

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

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PATRICK J. LYNCH, as President of the Patrolmen’s  
Benevolent Association of the City of New York, Inc., on  
behalf of himself and all police officers employed by the  
City of New York, and THE PATROLMEN’S  
BENEVOLENT ASSOCIATION OF THE CITY OF  
NEW YORK, INC.,

Plaintiffs- Petitioners,  
- against -

Index No. 152235/18

THE NEW YORK CITY CIVILIAN COMPLAINT  
REVIEW BOARD and FREDERICK DAVIE, in his  
Official Capacity as Acting Chair of the New York City  
Civilian Complaint Review Board,

Defendants-Respondents,  
- and -

JAMES P. O’NEILL, in his Official Capacity as  
Commissioner of the New York City Police Department,

Nominal Defendant-Respondent.

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**BRIEF OF *AMICI CURIAE* THE NEW YORK CIVIL LIBERTIES UNION AND THE  
AMERICAN CIVIL LIBERTIES UNION IN SUPPORT OF  
DEFENDANTS-RESPONDENTS THE NEW YORK CITY CIVILIAN  
COMPLAINT REVIEW BOARD AND FREDERICK DAVIE**

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## PRELIMINARY STATEMENT

In February 2018, the Civilian Complaint Review Board announced a resolution to begin investigating civilian allegations of sexual misconduct by New York City Police Department officers. This resolution—adopted after years of CCRB research on sexual misconduct, including public discussion with an expert on the issue and a review of complaints alleging possible sexual misconduct that the Board had already received—reversed the Board’s prior practice of forwarding all complaints of sexual misconduct to the NYPD for internal investigation. The CCRB’s resolution to begin investigating complaints of police sexual misconduct is an essential step towards promoting police accountability, reducing rampant sexual misconduct by New York City Police Department officers, and increasing trust between civilians and the NYPD. Yet the plaintiffs-petitioners in this case, Patrick J. Lynch and the Patrolmen’s Benevolent Association (PBA), seek to prevent the City’s independent police oversight entity from exercising its clear jurisdiction over this devastating type of police misconduct.

According to the PBA, complaints of sexual misconduct should continue to be handled outside the public eye and by the same agency that allegedly commits the abuse because this sexual misconduct resolution was procedurally flawed, unreasoned, and—most troublingly—outside the scope of the CCRB’s mandate because police sexual misconduct is not an abuse of authority. *Amici* submit this brief to emphasize that police sexual misconduct is exactly the type of abuse of authority that the CCRB can and should investigate and to highlight the enormous real-world importance of independent investigation of such complaints. Police sexual misconduct is inherently an abuse of authority and has been consistently recognized as such by researchers and law-enforcement organizations, falling squarely within the CCRB’s statutory mandate. Police officers commonly take advantage of the enormous authority, power, and

control afforded them by their badge to sexually harass and assault civilians. Accounts of police officers preying on vulnerable members of society are sadly commonplace across the country, and New York City is no exception. Yet redress for these abuses is rare. A victim of police sexual misconduct is unlikely to report such incidents to the very people who committed the abuse, and the failure of the NYPD to adequately investigate reports of sexual abuse and harassment further discourage victims from reporting. The CCRB's investigation of these complaints provides a much-needed independent avenue for accountability, helps combat rampant underreporting of such abuses, and promotes policy change to curb this devastating practice.

In addition to addressing the importance of upholding the CCRB's decision to investigate police sexual misconduct, *amici* briefly highlight concerns related to two CCRB rule changes adopted in January 2018, also challenged by the PBA. First, the City's interpretation of Rule § 1-24(l) as requiring civilians to make a "sworn statement" under "oath" could discourage civilians from providing essential information to CCRB investigators in contravention of the City Charter. Second, the revisions to Rule § 1-33, permitting past unsubstantiated, unfounded, and withdrawn complaints to be a—but not the sole—basis for findings and recommendations, should be construed narrowly in order to adequately protect the due process rights of police officers.

#### STATEMENT OF INTEREST OF AMICI CURIAE

*Amicus curiae* the New York Civil Liberties Union (NYCLU), the New York State affiliate of the American Civil Liberties Union, is a not-for-profit, non-partisan organization with over 175,000 members. The NYCLU defends and protects civil rights and civil liberties, as embodied in the United States Constitution, New York State Constitution, and state and federal law. The NYCLU is committed to police accountability and transparency as well as to the due

process rights of police officers. The NYCLU has regularly engaged with the CCRB from its inception through public reporting, written correspondence, and participation in public meetings and has consistently urged the Board to effectively and fairly investigate police misconduct and to promote police transparency and accountability.<sup>1</sup> For example, the NYCLU wrote two letters to the Board regarding the proposed rules at issue in this petition.<sup>2</sup> The NYCLU also advocates for transparency in judicial and adjudicative administrative proceedings, particularly where law enforcement is implicated in events involving use of force or potential misconduct.<sup>3</sup> The NYCLU is also an organization deeply committed to the rights of women, who are disproportionately the victims of police sexual misconduct.

The American Civil Liberties Union (ACLU) is a nationwide, non-partisan organization of more than a million members dedicated to preserving the Constitution and civil and human rights. The ACLU Women's Rights Project, founded in 1972 by Ruth Bader Ginsburg, has been a leader in legal battles to ensure women's full equality in American society. Through litigation, advocacy, grassroots mobilization, and public education, the Women's Rights Project pushes for change and systemic reform in those institutions that perpetuate discrimination based on

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<sup>1</sup> See e.g., The New York Civil Liberties Union, *Mission Failure: Civilian Review of Policing in New York City 1994-2006* [2007], available at [https://www.nyclu.org/sites/default/files/publications/nyclu\\_pub\\_mission\\_failure.pdf](https://www.nyclu.org/sites/default/files/publications/nyclu_pub_mission_failure.pdf) [analyzing the CCRB's failures and making recommendations for improvements in order to strengthen police accountability]; The New York Civil Liberties Union, *Report: Five Years of Civilian Review: A Mandate Unfulfilled* [1998], available at <https://www.nyclu.org/sites/default/files/publications/NYCLU%20-%20Five%20Years%20of%20Civilian%20Review%20-%20A%20Mandate%20Unfulfilled%20July%205%2C%201993-%20July%205%2C%201998.pdf> [same]; <https://www.nyclu.org/sites/default/files/publications/Police%20Abuse%20The%20Need%20for%20Civilian%20Investigation%20and%20Oversight.pdf> [advocating for a CCRB independent of the NYPD]; The New York Civil Liberties Union, *Report: Civilian Review of Policing: A Case Study* [1993], available at <https://www.nyclu.org/sites/default/files/publications/NYCLU.CivilianReviewPolicing.CaseStudyRep.1993.pdf> [recommending creation of independent CCRB and putting forth specific recommendations for its structure and function].

