

THE STATE OF NEW HAMPSHIRE  
SUPREME COURT

2022 TERM

Docket No. 2022-0321

AMERICAN CIVIL LIBERTIES UNION OF NEW HAMPSHIRE

v.

NEW HAMPSHIRE DEPARTMENT OF SAFETY, DIVISION OF  
STATE POLICE

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Appeal Pursuant to Rule 7

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**BRIEF OF BLACK LIVES MATTER MANCHESTER AS *AMICUS  
CURIAE* IN SUPPORT OF APPELLEE AMERICAN CIVIL  
LIBERTIES UNION OF NEW HAMPSHIRE**

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## **QUESTIONS PRESENTED**

*Amicus curiae* incorporates the Questions Presented as outlined by the parties.

## **IDENTITY OF *AMICUS CURIAE***

Black Lives Matter Manchester is an organization formed to stand against racial injustice in Manchester and across the globe. It was founded in 2016 by a group of recent high school graduates who sought to combat racial injustice, oppression, and state-sanctioned violence. Black Lives Matter Manchester is associated with Black Lives Matter Foundation, Inc., a global organization whose mission is to eradicate white supremacy and build local power to intervene in violence inflicted on Black communities. Black Lives Matter Manchester believes that its unique perspective and experience with these issues, including the relationship between law enforcement and communities of color, will make its brief of service to this Court.

## **SUMMARY OF THE FACTS**

*Amicus curiae* incorporates the facts of the case as outlined by the parties.

## **SUMMARY OF THE ARGUMENT**

Transparency in policing is universally beneficial, to the public and police alike. It allows for accountability; it serves to restore the dwindling trust in police; and it serves as a check on the over-policing that has plagued the relationship between police and people of color for so many years. And, in the context of cases like this one, it allows law enforcement agencies to prove that they are capable of evaluating and remedying

complaints against their own officers. Whether the records at issue show that the State Police viewed Haden Wilber's treatment of Robyn White as, to quote one officer, "complete horseshit," and acted accordingly or whether they, to quote the same officer, did not "want to hear that they're doing anything wrong," the public's interest and right in reviewing these records and vetting one of the most powerful agencies tasked with serving it is extraordinarily high. *See* Trial Court Order, at 6.

This is not a case of a minor policing mistake; Haden Wilber's misconduct was egregious and, frankly, horrifying. The idea that the public has no ability to determine whether it was the latest in a pattern of misconduct, whether it was the product of systemic issues, or whether Wilber's cavalier attitude towards citizens' constitutional rights and his constitutional duties is reflected in his treatment of people of color is alarming.

Ultimately, this case is one about accountability and trust: two pillars of the public's constitutional and statutory rights of access to public records and two essential preconditions in establishing a mutually beneficial relationship between the public and those who are sworn to protect and serve it. There is, perhaps, no more pressing a need to build and strengthen such a relationship than in the context of relations between police and communities of color. The focus of this Brief is on that issue and how it impacts the public interest balancing test mandated by this Court's Right-to-Know Law precedent—a balancing test that the State Police seeks to subvert in arguing that police personnel files are entitled to categorical secrecy under RSA 105:13-b—and the constitutional underpinning of the

public’s Right-to-Know “what its government is up to.” *Reid v. New Hampshire Attorney General*, 169 N.H. 509, 532 (2016).

## ARGUMENT

Under RSA 91-A, the right to information belongs to the public. This right, and its freedom from any eclipsing influence of individual officers, is particularly significant in the context of relations between police and communities of color. In *every* case, rebuilding those relations and restoring the trust that is necessary for effective law enforcement, and racial justice, requires unselective transparency, regardless of whether an issue of race is present in any given case. Communities of color need to know that law enforcement is policing *all* communities fairly and properly. And police need the opportunity to prove that the public can trust them.

### **I. Policing Communities of Color: A History of Disproportionality, Skewed Power Dynamics, and a Reckoning Brought About by Increased Transparency**

*“Over the life course, about 1 in every 1,000 Black men can expect to be killed by police.”<sup>1</sup>*

New Hampshire law enforcement often suffers from a lack of transparency and, as a result, the public often lacks the ability to hold them accountable. While police transparency has improved since this Court’s decisions in *Seacoast Newspapers, Inc. v. City of Portsmouth*, 173 N.H. 325 (2020) and *Union Leader Corp./ACLU-NH v. Town of Salem*, 173 N.H. 345 (2020), the State Police’s position in this case confirms that some

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<sup>1</sup> See Edwards, Frank, et al., *Risk of Being Killed by Police Use of Force in the United States by Age, Race-Ethnicity, and Sex*, 116 Proc. of the Nat’l Acad. of Sci. 16793, 16793–94 (2019), available at [https://www.pnas.org/content/116/34/16793?source=post\\_page-----1a2ce329f8e0-----](https://www.pnas.org/content/116/34/16793?source=post_page-----1a2ce329f8e0-----).

public agencies still operate with a presumption against transparency and wish to restart New Hampshire's era of secrecy with respect to disciplinary information that reigned from 1993 to 2020. Communities of color, which are disproportionately targeted by police, bear the brunt of these accountability failures. As such, to better understand the public interest in disclosure of records relating to policing, it is first necessary to understand how and why communities of color are most directly impacted by police misconduct.

As this Court is well aware, people of color are subjected to police encounters at disproportionate rates compared to white people. Black drivers are more likely to be stopped more often. Emma Pierson et al., *A Large-Scale Analysis of Racial Disparities in Police Stops Across the United States*, The Stanford Open Policing Project, available at <https://5harad.com/papers/traffic-stops.pdf>. Black and Hispanic drivers are more likely to be ticketed, searched, and arrested. *Id.* In 2015, although Black people comprised only 13% of the United States population, they accounted for 26.6% of all arrests. *Overview of Table 43 – Arrests, by Race and Ethnicity, 2015, Crime in the United States, 2015*, Uniform Crime Report, available at <https://ucr.fbi.gov/crime-in-the-u.s/2015/crime-in-the-u.s.-2015/tables/table-43>. These arrests translate into even greater disparities in incarceration. According to recent data, approximately 40% of those incarcerated in America are Black. *Breaking Down Mass Incarceration in the 2010 Census: State-by-State Incarceration Rates by Race/Ethnicity*, Prison Policy Initiative,

<https://www.prisonpolicy.org/reports/rates.html>.<sup>2</sup> Research also shows that other minority groups are similarly subjected to targeting by police, with similar consequences. See Tomás Rivera Policy Institute, *Disparities in the Criminal Justice System: Racial and Ethnic Disparities in Pretrial Detainment, Sentencing, and Incarceration*, USC, available at <http://safeandjust.uscmmediacurator.com/racial-and-ethnic-disparities-in-pretrial-detainment-sentencing-and-incarceration/>.

And New Hampshire is not immune from this trend in racial disparity. The lived experiences of people of color in New Hampshire highlight this distressing reality. For instance, Reena Goldthree, a professor at Princeton University (and formerly Dartmouth College), has addressed race as an issue in New Hampshire and how it can go unrecognized:

I think it might be difficult for some of our white neighbors in New Hampshire to understand the depth of fears that African Americans often experience during encounters with police officers. During routine traffic stops, many people are simply worried about receiving a citation, but African Americans wonder if they will be able to drive off with their lives. And I think that that deep sense of fear is still present here in New Hampshire.

