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

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

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

Richmond County
AD No. 2015-02774

In the Matter of New York Civil Liberties Union, Appellant v. Daniel Donovan, etc. Respondent -respondent
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INDEX No. 80296/14

In the Matter of NYP Holdings, Inc. etc., Petitionert
v. Daniel Donovan, etc. Respondent
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In the Matter of Staten Island Branch of National Association for Advancement of Colored People, et. Al., Appellants v. Daniel Donovan, etc. Respondent-respondent
(Index No. 080304/14)

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AMICUS CURIAE BRIEF

SUBMITTED BY

MEDGAR EVERS COLLEGE
Legal Pathways Program
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Elizabeth Roberts, Class of 2016
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CPLR 5531 STATEMENT

1. The index number of the case in the court below is: 080304/14.

2. The full names of the original parties were Letitia James, New York City Public Advocate, against Daniel Donovan. Appellant's co-petitioners below were the Legal Aid Society, The New York Civil Liberties Union, The Staten Island Branch of the National Association For the Advancement of Colored People and the New York State Conference Branches of the NAACP, and NYP Holdings, Inc., a/k/a, The New York Post.

3. This action was commenced in Supreme Court, Richmond County.

4. This action was commenced by Order to Show Cause filed on December 10, 2014.

5. This is an appeal from a Decision and Order, rendered March 19, 2015, denying appellant's request to unseal certain portions of the Grand Jury proceedings related to the investigation of the death of Eric Garner.

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PRELIMINARY STATEMENT

Medgar Evers College is a four year senior college within the City University of New York. It was formed as a result of collective action taken by residents and local politicians, and has a specific mandate to educate underserved residents of Central Brooklyn. The college is comprised of almost 85 percent African-American, Afro-Caribbean and African students. The Law Pathways program was designed to encourage students of color to pursue careers in the legal profession.

Despite ample precedent permitting disclosure, the court below erred in concluding that the Petitioner-Appellant had not demonstrated a compelling or particularized need for the Grand Jury minutes. There is a significant public interest in having the Grand Jury minutes to ensure that all pending legislation and policy reforms satisfy the standard set forth by the court in U.S. v. Lyons, which is impossible to determine without access to the minutes.

Medgar Evers College has several initiatives specifically targeted to the uplift of black males including its nationally recognized Male Development Empowerment Center (MDEC). Therefore, we are committed to ensuring that young black males, similarly situated to Eric Garner live in a city where they are

not racially profiled or targeted for controversial policing practices, including the use of chokeholds.

The students and their legal advisors, submit this Amicus Curiae brief in support of Petitioner-Appellant(s) motion to have the minutes from the Grand Jury hearing released. We believe that justice and fairness dictate a full and complete review of all relevant facts so that pending legislation and policy reforms are not crafted in a vacuum.

BACKGROUND

On July 17, 2014, Eric Garner died while being choked by police officers during an arrest. A bystander used a cell phone to record what became a widely disseminated video of Mr. Garner's final moments. The medical examiner ruled the death a homicide caused by compression of the neck and chest during physical restraint by the police.

A Grand Jury was convened on September 29, 2014 to investigate the circumstances surrounding Mr. Garner's death. On December 3, 2014, the grand jury adjourned without charging any person with the commission of a crime. Thereafter, District Attorney Donovan submitted a sealed motion to the Supreme Court, requesting public disclosure of certain information regarding the Grand Jury proceeding, pursuant to

N.Y. Crim. Pro. Law § 190.25(4)(a). In a December 5, 2014 Order, Justice Rooney granted the petition and disclosed summary information about the length of the Grand Jury proceeding, the number of witnesses who testified, and the number of exhibits admitted into evidence.

On December 10, 2014, the Public Advocate moved for an order under § 190.25(4)(a) permitting her to review materials from the Garner Grand Jury investigation. The New York City Charter vests the Public Advocate with authority to work with government officials to resolve citizens' complaints and introduce legislation to address systemic problems. *See* Charter of the City of New York § 24. The Public Advocate petitioned for access to the Grand Jury materials pursuant to her duty to investigate official misconduct and propose reform measures. Between December 5, 2014 and January 9, 2015, the Legal Aid Society of New York, New York Civil Liberties Union, the owner of the New York Post, and the Staten Island Branch of the National Association for the Advancement of Colored People in association with the New York State Conference of Branches of the National Association for the Advancement of Colored People filed parallel petitions seeking public disclosure of materials from the Garner Grand Jury proceeding.

The Supreme Court initially ordered that all petitions for Garner Grand Jury materials be filed under seal. On December 10, 2014, the Public Advocate appealed that order pursuant to CPLR 5704(a). On December 11, 2014, the Second Department granted the Public Advocate's appeal and directed that the petition be unsealed. On December 17, 2014, Justice Rooney recused himself from further consideration of the petitions. The cases were reassigned to Justice Garnett and consolidated for argument.

The trial court heard oral arguments on February 5, 2015. In a March 19, 2015 Decision and Order, the lower court denied the petitions in their entirety, ruling that the movants had not met the legal standard for unsealing materials under N.Y. Crim. Pro. Law §190.25(4)(a).

