
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)

Richmond County
AD No. 2015-2774

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

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 OF AMICI CURIAE THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS AND 29 MEDIA ORGANIZATIONS* IN SUPPORT OF APPELLANTS FOR THE DISCLOSURE OF GRAND JURY MINUTES AND MATERIALS

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Reporters Committee for Freedom of the Press
Advance Publications, Inc.
American Society of News Editors
Association of Alternative Newsmedia
Bloomberg L.P.
BuzzFeed
Cable News Network, Inc.
The Center for Investigative Reporting
Courthouse News Service
Daily News, LP
Dow Jones & Company, Inc.
First Amendment Coalition
First Look Media, Inc.
Investigative Reporting Workshop at American University
The McClatchy Company
MediaNews Group, Inc.
The National Press Club
National Press Photographers Association
The New York Times Company
News 12
Newsday LLC
North Jersey Media Group Inc.
NYP Holdings, Inc.
Online News Association
Radio Television Digital News Association
Reuters America LLC
The Seattle Times Company
Society of Professional Journalists
Tully Center for Free Speech
The Washington Post

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STATEMENT OF INTEREST OF AMICI CURIAE

Amici file this brief in support of Appellants for disclosure of grand jury minutes and materials related to the investigation of the death of Eric Garner, but write separately to emphasize the news media's perspective on disclosure — a perspective not otherwise represented in the briefing before the Court.¹

The use of deadly force by police and the role that grand juries play in the criminal justice system are two topics of immense public interest and concern. As the public's primary source of information about these issues, the news media play an essential role in gathering and disseminating newsworthy information and providing context and commentary to world events. The news media have a strong interest in monitoring the conduct of public officers and the workings of the criminal justice system on behalf of the public, and in preserving the right of access to documents, the disclosure of which is in the public interest. The news media bring a distinct perspective on the factors that weigh in favor of disclosure, the justifications offered in support of continued secrecy, and, more specifically, the balancing of interests with respect to evidence shown to the grand jury.

A supplemental statement of identity and interest of *amici curiae* is included below as Appendix A.

¹ NYP Holdings, Inc. a/k/a New York Post appeared below as a petitioner, *see* Index No. 080308/14, and is joining in this amicus but has not appealed.

SUMMARY OF ARGUMENT

A number of incidents nationwide involving officers and unarmed black men have created the greatest controversy over racial injustice in decades in this country, at least since the civil rights movement of the 1960s. These events, including the death of Eric Garner, prompted Chief Judge Jonathan Lippman to call for reforms in the grand jury system in New York. As this controversy rages, the Garner case presents a perfect opportunity for the courts to allow members of the general public to know more about the grand jury system, not out of idle curiosity but to better perform the task of public oversight of the justice system.

The Garner investigation presents a unique confluence of factors that counsels in favor of disclosing normally confidential grand jury records. The alleged crime was witnessed in real time, recorded on video, and widely disseminated. Due to extensive news reporting, there are few remaining unknowns about the underlying events that led to the criminal investigation, and even the police union leader has said that Officer Pantaleo, the target of the grand jury investigation, wants the public to hear what the grand jury heard. Because this case involves the use of deadly force by police against an unarmed minority and the grand jury did not return an indictment, the case holds particular interest for lawyers, legal reformers, activists, reporters and the public. Questions remain about the performance of the prosecutor, now an elected member of Congress, and

the efficacy of the criminal justice system itself. The grand jury process is deserving of public scrutiny no matter what the records reveal, or whether they suggest a fair or a flawed system. Thus, the press and the public have a compelling interest in disclosure.

Chief Judge Jonathan Lippman has stated that cases like this “undermine public trust and confidence in the justice system,” and that the grand jury system is in need of reform. Jonathan Lippman, *THE STATE OF THE JUDICIARY 2015*, at 2 (2015), available at <http://www.nycourts.gov/ctapps/news/SOJ-2015.pdf>. *Amici*, as members and representatives of the news media, have a particularized interest in obtaining greater insight into the functioning of the grand jury process in order to help the public, legislators, and the courts, evaluate efforts to reform the criminal justice system.

Here, where none of the traditional justifications for grand jury secrecy exist, there is a “lesser burden in showing justification” for disclosure, *see Douglas Oil Co. v. Petrol Stops Nw.*, 441 U.S. 211, 223 (1979), and the balance of interests strongly favors disclosure. This is particularly true for much of the documentary evidence in the case, including the four requested video exhibits, disclosure of which would not have any conceivable adverse effects on the frankness of future grand jury witnesses. As *amici* explain, the oft-repeated concern about the effect that disclosure would have on future witnesses is misplaced, because so many

exceptions to grand jury secrecy already exist that witnesses cannot reasonably have an expectation that their testimony will remain confidential under the law as it stands today.

This Court should invoke its inherent powers, in the interests of justice, to reverse the lower court and order the release of the requested grand jury minutes and records, due to the overwhelming public interest in this case. Greater public access can only benefit the public in understanding how the system works and what reforms may or may not be necessary.