Peter Biello & Cordelia Zars, *Police, Black Lives Matter, and Violence: A New Hampshire Perspective*, NHPR (July 8, 2016), available at <https://www.nhpr.org/post/police-black-lives-matter-and-violence-new-hampshire-perspective#stream/0>. She added that, “I, as a black American, have had negative experiences with police officers, including here in New

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<sup>2</sup> In 2015, over 9% of young Black men were incarcerated, compared to 1.6% of young white men. Pettit, Becky & Sykes, Bryan, Stanford Center on Poverty and Inequality, *State of the Union 2017: Incarceration*24, available at [https://inequality.stanford.edu/sites/default/files/Pathways\\_SOTU\\_2017\\_incarceration.pdf](https://inequality.stanford.edu/sites/default/files/Pathways_SOTU_2017_incarceration.pdf). Ten percent of Black children have an incarcerated parent. *Id.* at 26.

Hampshire. I think that most African Americans have either personally experienced it or have close friends or family members who have had the negative encounters with police.” *Id.*

These disparate experiences affect *all* people of color. For example, former NBA star Dwight Davis recently explained “an all-too-familiar experience for African Americans” in New Hampshire. Rajala, Liisa, *Black Granite Staters Call for More Inclusive New Hampshire*, N.H. Bus. Rev. (July 31, 2020), available at <https://www.nhbr.com/black-granite-staters-call-for-more-inclusive-newhampshire/?fbclid=IwAR3HUW4OvoKXaNHJIGrFVD7HJCEkdUy6gaGVE5-udmIYY1LzKXGjppe0o6A>. “Because you have so many of those small towns and here’s this Black guy driving through the town, whether Stratham or Epping, I’ve been pulled over an inordinate amount of times.” *Id.*; see also Gibson, Sarah, *Sununu Says State Looking Into Arrest of Black Man That Went Viral*, NHPR (May 29, 2020), available at <https://www.nhpr.org/nh-news/2020-05-29/sununu-says-state-looking-into-arrest-of-black-man-that-went-viral> (detailing an incident in which a Black man was pulled over by a State Trooper and ripped out of his vehicle by his dreadlocks, prompting an investigation by the Attorney General); Ray Duckler, *Racism, More Subtle Here Than in Metro Areas, is Still Felt by Black Community*, CONCORD MONITOR (July 24, 2016), available at <https://www.concordmonitor.com/If-you-re-black-in-NH-and-get-pulled-over-do-you-worry-You-bet-3518899> (noting how Black parents are forced to give their children “The Talk”<sup>3</sup>).

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<sup>3</sup> See *Utah v. Strieff*, 136 S. Ct. 2056, 2070 (2016) (Sotomayor, J., dissenting) (“For generations, black and brown parents have given their children ‘the talk’—instructing them never to run down the street; always keep your hands where they can be seen; do not even think of talking back to a stranger—all out of fear of how an officer with a gun will react to them.”).

In fact, disparate policing has even affected police of color. *See* Corwin, Emily, *Black Officer Navigates '2 Incompatible Worlds' on N.H. Police Force*, NPR (Oct. 12, 2016), available at <https://www.npr.org/2016/10/12/497637765/black-officer-navigates-2-incompatible-worlds-on-n-h-police-force>. Lakeisha Phelps was, at the time, one of only two Black officers on Nashua's force of more than 170. After she was hired, she was racially profiled by her fellow officers: "[O]ne of the troopers would stop me, like, once every other night." *Id.* Phelps stated: "I absolutely know that I can get shot just because I'm black," also discussing her struggle to explain to her 2-year-old son that "people that are dressed like me are killing people that look like you." *Id.*

Unfortunately, people in New Hampshire often disregard racial disparities or dismiss the significance of their impact, which only exacerbates the problem. *See* Seelye, Katharine Q., *New Hampshire, 94 Percent White, Asks: How Do You Diversify a Whole State*, N.Y. TIMES, (July 27, 2018), available at <https://www.nytimes.com/2018/07/27/us/new-hampshire-white-diversify.html> ("Part of the problem, Rogers J. Johnson, president of the Seacoast N.A.A.C.P., told [a conference] group, was 'a lack of recognition as to the seriousness of this problem.' He said that many people in New Hampshire view race as an issue in the South but not in the North.").

But statistics reinforce the reality that communities of color experience policing and the criminal justice system differently than do white people. Data from The Sentencing Project shows that, in New Hampshire, the rate of Black people incarcerated is 742 per 100,000 Black people. *See New Hampshire Profile*, The Sentencing Project (Updated

2019), available at <https://www.sentencingproject.org/the-facts/#map?dataset-option=SIR>. This compares to only 269 out of 100,000 white people. *Id.* Indeed, “[t]he Department of Corrections lists a Black population of 7%, when the census bureau tells us the Black population in New Hampshire is 1.8%.” Hausman, Stephanie, *Testimony Before N.H. Commission on Law Enforcement Accountability, Community and Transparency* (July 15, 2020), available at <https://www.governor.nh.gov/sites/g/files/ehbemt336/files/documents/20200715-stephanie-hausman-leact-statement.pdf>.

A recent study has further exposed similar racial disparities in arrests and jailing. See Emily Corwin, *Data Shows Racial Disparities Increase at Each Step of N.H.’s Criminal Justice System*, NHPR (Aug. 10, 2016), available at <https://www.nhpr.org/post/data-shows-racial-disparities-increase-each-step-nhs-criminal-justice-system#stream/0>. Data from this study shows that Black people are 5 times more likely to be jailed compared to white people, well above the United States average. *Id.* Hispanics face a 2.5 times higher rate. *Id.* Equally disturbing is that Black and Hispanic people make up less than 5% of the New Hampshire population, but account for 9% of the state’s arrests. *Id.*; see also Justine Paradis et al., *The Rules Are Different Here: A Series on New Hampshire’s Jails and Prisons*, NHPR (Feb. 8, 2019), available at <https://www.nhpr.org/post/rules-are-different-here-series-new-hampshires-jails-and-prisons#stream/0>.<sup>4</sup> More recent research shows that Black and

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<sup>4</sup> Some inaccurately assert that racial disparities in arrests can be explained by varying rates of drug involvement among different races or ethnicities. They cannot. Studies show that people of all colors use and sell illegal drugs at strikingly similar rates. And if there are significant disparities in

Hispanic people are both stopped and ticketed in New Hampshire more than white people. *See* Soloman, Dave, *Data Suggests Racial Bias in NH Traffic Stops, Bill Seeks to Add Body Cameras, Training*, Seacoast Online (Feb. 12, 2021), available at <https://www.seacoastonline.com/story/news/state/2021/02/09/data-suggests-racial-bias-in-nh-traffic-stops/4435395001/>. Another recent study revealed that Black people are 4.1 times more likely to be arrested for marijuana possession than white people. *See* *Marijuana Arrest Report*, ACLU, available at <https://graphics.aclu.org/marijuana-arrest-report/NH>. And a recent review of available data shows that police in New Hampshire still disproportionately target people of color. Steurer, Mary, *Data Show N.H. Police Disproportionately Arrest People of Color*, NHPR (Feb. 28, 2021), available at <https://www.nhpr.org/post/data-show-nh-police-disproportionately-arrest-people-color#stream/0>.

