

EXHIBIT A

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

POLICE BENEVOLENT ASSOCIATION OF THE CITY OF NEW YORK, INC., PATRICK J. LYNCH, as President of the Police Benevolent Association of the City of New York, Inc., SERGEANTS BENEVOLENT ASSOCIATION OF THE CITY OF NEW YORK, and VINCENT J. VALLELONG, as President of the Sergeants Benevolent Association of the City of New York,

Plaintiffs-Petitioners,

-against-

NEW YORK CITY CIVILIAN COMPLAINT REVIEW BOARD and ARVA RICE, in her official capacity as Chair of the New York City Civilian Complaint Review Board,

Defendants-Respondents.

Index No. 150441/2023

IAS Part 41

(Billings, J.)

PROPOSED BRIEF OF AMICUS CURIAE THE NEW YORK CIVIL LIBERTIES UNION IN SUPPORT OF DEFENDANTS-RESPONDENTS THE NEW YORK CITY CIVILIAN COMPLAINT REVIEW BOARD AND ARVA RICE

NEW YORK CIVIL LIBERTIES UNION
FOUNDATION

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PRELIMINARY STATEMENT

Before this court is the important question about whether the New York City Civilian Complaint Review Board had sufficient justification for promulgating a rule authorizing it to investigate instances of improper use of body-worn cameras by NYPD officers that arise during their investigations of civilian complaints. From its inception, the NYPD's BWC program's express purposes were to increase police accountability and transparency. Amicus curiae, the New York Civil Liberties Union, submits this brief to highlight three compelling reasons why independent oversight over the improper use of BWCs is necessary to effectuate these important goals. First, amicus curiae highlights the important role properly recorded BWC footage plays in police oversight and accountability efforts. Second, the NYCLU discusses the NYPD's historic inability to police itself, which underscores the need to remedy problems of BWC violations. Third, amicus curiae explains how the CCRB's mission and mandate uniquely position the agency to further transparency and public understanding around the issue of BWC misuse by NYPD officers.

This case is the latest in a series of challenges by the police unions to the New York City CCRB's efforts to improve its operations and better address the issues of NYPD misconduct, police accountability, and transparency. Contrary to the police unions' contentions, the CCRB's decision to investigate improper BWC use is amply justified and necessary. The Court should uphold the CCRB's rule and reject the petitioners-plaintiffs request to enjoin the CCRB's ability to conduct these investigations.

STATEMENT OF INTEREST OF AMICUS CURIAE

The New York Civil Liberties Union ("NYCLU") is the New York State affiliate of the American Civil Liberties Union. The NYCLU is a nonprofit, nonpartisan organization committed

to the defense and protection of civil rights and civil liberties, with over 85,000 members across the State. The NYCLU has brought many court challenges seeking police accountability and transparency, including serving as lead counsel in *Ligon v City of New York* (925 F Supp 2d 478 [SDNY 2013]), one of three landmark cases that exposed the NYPD's unlawful use of stop-and-frisk tactics and racial profiling of Black and Latinx New Yorkers. It has also served as amicus curiae in other challenges to the CCRB's administrative rules (*see Lynch v NYC CCRB*, 206 AD3d 558 [1st Dept 2022]). 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 promote police transparency and accountability. The NYCLU submitted written comments and testimony generally supporting the CCRB rules challenged in this litigation.

ARGUMENT

I. THE CCRB'S RULE CONCERNING BODY-WORN CAMERAS ARE NECESSARY TO EFFECTUATE THE NYPD'S BODY-WORN CAMERA PROGRAM'S GOALS OF INCREASED POLICE ACCOUNTABILITY AND TRANSPARENCY.

A central issue before this Court is whether the CCRB had a rational basis for promulgating a rule authorizing it to investigate the improper use of body-worn cameras. As detailed below, the NYCLU respectfully submits that three important considerations support the CCRB's rule.

