



**Testimony of the Center on Race, Inequality, and the Law at NYU School of Law  
Submitted to the New York City Civilian Complaint Review Board**

**January 5, 2020**

*Submitted by:*

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The Center on Race, Inequality and the Law at NYU School of Law presents the following testimony regarding new rules proposed by the Civilian Complaint Review Board (CCRB) empowering the CCRB to investigate allegations of sexual misconduct made against New York City Police Department (NYPD) officers and alleged untruthful statements made by NYPD personnel regarding a civilian during sworn testimony or in official documents. The Center has regularly called for greater independent oversight of the NYPD and stronger disciplinary measures in response to findings of misconduct. We do so while recognizing that the toll of police misconduct falls disproportionately upon New York City's communities of color. These proposed rules are well within the CCRB's mandate as granted by the New York City Charter. Furthermore, these rules will advance racial justice within New York City by providing a new avenue to hold accountable officers who engage in misconduct.

### **The Proposed Rules Are Within the CCRB's Mandate**

The New York City Charter authorizes the CCRB to investigate allegations of police misconduct in a fair and independent manner.<sup>1</sup> Sexual misconduct and false statements made against civilians in an official capacity clearly constitute police misconduct, and there can be no doubt that the CCRB has the statutory authority to investigate such allegations. The CCRB's ability to do so is of paramount importance, given the dearth of investigative efforts undertaken by the NYPD to police itself. The department seldom substantiates claims of officer misconduct, and when it does, strong action is rarely forthcoming. In 2019, the CCRB received thousands of complaints of officer misconduct<sup>2</sup>—resulting in a mere 27 officers losing their jobs.<sup>3</sup> Under such circumstances, it is imperative that the CCRB's hand be strengthened.

### **The Proposed Rules Will Advance Racial Justice in New York City**

Enacting these rules, as the CCRB is empowered to do, is an important step toward building a more racially equitable city. At bottom, they provide the CCRB with the tools necessary to hold the NYPD accountable, where appropriate, for the type of conduct that has undermined the relationship between the police and the communities they are supposed to protect and serve. That relationship has been especially strained by the NYPD's long and well-documented history of violating the rights of communities of color. In 2011, for example, the number of police stops of

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<sup>1</sup> N.Y.C. CHARTER 18-A § 440(a) (2020).

<sup>2</sup> N.Y.C. CIVILIAN COMPLAINT REV. BD., SEMI-ANNUAL REPORT 2019, at 7 (2019), [https://www1.nyc.gov/assets/ccrb/downloads/pdf/policy\\_pdf/annual\\_bi-annual/2019\\_semi-annual.pdf](https://www1.nyc.gov/assets/ccrb/downloads/pdf/policy_pdf/annual_bi-annual/2019_semi-annual.pdf).

<sup>3</sup> N.Y.C. POLICE DEP'T, DISCIPLINE IN THE NYPD 2019, at 10 (2019), [https://www1.nyc.gov/assets/nypd/downloads/pdf/analysis\\_and\\_planning/discipline/discipline-in-the-nypd-2019.pdf](https://www1.nyc.gov/assets/nypd/downloads/pdf/analysis_and_planning/discipline/discipline-in-the-nypd-2019.pdf); see also Kendall Taggart & Mike Hayes, *Secret NYPD Files: Officers Who Lie and Brutally Beat People Can Keep Their Jobs*, BUZZFEEDNEWS (Mar. 5, 2018), <https://www.buzzfeednews.com/article/kendalltaggart/secret-nypd-files-hundreds-of-officers-committed-serious> (reporting that “from 2011 to 2015 at least 319 New York Police Department employees who committed offenses serious enough to merit firing were allowed to keep their jobs”).

young Black men exceeded the entire population of young Black men in New York City.<sup>4</sup> Seven years after a federal court ordered the NYPD to stop its racially discriminatory and unconstitutional stop and frisk practices in the landmark case of *Floyd v. City of New York*, the NYPD still has yet to substantially comply with the ordered reforms,<sup>5</sup> and racial disparities in stops and frisks remain severe.<sup>6</sup>

The new rules are especially important given the prevalence of sexual misconduct and false statements by NYPD officers, and the damage that such misconduct does to communities and the administration of justice. Sexual misconduct and false statements by officers plague both New York’s communities of color and New Yorkers in general. A *ProPublica* investigation found that NYPD officers charged with policing sex work disproportionately target Black and Latinx neighborhoods and have sexually assaulted women on numerous occasions.<sup>7</sup> Other forms of sexual misconduct by officers are widespread, with the recent repeal of 50-a revealing dozens of complaints of sexual harassment by officers in the last several years.<sup>8</sup> One study of New Yorkers found that almost 40 percent of young women surveyed had been sexually harassed by officers over the previous year.<sup>9</sup>

False statements by police officers in official proceedings are also common. Indeed, this is such a common practice as to have garnered its own nickname: “testilying.”<sup>10</sup> Judges and prosecutors—people who can hardly be characterized as “anti-police”—have found in more than two dozen cases since 2015 alone that an officer lied under oath, often to cover up violations of constitutional rights or to convict people with fabricated evidence.<sup>11</sup> These likely represent only a fraction of instances

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<sup>4</sup> Michelle Shames and Simon McCormack, *Stop and Frisks Plummeted Under New York Mayor Bill de Blasio, but Racial Disparities Haven’t Budged*, ACLU BLOG (Mar. 14, 2019), <https://www.aclu.org/blog/criminal-law-reform/reforming-police/stop-and-frisks-plummeted-under-new-york-mayor-bill-de>.

<sup>5</sup> See Tenth Report of the Independent Monitor at 4, *Floyd v. City of New York*, 959 F. Supp. 2d 540 (S.D.N.Y. 2013), <http://nypdmonitor.org/wp-content/uploads/2020/01/Monitors-Corrected-Tenth-Report.pdf>.

<sup>6</sup> Dan Krauth, *Racial Disparities in Policing Have Increased in New York City, Data Shows*, ABC7 N.Y. (Sept. 11, 2020), <https://abc7ny.com/racial-profiling-disparities-in-policing-black-arrests/6414274/>.

<sup>7</sup> Joshua Kaplan & Joaquin Sapien, *NYPD Cops Cash in on Sex Trade Arrests with Little Evidence, While Black and Brown New Yorkers Pay the Price*, PROPUBLICA (Dec. 7, 2020, 5:00 AM), <https://www.propublica.org/article/nypd-cops-cash-in-on-sex-trade-arrests-with-little-evidence-while-black-and-brown-new-yorkers-pay-the-price>.

<sup>8</sup> See Derek Willis, Eric Umansky & Moiz Syed, *The NYPD Files*, PROPUBLICA (July 26, 2020), <https://projects.propublica.org/nypd-ccrb/>.

<sup>9</sup> Michelle Fine et al., “Anything Can Happen with Police Around”: *Urban Youth Evaluate Strategies of Surveillance in Public Places*, 59 J. SOC. ISSUES 141, 151 (2003), [http://www.blackwellpublishing.com/content/BPL/Images/Journal\\_Samples/JOSI0022-4537~59~1~293/301.PDF](http://www.blackwellpublishing.com/content/BPL/Images/Journal_Samples/JOSI0022-4537~59~1~293/301.PDF).

<sup>10</sup> See Joseph Goldstein, “Testilying’ by Police: A Stubborn Problem”, N.Y. TIMES (March 18, 2018), <https://www.nytimes.com/2018/03/18/nyregion/testilying-police-perjury-new-york.html>.

<sup>11</sup> See *id.*

in which officers have made false statements against civilians, particularly because the professional importance to prosecutors of maintaining good relationships with officers discourages calling out dishonesty.<sup>12</sup>

False police statements have been a mainstay of the high-profile police killings of unarmed Black men across the country that have galvanized the Black Lives Matter movement, with officers—including those of the NYPD—often giving self-serving accounts of these killings later proven false by video evidence. In the case of Officer Daniel Pantaleo’s 2014 killing of Eric Garner, for example, Judge Rosemarie Maldonado found that Pantaleo lied about using a prohibited chokehold on Garner.<sup>13</sup> Similarly, Pantaleo’s fellow officer Justin Damico admitted to lying in arrest paperwork that Garner had committed a felony.<sup>14</sup>

This phenomenon can also be seen in non-fatal cases of NYPD abuse of New Yorkers of color. In 2018, for example, Officer Henry Daverin arrested a Black teenager, Christopher Parham, for allegedly driving recklessly without a helmet on an illegal scooter. Daverin and fellow officer Tyler Howe claimed Parham violently resisted a non-forceful arrest—only for surveillance footage to reveal that there had been no resistance to the arrest, that the officers had tased and beaten Parham, and that evidence that Parham had committed a crime in the first place had been fabricated.<sup>15</sup>

The proposed rule changes, which expand the CCRB’s investigative powers, are necessary to curb and ultimately eradicate these types of conduct. Enacting them will ultimately advance justice for all New Yorkers.

## Conclusion

In 2020, New Yorkers joined Americans nationwide to protest the inequity that defines the criminal legal system and to challenge the impunity often enjoyed by police officers who have abused communities of color. The proposed rules are consistent with efforts to imbue the criminal system with justice. If New York City is ever to rein in a police department that has consistently refused to hold officers accountable for misconduct, strong external oversight is integral. The Center applauds the CCRB’s proposed new rules and supports their enactment.

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<sup>12</sup> See George Joseph & Ali Winston, *When Prosecutors Bury NYPD Officers’ Lies*, GOTHAMIST (Sept. 17, 2019, 3:00 AM), <https://gothamist.com/news/when-prosecutors-bury-nypd-officers-lies>.

<sup>13</sup> Ashley Southall, *Officer in ‘I Can’t Breathe’ Chokehold Was ‘Untruthful,’ Judge Says*, N.Y. Times (Aug. 18, 2019), <https://www.nytimes.com/2019/08/18/nyregion/daniel-pantaleo-eric-garner-chokehold.html>.

<sup>14</sup> Michael R. Sisak, *NYPD Officer Says He Inflated Charge Against Eric Garner*, ASSOCIATED PRESS (May 21, 2019), <https://apnews.com/article/ce589240fb884eceab7eaba2bfdff9e2>.

<sup>15</sup> Jake Offenhartz, *Video Showing NYPD Violently Arresting Delivery Worker Contradicts Police Account*, GOTHAMIST (Mar. 19, 2019, 2:15 PM), <https://gothamist.com/news/video-showing-nypd-violently-arresting-delivery-worker-contradicts-police-account>.



January 5, 2021

Civilian Complaint Review Board

Attn: Heather Cook, Esq.

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New York, NY 10007

Via Email to [ccrbrules@ccrb.nyc.gov](mailto:ccrbrules@ccrb.nyc.gov)

**Re: Miscellaneous Rule Amendments, Including Sexual Harassment**

Dear Chair Davie, Executive Director Darche, and Members and Staff of the Civilian Complaint Review Board:

Girls for Gender Equity (GGE) writes to the CCRB in strong support for interpreting jurisdiction to include sexual misconduct by members of the NYPD. Now with the opportunity to submit written comments on this proposed rule, GGE is offering recommendations to strengthen and clarify the language used.

According to the December 2020 Report of the CCRB, in the past year the people of New York formally reported allegations of verbal sexual harassment, sexual humiliation, sexual/romantic propositions, including substantiated allegations with instructions and charges.<sup>1</sup> GGE works daily with young women and girls of color who are policed at every juncture of their lives: in their communities, on the way to school, within and in proximity of their school buildings, and while accessing City services. In December, for the first time, the NYPD concluded that one of the department's employees engaged in racial profiling – a school safety agent.<sup>2</sup> In 2018, when BuzzFeed released thousands of records of misconduct cases, we found anecdotes involving school safety agents behaving inappropriately with students, such as wrongful searches, simulating sexual gestures, engaging in sexual activity

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<sup>1</sup> *Executive Director's Monthly Report December 2020 (Statistics for November 2020)*. Retrieved from [https://www1.nyc.gov/assets/ccrb/downloads/pdf/policy\\_pdf/monthly\\_stats/2020/20201209\\_monthlystats.pdf](https://www1.nyc.gov/assets/ccrb/downloads/pdf/policy_pdf/monthly_stats/2020/20201209_monthlystats.pdf).

<sup>2</sup> See <https://gothamist.com/news/the-nypd-substantiated-its-first-complaint-of-biased-policingbut-not-against-an-actual-officer>.

on school premises, digital harassment, harassing remarks, and utilizing Department of Education computers inappropriately.<sup>3</sup> It is with this context and organizational experience that we offer the recommendations in the following pages.

Researchers agree that while the issue of police sexual misconduct is often invisible in public discourse around racial profiling and police violence, it is both prevalent and systemic. National research and research conducted by community organizations across the country, including here in NYC, reveals that targets of police sexual misconduct include those who are not likely to be believed if they come forward, such as young women and LGBTQ youth. Studies by researchers at the CUNY Graduate Center found that two in five young women reported sexual harassment by the NYPD.<sup>4</sup>

GGE again applauds the expansion of CCRB's investigatory purview to include claims of NYPD sexual harassment and assault and looks forward to continuing conversation with the CCRB on this issue.

**GGE writes with the following recommendations for further amendments:**

PROPOSED RULE PAGE 5

CCRB's Proposed Language:

**Abuse of Authority.** The term "Abuse of Authority" refers to misusing police powers. This conduct includes, but is not limited to, improper searches, entries, seizures, property damage, refusals to provide identifying information, intentionally untruthful testimony and written statements made against members of the public in the performance of official police functions, and sexual misconduct.

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<sup>3</sup> Retrieved from

<https://www.buzzfeednews.com/article/kendalltaggart/nypd-police-misconduct-database#.uf5OLLlaN>.

<sup>4</sup> Brett G. Stoudt, Michelle Fine, and Madeline Fox, Growing Up Policed in the Age of Aggressive Policing Policies, 56 N.Y.L. Sch. L. Rev. 1331 (2011); Fine, M., N. Freudenberg, Y. Payne, T. Perkins, K. Smith, and K. Wanzer, "Anything can happen with police around": Urban youth evaluate strategies of surveillance in public places. Journal of Social Issues 59:141-58 (2003).

GGE Recommends:

We recommend front-loading an expanded definition of sexual misconduct to include sexual harassment sexual assault.

The language would then read:

Abuse of Authority. The term "Abuse of Authority" refers to misusing police powers. This conduct includes, but is not limited to, improper searches, entries, seizures, property damage, refusals to provide identifying information, intentionally untruthful testimony and written statements made against members of the public in the performance of official police functions, **sexual harassment, sexual assault and other sexual misconduct.**

PROPOSED RULE PAGE 7

CCRB's Proposed Language:

**Sexual Misconduct.** The term "Sexual Misconduct" encompasses misconduct of a sexual nature alleged by a civilian against a member of the Police Department. It includes, but is not limited to, the following examples of misconduct: verbal sexual harassment; sexual harassment using physical gestures; sexual humiliation; sexually motivated police actions such as stops, summonses, searches, or arrests; sexual or romantic propositions; and any intentional bodily contact of a sexual nature, including but not limited to, inappropriate touching, sexual assault, rape, and on-duty sexual activity.

GGE Recommends:

Add sexual intimidation, coercion and extortion. We ask that "using physical gestures" be expanded to include *expressions*, and we ask if the limitations of "gestures" led to a low number of reported allegations in 2020 as reported in December's year-to-date report.

Include *digital and written* with verbal sexual harassment to be inclusive of text-based communication or otherwise. To again reference the BuzzFeed database – which includes anecdotes of Facebook and phone harassment of students by NYPD employees.<sup>5</sup>

Include *taking unwarranted photographs or videos or voyeuristic actions* and also *use of personal information, including telephone numbers, obtained from individuals in the course of duty for other than legitimate purposes.*

Revise “inappropriate touching” to *groping*, as inappropriate is far too subjective a word choice.

Explain “on-duty sexual activity” to indicate more of a spectrum of coercive sexual contact. In the 2018 CCRB memo, the example scenario described a coercive situation involving a parent whose child was detained in the precinct.<sup>6</sup> We offer a potential revision of *engaging in sexual activity while on-duty*, as that clarifies that there is a difference between “on-duty” activity, which implies part of job or during a break, and then activity while on duty, including all time spent. We also encourage the inclusion of the use of an official position, official identification cards or badges, or any use of department property or vehicles, to coerce, persuade, force or initiate or engage in sexual contact with anyone or to solicit sexual conduct while off duty. We would appreciate more clarification from the CCRB on how the Board intends to navigate on- and off-duty activity and what is included in all contexts. As an example, according to the International Association of Chiefs of Police 2011 report, as cited by Andrea Ritchie’s presentation before the CCRB, police sexual misconduct spans a range of behaviors: sexual harassment of members of the public; taking unwarranted photos/videos; sexual humiliation/degradation during frisks and searches – “stop and grope”; unwarranted traffic and street stops, callbacks, searches, strip searches; sexual assault; forcible rape; extortion of sex in exchange for leniency; off duty sexual violence facilitated by the badge; and consensual on-duty sexual activity.

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<sup>5</sup> Retrieved from

<https://www.buzzfeednews.com/article/kendalltaggart/nypd-police-misconduct-database#.uf50LLlaN>.

<sup>6</sup> Memorandum Accompanying Public Vote. Retrieved from

[https://www1.nyc.gov/assets/ccrb/downloads/pdf/policy\\_pdf/20181402\\_boardmtg\\_sexualmisconduct\\_memo.pdf](https://www1.nyc.gov/assets/ccrb/downloads/pdf/policy_pdf/20181402_boardmtg_sexualmisconduct_memo.pdf).



We ask the CCRB for clarity on the decision not to define “sexual harassment.” We encourage the CCRB to rely on the definition of sexual misconduct that mirrors the City Human Rights Law or Human Rights Commission’s broad understanding of sexual harassment.

We ask the CCRB for clarity on the decision to utilize “of a sexual nature” in comparison to discrimination or harassment that is gender-based. Our concern is that the scope then becomes too narrow or limited to deferring to sexual desire, neglecting instances of sexual violence arising from gender discrimination. A potential reframing may be *misconduct of a sexual nature or motivated in whole or in part by the civilian’s actual or perceived gender or gender presentation*.

Finally, we applaud the CCRB for utilizing “a member of the Police Department” in this definition. Currently, pathways for reporting harmful experiences with school safety agents and other peace officers must also go to the NYPD Internal Affairs Bureau. Young people who have experienced reportable harm by school safety agents must have their reports handled by the NYPD. CCRB can and should be the primary agency for these reports.

The language would then read:

**Sexual Misconduct.** The term “Sexual Misconduct” encompasses misconduct of a sexual nature **or motivated in whole or in part by the civilian’s actual or perceived gender or gender presentation** alleged by a civilian against a member of the Police Department. It includes, but is not limited to, the following examples of misconduct: verbal, **digital, and written** sexual harassment; sexual harassment using physical gestures **and expressions**; sexual humiliation; **sexual intimidation and coercion; taking unwarranted photographs or videos or voyeuristic actions; use of personal information, including telephone numbers, obtained from individuals in the course of duty for other than legitimate purposes;** sexually motivated police actions such as stops, summonses, searches, or arrests; sexual or romantic propositions; and any intentional bodily contact of a sexual nature, including but not

limited to, **groping**, sexual assault, rape, and **engaging in sexual activity while on duty**.

CCRB's Proposed Language:

**Sexual Humiliation:** The term "Sexual Humiliation" refers to incidents in which an officer gratuitously shames or degrades a civilian in relation to their sexual organs or sexual behavior.

GGE Recommends:

Delete the word "gratuitously" as "shames or degrades" does not need a qualifier.

Replace "sexual organs" with *body in part or in whole, physical attributes, attire, appearance, or gender expression*. The language "sexual organs" is far too limited to physiology, at the expense of ignoring a person's presentation or appearance.