In the juvenile context, the disparities are equally troubling. *See* Lessard, Ryan, *DCYF Stats: Minority Children Reported to Child Welfare, Arrested, Jailed More than White Youth* (June 22, 2021), available at <https://www.concordmonitor.com/DCYF-stats-minority-children-reported-to-child-welfare-arrested-jailed-more-than-white-youth-41077986>. Black children are three times more likely than white children to be arrested by police; Black and Hispanic children were reported to the Division of Children, Youth and Families (“DCYF”) in 2019 at disparate rates; minority children are “two to three times more likely than white kids to be detained, and Black minors, in particular, are detained four times their

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the research, they frequently suggest that white people, particularly white youth, are more likely to engage in drug crime than people of color. *See* Michelle Alexander, *The New Jim Crow* 7 (2012).

population”; Black children make up 17.9% and Hispanic children make up 23.9% of those committed, though they represent only 2.7% and 6.4%, respectively, of all children 10-17 years old in New Hampshire. *Id.* DCYF Director Joseph Ribsam explained that “an overlapping income gap for minority families” may be “part of the story,” but “unconscious or conscious bias on the part of decision-makers at every stage of the juvenile justice and child welfare system plays a part.” *Id.*

Most frightening is that, based upon data collected by the Police Scorecard project from 2013 to 2021, a Black person in New Hampshire is 13.4 times more likely to be killed by police than a white person. Police Scorecard, *New Hampshire*, available at <https://policescorecard.org/nh>.

These statistics are consistent with the real, and widespread, experiences of people of color with police misconduct. In a study of young Black men, 83% reported personal experience with police harassment, and over 90% reported knowing someone who had been harassed by the police. Rod K. Brunson, “*Police Don’t Like Black People*”: *African-American Young Men’s Accumulated Police Experiences*, 6 *CRIMINOLOGY & PUB. POL’Y* 71, 81 (2007).<sup>5</sup>

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<sup>5</sup> People of color also appear to be far more likely to be deemed “suspicious” by New Hampshire’s Mobile Enforcement Team (“MET”) officers, who are tasked with conducting traffic stops in the pursuit of drug traffickers. See *State v. Brian Perez*, No. 218-2018-CR-334 & *State v. Jose Melendez*, No. 218-2018-CR-335, 2019 WL 5680907, n.4 (N.H. Super. Ct. Oct. 4, 2019) (Schulman, J.) (suggesting a “pattern” relating to the MET and potential racial profiling); *United States v. Hernandez*, No. 18-CR-118-LM, 2019 WL 2992045 (D.N.H. July 9, 2019). Although State Police Director Nathan Noyes claims that the MET does not employ pretextual stop tactics, the MET officers themselves admit that they use minor traffic violations, often after following vehicles for miles, to stop whomever they deem “suspicious.” Compare Transcript of LEACT Commission Hearing, at 23 (June 26, 2020), available at <https://www.governor.nh.gov/sites/g/files/ehbemt336/files/documents/20200626-accountability-transcript.pdf>, with, e.g., Covenor, Amy, *Mobile Enforcement Team Aims to Interrupt State’s*

What has resulted from these longstanding inequities is deep-seated mistrust toward police among communities of color. The mistrust and fear of police—particularly as police abuses are regularly documented on video—have long forced Black parents to give their children “the talk,” instructing them, among other things: “It doesn’t matter what you did. Just do what the police officer tells you. It could mean your life.” Tess Martin, *“The Talk” is Different for Parents of Black Kids*, Medium (Apr. 3, 2018), <https://medium.com/@tessintrovert/the-talk-is-different-for-parents-of-black-kids-77d5e8238c64>; see also Duckler, *Racism, More Subtle Here Than in Metro Areas, is Still Felt by Black Community*.

Experts, anecdotes, and statistics all document the mistrust and lack of confidence people of color have in police, a reality that has been highlighted in recent years. See AP, *Black Communities’ Distrust of Police Has Roots in History* (Nov. 28, 2020), available at [https://www.washingtontimes.com/news/2020/nov/28/black-communities-distrust-of-police-has-roots-in-/?utm\\_source=RSS\\_Feed&utm\\_medium=RSS](https://www.washingtontimes.com/news/2020/nov/28/black-communities-distrust-of-police-has-roots-in-/?utm_source=RSS_Feed&utm_medium=RSS) (“This year, data show Black adults reporting the lowest level of police confidence in a generation.”); Chavis, Kami, *Body-Worn Cameras: Exploring the Unintentional Consequences of Technological Advances and Ensuring a Role for Community Consultation*, 51 Wake Forest L. Rev. 985, 986 (2016) (“Recent studies also demonstrate that the level of trust between communities of color and police is dangerously low.”); Tracey Maclin, *“Black and Blue Encounters” Some Preliminary Thoughts About Fourth Amendment Seizures: Should Race Matter?*, 26

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*‘Drug Pipeline,’* WMUR 9 (May 3, 2019), available at <https://www.wmur.com/article/mobile-enforcement-team-aims-to-interrupt-states-drug-pipeline/27349016>.

VAL. U. L. REV. 243, 248 (1991) (noting the “anger and mistrust that surrounds encounters between black men and police officers”). A recent study shows that, while 61% of white people have confidence in the police, only 45% of Latinos and 30% of Black people do. Criss, Doug, *The One Thing that Determines How You Feel About the Police: Your Age, Race or Political Leaning Play a Role*, CNN (July 14, 2017), available at <https://www.cnn.com/2017/07/14/health/police-confidence-gallup-polls-trnd/index.html>. Compounding this mistrust is the fact—particularly pertinent to this appeal—that, out of 246 civilian complaints against New Hampshire law enforcement between 2016 and 2021, only 17% were resolved in favor of civilians. Police Scorecard, *New Hampshire*. Not a single complaint of police discrimination in that timeframe was resolved in favor of civilians. *Id.*

As discussed below, this mistrust, anger, and fear—especially where the public lacks the ability to hold police accountable for misconduct—contributes not only to the racial inequities already heavily present in policing, but also to a diminishment in police officers’ abilities to do their job.

## **II. Transparency in Policing, and the Disclosure of Investigative Reports, Promotes Trust in Policing and Public Safety, While Holding Officers Accountable for Misconduct and Inequitable Policing of Communities of Color**

### *a. Public Disclosure of Police Misconduct Investigations and Disciplinary Records is Critical to Police Accountability, and RSA 105:13-b Cannot Be Used to Subvert the Purpose of RSA 91-A*

“[T]he public has a significant interest in knowing that a government investigation is comprehensive and accurate.” *Reid*, 169 N.H. at 532

(quotation omitted). And the public has an interest in obtaining “the utmost information . . . about what its government is up to.” *Id.* Indeed, the Right-to-Know Law itself dictates: “Openness in the conduct of public business is essential to a democratic society. The purpose of this chapter is to ensure both the greatest possible public access to the actions, discussions and records of all public bodies, and their accountability to the people.” RSA 91-A:1. As the United States Supreme Court has stated more generally, there is a “paramount public interest in a free flow of information to the people concerning public officials, their servants.” *Garrison v. Louisiana*, 379 U.S. 64, 76 (1964). This “paramount public interest” extends to information about whether officers conduct themselves properly while engaged in official duties, as “public access” and “accountability” are explicitly referenced and contemplated in both RSA 91-A and Part I, Article 8 of the New Hampshire Constitution. And police officers are not mere public employees. They have enormous power—the authority to stop, detain, arrest, and in some cases, use deadly force against members of the public—that is inherently “subject to potential abuse.” *United States v. Robinson*, 414 U.S. 218, 248 (1973) (Marshall, J. dissenting). When officers overstep their authority or misuse their power, they risk violating the most fundamental rights of citizens.