<sup>2</sup> See Letters from the NYCLU to the CCRB Regarding Proposed Rules [Mar. 18, 2015 and June 10, 2016], attached as Exhibit A to Katovich Aff.

<sup>3</sup> See, e.g., *New York Civil Liberties Union v New York City Police Dep't* 148 AD3d 642 [1st Dept 2017], *appeal pending* [Article 78 petition seeking the written opinions of administrative judges in department trials of NYPD officers, where the misconduct allegations were substantiated by the CCRB].

gender. The ACLU Women's Rights Project has worked to strengthen police accountability for sexual violence, including successfully advocating for the Department of Justice (DOJ) to issue guidance on gender-biased policing of domestic violence and sexual assault in 2015 and promoting reforms of other police departments.

## ARGUMENT

### I. THE CCRB'S INVESTIGATION OF POLICE SEXUAL MISCONDUCT IS ESSENTIAL TO PROMOTING ACCOUNTABILITY AND SQUARELY WITHIN ITS CHARTER AUTHORITY

#### A. Police Sexual Misconduct Is Widespread and a Recognized Civil Rights Violation

Police sexual misconduct is a devastatingly widespread form of police abuse. An ever-growing number of studies demonstrate that police officers commonly commit sexual misconduct across the United States. In fact, a recent Buffalo News survey of over 700 cases of sexual misconduct by law-enforcement personnel over a 10-year period showed that, on average, a police officer is caught in an act of sexual misconduct at least every five days (Matthew Spina, *When a Protector Becomes a Predator*, Buffalo News, Nov. 22, 2015, available at <http://webcache.googleusercontent.com/search?q=cache:HTBikvF5G4wJ:projects.buffalonews.com/abusing-the-law/index.html+&cd=1&hl=en&ct=clnk&gl=us>, formerly available at <http://projects.buffalonews.com/abusing-the-law/index.html> [hereinafter "Buffalo News Survey"]).<sup>4</sup> Another study of nationwide police misconduct by the Cato Institute found that "[s]exual misconduct was the second most common form of misconduct reported throughout 2010 with 618 officers involved in sexual misconduct complaints during that period," second

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<sup>4</sup> The database compiled by the Buffalo News included "only those [cases] in which some action lends credibility to the accusation. In most cases, that includes termination, indictment, conviction, the officer's statements, resignation while an investigation was under way or internal affairs conclusions regarding departmental charges" (Buffalo News, *Abusing the Law*, 2015, available at <http://projects.buffalonews.com/abusing-the-law/data.html>). Given these parameters, even this high rate is unrealistically low.



only to complaints of excessive use of force (The Cato Institute National Police Misconduct Statistics and Reporting Project, *2010 Police Misconduct Statistical Report*, <https://www.policemisconduct.net/statistics/2010-annual-report/>).<sup>5</sup> In addition, high-profile cases of egregious sexual harassment by officers, such as the case of Alex Holtzclaw, the Oklahoma police officer who was convicted of raping 13 black women while patrolling low-income neighborhoods, have shed light on this horrific form of police abuse.<sup>6</sup> Studies also reveal that the same officers tend to repeatedly commit sexual misconduct and that many accused officers escape penalties (*see, e.g.*, C.E. Rabe-Hemp & J. Braithwaite, *An exploration of recidivism and the officer shuffle in police sexual violence*, 16 *Police Quarterly* [Issue 2] 127 [2013] [finding that more than 41 percent of police sexual violence cases surveyed were committed by recidivist officers with an average of four victims each and that many officers were able to maintain police employment despite allegations of sexual misconduct]).

Because most incidents of sexual misconduct by police remain unreported, these surveys and accounts are massively under-inclusive and the exact breadth of this crisis in policing remains unknown (*see, e.g.*, Buffalo News Survey [“The numbers are almost certainly higher. Sex offenses go widely unreported even when cops are not suspects. Victims may be even less likely to report offenses when they fear it will be their word versus an officer's.”]; Timothy Maher, *Cops on the Make: Police Officers Using Their Job, Power, and Authority to Pursue Their Personal Sexual Interests*, 7 *J. Inst. Just. Int'l Stud.* 32, 36 [2007] [explaining that “deviant

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<sup>5</sup> *See also* Philip M. Stinson et al., *Police sexual misconduct: A national scale study of arrested officers*, Criminal Justice Faculty Publications at 14 [2014] [identifying 548 arrests of police officers for sex-related crimes between 2005 and 2007]; Nancy Phillips and Craig R. McCoy, *Extorting Sex with a Badge*, *The Inquirer*, Mar. 29, 2007, [http://www.philly.com/philly/news/special\\_packages/inquirer/Extorting\\_sex\\_with\\_a\\_badge.html](http://www.philly.com/philly/news/special_packages/inquirer/Extorting_sex_with_a_badge.html) [finding “nearly 400 reports of police sexual misconduct across the country in the last five years”].

<sup>6</sup> *See* Sarah Larimer, *Disgraced ex-cop Daniel Holtzclaw sentenced to 263 years for on-duty rapes, sexual assaults*, *The Washington Post*, Jan. 22, 2016, available at [https://www.washingtonpost.com/news/post-nation/wp/2016/01/21/disgraced-ex-officer-daniel-holtzclaw-to-be-sentenced-after-sex-crimes-conviction/?noredirect=on&utm\\_term=.ad40e94ed42d](https://www.washingtonpost.com/news/post-nation/wp/2016/01/21/disgraced-ex-officer-daniel-holtzclaw-to-be-sentenced-after-sex-crimes-conviction/?noredirect=on&utm_term=.ad40e94ed42d).



police misconduct . . . is a hidden misbehavior” and suggesting that 80 to 90 percent of rapes by police officers may go unreported]). Regardless of the exact scale of the problem, the International Association of Chiefs of Police and the Department of Justice have recognized that police sexual misconduct is a grave problem that urgently needs to be addressed (International Association of Chiefs of Police, *Addressing Sexual Offenses and Misconduct by Law Enforcement: Executive Guide* at 1-2 [June 2011], available at [http://www.theiacp.org/Portals/0/Addressing\\_Sexual\\_Offenses\\_and\\_Misconduct\\_by\\_LE.pdf](http://www.theiacp.org/Portals/0/Addressing_Sexual_Offenses_and_Misconduct_by_LE.pdf) [hereinafter “IACP Report”] [noting that “cases of sexual misconduct by officers appear all too frequently in the news” and stating that “[t]he problem of sexual misconduct by officers warrants the full attention of law enforcement leadership”]; Department of Justice, *Identifying and Preventing Gender Bias in Law Enforcement Response to Sexual Assault and Domestic Violence* at 21 [2015], available at <https://www.justice.gov/opa/file/799366/download> [hereinafter “DOJ Guidance”] [recognizing that sexual misconduct by police officers and failures of agencies to appropriately discipline officers can undermine the legitimacy of law enforcement]).