Include *in relation to the officer's body or self*. In the February 2018 memo of the CCRB a situation is describe where an officer makes reference to themself, i.e. "You see me? I'm a big guy..."<sup>7</sup>

The language would then read:

Sexual Humiliation: The term "Sexual Humiliation" refers to Incidents in which an officer **shames, degrades, or harasses a civilian in relation to their body, in part or in whole, physical attributes or appearance or gender expression or sexual behavior, or an officer uses or refers to their own body or attributes to harass, shame, or degrade a civilian.**

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<sup>7</sup> Retrieved from

[https://www1.nyc.gov/assets/ccrb/downloads/pdf/policy\\_pdf/20181402\\_boardmtg\\_sexualmisconduct\\_memo.pdf](https://www1.nyc.gov/assets/ccrb/downloads/pdf/policy_pdf/20181402_boardmtg_sexualmisconduct_memo.pdf).

CCRB's Proposed Language:

(15[4]) **Other Misconduct Noted:** the Board found evidence during its investigation that an officer committed misconduct not traditionally investigated by the Board, but about which the Police Department should be aware.

GGE Recommends:

It would be beneficial to the mission of misconduct transparency that the categories of other misconduct be disaggregated in a way that the public can understand. We would be especially concerned with misconduct that is adjacent to sexual misconduct but does not cleanly fit into the definitions of that category.

## **Conclusion**

GGE strongly supports and encourages increased public transparency and reporting on this issue, including through a commitment to a detailed and designated report on police sexual misconduct. Finally, we would also urge the CCRB to increase public awareness of CCRB's full purview over NYPD sexual misconduct. Given limited governmental resources, we urge the CCRB to leverage existing resources to track and report data on complaints and use its policy power to recommend measures to prevent and address NYPD sexual misconduct in a systematic way, perhaps through partnerships similar to what has been launched with the Young Men's Initiative.

As we understand it, as of January 2020, the CCRB was only handling Phase 1 complaints as they were training their staff for Phase 2 expansion. With the designated hearing set for January, we would appreciate an update from the Board on any relevant developments on this.

For questions or more information from GGE, please contact Charlotte Pope at [cpope@ggenyc.org](mailto:cpope@ggenyc.org).

December 1, 2020

### **Innocence Project Testimony Supporting Proposed CCRB Charter Amendments**

My name is Laurie Roberts, and I am a State Policy Advocate with the Innocence Project. We are an organization that works to exonerate wrongfully convicted people across the country and here in New York, where 47 people have been proven innocent through DNA testing since 1991. The Innocence Project submits this letter in support of proposed amendments to the New York City Civilian Complaint Review Board charter.

We strongly support the proposed rule changes, specifically the proposal granting the CCRB new powers to investigate, hear, make findings, and recommend action regarding the truthfulness of material statements made by New York City Police Department officers. While the CCRB already investigates complaints alleging excessive force, abuse of authority, discourtesy, or use of offensive language, these proposed changes would have a large impact on the prevalence and prevention of wrongful convictions.

Police credibility is paramount to a functioning criminal legal system, to protecting the rights of the guilty and the innocent, and to preserving and improving relations between law enforcement and the communities they patrol. When officers lie, the consequences are devastating. Beyond fundamentally violating the public trust and the NYPD's oath to protect and serve, so-called "testilying" endangers public safety by bolstering convictions against innocent people while the real perpetrators remain undetected in the community. Indeed, the real perpetrator was identified in 50% of the 375 wrongful convictions proven by DNA nationwide – and they went on to commit 154 additional violent crimes, including 83 rapes and 36 murders.<sup>1</sup>

Our casework continues to demonstrate the clear link between false police testimony and wrongful convictions. Tragically, there are too many examples in our city to list.

For instance, in 2007, Charles Bunge was wrongfully convicted in Kings County for attempted robbery, and sentenced to 6 years, largely due to the testimony of then-Officer Lucy Rosa, who first stopped Bunge in connection with the robbery.<sup>2</sup> After Bunge was exonerated (and the real assailant identified), the New York Court of Claims specifically noted that Officer Rosa was "not credible," "evasive and contradictory," and that her testimony did not match up with the evidence.<sup>3</sup> Ultimately, the Court found that Rosa's testimony "was tailored to bolster the arrest," and awarded Bunge \$1.4 million in compensation. He had spent nearly 3 years in prison. Notably, before Bunge's arrest in 2006, Officer Rosa had already accumulated 15 civilian complaints from 9 discrete incidents, according to CCRB data. Accusations included aggressive use of

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<sup>1</sup> <https://innocenceproject.org/dna-exonerations-in-the-united-states/>

<sup>2</sup> [Charles Bunge v. State of New York](#); the *Bunge* opinion includes a detailed description of this case

<sup>3</sup> *Id.*

physical force, use of ethnic slurs, and abuse of authority; through 2009, 4 more complaints were filed against Rosa. Only 1 complaint was substantiated.

Carlton Wigfall was arrested and convicted of selling cocaine in 2010, after Manhattan Officer Neil Lawson allegedly observed him taking part in a drug transaction.<sup>4</sup> He was sentenced to 4 years in prison. During the appeal, his attorney discovered that at the time of Wigfall's trial, Lawson was the subject of *six* (eventually 12) federal lawsuits brought by people who claimed that Lawson had falsely accused them of selling narcotics. The court noted that Wigfall's eventual exoneration was largely due to Lawson's lack of credibility.<sup>5</sup>

Finally, Everton Wagstaffe and Reginald Connor were accused in 1992 of kidnapping and murdering a 16-year-old girl in Brooklyn, and eventually sentenced to 12.5 to 25 years in prison, based primarily on testimony from a purported eyewitness. Wagstaffe spent an additional 7 years in prison because he refused to accept any release on parole that would suggest he was guilty. Among the myriad instances of misconduct that colored this wrongful conviction are numerous false statements from NYPD detectives. Most notably, documents unearthed during the appeals process showed police were investigating the men before they ever talked to the supposed eyewitness, directly contradicting sworn testimony from Dets. Jeffrey Wright and James Curran.<sup>6</sup> DNA evidence eventually proved their innocence, and the pair were exonerated 32 years after their arrest.

These are just a few examples that demonstrate the importance of ensuring the CCRB can investigate and take action when police officers make false statements. In each instance, the officer's lack of credibility was only discovered after an innocent person had spent years behind bars; the courts emphasized the connection between untruthfulness and exoneration; and those officers rarely faced consequences for lying, under oath, with impunity.

Independent oversight will not just result in accountability for wrongdoers. It will also positively impact the many honest NYPD officers who are unfairly tarnished by their colleagues' misconduct. And critically, this proposed rule change will help detect and prevent wrongful convictions obtained through false testimony.

Respectfully submitted,

Laurie Roberts  
State Policy Advocate  
Innocence Project

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<sup>4</sup> <https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=5038>

<sup>5</sup> *Id.*

<sup>6</sup> <https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=4725>



**NYC Civilian Complaint Review Board  
January 13, 2020 Board Meeting**

**Testimony of the Legal Aid Society  
Regarding Rule Changes to CCRB Abuse of Authority Jurisdiction**

Jennvine Wong  
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The Legal Aid Society  
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The Legal Aid Society (Legal Aid) thanks the Civilian Complaint Review Board (CCRB) for the opportunity to provide testimony on the proposed rules governing investigations of sexual misconduct and false statements under the Board’s abuse of authority jurisdiction.

Since 1876, Legal Aid has provided free legal services to New York City residents who are unable to afford private counsel. Annually, through our criminal, civil and juvenile offices in all five boroughs, our staff handles more than 300,000 cases for low-income families and individuals. By contract with the City, Legal Aid serves as the primary defender of low-income people prosecuted in the state court system. The Cop Accountability Project at Legal Aid works to improve police accountability and transparency through litigation and advocacy against problematic policing policies. In this capacity, and through our role as counsel in several civil rights cases, Legal Aid is in a unique position to testify about changes to the CCRB rules. On November 9, 2020, the CCRB published new rules for public comment that would empower the agency to investigate two common areas of police abuse: sexual misconduct and lying in an official capacity. The proposed changes would empower the CCRB to investigate allegations of sexual misconduct by members of the NYPD and administratively prosecute those allegations where appropriate. The proposed changes would also expand the CCRB’s mandate to investigate false statements made by NYPD personnel regarding civilians during sworn testimony or in official documents. Both forms of misconduct are rampant within NYPD and both directly implicate the CCRB’s abuse of authority jurisdiction. This important effort has already been delayed for too long by a lawsuit filed by the Police Benevolent Association (PBA) that sought to prevent CCRB from exercising its clear jurisdiction over these forms of misconduct.

### **The NYPD’s Internal Misconduct Investigations Are Deficient**

#### *NYPD Investigations into Sexual Misconduct Are Deeply Flawed*

Nationally, sexual violence by law enforcement is the second-most frequently reported form of police misconduct.<sup>1</sup> One investigation found that a police officer is accused of an act of sexual misconduct once every five days.<sup>2</sup> A 2014 study of police sexual misconduct revealed a

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<sup>1</sup> Andrea Ritchie, *How Some Cops Use The Badge to Commit Crimes*, The Washington Post (Jan. 12, 2018) [https://www.washingtonpost.com/outlook/how-some-cops-use-the-badge-to-commit-sex-crimes/2018/01/11/5606fb26-eff3-11e7-b390-a36dc3fa2842\\_story.html](https://www.washingtonpost.com/outlook/how-some-cops-use-the-badge-to-commit-sex-crimes/2018/01/11/5606fb26-eff3-11e7-b390-a36dc3fa2842_story.html)

<sup>2</sup> “A 2015 investigation by the Buffalo News, based on a national review of media reports and court records over a 10-year period, concluded that an officer is accused of an act of sexual misconduct at least every five days.” *Id.* See also *Abusing the Law*, The Buffalo News (Dec. 2016) (last visited on Jan. 4, 2020) <https://s3.amazonaws.com/bncore/projects/abusing-the-law/data.html>.

pattern of predatory misconduct, where police exploited their status to target the vulnerable and marginalized civilians.<sup>3</sup>

Since 2016, the CCRB has made 299 referrals of sexual misconduct complaints to agencies with authority to prosecute or impose discipline against offending officers.<sup>4</sup> From February 2018 to May 2020, the CCRB made 158 referrals to various district attorney's offices and NYPD's Internal Affairs Bureau (IAB). In the past four years, more than half of all sexual misconduct complaints tracked by CCRB were deemed "truncated" – meaning that investigations were closed because investigators were unable to reach the complainant.<sup>5</sup> In response to a request for similar annual data on sexual misconduct cases, IAB responded that the department does not even track such detailed misconduct data,<sup>6</sup> which suggests that the total number of police sexual misconduct complaints may likely be much greater.<sup>7</sup> The extent of sexual misconduct within the NYPD is difficult to ascertain because the NYPD does not make data about such misconduct public. Moreover, any data on this subject is likely to understate the full extent of the problem. Victims reasonably fear retribution and retaliation backed by the power and authority of a badge.<sup>8</sup> They also reasonably fear their complaints will not be taken seriously when the perpetrator of sexual violence is an officer employed by the very agency entrusted to investigate the abuse.<sup>9</sup>

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<sup>3</sup> Philip M. Stinson, John Liederbach, Steven L. Brewer, Brooke E. Mathna, [Police Sexual Misconduct: A national Scale Study of Arrested Officers](#), Bowling Green State University Criminal Justice Faculty Publications (2014) [https://scholarworks.bgsu.edu/crim\\_just\\_pub/30/](https://scholarworks.bgsu.edu/crim_just_pub/30/)

<sup>4</sup> Sydney Pereira and Josefa Velasquez, *NYPD's Oversight Agency Launches Do-Over On Police Sexual Misconduct Investigations*, Gothamist (Nov. 10, 2020) <https://gothamist.com/news/nypds-oversight-agency-launches-do-over-police-sexual-misconduct-investigations>

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> See, e.g., Philip M. Stinson, John Liederbach, Steven P. Lab, Steven L. Brewer, [Police Integrity: A Study of Law Enforcement Officers Arrested](#), Bowling Green State University Criminal Justice Faculty Publications (January 2016) available at <https://www.ncjrs.gov/pdffiles1/nij/grants/249850.pdf> ("Police sexual misconduct and cases of police sexual violence are often referred to hidden offenses, and studies on police sexual misconduct are usually based on small samples or derived from officer surveys that are threatened by a reluctance to reveal these cases.")

<sup>8</sup> See, e.g., Isidoro Rodriguez, *Predators Behind the Badge: Confronting Police Sexual Misconduct*, The Crime Report (Mar. 12, 2020) <https://thecrimereport.org/2020/03/12/predators-behind-the-badge-confronting-hidden-police-sexual-misconduct/>. ("[P]olice agencies are reluctant to take reports or complaints of this kind of conduct – often trying to dissuade people from making them, and even wrongly categorizing reports of abuse as discourtesy, improper search, or unprofessional conduct in an attempt to diminish their severity and impact.")

<sup>9</sup> See, e.g., Hayley Miller, *Teen Accusing 2 NYPD Officers of Rape was Bullied by Others At Hospital, Lawyer Says*, The Huffington Post (Nov. 24, 2017) [https://www.huffpost.com/entry/nypd-teen-rape-intimidation-hospital\\_n\\_5a184988e4b0cee6c04f74a3](https://www.huffpost.com/entry/nypd-teen-rape-intimidation-hospital_n_5a184988e4b0cee6c04f74a3) (The mother of a teenage girl that accused two NYPD officers of rape claimed that roughly 13 officers from two different precincts approached them at a local hospital and attempted to dissuade them from reporting the crime.)



Since 2018, Legal Aid’s Exploitation Intervention Project (EIP), which represents people prosecuted for prostitution-related charges and advocates for survivors of trafficking and sexual exploitation, has demanded accountability for the systematic sexual harassment and assault of our clients by NYPD Vice Enforcement Division officers.<sup>10</sup> A recent investigation by ProPublica revealed that seventeen women reported to their attorneys sexual assault by a single undercover vice officer. NYPD leadership shielded that officer from any meaningful discipline, despite compelling allegations of false arrest and sexual misconduct reported to the Office of the Inspector General (OIG) almost three years ago.<sup>11</sup> As ProPublica explained: “Even for a department accused in recent months of acting with impunity, those policing New York’s sex trade appear to operate in an extreme vacuum of accountability.”<sup>12</sup> NYPD repeatedly refused requests to make its guidelines governing undercover vice work transparent. The IAB, Vice Division Commander, and district attorney’s offices have all failed to hold vice officers accountable for their egregious misconduct. In instances where survivors have sued, many cases have been settled before officers were forced to testify. The lack of accountability has created a culture so toxic that Legal Aid, along with Brooklyn Defender Services and elected officials, have called for the Vice Enforcement Division to be disbanded.<sup>13</sup>

The NYPD’s persistent failure to properly investigate complaints of sexual misconduct has a devastating effect on survivors of officer abuse and erodes public trust in policing. That failure also corrodes the department from within, creating a hostile workplace for women members of service. From 2014 to 2017, the City settled close to 20 claims of sexual harassment or sex discrimination involving NYPD employees.<sup>14</sup> A former NYPD domestic violence officer spent four years from 2014 to 2019 in an environment where she was repeatedly raped and sexually

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<sup>10</sup> OpEd by Abigail Swenstein, Leigh Latimer, and K.B. White, *End NYPD Vice Squad Secrecy*, amNY (Oct. 25, 2018) <https://www.amny.com/opinion/end-nypd-vice-squad-secrecy-1.22402834/>

<sup>11</sup> Joshua Kaplan and Joaquin Sapien, *NYPD Cops Cash In on Sex Trade Arrests With Little Evidence, While Black and Brown New Yorkers Pay The Price*, ProPublica (Dec. 7, 2020) <https://www.propublica.org/article/nypd-cops-cash-in-on-sex-trade-arrests-with-little-evidence-while-black-and-brown-new-yorkers-pay-the-price>

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

<sup>13</sup> Joshua Kaplan and Joaquin Sapien, *New York Lawmakers Demand NYPD Halt Undercover Sex Trade Stings*, ProPublica (Dec. 16, 2020) <https://www.propublica.org/article/new-york-lawmakers-demand-nypd-halt-undercover-sex-trade-stings>

<sup>14</sup> James Fanelli, *NYC paid nearly \$13 million to settle claims of sex harassment and discrimination in the past four years*, NY Daily News (Jun 12, 2018) <https://www.nydailynews.com/new-york/ny-metro-city-settlements-sex-harassment-nypd-20180612-story.html>

abused by her partner and another officer while her superiors turned a blind eye.<sup>15</sup> A former officer in the Vice Enforcement Division filed a sexual harassment lawsuit against a superior officer and won a \$112,500 settlement.<sup>16</sup> After filing a formal internal complaint following reports to her commanding officers, she became the target of an investigation herself in retaliation for reporting the sexual misconduct. Another female detective who won a settlement of \$325,000 in July 2016 for sexual harassment and assault committed by an NYPD lieutenant claimed that the NYPD's internal investigation exacerbated the harm she suffered. The detective filed a complaint with NYPD's Office of Equal Employment Opportunity (EEO) after being forced to perform oral sex and humiliated in front of her colleagues. The office took 15 months to issue a finding, during which time the detective faced retaliation for filing the complaint. Not only are internal investigations deficient, but they invite retaliation against reporting officers as well.<sup>17</sup>

The discriminatory culture that permeates NYPD contributes to inadequate investigations into sex crimes reported against civilians as well. A Department of Investigation (DOI) report found that NYPD routinely understaffed and neglected sexual assault investigations within the Special Victims Division.<sup>18</sup> A lawsuit filed by sexual assault survivors alleged not only a failure of NYPD to investigate reported sex crimes but also a failure to conduct adequate investigations of the survivors' allegations about the gender bias they faced from Special Victims Division detectives.<sup>19</sup>

NYPD continuously fails survivors of sexual abuse – whether they are civilians or members of service themselves. But officers cannot continue to hide behind a cloak of authority while exploiting vulnerable people they interact with. At a minimum, the CCRB must have authority to

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<sup>15</sup> Thomas Tracy, *'My whole family got ruined': Ex-NYPD Cop Claims She Was Sexually Abused, Raped by Cops in Her Harlem Precinct*, NY DAILY NEWS (Jul. 15, 2019) <https://www.nydailynews.com/new-york/nyc-crime/ny-nypd-cop-claims-repeated-rapes-by-other-cops-harlem-20190715-nn25uabtifanfhtdx43mgllhve-story.html>. (“Besides the rapes ... the notice of claim ... alleges a laundry list of appalling frat house behavior that includes highly sexualized comments toward women cops...”)

<sup>16</sup> See Kendall Taggart, *This NYPD Officer Reported Sexual Harassment. Then She Was Forced Into Rehab*, BuzzFeed News (Jul. 8, 2018) <https://www.buzzfeednews.com/article/kendalltaggart/this-nypd-officer-reported-sexual-harassment-then-she-was>

<sup>17</sup> “The young officer knew the rule, of the precinct and the department as a whole: ‘Don’t ever make a complaint.’” Taggart, *supra* note 16.

<sup>18</sup> Mark G. Peters, *An Investigation of NYPD's Special Victims Division – Adult Sex Crimes*, Department of Investigation's Inspector General for the NYPD (March 27, 2018) available at [https://www1.nyc.gov/assets/doi/reports/pdf/2018/Mar/SVDReport\\_32718.pdf](https://www1.nyc.gov/assets/doi/reports/pdf/2018/Mar/SVDReport_32718.pdf)

<sup>19</sup> Clayton Guse, *'Disdain, disbelief, disrespect': Lawsuit accuses NYPD of culture that fails sexual assault victims*, NY DAILY NEWS (Jan 31, 2019) <https://www.nydailynews.com/new-york/nyc-crime/ny-metro-nypd-sexual-assault-victims-lawsuit-20190131-story.html>

conduct independent investigations of police sexual misconduct, investigations that promote fairness and public trust.

*NYPD Internal Investigations into False Statements by NYPD Fail to Hold Officers Accountable*

Police officers make false statements. They make false statements in official documents, in conversation with prosecutors and on the witness stand, under oath. Those false statements—lies—have life-changing consequences for our clients, and their freedom. Police lies also have a devastating impact on public trust.