ARGUMENT

I. The public interest is well-served by disclosing the grand jury materials in this case.

In the last year alone, the public has witnessed a relentless succession of racially charged incidents in which unarmed minorities, typically black men, have died at the hands of police officers. The stories of Eric Garner in Staten Island; Freddie Gray in Baltimore; Michael Brown in Ferguson, Mo.; Eric Harris, in Tulsa, Okla.; Tamir Rice, in Cleveland; and Walter Scott in South Carolina — among others — have bred dangerous mistrust between communities and local police, sparking protests, galvanizing activists and inspiring reflection on law enforcement policies, race relations, and the grand jury system.² *See* Lippman, *supra*, at 2 (“it is obvious that we need significant change in grand jury practices and protocols”).

It is important to understand at the outset that the public interest implicated here is in knowing how the case was presented to the grand jury by prosecutors, rather than second-guessing or “Monday morning quarterbacking” the grand jurors’ deliberations or decision, as prosecutors incorrectly assumed Appellants are seeking to do. Transcript of Proceedings, Feb. 5, 2015, at 93. The Appellants

² *See* Jelani Cobb, *Baltimore and the State of American Cities*, *The New Yorker*, Apr. 27, 2015, <http://www.newyorker.com/?p=3041616> (describing the deaths as a “blurred collection of terrible redundancies” and the public reaction), *archived at* <http://perma.cc/G3KH-XZXY>. While not all of these cases involved police shootings or controversial grand jury decisions, each raises a fundamental question of whether justice was or will be served in an appropriate manner.

want to know how prosecutors presented evidence and controlled the process, not how the jurors deliberated and reached their decision.

The public, quite understandably, craves information about these incidents in order to better understand the loss of life, to evaluate the conduct of public officials and law enforcement agents, and to inform policy discussions about reform. The news media, as the public's primary source of information on such topics, therefore has the same particularized, compelling need for disclosure as the Appellants: to disseminate information to the public about the grand jury process and how criminal investigations into the use of deadly force by police proceed in the criminal justice system; to eliminate confusion and misinformation about the underlying events and the grand jury process, which has fueled anger, mistrust and protests³; to scrutinize the behavior of the people's prosecutor, now a member of Congress,⁴ and to prove or disprove the fairness and faithfulness with which he conducted the proceedings⁵; to disseminate information to the public and elected

³ See Matt Stroud, *Should the Secrets from the Eric Garner Grand Jury Be Revealed?*, Bloomberg (Feb. 5, 2015, 12:14 P.M.), <http://goo.gl/6yrOii>, archived at <http://perma.cc/SHW2-MA4P> (attributing protests, in part, to “a lack of transparency about why the grand jury decided not to indict”).

⁴ See Alexander Burns, *Donovan, Staten Island Prosecutor, Wins Congressional Seat Grimm Held*, The New York Times (May 5, 2015), <http://nyti.ms/1KhCnbk>, archived at <http://perma.cc/6UWZ-NHQQ>.

⁵ See *United States v. Salanitro*, 437 F. Supp. 240, 245 (D. Neb. 1977) (“Reestablishing faith in state and city governments by proving or disproving the faithfulness of their officials is a goal

representatives that informs ongoing discussions of reform⁶; and to reassure the public that the court system is not concealing unpleasant truths under a veil of secrecy at the expense of the public interest.

The Court below focused too specifically on the meaning of a “particularized” need, and was in fact quite dismissive of the interests of the news media. *See* Decision and Order at 9 (“Journalistic curiosity is simply not a legally cognizable need under the law.”) The court chose to interpret the inquiry as a “specific” need. But in a case like this, which raises the very issue of whether justice is even available to a significant portion of the population based on the color of their skin or their economic status, the more “general” interest in informing the public of how the process works is certainly “particular” enough to justify an interest in disclosure. *Cf. Myers v. Phillips*, No. 04-cr-4365, 2007 WL 2276388, at *2 (E.D.N.Y. Aug. 7, 2007) (ordering limited disclosure of grand jury transcripts, where the compelling and particularized need was in knowing what was told to the grand jury, not for the proving or disproving the underlying facts, because that information could not be obtained in any other manner). Given the calls for grand jury reform, including by the Chief Judge of the state court system,

with enough urgency to carry a major part of a compelling and particularized need. . . . [T]he primacy of the goal should be enough to allow revelation of the grand jury testimony.”).

⁶ *See* Jesse McKinley, *Head of New York’s Top Court Says Judges Should Oversee Grand Juries in Deaths Involving Police*, N.Y. Times, Feb. 17, 2015, <http://nyti.ms/1HRi6up> (reporting on one proposal to change grand jury practices).

knowledge of how the system operates in a case like this is essential for meaningful public participation in the reform process.

Excessive grand jury secrecy can contribute to a loss of confidence in the justice system. According to Chief Judge Jonathan Lippman,

[o]f immediate concern are the perceptions of some that prosecutors' offices, which work so closely with the police as they must and should, are unable to objectively present to the grand jury cases arising out of police-civilian encounters. Such perceptions, while broad brush, clearly can undermine public trust and confidence in the justice system. . . . In cases of significant public interest, secrecy does not further the principles it is designed to protect but, in fact, significantly impedes fair comment and understanding of the court process.

See Lippman, *supra*, at 2–3; *see also* Editorial, *Lack of transparency about Eric Garner grand jury will only fuel distrust of criminal justice system*, Staten Island Advance (Dec. 4, 2014, 6:56 P.M.), <http://goo.gl/DLOiiR>, *archived at* <http://perma.cc/J59T-F9FA> (asserting that transparency is essential to mollify “a distrusting public”).