ARGUMENT

The Compelling and Particularized Need Standard

In order to release normally secret Grand Jury proceedings, the Supreme Court must find "a compelling and particularized need for access to the Grand Jury material," Matter of District Attorney of Suffolk County, 58 N.Y.2d 436, at 444 (1983).

New York Civil Procedure Law 190.25 (4)(a) states that "[G]rand jury proceedings are secret and, in general, no person may disclose the nature or substance of any Grand Jury testimony without the written approbation of a court." The court must first find that there is "a compelling and particularized need for access to the Grand Jury material," Matter of District Attorney of Suffolk County, 58 NY2d at 444. The court must find that the party seeking the minutes "has a greater stake in the disclosure than does any other citizen - even one critical of the Grand Jury's decision," id., at 444. According to Judge Garnett in the Eric Garner New York Supreme Court decision, "each [successful] movant could answer the question: What would you do with the minutes if you were given them? Thus, a movant must have a strong reason for disclosure unique to that movant," In the Matter of the Investigation Into the Death of Eric Garner v. Donovan, 080304/2014, p. 9.

A. The Supreme Court Erred In Disregarding The Public Advocate's Historical Role As An Advocate For The Public Interest.

The New York City Charter, expressly defines the role of the Public Advocate's role as that of an essential "watchdog" over all government activities (see NYC Charter §24(f)). The Public Advocate is an elected official, who is expressly empowered and charged with overseeing all municipal agencies; including investigating any shortcomings or failures in the provision of services to New York City residents. The Public Advocate has the authority and responsibility to review systemic complaints relating to city services and programs; and to investigate and attempt to resolve such complaints.

The Charter further instructs that the Public Advocate is to work with municipal agencies and make "specific recommendations" in an effort to resolve complaints and systemic problems (see NYC Charter §24(g)). The Public Advocate has independent capacity to bring suit "to implement the power set forth in the Charter". In a sense she is a "Sentinel of Justice."

Moreover, the Charter grants the Public Advocate authority to review the documents of municipal agencies for the purposes

of investigating and resolving complaints (see New York City Charter § 24(j)), such as is presented in the case at bar.

Historical traditions record the function and duty of the office of the Public Advocate from before the Common Era (C.E.) and traces through the development of both the Greek and Roman court systems to our present municipal government. The modern day functions of the Public Advocates office can be traced to the 17th Century and is set forth in the New York City Council, evolving in name from Alderman to Ombudsman to "Public Advocate." The purpose of the role has always been to provide a voice for the public and power to be used in the public's interest.

Therefore, there is both case law, legislative intent and historical precedent that supports the role of the Public Advocate as the monitor and conscious of the city. The court below erred by not giving deference to her unique role among elected officials.

A.1 The Supreme Court Should Have Released The Grand Jury Minutes So That The Public Advocate Could Have Performed Her Unique Duty To Discover The Underlying Problems Beneath Unresolved Complaints.

While every New York City public official should work to lower chokehold violence, the New York City Charter assigns the

Public Advocate the particular and unique duty of investigating more to address unresolved complaints.

> The public advocate shall establish procedures for receiving and processing complaints, responding to complainants, conducting investigations, and reporting findings, and shall inform the public about such procedures. Upon an initial determination that a complaint may be valid, the public advocate shall refer it to the appropriate agency. If such agency does not resolve the complaint within a reasonable time, the public advocate may conduct an investigation and make specific recommendations to the agency for resolution of the complaint. If, within a reasonable time after the public advocate has completed an investigation and submitted recommendations to an agency, such agency has failed to respond in a satisfactory manner to the recommendations, the public advocate may issue a report to the council and the mayor. Such report shall describe the conclusions of the investigation and make such recommendations for administrative, legislative, or budgetary action, together with their fiscal implications, as the public advocate deems necessary to resolve the individual complaint or complaints or to address the underlying problems discovered in the investigation, *Charter of the City of New York § 24(g)*.

When an agency is unable to respond to pressing complaints, the Public Advocate has the unique job of conducting an investigation and making specific recommendations to resolve the problem.

The Public Advocate is different from any other citizen or agency ombudsman because she is positioned within the political process but above the political process to find solutions for citizen complaints. She is in the political process because she is elected in the same elections as the mayor and presides over the New York City Council. But she is above the political

process because she does not vote in the Council, and operates separately from the Mayor for the people of New York. See *Charter of the City of New York, §§ 22,24.*

The City Charter distinctly requires the Public Advocate to use this position, after unsatisfactory investigations, to report to the Mayor and the City Council until New York has resolved the issue. The Public Advocate shall report "as the public advocate deems necessary to resolve the individual complaint or complaints or to address the *underlying problems discovered in the investigation," Charter of the City of New York, § 24(g) (emphasis added).*

The Public Advocate has a compelling and particular interest to discover the *underlying problems* behind chokehold violence in New York City. The problem has lasted too long. Thirty years ago, the New York City Police Department attempted to resolve the use of chokeholds when it declared that "'chokeholds, which are potentially lethal and unnecessary, will not be routinely used,' except only when an officer's life was in danger." Conor Friedersdorf, *Eric Garner and the NYPD's History of Deadly Chokeholds*, The Atlantic, December 4, 2014, http://www.theatlantic.com/national/archive/2014/12/context-for-the-punishment-free-killing-of-eric-garner/383413/.

