163646/2025

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

IN THE MATTER OF THE APPLICATION OF SAMY FELIZ, MERY VERDEJA, ASHLEY VERDEJA, JULIE AQUINO, AND JUSTICE COMMITTEE, INC.,

Petitioner,

For a Judgment and Order Pursuant to Article 78 of the Civil Practice Law and Rules

- against –

JESSICA TISCH, in her official capacity as the Commissioner of the New York City Police Department, NEW YORK CITY POLICE DEPARTMENT, and LIEUTENANT JONATHAN RIVERA,

Respondent.

# RESPONDENTS' MEMORANDUM OF LAW IN FURTHER SUPPORT OF THEIR CROSS-MOTION TO DISMISS THE ARTICLE 78 PETITION AND IN REPLY TO PETITIONER'S OPPOSITION

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## PRELIMINARY STATEMENT

Respondents Jessica Tisch ("Commissioner Tisch"), in her official capacity as the Commissioner of the New York City Police Department, the New York City Police Department ("NYPD"), and Lieutenant Jonathan Rivera ("Lt. Rivera") (collectively, "Respondents") respectfully submit this memorandum of law in further support of their cross-motion to dismiss the Petition pursuant to CPLR 3211(a)(3) and (7) and 7804(g) and in reply to Petitioners Samy Feliz, Mery Verdeja, Ashley Verdeja, Julie Aquino, and Justice Committee, Inc.'s (collectively, "Petitioners") opposition to Respondents' cross-motion. Petitioners' opposition—rife with mischaracterizations of both the applicable case law and Respondents' arguments[1]—fails to establish their standing to bring a mandamus action, which would keep the proceedings with the trial court, and fails to state a cause of action. For the reasons stated in Respondents' cross-motion to dismiss and as further described below, the Court should deny the Petition and dismiss this proceeding in its entirety.

## ARGUMENT

### POINT I

### PETITIONERS CONTINUE TO RELY UPON SPECULATIVE INTANGIBLE HARM TO ESTBLISH STANDING

The harms alleged by Petitioners do not confer standing. Standing requires a showing of an "injury in fact," or, "an invasion of a legally protected interest" that is "concrete and particularized" and "actual or imminent, not conjectural or hypothetical." *Spokeo Inc. v. Robins*,

[1] For example, Petitioner allege that the "FID buried the case," but there is no support for that characterization. (Pet. Opp. 10). In addition, Petitioners' assertion that Respondents Statement of Facts "ignores" the Report of Commissioner Maldonado implies that they do not discuss the credibility findings at all. (Pet Opp. 3) This implication is demonstrably false as Respondents include discussion of it in Point III of its initial brief when it discussed Commissioner Maldonado's credibility determinations and the reasons Commissioner Tisch disagreed. *See* Resp. Mem, Point III.

578 U.S. 330, 339 (2016)(*citing Lujan v. Defenders of Wildlife* 504 U.S. 555, 560 [1992]). "An alleged injury will not confer standing if it is based on speculation about what might occur in the future or what future harm might be incurred." *Greco v. Syracuse ASC, LLC*, 218 A.D.3d 1156, 1156 (4th Dept 2023). While Respondents are sympathetic to the emotional harms suffered because of the loss of their relative, none of the individual Petitioners have standing to challenge the discretionary authority of Commissioner Tisch over departmental discipline and her decision to reverse Deputy Commissioner of Trials Rosemarie Maldonado's ("Deputy Commissioner Maldonado") findings. Both § 14-116 of the New York City Administrative Code and the 2012 Memorandum of Understanding between the NYPD and CCRB ("2012 MOU")[2] explicitly prevent Petitioners from challenging any determinations rendered pursuant to those authorities. Nor does their status as complainants to the CCRB that initiated the investigation into Lt. Rivera confer standing. *See Matter of Thomas v. New York City Dept of Ed*., 137 A.D.3d 642, 643 (1st Dept 2016). Despite outlining purely emotional harms, Petitioners continue to rely upon speculation that a favorable decision will redress their harms, which only further hampers their claim of standing. *See Davis v. New York State Dept of Educ.,* 96 A.D.3d 1261, 1262 (3d Dept 2012)(*finding* no standing to challenge decision by NYSDOE to close its investigation without discipline for a complaint of inappropriate touching filed by petitioner-patient against her therapist); *Spitz v. Caine & Weiner Co, Inc.,* 2024 US Dist LEXIS 2944 at *6 (EDNY 2024)(injury-in-fact not found for claims of wasted time and emotional harm). Indeed, Petitioners believe that the Police Commissioner will "follow the law" if they receive a favorable decision without articulating what "law" Commissioner Tisch violated or what "rule" governing "every other government official"