The loss of confidence comes at a cost. A growing body of empirical research “suggests that a criminal justice system derives practical value by generating societal perceptions of fair enforcement and adjudication.” Josh Bowers & Paul H. Robinson, *Perceptions of Fairness and Justice: The Shared Aims and Occasional Conflicts of Legitimacy and Moral Credibility*, 47 Wake Forest L. Rev. 211, 211 (2012). The research suggests that even incremental

decreases in the justice system's credibility can have an adverse effect on people's willingness to assist law enforcement investigations, to comply with substantive laws, and to defer to the outcomes produced by the criminal justice system in the future. *Id.* at 258–62. Excessive grand jury secrecy, then, has the potential to undermine future investigations, rather than protect them.

Because secrecy breeds “distrust” of the judiciary and its ability to adjudicate matters fairly, *Sheppard v. Maxwell*, 384 U.S. 333, 349 (1966), and because access to courts and government records is “an essential feature of democratic control and accountability,” *People v. Cipolla*, 184 Misc. 2d 880, 881 (N.Y. Cnty. Ct. Rensselaer Cnty. 2000), courts in this country are designed to maximize transparency and openness. *See Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 571 (1980) (stating that the public administration of justice serves “an important prophylactic purpose, providing an outlet for community concern, hostility and emotion” following “shocking” events). Public access plays a key role in ensuring openness and fairness of criminal proceedings, “guard[ing] against the miscarriage of justice by subjecting the police, prosecutors, and judicial processes to extensive public scrutiny and criticism.” *See Sheppard*, 384 U.S. at 350.

Although grand jury records are subject to a presumption of confidentiality, “the rule of secrecy is not absolute.” *See People v. Fetcho*, 91 N.Y.2d 765, 769

(1998). Where a proponent of access to grand jury records demonstrates “a compelling and particularized need,” the records should be disclosed if the public interest in disclosure outweighs the interest favoring secrecy. *Id.* The showing needed to meet this burden exists on a sliding scale: “as the considerations justifying secrecy become less relevant, a party asserting a need for grand jury transcripts will have a lesser burden in showing justification.” *See Douglas Oil Co. of Calif. v. Petrol Stops Nw.*, 441 U.S. 211, 223 (1979).

While there are some special factors to consider when assessing grand jury records, discussed *infra* at Part II, the same considerations that require openness of criminal trials counsel that grand jury materials should be disclosed in appropriate cases, such as this. Here, where much has already been reported about the incident, the alleged criminal act was captured on videotape and disseminated to the public, the target of the investigation has been identified, and the public has an overwhelming interest in evaluating the investigation itself, the justifications for keeping records under seal is particularly weak. District Attorney Robert McCulloch, in St. Louis County, Mo., recognized the overriding public interest in disclosure when, after the grand jury declined to return an indictment in the Ferguson, Mo., case, he released evidence presented to the grand jury, as well as transcripts of grand jury testimony, with limited redactions to shield the identity of the jurors and certain witnesses whose identities were not public. *See* Robert

Patrick, *St. Louis County prosecutor will release records if no indictment*, St. Louis Post-Dispatch, Nov. 24, 2014, <http://goo.gl/Tuqhv5>, archived at <http://perma.cc/DC26-7M7H>.

A chorus of other voices — including those of Mayor Bill de Blasio⁷; union officials and Officer Daniel Pantaleo, the target of the Garner grand jury investigation⁸; and Eric Garner’s family⁹ — agree the disclosure here is in the public interest. For the foregoing reasons, the requested grand jury materials should be released.

II. The news media use unsealed grand jury materials to help inform the public about the workings of its governments and public officials.

The news media have used unsealed grand jury materials as the basis for creating reports of the utmost public concern. In one notable example last year, an Illinois judge unsealed a special prosecutor’s investigatory report related to the death of David Koschman, to which Richard J. Vanecko, nephew of former

⁷ See Jillian Jorgensen, Bill de Blasio: ‘More Information Would Be Helpful’ From Garner Grand Jury, N.Y. Observer (Dec. 4, 2014, 4:51 P.M.) <http://nyob.co/1vRo3Re>, archived at <http://perma.cc/N7C3-9Q9W> (“Mayor Bill de Blasio said today he believed more information should be released to the public in the Eric Garner case.”).

⁸ See Elahe Izadi, *New York Mayor, police union officials clash after grand jury decision in Eric Garner’s death*, The Washington Post, Dec. 4, 2014, <http://wapo.st/1bDZamp>, archived at <http://perma.cc/K6HW-TGFB> (stating that union officials agree “that more information related to the grand jury decision should be released,” and quoting Patrick J. Lynch, president of the Patrolmen’s Benevolent Association, as saying that Pantaleo “has no qualms if that information is released,” and that Pantaleo “would like everyone to hear what the grand jurors heard”).

⁹ Christopher Mathias, *Lawyers March for Release of Eric Garner Grand Jury Records*, Huffington Post (Jan. 16, 2015, 11:59 A.M.), <http://huff.to/1Ew1FkK> (describing more than 100 protesters, including Eric Garner’s mother and daughter, demanding release of the records).