Thirty years later, New York City chokehold complaints are at the high of 219 per year that sustained itself above 200 complaints per year between 2006 and 2010, id.

The Supreme Court might have erroneously concluded that such a spectacular chokehold of Eric Garner recorded on video would have already galvanized the New York City Police Department and other agencies to resolve the issue of chokehold violence. However, New York City has witnessed similar violence without resolving the issue. Consider when family members of Anthony Ramon Baez alleged that two police officers "grabbed Mr. Baez around the neck and handcuffed him for no good reason" when two errant footballs hit parked police cars in the University Heights Section of the Bronx on December 22, 1994. Police claimed that he died of an asthma attack similar to the way that police excluded mentioned of a chokehold from the Eric Garner police report. Yet, the Medical Examiner said that the death was probably caused by asphyxiation, Conor Friedersdorf, *Eric Garner and the NYPD's History of Deadly Chokeholds*, The Atlantic, December 4, 2014.
http://www.theatlantic.com/national/archive/2014/12/context-for-the-punishment-free-killing-of-eric-garner/383413/
Notably, the police choked Mr. Baez after the Police Department's 1993 attempt to clarify previous "prohibitions" on chokeholds. Chokehold violence continued nonetheless.

The Public Advocate has the public duty to discover the underlying problems beneath chokehold violence, and the Grand Jury minutes will help the Public Advocate understand what factors led Officer Panteleo to chokehold Eric Garner.

B. The Supreme Court Erred By Denying The Public Advocate Has A Compelling And Particularized Need To Speak For Black Males, Who Are Similarly Situated To Eric Garner.

The question for this Court is what constitutes a "compelling and particularized" need. As examined herein, New York's case law and statutory framework anticipate such a need by those who advocate on behalf of the public and in the public's interest on matters concerning policies, oversight, and procedures of various government agencies, including the New York City Police Department.

The Richmond County Supreme Court act of granting District Attorney Donovan's request to unseal certain portions of the Grand Jury proceedings, while denying Petitioner-Appellants request in its entirety, was highly subjectivity and an abuse of judicial discretion. The decision by the court below was in error and should be reversed.

The justification provided by the court below, namely that the Public Advocate has a myriad of *other* resources to review police action, and does not need disclosure of the Grand Jury

minutes to perform such a review is defective on its face. It curiously ignores the Public Advocate's clearly defined role in municipal oversight, while placing no such restrictions on the Office of the Richmond County District Attorney.

The Public Advocate requested limited access to the Grand Jury minutes on the grounds that they are essential to informing prospective legislation and official investigations. The Public Advocate narrowly tailored her request to information that included (i) instructions to the Grand Jury, (ii) elements of the crimes charged, (iii) questions asked by Grand Jury members (iv)testimony of the principal officer subject to investigation, and (v) non-testimonial evidence presented to the Grand Jury.

Floyd v. the City of New York, (959 F. Supp. 2d 540, 560 (S.D.N.Y. 2013), addressed the erroneousness of certain NYPD policies and procedures such as the "Stop & Frisk" rule. "Stop & Frisk" was challenged when it was recognized that police policy, in fact, targeted members of a particular demographic, i.e. young black men, who were disproportionately arrested by police, without due process and in violation of the *U.S. Constitution's* Fourth Amendment.

The thorny issue of racial profiling as accepted police policy and practice was addressed by the U.S. Supreme Court in *LA v. Lyons*, 461 U.S. 95, 102 S. Ct. 1660. In *Lyons*, a black man

was pulled over by the authorities for a traffic violation. Although the complainant offered no resistance, nor provocation, he was seized and subjected to a "chokehold" which rendered him unconscious and caused damage to his larynx.

In *Lyons* the court established the contours within which police policies are to be reviewed and practices such as "chokeholds" must be examined. The court below erred by ignoring the strictures set forth by court in *Lyons*.

This court must also consider the macro effect, that racially targeted practices such as "Stop & Frisk" and chokeholds pose to the public's trust in its law enforcement and municipal authorities. How can the public have any regard for the authority of the law, when the law may choose to perpetually disregard the safety of its public in such a discriminatory manner?

The court further erred by ignoring the Public Advocate's "compelling and particularized" need to speak for black males, who are similarly situated to Eric Garner.

The Public Advocate is a unique voice for disenfranchised New Yorkers, including young black men, and black men in general. Black men like Eric Garner. Though unarmed, he was killed for being suspected of the petty offense of selling

"loosies". Eric Garner is a father of six and grandfather of two. One son was about to start college. Yet, Garner was relegated to selling "loosies" (unpackaged cigarettes) to financially support his family, despite the fact that he had part-time employment working for the New York City Parks Department.

The death of Eric Garner speaks to the myriad of problems faced by a systemically disadvantaged demographic (black men) who lack education, skills and socio-economic opportunities. This disconnected state, relegates them to pre-determined environments of unemployment, illegal commerce and utter poverty.

