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IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAI'I

STATE OF HAWAII ORGANIZATION OF POLICE OFFICERS (SHOPO),

Plaintiff,

v.

CITY AND COUNTY OF HONOLULU,

Defendant.

CIVIL NO. 1CCV-20-1512 DEO
(Declaratory Judgment)

MOTION FOR LEAVE TO FILE BRIEF OF *AMICI CURIAE*; MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR LEAVE TO FILE *AMICI CURIAE* MEMORANDUM; *AMICI CURIAE* MEMORANDUM; NOTICE OF MOTION; AND CERTIFICATE OF SERVICE

NON-HEARING MOTION
JUDGE: Hon. Dean E. Ochiai
TRIAL: NONE

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MOTION FOR LEAVE TO FILE BRIEF OF *AMICI CURIAE*

Pursuant to Rule 7.2 of the Rules of the Circuit Courts of the State of Hawai‘i, and this Court's inherent authority, and based on the pleadings filed in this action, Civil Beat Law Center for the Public Interest ("Civil Beat Law Center"), Lawyers' Committee for Civil Rights Under Law ("LCCR"), and the American Civil Liberties Union of Hawai‘i Foundation ("ACLU of Hawai‘i"), respectfully seek leave to file the accompanying *amici curiae* memorandum concerning the public's overwhelming interest in Act 47's provision requiring disclosure of the names of officers who have been suspended or discharged, but whose grievance processes are not yet final.

As a Hawai‘i nonprofit organization that seeks government transparency and accountability, Civil Beat Law Center advocated at the Legislature for years on the issue of public access to police disciplinary records. The community interests served by its mission will be directly impacted by any order entered by this Court. As legal advocacy organizations committed to eradicating the pernicious influence of systemic racism in law enforcement and the criminal justice system, the communities that the Lawyers' Committee for Civil Rights and ACLU of Hawai‘i serve will be affected by the outcome of the proceedings in this action. Accordingly, Movants respectfully request to be heard.

Movants consulted the parties with respect to Movant's intent to seek leave to file an *amici curiae* memorandum to assist the Court in evaluating the issues in this case. The City advised that it intends to take no position on the Motion; SHOPO has not advised Movants of its position.

DATED: Honolulu, Hawaii, January 7, 2021

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IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAI‘I

STATE OF HAWAII ORGANIZATION OF POLICE OFFICERS (SHOPO), Plaintiff, v. CITY AND COUNTY OF HONOLULU, Defendant.	CIVIL NO. 1CCV-20-1512 DEO (Declaratory Judgment) MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR LEAVE TO FILE *AMICI CURIAE* MEMORANDUM

MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR LEAVE TO FILE *AMICI CURIAE* MEMORANDUM

Civil Beat Law Center for the Public Interest ("Civil Beat Law Center"), the Lawyers' Committee for Civil Rights Under Law ("LCCR"), and the American Civil Liberties Union of Hawai‘i Foundation ("ACLU of Hawai‘i"), move for leave as *amici curiae* to file the attached brief in opposition to SHOPO's Motion for a Preliminary Injunction.[1]

In support of the motion for leave, *amici* state that they have specialized, demonstrated experience with and interest in the issues before the Court, namely, the promotion of transparency in the operations of police departments and the enforcement of laws and regulations designed to ensure public access to information about the actions of police officers, particularly when officers engage in violence against civilians or other misconduct that disproportionately impacts communities of color.

Civil Beat Law Center is a Hawai‘i nonprofit organization dedicated to solutions that promote transparency and responsiveness in government to better serve the people of Hawai‘i. The Law Center's transparency mission focuses primarily on protecting the public's right of

[1] As of the date of filing, despite the Court's suggestion, SHOPO has not filed an amended or revised Motion for Preliminary Injunction prior to the deadline required by Rule of the Circuit Courts of the State of Hawaii 7(a). This memorandum addresses SHOPO's filed Motion. If SHOPO files an untimely revised Motion, and if the Court is inclined to accept that Motion, *amici* request the opportunity to amend this memorandum or otherwise respond to SHOPO's arguments.

"timely" access to government records, because "[o]pening up the government processes to public scrutiny and participation is the only viable and reasonable method of protecting the public's interest." HRS § 92F-2. Affirmative disclosure requirements in reports to the Legislature deserve special consideration because the reports actively assist the community in understanding government operations without the need to rely on procedures in the public records law.

LCCR has been a leader in the battle for equal rights since it was created in 1963 at the request of President Kennedy to enlist the private legal bar's leadership and resources in combating racial discrimination. LCCR is a nonpartisan, nonprofit organization that works to secure equal justice under the rule of law, and to protect and defend the civil rights of people of color in the areas of voting rights, economic justice, education, criminal justice, fair housing, and fighting hate. LCCR's Criminal Justice Project works to combat race discrimination and protect equal justice under the law by confronting the ways in which racism infects every stage of the criminal justice system, by challenging laws and policies that criminalize poverty, by promoting access to justice and representation, and by advancing accountability and structural reform of police departments. LCCR brings its national experience to bear on the issues before this Court.

ACLU of Hawai'i is the local affiliate of the American Civil Liberties Union, a nationwide, nonprofit membership organization with over four million members that, from its founding in 1920, has been devoted to protecting and expanding the civil liberties and civil rights of all Americans, including their right to be free from law enforcement excessive violence and misconduct. ACLU of Hawai'i is actively involved in criminal justice reform and has filed numerous *amicus* briefs in state and federal courts in Hawai'i.[2]

Amici submit that their familiarity with, information about, and analysis of the issues here will assist the Court in consideration of the issues presented by the Complaint and Plaintiff's Motion for Preliminary Injunction.