Before turning to those considerations, however, the NYCLU provides important historical context that bears upon the CCRB's rational basis for the rule. The NYPD's Body-Worn Camera ("BWC") program is largely a consequence of NYPD's historic policy of racial profiling and unlawful stop-question-and-frisks and trespass enforcement, which targeted Black and Latinx people in New York City. In a challenge to these practices, and after a finding of their unconstitutionality, a federal court ordered a one-year BWC pilot program as part of its remedial

order (*Floyd v City of New York*, 959 F Supp 2d 668, 685 [SDNY 2013]). In ordering the pilot, the Court discussed the potential benefits of BWCs, including that they “provide a contemporaneous, objective record of stops and frisks, allowing for the review of officer conduct by supervisors and the courts,” and could confirm or refuse allegations of misconduct, particularly biased-based policing. (*Id.*) The NYPD eventually expanded its BWC use past the court-ordered pilot in three phases (NYPD, Body-Worn Cameras, <https://www.nyc.gov/site/nypd/about/about-nypd/equipment-tech/body-worn-cameras.page> [last accessed May 2, 2023]). At each phase of the program’s development, the intended transparency and accountability goals were made clear (*see id.* [discussing the purpose of BWCs as *inter alia* “provid[ing] a contemporaneous, objective record of encounters” between the police and the public and “foster[ing] accountability”]; *see also Floyd*, 959 F Supp 2d at 696-698; Samar Khurshid, *NYPD Publishes Long-Sought Body Camera Footage Policy*, Gotham Gazette, Nov. 1, 2019, <https://www.gothamgazette.com/city/8896-nypd-releases-body-camera-footage-policy> [“Mayor Bill de Blasio has repeatedly called the institution of body cameras a major step forward in NYPD transparency and accountability”]). Indeed, then-mayor Bill de Blasio recognized that BWCs “are only as powerful as the transparency that comes with them,” and “only work[] if people see accountability, see results from the presence of those cameras.” (*See* Ethan Geringer-Sameth, *Under New Body Camera Policy, NYPD Still Controls the Video and the Narrative*, Gotham Gazette, Sept. 2, 2020, <https://www.gothamgazette.com/city/9723-new-body-camera-policy-nypd-controls-video-narrative>.)

It is also important to note that while BWCs are recognized as important police-oversight and compliance-measuring tools, various stakeholders and community groups expressed their concern and apprehension about their potential abuse by law enforcement. Specifically, people

voiced their concerns that BWCs would be used not as tools for police accountability and transparency as intended, but rather as tools for surveillance and continued targeting of heavily-policed and marginalized communities, including Black and other communities of color, by the NYPD (*see generally* Council of City of NY Intro No. 1136, hearing testimony [Nov. 18, 2019] [“Intro No. 2018-1136 Hearing Testimony”], available at <https://legistar.council.nyc.gov/View.ashx?M=F&ID=7928770&GUID=B7ACDF7C-614E-4D76-A0CE-1D26EF40F49C>; Ian Head & Darius Charney, *Don’t Let N.Y.P.D. Co-opt Body-Cameras*, NY Times, Apr. 27, 2017, <https://www.nytimes.com/2017/04/27/opinion/dont-let-the-nypd-co-opt-body-cameras.html>; *see also* Catherine Chapman, *Police Body Cams Spark Concerns About Privacy, Mass Surveillance*, NBC News, Dec. 4, 2016, <https://www.nbcnews.com/news/us-news/police-body-cams-spark-concerns-about-privacy-mass-surveillance-n690536>). In addition to concerns about surveillance and privacy, under-recording and other improper uses of BWCs raise additional concerns that BWCs will, in practice, undermine police accountability and oversight efforts by providing incomplete records of encounters. The susceptibility of BWCs to abuse underscores the importance of monitoring for and investigating improper BWC use by independent agencies like the CCRB.

In light of the history and stated purpose of NYPD’s BWC program, the use and utility of BWCs must be viewed through the lens of police accountability, particularly for redressing biased-based, abusive, and unconstitutional policing. BWCs can be important tools for accountability and compliance-monitoring and bring about much-needed transparency into how the NYPD conducts itself during encounters with the public. To preserve these values, however, the need to ensure BWCs are not being abused or manipulated is crucial. As explained below, the CCRB’s investigations of improper use of BWCs by the NYPD will help address these abuses and increase

transparency around the issue, thus providing compelling justification for the rule.