Police sexual misconduct is not only widespread and harmful, it is also a civil rights violation. “Situations where officers engage in sexual misconduct and victimize those they are sworn to protect and serve amount to civil rights violations” (IACP Report at 2). Courts consistently find that sexual misconduct by police officers violates the Constitution (*see Rogers v City of Little Rock*, 152 F3d 790, 793-94, 797 [8th Cir 1998] [holding that a police officer violated substantive due process when he stopped a driver for a traffic violation and subsequently followed her home and raped her]; *United States v Morris*, 494 F Appx 574, 581 [6th Cir 2012] [stating that “it is more than obvious that the right to not be raped by a law enforcement officer lies at the core of the rights protected by the Due Process Clause”]; *Poe v Leonard*, 282 F3d 123,

139 [2d Cir 2002] [finding that “a police officer violates a person’s constitutional right to bodily privacy when that officer manipulates the circumstances to view, to photograph, to videotape or otherwise to record that person’s unclothed or partially unclothed body without his or her consent where, as here, there is no conceivable investigative or otherwise proper law-enforcement interest advanced by such a viewing”]; *Jones v Wellham*, 104 F3d 620, 628 [4th Cir 1997] [holding that an officer violated victim’s due process right to bodily integrity when he gave the victim a warning for an alleged traffic offense, then raped her before driving her home]). The Department of Justice also has recognized that gender bias in law enforcement responses to sexual assault, including failures of law enforcement agencies to adequately investigate and respond to police officer sexual misconduct, may violate the Constitution’s Equal Protection guarantee and federal law (DOJ Guidance at 23-25; *see also* Department of Justice, *Investigation of the New Orleans Police Department* at 32 [Mar. 16, 2011], available at [https://www.justice.gov/sites/default/files/crt/legacy/2011/03/17/nopd\\_report.pdf](https://www.justice.gov/sites/default/files/crt/legacy/2011/03/17/nopd_report.pdf) [suggesting that the New Orleans’ Police Department’s “fail[ure] to take sufficient steps to detect, prevent, or address bias-based profiling” and “fail[ure] to adequately investigate violence against women, including sexual assaults and domestic violence” violate Equal Protection]; Department of Justice, *Investigation of the Baltimore City Police Department* at 150 [Aug. 10, 2016], available at <https://www.justice.gov/crt/file/883296/download> [“Failing to properly investigate allegations that officers were engaged in sexual misconduct is troubling in light of the concerns of gender bias”]).

#### **B. Sexual Misconduct by NYPD Is a Serious Problem**

New York City is no exception to this nationwide crisis of police sexual misconduct. Though no entity currently collects reliable data on the scope of NYPD sexual abuse of civilians,

the complaints filed with the CCRB to date and the many high-profile reports of officers caught in flagrant acts of sexual misconduct portray a city where police officers regularly abuse the authority conferred upon them by their badge to sexually harass civilians.

As part of the research process that led the CCRB to announce its resolution to investigate complaints of sexual misconduct by the NYPD, the Board's Policy and Advocacy Unit reviewed the complaints of sexual misconduct that it had received and forwarded to the NYPD's Internal Affairs Bureau (IAB) between January 2016 and June 2017 (*see* CCRB, Memorandum Accompanying Public Vote Re: Sexual Misconduct Allegations, at 2-3 [Feb. 14, 2018] [NYSCEF Doc. No. 57], attached as Exhibit R to Kadushin Aff. [NYSCEF Doc. No. 39] [hereinafter "CCRB Feb. 14 Memo"]). Over this 18-month period, the Board received 117 complaints of sexual misconduct (*id.* at 2), a rate of 6.5 complaints per month. Notably, this represents complaints filed before the CCRB had announced its review of such complaints, suggesting that the number of allegations of NYPD sexual misconduct would be higher now. Indeed, between February 14, 2018 and early May 2018, the first months after the Board announced its policy of investigating these complaints, the CCRB reportedly received 28 complaints of sexual misconduct, a rate of over 9 complaints per month, representing a 43 percent increase (*see* Thomas Tracy, *CCRB eyes 28 NYPD sex-misconduct claims*, NY Daily News, May 10, 2018, available at <http://www.nydailynews.com/new-york/ccrb-eyes-28-nypd-sex-misconduct-claims-article-1.3981165>).

The few details disclosed by the CCRB from these complaints reveal troubling abuse by the NYPD. In one complaint filed between January 2016 and June 2017, a woman reported being questioned by a male detective at the scene of a shooting in 2014, after which he gave her his phone number (CCRB Feb. 14 Mem. at 2). The next time the woman encountered this officer, he

asked her why she never called him and bragged about his penis (*id.*). When the woman was later arrested and put in a lockup, the same detective entered her holding cell and, when she refused to respond to him, told her, “Suck my dick” (*id.*). Another complaint from this period described two male officers licking their lips and loudly commenting on the physical attractiveness of the complainant’s underage niece while patrolling a 2016 Fourth of July fireworks show (*id.* at 3).

In addition to complaints filed with the CCRB, a long list of high-profile NYPD sexual misconduct has made headlines in recent years. Most recently, outlets nationwide covered an alleged rape of an 18-year-old woman by on-duty NYPD officers in a police van (*see, e.g.*, Andrea J. Ritchie, *How Some Cops Use the Badge to Commit Sex Crimes*, The Washington Post, Jan. 12, 2018, [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?noredirect=on&utm\\_term=.9c5dc670cb04](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?noredirect=on&utm_term=.9c5dc670cb04)). According to her allegations, after two NYPD detectives pulled over the woman and her two friends for driving in a public park after dark, they searched the car and found marijuana and anti-anxiety medicine, at which point they arrested the woman, handcuffed her, and put her in the back of their unmarked van (*id.*). The detectives allegedly proceeded to rape her and force her to perform oral sex under threat of criminal charges (*id.*). The officers were later indicted on charges of rape, kidnapping, and official misconduct (*id.*).

