

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION – SECOND DEPARTMENT

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In the Matter of Letitia James, etc., Appellant,
v. Daniel Donovan, etc., Respondent-respondent.
(Index No. 080304/14)

In the Matter of Legal Aid Society, Appellant,
v. Daniel Donovan, etc., Respondent-respondent.
(Index No. 080296/14)

In the Matter of New York Civil Liberties Union,
Appellant, v Daniel Donovan, etc., Respondent.
(Index No. 080307/14)

In the Matter of NYP Holdings, Inc., etc., Petitioner,
v. Daniel Donovan, etc., Respondent.
(Index No. 080308/14)

In the Matter of Staten Island Branch of National
Association for Advancement of Colored People,
etc., et al., Appellants, v. Daniel Donovan, etc.,
Respondent-respondent.
(Index No. 080009/15)
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Richmond County
AD No. 2015-02774
Index No. 080296/14

**NOTICE OF
MOTION FOR
LEAVE TO FILE
BRIEF AS AMICUS
CURIAE**

PLEASE TAKE NOTICE that, upon the annexed affirmation of Andrew Stoll, dated May 12, 2015, The New York State Black, Puerto Rican, Hispanic and Asian Legislative Caucus of the New York State Legislature will move this Court at a term of the Appellate Division of the Supreme Court, Second Department, at the Courthouse located at 45 Monroe Place, Brooklyn, NY 11201 on May 29, 2015, at 9:30 a.m., or as soon thereafter as counsel may be heard, for an order

granting leave to file a brief as *amicus curiae* in support of Plaintiff-Appellant
Letitia James.

Dated: May 12, 2015
New York, N.Y.

By: _____
Andrew B. Stoll
Stoll, Glickman & Bellina LLP
475 Atlantic Avenue, Third Floor
Brooklyn NY 11217
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astoll@stollglickman.com

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Richmond County
AD No. 2015-02774
Index No. 080296/14

**AFFIRMATION
IN SUPPORT OF
MOTION FOR
LEAVE TO FILE
BRIEF AS AMICUS
CURIAE**

Andrew Stoll, an attorney admitted to practice in the State of New York, hereby affirms under penalty of perjury:

1. I am the attorney for the members of the New York State Assembly and Senate joining in the proposed *amicus curiae*. I am familiar with the legal issues involved in the above-captioned action. I submit this affirmation in support

of the legislators' motion for leave to file the accompanying brief as *amicus curiae* in support of Plaintiff-Appellants.

2. The proposed *amicus curiae* brief is submitted on behalf of the Black, Puerto Rican, Hispanic and Asian Legislative Caucus, which consists of over 50 members of the New York State Assembly and Senate. Their goal is to champion a legislative agenda that benefits all residents of New York State, including the poor and most vulnerable populations.

3. Also individually joining the proposed brief are Hon. Liz Krueger, Senate District 28, Hon. Velmanette Montgomery, Senate District 25, Hon. Kevin S. Parker, Senate District 21, Hon. Jose Rafael Peralta, Senate District 13, Hon. Bill Perkins, Senate District 30, Hon. Gustavo Rivera, Senate District 33, Hon. James Sanders, Jr., Senate District 10, Hon. Thomas J. Abinanti, Assembly District 92, Hon. Rodneyse Bichotte, Assembly District 42, Hon. Michael Blake, Assembly District 79, Hon. Marcos Crespo, Assembly District 85, Hon. Maritza Davila, Assembly District 53, Hon. Mark Gjonaj, Assembly District 80, Hon. Richard N. Gottfried, Assembly District 75, Hon. Latoya Joyner, Assembly District 77, Hon. N. Nick Perry, Assembly District 58, Hon. Dan Quart, Assembly District 73, Hon. Annette M. Robinson, Assembly District 56, Hon. Linda B. Rosenthal, Assembly District 67, Hon. Rebecca A. Seawright, Assembly District 76, Hon. Luis R. Sepulveda, Assembly District 87, Hon. Jo Anne Simon, Assembly District 52,

Hon. Latrice Walker, Assembly District 55, and Hon. Keith L.T. Wright, Assembly District 70.

4. As members of the New York State Assembly and Senate, proposed amici have a responsibility to enact laws for the benefit of the public. In the wake of the death of Eric Garner these legislators have worked to increase oversight and transparency in the grand jury cases involving civilian deaths at the hands of police officers. In creating legislation the State Legislature frequently considers the positions of city wide elected officials, well as various public interest groups such as the Appellants in this action. Proposed amici specifically value appellants' input and opinion in guiding reforms to the legal process.

5. The proposed *amicus curiae* speaks to the importance of the disclosure of the minutes from the Grand Jury's proceedings in the investigation into the death of Eric Garner at the hands of police, and to the manner in which that information will affect the legislature's future deliberations. The informed position of the appellants could have significant influence on future legislation. The *amicus curiae* brief speaks to the importance of the information sought to the missions of the appellants, and its potential impact on amici.

6. The unique perspective of the above named legislators is relevant to the questions considered by the Court in the consolidated appeals, and will, respectfully, be helpful to resolving the issues on appeal.

7. The parties are not capable of a full and adequate presentation, and movants can remedy this deficiency, in that movants are in the unique position of being able to accurately and specifically convey the compelling and particularized need of the New York State Legislature for access to the Garner Grand Jury proceedings, and input from the Public Advocate concerning those proceedings.

8. Movants can identify law or arguments that might otherwise escape the Court's consideration.

9. All parties to the consolidated appeal were contacted and there were no objections to the members of the New York State Assembly and Senate who join in this brief filing a brief as *amicus curiae*.

10. Lastly, because of their interest in this issue, should this motion to file the enclosed brief be granted, the joining legislators request leave to present argument to the Court on the day set for oral argument. They request five minutes before the Court.

11. In support of this motion the following exhibits are included:

- A. An accurate copy of the order and decision appealed from;
- B. An accurate copy of the notice of appeal,
- C. the proposed *amicus curiae* brief.

WHEREFORE, I respectfully request that this Court enter an order (i) granting the undersigned members of the New York State Assembly and Senate,

leave to submit their brief as *amicus curiae* in support of Plaintiff-Appellants; (ii) accepting the brief that has been filed and served along with this motion; (iii) granting the undersigned members of the New York State Assembly and Senate leave to argue before the Court on the date set for argument of the appeal; and (iv) granting such other and further relief as this Court deems just and proper.

May 12, 2015
Brooklyn, New York

By: _____
Andrew Stoll
Stoll, Glickman & Bellina LLP
475 Atlantic Avenue, Third Floor
Brooklyn NY 11217
718-852-3710
astoll@stollglickman.com

EXHIBIT A

At a Civil Term, Part 22 of the Supreme Court of the State of New York, held in and for the County of Richmond, at the Courthouse thereof, 18 Richmond Terrace, Staten Island, New York, on 19th day of March 2015.

P R E S E N T:

THE HONORABLE WILLIAM E. GARNETT, J.S.C.

In the Matter of the Investigation into the Death of
Eric Garner,

DECISION AND ORDER

Richmond County
Index Numbers:

Letitia James, New York City Public Advocate,

080304/2014

The Legal Aid Society,

080296/2014

The New York Civil Liberties Union,

080307/2014

NYP Holdings, Inc. a/k/a New York Post, and

080308/2014

The Staten Island Branch of The National Association
For The Advancement of Colored People and The
New York State Conference of Branches of The
National Association For The Advancement of Colored
People,

080009/2015

Petitioners,

-against-

DANIEL DONOVAN, Richmond County District
Attorney,

Respondent.

INTRODUCTION

On July 17, 2014, Eric Garner died during a confrontation with New York City police officers.

The interaction between Mr. Garner and the police was recorded on a cellular phone. Ultimately, and before a grand jury heard the evidence in this case, that tape and the findings of the Medical Examiner's autopsy of Mr. Garner were widely disseminated. Very few members of the public had not formed an opinion about the conduct of the police.

A grand jury was convened on September 29, 2014 to examine the evidence concerning the death of Mr. Garner. On December 3, 2014, the grand jury concluded its inquiry and did not charge any person with the commission of a crime. Thereafter, the District Attorney summarized the grand jury's investigation in a statement authorized by another judge of this court. No grand jury testimony was disclosed in this statement.

In separate motions, the Public Advocate of the City of New York, the Legal Aid Society, the New York Civil Liberties Union (hereinafter, NYCLU), the National Association for the Advancement of Colored People (hereinafter, NAACP) and the owner of the New York Post moved this court to release the minutes of the grand jury pursuant to Criminal Procedure Law § 190.25 (4) (a). The District Attorney opposed the disclosure.