A. BWCs Play a Critical Role in Police Accountability and Compliance-Monitoring Efforts, But Their Improper Use Undermines Such Efforts.

The CCRB has spoken directly to the concern about improper BWC use, such as under-recorded encounters, undermining the agency's own investigatory and accountability efforts (*see* NY St Cts Elec Filing [NYSCEF] Doc No. 4, CCRB BWC Memo; NYC CCRB, *Strengthening Accountability: The Impact of the NYPD's Body-Worn Camera Program on CCRB Investigations* [2020],

https://www1.nyc.gov/assets/ccrb/downloads/pdf/policy_pdf/issue_based/20200227_BWCReport.pdf). As explained by the CCRB, investigating and adequately disciplining this type of BWC misuse supports the CCRB's police accountability work (*see* NYSCEF Doc No. 4). Considering the express privacy concerns voiced by advocates of heavily-policed and marginalized communities, the CCRB's rule has an additional benefit of exposing incidents of recording of encounters that should not be recorded and possible surveillance. The CCRB's documented encounters with and concerns about BWC misuse alone provide strong support for its rule.

Even more support for the rule comes from the importance of *properly* recorded BWC footage outside the CCRB context. As participants in the federal-court monitorship over the NYPD, which resulted from the aforementioned findings that the NYPD had engaged in unconstitutional policing and racial profiling, the NYCLU witnesses first-hand the impact of BWC footage on the monitoring process and the monitor's assessment of compliance with various remedial efforts the NYPD is required to implement. For example, as reported by the court-appointed monitor, one persistent and significant obstacle in accurately measuring the NYPD's compliance with remedial efforts is officers' failure to document their stops in writing (*see* Peter Zimroth, *Eleventh Report of the Independent Monitor* at 13-14 [2020],

<https://www.nypdmonitor.org/wp-content/uploads/2022/09/11th-Report-Submission-2.pdf>

[“NYPD Monitor 11th Report”]). Without such documentation, auditing and other monitoring efforts are significantly impacted and remain incomplete. (*See id.*) Consequently, participants in the monitorship cannot fully assess the NYPD’s progress in implementing important remedial efforts. (*See id.* at 13 [“If the NYPD’s data is not accurate and complete, the Monitor cannot find that the City is in substantial compliance”].) However, “BWCs *used properly* can be useful tools for reducing the underreporting of stops and the number of unlawful stops by making stops more transparent” even absent written documentation (*see* Mylan Denerstein, *Seventeenth Report of the Independent Monitor: The Deployment of Body Worn Cameras on NYPD Housing Bureau Officers Assigned to Police Service Areas* at 4 [2022], <https://www.nypdmonitor.org/wp-content/uploads/2022/10/2022.10.17-Dkt.-894-Seventeenth-Report-of-the-Independent-Monitor.pdf> [emphasis added]). BWC footage can also reveal stops that have not been properly documented (*see* NYPD Monitor 11th Report at 16-17). BWC are clearly an integral part of the monitorship’s compliance assessments but can only support remedial efforts when footage gives a full and neutral account of police encounters with civilians (*see e.g. id.* at 15-17 [describing the role of BWC footage in the monitor’s auditing process]; *id.* at 27, 35 [describing how “BWC video recordings are assessed to explore the lawfulness of encounters between police officers and members of the public”]).

In addition to undermining police oversight and accountability efforts, the improper use of BWC has real-world consequences for New Yorkers. Advocacy organizations have highlighted in legislative testimony that “officers have exploited [BWCs] in order to avoid recording stops and searches of individuals ‘suspected of criminal activity’” and described the impact of this misuse on their clients and their clients’ cases, including depriving courts and defendants “a neutral and

objective view” of street encounters (*see* Intro No. 2018-1136 Hearing Testimony [Written Testimony from The Bronx Defenders and The Legal Aid Society]).