[2] CCRB, APU Memorandum of Understanding April 2, 2012 https://www.nyc.gov/site/ccrb/prosecution/apu-memorandum-of-understanding.page (*last accessed* Feb. 25, 2026); *see also* Pet. Opp. at 10, *fn*. 1

Commissioner Tisch is bound by other than the statutes and rules she was acting under when she rendered her determination. At bottom, Petitioners do not seem to advocate for anything other than compelling Commissioner Tisch to act according to their wants and desires in the mere hope that they will no longer have to suffer fear, anxiety, or future expenditures as a direct result of the death of their relative, not because of Commissioner Tisch's determination. Petitioners' claimed injuries are, thus, are neither concrete nor particularized.

Furthermore, an organization cannot defeat a standing challenge where it alleges the harm suffered is "having to expend resources" in furtherance of its advocacy efforts. *See Matter of Brennan Ctr for Justice at NYU Sch. of Law v. New York State Board of Elections*, 159 A.D.3d 1301, 1306 (3d Dept 2023); *see also Matter of Animal Defense Fund, Inc. v. Aubertine*, 119 A.D.3d 1202, 1205 (3d Dept 2014)(standing not found where one of the core missions of the organization is to use the legal system in furtherance of its advocacy efforts). Here, Petitioner LatinoJustice's core mission is to "use and challenge laws to create a more just and equitable society." *See* "About" LatinoJustice PRLDEF, https://www.latinojustice.org/en/history (*last accessed* Feb. 25, 2026) *see also,* LatinoJustice PRLDN, 2024 Annual Report, Pg 15 (explaining certain litigation efforts); Pg 23 (reflecting $44,190 in expert and court fees for FY 2024), https://www.latinojustice.org/sites/default/files/2025-05/2024%20Annual%20Report_ LatinoJustice%20PRLDEF.pdf (*last accessed* Feb. 25, 2026). This litigation is not an unusual circumstance that required Petitioner LatinoJustice to divert organizational resources because of conduct that directly interfered with the services the organization provides because litigating on behalf of members of the Latino community in relation to law enforcement action is central to its initiatives. *Cf. Havens Realty Corp. v Coleman*, 455 US 363 (1982); *Mixon v Grinker*, 157 AD2d 423 (1st Dept 1990). Accordingly, none of the Petitioners can establish standing.

### A. Petitioners' Reliance Upon the 2012 Memorandum of Understanding is Detrimental to Their Claims of Standing

Although Petitioners rely upon the 2012 MOU between the NYPD and CCRB in support of their argument against employing substantial evidence standard, the 2012 MOU itself quells any question that Petitioners have standing and supports dismissal on this basis alone. The 2012 MOU governs, generally, the process by which substantiated CCRB complaints are to be handled and prosecuted. It also governs disposition of disciplinary proceedings that arise from substantiated CCRB complaints. However, the 2012 MOU explicitly states that, "[t]his MOU is not intended nor shall be construed ***to create any rights or benefits in any third parties***." *See* MOU (V)(30)(emphasis added). Yet, that is precisely what Petitioners ask this court to do. Petitioners—who are not parties to the 2012 MOU— seek to create a right to challenge the determination of Commissioner Tisch for her decision to overturn the NYPD Commissioner of Trials who presided over Lt. Rivera's departmental disciplinary trial prosecuted by the CCRB. Petitioners are neither members of the NYPD nor the CCRB. They are third parties who have no rights under the 2012 MOU. Indeed, Petitioner LatinoJustice is acutely aware that the 2012 MOU does not create a right for them—or anyone else besides members of the NYPD or the CCRB—to challenge actions conducted pursuant to the 2012 MOU. *See Harvin Sr. v. The New York City Police Department*, N.Y County Index No. 156887/2024, NYSCEF Doc. No. 32. (holding that third party Petitioner had no right to challenge CCRB or NYPD actions conducted pursuant to the 2012 MOU where LatinoJustice represented Petitioner Harvin). For this very reason, it is not lost on Respondents that Petitioners cite the 2012 MOU only to support their argument that the substantial evidence standard should be applied and very conspicuously do *not* cite it as a basis to challenge Commissioner Tisch's decision. Because the 2012 MOU confers the absolute discretion—in conformance with §434 of NYC Charter—that the Commission retains the complete authority and

discretion to make a final disciplinary decision over the departmental discipline stemming from a substantiated CCRB complaint and only a party to the 2012 MOU may file suit to force implementation of its provisions. *See generally Harvin Sr. v. The New York City Police Department*, N.Y County Index No. 156887/2024. NYSCEF Doc. No. 32. Thus, as the challenged decision by Petitioners stem from proceedings that invoke the 2012 MOU, the provision expressly excluding third parties from asserting any rights applies to Petitioners and standing cannot be found.