Though abhorrent, this incident is far from an aberration. High profile accounts of NYPD officers committing sexual assault have become commonplace (*see, e.g.* Michael Brick, *Officer Is Found Guilty of Sexually Abusing Women While on Duty*, NY Times, Sept.18, 2017, available at [https://www.nytimes.com/2007/09/18/nyregion/18cop.html?\\_r=0](https://www.nytimes.com/2007/09/18/nyregion/18cop.html?_r=0) [reporting that an NYPD

officer was found guilty of sexual abuse and official misconduct, including making “women submit to searches that turned into unwanted groping” while responding to noise complaints and traffic violations and, in one instance, restraining a woman and masturbating in front of her]; Ben Yakas, *Woman Sues City for \$150M Claiming Cop Raped Her & Gave Her Black Eye*, Gothamist, June 6, 2014, available at [http://gothamist.com/2014/06/06/rape\\_cop\\_drugs\\_woman.php](http://gothamist.com/2014/06/06/rape_cop_drugs_woman.php) [describing allegations that an NYPD officer coerced a woman into a date after arresting her for drunk driving, then drugged her, raped her, and gave her a black eye]; John Eligon, *Officer is Convicted of Abusing Power in Seeking Sex*, NY Times, Jan. 15, 2010, available at <https://www.nytimes.com/2010/01/16/nyregion/16cop.html> [reporting that an NYPD officer was found guilty of “telling an 18-year-old that he would destroy a summons he was issuing her in exchange for oral sex”].<sup>7</sup>

Because police sexual assault is rarely reported and prosecution of such crimes is uncommon, these accounts may only scratch the surface of the police sexual misconduct problem in New York City.<sup>8</sup> In reality, the number of New Yorkers who are victims of such abuse are likely staggering. For example, one study from 2000, which surveyed almost 1,000 youth in New

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<sup>7</sup> See also U.S. Attorney’s Office, Eastern District of New York, *New York City Police Department Detective Arrested on Federal Civil Rights Charges for Sexual Misconduct*, May 18, 2010, <https://archives.fbi.gov/archives/newyork/press-releases/2010/nyfo051810.htm> [announcing the FBI’s arrest of an NYPD detective on charges of “violating the civil rights of three women through sexual misconduct,” including forcing one to perform oral sex under threat of losing her children]; Brendan Brosh, *NYPD captain who exposed himself in subway station gets to keep pension*, NY Daily News, Aug. 11, 2009, available at <http://www.nydailynews.com/news/crime/nypd-captain-exposed-subway-station-pension-article-1.398687> [reporting that a Transit Bureau Captain pled guilty to exposing himself to a 20-year-old man while on duty in a Queens subway station for which he was docked 11 vacation days but retained his full pension].

<sup>8</sup> Moreover, sexual harassment that does not rise to the level of many of the incidents described above, but is nonetheless damaging to victims and to civilian confidence in the NYPD, is unlikely to result in a lawsuit or news report (see, e.g., Brett G. Stoudt, Michelle Fine, Madeline Fox, *Growing Up Policed in the Age of Aggressive Policing Policies*, 56 N.Y.L. Sch. L. Rev. 1331, 1344 [2012] [recounting surveyed youth’s experience with police abuse, including the account of “[a] seventeen-year-old black male who identified as gay [and] told of a sexualized incident with police he and his best friend endured: ‘A group of police walked by and it just so happen her and I was sucking on dollar ice pops so they were long and the police said. ‘I like the way y’all sucking on them icy. Y’all should come in the park and suck on us.’”]).

York City, found that two out of five young women had been sexually harassed by police officers (Deanna L. Wilkinson, *Local Social Ties and Willingness to Intervene: Textured Views Among Violent Urban Youth of Neighborhood Social Control Dynamics and Situations*, 24 Just. Q. 185, 189 [2007] [hereinafter “Wilkinson Study”]).

**C. The CCRB Can and Should Investigate Complaints of Sexual Misconduct by the NYPD**

In the face of this crisis, the CCRB has an essential role to play in promoting fair investigations of police sexual misconduct, holding officers accountable for these abuses, and promoting structural change in the NYPD’s approach to sexual misconduct. Not only does this conduct fall squarely within the CCRB’s jurisdiction because the City Charter gives the CCRB the power to investigate complaints against the NYPD that “allege misconduct involving . . . abuse of authority” (NY City Charter § 440[c][1]) and sexual misconduct is inherently such an “abuse of authority,” but CCRB investigation of these complaints is all the more important because the NYPD, which had previously investigated such complaints internally, has shown itself to be a fundamentally inhospitable place for effective and fair sexual misconduct investigations. Moreover, investigating such complaints furthers the CCRB’s mandate to provide complete, thorough, and impartial investigations of police misconduct and to inform and advocate for needed NYPD policy changes; will help combat rampant underreporting of police sexual misconduct; and promotes compliance with Constitutional and federal law.

**i. Police Sexual Misconduct Is Squarely Within the Jurisdiction of the CCRB Because It Is Inherently an Abuse of Authority**

Police officers hold a position of immense authority in our society. They are empowered to enforce our laws, to stop individuals, to physically confine them, and to order cooperation. In fact, doing the job of a police officer effectively requires asserting authority over civilians. So

when, in the course of these assertions of authority, police officers make sexual comments or propositions, inappropriately touch a person in a sexual manner, or sexually assault them, such behavior abuses the authority conferred on them. In fact, the International Association of Chiefs of Police has defined sexual misconduct by law enforcement in terms of “behavior . . . that takes advantage of the officer’s position in law enforcement to misuse authority and power” (IACP Report at 3; *see also id.* at 1 [describing police sexual misconduct as a “grave abuse of authority”]). As one study on police sexual misconduct has explained, police sexual abuse is structurally tied to police officers’ abuse of their authority:

[O]pportunities [for sexual misconduct] derive from the context of police work—the same framework that provides the basis for legitimate policing. Police routinely operate alone and largely free from any direct supervision, either from administrators or fellow officers. Police commonly encounter citizens who are vulnerable, usually because they are victims, criminal suspects, or perceived as “suspicious” and subject to the power and coercive authority granted to police. Police-citizen interactions often occur 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

(Philip M. Stinson et al., *Police sexual misconduct : A national scale study of arrested officers*, Criminal Justice Faculty Publications at 2 [2014], available at [https://scholarworks.bgsu.edu/crim\\_just\\_pub/30/](https://scholarworks.bgsu.edu/crim_just_pub/30/)). And surveys show that the vast majority of police sexual misconduct involves situations in which officers take advantage of their authority over civilians (*see, e.g.*, Buffalo News Survey [“In more than 70 percent of the cases, officers wielded their authority over motorists, crime victims, informants, students and young people in job-shadowing programs.”]).

Police sexual misconduct also tends to target vulnerable individuals, further underscoring the dynamic of abuse of authority inherent in such interactions. “The targets of reported police sexual violence are overwhelmingly women, and typically women of color who are or are



perceived to be involved in the drug or sex trades, or using drugs or alcohol, as well as people with prior arrest records, immigrants, people with limited English proficiency, people with disabilities, and people who have previously been targeted for police sexual violence” (Andrea J. Ritchie, *Invisible No More* 112 [2017]; *see also* Wilkinson Study [survey of New York City youth in which almost half of those who reported sexual harassment by police were black, Latina, or Asian]). Police sexual misconduct often involves officers abusing their role as protectors by sexually assaulting victims of domestic violence and others who seek their help. For example, a 2016 complaint alleged that a Syracuse police officer sexually assaulted one woman when he responded to her home in connection with a domestic dispute and another woman when he responded to her request for help finding her missing daughter (Complaint ¶¶ 32, 46-59, *Montanez v City of Syracuse et al.*, No. 16-cv-00550 [NDNY filed May 11, 2016] [ECF No. 1]).