Although the public has every right to know how officers behave while acting on the public’s behalf, systems of police accountability too often operate in the dark. Until this Court’s ruling in *Town of Salem*, records relating to investigations into police and other public employee misconduct were routinely withheld or heavily redacted. See *Union Leader Corp. v. Fenniman*, 136 N.H. 624 (1993). As a result of such secrecy from

1993 to 2020, citizens and legislators were deprived of the information they needed to evaluate whether police departments were effectively holding officers accountable. Absent disclosure of such records, the public cannot know whether a department fails to properly investigate charges of police misconduct, or whether it imposes proportional discipline when wrongdoing is sustained.<sup>6</sup> And when well-performing systems are shrouded in secrecy, citizens and legislators in other jurisdictions lose the opportunity to learn from, and replicate, successful accountability models.

Appellant’s extraordinary position—that police personnel files are *per se* exempt from disclosure based upon a statute that *explicitly* excludes its application outside the context of a particular criminal case, *see* RSA 105:13-b; *John Doe v. N.H. Attorney General*, No. 2020-0447, 2022 WL 2866000 (N.H. July 21, 2022)—would discard *Town of Salem* as a meaningless exercise in judicial supposition. It would undermine the principle that the public has a right to vet public employees, particularly those who wield as much power, often in secrecy, as police officers. And if a statute that applies only in a particular, and distinct, context can result in a categorical exemption under RSA 91-A, it would subvert the very purpose of the Right-to-Know Law and would allow an unrelated statute to trump the public’s constitutional right to access governmental records. Instead, “any citizen wishing to assess or comment upon the actions of the police . . . would be unable to examine the primary sources of information—agency

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<sup>6</sup> Taggart, Kendal & Hayes, Mike, *The NYPD’s Secret Files*, BuzzFeed News (Apr. 16, 2018), available at <https://www.buzzfeednews.com/article/kendalltaggart/nypd-police-misconduct-database-explainer>.

records—and, instead, would have to rely upon media accounts.” *Grafton Cnty. Attorney’s Office v. Canner*, 169 N.H. 319, 328 (2016).

Ultimately, nothing in RSA 105:13-b specifically exempts these records from RSA 91-A; the Legislature could have, but did not, do so. *See Prof. Firefighters of N.H. v. HealthTrust, Inc.*, 151 N.H. 501, 505-06 (2004) (“Indeed, unlike other specific exemptions . . . nothing in RSA chapter 5-B specifically exempts HealthTrust from RSA chapter 91-A. While the legislature is free to exempt HealthTrust from the Right-to-Know Law, see RSA 91-A:4, I, it has not done so.”).

In fact, just recently, this Court rejected the argument that RSA 105:13-b applied to an investigatory report regarding alleged police misconduct. *Provenza v. Town of Canaan*, No. 2020-0563, 2022 WL 1196290, at \*4-5 (N.H. Apr. 22, 2022). Although this Court determined that the report in that case was not a “personnel record,” the Court’s analysis is informative. This Court noted that the pre-*Town of Salem* case *Pivero v. Largy*, 124 N.H. 187 (1998), was no longer good law to the extent that it held that “police internal investigative files were categorically exempt from disclosure under RSA 91-A:5.” *Id.* at \*5. In affirming disclosure of the investigatory report in that case, this Court emphasized that the information therein involved an officer’s “conduct as a government employee while performing his official duties and interacting with members of the public,” that governmental activities must be “open to the sharp eye of public scrutiny,” and that the public interest in disclosure of such records is “significant.” *Id.* at \*6 (citations omitted).

As noted above, this Court has explicitly discussed the “significant interest in knowing that a government investigation is comprehensive and

accurate.” *Reid*, 169 N.H. at 532; *Provenza*, No. 2020-0563, 2022 WL 1196290, at \*6. This Court has analyzed the strong public interest in knowing the comprehensiveness and accuracy of a government investigation in other contexts as well. *See, e.g., Goode v. N.H. Office of Legislative Budget Assistance*, 148 N.H. 551, 555-56 (2002). In *Goode*, a case involving the release of a final audit report concerning a public program but the withholding of material supporting the final report, this Court noted the public’s interest in the supporting materials such that the public can “ensure accuracy of the audit process[,] . . . evaluate the information collected and verify that it is consistent with the [ ] final audit report,” and “shed[] light on the activities of the” governmental auditing agency. *Id.*

With respect to investigations into police misconduct, this Court has indicated, in the context of explaining why the case had garnered substantial media attention, that the public has a “significant interest in learning about how its public officials resolve matters involving alleged breaches of trust and conflicts of interest by public employees and, in particular, police officers.” *Seacoast Newspapers, Inc.*, 173 N.H. at 329.

The public’s interest in “how its public officials resolve matters involving” police misconduct, and in ensuring that investigations are complete, accurate, and consistent with any public announcement, mandate that the subject records and similar investigatory or disciplinary records be disclosed.

Ultimately, it allows the public to hold police officers, and the agencies that investigate them, accountable. Accountability is the explicit and overarching purpose of the Right-to-Know Law. The right of the

public to hold its government employees accountable is also expressly granted by our Constitution. *See* N.H. Const. pt. I, art. 8. It is particularly important in the context of police misconduct investigations. *See* Futterman, Craig, et al., *Youth/Police Encounters on Chicago’s South Side: Acknowledging the Realities*, 2016 U. Chi. Legal. F. 125, 172 (2016) (“Sharing information redistributes power from law enforcement to citizens, allowing those most affected by police abuse to play meaningful roles in police oversight.”).

Indeed, in the short time since *Town of Salem* and the subsequent (thus-far limited) disclosure of investigatory reports into police misconduct, we are already seeing that police departments’ investigations into their own officers are often wholly inadequate<sup>7</sup> and that officers engage in intimidating and racist conduct.<sup>8</sup> After disclosure of a less-redacted report

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<sup>7</sup> Experience from across the country also shows that internal disciplinary investigations can drag on for years. In Syracuse, for example, at least 47 officers in the last three years have evaded discipline because the police department failed to complete investigations within the required 18-month period. Lohmann, Patrick & Libonati, Chris, *Syracuse police took so long on misconduct investigations that some officers can’t be disciplined*, Syracuse.com (July 13, 2020), available at <https://www.syracuse.com/news/2020/07/syracuse-police-took-so-long-on-misconduct-investigations-that-some-officers-cant-be-disciplined.html>. In New York City, the officer who killed Eric Garner in 2014 was not fired until 2019. Southall, Ashley, *Daniel Pantaleo, Office Who Held Eric Garner in Chokehold, Is Fired*, N.Y. Times (Aug. 19, 2019), available at <https://www.nytimes.com/2019/08/19/nyregion/daniel-pantaleo-fired.html>. Here in New Hampshire, two Seabrook officers who assaulted a man, without provocation, were fired (and several other participating officers were disciplined), but only after a video of the assault surfaced on the internet. *Two Seabrook Officers Fired, Others Disciplined in Assault of Suspect*, Fosters (July 23, 2014), available at [https://www.fosters.com/article/20140723/GJNEWS\\_01/140729704](https://www.fosters.com/article/20140723/GJNEWS_01/140729704). And then, it still took six months after the video’s release for the officers to be fired and disciplined, nearly five years after the incident itself occurred. *Id.* Not only does the public have a right to know *how* its law enforcement agencies investigate police misconduct, but it also has a right to know whether law enforcement agencies delay investigations while allowing potentially dangerous officers to patrol communities, as Haden Wilber did for years after his shocking misconduct.