The *National Urban League 2015 State of Black America Executive Summary & Key Findings*, states that the combined 2015 unemployment rate for blacks in New York, New Jersey and Pennsylvania is 14.2%; which is more than double the 2015 unemployment rate for the entire state(s) of New York (5.7%), New Jersey (6.5%), and Pennsylvania (5.3%), respectively. The same study found that that black income in the tristate region is only 53% of White Income.

The Civilian Complaint Review Board (CCRB) did a January 2009 to June 2014 study on the lack of enforcement in the face of persistent chokehold complaints in New York City. The report

noted that in the period of one year (July 2013 to June 2014) the CCRB received a greater number of chokehold complaints than it did in the previous four years (2006 to 2010). The study revealed that 77.1% of all fully investigated chokehold incidents involved an arrest. The data shows that there is a strong correlation between the use of chokeholds and the likelihood of arrest. It also revealed that the use of chokeholds by law enforcement is increasing.

This brings into question the NYPD policies and procedures on arrest, and its constitutionality. The study also pinpointed some stark disparities in accord to geographical locations of certain precincts, in regards to chokeholds. The 75th precinct, which is located in the East New York section of Brooklyn, had the most incidents within the confines of that precinct with 65 chokehold allegations followed by the 73rd precinct, which is located in the Ocean Hill and Brownsville area of Brooklyn, with 52 chokehold allegations. These are also areas known to have high crime and low income rates for residents.

These systematically predisposed, socioeconomically disenfranchised citizens of our city, who are subject to the capriciousness of municipal government and authority, deserve and require an advocate to have their complaints heard, their

rights defended, and justice served. Therefore, this court should reverse the decision of the court below in its entirety.

C. There Is A Compelling And Particularized Need To Ensure That NYPD Policy Meets The Standards Set By The Court In U.S. V. Lyons, Which Is Impossible To Determine Without Access To The Minutes.

The Supreme Court should have released the Eric Garner Grand Jury proceedings because there is a compelling and particularized need for access to the material to consider seeking injunctive relief. In order to obtain an injunction against chokeholds, City of Los Angeles v. Lyons, 461 U.S. 95 (1983) requires that the Legal Aid Society define the contours of the police policy authorizing chokeholds.

The Legal Aid Society needs the Eric Garner jury material to understand the contours of the New York Police Department chokehold policy because the Police Department appears to authorize chokeholds. Chokeholds in New York City are at an unprecedented high. The written policy was unclear when Eric Garner died. Furthermore, Officer Pantaleo's lawyer said that Officer Pantaleo testified that the maneuver portrayed on video as a chokehold was initiated pursuant to what he learned in police academy.

1. ***City Of Los Angeles V. Lyons*** **Required That Plaintiffs Identify How Police Departments Authorized Chokeholds In Order To Award Injunctive Relief.**

The Legal Aid Society and other plaintiffs have a compelling and particularized need for access to the Grand Jury material than does any other citizen because in seeking injunctive relief against the New York Police Department using chokeholds, the plaintiffs have to meet the City of Los Angeles v. Lyons requirement that the Police Department, in fact, authorized chokeholds.

In City of Los Angeles v. Lyons, 461 U.S. 95 (1983), the United States Supreme Court required that plaintiffs seeking injunctive relief "point to any written or oral pronouncement by the [Police Department] or any evidence showing a pattern of police behavior that would indicate that the official policy would permit the application of the control holds..." Id., at 110, footnote 9.

In City of Los Angeles v. Lyons, four City of Los Angeles officers stopped Adolph Lyons at 2 A.M. on October 6, 1976, for a traffic or vehicle code violation. Mr. Lyons alleged that the "officers, without provocation or justification, seized Lyons and applied a 'chokehold',...rendering him unconscious and causing damage to his larynx," Lyons, 461 U.S. at 97-98. The Ninth Circuit Court of Appeals "held that there was a sufficient

likelihood that Lyons would again be stopped and subjected to the unlawful use of force to constitute a case or controversy and to warrant the issuance of an injunction, if the injunction was otherwise authorized," Lyons, 461 U.S. at 99.

The District Court, that actually issued the preliminary injunction, found that "the department authorizes the use of the holds in situations where no one is threatened by death or grievous bodily harm, that officers are insufficiently trained, that the use of the holds involves a high risk of injury or death as then employed, and that their continued use in situations where neither death nor serious bodily injury is threatened 'is unconscionable in a civilized society.' The court concluded that such use violated Lyons substantive due process rights under the Fourteenth Amendment," Lyons, 461 U.S. at 99.

Justice Thurgood Marshall, writing for the dissent in City of Los Angeles v. Lyons noted the high likelihood that the City of Los Angeles would use a chokehold against Mr. Lyons again. Justice Marshall noted that since 1975, "no less than 16 persons...died following the use of a chokehold by an LAPD police officer," Lyons, 461 U.S. at 116. Twelve of these sixteen people were black men. "Between February 1975 and July 1980, LAPD officers applied chokeholds on at least 975 occasions, which represented more than three-quarters of the reported [physical] altercations," id., at 116.