So long as the NYPD utilizes BWCs, the NYPD and oversight agencies must ensure that BWCs are used properly to best effectuate its intended purpose to increase police accountability and transparency. The prevalence and significance of BWCs in the context of NYPD monitoring, oversight, misconduct investigations, and criminal cases thus offers compelling justification for the CCRB’s independent investigations into their misuse.

B. The NYPD’s Inability & Unwillingness to Police Itself Highlights the Importance of Independent Investigations by Agencies Like the CCRB.

Entrenched institutional issues within the NYPD’s offer further justification for the CCRB’s decision to investigate improper use of BWCs. To start, the NYPD’s history of mishandling other, more serious forms of officer misconduct inspires little confidence that the NYPD will thoroughly investigate BWC misuse and adequately discipline officers for violations. For instance, the NYPD’s Internal Affairs Bureau (“IAB”) has a well-documented history of inadequate investigations of officer misconduct, particularly those stemming from civilian complaints. Independent assessments of IAB investigations have demonstrated significant deficiencies in the IAB’s handling of misconduct investigations (*see, e.g.* Commn to Combat Police Corruption, *Nineteenth Annual Report* at 27-25 [2019], <https://www.nyc.gov/assets/ccpc/downloads/pdf/Annual-Nineteen-Report.pdf> [identifying various deficiencies in the IAB’s handling of investigations and noting that “the Commission’s satisfaction rate with the questioning in these interviews has declined significantly from 2014”]). IAB’s deficiencies particularly affect its ability to thoroughly, impartially, and fairly investigate serious misconduct that impacts marginalized communities. For example, in 2019 the Inspector General for the NYPD noted various deficiencies in the IAB’s handling of biased policing and

racial profiling allegations, including the fact that the NYPD sustained not one out of 2,495 allegations of biased policing (*see* NYC Dept of Investigation’s Inspector Gen for the NYPD, *Complaints of Biased Policing in New York City: An Assessment of NYPD’s Investigations, Policies, and Training* [June 2019], https://www1.nyc.gov/assets/doi/reports/pdf/2019/Jun/19BiasRpt_62619.pdf). And the NYPD monitor reported that “in 2019 and 2020, the Monitor Team reviewed NYPD investigations of profiling complaints and found significant concerns regarding their thoroughness and impartiality” (Mylan Denerstein, *Sixteenth Report of the Independent Monitor* at 94 [2022], <https://www.nypdmonitor.org/wp-content/uploads/2022/09/16-Sixteenth-Report-.pdf> [“Monitor’s 16th Report”]). In the area of unconstitutional stops, the federal court in *Floyd* found that despite mounting evidence of bad stops and a failure to document those bad stops, the NYPD “refuse[d] to impose meaningful discipline, and fail[ed] to effectively monitor the responsible officers for future misconduct.” *Floyd v City of New York*, 959 F Supp 2d 540, 561 & 617 [SDNY 2013]. Though the aforementioned NYPD monitorship is tasked with remedying these issues, more recent reporting suggests a continued resistance by the NYPD to police accountability (*see* Monitor’s 16th Report at 10-11, 14-15; Graham Rayman, *NYC Police Commissioner Sewell Overruled More Than 70 CCRB Discipline Rulings in 2022*, NY Daily News, Dec. 14, 2022, <https://www.nydailynews.com/new-york/nyc-crime/ny-nypd-keechant-sewell-ccrb-overturned-decisions-20221214-7453y6qdrjhs5bk45opqupay6a-story.html>).

Transparency into how the NYPD handles internal misconduct is also an issue and it remains unclear how the NYPD handles, in practice, violations of its policy (*see* NYSCEF Doc No. 13 [providing a high-level overview of the NYPD’s internal auditing practices]) and it appears not to publish data regarding the number of violations it finds or the ways in which it addresses those violations. By contrast, the CCRB is required to report on its investigations and operations

and has historically been a critical source of information on NYPD misconduct and disciplinary actions (*see* Section I.C., *infra*).