A 2019 report conducted by a prominent federal prosecutor and district court judge found that NYPD failed to hold officers accountable for making false statements. The report further concluded that NYPD’s system of internal discipline was too lenient when it charged officers with making false statements, if it charged officers at all. Such a permissive system allowed most officers to avoid termination entirely, even in cases where they clearly lied.<sup>20</sup>

A 2019 report by the Citizens Commission to Combat Police Corruption<sup>21</sup> came to similar conclusions, finding that only 9 of 144 officers who faced allegations related to false statements, were charged under the strictest rule.<sup>21</sup> From 2010 to 2018, the CCRB referred 81 false statement cases for discipline.<sup>22</sup> IAB substantiated only two.<sup>23</sup> In the remaining 79 cases, IAB found no wrongdoing or found the officer guilty of lesser conduct.<sup>24</sup>

Certainly, a police department should not tolerate a culture of lying. False statements, made under oath or in official documents, can ruin lives. A false arrest carries a litany of direct consequences—consequences that affect employment, housing, and immigration. Yet, even in cases where an officer’s false statements are exposed, it is rare that anything more than a dismissal of criminal charges occurs. Officers remain on the street to do it again.<sup>25</sup>

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<sup>20</sup> Mary Jo White, Robert L. Capers & Barbara S Jones, *The Report of the Independent Panel on the Disciplinary System of the New York City Police Department* (2019), <https://www.independentpanelreportnypd.net/assets/report.pdf>.

<sup>21</sup> Nineteenth Annual Report, Commission to Combat Police Corruption (December 2019) available at <https://www1.nyc.gov/assets/ccpc/downloads/pdf/Annual-Nineteen-Report.pdf>

<sup>22</sup> Goldstein, *infra* note 26

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> Mark Joseph Stern, *The Police Lie. All the Time. Can Anything Stop Them?*, Slate (Aug. 4, 2020) <https://slate.com/news-and-politics/2020/08/police-testifying.html>. (Surveillance footage released of an incident alleging a man resisting arrest by plainclothes officers directly contradicted police accounts, proving nearly every detail of NYPD’s account was false. Only after the video was released did the district attorney drop all charges. The officer, who had been named in at least 10 other misconduct lawsuits, was never disciplined and remains on the force two years later.)

For too long, officers have been able to lie without consequence. Rather than being reprimanded, or prosecuted for perjury, offending officers have received promotions.<sup>26</sup> District attorney offices maintain lists of officers with credibility issues, yet those officers are rarely subjected to any meaningful investigation. In fact, prosecutors' reluctance to investigate may even allow offending officers to evade credibility lists altogether.<sup>27</sup> And even when an officer is included on a district attorney's list, they will rarely suffer consequences. Police lying is so prevalent that it has earned the moniker "testilying."<sup>28</sup> Prosecutors almost never pursue charges against officers they have worked with or relied upon in other cases. In some cases, prosecutors may even proactively protect officers with well-documented histories of lying.<sup>29</sup>

According to the Gothamist, prosecutors across all five boroughs consistently fail to even document signs of officer dishonesty if they can otherwise sweep "police officers with credibility problems under the rug" by resolving cases with pleas or dismissing cases outright. Indeed, in a recently reported case, two officers were found to have lied in court about their arrest of a protester at trial.<sup>30</sup> The Manhattan D.A.'s office declined to prosecute. In the last 12 years, the Manhattan D.A.'s Office charged only four officers with perjury and 26 with charges related to lying about arrests or summons.<sup>31</sup> This is hardly indicative of an agency motivated to pursue and investigate claims of perjury by members of service.

The prevalence of the problem—including the historic failure to substantiate these allegations—undermines the public's trust in the police as well as their sense of substantive and procedural fairness in the criminal legal system at large. Efforts to address this sort of misconduct will fail without significant improvements in accountability and independent oversight. These

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<sup>26</sup> Joseph Goldstein, *Promotions, Not Punishments, for Officers Accused of Lying*, NY TIMES (March 19, 2018) <https://www.nytimes.com/2018/03/19/nyregion/new-york-police-perjury-promotions.html>

<sup>27</sup> Stern, *supra* note 24 ("One NYPD officer, David Grieco—commonly known as Bullethead—has been sued at least 32 times...for civil rights violations, including excessive force and fabrication of evidence. Yet Grieco was promoted and prosecutors continued to call him to the stand long after a slew of his victims blew the whistle on his violent and lawless behavior. Judges continued to rely on his word to lock up defendants. And Grieco's name did not appear on Brooklyn District Attorney Eric Gonzalez's long-secret list of officers with known credibility problems.")

<sup>28</sup> Joseph Goldstein, *Testilying by Police: A Stubborn Problem*, NY TIMES (March 18, 2018) available at <https://www.nytimes.com/2018/03/18/nyregion/testilying-police-perjury-new-york.html>

<sup>29</sup> George Joseph and Ali Winston, *When Prosecutors Bury NYPD Officer's Lies*, Gothamist (Sept. 17, 2019) <https://gothamist.com/news/when-prosecutors-bury-nypd-officers-lies>

<sup>30</sup> Nick Pinto, *Two NYPD Officers Lied in Court About Their Arrest of a Black Lives Matter Protester. The Manhattan D.A. Cleared Them*, Gothamist (Dec. 10, 2020) <https://gothamist.com/news/two-nypd-officers-lied-court-about-their-arrest-black-lives-matter-protester-district-attorney-cleared-them>

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

failures underscore the shortcomings of NYPD's ability to meaningfully investigate and discipline their own officers.

**The Board Must Approve the Proposed New Rules**

An essential step towards increased accountability is independent oversight. The proposed rule changes would provide civilians an opportunity to seek accountability with an entity other than the NYPD itself, an agency that has woefully failed to investigate misconduct by members of service. The erosion of public trust necessitates, at the very least, independent investigation into abuses of authority by police. We welcome an expansion of the CCRB's authority and jurisdiction to investigate claims of sexual misconduct and false statements and urge the Board to advocate for even greater authority to deliver real accountability for police misconduct to New Yorkers.



PUBLIC ADVOCATE FOR THE CITY OF NEW YORK

**Jumaane D. Williams**

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**TESTIMONY OF PUBLIC ADVOCATE JUMAANE D. WILLIAMS  
TO THE CIVILIAN COMPLIANT REVIEW BOARD HEARING -  
JANUARY 6, 2021**

Good evening,

My name is Nick Smith, First Deputy Public Advocate for the City of New York. On behalf of Public Advocate Jumaane Williams, I thank the Civilian Complaint Review Board for inviting me to speak today on potential rule changes.

No authority figure, especially a police officer, should abuse power. No survivor should be ignored. All rape and sexual assault cases must be investigated if an officer is the perpetrator. Survivors who experience severe and long-lasting trauma must be shown that no person is above the law. Therefore, I support the CCRB in leading sexual misconduct cases to ensure accountability.

Without accountability, there can be no justice. In 2017, two Brooklyn officers sexually assaulted a young woman. This horrific, traumatic, and violent act has a name: rape. The case even led to a new law a year later that prohibited sex between an officer and a person in custody. Unfortunately, the young woman did not receive justice as, in 2019, a judge gave a light sentence to these officers who later resigned. Worse, the credibility of the woman was questioned. Make no mistake, this was a failure of the justice system. The CCRB must make sure this failure is not normalized.

Untruthful statements are also alarming and require investigation. Lying is so common among officers that prosecutors across the City have a list of cops considered dishonest. Notably, Staten Island and Brooklyn district attorneys prohibit people on said list from testifying. Officers must commit to the truth and avoid a careless mistake that may permanently change or ruin a person's life. Otherwise, this will further deteriorate public trust in NYPD.

I emphasize that there needs to be a reimagining of policing, and that first starts with accountability. Having the CCRB lead that process is a helpful start. Thank you.



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January 8, 2021

**Via Electronic Mail**

Civilian Complaint Review Board  
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[ccbrules@ccrb.nyc.gov](mailto:ccbrules@ccrb.nyc.gov)

**Re: Comments on the November 2020 Proposed  
Revisions to the CCRB's Agency Rules**

To Whom It May Concern:

On behalf of the Center for Constitutional Rights (CCR), I write to provide my organization's views on the Civilian Complaint Review Board's proposed revisions to its agency rules in response to the November 2019 City Charter Amendment giving the Board jurisdiction to investigate, make findings, and recommend disciplinary penalties regarding false statements by NYPD officers.

For more than two decades, CCR, in close collaboration with our grassroots partners in the New York City police accountability movement, has used legal, legislative and administrative advocacy to challenge the abusive and discriminatory practices of the NYPD and push for a police department that is more transparent and accountable to the people of New York City. We took part in the legislative campaigns to pass the Community Safety and Right to Know Acts in the New York City Council and more recently were part of the successful statewide campaign to repeal New York Civil Rights Law 50-a, one of the broadest police secrecy laws in the nation. In addition, we have served for the past 12 ½ years as lead plaintiffs' counsel in *Floyd v. City of New York*, the federal civil rights class action lawsuit that successfully challenged the NYPD's unconstitutional and racially discriminatory stop-and-frisk practices and resulted in a federal court injunction requiring, among other things, changes to the NYPD's procedures for disciplining officers found by the CCRB to have committed misconduct during pedestrian *Terry* stops

Through our *Floyd* work, my colleagues and I have witnessed firsthand how police officers' false statements not only shield, but often facilitate, unlawful and discriminatory police conduct, frustrating efforts to achieve effective police accountability and transparency and constitutional policing in New York City. Thus, CCR was a strong supporter of the November 2019 City Charter amendments, and we are encouraged by the Board's sincere commitment, as expressed in the proposed agency rule amendments, to use its expanded jurisdiction to meaningfully address this category of serious police misconduct. I would now like to offer some suggested changes to these amendments which CCR believes will enhance the CCRB's ability to effectively respond to allegations of false officer statements and similar forms of misconduct:

**JUSTICE TAKES A FIGHT.**

1. § 1-01- *The Definition of “Abuse of Authority”*

The proposed rule amendments define “Abuse of Authority” to include “intentionally untruthful testimony and written statements made against members of the public in the performance of official police functions.” While officers’ false statements certainly can and do often constitute abuse of authority, the proposed definition, as written, is too narrow because by using the term “testimony,” it excludes an officer’s false oral statements which are not made under oath but which can be just as harmful to members of the public as false testimony, such as false oral statements about an arrestee that an officer makes to a supervisor arriving on the scene of the stop or in a meeting with a district attorney to draft a criminal complaint. In addition, using “testimony” rather than “oral statement” is inconsistent with the language in § 1-02(a) and § 440(c)(1). An officer’s false oral statement can also constitute a misuse of police power if it is made *to* a member of the public, such as when an officer provides a civilian with a fake name and badge number in response to the civilian’s request that the officer identify themselves or gives the civilian a false reason for stopping and/or searching them, both of which happened to plaintiffs in the *Floyd* litigation.

Accordingly, CCR proposes that the “Abuse of Authority” definition in § 1-01 be revised as follows:

**“The term “Abuse of Authority” refers to misusing police powers. This conduct includes, but is not limited to, improper searches, entries, seizures, property damage, refusals to provide identifying information, and intentionally untruthful testimony material oral and written statements made against or to members of the public in the performance of official police functions.**

2. § 1-44- *Other Misconduct*

CCR understands and agrees with the proposed amendment to this section which removes “making of a false statement by an officer” and replaces it with “superior officer’s failure to supervise.” However, there are other categories of misconduct which fall outside of FADO but which, like officer false statements during CCRB investigations, often help to conceal officer misconduct and therefore should also be expressly flagged in the CCRB agency rules. Specifically, the failure to document police incidents on the requisite departmental reports, especially failing to complete electronic stop reports for pedestrian *Terry* stops, has become a serious issue in the Department, which the Federal Monitor has continued to document during the past few years of the remedial phase of the *Floyd* litigation. *See* Eleventh Report of the Independent Monitor in *Floyd v. City of New York*, 08 Civ. 1034, Dkt # 795-1 at 13-14, 83-84 (S.D.N.Y. Oct. 28, 2020).

Accordingly, we propose that § 1-44 be revised as follows:

**If during the course of a Prosecution the Civilian Complaint Review Board becomes aware of possible misconduct falling outside its jurisdiction, such as failure to supervise, and failure to complete necessary departmental reports, the Board shall not itself prosecute such possible misconduct but shall instead immediately refer**



**such possible misconduct to the Police Department for investigation and possible prosecution by the Police Department. The Civilian Complaint Review Board will provide to the Police Department such assistance as may be requested, in the investigation or Prosecution by the Police Department of such possible misconduct and shall, if necessary, coordinate its Prosecution with that of the Police Department. Other misconduct will be noted in case dispositions by categories describing the possible misconduct and the evidence of such misconduct.**

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CCR believes that these above suggested revisions will clarify and reinforce the Board's commitment to use its expanded jurisdiction under the City Charter amendments to respond effectively to false officer statements and similar forms of misconduct that have historically hindered police accountability and transparency efforts in New York City.

Thank you for your time and consideration.

Respectfully submitted,

\s\Darius Charney  
Darius Charney  
Senior Staff Attorney  
Center for Constitutional Rights



New York City Alliance  
Against Sexual Assault



New York State Coalition  
Against Sexual Assault  
Working for a World Without Violence.

## COMMENT TO THE CIVILIAN COMPLAINT REVIEW BOARD

*Changes to Chapter 18-A § 440*

New York City Alliance Against Sexual Assault &  
New York State Coalition Against Sexual Assault

On behalf of the New York City Alliance Against Sexual Assault, its Executive Director and the Board of Directors, and New York State Coalition Against Sexual Assault, its Executive Director and the Board of Directors, I am here to express our support for changes to Chapter 18-A § 440 of the New York City Charter, expanding the CCRB's authority to encompass police sexual misconduct.

The New York City Alliance Against Sexual Assault (the Alliance) is dedicated to advocating for all survivors and victims of sexual violence in the NYC metropolitan area and across the state. The Alliance's mission is to prevent sexual violence and reduce the harm it causes through education, research and advocacy. The Alliance was founded by rape crisis centers in NYC to advocate for the needs of survivors and the programs that serve them. Through public education, cutting-edge programming, advocacy for survivors and the pursuit of legal and policy changes, the Alliance continues to expand as a hub for resources and information about sexual violence.

The New York State Coalition Against Sexual Assault (NYSCASA) is dedicated to advocating for survivors and victims of sexual violence across New York State. NYSCASA's mission is to end all forms of sexual violence and exploitation, and to address the impacts of sexual assault. NYSCASA has 83 member programs across the state of New York who offer support services to survivors of sexual violence.

We are grateful for the Board's commitment to investigating police sexual violence, a pervasive abuse of authority that requires oversight and accountability.

As both research and experience tells us, officers too often (consciously or unconsciously) leverage their authority to sexually harass, coerce and abuse the most vulnerable members of our community. Women of color, young people, individuals with criminal records, sex workers, homeless people, people who use substances, immigrants, people with disabilities, LGBTQ+ and gender non-confirming people, indigenous people, and victims of domestic violence are disproportionately sexually victimized by law enforcement.<sup>1</sup>

As you know, sexual violence is an abuse of power, and far too many of our clients have had the unfortunate, first-hand experience of abuse of power at the hands of the NYPD. Research bears out our anecdotal experience. In one instance, a teenage survivor of police sexual violence reported that nine NYPD officers ascended upon her hospital room, and discouraged her from

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<sup>1</sup> Stinson, Phillip; Liederbach, John; Brewer, Steven; Mathna, Brooke. Police Sexual Misconduct. A National Study of Arrested Officers. (2015). <https://www.bwjp.org/assets/documents/pdfs/webinars/dhhs-police-sexual-misconduct-a-national-scale-study.pdf>

completing a rape kit and pressing charges.<sup>2</sup> A 2010 study by the Cato Institute found that sexual misconduct by law enforcement is the second most common citizen complaints after excessive force nation-wide.<sup>3</sup> And in 2015, a national survey found that, on average, a police officer is reported for sexual misconduct at least every five days.<sup>4</sup> In NYC, a 2003 survey of young adults in NYC found that 2 in 5 young women reported sexual harassment by law enforcement, and half of those victimized were young women of color.<sup>5</sup> Survivors of police sexual misconduct deserve accountability, and it is our duty to advocate on their behalf.

Without independent oversight, police perpetrators often evade accountability. Internal reporting systems that represent law enforcement value internal, political and reputational protection and close cases above safeguarding the fundamental human rights of survivors. A 2018 report on discipline in the NYPD showed that only one percent of officers pleaded guilty or were convicted of disciplinary charges related to sexual misconduct.<sup>6</sup> This is a cyclical problem that without attention, continues to escalate. A 2012 study found that 41% of officers eventually convicted were repeat offenders, with between 2 and 21 prior allegations.<sup>7</sup> As a result of the current system's failure to protect survivors, many survivors do not report sexual misconduct by law enforcement due intimidation, threats, and fear of retaliation. In order for NYPD officers to serve and protect New York City residents, independent oversight is essential.

Voters have also expressed strong support for the expansion of CCRB's jurisdiction.<sup>8</sup> Currently, the NYPD does not publicly disclose information on sexual misconduct complaints. Accordingly, the CCRB's ability to document complaints is paramount to identifying patterns, and crafting data-driven policies, vetting processes, trainings, and interventions to prevent and redress the issue effectively and ensure that survivors' voices are heard. An independent review process can help create more agency for survivors whose power and voice have been stripped by the nature of this crime, and help build a bridge to supportive services.

As the Board has attested, police acts of sexual violence undermine the public trust in law enforcement's ability to keep New Yorkers safe. The inherent bias and conflict of interest present in the internal reporting system undermines survivors' ability to pursue justice and healing, disproportionately impacting people of color and the underserved. In order to strengthen trust between civilians and law enforcement, sexual misconduct by law enforcement must be addressed in an impartial and thorough manner. Establishing an independent review process

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<sup>2</sup> Nolan Brown, Elizabeth. *Teen Suing Two Cops for Rape Gets Hospital Visit From Nine Others on Force*. (2017). <https://reason.com/2017/11/27/nine-nypd-cops-visited-teen-in-hospital/>

<sup>3</sup> The Cato Institute. *2010 National Police Misconduct Statistics and Reporting Project (NPMSRP) Police Misconduct Statistical Report*. (2010). <https://www.leg.state.nv.us/Session/77th2013/Exhibits/Assembly/JUD/AJUD338L.pdf>

<sup>4</sup> Spina, Matthew. *When a Protector Becomes a Predator*. (2015). <https://s3.amazonaws.com/bncore/projects/abusing-the-law/index.html>

<sup>5</sup> Fine, M., Freudenberg, N., Payne, Y., Perkins, T., Smith, K. and Wanzer, K., *Anything Can Happen With Police Around: Urban Youth Evaluate Strategies of Surveillance in Public Places*. *Journal of Social Issues*, 59: 141-158. (2003). <https://doi.org/10.1111/1540-4560.t01-1-00009>

<sup>6</sup> NY Gov. *Discipline in the NYPD*. 2018. [https://www1.nyc.gov/assets/nypd/downloads/pdf/analysis\\_and\\_planning/discipline/discipline-in-the-nypd-2018.pdf](https://www1.nyc.gov/assets/nypd/downloads/pdf/analysis_and_planning/discipline/discipline-in-the-nypd-2018.pdf)

<sup>8</sup> McCormack, Simon. *Three Takeaways From This Year's Election*. (9 November 2019). <https://www.nyclu.org/en/news/three-takeaways-years-elections>

could deter police sexual misconduct, uphold police integrity and accountability, and ensure safeguards are put in place to protect our community.