Despite this likelihood that Mr. Lyons would suffer or die from a police chokehold again, the U.S. Supreme Court required that parties seeking an injunction against chokeholds identify how the police department authorized chokeholds. The Court required "(1) that all police officers in Los Angeles *always* choke any citizen with whom they happen to have an encounter, whether for the purpose of arrest, issuing a citation, or for questioning, or (2) that the City ordered or authorized police officers to act in such manner." Lyons, 461 U.S. at 106. The Court emphasized that the statistical likelihood that the police would chokehold Mr. Lyons again was not enough. According to the Court, "We cannot agree that the 'odds,' 615 F.2d, at 1247, that Lyons would not only again be stopped for a traffic violation but would also be subjected to a chokehold without any provocation whatsoever are sufficient to make out a federal case for equitable relief," Lyons, at 108.

In order for a party to successfully obtain an injunction against chokeholds pursuant to City of Los Angeles v. Lyons, that party must detail the contours of a police department's policies that authorize chokeholds. The mere facts that the Los Angeles Police Department authorized chokeholds "under circumstances where no one is threatened with death or grievous bodily harm" was not enough to convince a court to stop Los

Angeles from continuing its significant use of chokeholds, Lyons, at 110.

2. Since the facts surrounding Eric Garner's death suggest that the New York City Police Department authorizes chokeholds, there is a compelling and particularized need to examine the Grand Jury testimony to further define the contours of New York City's chokehold policies.

The Legal Aid Society and other advocates have a compelling and particularized need to learn about the contours of the New York City Police Department's Policy on chokeholds from Eric Garner Grand Jury testimony because of the U.S. Supreme Court's high standard for granting injunctive relief. The facts surrounding Eric Garner's death suggest that the New York City Police Department authorizes chokeholds. And since they do, there is a compelling and particularized need for the Legal Aid Society to define the contours of that policy to meet the City of Los Angeles v. Lyons standards.

First, the New York City Police Department used chokeholds in an unprecedented number of cases when Eric Garner died. In 2014, the New York Civilian Complaint Review Board (CCRB) substantiated six complaints by people who said that New York City police officers used chokeholds on them. This was a significant increase because the CCRB was only able to substantiate a total of nine chokehold complaints between 2009

and 2013, J. David Goodman and Al Baker, *Substantiated Complaints About Police Use of Chokeholds Increase",* N.Y.Times, February 2, 2015, at A20. From July 2013 through 2014, the CCRB received 219 chokehold complaints, a number not seen since 2006-2010 when the CCRB also received more than 200 complaints, New York City Civilian Complaint Review Board, *A Mutated Rule: Lack of Enforcement in the Face of Persistent Chokehold Complaints in New York City: An Evaluation of Chokehold Allegations Against Members of the NYPD from January 2009 through June 2014,* http://www.nyc.gov/html/ccrb/downloads/pdf/Chokehold%20Study_20141007.pdf, at ix. From July 2013 through June 2014, for every 100 force complaints, 7.6 were chokehold complaints, the highest relative number of chokehold complaints ever reported. New York City Civilian Complaint Review Board, *A Mutated Rule,* at ix.

Secondly, facts suggest that the New York City Police Department authorizes chokeholds because the New York City Police Department has issued contradictory directives making it unclear whether or not the NYPD authorizes chokeholds. In 1985, Police Commissioner Benjamin Ward issued an order limiting the use of chokeholds. The order stated, "1. Effective immediately, chokeholds, which are potentially lethal and unnecessary, WILL NOT be routinely used by members of the New York City Police Department. 2. Chokeholds will ONLY be used if the officer's life is in danger or some other person's life

is in danger and the chokehold is the least dangerous alternative method of restraint available to the police officer." New York City Civilian Complaint Review Board, *A Mutated Rule*, at 13. In 1993, Police Commissioner Raymond Kelly issued a prohibition on using chokeholds that still exists today. When asked about the new prohibition, Commissioner Kelly said that the ban was not a new policy but a clarification of the 1985 order. Every reading of the 1985 policy would suggest that New York City Police Officers were authorized to use chokeholds whenever they could justify it as the "least dangerous alternative method available to the police officer." New York City Civilian Complaint Review Board, *A Mutated Rule*, at 13.

Thirdly, according to what Officer Panteleo's lawyer reported to the media about the Grand Jury testimony, Officer Panteleo suggested that he choked Eric Garner pursuant how the New York City Police Department trained him. "Officer Pantaleo testified that when he put his hands on Mr. Garner, he was employing a maneuver taught to him at the Police Academy, hooking an arm underneath one of Mr. Garner's arms while wrapping the other around Mr. Garner's torso, Mr. London said. The move is meant to 'tip the person so they lose their balance and go to the ground,' as seen in wrestling, Mr. London said," J. David Goodman and Michael Wilson, *Officer Daniel Pantaleo*

Told Grand Jury He Meant No Harm to Eric Garner, N.Y.Times, December 4, 2014, at A29.

As a prosecutor or a member of the Eric Garner Grand Jury, if I had seen the video evidence of Officer Pantaleo choking Eric Garner and then heard Officer Pantaleo testify that he attempted to wrestle Eric Garner to the ground the same way the he had been taught in Police Academy training, I would like to know the contours of Police Department policy to see if the NYPD authorized the chokehold of Eric Garner.