GRAND JURY SECRECY

The Constitution of the State of New York provides that “no person shall be held to answer for a capital or otherwise infamous crime [i.e., a felony] . . . unless on indictment of a grand jury . . .” (NY Const Art I, § 6). Thus, a district attorney may not prosecute a person for a felony or other crime in the Supreme Court without the acquiescence of a grand jury made up of lay jurors. The grand jury's decision to charge a person is manifested when it files an indictment with the Supreme Court.

This constitutional provision is implemented by Article 190 of the Criminal Procedure

Law. Pertinent to these motions is the admonition contained in CPL 190.25 (4) (a) that grand jury proceedings are secret and, in general, no person may disclose the nature or substance of any grand jury testimony without the written approbation of a court. This prohibition is enforced by Penal Law § 215.70 which makes it a felony to disclose grand jury testimony. The only exception to this proscription is that a person may disclose the substance of his/her testimony without approval. CPL 190.25 (4) (a).

Despite these statutory rules, the secrecy of grand jury testimony is not sacrosanct and the minutes of a grand jury may be divulged, in a court's discretion, in the appropriate case. *Matter of District Attorney of Suffolk County*, 58 NY2d 436 (1983). In general, disclosure is the exception to the rule. *Id.* at 444.

The law is bottomed on the "presumption of confidentiality [which] attaches to the record of grand jury proceedings." *People v Fetcho*, 91 NY2d 765, 769 (1998). To overcome the presumption of confidentiality, a movant must initially demonstrate "a compelling and particularized need for access to the Grand Jury material." *Matter of District Attorney of Suffolk County*, 58 NY2d at 444. This showing is required to demonstrate how a party has a basis to seek relief from a court. Moreover, the mere fact that disclosure is sought by a government agency will not necessarily warrant the breach of grand jury secrecy, nor will the mere general assertion that disclosure will be in the public interest. *Matter of District Attorney of Suffolk County*, 58 NY2d at 444-445.

Thus, each movant must first show a "compelling and particularized need" such as to demonstrate that the party has a greater stake in the disclosure than does any other citizen - even one critical of the grand jury's decision. The movant must explain the purpose for which the party seeks access to the minutes. *Id.* at 444.

Simply put, what would the movant do with the minutes if the movant got them?

Only after such a showing will a court move on to balance the competing interests in deciding whether to grant disclosure.

COLLATERAL ESTOPPEL

The earlier application of the District Attorney to another judge of this court for a limited disclosure does not collaterally estop the District Attorney from arguing in these cases that the movants do not have a “compelling and particularized need” for disclosure.

First, the District Attorney only asked for a limited summary of the work of the grand jury. No grand jury testimony or the substance of any testimony was released.

More to the point, as will be explained later in this decision, each party must show a “compelling and particularized need.” Thus, even if the first judge was satisfied that the District Attorney had established a need for a summary, that decision does not preclude the District Attorney from opposing these motions or excuse these movants from making the requisite showing of a “compelling and particularized need.”

“COMPELLING AND PARTICULARIZED NEED”

In those cases in which relief has been granted, the successful movant has demonstrated a nexus between the grand jury minutes and a “compelling and particularized need” for those minutes. *People v DiNapoli*, 27 NY2d 229 (1970) (Public Service Commission needed the minutes to adjust rates after a grand jury investigation had revealed evidence of “bid rigging”); *Matter of Quinn [Guion]*, 293 NY 787 (1944) (limited disclosure was allowed for the purpose of the removal of a village tax collector pursuant to the Public Officers Law); *People ex rel Hirshberg v Board of Supervisors*, 251 NY 156 (1929) (a Commissioner sought reimbursement from the District Attorney for the county); *Matter of Aiani v Donovan*, 98 AD3d 972 (2d Dept 2012) (bank records subpoenaed from the United Arab Emirates for a grand jury investigation, not the minutes, were disclosed where the movant had no other means to execute on a large civil judgment); *Jones v State*, 62 AD2d 44 (4th Dept 1978) (statements made by witnesses, not grand jury minutes, were given to the state police for disciplinary proceedings); *Matter of City of Buffalo*, 57 AD2d 47 (4th Dept 1977) (the city’s corporation counsel needed grand jury minutes to sue persons who had been

paid for “no show” jobs); *Matter of Scotti*, 53 AD2d 282 (4th Dept 1976) (limited release to State Police superintendent and Correction commissioner for disciplinary actions); *People v Lindsey*, 188 Misc2d 757 (Cattaraugus County Ct 2001) (in a sixty-five [65] year-old murder case in which the grand jury minutes had earlier been released by the prosecutor, the defendant’s son was given access to the minutes to ensure the accuracy of a prospective movie script); *People v Cipolla*, 184 Misc2d 880 (Rensselaer County Ct 2000) (in a case in which the grand jury minutes had earlier been released, the minutes were given to litigants to further a federal lawsuit); *Matter of FOJP Service Corp.*, 119 Misc2d 287 (Sup Ct, New York County 1983) (a nonprofit employer sought grand jury minutes to further a “RICO” civil suit against attorneys who had unethically approached prospective clients); *People v Werfel*, 82 Misc2d 1029 (Sup Ct, Queen County 1975) (the New York City Department of Investigation, tasked with investigating the background of a judicial candidate, sought the minutes of a grand jury which had heard testimony about a narcotics case of which the candidate had been the subject); *People v Behan*, 37 Misc2d 911 (Onondaga County Ct 1962) (a special prosecutor appointed to investigate corruption in the prisons was granted access to grand jury minutes); *Matter of Crain*, 139 Misc 799 (Court of General Sessions, New York County 1931) (grand jury minutes were disclosed to a commissioner appointed to investigate judicial corruption).

Thus, in each of these cases, the movants were able to demonstrate a “compelling and particularized need” for disclosure. Each movant was able to give a specific reason for the disclosure of the minutes. Each movant could answer the question: What would you do with the minutes if you were given them? Thus, a movant must have a strong reason for disclosure unique to that movant.

The case law also demonstrates that even movants with law enforcement responsibilities or governmental authority must also make the same initial showing of a “compelling and particularized need.”

In the seminal case of *Matter of District Attorney of Suffolk County*, 58 NY2d 436 (1983), the District Attorney, who had been selected by the Suffolk County legislature to bring a federal lawsuit on behalf of the county, was denied access for having failed to

establish a “compelling and particularized need.”

Similarly, in *Matter of Hynes*, 179 AD2d 760 (2d Dept 1992), the Appellate Division of the Supreme Court for the Second Judicial Department found wanting the District Attorney’s request for the release of grand jury minutes to quell community unrest and to restore confidence in the criminal justice system as “compelling and particularized need[s].”

Of particular note are the efforts by public officials over the years to have the minutes of the Wyoming County grand jury which investigated the 1971 Attica prison uprising released. Since 1975, governors and attorneys general of this State have attempted to have the grand jury minutes released. *Matter of Carey*, 68 AD2d 220 (4th Dept 1979).

Most recently, Attorney General Schneiderman moved to disclose the minutes of the grand jury that had been quoted, but redacted, in the “Meyer report.” That report had concluded, in part, that there had been prosecutorial misjudgments in the investigation. The court ruled that, even after nearly forty (40) years since the report, the Attorney General’s contention that the disclosure of the redacted grand jury minutes would inform the public and complete the historical record did not constitute “compelling and particularized need.” *Matter of Carey*, 45 Misc3d 187 (Sup Ct, Wyoming County 2014).

Thus, as with any other movant, a public official, even one with prosecutorial duties, must make the same showing of a “compelling and particularized need” to obtain the release of grand jury minutes.

THE PUBLIC ADVOCATE

The Public Advocate has not demonstrated a “compelling and particularized need” for disclosure of the grand jury minutes.

Although the Public Advocate is a citywide elected official, the Advocate has no direct role in the criminal justice system. The New York City Charter, in Chapter 2, entitled, “Council” describes the work of the Public Advocate. Specifically, in section 24, the Public Advocate is permitted to participate in the discussions of the City Council but may not vote. The Advocate’s primary function is to receive complaints about, and monitor, city agencies.

By section 24 (k), the Public Advocate must refer any criminal complaint to the Department of Investigation "or . . . to the appropriate prosecutorial attorney or other law enforcement agency." Thus, the Advocate has no explicit role in the city's criminal justice system. To the contrary, the Public Advocate is mandated to refer criminal complaints to other authorities. Clearly, by the provisions of the City Charter, the Public Advocate's role in criminal matters is severely circumscribed.