## POINT II

### THE SUBSTANTIAL EVIDENCE STANDARD APPLIES BECAUSE COMMISSIONER TISCH'S DECISION WAS RENDERED FOLLOWING AN EVIDENTIARY TRIAL UPON WRITTEN CHARGES PURSUANT TO THE NYC ADMINISTRATIVE CODE AND NYC CHARTER

Petitioner's claim that the substantial evidence standard is inapplicable because Lt. Rivera's hearing was not made "pursuant to law" but, instead, pursuant to the 2012 MOU. (Pet. Opp. 10-12) Petitioners are incorrect. The substantial evidence standard governs these proceedings because Lt. Rivera's departmental disciplinary trial and Commissioner Tisch's determination were made pursuant to § 14-115 of the New York City Administrative Code and § 434 of the NYC Charter. *See Montella v. Bratton*, 93 N.Y.2d 424, 430 (1999). Section 14-115 of the NYC Admin Code and § 434 of the NYC Charter "make clear that the Legislature determined to 'leave the disciplining of police officers, including the right to determine guilt or innocence of breach of disciplinary rules and the penalty to be imposed upon conviction, to the discretion of the Police Commissioner.'" *Id*. (*citing Matter of City of New York v. MacDonald,* 201 A.D.2d 258, 259 (1st Dept 1994) *lv. denied* 83 N.Y.2d 759 [1994]). The MOU, rather, confers the responsibility of

prosecuting departmental discipline of substantiated CCRB complaints pursuant to §14-115. *See* MOU (1) and (2). Yet the MOU expressly permits the Police Commissioner to remain the final arbiter of discipline pursuant to her powers under § 14-115 of the NYC Admin Code and §434 of the NYC Charter. *See* 2012 MOU (8); *see, also* NYC Charter §440(3)(e); NYC Charter §434; NYC Admin Code §14-115.

The Court of Appeals has recognized that the evidentiary standard used to review police department disciplinary proceedings is the substantial evidence standard. *See Kelly v. Safier*, 96 N.Y.2d 32, 38-39 (2001). Indeed, Article 78 challenges to departmental disciplinary decisions following allegations of excessive force are regularly transferred to the Appellate Division. *See Miller v. Kerik*, 299 A.D.2d 267 (1st Dept 2002); *Quinn v. Kerik*, 305 A.D.2d 168 (1st Dept 2003); *Scott v. Kelly*, 305 A.D.2d 273 (1st Dept 2003); *Sierra v. McGuire*, 91 A.D.2d 179 (1st Dept 1983) *rev'd on other grounds*, 60 N.Y.2d 770 (1983); *Pantaleo v. O'Neil,* 192 A.D.3d 598 (1st Dept 2021); *see, also Murphy v. Valentine*, 284 N.Y. 524, 526 (1940). Petitioners concede that Commissioner Tisch rendered her decision following an administrative disciplinary trial conducted upon written charges where testimony and evidence were reviewed by a hearing officer. *See* Pet. ¶¶ 76-89. Petitioners seek to challenge Commissioner Tisch's determination reversing Deputy Commissioner Maldonado which was rendered pursuant to the Commissioner's powers under both the NYC Administrative Code and NYC Charter following a trial upon written charges under those same provisions. *See* Pet. ¶¶ 135-141. Thus, the substantial evidence standard is the prevailing standard to undertake review.

Under this standard, Commissioner Tisch's determination was rationally based and supported by the record. Commissioner Tisch's decision reflects that she carefully reviewed the administrative record—which contained the findings of the Office of the New York State Attorney

General as an exhibit offered by CCRB, specifically marked as "CCRB Exhibit 6" (*See* Pet Ex. 8, Pg 3 *fn*. 3; Pet Ex. 11, Pg 3)—and meticulously supported her decision by explicitly citing Lt. Rivera's testimony, the FID report (CCRB Exhibit 7), the Body Worn Camera footage from all three officers involved (CCRB Exhibits 1-3); a bystander video (CCRB Exhibit 4); and the trial transcript[3] which is all the evidence Petitioners attempt to argue were ignored by Commissioner Tisch when she rendered her determination. *See, e.g.,* Pet. Ex 11. Commissioner Tisch then employs a methodical analysis of the subjective and objective tests governing the law of justification and applied the law to the facts of the case derived wholly from the administrative record. *See* Pet. Ex. 11. Thus, the substantial evidence standard governs review of that decision in these proceedings warranting transfer to the Appellate Division.