Chicago Mayor Richard M. Daley, pleaded guilty on involuntary manslaughter charges. The Chicago Sun-Times, which had written extensively on the case, reported that the unsealed report revealed “a litany of law-enforcement failings,” including “new details about Koschman case files that went missing from the police department and the state’s attorney’s office.” Tim Novak, et al., *Daley Quickly Knew of Nephew’s Involvement*, Chicago Sun-Times, Feb. 4, 2014 <http://projects.suntimes.com/koschman/?p=1962>, *archived at* <http://perma.cc/45EY-7UHK>. The Sun-Times coverage quoted the leader of a government watchdog group, who concluded that the unsealed report “reveals troubling behavior by the Chicago Police Department and the Cook County state’s attorney’s office,” and “raises enough serious questions to warrant continuing investigation by, among others, the city of Chicago’s inspector general, the state’s executive inspector general, the Illinois attorney general and the U.S. attorney’s office.” *Id.*

In California, The San Diego Union-Tribune used unsealed grand jury transcripts to report on a Public Integrity Unit, created by the District Attorney, which was charged with investigating government corruption. The newspaper observed that “[t]he public has been given little information about the unit’s work,” but used a 732-page grand jury transcript to fill in details about an investigation that might have been politically motivated, despite contrary assertions by the

District Attorney. *See* Tanya Mannes, *DA unit works as quietly as it began*, The San Diego Union-Tribune, May 20, 2007, <http://goo.gl/e2wtN6>, archived at <http://perma.cc/22SN-GHAT>.

A grand jury report unsealed last month recommended that Pennsylvania Attorney General Kathleen Kane face charges of perjury, false swearing, and official oppression and obstruction, related to statements she made before a grand jury about leaked documents. *See* Paula Reed Ward, *Attorney general's testimony had 'inconsistencies,' a newly unsealed document says*, Pittsburgh Post-Gazette, Apr. 27, 2015, <http://goo.gl/1qTfUV>, archived at <http://perma.cc/4SE5-RKBX>. Although Kane maintains she did not leak sealed documents, the grand jury report suggested she lied under oath to protect herself. *Id.* No formal charges have been brought against Kane.

Other examples abound. Following the release of the Ferguson grand jury materials, the news media reported on the information “to illuminate and explain the events that have happened and the wide-ranging conversation that is going on.” *See, e.g.*, The Ferguson Project, St. Louis Public Radio, <http://apps.stlpublicradio.org/ferguson-project> (last visited May 7, 2015). The news media also have used unsealed grand jury materials to provide new insights into historical events,

including Watergate,¹⁰ the trial of Julius and Ethel Rosenberg,¹¹ and the investigation of Alger Hiss,¹² among others.

These examples demonstrate that the news media's interest in grand jury materials is not only to obtain "grist for its editorial mill," as the Supreme Court below suggested, but to inform the public about the conduct of its government and public officials, an essential aspect of a democratic society.

III. The traditional underpinnings of grand jury secrecy, and the reasons for denying disclosure in this case, do not justify continued secrecy in this case.

New York courts have held that "the reasons for maintaining the secrecy or confidentiality of grand jury minutes" include:

(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.

¹⁰ See Adam Nagourney & Scott Shane, *Newly Released Transcripts Show a Bitter and Cynical Nixon in '75*, N.Y. Times, Nov. 10, 2011, <http://nyti.ms/1Kn14n1>.

¹¹ See Robin Shulman, *Rosenberg Sons Say Father Was Guilty, Mother Was Framed*, The Washington Post, Sept. 23, 2008, <http://wapo.st/1KmZa5R>, archived at <http://perma.cc/X43D-Q85F>.

¹² See Deb Riechmann, *Nixon Urged Hiss Indictment*, Associated Press, Oct. 13, 1999, <http://wapo.st/1Kn2cH5>, archived at <http://perma.cc/4JY9-ATJY>.

People v. Di Napoli, 27 N.Y.2d 229, 235 (1970). These correspond with the factors identified by the U.S. Supreme Court. See *Douglas Oil*, 441 U.S. at 1673.

The Supreme Court for the County of Richmond, in denying the petitions for access, discussed four reasons for concluding that the interests favoring secrecy outweigh the public interest: (1) “[r]evealing the minutes . . . may place witnesses in jeopardy of intimidation or tampering if called to a federal grand jury or to a federal trial,” (2) Officer Pantaleo has a “reputational stake in not having [his] conduct reviewed again,” (3) “public comment or criticism” of witnesses’ testimony would discourage “witnesses’ cooperation and honesty” in future cases, and (4) the “collective decision” of the grand jury “should not be impeached by unbridled speculation that the integrity of this grand jury was impaired in any way.” Decision and Order, *In the Matter of the Investigation into the Death of Eric Garner*, Nos 080304/2014, 080296/2014, 080307/2014, 080308/2014 & 080009/2015, at 10–11 (N.Y. Cnty. Ct. for Richmond Cty. Mar. 19, 2015).

None of these factors, individually or in aggregate, outweighs the interest in disclosure here.