Our criminal justice system is a state, not city, system. The same procedures including those for the grand jury obtain throughout the state. Thus, the City Council of which the Public Advocate is a non-voting member cannot enact laws which would alter the New York State grand jury system.

Counsel for the Public Advocate argued that these minutes are needed to make recommendations and issue reports regarding police conduct including the use of excessive force. The Advocate's request for the minutes in this one, solitary case is undermined by the fact that the Public Advocate has a myriad of sources for reviewing police actions.

Besides the tape in this case, the Public Advocate, as a monitor of city agencies, has access to the records of the Department of Investigation, the Civilian Complaint Review Board, the Police Department and the City's Law Department which litigates federal lawsuits against police officers charged with the use of excessive force and other misconduct. Thus, the Public Advocate has a plethora of sources from which the Advocate can glean evidence to support her positions regarding the policing of the criminal law in New York City.

The Public Advocate has no "compelling and particularized need" to gain access to the minutes of the grand jury in this one case to fulfill her Charter responsibilities. *Matter of District Attorney of Suffolk County*, 58 NY2d at 444. The Public Advocate's position in the constellation of public officials makes the Advocate no different from any other public official who argues for change in the administration of justice in New York State.

The Legal Aid Society has not shown a “compelling and particularized need” for the disclosure of the grand jury minutes.

In its brief, the Society asserted, presumably to show a need for disclosure, that it had represented Eric Garner. As a matter of law, that representation ended upon his death. *See e.g., People v Drayton*, 13 NY3d 902 (2009); *People v Mintz*, 20 NY2d 770 (1967).

The Society further contended that other of its clients had been adversely impacted by the events surrounding the death of Eric Garner. Nevertheless, at oral argument, no effect on other clients was articulated or quantified. The court took the Society’s position at oral argument to be that the Society needed the grand jury minutes for future reference in representing clients whose cases will be presented to a grand jury and as a strategic resource.

Clearly, none of these arguments established a “compelling and particularized need” for the release of these minutes.

THE NYCLU & THE NAACP

The NYCLU and the NAACP have both contended that the disclosure of the grand jury minutes is necessary to foster transparency and demonstrate fairness to the public. The statutory phrase “compelling and particularized need” cannot be conflated by ignoring a demonstrable “need” by simply arguing that disclosure *per se* is compelling. Under the law, a compelling interest in a case is not a “compelling and particularized need.”

Therefore, these movants have not established a “compelling and particularized need” for the minutes. *Matter of Hynes*, 179 AD2d 760 (2d Dept 1992); *Matter of Carey*, 45 Misc3d 187 (Sup Ct, Wyoming County 2014).

THE NEW YORK POST

Finally, the entity which owns the New York Post has also failed to demonstrate a “compelling and particularized need” for the minutes. The newspaper would merely publish all, or part of, the minutes and might use them as grist for its editorial mill.

The Court has not found any case in which the testimony and evidence adduced in a grand jury has been disseminated to the public by the media.

Journalistic curiosity is simply not a legally cognizable need under the law.

CONCLUSION

Compelling and Particularized Need

Each of the movants has failed to establish that it has the required “compelling and particularized need” for the grand jury minutes. In every case cited at oral argument or in the motion papers in which disclosure was granted, there existed a clear nexus between the movant’s need and the grand jury minutes.

In summary, the movants in this case merely ask for disclosure for distribution to the public. This request is not a legally cognizable reason for disclosure.

What would they use the minutes for? The only answer which the court heard was the possibility of effecting legislative change. That proffered need is purely speculative and does not satisfy the requirements of the law.

Balancing Interests

The second part of the analysis would be the balancing of interests which attach to grand jury proceedings. Of course, this balancing process begins only after a movant has satisfied the “compelling and particularized need” requirement. *Matter of District Attorney of Suffolk County*, 58 NY2d at 444.

Assuming for the sake of argument that one of the movants had established a “compelling and particularized need” for disclosure, the balancing of interests would not have justified disclosure. The disclosure of minutes would have undermined the overriding

concern for the independence of our grand juries. *Id.*

In *People v DiNapoli*, 27 NY2d 229, 235 (1970), the Court of Appeals suggested five factors for the court to consider¹. Only three are arguably applicable in this case.

The shadow of a federal criminal investigation looms over these proceedings. Presumably, if the United States Department of Justice proceeds, the same witnesses and evidence will be examined. Revealing the minutes of the state grand jury may place witnesses in jeopardy of intimidation or tampering if called to a federal grand jury or to a federal trial. Witnesses might be approached to adjust or alter their testimony if perceived to have been too favorable or unfavorable to any of the parties.

In addition, those who were not charged by the grand jury have a reputational stake in not having their conduct reviewed again after the grand jury had already exonerated them.

Most important to the integrity and thoroughness of the criminal justice system is the assurance to witnesses that their testimony and cooperation are not the subject of public comment or criticism. This concern is particularly cogent in "high publicity cases" where the witnesses' truthful and accurate testimony is vital. It is in such notorious cases that witnesses' cooperation and honesty should be encouraged - not discouraged - for fear of disclosure.

Ironically, if courts routinely divulged grand jury testimony, disclosure would largely impact serious and newsworthy cases. It was contended that disclosure in a case such as this would be no different from disclosure after a defendant had been indicted. This argument does not justify disclosure. When a defendant is charged with a crime, the secrecy of the grand jury is trumped by the defendant's constitutional right to confront the witnesses against him (US Constitution, Sixth Amendment) and the defendant's statutory right to discovery

¹ "Those most frequently mentioned by courts and commentators are these: (1) prevention of flight by a defendant who is about to be indicted; (2) protection of the grand jurors from interference from those under investigation; (3) prevention of subornation of perjury and tampering with prospective witnesses at the trial to be held as a result of any indictment the grand jury returns; (4) protection of an innocent accused from unfounded accusations if in fact no indictment is returned; and (5) assurance to prospective witnesses that their testimony will be kept secret so that they will be willing to testify freely."

pursuant to Article 240 of the Criminal Procedure Law. These mandates would compel a limited disclosure. However, when no charges are voted by a grand jury, these rights do not come into play. Thus, this argument fails.

Finally, the decision of the grand jurors in this case was theirs alone, after having heard all of the evidence, having been instructed on the law and having deliberated. Their collective decision should not be impeached by unbridled speculation that the integrity of this grand jury was impaired in any way.

FINAL CONCLUSION

In this case, based on the arguments of the movants and the current state of the law, a decision in favor of the movants would constitute an unjustified departure from the plain statutory language of CPL 190.25 (4) (a) and case law. The movants argue for a “sea change” in the law governing the disclosure of grand jury minutes. If such a dramatic change is warranted, that change should be effected by the state legislature. The judiciary is not the branch of government for statutory repeal or amendments.

CPL 190.25 (4) (a), as interpreted in countless cases over many years, would have been judicially repealed or modified if courts succumb to the temptation to order disclosure in unique or high-publicity cases without reference to clear legal precedent. The law’s uniformity would be lost and the law would vary from court to court. The *ad hoc* release of grand jury minutes would be based on a judge’s subjective decision that a case was of singular importance or notoriety. If current, clearly articulated law governing the disclosure of grand jury minutes were abandoned each time a grand jury decision resulted in controversy, the law would have been changed by a judge. The rules of law established for the determinations of these motions would have been judicially amended and, in cases like

this one, the exception would have swallowed the rule². *Matter of Carey*, 45 Misc3d 187, 213 (Sup Ct, Wyoming County 2014).

It bears repeating that under the law, a “compelling interest” in a case is not a “compelling or particularized need.” If every newsworthy case were deemed compelling and, thus, justified disclosure, the veil of grand jury secrecy would be lifted and every citizen’s right to have fellow citizens, sitting on a grand jury, check the power of the police and the prosecutor without pressure from outside influences - real or perceived - would be imperiled.

Again, in summary, each movant has not established a “compelling and particularized need” for the release of the grand jury minutes and, if that legally-required showing had been made, disclosure, on balance, would not have been warranted.

Thus, the motions for disclosure are denied³.

This opinion shall constitute the decision and order of the court.

E N T E R


HON. WILLIAM GARNETT, J.S.C.

² “At an even more basic level of analysis, this Court must point out that, if the public's right to know could be a paramount or overriding consideration here, there would not exist a general rule of grand jury secrecy in the first place. Nor, if the supposed societal benefit of maximizing the public's awareness could by itself trump all other considerations, would there exist a legal presumption against disclosure of grand jury evidence, let alone a rule providing that such presumption may be overcome only by a showing of a particularized and compelling need for disclosure. To adopt the Attorney General's position in this case would be to effectively displace the presumption against disclosure of grand jury evidence with a presumption favoring the earliest and widest public revelation of grand jury material, at least in the most important and notorious cases.”

