 127, 136, 142 (Nov. 19, 2012) (finding 41.5% of officers who were found to have committed sexual misconduct were repeat offenders with a history of complaints against them, and stating that increased reporting “could reduce the practice of officer shuffle[,]” whereby officers are permitted to “shuffle” to another department after allegations of misconduct).

organizations, to pursue their missions of supporting and uplifting the voices of girls and women of color and transgender people, who are disproportionately targeted, profiled, assaulted, and victimized by police officers in New York and throughout the United States. Sexual misconduct is a particularly devastating and widespread form of police abuse that has a significant and severe impact on its victims; however, without the complete records, it is impossible to ascertain the full scope of the issue. In order for organizations, including *Amici*, to address these harms, they must be able to fully understand the patterns of abuse and how internal disciplinary systems are currently failing to address them. Honoring the Legislature's full repeal of Section 50-a by allowing the disclosure of non-final, unsubstantiated, unfounded, exonerated, or resulted in a finding of not guilty records would bring patterns of misconduct to light, allowing marginalized groups to hold individual officers accountable, and providing the transparency necessary for *Amici* to work to ensure the safety of and justice for girls and women of color and transgender and gender nonconforming people in New York.

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Respectfully submitted,

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1. This brief complies with the type-volume limitation of Second Circuit Local Rule 29.1(c) because this brief contains 6,502 words, excluding the parts of the brief exempted under Federal Rule of Appellate Procedure 32(f).
2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Rule 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman font.

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