As the CCRB moves towards taking on this responsibility, we further recommend that the Council consider the following needs:

Effectively addressing cases of sexual violence requires training that allows investigators to center the unique needs of survivors through an inclusive, anti-oppressive and trauma-informed framework. The CCRB can turn to communal expertise in these areas to prepare staff who will be taking on cases of sexual misconduct. The Alliance has had the privilege of providing trauma-informed training to CCRB over the past year, has hired an executive director with expertise in intersectionality and SV, and we have seen that CCRB staff are eager to gain adequate training to approach these difficult and nuanced cases with care.

The CCRB must consider the nuances of the many factors that can prevent survivors from reporting police sexual misconduct. To dismantle these barriers, CCRB investigators must ensure that the reporting process is clear, conspicuous, and accessible to the public. This must also include access to translators familiar with trauma-informed care. Furthermore, the CCRB must formulate internal and external procedures to protect the privacy of survivors, while upholding the due process rights of those accused. Investigations must be executed in a timely manner, with a thorough communication system that keeps complainants informed throughout.

Survivors of police sexual misconduct require unique resources. Any investigative process must ensure that they are afforded thorough safety and healing protections and resources. It is vital that survivors are connected to resources such as hospital services, mental health counseling, and supportive advocacy groups. To achieve this end, the CCRB could implement a coordinated response among these providers. Additionally, the CCRB could provide information and referrals to survivors. These endeavors would serve to address the holistic needs of survivors, minimize re-traumatization and re-victimization, and advance public welfare.

Under rule §1-01 (Definitions, under Sexual Humiliation), we suggest the removal of the word “gratuitously” from the definition, in order to avoid making complainants reach an arbitrary standard of humiliation. Any and all shaming or degradation by police in relation to sexual misconduct is unjustifiable and an affront to human rights, and must be duly investigated.

With regards to §1-01 (Definitions, under Mediation) and categories 17 and 18 of 38-A RCNY § 1-33(e), mediation is often not appropriate in cases of sexual harassment and assault because of the inherent power imbalance and often a feel intimidated or coerced into an agreement. This causes additional harm, when the purpose is to address the harm already exacted. Even if the alleged victim, victim, and complainant consents to this process initially they may feel reluctant to complete it.

In that vein, we request that alleged victims, victims and complainants be given the opportunity to rescind their agreement to move forward with mediation before, during or after the mediation process. In cases such as these, alleged victims, victims and complainants should be allowed to have their cases reconsidered or reopened (§ 1-34 Cases Closed without a Full Investigation).

As organizations dedicated to advancing civil and human rights, eliminating violence, and advocating for survivors, the New York State Coalition Against Sexual Assault and the New York City Alliance Against Sexual Assault overwhelmingly support the new policies and procedures related to changes to Chapter 18-A § 440 of the New York City Charter and the expansion of its authority, jurisdiction, composition, duties, and power to encompass sexual misconduct by police officers. Allowing an entity to investigate claims of sexual misconduct outside of NYPD or another entity where a conflict of interest presents itself is a major step in the right direction. In addition to investigating claims of sexual misconduct, all law enforcement agencies, including NYPD should have a sexual harassment and misconduct policy pertaining to their interactions with the public that is strictly enforced. Appendix B of the U.S Department of Justice, Office of Community Oriented Policing Services (COPS Office) report, [Gender, Sexuality, and 21st Century Policing: Protecting the Rights of the LGBTQ+ Community](#) includes a sample policy developed by Andrea J. Ritchie, and the Policing Subgroup of the LGBT/HIV Federal Criminal Justice Policy Working Group.<sup>9</sup> We firmly believe that expanding the CCRB's jurisdiction to include police sexual misconduct is essential to serving and protecting both survivors and the residents of New York City.

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<sup>9</sup> This [sample policy](#) was created by Andrea J. Ritchie, and the Policing Subgroup of the LGBT/HIV Federal Criminal Justice Policy Working Group.

**WE ARE NEW YORK'S LAW SCHOOL**

**Testimony of Alvin Bragg  
Co-Director of the New York Law School Racial Justice Project**

**The New York City Civilian Complaint Review Board  
January 13, 2021  
100 Church Street, 10th Floor  
New York, New York 10007**

**Regarding The Jurisdiction Of The Civilian Complaint Review Board**

Alvin Bragg, on behalf of the New York Law School Racial Justice Project, respectfully submits the following testimony today in support of the New York City Civilian Complaint Review Board's ("CCRB") authority to investigate allegations of untruthful testimony and written statements made by members of the New York City Police Department ("NYPD") as well as allegations of sexual misconduct by NYPD officers.

The Racial Justice Project is a legal advocacy organization dedicated to protecting the constitutional and civil rights of people who have been denied such rights on the basis of race, and to increasing public awareness of racism and racial injustice in, among other areas, the areas of education, employment, political participation, economic inequality, and criminal justice. The Racial Justice Project's work includes impact litigation, appellate advocacy, legislative advocacy, training, and public education.

For the reasons that follow, the Racial Justice Project fully supports the CCRB's proposed rule revisions.

**I. Investigating Intentionally Untruthful Testimony And Written Statements Falls Under The CCRB's Abuse Of Authority Jurisdiction.**

The proposed rule revisions defining CCRB's abuse of authority jurisdiction to include intentionally untruthful testimony and written statements are important measures that are fully consistent with the CCRB's mission, the City Charter, and relevant case law.

New York City Charter § 440(c)(1) vests the CCRB with "the power to receive, investigate, hear, make findings and recommend action upon complaints by members of the public against members of the police department that allege misconduct involving excessive use of force, abuse of authority, discourtesy, or use of offensive language, including, but not limited to, slurs relating to race, ethnicity, religion, gender, sexual orientation and disability." In November 2019, New York City voters voted overwhelmingly in favor of a ballot question to grant the CCRB the power "to investigate, hear, make findings and recommend action regarding the truthfulness of any material official statement made by a member of the police department who is the subject of a complaint received by the board, if such statement was made during the course of and in relation to the board's resolution of such complaint." New York City Charter § 440(c)(1).

The proposed rule revisions specify that the CCRB’s abuse of authority jurisdiction extends to intentionally untruthful testimony and written statements. The proposed rule revisions define “abuse of authority” to include, *inter alia*, “intentionally untruthful testimony and written statements made against members of the public in the performance of official police functions.” The proposed rule revisions thus reflect what the Court of Appeals and other courts have made clear: intentionally untruthful testimony and written statements constitute an abuse of authority. *See generally People v. Flanagan*, 28 N.Y.3d 644, 653 (2017) (where detective, *inter alia*, prepared a false report, including false statements, to close out a case, official misconduct conviction was legally supported); *Matter of Weissmann*, 176 A.D.3d 77 (2nd Dept. 2019) (submission of false documentation by prosecutor appointed to prosecute traffic tickets and zoning violations to a village justice to justify giving favorable plea dispositions in the course of performing official functions supported official misconduct conviction); *People v. Ackermann*, 44 Misc. 3d 626 (Sup. Ct. Bronx Co. 2014) (police officer's alleged act of making false statements in criminal complaint supported criminal charge against him for official misconduct). *See also* New York City Charter § 1116(b) (“Any officer or employee of the city or of any city agency who shall knowingly make a false or deceptive report or statement in the course of duty shall be guilty of a misdemeanor and, upon conviction, forfeit such office or employment.”).<sup>1</sup>

When a police officer intentionally offers untruthful testimony or written statements, public trust is undermined—and when law enforcement officers who offer intentionally untruthful testimony or written statements are not held accountable, public trust is further corroded. Empirical research supports the conclusion that transparency in connection with the work of police contributes to greater trust between people and police. *See* Brief of Amici Curiae Former Prosecutors in Support of Intervenor-Defendant-Appellee-Cross-Appellant and Urging Affirmance, *Uniformed Fire Officers Association, et al. v. Bill de Blasio, et al*, 2020 WL 6806462 (2nd Cir. 2020) (20-2789). Absent transparency, trust between law enforcement officers and the communities they serve suffers and the efficacy of law enforcement is significantly hindered. Public trust in law enforcement and the integrity of the investigatory and disciplinary processes require an effective system of accountability for members of the NYPD who offer untruthful testimony or written statements.

The CCRB’s investigation of the killing of Eric Garner, and the NYPD’s failure to take any action in relation to false statements discovered in connection with that investigation, is a prime example of why the CCRB must have jurisdiction to investigate untruthful testimony and written statements.

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<sup>1</sup> False statements by a federal agent in connection with the agent’s duties can be a federal offense. *See* 18 U.S.C. § 1000. Indeed, as an Assistant U.S. Attorney for the Southern District of New York, I prosecuted an FBI Agent who had a sexual relationship with a confidential informant and then lied about the relationship to the FBI and the U.S. Attorney’s Office. The FBI Agent was convicted, after a jury trial, for making false statements.



In the administrative trial of former Officer Pantaleo, the Deputy Commissioner of Trials found that Officer Justin Damico falsely stated on an arrest report that no force was used against Mr. Garner and that Mr. Garner committed a felony requiring possession of over 10,000 cigarettes. Notwithstanding that the NYPD's own bylaws proscribe against making false official statements and require the Police Commissioner to impose discipline and, absent extraordinary circumstances, dismiss the officer from the NYPD, it appears the Police Commissioner took no action.<sup>2</sup>

Intentionally offering untruthful testimony and written statements is undoubtedly an abuse of authority and, as the proposed rule revisions reflect, is well within the CCRB's abuse of authority jurisdiction.

## II. Investigating Sexual Misconduct Is Within the Purview Of The CCRB's Abuse of Authority Jurisdiction.

New York case law and the City Charter make clear what should be patently obvious: sexual misconduct by police officers against people they are charged with protecting is an abuse of authority that—as the proposed rule revisions reflect—is within the purview of the CCRB's abuse of authority jurisdiction.

New York City Charter § 440(c)(1) vests the CCRB with “the power to receive, investigate, hear, make findings and recommend action upon complaints by members of the public against members of the police department that allege misconduct involving excessive use of force, abuse of authority, discourtesy, or use of offensive language, including, but not limited to, slurs relating to race, ethnicity, religion, gender, sexual orientation and disability.”

The proposed rule revisions specify that conduct that amounts to “abuse of authority” includes, *inter alia*, “sexual misconduct.” The proposed rules further define sexual misconduct as “misconduct of a sexual nature alleged by a civilian against a member of the Police Department.” Some examples of such misconduct include “verbal sexual harassment; sexual harassment using physical gestures; sexual humiliation; sexually motivated police actions such as stops, summonses, searches, or arrests; sexual or

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<sup>2</sup> After five-plus years of denied access to fundamental information concerning Mr. Garner's death, including whether any investigations and disciplinary actions were taken in connection thereto, Mr. Garner's mother, sister, and police accountability organizers filed a petition, pursuant to New York City Charter § 1109, seeking an order convening a summary inquiry, at which City officials and employees with knowledge or information can be made to testify. On September 24, 2020, the Court held that a summary inquiry was warranted. *Carr v. de Blasio*, 133 N.Y.S.3d 737 (Sup. Ct. N.Y. Cnty. Sept. 24, 2020). The City filed a notice of appeal and argued that an automatic stay halted all proceedings in the matter. The Court rejected its arguments and ordered the parties to move forward with further proceedings. *Carr v. de Blasio*, No. 101332/2019 (Sup. Ct. N.Y. Cnty. Dec. 22, 2020). The Racial Justice Project is co-counsel for the Petitioners in this litigation, which remains ongoing.



romantic propositions; and any intentional bodily contact of a sexual nature, including but not limited to, inappropriate touching, sexual assault, rape, and on-duty sexual activity.”

That sexual misconduct is a form of abuse of authority has been recognized by our courts. *See generally People v. Arcila*, 152 A.D.3d 783, 784 (2nd Dept. 2017) (evidence that an off-duty police officer touched complainant’s breast and inner thigh, without her consent, while displaying his police badge, representing that he was a police officer, and stating that he could give complainant a ticket, was legally sufficient to establish the charge of official misconduct); *People v. Moreno*, 100 A.D.3d 435 (1st Dept. 2012) (entry into an apartment for official police functions when the police officer’s actual intent is to obtain a personal benefit, including “the prospect of sexual relations,” constitutes official misconduct); *People v. Sandino*, 34 Misc. 3d 1223(A) (Crim. Ct. 2011) (obtaining sexual gratification is sufficient to satisfy the benefit element of official misconduct).<sup>3</sup>

Public discussion about police violence generally focuses on excessive force and too infrequently considers another invidious form of police violence: sexual misconduct. When a member of the NYPD commits an assault upon a person—*i.e.*, an assault upon a person that the NYPD is charged with protecting—an independent oversight body is the necessary and appropriate body to receive, investigate, hear, make findings, and recommend action to be taken regarding the complaint.

Complainants should not have to go to the agency that employs the officer who allegedly committed the assault to investigate it. CCRB oversight would foster a system in which complainants can provide information to an independent agency about police misconduct that they have been subjected to or witnessed. Such a system would, among other things:

- give the community faith that complaints of sexual misconduct are being taken seriously and investigated appropriately;
- increase the likelihood that survivors report such misconduct;
- allow for the community to understand how often people are subjected to sexual misconduct by NYPD officers; and
- facilitate citywide policymaking to determine how to stop police sexual misconduct from happening in the first place.<sup>4</sup>

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<sup>3</sup> Federal courts also have addressed this issue. As an Assistant Attorney General for New York State, I worked on a matter in which a federal court imposed a monitor on a local police department subsequent to the filing of a lawsuit alleging that officers had a practice of stopping women motorists for the purpose of soliciting sexual conduct, in violation of the Fourth and Fourteenth Amendment. *See People of The State of New York v. The Town of Wallkill*, Docket No. 7:01-cv-00364 (S.D.N.Y. Jan. 18, 2001), available at <https://www.clearinghouse.net/detail.php?id=1033>.

<sup>4</sup> It is well-established that Black, Latinx, and LGBTQ persons disproportionately bear the brunt of police misconduct. *See, e.g., Stop-and-Frisk in the de Blasio Era*, New York

The number of complaints the CCRB has received about sexual misconduct by NYPD members indicate the need for a central, independent body to investigate such complaints. Between 2016 and 2020, CCRB made 299 referrals to other agencies.<sup>5</sup> Between January 2016 and June 2017, CCRB referred 117 sexual misconduct complaints to IAB; “the Police Department declined to answer questions about any discipline handed down to officers . . . how the cases were decided or what the complaints alleged.”<sup>6</sup> Implementation of the proposed rule revisions would empower the CCRB to investigate these types of complaints itself.

Sexual misconduct by police officers against people they are charged with protecting is unquestionably an abuse of authority and, as the proposed rule revisions reflect, is within the purview of the CCRB’s abuse of authority jurisdiction.

### III. Conclusion

We thank the Board for the opportunity to provide testimony today. The Racial Justice Project looks forward to working with the Board on this and other measures to ensure that complaints of police misconduct are appropriately heard, investigated, and adjudicated.

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Civil Liberties Union, 2 (2019), [https://www.nyclu.org/sites/default/files/field\\_documents/20190314\\_nyclu\\_stopfrisk\\_singles.pdf](https://www.nyclu.org/sites/default/files/field_documents/20190314_nyclu_stopfrisk_singles.pdf); *Transgressive Policing: Police Abuse of LGBTQ Communities of Color in Jackson Heights*, Make the Road New York, 4-5 (2012), [https://maketheroadny.org/pix\\_reports/MRNY\\_Transgressive\\_Policing\\_Full\\_Report\\_10.23.12B.pdf](https://maketheroadny.org/pix_reports/MRNY_Transgressive_Policing_Full_Report_10.23.12B.pdf). Anecdotal observations suggest that this is so for sexual misconduct by officers as well. Centralized, transparent recordkeeping of investigative findings concerning sexual misconduct by officers is important for fashioning remedies and preventative measures that account for disparities experienced by Black, Latinx, and LGBTQ persons.

<sup>5</sup> Sydney Pereira & Josefa Velasquez, *NYPD’s Oversight Agency Launches Do-Over On Police Sexual Misconduct Investigations*, Gothamist (Nov. 10, 2020, 5:00 AM), <https://gothamist.com/news/nypds-oversight-agency-launches-do-over-police-sexual-misconduct-investigations>.

<sup>6</sup> Al Baker & Benjamin Mueller, *Police Complaint Board to Investigate Charges of Sexual Misconduct*, The New York Times (Feb. 14, 2018), <https://www.nytimes.com/2018/02/14/nyregion/ccrb-sexual-misconduct-police.html>.

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**CARLINA RIVERA**  
COUNCIL MEMBER, 2<sup>ND</sup> DISTRICT  
CITY OF NEW YORK

On behalf of my constituents of New York City's 2nd Council District, I respectfully submit these comments in support of the proposed Civilian Complaint Review Board (CCRB) rule change to include "police sexual misconduct" under its purview. While I support this rule change, the CCRB must go further and City Hall must work to give this body full authority to investigate instances of false arrest, sexual harassment, and assault committed by police officers. Until 2018, New York state law did not explicitly forbid sexual contact between police officers and people in their custody.<sup>1</sup> In 2021, there is no question that police sexual misconduct is a glaring abuse of a New York Police Department (NYPD) member's authority and that the CCRB should be able to investigate it.

Currently, the CCRB investigates complaints about four areas of misconduct by members of the NYPD: force that is excessive or unnecessary; abuse of authority; discourtesy; and offensive language. Despite a unanimous vote in 2018 to officially include sexual misconduct within its jurisdiction, the Police Benevolent Association filed a lawsuit that has since halted the CCRB's investigations of hundreds of complaints of police sexual misconduct. I welcome this rule change as an opportunity to now codify an authority that should frankly already exist.

Black and brown New Yorkers have historically been disproportionately targeted, harassed, and surveilled by the NYPD. The "stop and frisk" program has gone on for decades, and continues to be used as a mechanism to racially profile and harass New Yorkers of color. Although Mayor de Blasio ran on reforming the stop and frisk program, 13,500 stops were still recorded by the NYPD in 2019, and 85% of New Yorkers stopped were Black or Latinx.<sup>2</sup> This rate of discrimination has stayed consistent for the 30 years that stop and frisk has been in place. Over the past year, our city has faced repeated instances of police misconduct, particularly during the Black Lives Matter protests.<sup>3</sup> We must actively reckon with the living legacy of police brutality and violence.

Under the umbrella of police misconduct, police sexual misconduct is especially egregious and inextricably tied to the movement to decriminalize sex work in our city. A 2020 ProPublica report revealed that NYPD officers make overtime wages when arresting people for soliciting or selling sex, and are incentivized to falsely arrest and frame people -- mostly men of color -- for soliciting sex from undercover officers. Many undercover officers have been accused of sexual assault of these individuals after their arrests as well. According to ProPublica's data analysis, in the last four years, 89% of people charged with prostitution were non-white. Of those charged with soliciting sex, 93% were non-white.<sup>4</sup> Decriminalizing sex would eradicate incentives for officers to falsely arrest people for prostitution or

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<sup>1</sup> [State lawmakers pass bill barring cops from having sex with detainees](#)

<sup>2</sup> [Stop-and-Frisk Data](#)

<sup>3</sup> [Lawsuit Filed Against City of New York over Police Brutality during BLM Protests; East Village Incident is Part of a Disturbing Trend: Police Accountability Advocates Call for Immediate Firing of Officer Francisco Garcia, and Removal of NYPD from Social Distancing Enforcement](#)

<sup>4</sup> [NYPD Cops Cash In on Sex Trade Arrests With Little Evidence, While Black and Brown New Yorkers Pay the Price](#)

for soliciting sex. This would also prevent so much of the violence that occurs when undercover Vice squad officers fail to wear their cameras or badges while falsely arresting innocent New Yorkers for alleged prostitution.<sup>5</sup>

In addition to oversight of police sexual misconduct, the CCRB should be the sole authority in recommending action -- including firings -- for police officers found guilty of misconduct. The amount of power the Commissioner has in deciding which CCRB decisions to enact is clearly not only a conflict of interest, but a problem that puts all New Yorkers at risk when the NYPD continues to employ officers known to have histories of misconduct.<sup>6</sup> Currently, the CCRB is extremely backlogged due to the increased numbers of complaints they received during Black Lives Matter protest. At the CCRB's June meeting, Executive Director Jon Darche mentioned that as of late May the CCRB had received over 740 complaints of police misconduct about 130 different incidents.<sup>7</sup> CCRB investigators are also consistently overburdened, often handling 30 cases at a time.<sup>8</sup> The board's task is enormous, and they must have the necessary resources to do this critical work.