³ The NAACP’s motions to recuse and to refer the matter to the Grievance Committee of the Appellate Division of the Supreme Court for the Second Judicial Department are denied as meritless.

EXHIBIT B

**Supreme Court of the State of New York
Appellate Division - Second Judicial Department**

Form A - Request for Appellate Division Intervention - Civil

See § 670.3 of the rules of this court for directions on the use of this form (22 NYCRR 670.3).

<p>Case Title: Set forth the title of the case as it appears on the summons, notice of petition or order to show cause by which the matter was or is to be commenced, or as amended.</p> <p>In the Matter of the Investigation into the Death of Eric Garner, LETITIA JAMES, New York City Public Advocate, Petitioner-Applicant, -against- DANIEL DONOVAN, Richmond County District Attorney, Respondent</p>	<p align="center">For Court of Original Instance</p> <hr/> <p align="center">Date Notice of Appeal Filed</p>
	<p align="center">For Appellate Division</p> <hr/>

<p>Case Type</p> <input type="checkbox"/> Civil Action <input type="checkbox"/> CPLR article 75 Arbitration	<input type="checkbox"/> CPLR article 78 Proceeding <input checked="" type="checkbox"/> Special Proceeding Other <input type="checkbox"/> Habeas Corpus Proceeding	<p>Filing Type</p> <input checked="" type="checkbox"/> Appeal <input type="checkbox"/> Original Proceeding	<input type="checkbox"/> Transferred Proceeding <input type="checkbox"/> CPLR 5704 Review
<p align="center">Nature of Suit: Check up to five of the following categories which best reflect the nature of the case.</p>			
<p>A. Administrative Review</p> <input type="checkbox"/> 1 Freedom of Information Law <input type="checkbox"/> 2 Human Rights <input type="checkbox"/> 3 Licenses <input type="checkbox"/> 4 Public Employment <input type="checkbox"/> 5 Social Services <input type="checkbox"/> 6 Other	<p>D. Domestic Relations</p> <input type="checkbox"/> 1 Adoption <input type="checkbox"/> 2 Attorney's Fees <input type="checkbox"/> 3 Children - Support <input type="checkbox"/> 4 Children - Custody/Visitation <input type="checkbox"/> 5 Children - Terminate Parental Rights <input type="checkbox"/> 6 Children - Abuse/Neglect <input type="checkbox"/> 7 Children - JD/PINS <input type="checkbox"/> 8 Equitable Distribution <input type="checkbox"/> 9 Exclusive Occupancy of Residence <input type="checkbox"/> 10 Expert's Fees <input type="checkbox"/> 11 Maintenance/Alimony <input type="checkbox"/> 13 Paternity <input type="checkbox"/> 14 Spousal Support <input type="checkbox"/> 15 Other	<p>E. Prisons</p> <input type="checkbox"/> 1 Discipline <input type="checkbox"/> 2 Jail Time Calculation <input type="checkbox"/> 3 Parole <input type="checkbox"/> 4 Other	<p>F. Torts</p> <input type="checkbox"/> 1 Assault, Battery, False Imprisonment <input type="checkbox"/> 2 Conversion <input type="checkbox"/> 3 Defamation <input type="checkbox"/> 4 Fraud <input type="checkbox"/> 5 Intentional Infliction of Emotional Distress <input type="checkbox"/> 6 Interference with Contract <input type="checkbox"/> 7 Malicious Prosecution/Abuse of Process <input type="checkbox"/> 8 Malpractice <input type="checkbox"/> 9 Negligence <input type="checkbox"/> 10 Nuisance <input type="checkbox"/> 11 Products Liability <input type="checkbox"/> 12 Strict Liability <input type="checkbox"/> 13 Trespass and/or Waste <input type="checkbox"/> 14 Other
<p>B. Business & Other Relationships</p> <input type="checkbox"/> 1 Partnership/Joint Venture <input type="checkbox"/> 2 Business <input type="checkbox"/> 3 Religious <input type="checkbox"/> 4 Not-for-Profit <input type="checkbox"/> 5 Other	<p>G. Real Property</p> <input type="checkbox"/> 1 Condemnation <input type="checkbox"/> 2 Determine Title <input type="checkbox"/> 3 Easements <input type="checkbox"/> 4 Environmental <input type="checkbox"/> 5 Liens <input type="checkbox"/> 6 Mortgages <input type="checkbox"/> 7 Partition <input type="checkbox"/> 8 Rent <input type="checkbox"/> 9 Taxation <input type="checkbox"/> 10 Zoning <input type="checkbox"/> 11 Other	<p>H. Statutory</p> <input type="checkbox"/> 1 City of Mount Vernon Charter §§ 120, 127-f, or 129 <input type="checkbox"/> 2 Eminent Domain Procedure Law § 207 <input type="checkbox"/> 3 General Municipal Law § 712 <input type="checkbox"/> 4 Labor Law § 220 <input type="checkbox"/> 5 Public Service Law §§ 128 or 170 <input checked="" type="checkbox"/> 6 Other	
<p>C. Contracts</p> <input type="checkbox"/> 1 Brokerage <input type="checkbox"/> 2 Commercial Paper <input type="checkbox"/> 3 Construction <input type="checkbox"/> 4 Employment <input type="checkbox"/> 5 Insurance <input type="checkbox"/> 6 Real Property <input type="checkbox"/> 7 Sales <input type="checkbox"/> 8 Secured <input type="checkbox"/> 9 Other	<p>I. Miscellaneous</p> <input type="checkbox"/> 1 Constructive Trust <input type="checkbox"/> 2 Debtor & Creditor <input type="checkbox"/> 3 Declaratory Judgment <input type="checkbox"/> 4 Election Law <input type="checkbox"/> 5 Notice of Claim <input checked="" type="checkbox"/> 6 Other	<p>J. Wills & Estates</p> <input type="checkbox"/> 1 Accounting <input type="checkbox"/> 2 Discovery <input type="checkbox"/> 3 Probate/Administration <input type="checkbox"/> 4 Trusts <input type="checkbox"/> 5 Other	

Appeal

Paper Appealed From (check one only):

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| <input type="checkbox"/> Amended Decree | <input type="checkbox"/> Determination | <input checked="" type="checkbox"/> Order | <input type="checkbox"/> Resettled Order |
| <input type="checkbox"/> Amended Judgment | <input type="checkbox"/> Finding | <input type="checkbox"/> Order & Judgment | <input type="checkbox"/> Ruling |
| <input type="checkbox"/> Amended Order | <input type="checkbox"/> Interlocutory Decree | <input type="checkbox"/> Partial Decree | <input type="checkbox"/> Other (specify): |
| <input type="checkbox"/> Decision | <input type="checkbox"/> Interlocutory Judgment | <input type="checkbox"/> Resettled Decree | |
| <input type="checkbox"/> Decree | <input type="checkbox"/> Judgment | <input type="checkbox"/> Resettled Judgment | |

Court:	County:
Dated:	Entered:
Judge (name in full):	Index No.:
Stage: <input type="checkbox"/> Interlocutory <input checked="" type="checkbox"/> Final <input type="checkbox"/> Post-Final	Trial: <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No If Yes: <input type="checkbox"/> Jury <input type="checkbox"/> Non-Jury

Prior Unperfected Appeal Information

Are any unperfected appeals pending in this case? Yes No. If yes, do you intend to perfect the appeal or appeals covered by the annexed notice of appeal with the prior appeals? Yes No. Set forth the Appellate Division Cause Number(s) of any prior, pending, unperfected appeals:

Original Proceeding

Commenced by: Order to Show Cause Notice of Petition Writ of Habeas Corpus Date Filed:

Statute authorizing commencement of proceeding in the Appellate Division:

Proceeding Transferred Pursuant to CPLR 7804(g)

Court:	County:
Judge (name in full):	Order of Transfer Date:

CPLR 5704 Review of Ex Parte Order

Court:	County:
Judge (name in full):	Dated:

Description of Appeal, Proceeding or Application and Statement of Issues

Description: If an appeal, briefly describe the paper appealed from. If the appeal is from an order, specify the relief requested and whether the motion was granted or denied. If an original proceeding commenced in this court or transferred pursuant to CPLR 7804(g), briefly describe the object of the proceeding. If an application under CPLR 5704, briefly describe the nature of the ex parte order to be reviewed.

