

COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT

SUFFOLK, SS.

2023 SITTING

SJC-13468

ERIC MACK

V.

OFFICE OF THE DISTRICT ATTORNEY
OF THE BRISTOL DISTRICT

AMICUS BRIEF OF NATIONAL POLICE ACCOUNTABILITY PROJECT
IN SUPPORT OF PLAINTIFF-APPELLEE ERIC MACK AND OF
AFFIRMANCE

Respectfully submitted,

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STATEMENT OF AMICUS CURIAE

Pursuant to Rule 17(c)(4) of the Massachusetts Rules of Appellate Procedure, the above-named Amicus Curiae, National Police Accountability Project, states as follows:

1. National Police Accountability Project is a 501(c)(3) non-profit organization dedicated to ending law enforcement abuse through legal action and educational programming, and to holding law enforcement accountable for misconduct. It submits this brief as amicus curiae in support of Plaintiff-Appellee and in favor of affirmance of the lower court's order compelling disclosure of the public records sought.

Further, Pursuant to Rule 17(c)(5), National Police Accountability Project hereby declares as follows:

1. no party or party's counsel authored this brief, in whole or in part;

2. no party or party's counsel, or any other person or entity, other than National Police Accountability Project, or their respective members or counsel, contributed money that was intended to fund the preparation or submission of this brief; and

3. Neither National Police Accountability Project nor its undersigned counsel represent or have represented one of the parties to the present appeal in another proceeding involving similar issues, and none of the foregoing have been a

party or have represented a party in a proceeding or legal transaction that is at issue in the present appeal.

ARGUMENT

I. The Genesis of Reform

A. **George Floyd’s murder prompts renewed calls for accountability and structural reform.**

The summer of 2020 brought a seismic shift in relations between United States law enforcement and the communities they serve. The seeds of that shift were planted in the early evening hours of May 25, 2020, when four Minneapolis police officers stopped an unarmed Black man accused of using a counterfeit \$20 bill at a convenience store. See Timeline of events since George Floyd’s arrest and murder, <https://apnews.com/article/george-floyd-death-timeline-2f9abbe6497c2fa4adaebb92ae179dc6>. After forcing the man to a facedown position on the ground, one officer pressed his knee into the man’s neck. *Id.* He and the other officers ignored the man’s and bystanders’ pleas to stop. *Id.* After approximately nine minutes, the man lost consciousness and was ultimately pronounced dead at a local hospital. *Id.* That man’s name—George Floyd—has come to signify a deep breakdown of trust and cooperation between law enforcement and those they are charged with protecting.

Graphic videos of Floyd’s murder from bystanders’ cell phones circulated the following day. *Id.* Outrage followed, which soon coalesced into large protests—

some unprecedented in scale—across the United States, including in communities across Massachusetts. Contemporary news coverage recounts the real-time erosion of trust between the people of Massachusetts and the police that summer, as law enforcement tactics in addressing the crowds came under intense scrutiny, and fed into the very narrative the protests decried. One Boston resident described their experience to the Boston Globe, “[The police] tear gassed us. They pepper sprayed us. They fired rubber bullets at us. They hit us with their cars. They ATTACKED us. Without any prompting. We were TRYING TO GO HOME.” Millar, Here’s what 6 Boston.com readers say they experienced at the George Floyd protests, <https://www.boston.com/news/local-news/2020/06/05/6-readers-share-their-experienced-from-george-floyd-protests/> (emphasis original); *see also* Video captures protesters, Boston Police clashing outside South End precinct, <https://www.wcvb.com/article/boston-protest-held-in-south-end-demanding-justice-for-george-floyd/32715976> (“Video from outside Boston’s District Four police precinct captured protesters clashing with police officers, and what appeared to be the use of pepper spray causing a commotion.”); Jochem, Northampton officials assess protest’s aftermath, <https://www.gazettenet.com/Northampton-Protest-Followup-34577543> (“Questions remained after the [peaceful] protest [in Northampton] ended, though, such as *why the state police were called in with riot gear.*”) (emphasis added); Millar, <https://www.boston.com/news/local->

[news/2020/06/05/6-readers-share-their-experiences-from-george-floyd-protests/](https://www.foxnews.com/2020/06/05/6-readers-share-their-experiences-from-george-floyd-protests/)

“I don’t blame people for acting out when the police come in and start engaging in violent tactics to disperse a peaceful crowd. We are NOT a police state.”) (emphasis original).