The first four *Di Napoli* factors do not apply to this case, where the investigation is over and the grand jury has been dismissed after deciding not to return an indictment. There is no risk of a target fleeing, no grand jurors to protect from interference from anyone under investigation, no risk of witness tampering

for trial, and no concerns over identifying those accused, since Officer Pantaleo has already been identified. *See Di Napoli*, 27 N.Y.2d at 235. Although the Supreme Court below stated that witnesses could be subject to “intimidation or tampering” if called before a federal grand jury, *see* Decision and Order, *supra*, at 10, that concern is unfounded. To *amici*’s knowledge, no federal grand jury has been convened, and the court made no findings or cited any evidence that suggests a risk of “intimidation or tampering” to any witnesses. Additionally, other measures, such as limited redactions, could be employed to satisfy this concern.

The final *Di Napoli* factor — assurance to prospective witnesses that their testimony will be kept secret so that they will be willing to testify freely, which the court below identified as “[m]ost important to the integrity and thoroughness of the criminal justice system,” *id.* — should be accorded little weight in light of the multitude of ways grand jury testimony may be disclosed. This factor is an oft-cited but misguided justification for continued secrecy of grand jury records.

Witnesses already do not have credible assurances that their testimony will remain confidential. By statute, grand jury records may be made available to a prosecutor, a law enforcement agency, a state or local officer or agency that issues gun licenses, the department of corrections, any prospective employer of a police officer or peace officer, or the probation department. CPL § 160.50(1)(d). If the grand jury returns an indictment, copies of the witness testimony are *automatically*

made available to the defendant. *See* CPL § 240.45(1)(a); *see also* *Palmer v. Estate of Stuart*, No. 02-cv-4076, 2004 WL 2429806, at *5 (S.D.N.Y. Nov. 1, 2004) (“The Court cannot accept the argument . . . that future witnesses before grand juries must be able to testify with the confidence that their testimony will never be revealed,” because grand jury testimony “is automatically made available” in discovery pursuant to CPL § 240.45(1)(a)). Testimony may be disclosed for impeachment purposes at trial and to refresh a witness’s recollection or to lead a hostile witness. *See, e.g.,* *Marcano v. City of N.Y.*, 695 N.Y.S.2d 597, 598, 264 A.D.2d 823 (N.Y. App. Div. 1999). Testimony also may be disclosed when grand jury witnesses possess material information relevant to separate lawsuits that is not available from any other source. *See In re Shopping Cart Antitrust Litig.*, 95 F.R.D. 309, 315 (S.D.N.Y. 1982). Courts have discretion to release grand jury testimony for *any* purpose, whenever the standard for disclosure has been met.

Therefore, at the moment any witness testifies before a grand jury, that witness cannot know whether his or her testimony will be disclosed pursuant to one of these many exceptions to grand jury secrecy, and thus the witness has absolutely no assurance that his or her testimony will be kept secret. And yet despite these avenues for disclosure, witnesses continue to fulfill their civic duty and testify candidly before grand juries. Disclosure here would have a negligible

effect on the willingness of witnesses to testify, or their honesty — to the extent future grand jury witnesses would even be conscious of it.¹³ *See Application of FOJP Serv. Corp.*, 119 Misc. 2d 287, 291–92 (Sup. Ct. N.Y. Cnty. 1983) (disclosing grand jury records and stating that “[t]he chilling effect factor alone cannot prevent disclosure where an obvious public interest is served by disclosure,” including “the very integrity of the judicial process and advocacy system”); *Application of Scotti*, 53 A.D.2d 282, 288, 385 N.Y.S.2d 659 (4th Dep’t 1976) (“The courts have not deemed that the policy of assuring prospective grand jury witnesses that their testimony will be kept secret (thus encouraging them to testify freely) requires a denial of the use of the minutes of grand jury testimony in the protection of the public interest.”); *see also In re Shopping Cart Antitrust Litig.*, 95 F.R.D. at 313 (finding that disclosure would have a “de minimis” effect on any interference with “open testimony” by witnesses in “future, or hypothetical grand juries”).

The two remaining factors mentioned by the Supreme Court below do not tip the scales in favor of secrecy. Officer Pantaleo will not suffer additional reputational harm as a result of the release of records. According to police union leader Patrick J. Lynch, Officer Pantaleo *wants* jury records to be released,

¹³ Research has not identified any reports out of Ferguson, Mo., that prosecutors have seen any chilling effect on witnesses based on the voluntary disclosures by District Attorney McCulloch.

“because it’s the truth. . . . He would like everyone to hear what the grand jurors heard.” *See Izadi, supra*. In any event, it is difficult to imagine how Pantaleo’s reputation would be even incrementally harmed by disclosures, given that the alleged criminal act was captured on video and widely disseminated, and that the grand jury declined to return an indictment. Finally, “unbridled speculation” about grand jury proceedings, to the extent that is a concern of legal significance, is occurring now in the *absence* of information about what the grand jury heard because of the secrecy surrounding the process. Additional information could lay speculation to rest. Therefore, these two remaining factors, far from supporting secrecy, counsel in favor of disclosure.

Courts, in their discretion and under their “inherent powers,” may disclose grand jury materials when the need for secrecy disappears. *In the Matter of Ex Parte Application of N.Y. State Temporary Comm’n*, 590 N.Y.S.2d 169, 171–172 (N.Y. Cnty. Ct. for Westchester Cnty. 1992). Here, there is a strong public interest in disclosure and no persuasive justifications for continued secrecy.