This is an appeal from each and every portion of the Decision and Order denying movant's petition to unseal certain grand jury materials related to the investigation into the death of Eric Garner.

Amount: If an appeal is from a money judgment, specify the amount awarded.

Issues: Specify the issues proposed to be raised on the appeal, proceeding, or application for CPLR 5704 review.

1. Did the court below misconstrue and misapply the legal standard for unsealing grand jury materials?
2. Did the court below err in determining that movant had not met the threshold standard for unsealing the requested materials?
3. Did the court below misconstrue the role of the Public Advocate under the New York City Charter and the significance of the requested materials for official investigations and proposals?

Issues Continued:

4. Did the court below err in failing to independently evaluate different categories of requested grand jury materials, including non-testimonial information?
5. Was the compelling and particularized need for public access to grand jury materials previously established via the Richmond County District Attorney's prior successful petition to unseal?
6. Did the court below err in refusing to recognize that the Richmond County District Attorney was judicially estopped from arguing that there was no compelling and particularized need for unsealing the Garner grand jury materials ?

Use Form B for Additional Appeal Information

Party Information

Instructions: Fill in the name of each party to the action or proceeding, one name per line. If this form is to be filed for an appeal, indicate the status of the party in the court of original instance and his, her, or its status in this court, if any. If this form is to be filed for a proceeding commenced in this court, fill in only the party's name and his, her, or its status in this court.

Examples of a party's original status include: plaintiff, defendant, petitioner, respondent, claimant, defendant third-party plaintiff, third-party defendant, and intervenor. Examples of a party's Appellate Division status include: appellant, respondent, appellant-respondent, respondent-appellant, petitioner, and intervenor.

No.	Party Name	Original Status	Appellate Division Status
1	Letitia James	Petitioner-Applicant	Petitioner-Appellant
2	Daniel Donovan	Respondent	Respondent
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Attorney Information

Instructions: Fill in the names of the attorneys or firms of attorneys for the respective parties. If this form is to be filed with the notice of petition or order to show cause by which a special proceeding is to be commenced in the Appellate Division, only the name of the attorney for the petitioner need be provided. In the event that a litigant represents herself or himself, the box marked "Pro Se" must be checked and the appropriate information for that litigant must be supplied in the spaces provided.

Attorney/Firm Name: **Matthew D. Brinckerhoff/Emery Celli Brinckerhoff & Abady LLP**

Address: **600 Fifth Avenue, 10th Floor**

City: **New York** State: **NY** Zip: **10020** Telephone No.: **(212) 763-5000**

Attorney Type: Retained Assigned Government Pro Se Pro Hac Vice

Party or Parties Represented (set forth party number(s) from table above or from Form C):

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Attorney/Firm Name: **Orion Danjuma/Emery Celi Brinckerhoff 7 Abady LLP**

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City: **New York** State: **NY** Zip: **10020** Telephone No.: **(212) 763-5000**

Attorney Type: Retained Assigned Government Pro Se Pro Hac Vice

Party or Parties Represented (set forth party number(s) from table above or from Form C):

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Attorney/Firm Name: **Jennifer Levy/New York City Public Advocate**

Address: **1 Centre Street, 15th Floor North**

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Attorney Type: Retained Assigned Government Pro Se Pro Hac Vice

Party or Parties Represented (set forth party number(s) from table above or from Form C):

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Attorney/Firm Name: **Anne Grady/Richmond County District Attorney**

Address: **130 Stuyvesant Place**

City: **Staten Island** State: **NY** Zip: **10301** Telephone No.: **(718) 876-6300**

Attorney Type: Retained Assigned Government Pro Se Pro Hac Vice

Party or Parties Represented (set forth party number(s) from table above or from Form C):

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Attorney/Firm Name:

Address:

City: State: Zip: Telephone No.:

Attorney Type: Retained Assigned Government Pro Se Pro Hac Vice

Party or Parties Represented (set forth party number(s) from table above or from Form C):

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Attorney/Firm Name:

Address:

City: State: Zip: Telephone No.:

Attorney Type: Retained Assigned Government Pro Se Pro Hac Vice

Party or Parties Represented (set forth party number(s) from table above or from Form C):

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Use Form C for Additional Party and/or Attorney Information

The use of this form is explained in § 670.3 of the rules of the Appellate Division, Second Department (22 NYCRR 670.3). If this form is to be filed for an appeal, place the required papers in the following order: (1) the Request for Appellate Division Intervention (Form A - this document); (2) any required Additional Appeal Information Forms (Form B); (3) any required Additional Party and Attorney Information Forms (Form C); (4) the notice of appeal or order granting leave to appeal; (5) a copy of the paper or papers from which the appeal or appeals covered in the notice of appeal or order granting leave to appeal is or are taken; and (6) a copy of the decision or decisions of the court of original instance, if any.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND

In the Matter of the Investigation into the Death
of Eric Garner,

LETITIA JAMES, New York City Public
Advocate,

Petitioner-Applicant,

-against-

DANIEL DONOVAN, Richmond County District
Attorney,

Respondent.

Index No. 080304-14

NOTICE OF APPEAL

PLEASE TAKE NOTICE that petitioners hereby appeal to the Appellate Division of the Supreme Court of the State of New York for the Second Judicial Department from the Decision and Order of Justice Garnett, in the above-captioned action, dated March 19, 2015, duly entered in the office of the Richmond County Clerk on March 19, 2015, and served with a Notice of Entry by U.S. mail on April 1, 2015.

Petitioners appeal from the whole Decision and Order, and from all parts thereto, both on the law and on the facts. Annexed hereto is a completed Request for Appellate Division Intervention - Civil (Form A) and a copy of the Decision and Order appealed from.

Dated: April 2, 2015
New York, New York

EMERY CELLI BRINCKERHOFF &
ABADY LLP

By:


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Orion Danjuma

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*Attorneys for New York City Public
Advocate Letitia James*

To: Daniel M. Donovan, Jr.
Richmond County District Attorney
Attention: Anne Grady, Esq.
130 Stuyvesant Place
Staten Island, NY 10301
(718) 876-6300

EXHIBIT C

To be argued by
Andrew B. Stoll
(5 Minutes)

NEW YORK SUPREME COURT

APPELLATE DIVISION – SECOND DEPARTMENT

In the Matter of Letitia James, etc., Appellant,
v. Daniel Donovan, Etc., Respondent-respondent
(Index No. 080304/14)

In the Matter of Legal Aid Society, Appellant,
v. Daniel Donovan, etc., Respondent-respondent.
(Index No. 080296/14)

In the Matter of New York Civil Liberties Union,
Appellant, v. Daniel Donovan, etc., Respondent-
respondent.
(Index No. 080307/14)

In the Matter of NYP Holdings, Inc., etc., Petitioner,
v. Daniel Donovan, etc., Respondent
(Index No. 080308/14)

In the Matter of Staten Island Branch of National
Association for Advancement of Colored People, etc.,
et al., Appellants, v. Daniel Donovan, etc., Respondent-
respondent.
(Index No. 080009/15)

BRIEF FOR AMICI CURIAE THE BLACK, PUERTO RICAN, HISPANIC AND ASIAN LEGISLATIVE CAUCUS OF THE NEW YORK STATE LEGISLATURE

ANDREW B. STOLL
STOLL, GLICKMAN & BELLINA, LLP
475 Atlantic Avenue
Brooklyn, NY 11217
Counsel for Amici Curiae

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INTRODUCTION

As legislators representing the people of New York in the State Senate and Assembly (“state legislators”), and members of the New York State Black, Puerto Rican, Hispanic and Asian Legislative Caucus which consists of fifty three senators and assemblymembers, Amici Curiae are charged with enacting laws to protect the welfare, health, and safety of the public, including provisions of the criminal procedure law governing the operation of grand juries. Amici offer this brief in support of Petitioner-Appellants’ appeal of the Supreme Court’s denial of their petitions to unseal the grand jury proceedings in the investigation into the death of Eric Garner (“the grand jury records”).

STATEMENT OF INTEREST

The elected officials submitting this brief are members of a body representing almost 20 million New Yorkers. Access to the grand jury records, and to fully informed institutional voices, is critical to their ongoing work, as they explore reforms to the current grand jury process and craft solutions to restore the public’s trust in our justice system. Together, as members of the New York State Legislature, amici urge this Court to reverse the decision below.