I stand in full support of this proposed rule change and will continue to advocate for bolder action and broader CCRB oversight. Survivors of police sexual misconduct deserve an entity other than the NYPD to make reports about NYPD misconduct. I look forward to the CCRB adopting these new rules to work to prevent police sexual misconduct and radically change the way we think about public safety in our city.

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<sup>5</sup> [NYPD Cops Cash In on Sex Trade Arrests With Little Evidence, While Black and Brown New Yorkers Pay the Price](#)

<sup>6</sup> [What It Looks Like When the New York City Police Commissioner Has “Unchecked Power” Over Officer Discipline](#)

<sup>7</sup> June 2020 CCRB Meeting Minutes

<sup>8</sup> [Why The Majority Of NYPD Misconduct Complaints End Up “Unsubstantiated”](#)



January 6, 2021

Civilian Complaint Review Board  
Attn: Heather Cook, Esq.  
100 Church Street, 10<sup>th</sup> Floor  
New York, NY 10007

Dear Ms. Cook,

The New York Civil Liberties Union (NYCLU) and the American Civil Liberties Union (ACLU) submit these comments supporting the Civilian Complaint Review Board's (CCRB) proposed sexual misconduct rules. Police sexual misconduct is pervasive, it is imperative that the CCRB assert jurisdiction over such misconduct, and the CCRB has the statutory authority to do so. These comments also recommend a few areas where the rules' definitions of sexual misconduct and sexual humiliation could be strengthened.

The NYCLU, the New York State affiliate of the American Civil Liberties Union, is a not-for-profit, non-partisan organization with over 180,000 members. The NYCLU defends and protects the civil rights and civil liberties embodied in the United States Constitution, New York State Constitution, and state, city, and federal law. The NYCLU is committed to police accountability and transparency as well as to the due process rights of police officers. The NYCLU has regularly engaged with the CCRB from its inception through public reporting, written correspondence, and participation in public meetings and has consistently urged the Board to effectively and fairly investigate police misconduct and to promote police transparency and accountability.<sup>1</sup> The NYCLU also advocates for

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<sup>1</sup> See e.g., The New York Civil Liberties Union, *Mission Failure: Civilian Review of Policing in New York City 1994-2006* (2007), [https://www.nyclu.org/sites/default/files/publications/nyclu\\_pub\\_mission\\_failure.pdf](https://www.nyclu.org/sites/default/files/publications/nyclu_pub_mission_failure.pdf) (analyzing the CCRB's failures and making recommendations for improvements in order to strengthen police accountability); The New York Civil Liberties Union, *Report: Five Years of Civilian Review: A Mandate Unfulfilled* (1998), <https://www.nyclu.org/sites/default/files/publications/NYCLU%20-%20Five%20Years%20of%20Civilian%20Review%20-%20A%20Mandate%20Unfulfilled%20July%205%2C%201993-%20July%205%2C%201998.pdf>; The New York Civil Liberties Union, *Report: Civilian Review of Policing: A Case Study* (1993), <https://www.nyclu.org/sites/default/files/publications/NYCLU.CivilianReviewPolicing.CaseStudyRep.1993.pdf> (recommending creation of independent CCRB and putting forth specific recommendations for its structure and function); The New York Civil Liberties Union, *Police Abuse: The Need for Civilian Investigation and Oversight* (1990),

transparency in judicial and adjudicative administrative proceedings, particularly where law enforcement is implicated in events involving use of force or potential misconduct.<sup>2</sup> In addition, the NYCLU is deeply committed to eliminating discrimination against women and lesbian, gay, bisexual, and transgender people (LGBT), who are disproportionately the victims of police sexual misconduct.

The ACLU is a nationwide, non-partisan organization of more than a million members dedicated to preserving the Constitution and civil and human rights. The ACLU Women's Rights Project, founded in 1972 by Ruth Bader Ginsburg, has been a leader in legal battles to ensure women's full equality in American society. Through litigation, advocacy, grassroots mobilization, and public education, the Women's Rights Project pushes for change and systemic reform in those institutions that perpetuate discrimination based on gender. The ACLU Women's Rights Project has worked to strengthen police accountability for sexual violence, including successfully advocating for the Department of Justice to issue guidance on gender-biased policing of domestic violence and sexual assault and promoting reforms of other police departments.

### **Police Sexual Misconduct is Rampant**

Through these proposed rules, the CCRB responds to a pervasive problem. According to the CATO Institute, police sexual misconduct nationwide is the second most reported form of police misconduct after use of force.<sup>3</sup> Although no entity currently collects reliable data on the scope of NYPD sexual abuse of civilians, the complaints filed with the CCRB to date and the many high-profile reports of officers caught in flagrant acts of sexual misconduct portray a city where police officers regularly abuse the authority their badges confer upon them to sexually harass and abuse civilians.

As part of the research process that led the CCRB to announce its February 2018 resolution to investigate complaints of sexual misconduct by the NYPD, the Board's Policy and Advocacy Unit reviewed the complaints of sexual misconduct that it had received and forwarded to the NYPD's Internal Affairs Bureau (IAB) between January 2016 and June 2017.<sup>4</sup> Over this 18-month period, the Board received 117 complaints of sexual misconduct,<sup>5</sup> a rate of 6.5 complaints per month. Notably, this represents complaints filed before the CCRB had announced its review of such complaints, suggesting that the number of allegations of NYPD sexual misconduct would be higher following these rules'

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<https://www.nyclu.org/sites/default/files/publications/Police%20Abuse%20The%20Need%20for%20Civilian%20Investigation%20and%20Oversight.pdf> (advocating for a CCRB independent of the NYPD).

<sup>2</sup> See, e.g., *New York Civil Liberties Union v New York City Police Dep't* 148 AD3d 642 (1st Dept 2017) (Article 78 petition seeking the written opinions of administrative judges in department trials of NYPD officers, where the misconduct allegations were substantiated by the CCRB).

<sup>3</sup> The CATO Institute, *National Police Misconduct Reporting Project 2010 Annual Report* 1 (Feb. 17, 2013), <https://www.leg.state.nv.us/Session/77th2013/Exhibits/Assembly/JUD/AJUD338L.pdf>.

<sup>4</sup> See CCRB, Memorandum Accompanying Public Vote Re: Sexual Misconduct Allegations, at 2-3 (Feb. 14, 2018) (NYSCEF Doc. No. 57).

<sup>5</sup> *Id.* at 2.

promulgation. Indeed, between February 14, 2018 and early May 2018, the first months after the Board announced its policy of investigating these complaints and before the Appellate Division nullified the CCRB's resolution,<sup>6</sup> the CCRB reportedly received 28 complaints of sexual misconduct, a rate of over 9 complaints per month, representing a 43 percent increase.<sup>7</sup>

Likewise, records of CCRB closed cases involving substantiated misconduct allegations, released by ProPublica in July, establish police sexual misconduct. Girls for Gender Equity analyzed these records for cases involving girls or young women and highlighted a number of disturbing instances of police sexual misconduct.<sup>8</sup>

In addition to complaints filed with the CCRB, a long list of high-profile NYPD sexual misconduct has made headlines in recent years. For example, outlets nationwide covered an alleged rape of an 18-year-old woman by on-duty NYPD officers in a police van.<sup>9</sup> According to her allegations, after two NYPD detectives pulled over the woman and her two friends for driving in a public park after dark, they searched the car and found marijuana and anti-anxiety medicine, at which point they arrested the woman, handcuffed her, and put her in the back of their unmarked van. The detectives allegedly proceeded to force her into sexual activity under threat of criminal charges, and they ultimately plead guilty to bribery and official misconduct.<sup>10</sup> Though abhorrent, this incident is far from an aberration. High profile accounts of NYPD officers committing sexual assault have become commonplace.<sup>11</sup> And,

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<sup>6</sup> *Lynch v. New York City Civilian Complaint Review Board*, 183 AD3d 512, 518 (1st Dept 2020).

<sup>7</sup> Thomas Tracy, *CCRB eyes 28 NYPD sex-misconduct claims*, NY DAILY NEWS, May 10, 2018, <http://www.nydailynews.com/new-york/ccrb-eyes-28-nypd-sex-misconduct-claims-article-1.3981165>.

<sup>8</sup> Girls for Gender Equity, *Overlooked in Plain Sight: Documenting Police Violence Against Girls of Color* (July 2020).

<sup>9</sup> See, e.g., Andrea J. Ritchie, *How Some Cops Use the Badge to Commit Sex Crimes*, WASH. PO., Jan. 12, 2018, [https://www.washingtonpost.com/outlook/how-some-cops-use-the-badge-to-commit-sex-crimes/2018/01/11/5606fb26-eff3-11e7-b390-a36dc3fa2842\\_story.html?noredirect=on&utm\\_term=.9c5dc670cb04](https://www.washingtonpost.com/outlook/how-some-cops-use-the-badge-to-commit-sex-crimes/2018/01/11/5606fb26-eff3-11e7-b390-a36dc3fa2842_story.html?noredirect=on&utm_term=.9c5dc670cb04).

<sup>10</sup> *Id.*; EJ Dickson, *Two Cops Accused of Raping a Teen in Custody Got Probation, Not Jail Time*, ROLLING STONE, Aug. 30, 2019, <https://www.rollingstone.com/culture/culture-news/nypd-officers-eddie-martins-richard-hall-plea-deal-878651/>.

<sup>11</sup> See, e.g., Michael Brick, *Officer Is Found Guilty of Sexually Abusing Women While on Duty*, NY TIMES, Sept. 18, 2017, [https://www.nytimes.com/2007/09/18/nyregion/18cop.html?\\_r=0](https://www.nytimes.com/2007/09/18/nyregion/18cop.html?_r=0) (reporting that an NYPD officer was found guilty of sexual abuse and official misconduct, including making “women submit to searches that turned into unwanted groping” while responding to noise complaints and traffic violations and, in one instance, restraining a woman and masturbating in front of her); Ben Yakas, *Woman Sues City for \$150M Claiming Cop Raped Her & Gave Her Black Eye*, GOTHAMIST, June 6, 2014, [http://gothamist.com/2014/06/06/rape\\_cop\\_drugs\\_woman.php](http://gothamist.com/2014/06/06/rape_cop_drugs_woman.php) (describing allegations that an NYPD officer coerced a woman into a date after arresting her for drunk driving, then drugged her, raped her, and gave her a black eye); John Eligon, *Officer is Convicted of Abusing Power in Seeking Sex*, NY TIMES, Jan. 15, 2010, <https://www.nytimes.com/2010/01/16/nyregion/16cop.html> (reporting that an NYPD officer was found guilty of “telling an 18-year-old that he would destroy a summons he was issuing her in exchange for oral sex”); U.S. Attorney’s Office, Eastern District of New York, *New York City Police Department Detective Arrested on Federal Civil Rights Charges for Sexual Misconduct*, May 18, 2010, <https://archives.fbi.gov/archives/newyork/press-releases/2010/nyfo051810.htm> (announcing the FBI’s

because police sexual assault is rarely reported and prosecution of such crimes is uncommon, these accounts may only scratch the surface of the police sexual misconduct problem in New York City. The number of New Yorkers who survive such abuse is likely staggering.

For example, one study, which surveyed almost 1,000 youth in New York City, found that two out of five young women had been sexually harassed by police officers; these young women repeatedly described the inappropriate comments and touching during police stops as “stop and grope.”<sup>12</sup> LGBT youth are more than twice as likely as their heterosexual and cisgender peers to report police sexual misconduct with transgender, non-binary, and gender nonconforming New Yorkers reporting unlawful searches to assign gender, frequently in the context of street stops.<sup>13</sup> In fact, 12% of LGBT youth report being inappropriately touched during NYPD searches.<sup>14</sup>

### **CCRB Review of Police Sexual Misconduct Is Essential**

In the face of such widespread abuse, CCRB investigation of complaints of police sexual misconduct is a critical step towards promoting police accountability, reducing rampant sexual misconduct by New York City Police Department officers, and increasing trust between civilians and the NYPD. CCRB investigation of these complaints is all the more important because the NYPD, which had previously investigated such complaints internally, has shown itself to be a fundamentally inhospitable place for effective and fair sexual misconduct investigations.

First, the NYPD has no official policy, either in its patrol or administrative guides, prohibiting police from engaging in sexual misconduct against civilians, and no policy provides guidance as to how sexual misconduct complaints against officers are handled.<sup>15</sup> In

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arrest of an NYPD detective on charges of “violating the civil rights of three women through sexual misconduct,” including forcing one to perform oral sex under threat of losing her children); Brendan Brosh, *NYPD captain who exposed himself in subway station gets to keep pension*, NY DAILY NEWS, Aug. 11, 2009, <http://www.nydailynews.com/news/crime/nypd-captain-exposed-subway-station-pension-article-1.398687> (reporting that a Transit Bureau Captain pled guilty to exposing himself to a 20-year-old man while on-duty in a Queens subway station for which he was docked 11 vacation days but retained his full pension).

<sup>12</sup> Deanna L. Wilkinson, *Local Social Ties and Willingness to Intervene: Textured Views Among Violent Urban Youth of Neighborhood Social Control Dynamics and Situations*, 24 JUST. Q. 185, 189 (2007) (hereinafter “Wilkinson Study”).

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

<sup>14</sup> *Id.*

<sup>15</sup> The closest the NYPD Patrol Guide comes to addressing complaints of sexual misconduct is in its policy regarding sexual assault and sexual harassment of prisoners. But even this procedure fails to explicitly refer to NYPD officers. 2020 NYPD Patrol Guide, Procedure No. 210-01 (“The Department has a zero tolerance policy toward all forms of sexual assault and sexual harassment of prisoners by other prisoners or any other person.”). The IAB website provides no clarity as to complaint procedures, merely providing: “The bureau can receive complaints from the public and NYPD service members by telephone, email, and mail” with no further specificity about the types of complaints



fact, in a recent annual report reviewing investigations conducted by IAB into complaints against NYPD officers, the Commission to Combat Police Corruption made the following recommendation:

Due to police officers' inherent authority and the possible coercive nature of any relationship between a member of the service and the civilians with whom he or she comes in contact during the course of his or her job performance, these types of relationships can negatively affect criminal cases and incur civil liability for the City of New York. Although the Department disapproves of these types of contact, there are currently no uniform guidelines detailing what is impermissible. The Commission continues to recommend that the Department should set forth a list of rules to put members of the service on notice that engaging in social and intimate relationships with victims, defendants, or witnesses in cases to which they are assigned, at least during the pendency of the investigation and the criminal prosecution, are strictly prohibited. If there are permissible forms of contact, outside the scope of the investigation, these should also be specified.<sup>16</sup>

The NYPD's complete lack of internal guidelines either prohibiting sexual misconduct by police officers or setting forth procedures for how complaints of such abuse are handled demonstrates the Department's fundamental disregard for these allegations. An agency that does not see the need to prohibit its officers from sexually harassing civilians surely cannot be trusted to fairly investigate their complaints.

Second, the NYPD's handling of investigations of sexual assault committed by civilians against other civilians does little to inspire confidence that the Department is capable of fair and impartial investigations when it comes to complaints of police sexual misconduct. A March 2018 NYC Department of Investigation Report found that the NYPD understaffs and under-resources the Special Victims Division, the unit tasked with investigating sex crimes, including sexual assault, and that, as a result, "many sexual assault cases are not properly investigated."<sup>17</sup> The press release accompanying this report described the systemic failures of the NYPD in this area as causing "re-traumatiz[ation] [of] victims" and as "negatively impact[ing] the reporting of sex crimes, thereby adversely affecting public safety."<sup>18</sup> The report itself describes a culture of sexual assault investigation that

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that it investigates or what the investigation procedures entail NYPD, *Internal Affairs*, <https://www1.nyc.gov/site/nypd/bureaus/investigative/internal-affairs.page> (last visited Jan. 5, 2021).

<sup>16</sup> NYC Commission to Combat Police Corruption, *Eighteenth Annual Report of the Commission* (Aug. 2017), <http://www1.nyc.gov/assets/ccpc/downloads/pdf/18th-Annual-Report.pdf>.

<sup>17</sup> New York City Department of Investigation's Inspector General for the NYPD, *An Investigation of NYPD's Special Victims Division—Adult Sex Crimes* at 1 (Mar. 27, 2018), [http://www1.nyc.gov/assets/doi/reports/pdf/2018/Mar/SVDReport\\_32718.pdf](http://www1.nyc.gov/assets/doi/reports/pdf/2018/Mar/SVDReport_32718.pdf) (hereinafter "DOI Report").

<sup>18</sup> The City of New York Department of Investigation, *DOI Investigation Finds NYPD Has Routinely Understaffed and Neglected the Special Victims Division, Negatively Impacting Sexual Assault*

disrespects survivors and pushes them away from engaging with the criminal legal system:

Service providers and victim advocates described numerous instances in which inexperienced detectives or police officers responded insensitively, dismissively, or incredulously during some victim interviews and infrequently updated victims on the status of their case. [Special Victims Division] retirees, prosecutors, victim advocates, and service providers universally attributed these lapses to understaffing and/or inexperience. Further, service providers, victim advocates, and sex crimes prosecutors identified these kinds of failures as the primary reason victims disengage from the investigative process.<sup>19</sup>

A survivor of police sexual misconduct is already unlikely to report such incidents to the NYPD itself, and the failure of the NYPD to adequately investigate reports of sexual abuse and harassment further discourage survivors from reporting. CCRB investigation of these complaints will provide a much-needed independent avenue for accountability, help combat rampant underreporting of such abuses, and promote policy change to curb police sexual misconduct.

### **CCRB Review of Police Sexual Misconduct Falls Squarely within the CCRB's Statutory Mandate**

Police sexual misconduct is inherently an abuse of authority and has been consistently recognized as such by researchers and law enforcement organizations, falling squarely within the CCRB's statutory mandate. The City Charter gives the CCRB the power to investigate complaints against the NYPD that "allege misconduct involving . . . abuse of authority."<sup>20</sup> Police officers commonly take advantage of the enormous authority, power, and control afforded them by their badges to sexually harass and assault civilians.<sup>21</sup>

Police officers hold positions of immense authority in our society. They are empowered to enforce our laws, to stop individuals, to physically confine them, and to order cooperation. In fact, doing the job of a police officer effectively requires asserting authority over civilians. As a result, when, in the course of these assertions of authority, police officers make sexual comments or propositions, inappropriately touch a person in a sexual manner, or sexually assault them, such behavior abuses the authority conferred on them. As one study on police sexual misconduct explained, police sexual abuse is structurally tied to police officers' abuse of their authority:

[O]pportunities [for sexual misconduct] derive from the context of police

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*Investigations*, Mar. 27, 2018,

[http://www1.nyc.gov/assets/doi/reports/pdf/2018/Mar/SVDReport\\_32718.pdf](http://www1.nyc.gov/assets/doi/reports/pdf/2018/Mar/SVDReport_32718.pdf).

<sup>19</sup> DOI Report at 28.

<sup>20</sup> NY City Charter § 440(c)(1).