Given these facts suggesting that the New York City Police Department authorizes chokeholds, the Legal Aid Society and other advocates have a compelling and particularized need for access to the Grand Jury material to understand the contours of NYPD policy. The Legal Aid Society can then decide whether or not the New York Police Department explicitly authorized chokeholds pursuant to the City of Los Angeles v. Lyons standards.

D. Balancing the Competing Interests

In *People v. DiNapoli*, 27 N.Y.2d 229, 235 (1970), the Court of Appeals suggested five factors for a court to evaluate whether the compelling and particularized need for Grand Jury minutes outweighed the following five interests in keeping Grand Jury minutes secret:

> (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. Id.

The Supreme Court erroneously put too much weight on protecting Grand Jury witnesses. The Court said:

> Most important to the integrity and thoroughness of the criminal justice system is the assurance to witnesses that their testimony and cooperation are not the subject of public comment or criticism. This concern is particularly cogent in 'high publicity cases' where the witnesses' truthful and accurate testimony is vital. It is in such notorious cases that witnesses' cooperation and honesty should be encouraged - not discouraged - for fear of disclosure, *In the Matter of the Investigation Into the Death of Eric Garner v. Donovan*, 080304/2014, p. 10.

While these interests are important, it is now more important to release the Grand Jury minutes so that the Public Advocate, the Legal Aid Society, New York agencies, and other advocates can discover why chokehold violence has persisted for so long, and so harshly against black men, and recommend how to stop it.

Ironically, if chokehold violence persists, less enlightened approaches to deterring the problem may gain more credence and contribute to this cycle of violence and retribution. For example, The Atlantic Monthly noted one online commentator who said that "What will change this situation, is putting police officers in jail for killing and abusing people. And it is abundantly clear that our current laws are too lax to accomplish that. The laws need to change," Conor Friedersdorf, *Eric Garner and the NYPD's History of Deadly Chokeholds*, The Atlantic, December 4, 2014, http://www.theatlantic.com/national/archive/2014/12/context-for-the-punishment-free-killing-of-eric-garner/383413/

If the Supreme Court's decision to keep the Grand Jury minutes secret led to these responses to punish police officers more harshly, it might ironically lead to less candor and integrity in Grand Jury proceedings and other parts of the judicial process.

The compelling and particularized needs, expressed in this brief, to permit the Public Advocate to discover the underlying reasons for chokehold violence, to allow public advocates to determine whether chokehold violence impermissibly targets black men, and to allow the Legal Aid Society to find out how the New York City Police Department authorizes chokehold violence will do much more to ensure the integrity of the legal system and resolve this chokehold violence problem that has plagued our New York City community for too long.

CONCLUSION

Based on the statements contained herein, we respectfully request that the decision of the court below be reversed and that the petition of the New York City Public Advocate, et al., for disclosure of the grand jury materials in the Garner matter be granted.

Dated: May 12, 2014
Brooklyn, New York

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I HEREBY CERTIFY, pursuant to 22 NYCRR §670.10.3(f) that the within brief was prepared on a computer in compliance with the Court's rules as follows:

a. Typeface:	Courier New
b. Font Size:	12 points
c. Spacing	Double spaced
d. Word Count:	6,118

Dated: May 12, 2015
Brooklyn, New York

Signature (Rule 130-1.1-a)

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

In the Matter of Letitia James, Appellant v. Daniel Donovan, Respondent
In the Matter of Legal Aid Society, Appellant v. Daniel Donovan, Respondent
In the Matter of NY Civil Liberties Union, Appellant v. Daniel Donovan, Respondent
In the Matter of NYP Holdings, Petitioner v. Daniel Donovan, Respondent
In the Matter of Staten Island Branch of NAACP v. Donovan

AFFIDAVIT OF SERVICE

Appellate Division Docket No.:
2015-02774

State of New York)
County of Kings) ss.:

Tobias Pinckney, being duly sworn, deposes and says that:

1. The deponent is not a party to the action, is 18 years of age or older, and resides at:

2. On the 13th day of May, 2015, the deponent served the following described paper upon the person or persons listed in paragraph 5 hereof:
   Notice of Motion / Affirmation
   Copy of the Amicus Brief
3. The number of copies served on each of said persons was _____.
4. The method of service on each of said persons was:
   - ☐ By delivering the paper to the person personally pursuant to CPLR 2103(b)(1).
   - ☑ By mailing the paper to the person at the address designated by him or her for that purpose by depositing the same in a first class, postpaid, properly addressed wrapper, in a post office or official depository under the exclusive care and custody of the United States Postal Service within the State of New York pursuant to CPLR2103(b)(2).
   - ☐ Where the person served is an attorney, by leaving the paper with the person in charge of the office of that attorney, pursuant to CPLR 2103(b)(3).
   - ☐ Where the person served is an attorney whose office was not open for business at the time of service, by depositing the paper, enclosed in a sealed wrapper directed to the attorney, in the attorney's office letter drop or box pursuant to CPLR 2103(b)(3).
   - ☐ By leaving the paper at the person's residence within the State of New York with a person of suitable age and discretion, pursuant to CPLR 2103(b)(4) where service at the person's office could not be made pursuant to CPLR 2103(b)(3).
   - ☐ By transmitting the paper by facsimile transmission to the telephone number or other station designated by the person for that purpose, pursuant to CPLR 2103(b)(5). A signal was obtained from equipment of the person served indicating that the transmission was received and a copy of the paper was mailed to the person

- ☐ By dispatching the paper to the person by overnight delivery service at the address designated by the person for that purpose, pursuant to CPLR 2103(b)(6).