IV. The question of access does not have to be all or nothing, as different types of information can be handled under different standards.

It is critical to understand that openness in the grand jury system does not have to be seen as an all-or-nothing proposition. Different types of information implicate openness and confidentiality interests in different ways, and a particularized need may be evident for some information even if not for all

materials. In fact, the requirement to show a “particularized” need for information suggests the need can be different for different information, rather than “generalized” enough to cover all information presented to the grand jury.

While some witness testimony may be sensitive (which could be addressed with appropriate redactions), information like the additional video segments and training manuals, and how they were presented to the jurors, present none of the same concerns. In this case, even the medical records, which the Garner family wants released to the public, present none of the same concerns. This court should take the opportunity to recognize that these materials are of particular interest to the public and must be released.

According to the information provided by the Supreme Court below, “four (4) videos” were “admitted into evidence.” Decision and Order, *In the Matter of the Investigation into the Death of Eric Garner*, No. 80294/14, at 4 (N.Y. Cnty. Ct. for Richmond Cty. Dec. 4, 2014). To the knowledge of *amici*, only two videos are currently publicly available: a three-minute video of the confrontation, obtained by the New York Daily News,¹⁴ and a seven-and-a-half-minute video of the aftermath, posted to Facebook and reposted by several news organizations.¹⁵ Assuming these

¹⁴ See *Staten Island man dies after NYPD cop puts him in chokehold*, N.Y. Daily News, <http://goo.gl/vfectk> (last visited Apr. 29, 2015).

¹⁵ See, e.g., Emily Badger, *There is a second Eric Garner video*, The Washington Post, Dec. 5, 2014, <http://wapo.st/1IouqTu>, archived at <http://perma.cc/524W-JECM>.

two videos were among the four exhibits admitted into evidence, it appears that at least two video exhibits have never been released to the public.

None of the justifications for secrecy cited by the Supreme Court are relevant to the inquiry of whether the four video exhibits should be released. Because the videos are not testimony from witnesses, the concerns about intimidation or tampering disappear, as do concerns of the effect that disclosure would have on future witnesses. And, as explained above, *supra*, at Part II, neither Officer Pantaleo's reputation nor "unbridled speculation" about the grand jury process are strong enough interests to overcome the public interest in understanding more fully the circumstances surrounding Garner's death.

The two videos already in circulation document the verbal confrontation between Garner and police officers, the moment Officer Pantaleo appeared to place Garner in a chokehold, and the aftermath as the officers await emergency medical personnel. To the extent the other videos capture the same moments from different vantage points, there can be no justification for withholding those videos now. *Accord In re Craig*, 131 F.3d 99, 107 (2d Cir. 1997) ("even partial previous disclosure often undercuts many of the reasons for secrecy"). To the extent the videos capture distinct moments of the confrontation timeline, there is an even stronger interest in their disclosure, because the videos will provide a more complete picture of the events. Because the incident occurred on a public street,

there cannot be strong privacy interests weighing against disclosure. *See* Restatement (Second) of Torts § 652D, cmt. b (stating that an individual cannot object on privacy grounds when photographed in a public street); *Arrington v. N.Y. Times Co.*, 55 N.Y.2d 433, 440 (1982) (“in this State there exists no so-called common-law right to privacy”).

To an even greater degree, there can be no justification for withholding the information given to grand jurors about police policies, and specifically how it was presented by prosecutors. None of the articulated interests behind grand jury secrecy apply to this information and instruction, yet it plays a valuable role in determining how the grand jurors are instructed in what is proper police behavior. Nor is there any justification for withholding the charges presented to the grand jury by prosecutors. Maintaining the confidentiality of this material does nothing but fan the flames of theories of prosecutorial manipulation.

Appellants and *amici* have legitimate, articulable and particularized needs for access to the grand jury material, even if those needs do not include a specific evidentiary need in a pending matter. *See supra*, at Part I. At the very least, Appellants and *amici* have presented a compelling and particularized need for the video exhibits, given the lower burden to justify disclosure when the reasons for secrecy have faded. *See Douglas Oil*, 441 U.S. at 223. Even if this Court rules that some materials should remain under seal, courts have the authority to release a

subset of the requested records, when that subset qualifies for disclosure. *See Gonzalez v. Cnty. of Suffolk*, No. 09-cv-1023, 2014 WL 1669134, at *1 (E.D.N.Y. Apr. 23, 2014) (finding disclosure was warranted for some, but not all, requested grand jury records).

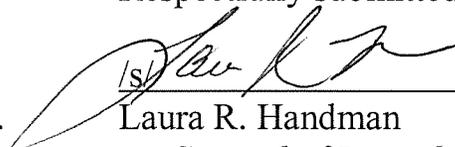
This Court should avoid upholding secrecy for secrecy's sake in this case, where the alleged crime has been documented and widely disseminated, and there is such an overwhelming public interest in disclosure of the material to assess the conduct of the prosecutor and the functioning of the criminal justice system.

CONCLUSION

For the foregoing reasons, *amici curiae* respectfully request that this Court reverse the Supreme Court for the County of Richmond and order the release of grand jury minutes and materials.