**ii. The CCRB’s Investigation of These Complaints Is All the More Important Because the NYPD Has Consistently Failed to Conduct Effective Internal Investigations of Sexual Misconduct**

Many of the PBA’s arguments against the CCRB’s resolution rely on an assumption that the prior state of affairs—through which the NYPD’s IAB conducted all investigations into complaints of police sexual misconduct—was adequate. First, the PBA argues that the CCRB’s policy of investigating sexual misconduct complaints is inconsistent with the City Charter’s mandate because “[n]either the public nor Police Officers can have confidence in the CCRB . . . handling sexual misconduct complaints” (Plaintiffs-Petitioners’ Memorandum of Law in Support of Petition, Mar. 13, 2018, NYSCEF Doc. No. 3 at 45 [hereinafter “PBA Mem.”]). Second, the PBA claims that the CCRB’s investigation of these complaints will “interfere with . . . IAB investigations” (*id.*). And finally, the PBA argues that the Resolution has no rational basis

because “sexual misconduct complaints against Police Officers are already being handled by the IAB” and the CCRB has not adequately shown “that any change is needed in the handling of these claims” (*id.* at 46).

These arguments ignore the reality that the NYPD is no place for complaints of sexual assault to be handled. Rather, the NYPD’s failure to conduct effective and fair internal investigations of sexual misconduct further underscores the importance of the CCRB’s investigation of these complaints.

First, the NYPD has no official policy, either in its patrol or administrative guides, prohibiting police from engaging in sexual misconduct against civilians, and no policy provides guidance as to how sexual misconduct complaints against officers are handled.<sup>9</sup> In fact, in its most recent annual report reviewing investigations conducted by IAB into complaints against NYPD officers, the Commission to Combat Police Corruption made the following recommendation:

Due to police officers’ inherent authority and the possible coercive nature of any relationship between a member of the service and the civilians with whom he or she comes in contact during the course of his or her job performance, these types of relationships can negatively affect criminal cases and incur civil liability for the City of New York. Although the Department disapproves of these types of contact, there are currently no uniform guidelines detailing what is impermissible. The Commission continues to recommend that the Department should set forth a list of rules to put members of the service on notice that engaging in social and intimate relationships with victims, defendants, or witnesses in cases to which they are assigned, at least during the pendency of the investigation and the criminal prosecution, are strictly prohibited. If there are permissible forms of contact, outside the scope of the investigation, these should also be specified.

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<sup>9</sup> *Amici* reviewed the NYPD’s 2018 Administrative Guide and 2018 Patrol Guide and found no policies regarding sexual misconduct by NYPD officers. The closest the NYPD Patrol Guide comes to addressing complaints of sexual misconduct is in its policy regarding sexual assault and sexual harassment of prisoners. But even this procedure fails to explicitly refer to NYPD officers (2018 NYPD Patrol Guide, Procedure No. 210-01 [“The Department has a zero tolerance policy toward all forms of sexual assault and sexual harassment of prisoners by other prisoners or any other person.”]). The IAB website provides no clarity as to complaint procedures, merely providing: “The bureau can receive complaints from the public and NYPD service members by telephone, email, and mail” with no further specificity about the types of complaints that it investigates or what the investigation procedures entail (NYPD, *Internal Affairs*, <https://www1.nyc.gov/site/nypd/bureaus/investigative/internal-affairs.page>).

(NYC Commission to Combat Police Corruption, *Eighteenth Annual Report of the Commission* [Aug. 2017], available at <http://www1.nyc.gov/assets/ccpc/downloads/pdf/18th-Annual-Report.pdf>). The NYPD's complete lack of internal guidelines either prohibiting sexual misconduct by police officers or setting forth procedures for how complaints of such abuse are handled demonstrates the fundamental disregard that the department has for these allegations. An agency that cannot be bothered to prohibit its officers from sexually harassing civilians surely cannot be trusted to fairly investigate their complaints.

Second, the NYPD's handling of investigations of sexual-assault committed by civilians does little to inspire confidence that the department could fulfill the Charter's mandate of fair, impartial, and confidence-inspiring investigations when it comes to complaints of sexual misconduct. A March 2018 NYC Department of Investigation Report found that the NYPD understaffs and under-resources its Special Victims Division—the division tasked with investigating sex crimes, including sexual assault—and that, as a result, “many sexual assault cases are not properly investigated” (New York City Department of Investigation's Inspector General for the NYPD, *An Investigation of NYPD's Special Victims Division—Adult Sex Crimes* at 1 [Mar. 27, 2018], available at [http://www1.nyc.gov/assets/doi/reports/pdf/2018/Mar/SVDRreport\\_32718.pdf](http://www1.nyc.gov/assets/doi/reports/pdf/2018/Mar/SVDRreport_32718.pdf) [hereinafter “DOI Report”]). The press release accompanying this report described the systemic failures of the NYPD in this area as causing “re-traumatiz[ation] [of] victims” and as “negatively impact[ing] the reporting of sex crimes, thereby adversely affecting public safety” (The City of New York Department of Investigation, *DOI Investigation Finds NYPD Has Routinely Understaffed and Neglected the Special Victims Division, Negatively Impacting Sexual Assault Investigations*, Mar. 27, 2018, [http://www1.nyc.gov/assets/doi/reports/pdf/2018/Mar/SVDRreport\\_32718.pdf](http://www1.nyc.gov/assets/doi/reports/pdf/2018/Mar/SVDRreport_32718.pdf)).

The damning report goes on to describe a culture of sexual-assault investigation that disrespects victims and pushes them away from engaging with the criminal justice system:

Service providers and victim advocates described numerous instances in which inexperienced detectives or police officers responded insensitively, dismissively, or incredulously during some victim interviews and infrequently updated victims on the status of their case. SVD retirees, prosecutors, victim advocates, and service providers universally attributed these lapses to understaffing and/or inexperience. Further, service providers, victim advocates, and sex crimes prosecutors identified these kinds of failures as the primary reason victims disengage from the investigative process (DOI Report at 28).

This is consistent with other reports of NYPD mistreatment of victims of sexual assault. For example, the Crime Victims Treatment Center, a nonprofit in New York that assists sexual assault victims, reported that almost half of the sexual assault victims it helps each year report negative interactions with the police handling of their sexual assault investigation (*see* Josh Saul, *These Women Say the New York City Police Department Is Failing Rape Victims*, Newsweek, Apr. 18, 2018, available at <http://www.newsweek.com/nypd-special-victims-rape-sexual-assault-police-crime-metoo-891393>).