This erosion of trust threatened the safety of all—protester, bystander, and officer alike. See, e.g., Larocque, Mayhem in Brockton as protest ends in violent clash with police, vandalism,

<https://www.enterpriseneews.com/story/news/local/2020/06/03/mayhem-in-brockton-as-protest-ends-in-violent-clash-with-police-vandalism/114499160/>

“*One of those pepper sprayed was a bystander*, Boston Globe tech columnist Hiawatha Bray, who was live streaming the clash with police and demonstrators using his smartphone. Bray, who lives in Brockton, *[said] he just wanted to observe the protest.*”) (emphasis added); see also Eliopoulos, 10 arrested in clashes with Boston police during Friday night’s protests,

<https://www.wcvb.com/article/peaceful-protests-clashes-boston-police-george-floyd/32717686#> (noting four officers injured in Boston).

Separate and distinct from the violent clashes, the centerpiece of the peaceful demonstrations that summer was to seek greater accountability for police misconduct; one organizer told CBS Boston that “the arrest of the officer involved in Floyd’s murder is a step in the right direction, but ... *the protest has a bigger*

mission of applying pressure to hold police accountable for violence.” Protesters Clash With Officers Outside Boston Police Station, <https://www.cbsnews.com/boston/news/boston-south-end-protest-police-brutality-mass-action-against-police-brutality-george-floyd/> (emphasis added).

B. The Massachusetts Legislature acts.

In the midst of the upheaval following George Floyd’s murder, the Massachusetts Legislature began negotiating various police reform proposals aimed at increasing accountability and, ultimately, restoring trust between the people of Massachusetts and law enforcement. After months of negotiations and hearings, those efforts culminated in Senate Bill 2963, a reconciliation bill that passed the House of Representatives on December 1, 2020, and ultimately became law. See 2020 Mass. Legis. Serv. Ch. 253 (S.B. 2963) (WEST) (the “Amendment”).

In a floor statement advocating for the bill’s passage, one of its cosponsors, Representative Claire D. Cronin, identified a primary purpose of the bill: “We can’t allow the bad apples to cause the fine men and women of law enforcement to be smeared in the eyes of their community.” The General Court of the Commonwealth of Massachusetts, Formal Without Calendar House Session 114, <https://malegislature.gov/Events/Sessions/Detail/3794>, timestamp -1:42:08. She further explained that the bill’s reclassification of police misconduct records as

public records was, in particular, one of the “major points” of the legislation. *Id.* at timestamp -1:39:07.

Contemporary news coverage during the bill’s formation illustrates the public’s understanding of its purpose; contrary to the DA’s position in this case, the bill was expressly understood to cover open investigations as well as closed ones: “The bill clarifies that records on police misconduct investigations are subject to the public records law; *Many departments shield open investigations from public view.*” Brown & Jarmanning, Here’s What’s In The Massachusetts Police Reform Law, <https://www.wbur.org/news/2020/12/01/massachusetts-police-reform-legislation-explainer> (emphasis added). As former Cheshire County, New Hampshire Department of Correction Superintendent Rick Van Wickler observed that summer, “If the public felt confident the complaints were addressed in a sober, meaningful, serious way, there would be a lot more faith in police.” Fisher, Attorney: Police-involved shootings need civilian review, <https://manchesterinklink.com/attorney-police-involved-shootings-need-civilian-review/>. In other words, the policy concern underlying Senate Bill 2963 was the investigation itself and how it is conducted—not necessarily its ultimate conclusion.