5. The name of the person or names of the persons served and the address or addresses at which service was made are as follows:

The Public Advocate, c/o, Attorney Brinckerhoff.
NYCLU
NYS NAACP
District Attorney, Staten Island
NY P Holdings
Legal Aid Society
American Constitution Society of NYU

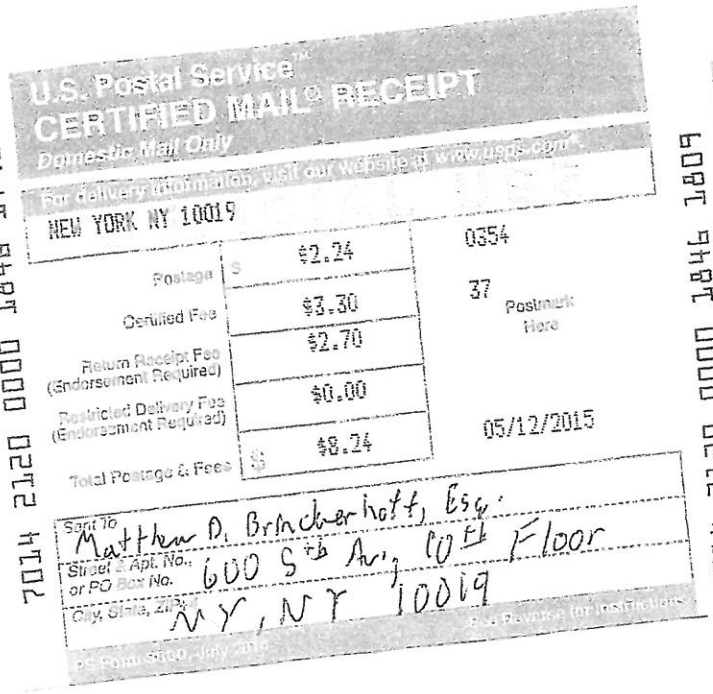
(addresses enclosed/attached)

Dated: Brooklyn, New York
May 13, 2015

Yolanda Pimentel, Esq

Sworn to before me this _____
day of _____, 20____

_____
Notary Public



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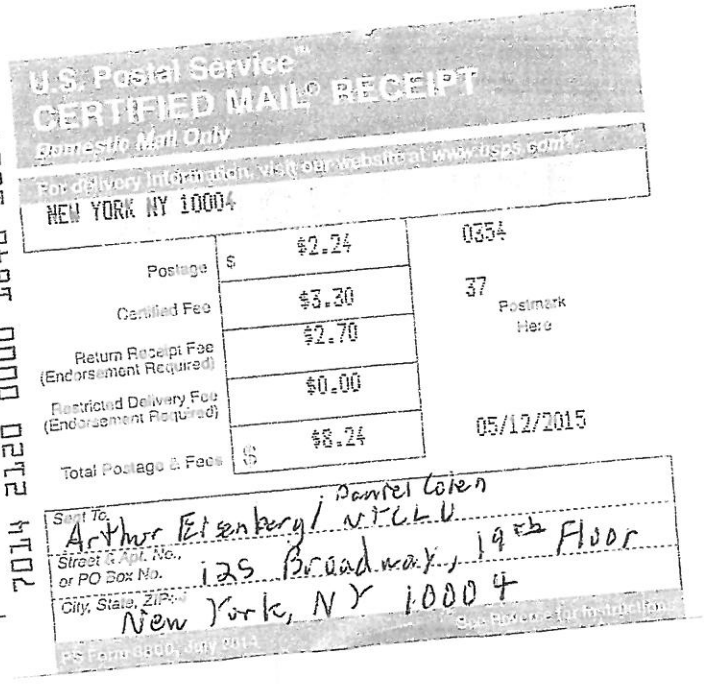

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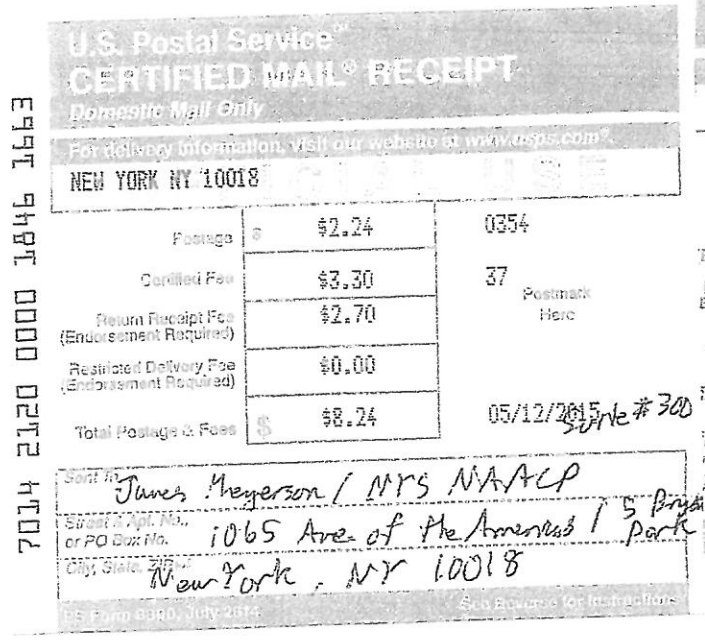