When it comes to victims who are sexually assaulted *by* the police, this general mistreatment of sexual assault victims is compounded by intimidation.<sup>10</sup> For example, the Brooklyn teenager who was allegedly raped by two officers in a police van in 2017 reported that at least nine NYPD officers came to her hospital room to discourage her from completing a rape kit (Shawn Cohen and Joe Tacopino, *Teen details how NYPD cops tried to silence her after rape*, NY Post, Nov. 25, 2017, available at <https://nypost.com/2017/11/25/teen-who-claims-nypd-cops-bullied-her-over-rape-allegations-tells-her-story/>). In another example of police intimidation of

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<sup>10</sup> The NYPD is sadly not an outlier in mishandling reports of sexual misconduct by police officers. A 2016 DOJ investigation of the Baltimore Police Department revealed that the department had conducted subpar investigations of allegations that officers had extorted sex from women in the sex industry and that most of these investigations resulted in no punishment for the officers involved (Department of Justice, *Investigation of the Baltimore City Police Department* [Aug. 10, 2016], available at <https://www.justice.gov/crt/file/883296/download>; *see also* Andrea J. Ritchie, *Invisible No More 108* [2017] [“researchers have consistently documented patterns of inadequate investigations of police sexual violence”]).

victims from 2017, a young woman described being arrested and groped in her New York City public-housing project and then, when she tried to report the assault at a precinct, being mocked and told by the officer to whom she reported the abuse that “he knew where she lived” (Andrea J. Ritchie, *Invisible No More* 119-20 [2017]; *see also* Philip M. Stinson, et al., *Police Sexual Misconduct: Arrested Officers and Their Victims*, Criminal Justice Faculty Publications [2014], available at [https://scholarworks.bgsu.edu/crim\\_just\\_pub/38](https://scholarworks.bgsu.edu/crim_just_pub/38), at 8 [“Victims may not file a report with a law enforcement agency because they feel humiliated or fear retaliation by the police”]; Transcript of October 2016 CCRB Meeting, NYSCEF Doc. No. 56, attached as Exhibit Q to Kadushin Affidavit at 27 [hereinafter “October 2016 CCRB Transcript”][discussing reports of intimidation of police sexual misconduct victims by IAB investigating officers]).

Finally, NYPD officers’ sexual harassment of other officers and the NYPD’s mishandling of these complaints completes the bleak portrait of an agency that tolerates police officer sexual misconduct. Sexual harassment within the NYPD appears to be rampant; a recent review of New York City’s settlements of sexual harassment and discrimination claims revealed that between 2014 and 2017, the city settled 20 such claims involving NYPD officers, the most of any city agency during that period (James Fanelli, *NYC paid nearly \$13 million to settle claims of sex harassment or discrimination in the past four years*, NY Daily News, June 12, 2018, available at <http://www.nydailynews.com/new-york/ny-metro-city-settlements-sex-harassment-nypd-20180612-story.html>).

Moreover, internal investigations of such claims are deeply flawed. Two recent lawsuits filed by female police officers who allege that they were sexually harassed by colleagues contend that the NYPD’s internal investigations of sexual harassment are biased. In one, Officer Maribel Sarante reported repeated harassment from her supervisor to the NYPD’s Office of Equal

Employment Opportunity (EEO) but that office declined to substantiate her claims (Complaint, *Sarante v City of New York et al.*, No. 18-cv-01967 [EDNY filed Apr. 2, 2018] [ECF No. 1]). Her lawsuit alleges that the EEO and IAB have a substantiation rate of under 10 percent for such claims and that this low rate is motivated by “gender bias” and a culture of not taking such complaints seriously, particularly against supervisors (*id.* ¶¶ 16-24). A similar lawsuit filed in 2016 by a now-retired female police officer similarly alleged that NYPD leadership was “fully aware [that] sexual harassment is a very serious problem especially in the ranks of Captain and above, [but] they are rarely if ever disciplined” (Complaint ¶ 18, *Foster v City of New York et al.*, No. 16-cv-06859 [EDNY filed Dec. 13, 2016] [ECF No. 1]).

Other lawsuits by harassed officers claim that filing complaints of sexual harassment with the NYPD only results in retaliation. For example, a female detective who won a settlement of \$325,000 in July 2016 for sexual harassment and assault committed by an NYPD lieutenant claimed that the NYPD’s internal investigation only exacerbated the harm she suffered (James Fanelli, *City paid \$325,000 to NYPD detective who said disgraced SVU lieutenant sexually abused her for years, including on 9/11*, NY Daily News, June 13, 2018, available at <http://www.nydailynews.com/new-york/ny-metro-adam-lambo-sex-harassment-settlement-20180612-story.html>). After being forced to perform oral sex and humiliated in front of her colleagues, the detective filed a complaint with the NYPD’s EEO, but that office took 15 months to issue a finding, during which time the detective faced retaliation for filing the complaint (*id.*; see also Devlin Barrett, *Exposing the ‘Grope’ Mentality of the NYPD-Female Cops Blowing the Whistle on Sex Harassment*, NY Post, Oct. 19, 2000, available at <https://nypost.com/2000/10/19/exposing-the-grope-mentality-of-the-nypd-female-cops-blowing-the-whistle-on-sex-harassment/> [reporting rampant retaliation against female NYPD officers who



filed sexual harassment complaints with the NYPD's EEO)).

Even where the NYPD's internal investigations substantiate NYPD employee complaints of sexual harassment, the punishments are inconsequential. For example, in another case, when an officer, who eventually also won a \$325,000 jury award for sexual harassment by a lieutenant, reported the harassment to the NYPD's EEO, the resulting punishment was merely to "re instruct[]" the lieutenant "on E.E.O. policies and the prohibition against inappropriate behavior" (Complaint ¶ 99, *Balu v City of New York et al.*, No. 12-cv-01071 [SDNY filed Feb. 10, 2012] [ECF No. 1])<sup>11</sup>

What little information has become public about internal NYPD sexual-misconduct investigations reveals an agency that tolerates sexual harassment and abuse by NYPD officers, even against their colleagues, and an internal investigation and discipline system that consistently fails victims of sexual abuse. In light of this reality, independent investigation of complaints of police sexual misconduct towards civilians is the only way to ensure that these complaints will be "conducted fairly and independently, and in a manner in which the public and the police department have confidence," as the City Charter requires (NY City Charter § 440[a]).