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[2] *See, e.g.*, Brief of *Amicus Curiae* ACLU of Hawai'i, African American Lawyers Association of Hawai'i, and Hawaii Disability Rights Center as *Amici Curiae* in Support of Plaintiffs-Appellants' Opening Brief, *Silva v. City & Cty. of Honolulu*, No. 20-15381 (9th Cir. July 17, 2020); Brief of *Amicus Curiae* ACLU of Hawai'i, *Park v. City & Cty. Of Honolulu*, No. 18-16692 (9th Cir. May 4, 2020); *see also, e.g.*, *State v. Lee*, 129 Haw. 449, 302 P.3d 717 (Ct. App. 2013); *State v. Augafa*, 92 Haw. 454, 992 P.2d 723 (Ct. App. 1999); *State v. Lee*, 75 Haw. 80, 856 P.2d 1246 (Haw. 1993); *Barta v. City & Cty. of Honolulu*, 169 F.R.D. 132 (D. Haw. 1996).

Accordingly, *amici* here respectfully request leave to file the attached brief in opposition to SHOPO's Motion for Preliminary Injunction.

DATED: Honolulu, Hawaii, January 7, 2021

/s/ Jongwook "Wookie" Kim

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***AMICI CURIAE* MEMORANDUM**

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I. INTRODUCTION

For decades, Hawaii's public records law shielded law enforcement from accountability by letting police departments withhold from the Legislature and the public the details of police misconduct. Act 47, which lifted this cloud of secrecy, emerged from a years-long conversation within the Hawai'i Legislature about restoring public trust in law enforcement. SHOPO now seeks, by injunction, a shadow repeal of Act 47 that would reverse the will of the Legislature and, by extension, the will of the people. This Court has already rejected SHOPO's request that it enjoin Act 47's repeal of police officers' prior special exemption under the Uniform Information Practices Act, which hindered public access to the disciplinary records of suspended officers who had completed the grievance process.[1] SHOPO now seeks to enjoin Act 47's additional requirement that the names of suspended and discharged officers be disclosed to the Legislature upon suspension or discharge in each department's annual report, rather than after the completion of any grievance process. This request, too, should be denied.

Amici curiae submit this brief to make a limited but critically important point: that the public interest is overwhelmingly served by Act 47's provision requiring police departments to disclose to the Legislature the names of officers who have been suspended or discharged but whose grievance processes are not yet final. Like so many other states, Hawai'i has decided it is time to increase transparency as a critical step in rebuilding the relationship between law enforcement and the people, particularly the communities of color within the state. Rebuilding this public trust is squarely within the public interest. *See Peer News LLC v. City & Cty. of Honolulu*, 138 Haw. 53, 73-74, 376 P.3d 1, 21-22 (2016) (emphasizing the "significant public interest in knowing how the police department supervises its employees and responds to allegations of misconduct" (internal quotation omitted)). SHOPO's requested injunction, by contrast, is squarely outside it.

The pernicious influence of systemic racism infects the criminal justice system, manifesting in, among other things, police abuse and violence against communities of color. Prior to Act 47's reforms, these communities, the Legislature, and the public were denied access to information about suspended or discharged officers who had yet to complete their potentially years-long grievance processes, thereby crippling any meaningful external accountability or

[1] *See* Interim Order Denying in Part Pl.'s Mot. for Prelim. Inj. Filed on Nov. 23, 2020, Dkt. 65.

oversight measures to reduce the risk of future abuses. Act 47, by mandating affirmative disclosure of police misconduct, will inform citizens and legislators about patterns of misconduct and flaws in police accountability systems, give victims of police abuse some assurance of accountability for the harms they suffered, deter future misconduct, and enable further reform.

Numerous states have passed statutes like Act 47, and the parade of horribles proffered by SHOPO has not come to pass in those states. Officers have not been publicly humiliated for trivial infractions like having dirty shoes, and there is no evidence that transparency laws have resulted in heightened safety risks to officers and their families.[2] Moreover, similar reforms have withstood judicial scrutiny, including in the face of requests for preliminary injunctive relief. Indeed, not one of the efforts to preliminarily enjoin recently enacted law enforcement transparency measures has succeeded. *Amici* urge this Court to similarly reject the injunction requested by SHOPO here. Act 47—specifically its requirement that police departments disclose names of disciplined officers upon suspension or discharge—is a modest, considered effort by the Legislature to bring trust, accountability, and further improvements to policing in Hawai‘i. The people of Hawai‘i have often waited years to learn the names of officers who have engaged in reprehensible misconduct, yet SHOPO is again attempting to delay disclosure, this time by seeking to hide the identities of officers whose grievance processes are not yet final. The people have spoken, and they should be heard—now.

II. ARGUMENT

A. Act 47 Addresses the Lack of Transparency and Accountability in Policing, Which Perpetuates Discrimination, Violence, and Mistrust in Law Enforcement, Especially for Communities of Color.

1. Communities of Color in Hawai‘i and Across the Country Suffer Disproportionately from Violence at the Hands of Law Enforcement.

Police violence is a tragic and far too common feature of American life, and communities of color suffer disproportionately from that violence. Last year, more than a third of the Honolulu Police Department's ("HPD") use-of-force incidents involved Native Hawaiians,

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[2] *See Promote Police Transparency with the Repeal of CRL 50-a*, N. Y. City Bar (June 9, 2020), https://www.nycbar.org/member-and-career-services/committees/reports-listing/reports/detail/promote-police-transparency-repeal-crl-50-a (noting that as of 2018, in states that have promoted transparency in police disciplinary actions, "[t]here is no evidence that transparency endangers officers in those states or inhibits the administration of justice").