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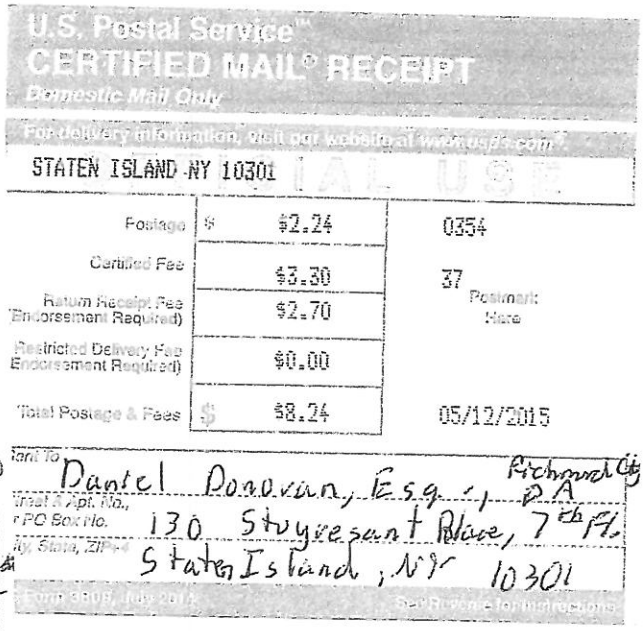

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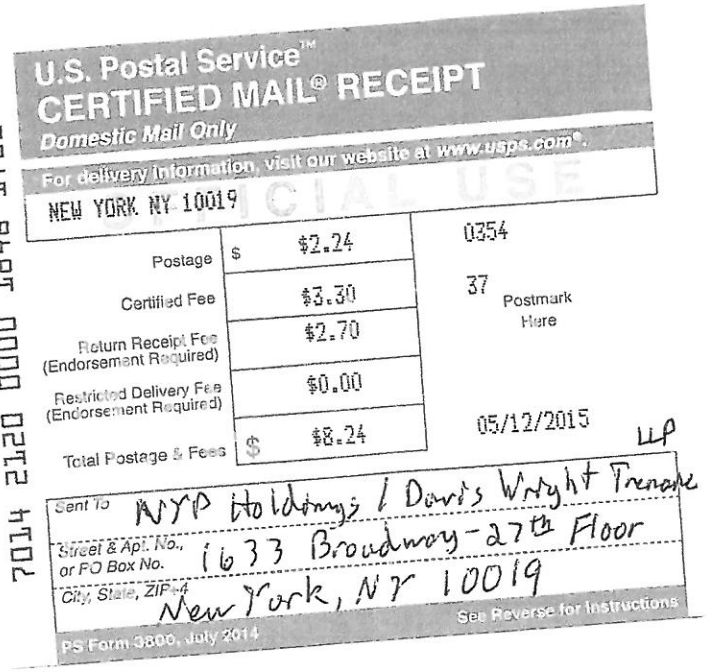

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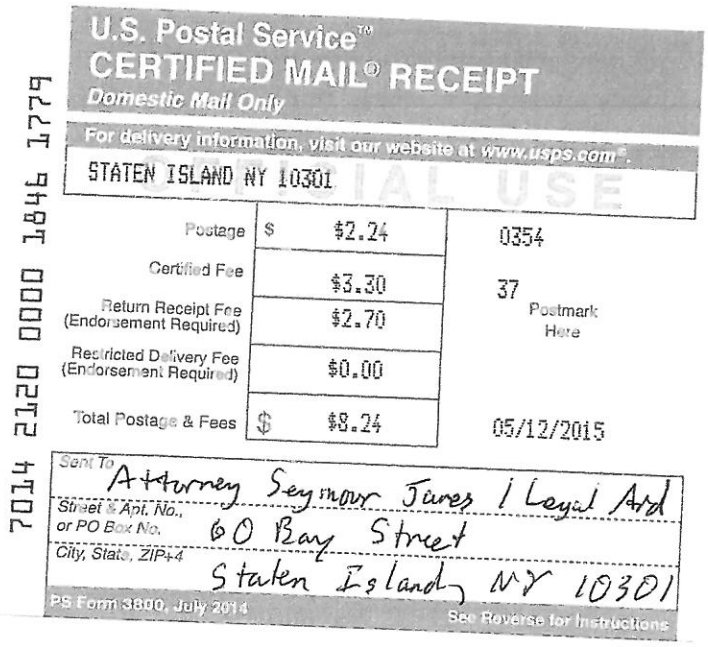

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