Respectfully submitted,

Dated: May 11, 2015
Washington, D.C.



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Appendix B

CERTIFICATE OF COMPLIANCE
PURSUANT TO 22 NYCRR § 670.10.3(f)

The foregoing brief was prepared on a computer. A proportionally spaced typeface was used, as follows:

Name of typeface: Times New Roman
Point size: 14
Line spacing: Double

The total number of words in the brief, inclusive of point headings and footnotes and exclusive of pages containing the table of contents, table of citations, proof of service, certificate of compliance, or any authorized addendum containing statutes, rules, regulations, etc., is 5,384.

Dated: May 11, 2015



Laura R. Handman
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APPENDIX A

SUPPLEMENTAL STATEMENT OF IDENTITY AND INTEREST OF AMICI CURIAE (A-1 to A-9)

The Reporters Committee for Freedom of the Press is a voluntary, unincorporated association of reporters and editors working to defend and preserve First Amendment rights and freedom of information interests of the news media. The Reporters Committee has provided representation, guidance, and research in First Amendment and Freedom of Information Act litigation since 1970, and it frequently files friend-of-the-court briefs in significant media law cases.

Advance Publications, Inc., directly and through its subsidiaries, publishes more than 20 print and digital magazines with nationwide circulation, local news in print and online in 10 states, and leading business journals in over 40 cities throughout the United States. Through its subsidiaries, Advance also owns numerous digital video channels and internet sites and has interests in cable systems serving over 2.3 million subscribers.

With some 500 members, **American Society of News Editors** (“ASNE”) is an organization that includes directing editors of daily newspapers throughout the Americas. ASNE changed its name in April 2009 to American Society of News Editors and approved broadening its membership to editors of online news providers and academic leaders. Founded in 1922 as American Society of

Newspaper Editors, ASNE is active in a number of areas of interest to top editors with priorities on improving freedom of information, diversity, readership and the credibility of newspapers.

Association of Alternative Newsmedia (“AAN”) is a not-for-profit trade association for 130 alternative newspapers in North America, including weekly papers like The Village Voice and Washington City Paper. AAN newspapers and their websites provide an editorial alternative to the mainstream press. AAN members have a total weekly circulation of seven million and a reach of over 25 million readers.

Bloomberg L.P. operates Bloomberg News, a 24-hour global news service based in New York with more than 2,400 journalists in more than 150 bureaus around the world. Bloomberg supplies real-time business, financial, and legal news to the more than 319,000 subscribers to the Bloomberg Professional service worldwide and is syndicated to more than 1000 media outlets across more than 60 countries. Bloomberg television is available in more than 340 million homes worldwide and Bloomberg radio is syndicated to 200 radio affiliates nationally. In addition, Bloomberg publishes Bloomberg Businessweek, Bloomberg Markets and Bloomberg Pursuits magazines with a combined circulation of 1.4 million readers and Bloomberg.com and Businessweek.com receive more than 24 million visitors each month. In total, Bloomberg distributes news, information, and commentary to

millions of readers and listeners each day, and has published more than one hundred million stories.

BuzzFeed is a social news and entertainment company that provides shareable breaking news, original reporting, entertainment, and video across the social web to its global audience of more than 200 million.

Cable News Network, Inc. (“CNN”), a division of Turner Broadcasting System, Inc., a Time Warner Company, is the most trusted source for news and information. Its reach extends to the following: nine cable and satellite television networks; one private place-based network; two radio networks; wireless devices around the world; CNN Digital Network, the No. 1 network of news websites in the United States; CNN Newsource, the world’s most extensively syndicated news service; and strategic international partnerships within both television and the digital media.

The Center for Investigative Reporting (CIR) believes journalism that moves citizens to action is an essential pillar of democracy. Since 1977, CIR has relentlessly pursued and revealed injustices that otherwise would remain hidden from the public eye. Today, we're upholding this legacy and looking forward, working at the forefront of journalistic innovation to produce important stories that make a difference and engage you, our audience, across the aisle, coast to coast and worldwide.

Courthouse News Service is a California-based legal news service for lawyers and the news media that focuses on court coverage throughout the nation, reporting on matters raised in trial courts and courts of appeal up to and including the U.S. Supreme Court.

Daily News, LP publishes the New York Daily News, a daily newspaper that serves primarily the New York City metropolitan area and is the sixth-largest paper in the country by circulation. The Daily News' website, NYDailyNews.com, receives approximately 22 million unique visitors each month.

Dow Jones & Company, Inc., a global provider of news and business information, is the publisher of The Wall Street Journal, Barron's, MarketWatch, Dow Jones Newswires, and other publications. Dow Jones maintains one of the world's largest newsgathering operations, with more than 1,800 journalists in nearly fifty countries publishing news in several different languages. Dow Jones also provides information services, including Dow Jones Factiva, Dow Jones Risk & Compliance, and Dow Jones VentureSource. Dow Jones is a News Corporation company.

First Amendment Coalition is a nonprofit public interest organization dedicated to defending free speech, free press and open government rights in order to make government, at all levels, more accountable to the people. The Coalition's mission assumes that government transparency and an informed electorate are

essential to a self-governing democracy. To that end, we resist excessive government secrecy (while recognizing the need to protect legitimate state secrets) and censorship of all kinds.