<sup>21</sup> *See supra* pp. 2 – 4.

work—the same framework that provides the basis for legitimate policing. Police routinely operate alone and largely free from any direct supervision, either from administrators or fellow officers. Police commonly encounter citizens who are vulnerable, usually because they are victims, criminal suspects, or perceived as “suspicious” and subject to the power and coercive authority granted to police. Police-citizen interactions often occur in the late-night hours that provide low public visibility and ample opportunities to those officers who are able and willing to take advantage of citizens to commit acts of sexual deviance and to perpetrate sex crimes.<sup>22</sup>

Police sexual misconduct also tends to target vulnerable individuals, further underscoring the dynamic of abuse of authority inherent in such interactions. “The targets of reported police sexual violence are overwhelmingly women, and typically women of color who are or are perceived to be involved in the drug or sex trades, or using drugs or alcohol, as well as people with prior arrest records, immigrants, people with limited English proficiency, people with disabilities, and people who have previously been targeted for police sexual violence.”<sup>23</sup> Police sexual misconduct often involves officers abusing their role as protectors by sexually assaulting victims of domestic violence and others who seek their help.<sup>24</sup>

The City Charter mandates that “investigation of complaints concerning misconduct by officers of the department towards members of the public be complete, thorough and impartial, . . . conducted fairly and independently, and in a manner in which the public and the police department have confidence.”<sup>25</sup> The CCRB’s proposed rules advance this interest by ensuring fair, independent, thorough, and impartial review of police sexual misconduct and by removing exclusive jurisdiction over such behavior from agency that has already failed New Yorkers when it comes to sexual assault and harassment.

In addition, because the City Charter requires the CCRB to issue public reports and because the CCRB’s mission requires it to “report relevant issues and policy matters to the police commissioner,” the CCRB’s exercise of jurisdiction over complaints of police sexual misconduct will also help to shape NYPD policy, which, as of now, does nothing to address police sexual misconduct.

The CCRB’s investigation of complaints of NYPD sexual misconduct is both lawful and immensely important. The proposed rules are clearly permitted by the City Charter and

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<sup>22</sup> Philip M. Stinson et al., *Police sexual misconduct: A national scale study of arrested officers*, Criminal Justice Faculty Publications 2 (2014), [https://scholarworks.bgsu.edu/crim\\_just\\_pub/30/](https://scholarworks.bgsu.edu/crim_just_pub/30/).

<sup>23</sup> Andrea J. Ritchie, *Invisible No More* 112 (2017); see also Wilkinson Study (survey of New York City youth in which almost half of those who reported sexual harassment by police were black, Latina, or Asian).

<sup>24</sup> E.g., Complaint ¶¶ 32, 46-59, *Montanez v City of Syracuse et al.*, No. 16-cv-00550 (NDNY filed May 11, 2016) (ECF No. 1) (A 2016 complaint alleged that a Syracuse police officer sexually assaulted one woman when he responded to her home in connection with a domestic dispute and another woman when he responded to her request for help finding her missing daughter).

<sup>25</sup> New York City Charter § 440(a).

further the CCRB’s mandate and mission. Although the Appellate Division struck down the CCRB’s February 2018 resolution asserting jurisdiction over police sexual misconduct, it did so on procedural grounds and suggested that jurisdiction could be properly established through the rulemaking proceeding the CCRB now undertakes.<sup>26, 27</sup>

Still, there are important edits the CCRB should make to the definitions in its proposed rules in order to ensure that the rules achieve their intended effect.

## Recommendations

We offer the following comments about the sexual misconduct definition contained in the proposed rule. We are happy to discuss these in further detail as the CCRB continues its work on the regulation.

### **1. The final rule should include explicit acknowledgement that sexual misconduct can be perpetrated while on-duty and off-duty.**

We strongly urge the CCRB to adopt a definition of sexual misconduct that clearly delineates conduct that is impermissible when a member of the Department is off-duty as well as on-duty. We refer the CCRB to the sample policy on police sexual misconduct developed by Andrea Ritchie and the Policing Subgroup of the LGBT/HIV Federal Criminal Justice Policy Working Group, which appears as Appendix B of James E. Copple & Patricia M. Dunn, U.S. Dep’t of Justice Office of Community Oriented Policing Services, *Gender, Sexuality, and 21st Century Policing: Protecting the Rights of the LGBTQ+ Community* 45 (2017), <https://evawintl.org/wp-content/uploads/Gender-Sexuality-21stCPolicingCOPSreport.pdf> (hereinafter, “Sample Policy”). The Sample Policy describes five different categories of sexual misconduct, including sexual activity while on-duty, sexual activity while off-duty, sexually inappropriate material, unnecessary law enforcement activity, and discriminatory or sexual language or gestures. (Note: the last three categories could be folded into the definition of sexual misconduct on-duty, as they all relate to on-duty behaviors).

- In the Sample Policy, prohibited sexual activity on-duty is defined to include sexual activity or behaviors “while on duty,” “in a police vehicle under the control of the agency,” or “at a police or governmental facility,” and then further provides examples of prohibited sexual activity or sexually motivated behaviors while on-duty. We recommend that the CCRB clearly set out what types of activity are prohibited while on-duty.

The current proposed rule is somewhat ambiguous on this point. The examples of misconduct include “verbal sexual harassment; sexual

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<sup>26</sup> *Lynch v. New York City Civilian Complaint Review Board*, 183 AD3d 512, 518 (1st Dept 2020).

<sup>27</sup> We do not agree with the Appellate Division’s analysis. Nonetheless, the proposed rules comport both with the Appellate Division’s analysis and with our understanding of the law.

harassment using physical gestures; sexual humiliation; sexually motivated police actions such as stops, summonses, searches, or arrests; sexual or romantic propositions; and any intentional bodily contact of a sexual nature, including but not limited to, inappropriate touching, sexual assault, rape, and on-duty sexual activity.” It is not entirely clear whether all of the examples cover only conduct that an officer engages in while on-duty. The last clause that specifically lists “on-duty sexual activity” suggests that possibly some of the other examples would be prohibited while off-duty. However, that also raises questions, as “sexual or romantic propositions” should not qualify as misconduct unless an officer abused their authority in making the proposition. For these reasons and those listed in the discussion below, we recommend that the final rule explain the types of misconduct that are prohibited while on-duty.

- In the Sample Policy, prohibited sexual activity off-duty is defined to include any use of “agency facility or property, vehicle, or information system to initiate or participate in a sexual act with another or engage in voyeuristic behavior that is personally or sexually motivated” and use by members of “their official position, official identification cards or badges to coerce, persuade, force, or initiate sexual contact or penetration with anyone, or to solicit sexual conduct when off duty.” We recommend that these two categories of prohibited off-duty sexual activity be incorporated into the definition of sexual misconduct to ensure that officers do not abuse Department resources or authority to coerce sexual activity even when they are officially off-duty. The potential for an officer to abuse their position to perpetrate sexual misconduct does not end the moment their shift does, and it is important that these forms of misconduct be explicitly addressed in the rule.

## **2. The final rule should be clarified to adopt a broad understanding of sexual misconduct.**

The proposed definition of “sexual misconduct” includes a number of terms that are not separately defined.

For example, the definition references misconduct “of a sexual nature” and “sexually motivated police actions.” While we do not object to describing actions this way, it is vital that the CCRB recognize that proving actual sexual desire of an officer is not a prerequisite to finding sexual misconduct. Officers can engage in a wide range of sexual misconduct, including sexually harassing stops, searches, or arrests, even as they do not personally experience sexual desire for the target. Moreover, women experience gender-specific forms of humiliation and abuse during inappropriate police interactions, including feels of violation, embarrassment, or sexual intimidation that do not necessarily stem

directly from an officer's sexual desire, but from gender-based abuse of authority. We recommend that the definition of sexual misconduct be amended so that it acknowledges that personal sexual desire is not a required element of sexual misconduct. One approach might be to define sexual misconduct as encompassing "misconduct of a sexual nature or misconduct motivated in whole or in part by the civilian's actual or perceived gender." Likewise, the regulation could be amended to refer to "sexually motivated *or harassing* police actions."

With regard to "sexual harassment," we urge CCRB to make clear that it is relying on an understanding of "harassment" that is broad, rather than definitions that arise from the Penal Code or federal civil rights law. This approach is appropriate in this context, where the CCRB is providing oversight over police sexual misconduct, outside of criminal proceedings or civil litigation against a defendant. We also recommend that "verbal sexual harassment" be expanded to include "verbal, written, and digital harassment," given the range of ways sexual harassment can be communicated.

In addition, we recommend the inclusion of examples contained in the Sample Policy that are not currently described in the proposed regulation, including "inappropriate or unauthorized use of personal information, including telephone numbers, obtained from individuals in the course of duty," and "voyeuristic actions," such as taking unwarranted photographs or videos for other than legitimate purposes. These types of actions similarly involve abuse of an officer's authority to engage in improper sexual behaviors.

### **3. The final rule should amend the definition of "sexual humiliation."**

The proposed rule defines "sexual humiliation" to refer to "incidents in which an officer gratuitously shames or degrades a civilian in relation to their sexual organs or sexual behavior." We recommend that the word "gratuitously" be deleted, as "shames or degrades" is a sufficient description of the harmful behavior. We also recommend that the reference to "sexual organs" be replaced by "body in part or in whole or gender presentation or expression" as "sexual organs" does not encompass the range of sex-based shaming or degradation.

As amended, the definition would read:

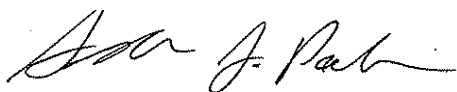
**Sexual Humiliation:** The term "Sexual Humiliation" refers to incidents in which an officer **shames or degrades a civilian in relation to their body (in part or in whole), their gender presentation or expression, or their sexuality.**

## **Conclusion**

In sum, we appreciate the opportunity to submit these comments supporting the CCRB's proposed sexual misconduct rules. In light of widespread allegations of NYPD mishandling of sexual misconduct investigations, the CCRB's independent investigation of these

complaints is essential to safeguarding the rights of survivors of sexual misconduct and to promoting police transparency and accountability. We commend the CCRB for taking the initiative to assert jurisdiction over police sexual misconduct, and we urge the CCRB to make the forgoing improvements to the definitions of sexual misconduct and sexual humiliation and to finalize the rules.

Sincerely,



Sandra Park  
Senior Staff Attorney, Women's Rights Project  
American Civil Liberties Union



Allison S. Bohm  
Policy Counsel  
New York Civil Liberties Union



Christopher Dunn  
Legal Director  
New York Civil Liberties Union



January 6, 2020

Chairman Fredrick Davie  
Civilian Complaint Review Board  
100 Church Street, 10th Fl.  
New York, NY 10007

RE: CCRB’s Proposed Rules Allowing Investigations into Sexual Misconduct by the NYPD

Dear Chairman Davie,

**Brooklyn Defender Services submits these comments in response to the Civilian Complaint Review Board (“CCRB”) [Proposed Rule Changes](#), specifically those allowing the CCRB to handle claims of sexual misconduct by the New York Police Department (“NYPD”). For the reasons set forth below, we strongly support the adoption of the rules.**

Every year, Brooklyn Defender Services (“BDS”) represents nearly 30,000 people in the criminal, family, and civil court systems of Kings County. Many of the people we serve, primarily Black and brown New Yorkers, have experienced abuse and misconduct by the NYPD. This misconduct includes countless instances of sexual abuse and harassment by members of the Department. The abuse ranges from instances of rape to sexual harassment on the street. Without an independent investigatory body to turn to in these instances, victims are left with no recourse other than reporting the incident to the NYPD itself—all but ensuring inaction while risking retribution and additional harm.

Sexual abuse and harassment is endemic to NYPD interactions with civilians. People of all genders and sexual orientations are at risk of abuse, harassment, and exploitation by the police. However, many of the individuals subjected to this common form of police misconduct are targeted specifically because of their sexual orientation, race, and/or gender. The police commonly subject women, trans people, and sex workers to sexual abuse and harassment. **The inherent power imbalance between civilians and the NYPD is heightened by gendered and racial dynamics often present in abusive police interactions, and it is completely unreasonable to expect victims of sexual misconduct by police to turn to the Department for help.**



In our experience as public defenders, we represent people who are targeted with gendered slurs, catcalling, and unwanted advances by officers, many of whom are uniformed and on duty. People we represent, often transgender and cisgender women, describe officers using personal cell phones to take pictures of their bodies and officers making crude comments about their bodies with other officers while within earshot of the targeted person. Members of the Vice Squad, among others, routinely abuse people in their custody or those who are targeted during their rogue operations. Some officers—such as the undercover officer known as UC-157—commit rape, humiliate people in custody, and obtain sexually compromising material from targets to blackmail them into sex.

These stories and others involving sexual misconduct were confirmed through recent reporting by ProPublica into the operations of the NYPD Vice Squad.<sup>1</sup> The article details routine sexual misconduct and humiliation as well as instances of horrific sexual abuse. Among other revelations, the article details what we know to be commonplace and systematic behavior within the Vice Squad, such as arresting and charging people even when they have not agreed to sexual conduct or coercing individuals into agreeing to sexual conduct only to charge them with crimes. The notion that victims of sexual misconduct should be able to place their faith in this same Department to investigate these abuses is, frankly, ridiculous.

It is no coincidence that officers often target sex workers, transgender people, and people of color for sexual abuse and harassment. These members of the NYPD understand that the current system all but guarantees not only the unaccountability of the perpetrators but the continued victimization of targeted people should they turn to their abusers for help. **Like other forms of police abuse, sexual misconduct by officers is an exercise of unchecked police power over civilians that should be investigated by the CCRB as an independent agency.**

### *The Solution*

It is imperative that the CCRB adopt rules that allow the agency to investigate sexual misconduct by the NYPD in accordance with the agency's 2018 vote. It is unacceptable that these complaints are excluded from CCRB jurisdiction, particularly given the sensitive nature of the allegations and the valid reasons that targeted people would decline to lodge these complaints to the NYPD. The current exclusion of sexual misconduct from the CCRB's investigatory power serves no purpose other than to provide cover for abusive police.

The NYPD's desire for unchecked authority to abuse New Yorkers must not be prioritized over the needs of the people of this City. The Department has repeatedly demonstrated disinterest in holding police accountable and has a history of retribution against people who lodge complaints.

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<sup>1</sup> ProPublica, "[NYPD Cops Cash In on Sex Trade Arrests With Little Evidence, While Black and Brown New Yorkers Pay the Price.](#)"

Police Benevolent Association (PBA) has sued to block the CCRB's handling of sexual misconduct cases. The Detective Benevolent Association (DPA) has referred to the proposed rules as "a dangerous power grab." This caterwauling predictably follows every modest proposal to introduce a modicum of oversight to the NYPD, and it should be ignored in favor of common sense rules.

While the NYPD remains in control over all disciplinary actions against its own members, we are unlikely to see meaningful change to the Department itself. Still, increasing the scope of the CCRB's authority can only be seen as a positive step towards accountability. Victims of police abuse need a safe, non-NYPD institution to address the harm they have suffered. We urge the CCRB to adopt these rules and to continue to strive to create this space for them.

Sincerely,

Maryanne Kaishian  
Senior Policy Counsel  
Brooklyn Defender Services

My name is Josie Torielli, and I am a Licensed Clinical Social Worker. I have worked with Interpersonal Violence since 2004. My social work career has focused specifically on intervention and prevention of sexual, gender-based, intimate partner, and domestic violence. My goal is to ensure that all people have access to expert and compassionate care following trauma. I earned my BA from Syracuse University, my MSSW from Columbia University, and I have completed post-graduate certification in Advanced Trauma Treatment via the Institute for Contemporary Psychotherapy. My prior experience includes work with the NYC Alliance Against Sexual Assault, Training Institute for Mental Health, Institute for Contemporary Psychotherapy, Aldea Counseling Services, New York Presbyterian Hospital Weill-Cornell Medical Center, Safe Horizon and The Long Island College Hospital. I currently work as a freelance consultant, advising on clinical practice, training initiatives, trauma-informed care, and best practice. I am also an adjunct lecturer at Columbia University School of Social Work, and have published material related to trauma-informed care for medical professionals.

Of note, I am a survivor of intimate partner and sexual violence. I feel that this is important to include as this informs my professional work and viewpoint, and to make clear that we are not talking about 'others' who have experienced interpersonal violence. As a professional and a survivor, I am here to support the investigation of sexual misconduct allegations via the CCRB's abuse of authority jurisdiction.

I have worked with thousands of survivors of sexual violence in my career. This includes crisis work in Emergency Departments immediately following an assault, accompaniment during reporting to police, and long-term therapy with survivors. Often, an important part of their healing has included naming and reporting what happened. This act of naming and reporting involves placing a great amount of trust in the systems that

are supposed to support crime victims. It is quite literally turning over your story to the criminal legal system, and with it, releasing control over the outcome of the disclosure. Too many times, I have seen survivors' trust in justice and accountability disappear as our systems fail.

I balance between working with these systems and fighting to improve their response. An essential piece of this work has included utilizing my knowledge of neurobiology and trauma. When systems and the people who work in those systems are aware of universal trauma responses and how this informs behavior following trauma, it is my belief that these mechanisms become more responsive to trauma survivors. This includes impacts on behavior and memory that are so often dismissed as indicators of truthfulness. Throughout my career, I have worked to integrate trauma-informed response within medical, criminal legal, social work, academic and social justice systems.

The failures of the current system have been evident when working with people who have experienced sexual violence from the NYPD. In my experience, survivors who opted to report sexual misconduct and violence perpetrated by members of the NYPD faced additional barriers to justice. To whom do you report a crime when it was committed by that system? As we know, these reports are currently investigated by the Internal Affairs Bureau of the NYPD. In my experience, the IAB does not provide accountability, nor consequence related to these reports. It is extremely difficult to receive information about the progress or outcome of investigations. Advocates and survivors are not able to receive essential information. Furthermore, these reports and investigations are not public record, providing no transparency related to process. There is no clear data available related to how many complaints have been received and how those complaints have been investigated.

This is particularly problematic considering the city's Department of Investigation (DOI) March 2018 report on the NYPD's failure to staff and provide resources within the Special Victims Division, which "re-traumatizes victims" and "negatively impacts the reporting of sex crimes, thereby adversely affecting public safety." If the NYPD cannot adequately handle investigations of civilians committing these crimes, how can we expect this unit to investigate crimes committed by their own?

I strongly support the ability of the CCRB to investigate these crimes. I have worked with CCRB leadership and investigators, providing training and guidance related to trauma-informed care. This information includes: Overview of Dynamics and Reality of Sexual Assault (including the social-psychology of sexual assault), Adopting a Victim-Centered Approach/Preventing Re-Victimization (including how to be victim-centered while remaining fair and impartial w/ regard to the investigation), Trauma-Informed Response and Trauma Informed Interviews (Forensic Experiential Trauma Interview (FETI), Fundamentals of Sexual Assault Investigative Procedures and Report Writing (including different strategies for stranger vs. non-stranger sexual assault investigations), Documenting an Investigation: Strategies and Considerations, Protecting Victim Privacy, Public Outreach and Education (including strategies for increasing reports of sexual assaults made to CCRB), and Collaborating with Community Partners During Investigations. I am confident that the agency will be able to draw on their many years of experience in investigation to provide fair, transparent, trauma-informed, expert services to survivors.

Enabling the CCRB to conduct these investigation will allow for increased justice, increased transparency, increased favorable experience in reporting, and an improved and accountable NYPD force.

Thank you.

## **BALA Testimony – January 13, 2021**

Good morning/afternoon. My name is Zamir Ben-Dan, and I am a staff attorney with the Legal Aid Society. I am also a representative of the Black Attorneys of Legal Aid caucus (BALA), an amalgamation of over one hundred Black Legal Aid lawyers. On June 26, 2020, our caucus sponsored a social media action drawing attention to the decades-old problem of police perjury, known as “testilying.” Using the hashtag, “#Copslie,” attorneys from all over the country provided dozens upon dozens of real-life examples of police dishonesty. This action revealed what our caucus, what defense attorneys throughout the country, and what even prosecutors and judges all know: cops lie, and they lie quite frequently.

Cops lie to get around constitutional constraints regarding search and seizure. Because police officers routinely search and seize our clients without proper cause, they justify their actions in court with falsehoods, tailoring their testimony to make an invalid search or seizure constitutionally legitimate.

Cops lie to cover up their own misdeeds, like assaulting the people they arrest. Quite often when police officers injure people, they charge those individuals with resisting arrest and/or obstruction of governmental administration. When a cop kills a person, they always make out the person to be dangerous, making the officer fear for their safety.