<sup>8</sup> *See* Lessard, Ryan, *Updated Salem Police Audit Report Released*, Union Leader (May 27, 2021), available at [https://www.unionleader.com/news/safety/updated-salem-police-audit-report-released/article\\_adc8964a-a636-5937-b401-b0d487356051.html](https://www.unionleader.com/news/safety/updated-salem-police-audit-report-released/article_adc8964a-a636-5937-b401-b0d487356051.html).

(the report that was the subject of *Town of Salem*) in May of 2021, it was revealed that the Salem Police Department’s “internal affairs investigations . . . were incomplete efforts.”<sup>9</sup> The report documented that of the eight different formal and informal internal affairs investigations conducted from 2013-2015 by the current Chief, only “two were found to be completely compliant and following best practices.”<sup>10</sup> In some cases, allegations of misconduct were investigated informally when they met the criteria for formal investigation and, in one case, “a lack of documentation made it impossible to determine whether best practices were followed.”<sup>11</sup>

Moreover, and more concerning to this *amicus*, previously redacted portions of the investigative report found what often can only be demonstrated by pointing to statistics and anecdotal evidence: racism among police officers. Officers were found to have been “intimidating civilians and posting racist and sexist comments on social media,” and the former Deputy Chief was found to have made Facebook posts about Muslims that the former human resources director described as “equivalent to hate speech.”<sup>12</sup> Whenever the human resources director would bring complaints to the Chief’s attention, the Deputy Chief would call and email her “threatening to sue her or get her fired.”<sup>13</sup> In short, the eventual release of a report into police misconduct—brought about by *Town of Salem*—has revealed precisely what the sources cited herein and communities of color have feared and experienced: that police officers contribute to the racist,

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<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*; see also Moran, Rachel, *Ending the Internal Affairs Farce*, 64 Buff. L. Rev. 837, 854-864 (2016).

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

discriminatory, and disparate aspects of the criminal justice system, sometimes intentionally, and that investigations into their misconduct are discouraged, vastly insufficient to promote accountability absent public oversight, and sometimes covered up altogether.

Unfortunately, the *Town of Salem* report is not the latest manifestation of this concern. Just a few months ago, a Manchester police officer was promoted following an incident in which he sent a “meme that mocks the choking death of George Floyd,” considered by local racial justice organizations as racist. Hayward, Mark, *ACLU, BLM Go To Court to Identify MPD Supervisors Who Did Not Report George Floyd Meme*, Union Leader (Oct. 6, 2022), available at [https://www.unionleader.com/news/courts/aclu-blm-go-to-court-to-identify-mpd-supervisors-who-did-not-report-george-floyd/article\\_04c82563-04a9-54b5-a6fc-9c7d6ca70873.html](https://www.unionleader.com/news/courts/aclu-blm-go-to-court-to-identify-mpd-supervisors-who-did-not-report-george-floyd/article_04c82563-04a9-54b5-a6fc-9c7d6ca70873.html). The Manchester Police Department originally refused to disclose the meme, and now they continue to resist disclosure of the numerous supervising officers who failed to report the officer’s troubling conduct. *Id.*

One additional point bears emphasis. Unlike in other states, the New Hampshire State Police does not collect comprehensive data on stops and searches, “a key metric, as it allows analysts to see whether officers are searching Black and Latino drivers more often than their white counterparts.” Cuno-Booth, Paul, *Examining Racial Bias When Police Make Stops Based on Suspensions*, Granite State News Collaborative (May 13, 2022), available at <https://www.collaborativenh.org/granite-solutions-coronavirus-1/2022/5/13/examining-racial-bias-when-police-make-stops-based-on-suspensions>. This leaves the public in the dark as to how law

enforcement is policing communities and, in particular, communities of color. What the little available data shows is that communities of color are policed disproportionately in New Hampshire—including, most problematically, via the State Police’s Mobile Enforcement Team (“MET”), which deliberately conducts pretextual stops that, perhaps unsurprisingly, disproportionately target people of color, *see supra* note 5—but the lack of comprehensive data largely shields law enforcement from meaningful scrutiny. Records such as those at issue in this case, therefore, are one of the few tools the public has to vet its law enforcement and hold them accountable.

In fact, the MET has particular relevance to this appeal. Haden Wilber was a member of the MET. *Id.* In one particular stop, he began following a Black man in a Toyota Camry he found suspicious. *Id.* He followed the Black man for 7-8 miles before pulling him over for purportedly following another vehicle too closely. *Id.* Wilber’s reason for finding the Black man suspicious? “The vehicle had drawn my attention to it due to how clean it was, given the age of the vehicle and current weather conditions in New England.” *Id.* The government dismissed the charges before a suppression hearing. *See United States v. Dance*, No. 1:19-cr-00185-LM (D.N.H. 2019).

The public’s interest in records such as those at issue in this case—to hold its government, and its power-wielding police officers, accountable and to eliminate the disproportionate targeting of people of color—is undeniably strong.

b. *Public Disclosure of Police Misconduct Investigations and Disciplinary Records Benefits Police Officers and Departments by Establishing Community Trust and Promoting Public Safety*

Although the public's need and right to hold police accountable is sufficient to overcome an inapplicable statute and any minimal privacy interest of an officer engaging in official public duties, we must also examine the great benefit disclosure of records such as those at issue here confers upon officers and departments themselves, as well as the public at large. As examined above, *supra* Section I, there is a significant trust issue when it comes to policing communities of color. Studies have shown that, while communities of color, particularly Black Americans, distrust police at higher rates, approximately *half of the public on the whole* lacks confidence in the police. See Bakke, Erik, *Predictive Policing: The Argument for Public Transparency*, 74 N.Y.U. Ann. Surv. Am. L. 131, 147 (2018) (citation omitted).

And when police engage in conduct such as mocking reform efforts, even police departments recognize that it hinders their ability to gain and keep trust in their communities. See Burton, Paul, *'Deeply Disturbing: Bedford, NH Police Officer Off Job After TikTok Video Shows Him Mocking Police Reform'*, CBS Boston (Apr. 26, 2021), available at <https://boston.cbslocal.com/2021/04/26/bedford-nh-police-investigate-officers-tiktok-video/> (“The integrity and the trust and the confidence of the Bedford Police Department clearly is shaken here,” [Bedford Police Chief John] Bryfonski said.”). When trust is eroded and the legitimacy of police is questioned—as in the case of discrimination, over-policing, and unchecked police brutality—marginalized communities are less likely to

report crimes or cooperate with law enforcement, and police-public relations will continue to suffer, increasing risk for both the public *and* police.<sup>14</sup>

Building trust between police and the public is, and has always been, a foundational element of effective law enforcement. *See* United States Department of Justice (“USDOJ”), *Police Integrity: Public Service with Honor*, at 7 (Jan. 1997), available at <https://www.ojp.gov/pdffiles/163811.pdf> (“The police, one of the foundations of the criminal justice system, must ensure the public trust if the system is to perform its mission to the fullest.”); Law Enforcement Action Partnership, Sir Robert Peel’s Policing Principles, available at <https://lawenforcementactionpartnership.org/peel-policing-principles/>.