First Look Media, Inc. is a new non-profit digital media venture that produces *The Intercept*, a digital magazine focused on national security reporting.

The Investigative Reporting Workshop, a project of the School of Communication (SOC) at American University, is a nonprofit, professional newsroom. The Workshop publishes in-depth stories at investigativereportingworkshop.org about government and corporate accountability, ranging widely from the environment and health to national security and the economy.

The McClatchy Company, through its affiliates, is the third-largest newspaper publisher in the United States with 29 daily newspapers and related websites as well as numerous community newspapers and niche publications.

MediaNews Group's more than 800 multi-platform products reach 61 million Americans each month across 18 states.

The National Press Club is the world's leading professional organization for journalists. Founded in 1908, the Club has 3,100 members representing most major news organizations. The Club defends a free press worldwide. Each year, the

Club holds over 2,000 events, including news conferences, luncheons and panels, and more than 250,000 guests come through its doors.

The National Press Photographers Association (“NPPA”) is a 501(c)(6) non-profit organization dedicated to the advancement of visual journalism in its creation, editing and distribution. NPPA’s approximately 7,000 members include television and still photographers, editors, students and representatives of businesses that serve the visual journalism industry. Since its founding in 1946, the NPPA has vigorously promoted the constitutional rights of journalists as well as freedom of the press in all its forms, especially as it relates to visual journalism. The submission of this brief was duly authorized by Mickey H. Osterreicher, its General Counsel.

The New York Times Company is the publisher of The New York Times and The International Times, and operates the news website nytimes.com.

News 12 is a cable-exclusive news service available throughout the New York tri-state area.

Newsday LLC (“Newsday”) is the publisher of the daily newspaper, Newsday, and related news websites. Newsday is one of the nation’s largest daily newspapers, serving Long Island through its portfolio of print and digital products. Newsday has received 19 Pulitzer Prizes and other esteemed awards for outstanding journalism.

North Jersey Media Group Inc. (“NJMG”) is an independent, family-owned printing and publishing company, parent of two daily newspapers serving the residents of northern New Jersey: The Record (Bergen County), the state’s second-largest newspaper, and the Herald News (Passaic County). NJMG also publishes more than 40 community newspapers serving towns across five counties and a family of glossy magazines, including (201) Magazine, Bergen County’s premiere magazine. All of the newspapers contribute breaking news, features, columns and local information to NorthJersey.com. The company also owns and publishes Bergen.com showcasing the people, places and events of Bergen County.

The New York Post, owned by **NYP Holdings, Inc.**, is the oldest continuously published daily newspaper in the United States, with the seventh largest circulation. It is published in print and online.

Online News Association (“ONA”) is the world’s largest association of online journalists. ONA’s mission is to inspire innovation and excellence among journalists to better serve the public. ONA’s more than 2,000 members include news writers, producers, designers, editors, bloggers, technologists, photographers, academics, students and others who produce news for the Internet or other digital delivery systems. ONA hosts the annual Online News Association conference and administers the Online Journalism Awards. ONA is dedicated to advancing the interests of digital journalists and the public generally by encouraging editorial

integrity and independence, journalistic excellence and freedom of expression and access.

Radio Television Digital News Association (“RTDNA”) is the world’s largest and only professional organization devoted exclusively to electronic journalism. RTDNA is made up of news directors, news associates, educators and students in radio, television, cable and electronic media in more than 30 countries. RTDNA is committed to encouraging excellence in the electronic journalism industry and upholding First Amendment freedoms.

Reuters, the world’s largest international news agency, is a leading provider of real-time multi-media news and information services to newspapers, television and cable networks, radio stations and websites around the world. Through Reuters.com, affiliated websites and multiple online and mobile platforms, more than a billion professionals, news organizations and consumers rely on Reuters every day. Its text newswires provide newsrooms with source material and ready-to-publish news stories in twenty languages and, through Reuters Pictures and Video, global video content and up to 1,600 photographs a day covering international news, sports, entertainment, and business. In addition, Reuters publishes authoritative and unbiased market data and intelligence to business and finance consumers, including investment banking and private equity professionals.

The Seattle Times Company, locally owned since 1896, publishes the daily newspaper The Seattle Times, together with The Issaquah Press, Yakima Herald-Republic, Walla Walla Union-Bulletin, Sammamish Review and Newcastle-News, all in Washington state.

Society of Professional Journalists (“SPJ”) is dedicated to improving and protecting journalism. It is the nation’s largest and most broad-based journalism organization, dedicated to encouraging the free practice of journalism and stimulating high standards of ethical behavior. Founded in 1909 as Sigma Delta Chi, SPJ promotes the free flow of information vital to a well-informed citizenry, works to inspire and educate the next generation of journalists and protects First Amendment guarantees of freedom of speech and press.

The Tully Center for Free Speech began in Fall, 2006, at Syracuse University’s S.I. Newhouse School of Public Communications, one of the nation’s premier schools of mass communications.

WP Company LLC (d/b/a The Washington Post) publishes one of the nation’s most prominent daily newspapers, as well as a website, www.washingtonpost.com, that is read by an average of more than 20 million unique visitors per month.

APPENDIX B

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