The DA’s brief does not acknowledge the substantial shifts in police-community relations in recent years, nor does it acknowledge the contemporary context behind the Amendment or its updated purposes; instead, the DA cites a case

that predates the Amendment by decades and states the purpose of the Public Records Law is simply “to give the public broad access to governmental records.” Brief of the Defendant-Appellant at 22 (citing *Worcester Tel. & Gazette Corp. v. Chief of Police of Worcester*, 436 Mass. 378, 382-83 (2002)). This generalized statement of the law’s original purpose fails to embrace the heightened purposes of transparency, trust, integrity, and safety that drove the Legislature to change it in 2020. See The General Court of the Commonwealth of Massachusetts, Formal Without Calendar House Session 114, <https://malegislature.gov/Events/Sessions/Detail/3794>, timestamp -1:39:49 (noting, “Everyone, including our law enforcement, wants to protect our communities from the bad actors.”).

Of course, the DA does not (and cannot) dispute that the Amendment was enacted in direct response to the recent controversies surrounding police-involved shootings and the mistrust that grew in the aftermath of George Floyd’s murder; indeed, a significant number of high-profile police killings (including in Massachusetts) have occurred in the last several years, including:

- Terrence Coleman, Boston, Massachusetts, October 30, 2016 (Swasey & Rios, Mother Whose Son Was Fatally Shot By A Boston Cop Files A Civil Rights Lawsuit, <https://www.wbur.org/news/2018/04/04/coleman-shooting-lawsuit>);
- Juston Root, Boston, Massachusetts, February 9, 2020 (Family Identifies Man Shot And Killed By Police In Chestnut Hill Friday,

- <https://www.wbur.org/news/2020/02/09/brigham-and-womens-hospital-shooting-juston-root>);
- George Floyd, Minneapolis, Minnesota, May 25, 2020 (Timeline of events since George Floyd's arrest and murder, <https://apnews.com/article/george-floyd-death-timeline-2f9abbe6497c2fa4adaebb92ae179dc6>);
 - Breonna Taylor, Louisville, Kentucky, March 13, 2020 (Lovan, After Breonna Taylor death, feds find police discrimination, <https://apnews.com/article/breonna-taylor-louisville-justice-department-investigation-07017f9d2721e1b6f99494ea6b03f1f4>);
 - Elijah McClain, Aurora, Colorado, August 24, 2019 (Slevin & Brown, Neck hold used on Elijah McClain emerges as focal point in officers' trial over his 2019 death, <https://apnews.com/article/elijah-mcclain-death-trial-ketamine-neck-hold-1cb1479a84dff001dfd608446331b893>);
 - Justine Ruszczyk Damond, Minneapolis, Minnesota, July 15, 2017 (Baenen, Woman killed by Minneapolis officer 'yearned to help people', <https://apnews.com/article/minneapolis-australia-lawsuits-fe76ba4e05fd408d85a621ba52f7b2e0>);
 - Jordan Edwards, Balch Springs, Texas, April 29, 2017 (<https://www.vox.com/identities/2017/5/1/15499996/jordan-edwards-police-shooting-texas-balch-springs>);
 - Philando Castile, Falcon Heights, Minnesota, July 6, 2016 (<https://www.nbcnews.com/news/us-news/philando-castile-case-ex-officer-involved-fatal-shooting-gets-48-n781636>);
 - Alton Sterling, Baton Rouge, Louisiana, July 5, 2016 (DA recuses himself from Alton Sterling case over cop link, <https://www.cbsnews.com/news/alton-sterling-case-da-hillar-moore-recuses-himself-from-the-investigation/>); and
 - Daniel Shaver, Mesa, Arizona, January 18, 2016 (Friedersdorf, A Police Killing Without a Hint of Racism,

<https://www.theatlantic.com/politics/archive/2017/12/a-police-killing-without-a-hint-of-racism/546983/>).