## POINT III

## ALTERNATIVELY, COMMISSIONER TISCH'S DETERMINATION WAS NEITHER ARBITRARY NOR CAPRICIOUS

For the same reasons that Commissioner Tisch's determination was supported by substantial evidence, so too was her determination neither arbitrary nor capricious. Commissioner Tisch followed all lawful procedure, rendered her determination pursuant to her discretionary authority, and provided a sound basis for her determination citing extensively to the record and her objections to the report of Deputy Commissioner Maldonado. Despite Petitioners' assertions to the contrary, nothing about Commissioner Tisch's determination was either arbitrary or capricious.

### A. Commissioner Tisch's Decision Was Rational and Based Upon the Administrative Record

[3] Petitioners attempt to attack Respondents' argument regarding employing substantial evidence standard by asserting that the "substantial evidence standard does not apply to secret transcripts" (Pet. Opp, at 11) but fail to provide any decisional law supporting this proposition. It should be disregarded.

An agency will be found to have acted arbitrarily where it "summarily rejects" findings of credibility and "fails to make new findings sufficient for judicial review." *See Stevens v. Axelrod*, 162 A.D.2d 1025, 1026 (4th Dept 1990). "An action is arbitrary and capricious when it is taken without sound basis in reason or regard to the facts." *Matter of Peckham v. Calogero*, 12 N.Y.3d 414, 430 (2009); *see also Matter of Home Depot, USA v. Town Bd. of Town of Hempstead*, 63 A.D.3d 938, 939 (2d Dept 2009)(*holding* as arbitrary and capricious a decision of the town board which offered no findings to support its determinations).

Petitioners take issue with the Commissioner Tisch's determination in two respects. First, Petitioners argue that Commissioner Tisch improperly rejected the credibility determinations of Deputy Commissioner Maldonado. Second, Petitioners argue that Commissioner Tisch's reliance on the OAG report was improper because it was not part of the hearing record. Both arguments fail as a matter of fact and law. "Findings of a hearing officer are not conclusive and may be overruled by the official upon whom has been imposed the power to remove or mete out discipline, provided, of course, that the latter's action is supported by substantial evidence." *Simpson v. Wolansky*, 38 N.Y.2d 391, 394 (1975); *see, also Matter of Redmond v. Town of Haverstraw*, 174 A.D.3d 719, 720 (2d Dept 2019); *Matter of OConnor v. Cutting*, 166 A.D.3d 1099, 1102 (3d Dept 2018)("The credibility determinations of a hearing officer are not binding upon the official charged with making a final determination, who, in the exercise of his or her duty to weigh the evidence and resolve conflicting testimony, may make different factual findings and conclusions, provided they are supported by substantial evidence."). Commissioner Tisch's decision to overrule Deputy Commissioner Maldonado, which was based on a thorough analysis replying to each determination in the Deputy Commissioner's recommendation, was proper.

Here, Commissioner Tisch is not bound by the findings of Deputy Commissioner Maldonado because, pursuant to statute and the 2012 MOU, Commissioner Tisch is expressly empowered with the discretion to make final disciplinary determinations. *See* NYC Admin. Code §14-115; NYC Charter §434; 2012 MOU (8). Additionally, Petitioners are incorrect that the OAG Report was outside of the record because the OAG Report was, in fact, offered as evidence by CCRB. *See* Pet Ex. 8, Pg 3 *fn*. 3; Pet Ex. 11, Pg 3. Even still, Commissioner Tisch relied upon several evidentiary exhibits and the trial transcripts in addition to the OAG Report making her determination *consistent with the record*, even if it disagreed with the Deputy Commissioner's report and recommendation. *See* 38 RCNY 15-08(a)("The Police Commissioner may approve the recommendation or modify the findings or the penalty *consistent with the record*.")(emphasis added). Here, the rules require consistency with the *record*, not consistency with the *report and recommendation* of the Deputy Commissioner. Thus, Commissioner Tisch acted lawfully by relying exclusively upon the administrative record to render her decision that fully and adequately provides a sound basis for her determination.