“[R]esearch show[s] that when young people feel that they are treated fairly and respectfully, they are far more likely to view the police as legitimate.” Futterman, Craig, et al., *Youth/Police Encounters on Chicago’s South Side: Acknowledging the Realities*, 2016 U. Chi. Legal. F. at 207 (citing Tracey L. Meares & Peter Neyroud, *New Perspectives in Policing: Rightful Policing*, NAT’L INST. OF JUST. 6 (2015), available at <https://perma.cc/V5TS-FS6S>). “When people view police and the criminal justice system as legitimate, they are more likely to obey the law; they are more likely to trust law enforcement; and they are more likely to work together with law enforcement to improve public safety, such as reporting

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<sup>14</sup> *See, e.g., Distrust of Police is Major Driver of US Gun Violence, Report Warns*, The Guardian (Jan. 21, 2020), available at <https://www.theguardian.com/us-news/2020/jan/21/police-gun-violence-trust-report>; Felton, SteVon, *Criticism and Transparency Are Good for Police Departments*, R Street (Oct. 25, 2018), available at <https://www.rstreet.org/2018/10/25/criticism-and-transparency-are-good-for-police-departments/>.

crime, serving as witnesses, identifying safety concerns, and cooperating with the police in investigations.” *Id.* Transparency and trust “improves the effectiveness of police in addressing crime [and i]t makes [the public] safer.” *Id.*<sup>15</sup>

Indeed, there are many benefits to mutual trust between the police and the community.

When there is trust between law enforcement and the community, the community benefits because law enforcement officers place primacy on the community’s wellbeing and understand the weight of their responsibility. Police, in turn, benefit from working in a community that appreciates their role in promoting safety and actively supports that common goal.

Adebile, Debo, *Policing Through an American Prism*, 126 Yale L.J. 2222, 2232 (2017). Perhaps that is why studies have shown that 90% of police officers agree that it is important for an officer to “know the people, places, and the culture in the areas where they work in order to be effective at their job.” *Id.* at 2240.

The answer to repairing trust is, in part, transparency. As retired Major Neill Franklin, a 33-year police veteran, explained in advocating for disclosure of records such as those at issue here:

[T]he police are the public, and the public are the police . . .

In short, we exist because of the public and the work we do “for them” should be approved “by them.” As such, the public should be informed of all that we do within the community. They must have access to reports of police

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<sup>15</sup> See also USDOJ, Nat’l Institute of Justice, *Race, Trust and Police Legitimacy* (Jan. 8, 2013), available at <https://nij.ojp.gov/topics/articles/race-trust-and-police-legitimacy> (“Distrust of police has serious consequences. It undermines the legitimacy of law enforcement, and without legitimacy police lose their ability and authority to function effectively.”).

behavior within the community, good and bad. This level of transparency is not only necessary for securing public respect — trust — but it is their right.

Franklin, Neill, *Time for a ‘Code of Transparency’ in Policing*, Baltimore Sun (Mar. 1, 2017), available at <https://www.baltimoresun.com/opinion/op-ed/bs-ed-police-misconduct-bill-20170301-story.html>. And, as noted below, *infra* Section IV, police here in New Hampshire similarly advocate for transparency in policing. It is not enough for police to claim that they are repairing racial inequities in policing, reporting and disciplining officers for engaging in biased policing, and instituting training and record-keeping procedures to combat biased policing—although that is a good start.<sup>16</sup> Police must *prove it* to communities of color, who have long suffered at the hands of biased policing and empty promises. That requires transparency, disclosure of records concerning police behavior, and public oversight.

Fostering trust such that police can more effectively do their jobs is not the only benefit that disclosure of records concerning allegations of misconduct gives to officers and police departments. “A public that has confidence in its police is more likely to encourage politicians to increase budgets for police. Restoring trust in law enforcement agencies also results in less pressure from political figures on chiefs and, of course, less tension between communities and street cops.” Macht, Rachel, *Should Police Misconduct Files be Public Record? Why Internal Affairs Investigations and Citizen Complaints Should be Open to Public Scrutiny*, 45 Crim. L. Bull. 1006 (2009). Prosecutors, too, will be more effective. *See id.*; *see*

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<sup>16</sup> NHDOJ, Law Enforcement Manual, at 28 (2020 Edition), available at <https://www.doj.nh.gov/criminal/documents/law-enforcement-manual.pdf>.

also *Brief of Amici Curiae Former Prosecutors* (Nov. 5, 2020), available at [https://digitalcommons.nyls.edu/cgi/viewcontent.cgi?article=1009&context=racial\\_justice\\_project](https://digitalcommons.nyls.edu/cgi/viewcontent.cgi?article=1009&context=racial_justice_project). And police officers of color, as well as women, will see a fairer and more just internal investigatory and disciplinary process. See Morin, Rich, et al., *Behind the Badge: Inside America's Police Departments*, Pew Research Center (Jan. 11, 2017), available at <https://www.pewresearch.org/social-trends/2017/01/11/inside-americas-police-departments/> (discussing how white men are more likely to say that the disciplinary process in their department is fair than are women, Black, and Latino officers); Stoud, Matt & Johnson, O'Ryan, *Black Boston Police Officers Facing Higher Discipline Rates than White Counterparts*, Boston Herald (May 4, 2015), available at <https://www.bostonherald.com/2015/05/04/black-boston-police-officers-facing-higher-discipline-rates-than-white-counterparts/>.

Finally, disclosure of records concerning allegations of police misconduct mitigates the effect of the “thin blue line” (an informal code that discourages officers from reporting the errors, crimes, and brutality of fellow officers<sup>17</sup>), while supporting the desire of good police officers to root out “bad apples.” See Dinan, Elizabeth, *Sununu: Laurie List Replacement Gives Police ‘Benefit of Doubt,’* Seacoast Online (May 1, 2018), available at <https://www.seacoastonline.com/news/20180501/sununu-laurie-list-replacement-gives-police-benefit-of-doubt> (“We do not want bad apples

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<sup>17</sup> See Doherty, Owen, *A Reform to Police Department Hiring: Preventing the Tragedy of Police Misconduct*, 68 Case W. Res. L. Rev. 1259, 1271 (2018).

spoiling our profession. But the process to weed out the bad and protect the good has been a blurred and controversial endeavor.”).<sup>18</sup>

### **III. Police Misconduct and Mistrust in Police Endure Because Officers Who Violate the Public Trust Often Face Little to No Accountability and Secrecy Obstructs the Police’s Ability to Earn the Trust of People of Color**

Criminal prosecution of police officers is exceptionally rare. Of the roughly 15,000 fatal police shootings since 2005, just 110, or 0.73%, ended with the responsible officers being charged with murder or manslaughter.<sup>19</sup> Only 42, or 0.28%, ended in convictions.<sup>20</sup> As for civil liability, the doctrine of qualified immunity in practice “operates like absolute immunity” and “protect[s] law enforcement officers from having to face any consequences for wrongdoing.” *Jamison v. McClendon*, 476 F. Supp. 3d 386, 391 (S.D. Miss. 2020); *see also, generally, Farrelly v. City of Concord*, 168 N.H. 430 (2015).

If civil rights violations result in legal action, not only does the municipality or the State foot the bill, but the details of the misconduct are also often hidden from the public by way of nondisclosure provisions in settlement agreements. *See* Bookman, Todd, *N.H. Towns Pay Millions to Settle Claims Against Police; Details Often Hidden From Public*, NHPR (July 23, 2020), available at <https://www.nhpr.org/post/nh-towns-pay->

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<sup>18</sup> *See also* Dance, Scott, *De Sousa: Baltimore Police Corruption Limited to a ‘Very Few Bad Apples,’* The Baltimore Sun (Feb. 2, 2018), available at <https://www.baltimoresun.com/news/crime/bs-md-desousa-annapolis-20180202-story.html>.