Micronesians, Samoans, or people of other Pacific Islander ethnicities,[3] though these groups make up only 10.1% of Hawaii's population.[4] And while the Black community accounts for just 2% of Hawaii's population,[5] 7.4% of HPD's use-of-force incidents were against Black people.[6]

For young men across the country, police violence is a leading cause of death, and that violence is not color-blind.[7] Nationwide, about one in every 1,000 Black men can expect to be killed by police—a rate 2.5 times higher than for white men.[8] Black people killed by police are more than twice as likely to be unarmed as white people.[9] Police also use force on Black people nearly four times more often than on white people.[10] Across the country, police enforce laws disproportionately against communities of color. In San Francisco, for example, Black people represented 26% of all police stops in the second half of 2018, even though they represented just 5% of the city's population.[11] In California, police are more likely to search Black, Latinx, and Native American people, and they are *less* likely to find drugs or weapons compared to when they search white people.[12] In Washington, D.C., although there is little difference in the rates of

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3 *2019 Use of Force Annual Report*, Honolulu Police Department, at 6, https://www.slideshare.net/civilbeat/2019-use-of-force-annual-report-hpd (last visited Jan. 3, 2021); Anita Hofschneider, *Report: Honolulu Police Use Of Force Increased Last Year*, Honolulu Civil Beat (Nov. 11, 2020), https://www.civilbeat.org/2020/11/report-honolulu-police-use-of-force-increased-last-year/.

4 *See Quickfacts: Hawaii*, United States Census Bureau, https://www.census.gov/quickfacts/HI (last visited Jan. 5, 2021) (estimating Hawaii's population in 2019 as 10.1% Native Hawaiian and Other Pacific Islander)

5 *See id.* (estimating Hawaii's population in 2019 as 2.2% Black).

6 *2019 Use of Force Annual Report*, *supra* note 3, at 6.

7 *See* Frank Edwards, Hedwig Lee & Michael Esposito, *Risk of Being Killed by Police Use of Force in the United States by Age, Race-Ethnicity, and Sex*, 116 Proc. of the Nat'l Acad. of Sci. 16793, 16793-94 (Aug. 2019), https://www.pnas.org/content/pnas/116/34/16793.full.pdf.

8 *Id.* For additional statistics regarding the racial disparity in policing, *see* Brief of *Amici Curiae* NAACP Legal Defense and Educational Fund, Inc., Lawyers' Committee for Civil Rights Under Law, LatinoJustice PRLDEF, and Law for Black Lives 5-7, *Uniformed Fire Officers Ass'n v. De Blasio*, No. 20-2789 (2d Cir. Sept. 24, 2020), ECF No. 60-2.

9 Justin Nix, Bradley A. Campbell, Edward H. Byers & Geoffrey P. Alpert, *A Bird's Eye View of Civilians Killed by Police in 2015*, 16 Criminology & Pub. Pol'y 309, 309 (2017).

10 Center for Policing Equity, *The Science of Justice: Race, Arrests, and Police Use of Force*, at 15 (July 2016), https://policingequity.org/images/pdfs-doc/CPE_SoJ_Race-Arrests-UoF_2016-07-08-1130.pdf.

11 Darwin Bond Graham, *Black people in California are stopped far more often by police, major study proves*, The Guardian (Jan. 3, 2020), https://www.theguardian.com/us-news/2020/jan/02/california-police-black-stops-force.

12 *Id.*

drug use between white and Black people, almost 90% of arrests for drug possession are of Black people.[13]

Hawai‘i is no stranger to these disparities. As Chief Justice Recktenwald of the Hawai‘i Supreme Court commented last year, "[a]lthough separated geographically from the events that have unfolded in other states, Hawai‘i is not immune to the types of implicit and explicit bias and prejudice that are found elsewhere."[14] It manifests in, among other things, "disproportionately high rates of Pacific Islander arrest and detention and police assaults on unarmed or minimally armed Samoan adults."[15] And Black people in Hawai‘i are incarcerated at extraordinarily disproportionate rates: 1,032 of every 100,000 Black people in Hawai‘i are incarcerated, while just 412 of every 100,000 white people are.[16]

But on the occasions that instances of discrimination, excessive force, or other misconduct have been investigated in Hawai‘i, the identities of officers suspended or discharged

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13 Washington Lawyers' Committee for Civil Rights and Urban Affairs, *Racial Disparities in Arrests in the District of Columbia, 2009-2011*, at 2-3 (July 2013), https://www.washlaw.org/pdf/wlc_report_racial_disparities.pdf.

14 Statement by Chief Justice Mark E. Recktenwald, Hawai‘i State Judiciary (June 15, 2020), https://www.courts.state.hi.us/news_and_reports/2020/06/statement-by-chief-justice-mark-e-recktenwald.