ARGUMENT

Without a reversal of Justice Garnett's decision to maintain the secrecy of the grand jury proceeding, both city and state officials will lack access to materials and informed voices that are critical to making fully reasoned judgments about important matters of public policy. In the wake of the District Attorney's failure to secure an indictment in the Eric Garner grand jury, New York lawmakers have focused efforts on reforming the grand jury system and increasing oversight and transparency in cases involving civilian deaths at the hands of police officers. In considering such reforms, amici will significantly weigh input from local elected officials and from institutional defenders. As a citywide elected official and lawmaker with oversight responsibilities over the affairs of the City, the Public Advocate is well positioned to demand the grand jury materials and advise the legislature on needed reforms. As the largest public defender in New York City, the Legal Aid Society has a unique ability to evaluate the consistency of the application of the laws concerning grand jury presentations, and is thus well positioned, like the Public Advocate, to demand release of the Garner grand jury materials, and provide valuable input on their findings to amici. With input from the Public Advocate and the Legal Aid Society, the New York State Legislature will be able to draft

effective reforms that reestablish public trust in New York's guarantee of equal access to criminal justice for all segments of the population.

The Public Advocate has presented a compelling and particularized need for the grand jury information to capitalize on this specific historical moment and influence actual, existing legislative proposals to make the criminal justice system responsive to the entire populace.

I. THE NEW YORK STATE LEGISLATIVE PROCESS IS DRIVEN BY SPECIFIC EVENTS AND INFORMED BY LOCAL CONCERNS AND DIVERSE VOICES, INCLUDING CITY-WIDE ELECTED OFFICIALS SUCH AS THE NEW YORK CITY PUBLIC ADVOCATE

In the wake of a series of highly public incidents where young African-Americans were killed by law enforcement officers, there has been a national movement toward criminal justice reform that is without recent precedent. After the Eric Garner grand jury decision, that movement began to defy preexisting partisan, racial and geographic lines and extend from the grassroots to the highest halls of power. Federal officials and state legislatures across the country are debating reforms aimed at improving police-community relations through measures that will improve transparency and accountability.

The calls for change have particular force in New York City and New York State because of the prosecution's failure to secure an indictment in the

Garner case. A debate on specific proposals is already in progress across city and state government. Unique among the elected officials critical to this debate is the Public Advocate, a New York City-wide official whose charter role is directly tied to ensuring that city services are fair and just. In order to fulfill both her charter role and her part in advancing the debate on specific reform proposals, the Public Advocate is well poised to demand disclosure of the Eric Garner grand jury minutes, and advise the legislature of her city-wide perspective of legislative lessons to be drawn from them. The Legal Aid Society, the largest institutional defender in New York State, occupies a different, but similarly unique position in its ability to evaluate the consistency of application of the law to grand jury proceedings.

A. Disclosure Will Inform the Discussion Around Several Existing Legislative and Policy Proposals

Because grand jury reform is currently being debated statewide (indeed, nationally), with specific policy initiatives being advanced by every branch of the New York State government, this matter is easily distinguished from this Court's holding in Matter of Hynes v. Patrolmen's Benevolent Association, 179 A.D.2d 760, 579 N.Y.S.2d 117 (2d Dept. 1992). There, this Court held that "curb(ing) community unrest" and "restor(ing) confidence in the Grand Jury system", under the circumstances of that case, did not constitute "compelling and particularized need". Hynes at 760. But

the goals of this litigation are far greater than placating the populace. Instead, the information is needed to inform actual legislation that effects changes to existing law, making the system more accountable to the public it is meant to serve.

Amici submit this brief in part to demonstrate that this need is not speculative; rather, it is an actually present necessity. The national momentum towards reform, and deep local resonance of the Eric Garner decision in this state has created more political will to fix the systemic failures of our criminal justice system than any time since the reform of the Rockefeller Drug Laws in 2009. But the legislative debate over grand jury reform, unlike any other aspect of the criminal justice system, is crippled by the limited access to critical information that grand jury secrecy breeds.

Amici require more than raw data and information to inform their debate. Rather, the legislature benefits from the input of policy makers and participants closest to the issues they are considering. The Public Advocate, as a city-wide elected official of New York's largest city, tasked with making policy recommendations, and the Legal Aid Society, as the sole institutional public defender in Staten Island and historically the primary public defender in New York City, are vital voices in the conversation. By denying appellants' petitions the court below limited the state legislature's

access to precisely the sort of well-informed input it needs to carry out its mission and weigh proposed changes to the law. Policy makers are thus left actively debating the merits of reforms based on incomplete information.

Specific initiatives have been advanced by everyone from Governor Cuomo to Chief Judge Lippman to conference leaders and committee chairs in both houses of the legislature. The Senate and Assembly have held multiple public hearings on criminal justice and public protection.¹ In his 2015 State of the State Address, Governor Cuomo proposed that independent monitors review decisions in cases where a police officer who has killed a civilian is not charged or, if charged, is not indicted in a grand jury.²

The plan was picked up by the New York State Senate, which vigorously debated its merits when Alphonso David, Counsel to the Governor, testified at a March 11, 2015 Senate public hearing on police

¹ New York State Senate (Mar. 11, 2015), <http://www.nysenate.gov/event/2015/mar/11/examining-police-safety-and-public-protection-new-york-state-0>; Press Release, N.Y. State Senate, Senate Holds First Hearing on Police Safety and Public Protection in New York City (Feb. 4, 2015), available at <http://www.nysenate.gov/press-release/senate-holds-first-hearing-police-safety-and-public-protection-new-york-city>; Press Release, N.Y. State Assembly, Notice of Public Hearing – Criminal Justice Reform (Feb. 27, 2015), available at <http://assembly.state.ny.us/comm/Codes/20150227/>

² Aaron Short & Carl Campanile, Cuomo to Name “Independent Monitor” to Review Cop-Related Grand Jury Decisions, N.Y. Post (Jan. 22, 2015), <http://nypost.com/2015/01/22/cuomo-to-name-independent-monitor-to-review-cop-related-grand-jury-decisions/>.

safety and public protection.³ In the course of that very debate, several senators, including Senator Michael F. Nozzolio, Chair of the Codes Committee, Senator Andrew Lanza, a former Assistant District Attorney who represents Staten Island, and Senator John Bonacic, also a former Assistant District Attorney, acknowledged the need to make the process more open.⁴

The third branch of New York State government, the judiciary, has also advanced proposals for grand jury reform. The Chief Judge of the State of New York, Jonathan Lippman, proposed legislation⁵ since introduced by the Assembly Codes Committee Chairman Joseph R. Lentol,⁶ that would require a judge to be physically present and preside over the grand jury investigation in cases involving a law enforcement officer killing or feloniously assaulting a civilian. Even more critically, the bill proposes a “crystal clear presumption” in favor of disclosing grand jury minutes in cases where there is widespread public knowledge of a grand jury

³ See Matthew D’Onofrio, Senators Put Grand Jury Reforms Under the Microscope, The Legislative Gazette (Mar. 16, 2015), <http://www.legislativegazette.com/Articles-Main-Stories-c-2015-03-16-91089.113122-Senators-put-grand-jury-reforms-under-the-microscope.html>.

⁴ *Id.*

⁵ See Jonathan Lippman, Chief Judge of the State of N.Y., The State of the Judiciary 2015 Address: Access to Justice: Making the Ideal a Reality (Feb. 17, 2015), available at <http://www.nycourts.gov/ctapps/news/SOJ-2015.pdf>

⁶ 2015 NY Assembly Bill A7194 available at <http://open.nysenate.gov/legislation/api/1.0/pdf/bill/A7194-2015> [hereinafter Assembly Bill A7194]

investigation and the identity of its subject, no indictment is returned, and a significant public interest would be advanced through disclosure.⁷ As the sponsor’s memo notes, in such cases “[grand jury] secrecy rules may become an obstacle to meaningful understanding of the criminal justice process and, on balance, counter-productive to assuring public faith in the institutions of government.”⁸

State Senator Diane Savino and Assemblyman Matthew Titone, who represent districts in Eric Garner’s home borough of Staten Island, introduced legislation that would allow district attorneys, in the interest of justice and with proper redaction, to disclose the nature or substance of any grand jury testimony, evidence, or any decision, result or other matter attending a grand jury proceeding based on a valid written request.⁹

Assemblyman Keith Wright has sponsored a bill that would create an “Office of Special Investigation” within the Office of the Attorney General to investigate and, where necessary, prosecute, police officers who kill civilians in the line of duty, supplanting local district attorneys entirely in

⁷ Jonathan Lippman, *supra*

⁸ Assembly Bill A7194, *supra*

⁹ 2015 NY Senate-Assembly Bill S1828, A3462 available at <http://open.nysenate.gov/legislation/bill/S1828-2015>

such cases.¹⁰ There are at least five other alternative special prosecutor bills under consideration by the legislature.¹¹