In fact, in one of the as-yet few post-Amendment cases under the Public Records Law, the Massachusetts Superior Court recognized the law’s purpose goes deeper than giving the public access to governmental records: “‘*A citizenry’s full and fair assessment of a police department’s internal investigation* of its officer’s actions promotes the core value of trust between citizens and police essential to law enforcement and the protection of constitutional rights.’ ... *The ‘quintessential purpose* [of the internal affairs process] *is to inspire public confidence.*” *Gatehouse Media v. City of Worcester*, No. 1885CV1526A, 2021 Mass. Super. LEXIS 54, at *35-36, 2021 WL 2328416 (Worcester Sup. Ct. June 2, 2021) (quoting *Worcester Telegram & Gazette Corp. v. Chief of Police of Worcester*, 58 Mass. App. Ct. 1, 7-9 (2003)) (alteration original) (emphasis added). That court ultimately ordered production of un-redacted internal investigation records. *Id.* This Court should do the same and affirm the lower court’s summary judgment order.

II. **The DA’s Interpretation Undermines the Purposes and Frustrates the Achievability of the Amendment.**

The DA offers speculative concerns that compelling the disclosure Plaintiff seeks might chill both individuals’ cooperation with law enforcement investigations and the “open, frank inter-agency and intra-agency deliberations” regarding investigations, and that it might encourage those individuals who do cooperate to be

“less than candid” because they are “aware of what is to be expected in such interviews[.]” See, e.g., Brief of the Defendant-Appellant at 25-28, 30, 25, 40, 50-54 (citation omitted). And notably, all of the DA’s cited authorities on these points long predate the Amendment. *Id.*

Plaintiff’s concerns, by contrast, are far from speculative, and they fall squarely within the legislative purposes underlying the Amendment. Plaintiff articulates several serious, particular concerns regarding the integrity of the investigation in this case—concerns that, if true, cut to the heart of the government’s conclusion that the shooting was justified, including:

- inconsistent statements from one of the two officers at the scene stating first that Mr. Harden, the decedent, had a “knife,” then later admitting it was an “unknown object,” together with a total lack of any report of seeing a knife or any other possible weapon from anybody present at the scene during or shortly after the incident (Brief of Plaintiff-Appellee at 13);
- inconsistent and uncorroborated statements from investigating officers regarding the location of the knife (if any such knife exists), and whether the knife was found under the decedent’s body, near his feet, on the floor then moved to a desk, or on a desk and moved to the floor (*Id.* at 13-14);
- statements from the two officers present at the time of the shooting stating neither saw a knife after shots were fired, and a statement from a paramedic who moved Mr. Harden’s body who said he did not see any weapons under the body (*Id.* at 15-16);
- general confusion over who was present at the scene and when (*Id.* at 18);

- the redaction of the shooting officer’s statement shortly after the incident, in which she “asked a sergeant if she was going to be fired.” (*Id.* at 19);
- extensive redaction of an officer’s written statement concerning Mr. Harden’s autopsy report (*Id.* at 20).

Disclosure of the materials Plaintiff seeks—e.g., diagrams of the scene, photos and video of the scene and officers’ processing of the scene shortly after the incident, and witness statements, among other materials—directly addresses those concerns; disclosure will clarify the facts that were before the DA in the investigation, shine an objective light on the officers’ actions at the time of the shooting and shortly thereafter and, ultimately, enable an open, objective assessment of law enforcement’s actions surrounding Mr. Harden’s death. And regardless of whether the disclosure reaffirms or contradicts the DA’s conclusions, the disclosure itself is the essential concern; with transparency comes greater trust, which is integral to effective law enforcement and improved police-community relations—the core purposes of the Amendment. See The General Court of the Commonwealth of Massachusetts, Formal Without Calendar House Session 114, <https://malegislature.gov/Events/Sessions/Detail/3794>, timestamp -1:42:08 (“We can’t allow the bad apples to cause the fine men and women of law enforcement to be smeared in the eyes of their community.”).