**iii. Investigating Sexual Misconduct Complaints Furthers the CCRB's Mandate of Promoting Fair and Impartial Investigations and Better NYPD Policies and Combats Underreporting of These Abuses**

Contrary to the PBA's assertions, investigation of sexual misconduct complaints is consistent with, and in fact furthers, the CCRB's mandate. The City Charter mandates that "investigation of complaints concerning misconduct by officers of the department towards

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<sup>11</sup> See also John Marzulli, *Exclusive: Jury awards \$325K to female NYPD cop who claimed her boss was a pervert obsessed with her panties*, NY Daily News, June 15, 2015, available at <http://www.nydailynews.com/new-york/exclusive-325k-female-nypd-sued-perv-boss-article-1.2258171> [describing jury verdict]; James Fanelli, *NYC paid nearly \$13 million to settle claims of sex harassment or discrimination in the past four years*, NY Daily News, June 12, 2018 [reporting that though a complaint of sexual harassment against a sergeant was substantiated by NYPD's EEO, the "sergeant remains on the job and earned \$177,000 in 2017. . . [and] received a promotion in July 2017, a year after the equal employment office substantiated the charges"]).



members of the public be complete, thorough and impartial, . . . conducted fairly and independently, and in a manner in which the public and the police department have confidence” (New York City Charter § 440[a]). The Charter also requires that the CCRB issue a semi-annual report “describing its activities and summarizing its actions” and that it “develop and administer an on-going program for the education of the public” about the Board’s function (*id.* § 440 [b][6]-[7]). The CCRB’s mission statement also includes encouraging community members to file complaints when they believe they have been the victims of police misconduct, engaging in community outreach, reporting issues and policy matters to the police commissioner and the public, and advocating for NYPD policy changes (*see CCRB, Annual Report: January – December 2017*, at 2, available at [https://www1.nyc.gov/assets/ccrb/downloads/pdf/policy\\_pdf/annual\\_bi-annual/2017\\_annual.pdf](https://www1.nyc.gov/assets/ccrb/downloads/pdf/policy_pdf/annual_bi-annual/2017_annual.pdf) [hereinafter CCRB 2017 Annual Report]).

As discussed above, the NYPD’s mishandling of complaints of sexual assault and harassment in a variety of contexts has undermined public confidence in the ability of the department to fairly investigate sexual misconduct, whether committed by its own officers or by civilians. The CCRB resolution on sexual misconduct thus furthers the “interest of the people of the city of New York and the New York City police department that the investigation of complaints concerning misconduct by officers of the department towards members of the public be complete, thorough and impartial” by ensuring that this important area of police misconduct will not be in the exclusive realm of an agency that has already failed New Yorkers when it comes to sexual assault and harassment (*see NY City Charter § 440[a]* ).

The sexual misconduct resolution also aligns with the Charter’s public education mandate (*see NY City Charter § 440 [b][7]*) and the CCRB’s mission of engaging in community outreach

and encouraging victims to make complaints (*see* CCRB 2017 Annual Report at 2]). Given that sexual misconduct by the NYPD is a widespread and yet underreported issue, the CCRB's mission of engaging with community members and encouraging victims of abuse to come forward is particularly important in this area. Only one-third of all sexual assaults are ever reported to the police (RAINN, *The Criminal Justice System: Statistics*, <https://www.rainn.org/statistics/criminal-justice-system>). And this percentage is likely far lower for sexual assaults perpetrated by police, given the additional obstacle of having to report a sexual assault to the same people who perpetrated it (*see infra* Section I.A [describing low rates of reporting police sexual misconduct]). As the DOJ has recognized:

If a law enforcement agency does not fully investigate reports of sexual assault, sexual misconduct and domestic violence perpetrated by its own officers, or fails to appropriately discipline officers when those allegations are substantiated, the legitimacy of that law enforcement agency may be called into question. This, in turn, may make victims more reluctant to report crimes of sexual assault and domestic violence, which undermines public safety by increasing the risk of future harm from offenders who are not held accountable by the criminal justice system (DOJ Guidance at 21).

By providing victims of police sexual assault and harassment with a way to report sexual misconduct by the police to an entity independent of the police, the CCRB's revised policy can help combat underreporting of these incidents and increase the legitimacy of law enforcement in New York City.

Perhaps most importantly, because of the City Charter's requirement that the CCRB issue semi-annual public reports and the Board's mission to "report relevant issues and policy matters to the police commissioner," the Board's exercise of jurisdiction over complaints of police sexual misconduct will also help shape NYPD policy, which, as of now, does nothing to address police sexual misconduct. IAB does not publicly report on its sexual misconduct investigations. The NYCLU has in the past obtained IAB reports through freedom of information requests, but

even these reports contain no information regarding police sexual misconduct complaints (*see* Katovich Affidavit at ¶ 7). In contrast, the CCRB publishes a semi-annual report categorizing and analyzing all of the complaints that it investigates (*see, e.g.,* CCRB, *Semi-Annual Report: January – June 2017*, available at [https://www1.nyc.gov/assets/ccrb/downloads/pdf/policy\\_pdf/annual\\_bi-annual/20171206\\_semi-annual.pdf](https://www1.nyc.gov/assets/ccrb/downloads/pdf/policy_pdf/annual_bi-annual/20171206_semi-annual.pdf) [hereinafter “CCRB 2017 Semi-Annual Report”]). The CCRB’s ability to track and report on such complaints, combined with its mission of advocating for NYPD policy change, will contribute both to greater public awareness of police sexual misconduct and to better-informed NYPD policies (*see* October 2016 CCRB Transcript at 30, 31).<sup>12</sup>

The CCRB’s investigation of complaints of NYPD sexual misconduct is both lawful and immensely important and should be upheld by this Court. The Board’s February resolution to investigate complaints of sexual misconduct is plainly permitted by the City Charter and furthers the CCRB’s mandate and mission. Moreover, in light of widespread allegations of NYPD mishandling of sexual misconduct investigations, the CCRB’s independent investigation of these complaints is essential to safeguarding the rights of victims of sexual abuse and to promoting police transparency and accountability.

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<sup>12</sup> In addition, the CCRB’s investigation of police officer sexual misconduct complaints promotes the NYPD’s compliance with the Prison Rape Elimination Act of 2003 (PREA) (42 USC §15601 *et seq.*). PREA regulations set forth detailed requirements for how detainees in lockups must be able to report sexual abuse and harassment. These regulations require that agencies (including police departments) provide at least one way for detainees to report such abuse or harassment to an entity that is not part of the agency (*see* 28 CFR 115.151[b] [“The agency shall also inform detainees of at least one way to report abuse or harassment to a public or private entity or office that is not part of the agency, and that is able to receive and immediately forward detainee reports of sexual abuse and sexual harassment to agency officials, allowing the detainee to remain anonymous upon request.”]) Before the CCRB’s resolution, the NYPD did not provide individuals detained in lockups an opportunity to make complaints regarding sexual abuse or harassment to an outside entity and, as such, was violating PREA’s regulations. The CCRB’s revised policy of investigating these complaints thus also helps the NYPD comply with federal law.