Cops lie to make arrests and quotas. In Staten Island, two officers were caught on video planting a marijuana joint in a young man’s car in November 2018. In Brooklyn, an officer’s own body cam caught him planting a stun gun inside a person’s car in 2019. In the Bronx, anti-crime officers planted drugs on a middle-aged man in May 2017; the man was acquitted at trial after fighting the case for approximately a year and a half.

Lying has had its perks for the NYPD. Despite the mountain of evidence of police perjury, judges and prosecutors still take police officers at their word. Plenty of cops who have lied have gotten promoted nonetheless. In fact, of the 420 NYPD officers that have obtained a rank above captain, eighty-six have at least one substantiated CCRB complaint against them. Chances are, none of those officers admitted to the substantiated misconduct to CCRB investigators.

Testilying is a major and lingering problem for one simple reason: police officers are not punished when they lie. The Civilian Complaint Review Board can take a leading role in reversing this pattern. The CCRB should be empowered to investigate police perjury and open the eyes the city willfully closes to this grave problem. In the age of all this talk about police accountability, police perjury needs to be rooted out, and those who engage in it severely penalized.

**POLICE BENEVOLENT ASSOCIATION**

**125 Broad Street**

**New York, NY 10004**

**Phone: 212-298-9144**

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**FAX COVER SHEET**

To: Heather Cook, Esq.  
Assistant General Counsel  
Civilian Complaint Review Board  
100 Church Street, 10th Floor  
New York, NY 10007

Date: January 11, 2021

Fax Number: 646-500-6149

From: Police Benevolent Association of the City of New York, Inc.  
Detectives' Endowment Association  
Sergeants Benevolent Association  
Lieutenants Benevolent Association  
Captains Endowment Association

Re: *Civilian Complaint Review Board's Proposed Rule Changes*

Pages: 16 (including cover sheet)

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January 11, 2021

**VIA FACSIMILE & ELECTRONIC MAIL**

Heather Cook, Esq.  
 Assistant General Counsel  
 Civilian Complaint Review Board  
 100 Church Street, 10th Floor  
 New York, NY 10007

**Re: Civilian Complaint Review Board's Proposed Rule Changes**

Dear Ms. Cook:

The Police Benevolent Association of the City of New York, Inc., Detectives' Endowment Association, Sergeants Benevolent Association, Lieutenants Benevolent Association, and Captains Endowment Association (collectively, the "Unions") submit this letter on behalf of their more than 35,000 members, who do the difficult and dangerous work of protecting every resident, visitor, and business operating within New York City. We present our concerns and objections with respect to certain of the Civilian Complaint Review Board's ("CCRB" or the "Board") proposed changes to its Rules published in December 2020.

**The Board's Flawed Process**

At the outset, we note our concern that the Board devised these proposed changes without any discussion of the proposals during the Board's public meetings. Neither the Unions nor the public has had an opportunity to observe or review, let alone participate in, the Board's deliberations leading to the proposed changes. The Board's process with respect to these proposed Rule changes is in stark contrast to the changes CCRB proposed in 2016 and ultimately adopted in 2017 (the "2017 Rule Changes"), where the proposed changes were discussed at numerous public meetings before CCRB published the proposals. It is unclear why the Board changed its process by deliberating over the current proposed Rule changes behind closed doors, and thereby concealed the Board's deliberations from the public.

The Board's secrecy over its process and reasoning in devising these proposed Rule changes is a violation of Public Officers Law §103(a) (the "Open Meetings Law"),<sup>1</sup> and

<sup>1</sup> See N.Y. Comm. Open Gov. Advisory Opinion 2986 (1999) ("[A] series of communications between individual members or telephone calls among the members which results in a collective decision . . .

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particularly troubling because, as discussed further below, many of the proposed changes are defectively vague and ambiguous, and the Statement of Basis and Purpose fails to explain, and provide a rational basis for, the proposed changes as required by the New York City Administrative Procedure Act (“CAPA”) §1043 and New York Civil Practice Law and Rules (“CPLR”) Article 78.<sup>2</sup>

We request that the Board make public the record of its deliberations over these proposed Rule changes, and that the date to respond to these proposals be extended until a reasonable time after those deliberations are made public. In addition, these comments and all other comments the Board receives should be made public as required, together with the Board’s further deliberations of the proposed Rules.

### Specific Comments

In addition to the general deficiencies with CCRB’s process, the Unions also object to the following specific proposed Rule changes for the reasons set forth below.<sup>3</sup>

#### **I. The Proposed New Definition Of “Abuse of Authority” Exceeds CCRB’s Jurisdiction In Multiple Respects, And The Board Offers No Rational Basis For The Policy Changes And Expansions Of CCRB Powers Reflected Therein**

The Charter limits CCRB’s jurisdiction to complaints by members of the public against members of the police department (“Police Officers”) alleging “misconduct involving excessive use of force, abuse of authority, discourtesy, or use of offensive language” (commonly referred to as “FADO”).<sup>4</sup> Because these FADO categories are statutory terms and predicates for CCRB’s jurisdiction, CCRB is required to strictly adhere to legislative intent, and it is not entitled to discretion or deference in purporting to define or apply these terms.<sup>5</sup>

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would in my opinion be inconsistent with law. . . . [T]he Open Meetings Law is intended to provide the public with the right to observe the performance of public officials in their deliberations.”) (*available at* <https://docs.dos.ny.gov/coog/otext/o2986.htm>).

<sup>2</sup> See *St. Vendor Project v. City of N.Y.*, 10 Misc.3d 978, 985 (Sup. Ct. N.Y. Cty. 2005), *aff’d*, 43 A.D.3d 345 (1st Dep’t 2007) (“The City’s public policy, as set forth in CAPA, requires that city agencies may not adopt a rule without explaining the legal basis upon which the agency is acting and the purpose that the rule is intended to further. This policy serves, on a local level, to inform the public generally, and any reviewing court, that the agency conducted a legal process and had a rational basis for adopting the rule change.”).

<sup>3</sup> The Unions provide these comments based on their understanding of the proposed changes from the scant information CCRB has provided. The discussion of specific Rule changes should not be viewed as the Unions agreeing to the validity of, or acquiescing to, the Rule changes not specifically discussed. The Unions expressly reserve any and all rights to challenge any of the proposed Rule changes in any appropriate forum(s).

<sup>4</sup> Charter §440(c)(1).

<sup>5</sup> See *DaimlerChrysler Corp. v. Spitzer*, 7 N.Y.3d 653, 660 (2006); *Teachers Ins. & Annuity Assoc. of Am. v. City of N.Y.*, 82 N.Y.2d 35, 42 (1993).

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In the proposed Rule changes, however, CCRB for the first time in its history, and without any explanation of its reasoning in the Statement of Basis and Purpose or otherwise, purports to create a definition for the statutory term “abuse of authority” as “misusing police powers.” The proposed definition further states, “[t]his conduct includes, but is not limited to, improper searches, entries, seizures, property damage, refusals to provide identifying information, intentionally untruthful testimony and written statements made against members of the public in the performance of official police functions, and sexual misconduct.” This proposal must be rejected because it exceeds CCRB’s jurisdiction and fails to comply with the rule-making requirements of CAPA and CPLR Article 78 in at least four respects.

#### **A. “Misusing Police Powers” Is Overbroad**

The Board’s new proposed definition – “misusing police powers” – is clearly overbroad, as it would encompass matters that are indisputably outside CCRB’s jurisdiction. In enacting Charter §440, the City Council demonstrated its intent to impose limits on the “abuse of authority” prong of CCRB’s FADO jurisdiction, providing examples of matters that are outside its jurisdiction, including corruption and criminal matters.<sup>6</sup> By way of further example, complaints of racial, gender, or other protected-class profiling have also long been recognized as being outside CCRB’s jurisdiction.<sup>7</sup> And as discussed specifically below, “sexual misconduct” and “intentionally untruthful testimony and written statements” are also outside CCRB’s jurisdiction.

All of these examples, however, would impermissibly fall within CCRB’s overbroad phrase “misusing police powers.” In fact, the proposed definition is so broad that it would effectively eliminate all limitations on CCRB’s jurisdiction, in clear violation of the City Council’s intent to create CCRB as an agency of limited jurisdiction while expressly recognizing that other categories of complaints against Police Officers remain in the jurisdiction of other bodies.

#### **B. CCRB Provides No Reason For The Definition Or Changes Effected Thereby**

As discussed further below, the Board does not identify any need or intended use of this new proposed definition, nor has the Board made clear to the public its view of the meaning of the phrase “misusing police powers.” The Board has not identified any issue that this proposal is intended to address, or the purported basis for this overbroad new definition; indeed, CCRB has operated since its inception without such a definition in the Rules.

The proposed definition does not provide clarity to the public or Police Officers. To the contrary, it is highly misleading and confusing and invites the filing of complaints with the wrong agency and of matters outside CCRB’s jurisdiction. Such a result does not serve the

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<sup>6</sup> See Bill Jacket, 1993 Local Law #1 (“Bill Jacket”), *City Council Report of the Legal Division*, at 2.

<sup>7</sup> See NYPD, *Response to June 2019 Report of Office of Inspector General for NYPD* (Aug. 16, 2019), at 7, 8-9 (available at [https://www1.nyc.gov/assets/doi/oignypd/response/FinalResponse\\_to\\_IG\\_v2\\_81619.pdf](https://www1.nyc.gov/assets/doi/oignypd/response/FinalResponse_to_IG_v2_81619.pdf)).

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public or Police Officers, as it will lead not only to the potential for jurisdictional over-stepping, but also inefficiencies and delays in the processing of complaints. Indeed, CCRB's data shows that even prior to this proposed Rule change, 55% of complaints filed with CCRB in 2019 were outside its jurisdiction.<sup>8</sup> CCRB's proposed overbroad definition of "abuse of authority" will exacerbate this problem.

### **C. CCRB Has No Jurisdiction Over, And Has Stated No Rational Reason For It Now To Handle, Sexual Misconduct Complaints**

Sexual misconduct, whether in the workplace, by law enforcement, or anywhere else, is an abhorrent and serious matter that cannot be tolerated and must be properly addressed when it occurs. However, CCRB's unilateral effort to assume power over this issue through an internal Rule change exceeds the jurisdiction that the City Council granted to CCRB under the Charter, and violates numerous precepts of agency rule-making that are designed to prevent such dramatic changes to agency practices without appropriate research, studies, and analysis and a reasoned basis for the change, all of which are lacking here.

Without any explanation in the Statement of Basis and Purpose, CCRB proposes to include "sexual misconduct" within the proposed new definition of "abuse of authority," defined as "misconduct of a sexual nature alleged by a civilian against a member of the Police Department" which "includes, but is not limited to, the following examples of misconduct: verbal sexual harassment; sexual harassment using physical gestures; sexual humiliation; sexually motivated police actions such as stops, summonses, searches, or arrests; sexual or romantic propositions; and any intentional bodily contact of a sexual nature, including but not limited to, inappropriate touching, sexual assault, rape, and on-duty sexual activity." The proposed Rule changes would also create a new defined term "sexual humiliation," defined as: "incidents in which an officer gratuitously shames or degrades a civilian in relation to their sexual organs or sexual behavior."

For 25 years since its inception, CCRB appropriately recognized that sexual misconduct complaints are outside its FADO jurisdiction, referring these complaints to other agencies, including the Internal Affairs Bureau ("IAB") and/or the District Attorneys' Offices. In 2018, without advance notice and without any opportunity for public comment, CCRB adopted a purported "Resolution" by which CCRB announced that it would begin handling certain types of sexual misconduct complaints. In the Resolution, CCRB admitted that "[m]eeting the needs of sexual trauma survivors requires resources the Agency currently lacks."<sup>9</sup> Nevertheless, CCRB announced that it would immediately begin investigating what it deemed "Phase 1" allegations, which included alleged sexual harassment without physical contact. CCRB further announced that once it determined that it had completed sufficient preparations, it would begin investigating

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<sup>8</sup> CCRB, *2019 Annual Report*, at 12-13 (available at [https://www1.nyc.gov/assets/ccrb/downloads/pdf/policy\\_pdf/annual\\_bi-annual/2019CCRB\\_AnnualReport.pdf](https://www1.nyc.gov/assets/ccrb/downloads/pdf/policy_pdf/annual_bi-annual/2019CCRB_AnnualReport.pdf)).

<sup>9</sup> See CCRB, *Memorandum Accompanying Public Vote* (Feb. 14, 2018), at 4 (available at [https://www1.nyc.gov/assets/ccrb/downloads/pdf/policy\\_pdf/20181402\\_boardmtg\\_sexualmisconduct\\_mo.pdf](https://www1.nyc.gov/assets/ccrb/downloads/pdf/policy_pdf/20181402_boardmtg_sexualmisconduct_mo.pdf)).

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“Phase 2” allegations, which included alleged physical contact, including sexual assault and rape. CCRB stated that before commencing Phase 2, it would need to designate a select group of senior investigators who would “receive specialized training in trauma-informed care and the Agency should seek to appropriate the necessary funding for such training,” and that at least one specialized prosecutor in the Administrative Prosecution Unit with experience prosecuting sex crimes or working with victims of sexual violence would be designated to prosecute these complaints.<sup>10</sup> The Resolution further provided that “[u]ntil CCRB can effectively and responsibly serve sexual assault survivors,” it would continue to refer these complaints to IAB and/or the District Attorneys’ Offices.<sup>11</sup>

In *Lynch v. New York City Civilian Complaint Review Board* (“*Lynch v. CCRB*”), the New York Appellate Division, First Department, struck down the Resolution in its entirety as a “nullity,” holding that that “the resolution announced a sweeping policy change that materially affected the rights of all alleged victims of sexual misconduct and allegedly offending police officers,” but “CCRB undisputedly did not follow the public vetting process required by CAPA for adopting a new rule.”<sup>12</sup> Because the Resolution was stricken on this procedural ground, the Court did not address the other challenges to its validity.

CCRB’s attempt through the proposed Rule changes to expand its power to cover sexual misconduct complaints unquestionably exceeds well-established limits on CCRB’s jurisdiction. This conclusion is readily apparent by an obvious defect with the proposed definition of “sexual misconduct”: it expressly includes criminal sexual misconduct, such as sexual assault and rape. The City Council made clear in establishing CCRB, and the Appellate Division confirmed, that criminal matters are outside CCRB’s jurisdiction.<sup>13</sup> CCRB’s effort to grant itself authority over alleged criminal conduct violates a clear limitation on its jurisdiction.

More broadly, the City Council did not grant CCRB jurisdiction over sexual misconduct complaints, as confirmed by the Charter’s text, legislative history, and CCRB’s 25 years of past practice of referring these complaints to other bodies. The City Council made clear that the Charter “shall not be construed to hinder the investigation or prosecution of [Police Officers] for violations of law” by other appropriate bodies.<sup>14</sup> Yet, the proposed Rule change would impermissibly expand CCRB’s jurisdiction into an area already covered by other bodies, including the IAB and the District Attorneys’ Offices, thereby subjecting Police Officers to parallel investigations and the prospect of inconsistent determinations. Moreover, CCRB conceded in *Lynch v. CCRB* that no other civilian agency in the country investigates sexual misconduct complaints against police officers, which undermines the notion that the Council intended to grant such novel and broad power to CCRB through silence. In fact, when the

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<sup>10</sup> *Id.* at 5.

<sup>11</sup> *Id.*

<sup>12</sup> *Lynch v. CCRB*, 183 A.D.3d 512, 518 (1st Dep’t 2020).

<sup>13</sup> See Bill Jacket, *City Council Report of the Legal Division*, at 2; *Lynch v. CCRB*, 183 A.D.3d at 515 (holding that criminal conduct “is outside of the CCRB’s jurisdiction”).

<sup>14</sup> Charter §440(f).

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Council has addressed sexual misconduct in this City, it has done so expressly. In 1991, just two years prior to the creation of the CCRB, the Council passed a comprehensive set of amendments to the New York City Human Rights Law.<sup>15</sup> That statute specifically deals with sexual harassment, and creates a Commission on Human Rights as the agency charged with enforcement.<sup>16</sup> The Council gave the Commission on Human Rights broad powers to address complaints and study issues of discrimination and harassment in the City, powers it did not grant in CCRB's narrow Charter.<sup>17</sup> Had the Council intended CCRB to handle sexual misconduct complaints, it knew how to grant such authority in the Charter, but did not do so.

CCRB's attempt to empower itself to address sexual misconduct complaints through the inclusion of a definition in the proposed Rule changes is also defective because it contains absolutely no explanation of CCRB's reasoning for proposing this change or how it will be implemented. Notably, in seeking public comment on this new definition, the Board fails to advise the public of the extent to which it is seeking to extend its powers. It does not explain why it believes CCRB has the jurisdiction to address "sexual misconduct" and "sexual humiliation," including criminal levels of such conduct. It does not advise the public of the change this rule implements: of decades-long handling of such complaints by other agencies rather than CCRB, and why it believes this change, now, is necessary and appropriate. It does not advise the public that no other civilian agency in the country investigates such matters or the reason therefor, or why it believes CCRB nonetheless should be the first. And after CCRB admitted in the Resolution struck down by the Appellate Division that it did not have experience to handle such complaints, it does not explain why it believes it is now trained and well-positioned for the task it seeks to assume for itself. The Appellate Division already admonished CCRB for undertaking such a "sweeping policy change" without an appropriate "public vetting process," yet CCRB is repeating that error.

In fact, CCRB's unilateral determination to grab for itself power over sexual misconduct complaints creates serious public policy concerns for both the public and Police Officers. First, CCRB admits that it does not have the training, staffing, or funding to handle these complaints, and thus its assumption of authority over these complaints creates the risk of flaws and mistakes in its investigations and conclusions, delays in resolving these complaints, as well as the risk of trauma that an improperly handled CCRB investigation may impart upon the complainant. Second, given its track record, CCRB clearly is not the proper agency to handle such stigmatizing allegations against Police Officers. Simply the filing of a complaint with CCRB – even unsubstantiated or entirely false complaints – has immediate and permanent effects on Police Officers' reputations and careers. Yet, it is well-established that CCRB has an enormous problem of meritless complaints against Police Officers being filed. CCRB's data shows that well more than 90% of complaints filed with CCRB that CCRB deems to be within its

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<sup>15</sup> N.Y. City Local Law 39 of 1991.

<sup>16</sup> N.Y. City Admin. Code §8-103.

<sup>17</sup> See N.Y. City Admin. Code §§8-104, 8-105.

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jurisdiction are not substantiated year after year.<sup>18</sup> These results are unquestionably due in part to the civilian nature of CCRB and CCRB's failure to impose any consequences for the filing of false complaints.<sup>19</sup> CCRB's attempt to expand its power to sexual misconduct complaints will only exacerbate this problem.

CCRB's significant internal turmoil – including internal sexual misconduct allegations against Board members and senior staff – also underscores the impropriety of shifting sexual misconduct complaints to CCRB. For example, CCRB's female Executive Director in 2016 reportedly resigned and filed a lawsuit accusing CCRB's then-Chair of making inappropriate comments toward women and retaliating against her when she complained.<sup>20</sup> Her female predecessor also sued, claiming that she was terminated for complaining about sexual harassment by another Board member. The City reportedly paid \$275,000 to settle that claim.<sup>21</sup> In 2017, the Board appointed a male Executive Director, who reportedly had complaints against him involving, among other things, inappropriate comments of a sexual nature while he was a CCRB employee, and the Board apparently promoted him with knowledge of these complaints.<sup>22</sup> CCRB's apparent belief that complainants will be more willing to report legitimate complaints to the strife-ridden CCRB and that its civilian members and staff are more qualified than experienced, trained IAB investigators and District Attorneys to handle sexual misconduct complaints is baseless.

In sum, the seriousness of a sexual misconduct complaint only underscores why CCRB, a civilian City agency with a narrowly defined jurisdiction, cannot unilaterally endow itself with authority over this issue. The matter is beyond its jurisdiction, and its assertion of authority violates well-established principles of agency rule-making and creates serious public policy concerns.