Though the NYPD has been notoriously opaque about how it handles internal misconduct by its officers, the limited publicly available information that does shed light on internal NYPD investigations and discipline raises serious questions about the NYPD's ability and willingness to police itself. This history of systemic issues suggest that the NYPD is unlikely to take seriously BWC violations. Given the lack of confidence in the NYPD's ability to monitor and investigate BWC violations, investigations of this conduct by independent agencies like the CCRB remain the best way to further the public's interest in fair, impartial, thorough misconduct investigations (*see* NY City Charter § 440[a]) and further supports the CCRB's rational basis for its rule.

C. Given Its Mission & Mandate, the CCRB's Investigations of Improper Use of BWCs Will Provide Needed Transparency and Public Understanding Around the Issue.

The CCRB's investigations into the improper use of BWCs serve distinct public-reporting and policy values that are specifically within the CCRB's mission and mandate. The CCRB's handling of these investigations will help address a lack of transparency on the scale of the issue and can promote police accountability and much-needed institutional changes within the NYPD.

First, the CCRB's engagement with the public is ever the more important given intense public scrutiny around policing and public demands for transparency about police misconduct and meaningful accountability. Because the CCRB is required to issue semi-annual reports "describ[ing] its activities" and "develop and administer an on-going program for the education of the public" about its functions (NY City Charter § 440 [c][6]-[7]), ensuring independent investigations by the CCRB over BWC misuse will necessarily increase transparency and public understanding around this important issue.

Indeed, it has been the NYCLU's experience that the CCRB is thoroughly committed to

transparency. And the value of the CCRB's transparency is amplified when considering the NYPD's historical preference for secrecy over matters of officer misconduct. For example, in the wake of New York's repeal of Civil Rights Law Section 50-a, which had shielded police disciplinary records from public view for decades, the CCRB provided the public with unprecedented access to critical police disciplinary records, regardless of their case disposition (see James D. Walsh, NY Mag, *The City Just Released a Massive NYPD-Misconduct Database*, Mar. 4, 2021, <https://nymag.com/intelligencer/2021/03/the-city-just-published-a-massive-nypd-misconduct-database.html>). By contrast, and though the NYPD holds a much larger universe of police misconduct records, the NYPD later published a limited, narrower database (see Jake Offenhartz, Gothamist, *New NYPD Database Offers "Narrow" Glimpse at Police Disciplinary Records*, Mar. 9, 2021, <https://gothamist.com/news/new-nypd-database-offers-narrow-glimpse-police-disciplinary-records>) and continues to resist providing public access to a broader swath of records (see e.g. *Rickner PLLC v City of New York*, 2022 WL 1664298, *2 [Sup Ct, NY County 2022, Index No. 157876/2021] [arguing against the release of unsubstantiated misconduct records]). The CCRB's investigations can thus provide the public with increased transparency around the issue of improper BWC use. Armed with more information, the public can better advocate for more meaningful police accountability.

Second, the CCRB can play an important role in shaping NYPD policy by handling investigations of BWC violations. Through its tracking and regular reporting of the investigations it handles, combined with its mission of advocating for NYPD policy change, the CCRB will be better positioned to recommend and report on specific policy changes needed within the NYPD.

CONCLUSION

The CCRB's rule authorizing it to investigate the improper use of BWCs is not only rational, but necessary. The NYCLU of course recognizes that even if the CCRB is authorized to

conduct investigations into the improper use of BWCs, it is still subject to significant limitations in ushering adequate discipline for officer misconduct given the NYPD's exclusive authority over final disciplinary determinations. Notwithstanding such limitations, for the all the reasons outlined above, the NYCLU believes that the CCRB remains the best available venue for these investigations. Therefore, the Court should uphold the CCRB's rule.

Dated: May 2, 2023
New York, N.Y.

Respectfully Submitted,

NEW YORK CIVIL LIBERTIES UNION
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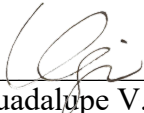
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CERTIFICATE OF COMPLIANCE WITH 22 NYCRR §202.8-b

I hereby certify that:

This brief complies with the word count limitation of 22 NYCRR §202.8-b because the total word count, according to the word count function of Microsoft Word, the word processing program used to prepare this document, of all printed text in the body of the brief, exclusive of the caption, table of contents, table of authorities and signature block is 3,621.

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