15 *See e.g.*, Office of Hawaiian Affairs, The Disparate Treatment of Native Hawaiians in the Criminal Justice System, at 26-30, 53-58 (2010), https://19of32x2yl33s8o4xza0gf14-wpengine.netdna-ssl.com/wp-content/uploads/2014/12/ir_final_web_rev.pdf; Hofschneider, *supra* note 3. While many prefer to idealize Hawai‘i as a multi-cultural melting pot, in reality, the state has a unique and complex relationship with race. "During their centuries of isolation before western contact, the Native Hawaiians established their own highly structured and successful civilization," full of people "who were deeply spiritual, intellectual, diligent, highly skilled, pragmatic, [and] loyal to their social system." *Doe v. Kamehameha Sch./Bernice Pauahi Bishop Estate*, 295 F. Supp. 2d 1141, 1148 (D. Haw. 2003), *aff'd in part, rev'd in part*, 416 F.3d 1025 (9th Cir. 2005). But after the overthrow of the sovereign Hawaiian nation, and the United States took control of the Hawaiian Islands, "laws suppress[ed] Hawaiian culture and language, and displace[d them] from the land, and the Native Hawaiian people suffered mortality, disease, economic deprivation, social distress, and population decline." *Id.* Today, they "continue to suffer from economic deprivation, low educational attainment, poor health status, substandard housing, and social dislocation." *Id.* Additionally, Native Hawaiians, Pacific Islanders, Blacks, and other communities of color continue to be stereotyped as violent, hypermasculine, and warrior-like. *See* Katherine Irwin & Karen Umemoto, *Being Fearless and Fearsome: Colonial Legacies, Racial Constructions, and Male Adolescent Violence*, Race and Justice (2012).

16 *Hawaii profile*, Prison Policy Initiative, https://www.prisonpolicy.org/profiles/HI.html (last visited Jan. 3, 2021).

were hidden from the Legislature (and therefore the public) under Hawaii's previous regime. It is this wall of secrecy that Act 47 was intended to overcome.

2. Act 47 Remedies Serious Deficiencies in Disclosure of Police Misconduct.

Act 47's changes to police departments' legislature reporting requirements do not permit delays for officers to complete their grievance processes, instead requiring that departments provide the names of suspended or discharged officers in the year in which they were suspended or discharged.[17] This increased, immediate transparency makes it easier for the Legislature and the public to hold law enforcement accountable.

The last ten years provide a chilling lesson in why disclosure at the time of suspension or discharge is so critical. Take Officer Michael Tarmoun, whom HPD terminated in 2011, after he forced a Waikiki sex worker to have sex with him in exchange for not arresting her.[18] The Legislature and the public did not learn of Tarmoun's discipline until *more than three years* after the incident occurred, and even then, there was no way to determine whether and where Tarmoun's incident was reflected in the annual reports to the Legislature, because the prior statutory regime did not require disclosure of his name. While the 2012 annual report did confirm the discharge of an officer who "[w]as convicted of a felony sex assault," it did not indicate whether the incident related to Tarmoun or to one of the numerous other reported incidents involving sexual misconduct.[19] And it is impossible to tell from the reports whether HPD suspended Tarmoun for the incident in the years leading up to his eventual discharge.

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[17] SHOPO's Mot. for Prelim. Inj. 7, Dkt. 28 ("Act 47 amended HRS § 52D-3.5 to require the disclosure of a police officer's name 'upon' suspension or discharge and before the officer's due process rights provided by the grievance process have been exercised and exhausted."); 2020 Haw. Sess. Laws Act 47, § 2 at 2-3 (amending § 52D-3.5 as follows: "Disclose the identity of the police officer *upon the police officer's suspension or discharge*.") (emphasis added)).

[18] Nelson Daranciang, *Ex-police officer found guilty of sex assault is a fugitive in Morocco*, Star-Advertiser (Feb. 8, 2012), https://www.staradvertiser.com/2012/02/08/breaking-news/ex-police-officer-found-guilty-of-sex-assault-is-a-fugitive-in-morocco-2/; Nick Grube, *In the Case of This Fired Honolulu Cop, The Public Is Still In the Dark*, Honolulu Civil Beat (Apr. 9, 2013), https://www.civilbeat.org/2013/04/18784-in-the-case-of-this-fired-honolulu-cop-the-public-is-still-in-the-dark/.

[19] *See* Honolulu Police Department, *Legislative Disciplinary Report* (2012) (describing two other incidents involving sexual misconduct); Honolulu Police Department, *Legislative Disciplinary Report* (2015) (No. 15-032 "Committed criminal acts of a sexual nature against the victim. Criminal Conduct Initiated: Kidnapping[,] Sexual Assault in the First Degree[,] Sexual Assault in the Second Degree[,] Sexual Assault in the Fourth Degree."); Honolulu Police

In other cases, the annual summaries HPD gave legislators were egregiously misleading. Consider Michael Easley, an officer discharged for, as the 2012 legislative report put it, "[c]onduct[ing] personal business while on duty."[20] As would become clear only years later, the "personal business" for which Easley was fired was driving a domestic-violence complainant to an unknown location and raping her on the hood of his police car.[21] Even more worrisome, the reports show *at least 11 other instances* of misconduct vaguely described as "personal business," all by as-yet unidentified officers.[22]

These grievance delays in public disclosure to the Legislature critically undermine sorely needed oversight and reform efforts. As the City Auditor found, the "grievance process can take a long time to resolve, *even when the complaint investigation and review has produced evidence of proven misconduct*."[23] By requiring police departments to release the names of officers upon suspension or discharge, Act 47 enables the Legislature and the public to scrutinize summaries provided by departments, track the misconduct histories of individual officers, and match up these legislature reports with news reports—and Act 47 enables this oversight in real time, not years after an officer had engaged in egregious misconduct.

Often, officers involved in incidents of misconduct are repeat offenders. In fact, between 2014 and 2016, nearly a quarter (10 out of 43) of the incidents that resulted in final disciplinary actions involved the same three officers.[24] But the withholding of names from reports has

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Department, *Legislative Disciplinary Report* (2014) (at least 5 incidents involving sexual misconduct); Honolulu Police Department, *Legislative Disciplinary Report* (2003) ("Sexually assaulted a person while conducting an investigation").

[20] Honolulu Police Department, *Legislative Disciplinary Report* (2012).