Indeed, the evidence and academic literature confirm the direct relationship between transparency, accountability, and trust—that is, greater transparency leads

to greater trust and, ultimately, better outcomes for police and citizens alike. See, e.g., Luna, *Transparent Policing*, 85 IOWA L. REV. 1107, 1193 (2000) (“Undemocratic opaqueness in law enforcement policy and practice, however, is never harmless. ... At a minimum, [it] undermines the influence of law and the perceived integrity of its enforcers, fostering fear and animosity between police and minority citizens.”); Mason, et al., *Are Informed Citizens More Trusting? Transparency of Performance Data and Trust Towards a British Police Force*, 122 J. BUS. ETHICS 321, 321-41 (2013) (study finding that being informed of police performance data “affects citizens’ trust significantly”); Rozema & Schanzenbach, *Good Cop, Bad Cop: Using Civilian Allegations to Predict Police Misconduct*, 11 AM. ECON. J. 225, 259 (2019) (“[T]he results suggest that the investigation of civilian allegations should be taken more seriously. ... A more serious investigatory process would have the benefit of screening out frivolous allegations, improving the signal quality contained in allegations”); Tyler, *Why People Obey the Law*, 5 (2006) (“Of particular importance is the impact of [people’s] experiences [with legal authorities] on views of the legitimacy of legal authorities, because legitimacy in the eyes of the public is a key precondition to the effectiveness of authorities.”); Bell, *Police Reform and the Dismantling of Legal Estrangement*, 126 YALE L. J. 2054, 2144 (2017) (transparency in policing “[d]ata might alert scholars and activists to overlooked systemic problems, but ... could also illuminate police agencies and

officers that are doing their work properly. If one suspects that most police interactions go the way that they should, data and transparency can potentially be a boon to solidarity between officers and communities. Data can perhaps put what police actually do most of the time in clearer perspective.”); *id.* at 2059 (“Empirical evidence suggests that feelings of distrust manifest themselves in a reduced likelihood among African Americans to accept law enforcement officers’ directives and cooperate with their crime-fighting efforts.”) (citations omitted).

In short, the disclosure Plaintiff seeks will help foster precisely the kind of enhanced transparency, accountability, and trust that the Legislature sought to achieve when it passed the Amendment. Affirming the lower court’s order will help further these goals and therefore carry out the Legislature’s intent.

CONCLUSION

The events of summer 2020 fanned the flames of deep distrust between the public and law enforcement. In passing the Amendment, the Legislature sought to address this lack of transparency and accountability. The specific disclosures Plaintiff seeks bear a direct relation to the perceived legitimacy of the investigation surrounding Mr. Harden’s death and, ultimately, to the transparency and trust that lie at the heart of the Public Records Law and its recent amendments. National Police Accountability Project respectfully requests this Court affirm the lower court’s order compelling disclosure.

Respectfully submitted,

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DATED: November 15, 2023.

CERTIFICATE OF COMPLIANCE
Pursuant to Rule 16(k) of the
Massachusetts Rules of Appellate Procedure

I, David Milton, hereby certify that the foregoing brief complies with the rules of court that pertain to the filing of briefs, including, but not limited to: Rule 16(a)(13) (addendum); Rule 16(e) (references to the record); Rule 17 (brief of an amicus curiae), Rule 18 (appendix to the briefs); Rule 20 (form and length of briefs, appendices, and other documents); and Rule 21 (redaction).

The foregoing brief complies with the applicable length limitation in Rule 20(a)(3)(E) because it was produced in Microsoft Word Version 2208 in proportional Times New Roman, 14-point font and contains 2,666 non-excluded words.

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CERTIFICATE OF SERVICE
Pursuant to Rule 13(e) of the
Massachusetts Rules of Appellate Procedure

I, David Milton, hereby certify, under penalty of perjury, that on November 15, 2023, I made service of the foregoing AMICUS BRIEF OF NATIONAL POLICE ACCOUNTABILITY PROJECT IN SUPPORT OF PLAINTIFF-APPELLEE ERIC MACK AND OF AFFIRMANCE, on behalf of Amicus Curiae National Police Accountability Project upon the following counsel of record via the Electronic Filing System eFileMa.

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