**B. Commissioner Tisch's Decision Was Made Pursuant to Lawful Procedure**

For the first time, Petitioners raise the argument that they challenge the "the *process* by which Tisch came to her decision that is arbitrary and capricious—not merely the result." *See* Pet. Opp at 13. Without specifying the issue with the process—or what process Commissioner Tisch deviated from—Petitioners cannot maintain a challenge on this basis. A decision of an administrative agency is "arbitrary and capricious if it neither adheres to its own prior precedent nor indicates its reasons for reaching a different result on essentially the same facts." *In re Lafayette Storage & Moving Corp*., 77 N.Y.2d 823, 826 (1991)(*citing Matter of Field Delivery Serv*. 66 N.Y.2d 516, 520 [1985]). However, to the extent this Court does permit such a challenge,

Commissioner Tisch followed all policies and procedures pursuant to the 2012 MOU, § 440 of the NYC Charter, and §14-115 of the NYC Administrative Code.

Under § 434 of the NYC Charter, Commissioner Tisch has "cognizance and control of the government, administration, disposition and discipline of the department, and of the police force of the department." *See* NYC Charter § 434. Section 14-115 of the NYC Administrative Code requires that discipline of officers require notice of and a hearing upon written charges, the manner in which is controlled by the Police Commissioner. *See* NYC Admin. Code § 14-115(b).

For departmental discipline cases involving substantiated CCRB complaints, the Commissioner has prescribed the manner of investigations and prosecutions, delegating the authority to do so to the CCRB pursuant to the 2012 MOU and § 440(c) of the NYC Charter. Both the 2012 MOU and § 440(d) of the NYC Charter the Commissioner is required to inform the CCRB of any action taken including any deviations from the recommendations of the board or deputy commissioner. Specifically, NYC Charter § 440(d)(3) states, in relevant part:

> [...]the police commissioner shall provide such written report, with notice to the subject officer, no later than 45 days after the imposition of such discipline or in such shorter time frame as may be required pursuant to an agreement between the police commissioner and the board. Such report shall include a detailed explanation of the reasons for deviating from the board's recommendation or the recommendation of the deputy commissioner responsible for making disciplinary recommendations and, in cases in which the police commissioner intends to impose or has imposed a penalty or level of discipline that is lower than that recommended by the board or such deputy commissioner, shall also include an explanation of how the final disciplinary outcome was determined, including each factor the police commissioner considered in making his or her decision.

*Id*.

Under the 2012 MOU, the Police Commissioner is also required to inform the CCRB of her final determination which then permits the CCRB to undertake the responsibility of "taking

any appropriate follow up action." *See* 2012 MOU (III)(2). Under both § 440 and the 2012 MOU, the Police Commissioner expressly retains the right to impose discipline upon members of the department and is expressly permitted to "retain all aspects and authority and discretion to make final disciplinary determinations." *See* 2012 MOU (8).

All lawful procedures and processes were followed by Commissioner Tisch when she rendered her determination. When she planned to reject Deputy Commissioner Maldonado's recommendation, Deputy Chief Michael P. Baker forwarded a copy of Commissioner Tisch's preliminary report to CCRB Executive Director, Jonathan Darche. *See* Pet. Ex. 9. Following the notification to CCRB, CCRB Chief Prosecutor Andre Applewhite served Commissioner Tisch with the CCRB response. *See* Pet. Ex. 10. Thereafter, Commissioner Tisch rendered a 10-page final determination reversing the recommendation of Deputy Commissioner Maldonado. *See* Pet. Ex. 11. Thus, all lawful procedures were followed resulting in a comprehensive decision based upon the administrative record and was neither arbitrary nor capricious.

## CONCLUSION

For all the reasons set forth in its cross-motion to dismiss and herein, Respondents respectfully request that this Court dismiss the Petition in its entirety, that judgment be entered for Respondents, and that Respondents be granted costs, fees, and disbursements together with such other and further relief as the Court deems just and proper. In the alternative, Respondents respectfully request that the Petition be transferred to the Appellate Division, First Department, and, upon transfer, the Petition should be dismissed in its entirety and the relief sought therein should be denied in all respects.

Dated: New York, New York
February 27, 2026

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## CERTIFICATION OF COMPLIANCE

Pursuant to 22 NYCRR 202.8-b, the total number of words in the foregoing memorandum of law, inclusive of point headings and footnotes, excluding the caption, certificate of compliance, and signature block is 3,525

By:_____/s/_____
Robyn L. Rothman
Assistant Corporation Counsel