[21] Nick Grube, *HPD Keeps Mum About Fired Cop Now Charged With Sex Assault*, Honolulu Civil Beat (Jan. 27, 2016), https://www.civilbeat.org/2016/01/hpd-keeps-mum-about-fired-cop-now-charged-with-sex-assault [*hereinafter* Grube, *HPD Keeps Mum About Fired Cop*].

[22] *Civil Beat Data—Honolulu Police Misconduct: Disciplinary Actions, 2000-2019*, Honolulu Civil Beat, http://cops.civilbeat.org/records/?disc_s=%22personal%20business%22 (last visited Jan. 3, 2021).

[23] Office of the City Auditor, *Audit of the Honolulu Police Department's Policies, Procedures, and Controls, Resolution 19-255* at 39 (Dec. 2020) (emphasis added), http://www.honolulu.gov/rep/site/oca/oca_docs/Audit_of_HPDs_Policies_Procedures_and_Controls_Final_Report.pdf.

[24] *See* Honolulu Police Department, *Legislative Disciplinary Report* (2014-2016); Nick Grube, *How the Hawaii Police Union Is Helping Keep Bad Cops On the Job*, Honolulu Civil Beat (Apr. 3, 2017), https://www.civilbeat.org/2017/04/how-the-hawaii-police-union-is-helping-

prevented the Legislature and the public from understanding the full scope of the problem. For many years, annual reports did not reveal whether entries were linked—either to other entries (e.g., an incident involving multiple officers) or to the same officers (e.g., multiple incidents of misconduct by the same officer). A 2014 amendment to § 52D-35 made it possible to connect incidents by the same officer included in the same report,[25] but the public still could not connect incidents by the same officer where those incidents occurred in different years. Without these facts, the Legislature and public cannot understand the full picture or know when repeat offenders continue to evade appropriate punishment—or worse, when repeat offenders remain on the job or rotate to a different police department in the state.[26]

By requiring the disclosure of names upon suspension or discharge without waiting until officers complete the grievance process, Act 47 will help identify officers who are associated with multiple instances of misconduct. This in turn helps the Legislature monitor whether departments are taking appropriate steps to address repeat offenders in their ranks. It will also eliminate the potentially years-long delay in disclosure caused by lengthy grievance processes.

3. Act 47 Shines a Critical Light on Disciplinary Proceedings That Are Otherwise Shrouded in Secrecy.

Internal investigations, a critical component of police accountability, are often conducted and overseen by fellow officers, and the results are rarely disclosed to the public.[27] Transparency about these processes is critical to building public confidence in them; a lack of

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keep-bad-cops-on-the-job/. Although the public was unable to link incidents to specific officer names prior to Act 47, departments have been required to track multiple incidents involving the same officer (without naming him or her) in a single report. HRS § 52D-3.5 (2014).

[25] *See* HRS § 52D-3.5 (2014)

[26] *See* Grube, *HPD Keeps Mum About Fired Cop*, *supra* note 21 (describing how Ethan Ferguson was fired by HPD, was then hired as a law enforcement officer by the Department of Land and Natural Resources, and then was investigated and criminally charged for sexual assault on the job for DLNR).

[27] *Shielded From Justice: Police Brutality and Accountability in the United States—Internal Affairs Units*, Human Rights Watch, https://www.hrw.org/legacy/reports98/police/uspo25.htm (last visited Jan. 4, 2021) ("In many [internal investigations], sloppy procedures and an apparent bias in favor of fellow officers combine to guarantee that even the most brutal police avoid punishment for serious violations . . . The workings of internal affairs divisions are cloaked in excessive secrecy . . . [and] the public is prevented from participating in, or even knowing about, the way police officers patrolling their streets are dealt with when they commit abuses.").

transparency naturally leads to charges of bias.[28] In short, secrecy around disciplinary and accountability processes allows police misconduct and public mistrust of police to endure.

Examples from across the country make the point. In Chicago, for example, a 2017 Department of Justice (DOJ) report found that the Chicago Police Department's internal disciplinary team was "broken" and "seldom h[eld] officers accountable for misconduct."[29] Over a five-year period, the DOJ investigated 409 police shootings and concluded that just two, or 0.49% of the shootings were unjustified.[30] And between 2004 and 2017, "[t]he City paid over half a billion dollars to settle or pay judgments in police misconduct cases . . . without even conducting a disciplinary investigation in over half of those cases, and it recommended discipline in fewer than 4% of those cases it did examine."[31] The DOJ uncovered a series of barriers to initiating investigations, including "a formal policy against investigating many complaints about force; referral of verbal abuse complaints to a process in which no discipline can be imposed even if misconduct occurred; [and] a failure to investigate anonymous complaints or complaints without a sworn affidavit[.]"[32] And even for complaints that "*were* investigated" there were "consistent patterns of egregious investigative deficiencies that impede the search for the truth."[33]

Or take New York, where the NYPD's Internal Affairs Bureau investigated 2,947 civilian complaints related to race and bias-based policing between 2014 and 2019 and *did not substantiate a single complaint*.[34] Yet an independent monitor charged with overseeing court-ordered reforms to NYPD's discriminatory policing practices identified a number of problems with the NYPD's investigations, such as "[n]ot interviewing the complainant, or witness, or subject and witness officers"; asking questions which "suggested the investigator had already

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28 *See, e.g.*, Rachel Moran, *Ending the Internal Affairs Farce*, 64 Buffalo L. Rev. 837 (2016), https://digitalcommons.law.buffalo.edu/cgi/viewcontent.cgi?article=4586&context=buffalolawreview (describing repeated failures to hold officers accountable for misconduct).

29 U.S. Dep't of Justice, *Investigation of the Chicago Police Department*, at 46 (Jan. 13, 2017), https://www.justice.gov/opa/file/925846/download.