#### **D. The Inclusion Of “Intentionally Untruthful Testimony and Written Statements” In The Proposed New Definition Is Overbroad And Improper**

The inclusion of “intentionally untruthful testimony and written statements made against members of the public in the performance of official police functions” in the definition of “abuse

<sup>18</sup> See CCRB, *2018 Annual Report Statistical Appendix*, at 61 (available at [https://www1.nyc.gov/assets/ccrb/downloads/pdf/policy\\_pdf/annual\\_bi-annual/2018\\_annual-appendix.pdf](https://www1.nyc.gov/assets/ccrb/downloads/pdf/policy_pdf/annual_bi-annual/2018_annual-appendix.pdf)). This is the most recent Statistical Appendix CCRB has published.

<sup>19</sup> See Shawn Cohen and Bob Fredericks, *CCRB Considering Perjury Charges For False Police Complaints*, N.Y. Post (Mar. 13, 2015) (quoting CCRB's then-Chair as acknowledging that CCRB “has failed to do its job” with respect to the problem of false complaints) (available at <https://nypost.com/2015/03/13/ccrb-considering-perjury-charges-for-false-police-complaints/>).

<sup>20</sup> Richard Calder and Joe Tacopino, *CCRB Director Quits After Accusing Ex-Chairman of Sexism*, N.Y. Post (Nov. 25, 2016) (available at <https://nypost.com/2016/11/25/ccrb-director-quits-after-accusing-ex-chairman-of-sexism/>).

<sup>21</sup> *Id.*

<sup>22</sup> See Jake Pearson, *NYC Police Watchdog Was Rebuked for Work Jokes*, AP News (May 25, 2017) (available at <https://apnews.com/article/15e7d0b2b49f4e79a53421b5d3bb153c>).

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of authority” is also improper. Although CCRB’s power was narrowly expanded as part of the recent Charter revisions, the proposed Rule goes beyond those revisions in violation of CCRB’s jurisdiction and makes yet another dramatic change to decades of past practice, and without explaining what CCRB is doing or why.

It has long been recognized that alleged false statements were outside CCRB’s jurisdiction. Over the last decade, CCRB has issued annual reports identifying categories it deemed to fall within “abuse of authority.” CCRB has never identified alleged false statements as an “abuse of authority” category (nor as part of any other prong of FADO jurisdiction).<sup>23</sup> In fact, as recently as 2018, CCRB expressly acknowledged that alleged false statements constitute a matter outside its jurisdiction that CCRB refers to the New York City Police Department (“NYPD”).<sup>24</sup>

The Charter was revised as part of the November 2019 ballot to grant CCRB a narrow additional power to investigate only “the truthfulness of any material official statement made by a member of the police department who is the subject of a complaint received by the board, if such statement was made during the course of and in relation to the board’s resolution of such complaint.”<sup>25</sup> CCRB acknowledged the narrow scope of the Charter revision relating to alleged false statements when it was lobbying for the passage of the ballot initiative, stating that the initiative “would provide the CCRB with just **one** new power: the authority to investigate and prosecute when a member of the NYPD has made a false claim before CCRB staff about the incident under investigation during a CCRB investigation.”<sup>26</sup> Thus, CCRB’s authority to investigate alleged false statements is limited and the proposed Rule changes already address this narrow new power in Rule 1-02(a).

The false statements language in the proposed new definition of “abuse of authority,” however, is far broader than what is permitted in the Charter revision. CCRB does not have jurisdiction to investigate alleged false statements except those allegedly made by the subject of a CCRB complaint to CCRB in the course of the Board’s work on that complaint. The proposed definition is overbroad, exceeds CCRB’s jurisdiction, and must be rejected.

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<sup>23</sup> See CCRB, *Annual & Bi-Annual Reports* (available at <https://www1.nyc.gov/site/ccrb/policy/annual-bi-annual-reports.page>). Nor did the Reports include sexual misconduct as within CCRB’s jurisdiction prior to the unlawful Resolution.

<sup>24</sup> CCRB, *2018 Semi-Annual Report* (Jan.-June 2018), at 74 (available at [https://www1.nyc.gov/assets/ccrb/downloads/pdf/policy\\_pdf/annual\\_bi-annual/20181221\\_Semi-Annual%20Report.pdf](https://www1.nyc.gov/assets/ccrb/downloads/pdf/policy_pdf/annual_bi-annual/20181221_Semi-Annual%20Report.pdf)).

<sup>25</sup> Charter §440(c)(1). The changes to the Charter pursuant to the November 2019 ballot initiative are the subject of pending litigation to declare those changes invalid. To the extent the changes to the Charter are declared invalid in whole or in part, CCRB’s corresponding proposed Rule changes must also be stricken. The Unions reserve all of their rights with respect to the pending litigation and the proposed Rule changes made pursuant to the Charter revisions.

<sup>26</sup> CCRB, *What’s True On Question 2?: Myth v. Fact* (emphasis in original) (available at <https://www1.nyc.gov/site/ccrb/about/outreach/charter2019.page>).



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CCRB has also failed to provide any rational basis, and there is none, for this dramatic policy change to suddenly assume broad authority over alleged false statements, including those made outside the context of CCRB investigations. CCRB has never previously taken this position and in fact has acknowledged that such matters must be referred to the NYPD. It is highly troubling that even after the Appellate Division's decision in *Lynch v. CCRB* admonishing that such significant policy changes must be publicly vetted, CCRB is attempting to effectuate this significant power grab in a clandestine manner through the use of a purported definition without any explanation.

For all of the foregoing reasons, the proposed new definition of "abuse of authority" in the Rules must be rejected.

## **II. The Proposed Definition Of "Complaint" And The Proposed Change To Rule 1-23(e) Pertaining To Obtaining Records From The NYPD Improperly Exceed The Limitation On CCRB's Jurisdiction To Act Upon Sworn Complaints From Members Of The Public**

The proposed new defined term "Complaint," and the proposed change to Rule 1-23(e) pertaining to when CCRB may obtain records from the NYPD, both violate CCRB's jurisdiction because they fail to comply with the Charter's limitation on CCRB's power to act upon sworn complaints received from "members of the public."

Charter §440(c)(1) limits CCRB's power to receiving, investigating, hearing, making findings, and recommending action "upon complaints by members of the public" against Police Officers that allege FADO misconduct. Thus, in *Lynch v. CCRB*, the New York Supreme Court held that CCRB cannot take action without a complaint from a member of the public, and the Court struck down CCRB's proposed Rule that would have allowed CCRB to initiate contact with potentially aggrieved parties or gather evidence without such a complaint.<sup>27</sup> Charter §440(c)(1) further requires that a complaint be sworn.

CCRB proposes to include in the Rules a new defined term for "Complaint" as "a report of alleged police misconduct received by the Board." To comply with Charter §440(c)(1) and the case law applying that provision, the proposed definition must be amended to clarify that the "report of alleged police misconduct" must be received by the Board from *a member of the public*. Additionally, the definition should clarify that for a report to constitute a "Complaint" upon which CCRB may act pursuant to Charter §440(c)(1), it must be sworn.<sup>28</sup>

<sup>27</sup> *Lynch v. CCRB*, 2019 WL 978479, at \*13-\*14 (Sup. Ct. N.Y. Cty. Feb. 28, 2019). These holdings were not appealed, and are binding on CCRB.

<sup>28</sup> The Statement of Basis and Purpose for the proposed Rule changes makes no mention of the new defined term "Complaint," but lists "Complainant" among the proposed amended definitions. This appears to be an error, because no change to the definition of "Complainant" is indicated in the body of the proposed Rule changes. CCRB has failed to explain its reasoning for the new defined term "Complaint," which in itself renders it defective.

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CCRB also proposes to revise Rule 1-23(e), which currently states that “[t]he Board may obtain records and other materials from the Police Department which are necessary for the investigation of complaints submitted to the Board,” to instead state that “[t]he Board may obtain records and other materials from the Police Department which are necessary for investigations undertaken by the Board.” By removing the reference to “complaints submitted to the Board,” CCRB appears to be suggesting that the Board may undertake investigations that are not based on complaints. However, as discussed above, CCRB has no jurisdiction to commence an investigation, or request records or other materials from the NYPD, absent a sworn FADO complaint submitted to CCRB by a member of the public. As such, there is no authority for the proposed change to Rule 1-23(e). Moreover, the Board has provided no explanation for this proposed change, as it is not even listed in the Statement of Basis and Purpose.

For the foregoing reasons, the proposed definition of “Complaint” must be clarified to reflect that the report must be received from a member of the public and be sworn, and the proposed change to Rule 1-23(e) must be abandoned in its entirety.

### **III. The Proposed New Case Disposition Categories In Rule 1-33(e) For “Other Misconduct Noted” And “Closed—Pending Litigation” Must Be Amended To Comply With The Limitations On CCRB’s Referral Authority And To Avoid Creating Misleading Case Dispositions**

Proposed Rule 1-33(e)(15) would create “Other Misconduct Noted” as a new case disposition category for CCRB reports to the Police Commissioner. It is defined as: “the Board found evidence during its investigation that an officer committed misconduct not traditionally investigated by the Board, but about which the Police Department should be aware.” This proposal must be amended to comply with CCRB’s limited FADO jurisdiction and the Appellate Division’s ruling in *Lynch v. CCRB*.

With its change to Rule 1-44 as part of the 2017 Rule Changes, CCRB announced that it will note possible non-FADO misconduct of which it becomes aware during the course of an investigation of a FADO complaint in case dispositions for referral to the NYPD. This change to Rule 1-44 was a subject of *Lynch v. CCRB*. The Appellate Division upheld the change to Rule 1-44, but only based on certain limitations on this referral authority. The Court confirmed that in referring possible “other misconduct,” CCRB is not permitted to “mak[e] any findings or recommendations with respect thereto,” because to do so would violate CCRB’s limited FADO jurisdiction.<sup>29</sup> Thus, Rule 1-44 expressly states that “the Board shall not itself prosecute such possible misconduct but shall instead immediately refer such possible misconduct to the Police Department for investigation and possible prosecution by the Police Department.” Moreover, the Court upheld the change to Rule 1-44 only because “the amended rule specifies that potential non-FADO misconduct is to be ‘noted’ as ‘possible misconduct.’”<sup>30</sup>

<sup>29</sup> *Lynch v. CCRB*, 183 A.D.3d at 517.

<sup>30</sup> *Id.*

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The proposed new case disposition category in Rule 1-33(e)(15) is inconsistent with Rule 1-44 and fails to comply with *Lynch v. CCRB* in three respects. First, the current language would provide for a case disposition category of “Other Misconduct Noted” without any indication that this is only a notation of *possible* misconduct. Both the case disposition category and its definition must be amended to state that the notation is only of “possible misconduct.”

Second, the definition also must be amended to make clear that CCRB is not making any findings or recommendations with respect to the possible other misconduct, because the language as currently drafted implies otherwise.

Third, the proposed definition is inconsistent with Rule 1-44, and therefore vague and confusing. While the language of Rule 1-44 that the Court upheld refers to “possible misconduct falling outside [CCRB’s] jurisdiction,” the proposed new definition uses different language – “committed misconduct not traditionally investigated by the Board.” Because Rule 1-44 is the only source of authority for this new case disposition category, the definition should be amended to be consistent with Rule 1-44 as pertaining only to “possible misconduct falling outside [CCRB’s] jurisdiction.”

A failure to make these amendments would not only violate applicable law, but would seriously prejudice Police Officers by tainting their case dispositions with misleading information. The notation of “other misconduct” refers only to *possible* misconduct that has not been investigated or vetted by any appropriate agency, and this should be made clear in this case disposition category in the Rules. Accordingly, to address each of these issues, we propose that Rule 1-33(e)(15) be amended to read as follows: “Other Possible Misconduct Noted: during the course of its investigation of a FADO complaint, the Board became aware of possible misconduct falling outside its jurisdiction, as to which it has not made any findings or recommendations, but which it referred to the Police Department.”

The new proposed case disposition category in Rule 1-33(e)(11) labeled “Closed—Pending Litigation” is also misleading to the prejudice of Police Officers. The label of this category gives the impression that litigation has been commenced against the subject Police Officer. However, the proposed definition of this new category – “the Complainant or Victim chose not to cooperate with the investigation on the advice of counsel” – indicates that this category is not limited to circumstances where there is litigation pending against the Police Officer, but rather covers a broader category of cases where, for whatever reason, the complainant’s or alleged victim’s counsel advised them not to cooperate in the CCRB investigation. Indeed, a complainant’s or victim’s counsel could provide this advice where the *complainant or alleged victim* is a defendant in a criminal proceeding. To make the label of this proposed new category consistent with its meaning and thereby avoid creating a misleading record in the Police Officer’s case disposition, the label in Rule 1-33(e)(11) should be amended to be “Closed—On Advice of Complainant/Victim Counsel.”

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**IV. The Proposed Changes To Rule 1-36(d) Unnecessarily Impair The Fundamental Right Of Police Officers To Have The Reconsideration Of Closed Cases Conducted By The Previously Deciding Panel**

The proposed changes to Rules 1-36(d)(1) and (2) unfairly and unnecessarily prejudice Police Officers by diminishing their long-standing and fundamental right to have the reconsideration of a closed case conducted by the previously deciding panel.

Rules 1-36(d)(1) and (2) currently reflect Police Officers' right to have a reconsideration of a closed case conducted by the previously deciding panel. They provide that a different Board member may be added to the panel only in the limited circumstance where a member of the previous panel is no longer a member of the Board. The proposed changes to subparts (1) and (2) dramatically expand the circumstances by which a new panel may be convened to reconsider a closed case by adding language stating that the previously deciding panel members will be reconvened only if they are "available to meet," and that the Chair may designate a replacement if any member from the prior panel is "unavailable to meet."

These proposed changes violate the well-established principle of New York law in the courts – which applies equally to CCRB proceedings where significant Police Officer rights are involved – that "a Justice should not modify or overrule an order of a fellow Justice."<sup>31</sup> In other words, where a panel makes a decision to close a case and those panel members remain members of the Board, another panel cannot modify or overrule the previously deciding panel's decision.

Neither the Rules nor the Statement of Basis and Purpose provides any reason for this change. Nor do they provide a definition or explanation of what "available to meet" means, creating a vague and ambiguous standard without any objective parameters to limit its application or prevent uneven enforcement against Police Officers. If a member from the previously deciding panel is "unavailable," reconsideration of the closed case can wait until that member becomes "available."

**V. The Proposed Change to Rule 1-51(b) To Reduce The Number Of Board Meetings Will Needlessly Create Further Delays In The CCRB Process, To The Prejudice Of Police Officers**

The current Rules require the Board to meet at least monthly (*i.e.*, 12 times per year), but the proposed change to Rule 1-51(b) would reduce the minimum number of Board meetings each year to 10 by providing that the Board is not required to meet in the months of August and December. Reducing the number of times the Board meets each year will only contribute to the already inordinate delays in CCRB's handling of complaints, with concomitant prejudice to Police Officers whose careers may be effectively put on hold while a complaint is pending. Moreover, there is no reason for this proposed change, and the Board has not even attempted to provide a rational basis for it.

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<sup>31</sup> *Bansi v. Flushing Hosp. Med. Ctr.*, 15 Misc.3d 215, 219 (Sup. Ct. Queens Cty. 2007); *see also Prudential Lines, Inc. v. Firemen's Ins. Co. of Newark, N.J.*, 109 Misc.2d 281, 283 (Sup. Ct. N.Y. Cty. 1981).

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While August and December are popular vacation times, vacations can be accommodated without the need for the Board to take these *entire* two months off. Alternatively, the proposal should be amended to continue the long-standing requirement of conducting at least 12 meetings per year, which can be accomplished during the other 10 months.

#### **VI. The Proposed Changes To Rule 1-52(b) To Permit The Board To Conduct Meetings In Secret And Arbitrarily Limit When Board Members May Abstain From Voting Violate The Law And Public Policy**

The proposed changes to Rule 1-52(b) – which would delete the current requirement that Board members be present in person or by videoconference to register their votes, and replace it with an entirely different Rule purporting to limit when a Board member may abstain from voting – violate state statutes and the Charter and are contrary to public policy.

First, the proposal would delete the current language in Rule 1-52(b) requiring that “Board members must be present at a meeting of the Board or a panel in person or, subject to such limitations as the Board may by resolution from time to time determine, by videoconference in order to register their votes.” CCRB previously proposed deleting Rule 1-52(b) in the 2017 Rule Changes, but, after receiving objections to this proposal, did not make this change. CCRB has provided no explanation for why, after previously abandoning this change, it is proposing it again.

If the current language of Rule 1-52(b) is deleted, there would be no Rule requiring Board members to attend monthly Board meetings at all. These meetings are the only opportunities for members of the public to monitor and provide input on the Board’s activities. The Board’s trend toward increasing secrecy, such as with its deliberations over the proposed Rule changes at issue and with this proposed Rule change that would allow Board members to cast their votes behind closed doors, is not only seriously troubling from an accountability standpoint, but violates state law. The Open Meetings Law requires that the Board’s meetings be open to the public (including, when videoconferencing is used, that the public have an opportunity to attend the videoconference session). The deletion of Rule 1-52(b) violates this statute by purporting to authorize the Board to hold meetings closed to the public, and/or without all members present.

Additionally, General Construction Law §41, which is applicable to both Board and panel meetings (*i.e.*, whenever “three or more persons are charged with any public duty”), requires that voting take place “in the presence of each other or through the use of videoconferencing.” This statute does not permit the Board or a panel to vote by any other means.<sup>32</sup> The current language of Rule 1-52(b) reflects the requirements of the Open Meetings Law and the General Construction Law, and must not be removed from the Rules.

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<sup>32</sup> See *Town of Eastchester v. N.Y. State Bd. of Real Prop. Servs.*, 23 A.D.3d 484, 485 (2d Dep’t 2005) (“Because General Construction Law §41 contains no provision authorizing participation by telephone conference call, only the votes cast by the members actually present at the meeting can be counted towards a majority vote.”)

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Second, CCRB proposes, also without explanation, to replace Rule 1-52(b) with language providing that “[a] Board member may not abstain from voting unless the member is subject to subdivision (a) of this section” – *i.e.*, the Board member “has a personal, business or other relationship or association with a party to or a witness in a Case before a panel to which such member has been assigned.” There is no reason to impose this narrow limitation on when a Board member may abstain from voting, and this proposal violates the Charter.

The Charter requires that CCRB’s activities be “impartial” and “conducted fairly and independently, and in a manner in which the public and the police department have confidence.”<sup>33</sup> Board members also have fiduciary obligations in this regard. If there is any reason that a Board member believes he or she cannot be fair and impartial, or that would even give the appearance that a Board member cannot be fair and impartial, he or she should be permitted, and is required, to abstain, regardless of whether he or she falls within the limitations of subdivision (a). For example, a Board member may not have a personal, business, or other relationship or association with a party to or a witness in a case, but he or she may have an interest in property such as a vehicle or business involved in a case, which would render the member unable to be impartial and/or create the appearance of partiality. Any issue of abstention should be evaluated on a case by case basis, not subject to arbitrary and overly-narrow limitations.

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<sup>33</sup> Charter §440(a).

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We urge the Board to amend the proposed Rules in a manner consistent with the concerns outlined above. If you would like to discuss any of our comments, please let us know. If you disagree with any of our comments, we request that the Board provide an explanation of the reasons for its disagreement.

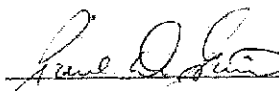
Very truly yours,

Police Benevolent Association of the City of New York, Inc.



By: Patrick J. Lynch, President

Detectives' Endowment Association



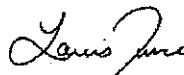
By: Paul DiGiacomo, President

Sergeants Benevolent Association



By: Ed Mullins, President

Lieutenants Benevolent Association



By: Louis Turco, President

Captains Endowment Association



By: Chris Monahan, President