<sup>19</sup> Thomson-DeVeaux, Amelia, et al., *Why It’s So Rare For Police Officers To Face Legal Consequences*, FiveThirtyEight (June 4, 2020), available at <https://fivethirtyeight.com/features/why-its-still-so-rare-for-police-officers-to-face-legal-consequences-for-misconduct/>.

<sup>20</sup> *Id.*

[millions-settle-claims-against-police-details-often-hidden-public#stream/0](https://www.nhpr.org/post/manchester-cuts-check-fired-cop-ending-legal-battle#stream/0).

When New Hampshire Public Radio collected 87 settlement agreements (paying out a total of \$4,354,000), it painted a picture of excessive force, wrongful arrest, sexual harassment, and racial profiling involving police officers across the state. *Id.* But these rarely come to light and, when they do, they are often devoid of details. *See id.* And even when police departments and municipalities try to do the right thing, the public is still sent a discouraging message, due to how officers are, by default, protected.

For instance, when disgraced Manchester police officer Aaron Brown was caught sending racist text messages from a department-issued phone and claiming to have intentionally damaged property while executing search warrants, he was fired. *See* Bookman, Todd, *Manchester Cuts Check to Fired Cop, Ending Legal Battle*, NHPR (Nov. 20, 2020), available at <https://www.nhpr.org/post/manchester-cuts-check-fired-cop-ending-legal-battle#stream/0>. But an arbitrator ruled that his conduct did not warrant dismissal and that he was entitled to back pay, resulting in the issuance of a \$187,700 check from the City of Manchester to a known racist officer. *Id.*

The limitations of these external legal mechanisms as a vehicle for police accountability highlight the importance of internal investigations, and the dangers of keeping them secret. When they are exposed, we see the abuses of power, biases, racism, inaccurate and incomplete records and investigations, and obstructionist policies that are designed to thwart accountability, just as we saw in the *Town of Salem* report. When disciplinary systems do not hold officers accountable, police officers who have previously endangered public safety continue to abuse their authority.

For example, officers with a history of shooting civilians are 51% more likely to do so again. McElvain, James & Kposowa, Augustine, *Police Officer Characteristics and the Likelihood of Using Deadly Force*, 35 *Crim. Just. & Behavior* 505, 515 (2008).

When records of misconduct are ignored, the results are both tragic and predictable. For example, before Atlanta officer Garret Rolfe fatally shot Rayshard Brooks in the back while Mr. Brooks was running away, 12 complaints had been filed against him, 9 of which were dismissed.<sup>21</sup> Among the complaints that failed to result in any discipline was another shooting of an unarmed Black civilian.<sup>22</sup> And “prior to killing George Floyd, Derek Chauvin was one of a substantial number of officers who have been the subject of repeated civilian complaints but never faced serious discipline from their departments . . . in response to [ ] 17 complaints . . . Chauvin had received only two letters of reprimand.”<sup>23</sup>

The failure to discipline officers who engage in misconduct not only leaves those officers free to repeat and escalate their improper behavior; it also helps create a culture of impunity in which other officers are more likely to engage in misconduct. A study in Chicago, for example, found that “police violence is contagious.”<sup>24</sup> And the United States Department of Justice’s (“USDOJ”) investigation of the Chicago Police Department

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<sup>21</sup> Gilbert, Curtis, *Atlanta Cop Who Killed Rayshard Brooks Had Prior Controversial Shooting*, American Public Media (June 17, 2020), available at

<https://www.apmreports.org/story/2020/06/17/officer-garrett-rolfe-atlanta-shooting>.

<sup>22</sup> *Id.*; see also Moran, Rachel, *Police Privacy*, 10 UC Irvine L. Rev. 153, 162 (2019).

<sup>23</sup> Ross, Janell, *Derek Chauvin Was Just Sentenced to 22 and a Half Years. But America’s Law Enforcement System Still Isn’t Set Up for Accountability*, Time (June 25, 2021), available at <https://time.com/6075908/derek-chauvin-sentence/?amp=true>.

<sup>24</sup> Thibaut Horel et al., *The Contagiousness of Police Violence* at 1 (2018), available at [https://www.law.uchicago.edu/files/2018-11/chicago\\_contagiousness\\_of\\_violence.pdf](https://www.law.uchicago.edu/files/2018-11/chicago_contagiousness_of_violence.pdf).

concluded that the department’s “failure to ensure the accurate reporting, review, and investigation of officers’ use of force has helped to create a culture in which officers expect to use force and never be carefully scrutinized about the propriety of that use.”<sup>25</sup> Externally, without acknowledgment of the wrongdoing by the actors responsible for the officers or a promise of remedy—accompanied by transparency in that process—victims of police misconduct may give up on speaking out, for fear the process is futile or for fear of retaliation. *See* Emery, Richard & Maazel, Ilann Margalit, *Why Civil Rights Lawsuits Do Not Deter Police Misconduct: The Conundrum of Indemnification and a Proposed Solution*, *Fordham Urb. L.J.* 587, 596 (2000); Kaurin, Dragana, *The Price of Filming Police Violence*, *Vice* (April 27, 2018), available at [https://www.vice.com/en\\_us/article/evqw9z/filming-police-brutalityretaliation](https://www.vice.com/en_us/article/evqw9z/filming-police-brutalityretaliation); Freeman, Alexa, *Unscheduled Departures: The Circumvention of Just Sentencing for Police Brutality*, 47 *Hastings L.J.* 677 (1996) (describing that in communities of color, police misconduct is often “underreported, underinvestigated, underprosecuted, and underconvicted”).

What results from secrecy in these investigations is more misconduct, discriminatory policing, injustice for communities of color, and deterioration of the trust that is essential for police to protect and serve their communities.

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<sup>25</sup> USDOJ, *Investigation of the Chicago Police Department 41* (Jan. 13, 2017), available at <https://www.justice.gov/opa/file/925846/download>.

#### **IV. The National and Local Conversation Regarding Transparency and Accountability in Policing Demonstrates a Strong Public Interest in the Disclosure of Records Concerning Police Misconduct and Related Investigations**

In response to the public outcry following the murder of George Floyd, New Hampshire Governor Chris Sununu created the Commission on Law Enforcement Accountability, Community and Transparency (the “LEACT Commission”)<sup>26</sup> to examine policing and its relationship to communities within the state. Members of the LEACT Commission included law enforcement representatives, activists, and members of the legal community. The LEACT Commission’s finalized recommendations included, among many other things, the “establishment of a single, neutral and independent statewide entity to receive complaints alleging misconduct regarding all sworn and elected law enforcement officers”; a “statewide, universal standard” to apply with respect to “determination of whether misconduct occurred”; an “executive summary of finding to be made available to the public with the full investigative report subject to disclosure upon in-camera review”; the collection and analysis of demographic data regarding police interactions with citizens, including “at a minimum, gender and race”; community policing and relationship-building standards;

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<sup>26</sup> See Press Release, *available at* <https://www.governor.nh.gov/news-and-media/governor-chris-sununu-endorses-all-leact-recommendations-puts-forward-road-map>. Governor Sununu issued an Executive Order establishing the LEACT Commission as a result of, in part, “the tragic murder of George Floyd.” See Executive Order 2020-11 (June 16, 2020), *available at* <https://www.governor.nh.gov/sites/g/files/ehbemt336/files/documents/2020-11.pdf>.

training on bias and ethics; and “sustained findings publicly accessible in a database.”<sup>27</sup>

Testimony before the LEACT Commission demonstrates the strong public interest in disclosure of records such as those at issue here and makes clear that members of the law enforcement community themselves desire more trusting, transparent relationships with the communities they police. Captain Mark Newport of the Portsmouth Police Department, for instance, testified that to be an “effective police department, you must be able to engage with your community and understand their needs and requests.”<sup>28</sup> He further noted that this kind of engagement can only come from “pro-active policing,” which includes engaging with the community “in good times” and collaborating with members of the community to create trust.<sup>29</sup>

Charlie Dennis, president of the New Hampshire Association of Chiefs of Police, offered that “accountability and transparency are not only fundamental principles of a democratic society but are also central to achieving lawfulness and legitimacy in law enforcement.”<sup>30</sup> Police *want* transparency; they understand that with transparency can come community trust, which is “critical to . . . reducing crime and disorder, enhancing the quality of life for all, and serving community needs.”<sup>31</sup>

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<sup>27</sup> LEACT Commission Final Report (Aug. 31, 2020), *available at* <https://www.governor.nh.gov/sites/g/files/ehbemt336/files/2020-09/accountability-final-report.pdf>.