30 *Id.*

31 *Id.* (emphasis added).

32 *Id.* at 50.

33 *Id.* at 47 (emphasis in original).

34 Tenth Report of Independent Monitor 73, *Davis v. City of New York*, 10-cv-0699-AT (S.D.N.Y.), Dkt. No. 496.

reached a conclusion" and/or "doubted the validity of the complaint or the credibility of the complainant"; and "[n]ot following up on leads."[35]

Disciplinary-system failures are not confined to mega-metropolises such as Chicago and New York. Indeed, Honolulu's former police chief was convicted for attempted obstruction based on abuses of power while in office.[36] In an audit triggered by "grave concerns as to how such abuses of power . . . were allowed to go on seemingly unchecked," the City Auditor found that HPD had failed to "discern early warning signs in troubled officers and appropriately intervene before it turns into serious performance issues or misconduct."[37] Furthermore, even when misconduct is detected, the "grievance process can take a long time to resolve," and overturns many disciplinary actions: In 2019, an arbitrator reduced the discipline issued in 41% of cases.[38] As the City Auditor admonished, this "may send a message that penalties and punishment can be lessened rather than [that] misconduct should be avoided."[39] Act 47 is a necessary counter-balance to this "message," and the transparency it brings will enable the Legislature to ensure that police disciplinary systems are working, and if not, to reform them.[40]

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35 *Id.*

36 *United States v. Kealoha*, No. 17-cr-582-JMS-WRP (D. Haw. June 19, 2019).

37 Office of the City Auditor, *supra* note 23, at 2, 43.

38 *Id.* at 36, 39.

39 *Id.* at 39-40. Along that line, the Council noted that "officers were allegedly engaging in the same kinds of conduct in multiple incidents or complaints." *Id.* at 21.

40 Just as internal disciplinary systems often fail to hold officers accountable, so do external legal mechanisms. Criminal prosecution of police officers is exceedingly rare. Only 0.73% of the roughly 15,000 fatal police shootings across the country since 2005 ended with the responsible officers being charged with murder or manslaughter, and only 0.25%, ended in convictions. Amelia Thomson-DeVeaux, Nathaniel Rakich & Likhitha Butchireddygari, *Why It's So Rare For Police Officers To Face Legal Consequences*, FiveThirtyEight (June 4, 2020), https://fivethirtyeight.com/features/whyits- still-so-rare-for-police-officers-to-face-legal-consequences-for-misconduct/. The doctrine of qualified immunity presents a nearly insurmountable hurdle to civil liability, *Jamison v. McClendon*, No. 3:16-CV-595-CWR-LRA, 2020 WL 4497723, at *2 (S.D. Miss. Aug. 4, 2020), and even when it is imposed, local governments generally indemnify individual officers against awards for money damages. Joanna C. Schwartz, *Police Indemnification*, 89 N.Y.U. L. Rev. 885, 1004 (2014) (99.8% of dollars recovered by plaintiffs in civil rights cases against police paid by public, rather than responsible officers). This imposes a substantial burden on the public coffers: In 2014, for example, Honolulu taxpayers paid for at least 12 settlements involving police, including $1.4 million to the family of Aaron Torres, whom police suffocated while trying to restrain him. Rob Shikina, *Suits Claiming Misconduct by HPD Settled for $60,000*, Honolulu Star-Advertiser (Oct. 14, 2014),

4. Act 47 Ends a Culture of Impunity.

When disciplinary systems do not hold officers accountable, police officers who have previously endangered public safety continue to abuse their authority and make their peers more likely to engage in misconduct. Officers with a history of shooting civilians are 51% more likely to do so again.[41] Lack of accountability also creates a culture of impunity in which other officers are more likely to engage in misconduct. "[P]olice violence is contagious": Officers' exposure to colleagues who have previously shot civilians increases the risk that the officers will themselves shoot civilians,[42] and a 10% increase in peers' prior misconduct increases an officer's later misconduct by 8%.[43] And based on in-depth examinations of police department abuses, the DOJ concluded that a department's "failure to ensure the accurate reporting, review, and investigation of officers' use of force" can "create a culture in which officers expect to use force and never be carefully scrutinized about the propriety of that use."[44]

Furthermore, allowing police departments to withhold the identity of suspended or discharged officers so long as their grievance processes are unfinished—as the law did before Act 47—creates additional, pernicious incentives to delay resolving grievances,[45] thereby resulting in annual misconduct reports littered with anachronistic disciplinary incidents.[46] This outdated information prevents the Legislature from effectively monitoring patterns of misconduct and ensuring the effectiveness of police disciplinary procedures. Moreover, if a disciplinary appeal lapses, or if an officer resigns during the grievance process, records might

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https://www.staradvertiser.com/2014/10/14/hawaii-news/suits-claiming-misconduct-by-hpd-settled-for-60000-2/.

41 James P. McElvain & Augustine J. Kposowa, *Police Officer Characteristics and the Likelihood of Using Deadly Force*, 35 Crim. Just. & Behav. 505, 515 (2008).

42 Thibaut Horel et al., *The Contagiousness of Police Violence*, at 1 (Nov. 2018), https://www.law.uchicago.edu/files/2018-11/chicago_contagiousness_of_violence.pdf.

43 Edika G. Quispe-Torreblanca & Neil Stewart, *Causal peer effects in police misconduct*, 3 Nature Hum. Behav. 797, 797 (2019).

44 U.S. Dep't of Justice, *supra* note 29, at 41.

45 Conversely, requiring disclosure of non-final disciplinary actions will incentivize prompt completion of the grievance process.