There are also clear signs of an appetite for greater transparency even among those who oppose more sweeping changes. On February 4, 2015, Staten Island District Attorney Daniel Donovan testified at another State Senate public hearing in favor of a proposal that grand juries create a report summarizing their conclusion in cases where they chose not to return a true bill against a defendant, and supported the appointment of a monitor in those cases.¹² Republican State Senator Martin Golden, a retired New York City Police Officer who has taken a strong stand against special prosecutors and independent monitors, has signaled his openness to broader disclosure of much of the information that is presented to a grand jury, saying he thought the public should be better informed.¹³

¹⁰ 2015 NY Senate-Assembly Bill S1828, A3462 available at <http://open.nysenate.gov/legislation/bill/S1828-2015>

¹¹ See, e.g., 2015 NY Assembly Bill A4321 available at <http://open.nysenate.gov/legislation/bill/A4321-2015>; 2015 NY Assembly Bill A5524A available at <http://open.nysenate.gov/legislation/bill/A5524A-2015>; 2015 NY Assembly Bill A6342 available at <http://open.nysenate.gov/legislation/bill/A6342-2015>; 2015 NY Assembly Bill A6572 available at <http://open.nysenate.gov/legislation/bill/A6572-2015>; 2015 NY Senate Bill S2526 available at <http://open.nysenate.gov/legislation/bill/S2526-2015>

¹² See Colby Hamilton, „Donovan Backs Limited Grand Jury Reforms, Capital (Feb. 4, 2015), <http://www.capitalnewyork.com/article/albany/2015/02/8561655/donovan-backs-limited-grand-jury->

¹³ Fredric U. Dicker, GOP-controlled Senate to veto Cuomo’s cop proposals, N.Y. Post (Dec. 8, 2014), <http://nypost.com/2014/12/08/gop-controlled-senate-to-veto-cuomos-cop-proposals/>

This parade of legislative proposals demonstrates a particularized and compelling need, at this time in history, for the Eric Garner grand jury information. Unsealing would intelligently inform the debate, and arm the Public Advocate with the information she needs to assist and advise amici in drafting these vitally important legislative fixes. The death of Eric Garner and the failure to secure an indictment of the officer involved in his death has set in motion a chain of events that will lead to systemic changes. The question is whether those changes will be based on a full airing of what transpires in the grand jury in cases like this, or on guesswork.

B. The Failure to Secure an Indictment in the Eric Garner Matter Catalyzed an Unprecedented Symbiotic New York City, State and National Movement Towards Grand Jury Reform, Which is Cresting Now

The sweeping demands for change across the nation have brought us to a historical turning point. There is a compelling and particularized need to disclose the grand jury information to parlay this movement, at this particular place and time, into informed legislative change.

As discussed above, this Court ruled in Matter of Hynes that curbing unrest and restoring confidence, in and of themselves, were not compelling and particularized needs. 179 A.D.2d 760 (2d Dept. 1992). But there was no showing in that case of a peaking state and national movement. Nor

could there have been such a showing in that matter, as the outcry was a localized controversy over the perception of disparate governmental treatment between two different minority groups- orthodox Jews and African Americans.

This matter is distinct, however not only because there are existing legislative proposals to be affected by the requested disclosures, but because a broad national movement has ripened into a unique opportunity for reform that must be capitalized on.

There is a public perception that prosecutors treat grand jury presentations involving police officers differently than grand jury presentations with the average suspect or criminal defendant. Most grand jury presentations involve one or two witnesses²¹ and last less than one day; only a very small percentage last longer than three days.²² The Garner grand jury heard from fifty witnesses and sat for nine weeks.²³ When the jury

²¹ Jeffrey Fagan & Bernard E. Harcourt, Professors Fagan and Harcourt Provide Facts on Grand Jury Practice In Light of Ferguson Decision, Columbia Law School (revised Dec. 5, 2014), http://www.law.columbia.edu/media_inquiries/news_events/2014/november2014/Facts-on-Ferguson-Grand-Jury.

²² N.Y. Courts, Grand Jury Report: Report to Chief Judge Judith S. Kaye and Chief Administrative Judge Jonathan Lippman, Vol. 1, Findings and Recommendations (1999), available at https://www.nycourts.gov/press/old_keep/gjrr.shtml.

²³ See, e.g. Jon Campbell, No One Knows Why the Eric Garner Grand Jury Is Taking So Long, The Village Voice (Nov. 21, 2014) http://blogs.villagevoice.com/runninscared/2014/11/as_we_wait_for_ferguson_grand_jury_whats_going_on_with_the_eric_garner_case.php; Al Sharpton, Misuse of a Grand

returned “no true bill,” nationwide protests erupted in hundreds of American cities over the perceived miscarriage of justice, spreading across the globe to such far-flung place as Melbourne, Australia and Tokyo, Japan.²⁴ Sixty percent of Americans thought that the Garner grand jury reached the wrong result.²⁵

This is not a partisan issue: former President George W. Bush, called the failure to indict “hard to understand;”²⁶ Fox News commentator Charles Krauthammer said the result was “totally incomprehensible;”²⁷ a writer for the conservative blog Red State said the decision was “truly baffling” and “infuriating;”²⁸ Sean Davis at The Federalist went so far as to muse that “it’s

Jury, The Huffington Post, http://www.huffingtonpost.com/rev-al-sharpton/misuse-of-a-grand-jury_b_6172862.html (last updated Jan 17, 2015).

²⁴ Paula Mejia, Ferguson, Eric Garner Protests Spread Worldwide, Newsweek (Dec. 6, 2014), available at <http://www.newsweek.com/ferguson-eric-garner-protests-sprawl-worldwide-289867>.

²⁵ Aaron Blake, Why Eric Garner Is the Turning Point Ferguson Never Was, Wash. Post The Fix Blog (Dec. 8 2014) <http://www.washingtonpost.com/blogs/the-fix/wp/2014/12/08/why-eric-garner-is-the-turning-point-ferguson-never-was/>.

²⁶ Lindsey Boerma, George W. Bush: Verdict in Eric Garner Case "Hard to Understand," CBS News (Dec. 5, 2014) <http://www.cbsnews.com/news/george-w-bush-verdict-in-eric-garner-case-hard-to-understand/>.

²⁷ Fox News Insider, “Totally Incomprehensible”: Krauthammer Says Grand Jury Made Wrong Judgment, Fox News (Dec. 3, 2014) <http://insider.foxnews.com/2014/12/03/totally-incomprehensible-charles-krauthammer-says-grand-jury-made-wrong-judgment-nypd>.

²⁸ Husna Haq, Why Conservatives and Liberals are United on Eric Garner Case, Christian Science Monitor (Dec. 4, 2014) <http://www.csmonitor.com/USA/Society/2014/1204/Why-conservatives-and-liberals-are-united-on-Eric-Garner-case-video>.

almost as if the grand jury system is just a convenient means for prosecutors to get the outcome they want wrapped in a veneer of due process.”²⁹

Two weeks after the Garner decision, President Obama announced a Task Force on 21st Century Policing charged with “making recommendations ... on how policing practices can promote effective crime reduction while building public trust.”³³ A bi-partisan group of federal lawmakers are working in concert on a variety of reforms to our justice system.”³⁴ Nearly every declared and expected Republican Presidential Candidate has expressed support for sentencing and prison reform.³⁵

As one scholar has written, “absent concerted national action, the states are the ‘default setting’ of the American federal system.”⁴² As laboratories of democracy, states are “often innovative policy makers, in

²⁹ Sean Davis, Hands Up, Don’t Choke: Eric Garner Was Killed By Police For No Reason, *The Federalist* (Dec. 3, 2014) <http://thefederalist.com/2014/12/03/hands-up-dont-choke-eric-garner-was-murdered-by-police-for-no-reason/>.

³³ Exec. Order No. 13684, 79 Fed. Reg. 76,865 (Dec. 18, 2014) available at <https://www.federalregister.gov/articles/2014/12/23/2014-30195/establishment-of-the-presidents-task-force-on-21st-century-policing>.

³⁴ Tierney Sneed, Lawmakers Outline Path Forward on Criminal Justice Reform, *U.S. News* (Mar. 26, 2015) <http://www.usnews.com/news/articles/2015/03/26/lawmakers-outline-path-forward-on-criminal-justice-reform>.

³⁵ Betsy Woodruff, 2016 Contenders Are Lining Up Behind Sentencing Reform --- Except This One Tea Partier, *The Wash. Examiner* (Aug. 1, 2014) <http://www.washingtonexaminer.com/2016-contenders-are-lining-up-behind-sentencing-reform-except-this-one-tea-partier/article/2551545>.