<sup>28</sup> APPX, at 7.

<sup>29</sup> *Id.*

<sup>30</sup> APPX, at 11.

<sup>31</sup> *Id.*

Eva Castillo-Turgeon, a member of the Manchester Police Commission, testified that relationships between police and communities build trust, respect, and credibility between police and community members; when there is transparency and “officers are held accountable for their actions,” people will trust police.<sup>32</sup>

As this testimony makes clear, necessary relationships cannot be fostered when there is secrecy. And currently, secrecy surrounds every aspect of police misconduct investigations, including in the context of the State’s infamous “Laurie List,” a not-yet-completely-published list of approximately 180 New Hampshire officers with sustained findings of misconduct and the subject of another current topic of great public interest. *See, e.g.,* DeWitt, Ethan, *Senate Passes Bill to Release ‘Laurie List’ of Police Officers Cited for Bad Conduct*, NH Bulletin (Apr. 29, 2021), available at <https://newhampshirebulletin.com/2021/04/29/senate-passes-bill-to-release-laurie-list-of-police-officers-cited-for-bad-conduct/>. Indicating the strong public interest in records concerning police behavior is the recent legislative passage of HB 471, a product of LEACT Commission recommendations, which made the Laurie List public and made police disciplinary hearings open to the public.<sup>33</sup>

The public, the Legislature, and police themselves want transparency. Accordingly, the public interest in disclosure of records concerning police behavior or misconduct is immense.

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<sup>32</sup> APPX, at 9-10.

<sup>33</sup> *See* HB 471 (2021), available at [http://www.gencourt.state.nh.us/bill\\_status/billText.aspx?id=614&txtFormat=html&sy=2021](http://www.gencourt.state.nh.us/bill_status/billText.aspx?id=614&txtFormat=html&sy=2021).

It is worth now revisiting the incident involving the officer who disseminated a meme mocking the death of George Floyd. *See supra* p. 34. Although some transparency issues remain surrounding that incident, it serves as a noteworthy example of why transparency is so important and how it benefits both police and the public. When records relating to the incident became public, local groups such as the American Civil Liberties Union of New Hampshire, NAACP-Manchester, and this *amicus* were able to monitor the issue, bring new perspectives to the discussion concerning the issue, and question the promotion of the officer involved. *See* Albertson-Grove, Josie, *Manchester Chief Says Department Has Learned From the Cop Sharing Meme Mocking George Floyd; Advocates Remain Concerned About Permissive Culture*, Union Leader (Sept. 4, 2022), available at <https://yhoo.it/3NxIsbV>. Perhaps of equal importance, the Manchester Police Chief, who had expected that the investigation would become public, said that the department learned from the incident, instituting new training to include bias and sensitivity training, and said he was proud that the department took the complaint seriously, investigated it, and disciplined the officer involved. *Id.* The transparency and public's involvement allowed the public to vet the department's handling of this incident, allowed the department to prove that it was taking action, and brought legitimacy to the process.

**V. The Extraordinary Public Interest in Disclosure of Records Such as Those at Issue Here Clearly Outweighs an Individual Officer's Minimal Privacy Interest**

Police officers are public employees. They wear their names and identifying badges. Their activities are frequently conducted in public.

The right to information concerning the activities of officers while performing their jobs belongs to the people, not individual officers.

This Court and others have made clear that public employees, including police officers, have a minimal privacy interest in matters relating to their conduct in performing official duties and interacting with the public. *See, e.g., New Hampshire Civil Liberties Union v. City of Manchester*, 149 N.H. 437, 441 (2003) (“Assuming there is a relevant privacy interest at stake, that interest is minimal because the [records] do not reveal intimate details of an individual’s life.”); *Lamy v. N.H. Public Utilities Com’n*, 152 N.H. 106, 111 (2005); *Prof’l Firefighters of N.H. v. Local Gov’t Ctr.*, 159 N.H. 699, 709-10 (2010) (holding that the government must disclose specific salary information of Local Government Center employees notwithstanding RSA 91-A:5, IV); *Provenza*, No. 2020-0563, 2022 WL 1196290, at \*6.

Too often, claims to “privacy” represent a longstanding resistance to greater police transparency, accountability, and racial equity. Sometimes, that resistance is brought to light. *See, e.g.,* 84 Civilian Complaint Review Board, *History*, available at <https://www1.nyc.gov/site/ccrb/about/history.page> (documenting comments of the President of the Patrolman’s Benevolent Association, in opposing civilian oversight of police misconduct investigations: “I’m sick and tired of giving in to minority groups with their whims and their gripes and shouting”); APPX, at 5 (while testifying in support of 2001 HB 1134, Director of the NH Police Standards and Training Council Earl Sweeney complained that “every time a criminal is arrested as a result of [a routine stop leading to an investigation for more

‘serious crimes’] they are ready to cry that they were stopped as a result of illegal profiling . . .” (emphasis added)).

For the many reasons outlined above, any minimal privacy interest is far outweighed by the extraordinary public interest in transparency, accountability, and racial justice in policing, as well as the interest of police officers and departments themselves in developing an open, transparent, and trusting relationship with each other and with the community. A statute that applies in a separate context does not alter the balance.

### **CONCLUSION**

For the foregoing reasons, the trial court’s Order should be affirmed, and the subject records should be released.

Dated: November 4, 2022

Respectfully submitted,

Black Lives Matter Manchester

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**CERTIFICATE OF SERVICE**

The undersigned certifies that, on this date, copies of this Brief and the accompanying Appendix, as required by the Rules of this Court, are being electronically delivered through the Court’s electronic filing system to Attorney Jessica King, Assistant Attorney General, counsel of record for the New Hampshire Department of Safety, Division of State Police, and Attorneys Gilles Bissonnette and Henry Klementowicz, counsel of record for the American Civil Liberties Union of New Hampshire.

Dated: November 4, 2022                      /s/ Michael G. Eaton  
Michael G. Eaton, Esq.

**STATEMENT OF COMPLIANCE**

The undersigned hereby certifies that, pursuant to New Hampshire Supreme Court Rule 26(7), this Brief complies with New Hampshire Supreme Court Rule 26(2)-(4). Further, this Brief complies with New Hampshire Supreme Court Rule 16(11), in that this Brief contains 8835 words (including footnotes) from the “Questions Presented” through the “Conclusion” sections of the Brief.

/s/ Michael G. Eaton  
Michael G. Eaton, Esq.