46 Even before disclosure of a disciplined officer's identity was on the table, from 2014 to 2019, on average more than four disciplinary incidents remained pending for an entire reporting year following the first time they were reported to the Legislature. *See* Honolulu Police Department, *Legislative Disciplinary Report* (2014-2019). Indeed, some disciplinary incidents even remained pending for three reporting cycles. *See id.*

forever evade public scrutiny. At the very least, such an approach deprives the public of access to information for substantial periods of time—including in the immediate aftermath of an incident of misconduct, when the public's interest in pertinent information is often most pronounced—while an officer with a history of misconduct continues to walk the streets.

For too long, inadequate internal oversight has cultivated a climate of police misconduct, contributing to strained relations between law enforcement and the people they are sworn to protect. Hawaii's public records regime before Act 47—in which police departments could withhold the names of suspended or discharged officers still in the grievance process—stood in the way of systemic change.

B. The Hawai‘i Legislature Passed Act 47 to Restore Transparency and Public Trust In Law Enforcement.

Act 47 resulted from a decades-long process in which the Legislature determined that the people of Hawai‘i should know *more*—not less—information about misconduct by police than that of other public employees. The Legislature of Hawai‘i passed the Uniform Information Practices Act ("UIPA") over 30 years ago to promote the timely and complete disclosure of government records in support of enhanced government accountability.[47] But as a result of SHOPO's relentless lobbying, the Legislature substantially amended § 92F-14 in 1995, as it pertained to police officers: County police departments were permitted to keep secret the names of all but discharged officers who had completed the grievance process, meaning suspended officers and officers with non-final discharges were hidden from the public eye unless the public interest in disclosure outweighed the officer's privacy interest.[48]

But that same year, in an effort to maintain oversight in light of the reduced public access to information about police misconduct, the Legislature began requiring the police chiefs to submit annual reports to the Legislature that included a summary of each incident that resulted in the suspension or discharge of an officer, without naming the officers involved.[49] In 2014, the reports were required to include more information, such as the stage of the grievance process, but the identity of disciplined officers still remained secret.[50] Through Act 47, the Legislature sought to "enhance public's trust in law enforcement and standardize best practices for the use of

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47 HRS § 92F-2 (1988).
48 HRS § 92F-14 (1995).
49 1995 Haw. Sess. Laws Act 242, § 3 at 642; HRS § 52D-3.5 (1995).
50 2014 Haw. Sess. Laws Act 121, § 1 at 333–34; HRS § 52D-3.5 (2014).

force by" requiring that annual reports include the identity of suspended or disciplined police officers *upon suspension or discharge*, rather than at the completion of the grievance process.[51]

Act 47 was an intentional corrective to the prior system of special treatment for police officers. In 1995, the Legislature had been persuaded to distinguish police officers from other government employees out of fear they might be suspended for minor offenses like failing to shine their shoes.[52] But years of HPD annual disciplinary reports show that unshined shoes are the least of the public's concerns.[53] Instead, officers have been suspended (following successful appeals of their discharges) for, among other things, slapping and kicking a girlfriend during an argument, a physical altercation with an ex-wife causing injuries, multiple hit and runs, driving under the influence, falsifying records, and stealing drug evidence.[54] And while all of these incidents occurred in 2016 and 2017, the grievance processes were not completed until the 2018 reporting cycle.[55] Act 47 recognizes that the Legislature should have learned this information about specific problematic officers years earlier, so that it could ensure that the department had the proper disciplinary systems in place, and that those systems worked as intended.

The delayed-reporting provision also hid from the public critical information about the now-famous cases of Darren Cachola (an officer who assaulted his girlfriend),[56] Kirk Uemura (who arbitrarily arrested a 15-year-old classmate of his son's),[57] and James Easley (who was fired for committing sexual assault, reported as conducting "personal business while on duty").[58] Officer Cachola, for example, assaulted his girlfriend in 2014 and was discharged in 2015, but

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51 2020 Haw. Sess. Laws Act 47, § 1 at 1, § 2 at 2-3.

52 *See, e.g.*, 1995 House Journal, at 682 (remarks of Rep. Alcon) ("You mean to say, just because the policeman did not shine his shoes that we will have to publish his name in the paper?").

53 The annual reports to the Legislature required by HRS § 52D-3.5 must be posted for public access. HRS § 93-16(a).

54 Honolulu Police Department, *Legislative Disciplinary Report* (2018).

55 *Id.*

56 *See SHOPO v. City & County of Honolulu*, SCAP-19-0000450 (Haw. Dec. 16, 2020); Rick Daysog, *City agrees to a tentative $320,000 settlement over HPD domestic violence case*, Hawaii News Now (Oct. 25, 2020), https://www.hawaiinewsnow.com/2020/10/25/city-agrees-tentative-settlement-over-hpd-domestic-violence-case/.

57 Jennifer Sinco Kelleher, *Honolulu police offer no details in power abuse discipline,* AP News (Oct. 27, 2020), https://apnews.com/article/arrests-lawsuits-hawaii-honolulu-844873b006de943109445d650ed0b4e0.