⁴² Gary Moncreif & Peverill Squire, Why States Matter: An Introduction to State Politics 74 (2013) (quoting Martha Derthick, Keeping the Compound Republic: Essay on American Federalism 28 (2001)).

some cases well in advance of the national government.”⁴³ It is also important to note that such innovation “often comes in ‘waves’—periods in which many states are adopting new policies.”⁴⁴ We are clearly atop such a wave when it comes to criminal justice reform, much of it the direct result of the death of Eric Garner and perceived illegitimacy of the grand jury investigation into his death.

According to the National Conference of State Legislatures, numerous states are considering measures that “would increase public access to information concerning officer-involved deaths,” including “active bills [which] would improve transparency into investigations of police-involved deaths, restrict the use of chokeholds and require that statistics be reported for each incident resulting in death.”⁴⁵

As of February of this year at least nine states were considering the appointment of special prosecutors or independent investigators in all officer-involved deaths; bills to codify community-policing practices were before six state legislatures, and thirty or more states were considering body-worn cameras for officers.⁴⁶ In California, a state known for policy

⁴³Moncrief & Squire, supra, at 77.

⁴⁴Id. at 159.

⁴⁵National Conference of State Legislatures, Law Enforcement Overview (Feb. 13, 2105), <http://www.ncsl.org/research/civil-and-criminal-justice/law-enforcement.aspx>.

⁴⁶Id.

innovation,⁴⁷ one state legislator has already introduced a bill to ban grand juries entirely in cases of officer-involved civilian deaths.⁴⁸ In Maryland, there were calls for a special session of the state legislature even before the death of Freddie Gray was ruled a homicide.⁴⁹

Plainly, the controversy underlying this litigation is a broad national drive whose time is now. It is a compelling movement, at a particular moment, with a singular need.

II. The Public Advocate has Authority to Seek the Unsealing of the Eric Garner Grand Jury Minutes and Her Efforts Will Aid the Policy Debate on the State Level.

The Public Advocate has the authority to seek the unsealing of the grand jury minutes in order to fulfill her Charter role as ombudsman for her eight-and-a-half million constituents and watchdog over the government entities and agencies that exist to serve them. The court below viewed this broad mandate with tunnel vision, rationalizing that because the Public Advocate “has no direct role in the criminal justice system”, and because the criminal justice system is a “state, not city, system”, her need for the

⁴⁷ Moncrief & Squire, *supra*, at 159.

⁴⁸ Patrick McGreevy, Lawmaker Would Bar Grand Juries in Cases of Police Shootings, L.A. Times (Feb. 16, 2015) <http://www.latimes.com/local/political/la-me-pc-lawmaker-would-bar-grand-juries-in-police-shootings-cases-20150216-story.html>.

⁴⁹ Erin Cox & Jessica Anderson, Civil Rights Groups Call on Hogan to Convene Special Session, Balt. Sun (Apr. 24, 2015) <http://www.baltimoresun.com/news/maryland/bs-md-freddie-gray-hogan-bills-20150424-story.html>.

information was not compelling and particularized. In re: Investigation into the Death of Eric Garner, Joint Appendix 13-14. But the court's constrained view of the Public Advocate's role misconstrues the reality of state lawmaking, the interconnectedness of New York City public officials and state lawmakers, and the degree to which the public interest at issue in this case is local, citywide, statewide and national all at once.

First, the absence of a "direct" role within the courts does not undermine the broad authority the Public Advocate has with respect to myriad agencies affecting criminal justice in New York City. The position was created as "an independent public official to monitor the operations of City agencies with the view to publicizing any inadequacies, inefficiencies, mismanagement and misfeasance found, with the end goal of pointing the way to right the wrongs of government." Green v. Safir, 174 Misc. 2d 400, 403 (N.Y. Sup. Ct. 1997) *affd*, Green v. Safir, 255 A.D.2d 107, 679 N.Y.S.2d 383 (1st Dept. 1998) (remanded on unrelated grounds). In granting then Public Advocate Mark Green access to police personnel records which, like Grand Jury minutes, are presumed confidential under state law, the court noted that "[m]isconduct by those invested with police power is now, and always has been, an area of concern to government." Id. at 403. It remains

so today; as does the Public Advocate's need for the information necessary to fulfill her Charter duties.

Notably, New York City Charter § 1109 explicitly grants the Public Advocate the authority for a summary inquiry "into any alleged violation or neglect of duty in relation to the property, government, or affairs of the city." The plain language of § 1109 broadly speaks of "any alleged violation or neglect of duty" that affects the City's property, government, or affairs. The prosecution of offenses in New York City undeniably affects the "property, government or affairs" of the city.

With respect to Justice Garnett's city-state distinction, Amici submit this brief in large part to refute the suggestion that state lawmaking is entirely severable from city lawmaking, and to assure the Court that the perspective of the Public Advocate, as a citywide elected official, is weighed significantly by state lawmakers in crafting criminal justice policy that affects New York City. In addition to her formal Charter role, the Public Advocate is part of the fluid and symbiotic policymaking dynamic that exists between New York City and State. Clearly the state plays a large role in the law and policies of New York City, through home rule provisions, mandates and preempted areas of law. The dynamic also goes in the other direction. As described by one commentator:

Given the state's far-reaching influence in city politics and government, the city and its officials have responded with a continuous effort to shape state policy. Over time, this effort has taken on both a formal institutional approach as well as a more ad hoc informal approach. The institutional approach involves the presence of representatives of the city government in Albany on a full-time basis as well as elected state officials who represent the city and its citizens. The informal ad hoc approach involves the frequent, but not necessarily routine, attempts by city officials to lobby for city interests at the state level. This is done either through communicating directly with state officials or by getting the city's position articulated through the media.⁷⁵

In the same way states sometimes serve as forerunners to federal action in non-preempted areas of law, local governments can serve as forerunners ahead of states. The Public Advocate is an important part of this city-state exchange of ideas. She regularly weighs in on issues of overlapping policy concern and generates proposals that would need to be implemented through state law. She also has the power to introduce legislation in the city council, which may serve as a model for statewide expansion, or directly call on the state to pass new law through a formal Council resolution.

⁷⁵ Bruce F. Berg, New York City Politics: Governing Gotham 81-82 (2007).

The Public Advocate has appeared in litigation regarding the propriety of the closure of a hospital, because although hospital closures are regulated by the State, they affect the people of New York City.

Although the Public Advocate does not have authority to bring an Article 78 proceeding against a state government agency [citing see *Matter of Madison Sq. Garden*], ... the instant matter does not challenge the actions of a state agency acting as such, but relates to the exercise by LICH's Board of Regents of its fiduciary duty to preserve the mission of LICH to serve the public need for medical care and the adequacy of consideration provided by SUNY for LICH's assets.”

Matter of Long Is. Coll. Hosp., 41 Misc. 3d 1210(A), 1210A (N.Y. Sup. Ct. 2013).

Few would argue that the New York City Mayor does not have a significant voice and role to play with respect to New York State politics. The Public Advocate, created as a “counterweight” to the Mayor, has no less a voice. *Green v. Safir*, 174 Misc.2d 400, 403. She is a citywide elected official who represents a vast portion of the population of this state, and she is an important colleague in government who regularly collaborates with the Legislature on a multitude of public policy issues ranging from access to quality health care, robust high speed internet infrastructure, women’s equality, and criminal justice reform.

Finally, the court below wrote that the Public Advocate has a “myriad of sources for reviewing police actions.” *In re: Investigation into the Death*

of Eric Garner, Joint Appendix 14. By this, however, the court signaled a fundamental misunderstanding of the Public Advocate's purpose in moving for disclosure of the grand jury proceeding. Amici do not support disclosure for the sake of reviewing police actions either specifically in this case, or generally in police shootings. Properly designed, the grand jury should fulfill precisely that role. Rather, Amici support the Public Advocate's request for disclosure to illuminate how to best draft legislation to address systemic obstacles to the grand jury's ability to play its proper role. This is not about police actions- it is about legislating increased transparency and public oversight of our system of justice.

CONCLUSION

The New York City Public Advocate has demonstrated a compelling need for the Eric Garner grand jury records to fulfill her role as a city wide public watchdog by advancing actual, pending litigation on behalf of the City of New York, in particular to capitalize on a historical opportunity to ensure equal justice for the entire populace. Amici respectfully urge the Court to reverse the decision below, to assist us in capitalizing on this moment in time.

May 12, 2015
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