## II. THE CCRB'S AMENDED RULE § 1-24(L) CANNOT SERVE AS THE BASIS FOR PERJURY PROSECUTIONS OF CIVILIAN INTERVIEWEES

Rule § 1-24(l), one of the amended rules challenged in this lawsuit, provides that prior to an interview's commencement, a complainant, alleged victim, or civilian witness will be told that they will be asked to sign a statement at the conclusion of the interview "verifying that all of the statements you have provided in connection with this investigation are true to your knowledge." The Rule further provides that the interviewee will be told that signing the form "reflects the fact that you have verified that the statements you have made in connection with this case are true to your knowledge" (Rule § 1-24[l]).

The main dispute between the parties regarding this rule goes to whether it creates a "sworn statement." The City describes this verification as signed "under oath before a Commissioner of Deeds" and suggests that Rule 1-24(l) "does require sworn statements" of civilian interviewees (Defendants-Respondents' Memorandum of Law in Support of Answer, May 23, 2018, NYSCEF Doc. No. 58, at 23 [hereinafter "City Mem."]; *see also id.* [describing verification as being signed "under oath"]). In contrast, the PBA contends that this verification procedure does not constitute a sworn statement because it is not made under penalty of perjury or under oath and that the rule therefore violates the Charter's requirement that "[n]o finding or recommendation [of the CCRB] shall be based solely upon an unsworn complaint or statement" (PBA Mem. at 17-18).

As an initial matter, even if the new Rule does not impose a "sworn statement," the PBA is wrong that such unsworn civilian statements would contravene Charter section 440(c), which states that "[n]o finding or recommendation shall be based *solely* upon an unsworn complaint or statement" (NY City Charter § 440[c][1] [emphasis added]). Per the plain language of that section, a civilian interviewee could opt out of giving testimony under oath, but that testimony

could nevertheless serve as a basis for a recommendation or finding, so long as it is not the sole basis but instead combined with other investigation by the CCRB. Nothing in the Charter requires that all statements made by civilian interviewees and used by the CCRB in their investigations be sworn.

However, the CCRB's characterization of this new rule as requiring sworn statements, or as requiring that statements be made "under oath," is troubling because it suggests that civilian interviews could lead to perjury prosecutions (*see* NY Penal Law § 210.15 ["A person is guilty of perjury in the first degree when he swears falsely and when his false statement (a) consists of testimony, and (b) is material to the action, proceeding or matter in which it is made."]). While the verification created by Rule § 1-24(l) would likely not sustain a perjury prosecution (*see People v McAndris*, 300 A.D.2d 1, 1 [1st Dept 2002] [finding that "evidence was legally insufficient to support defendant's perjury convictions since it established that although he signed affidavits before notaries, neither notary actually administered any oath whatsoever, notwithstanding the presence of their jurats on the affidavits"]), the City's characterization of the rule could nevertheless discourage civilians from participating in interviews, which would fly in the face of the Charter's mandate that investigations of civilian complaints be "complete" and "thorough" (NY City Charter § 440[a][1]).

The prospect of perjury prosecutions arising from CCRB interviews could have an enormous adverse impact on the willingness of complainants to come forward that would go far beyond the small number of complainants who might not be entirely truthful. Moreover, there is no empirical basis to support the notion that civilian interviewees are commonly untruthful such that the threat of perjury is necessary. Rather, if anything, far too many officers have made false statements to the agency (*see* CCRB 2017 Semi-Annual Report at 24 [showing that the CCRB

documented 25 false police officer statements in 2014, 60 in 2015, 25 in 2016, and 10 in the first half of 2017]). Yet police officer false statements during CCRB investigations do not expose them to criminal perjury prosecutions (*see* Rule § 1-24[d] [explaining that the consequence of a false statement by police officer, per the NYPD Patrol Guide, is dismissal from employment]).

In order to avoid an interpretation of Rule § 1-24(l) that chills the willingness of civilians to participate in CCRB investigations, and thus that contravenes the Charter’s requirement that investigations be “complete” and “thorough,” this Court should make clear that Rule § 1-24(l) does not require sworn statements that could form the basis for criminal perjury prosecution.

### **III. THE CCRB’S REVISED RULE § 1-33 MUST BE INTERPRETED NARROWLY TO ADEQUATELY PROTECT POLICE OFFICERS’ DUE PROCESS RIGHTS**

Revised Rule § 1-33 changed the prior rule—which forbade any unsubstantiated, unfounded, or withdrawn complaints from serving as the basis for findings or recommendations—to forbid such complaints from serving as “the sole basis” for findings or recommendations. The primary disagreement between the parties as to this change revolves around whether the City Charter, which provides “nor shall prior unsubstantiated, unfounded or withdrawn complaints be the basis for any such finding or recommendation” permits any consideration of such complaints (NY City Charter § 440[c][1]).

Regardless of the merits of the statutory construction arguments at issue, *amici* maintain that the proposed change in rules lacks the necessary detail and nuance to adequately protect NYPD officers’ due process rights. While *amici* believe that there are circumstances in which past unsubstantiated complaints—which, according to the CCRB’s definitions merely indicate that “there was insufficient evidence to establish whether or not an act of misconduct occurred,” (*see* CCRB 2017 Semi-Annual Report at 50)—are properly considered in a CCRB investigation, they also believe other past complaints, and particularly the mere fact of past exonerated

complaints, should play no role in the CCRB's disposition of a case.

This is an area ripe for nuanced treatment, depending on the circumstances presented. For example, prior uncontested parts of unsubstantiated or unfounded complaints could properly be considered in a current investigation without undermining the rights of the accused. Similarly, the fact of prior false statements by a police officer in an unfounded case could be considered in evaluating the same officers' testimony in an open case. In contrast, the mere fact of past unfounded complaints should not serve as a basis for findings or recommendations in current cases (*cf. United States v Baylin*, 696 F2d 1030, 1040 [3d Cir 1982] [finding that "as a matter of due process, factual matters may be considered as a basis for sentence only if they have some minimal indicium of reliability beyond mere allegation. . . . [S]uch information must, either alone or in the context of other available information, bear some rational relationship to the decision to impose a particular sentence"]).

By amending this rule with a single word, the CCRB has elided important distinctions between the three dispositions that it governs, as well as the very different considerations that should apply to different types of information drawn from past complaints. This broad-brush approach risks violating officers' right to due process. This Court should construe Rule § 1-33 more narrowly in order to avoid this Constitutional concern.

### CONCLUSION

For the reasons described above, the Court should deny the plaintiffs-petitioners' petition regarding to the CCRB's sexual misconduct resolution.



Respectfully Submitted,



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Dated: June 27, 2018  
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