58 Grube, *HPD Keeps Mum About Fired Cop*, *supra* note 21.

his grievance process (and thus the intended concealment of his identity) dragged on until 2018—when he was reinstated with backpay.[59] Indeed, the public only learned about his alarming conduct because a video of his attack was leaked to the press, thus highlighting the need for more transparency into departments' internal investigations and disciplinary decisions.[60]

The Hawai‘i Legislature was well aware of all these concerns when it considered House Bill 285 (HB 285), which eventually became Act 47. Over the past decade, legislators have proposed and voted on a series of laws addressing police oversight and public trust.[61] In 2019, the Legislature first addressed the bill that would eventually become Act 47. Numerous legislative committees heard testimony both for and against reform, and the Legislature came to a well-reasoned, uncompromised decision to increase transparency.[62] The Legislature's goal was to promote accountability, transparency, and ultimately trust, between the public and the police.[63]

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[59] Lynn Kawano, *Officer fired after violent video surfaced to get his job back — with back pay*, Hawaii News Now (Feb. 22, 2018), https://www.hawaiinewsnow.com/story/37563061/hpd-officer-fired-after-violent-video-will-get-his-job-back-plus-hundreds-of-thousands-in-back-pay/; Nick Grube, *Hawaii Supreme Court Releases Cachola Arbitration Decision*, Honolulu Civil Beat (Dec. 17, 2020), https://www.civilbeat.org/2020/12/hawaii-supreme-court-releases-cachola-arbitration-decision/.

[60] *See, e.g.*, Leila Fujimori & Kevin Dayton, *Hawaii State Legislature passes police reform bill*, Honolulu Star-Advertiser (July 6, 2020), https://www.staradvertiser.com/2020/07/06/breaking-news/hawaii-state-legislature-passes-police-reform-bill/; Lynn Kawano, *Lawmakers join the fight for more details on HPD officer's firing*, Hawaii News Now (Sept. 1, 2017), https://www.hawaiinewsnow.com/story/36276135/lawmakers-join-the-fight-for-more-details-on-hpd-officers-firing/.

[61] *See e.g.*, 2014 Haw. Sess. Laws Act 121 (required additional details and record retention for misconduct identified in annual police disciplinary reports); S.B. 497, S.D. 1, 28th Leg., Reg. Sess. (2015) (failed legislation that would have repealed the privacy interest in the public records law for suspended officers); S.B. 3016, S.D. 1, 28th Leg., Reg. Sess. (2016) (failed legislation that would have repealed the privacy interest in the public records law for suspended officers); 2016 Haw. Sess. Laws Act 161 (established law enforcement officer independent review board for fatal use of force by law enforcement); 2018 Haw. Sess. Laws Act 220 (established standards board for certification of law enforcement officers).

[62] The Legislature rejected SHOPO's objections to disclosing names before the grievance process was completed. S. Comm. on Pub. Safety, Intergovernmental, and Military Affairs, *Testimony on H.B. No. 285, Relating to Public Safety* (Mar. 19, 2019) (SHOPO's testimony raising the same concerns as asserted here), https://www.capitol.hawaii.gov/Session2019/Testimony/HB285_HD1_TESTIMONY_PSM_03-19-19_.PDF.

[63] 2020 Haw. Sess. Laws Act 47, § 1 at 1.

HB 285 also had the clear support of numerous public agencies and civic organizations. The State of Hawai‘i Office of Information Practices supported HB 285's effort to withdraw the "special treatment" given to information about police misconduct.[64] The Society of Professional Journalists supported it as a means to "end years of secrecy about disciplined officers' identities" and "assur[e] the public that the minority of bad officers will be held accountable."[65] Common Cause Hawai‘i recognized that the increased information disclosed as a result of HB 285's changes "would increase the respect for police and perhaps also make police officers more careful."[66] The League of Women Voters supported HB 285 so that UIPA would "apply to suspensions of county police officers in exactly the same way that UIPA applies to all suspensions of other public employees."[67]

Legislative committees were persuaded. The Senate Committee on Public Safety, Intergovernmental, and Military Affairs determined that "this measure would provide public access to records of suspended police officers."[68] It further found it to be "in the best interests of the State" to "promot[e] transparency and greater accountability of public servants."[69] The Senate Judiciary Committee concluded that "requiring disclosure of the identities of suspended or discharged county police officers to the Legislature will improve oversight of police departments in case of severe misconduct," and "increase transparency in law enforcement."[70]

In September 2020, Act 47 was passed—requiring the public disclosure of detailed records for officers who were suspended and who had completed their grievance processes and the inclusion in annual reports to the Legislature of the names of suspended and discharged

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64 S. Comm. on Labor and Pub. Employment, *Testimony on H.B. No. 285, Relating to Public Safety* (Feb. 12, 2019), https://www.capitol.hawaii.gov/Session2019/Testimony/HB285_TESTIMONY_LAB_02-12-19_.PDF.

65 *Id.*

66 *Id.*

67 *Id.*

68 S. Stand. Comm. Rep. No. 1408, Comm. on Pub. Safety, Intergovernmental, and Military Affairs, in 2019 Advance Senate Journal, at 5, https://www.capitol.hawaii.gov/session2019/CommReports/HB285_SD1_SSCR1408_.htm (last accessed Jan. 7, 2021).

69 *Id.*

70 S. Stand. Com. Rep. No. 1906, Jud. Comm., https://www.capitol.hawaii.gov/session2019/CommReports/HB285_SD2_SSCR1906_.htm. The Conference Committee made similar findings. *Id.*

officers who had not yet completed their grievance procedures.[71] As noted above, Act 47 thus resulted from a lengthy and considered legislative determination that the people of Hawai‘i should know *more*—not less—information about misconduct by police than that of other public employees.[72] The disclosure of the names of suspended and discharged officers whose grievance process are not yet final—just one of Act 47's reforms—helps give the Legislature and the public necessary oversight of police misconduct.

C. Like the Reforms Enacted in Many Other States, Hawaii's Act 47 Is an Appropriate Response to Promote Much Needed Police Transparency and Accountability.

Although the legislative efforts that ultimately culminated in the passage of Act 47 began years ago, the events of 2020—including the killing of Ahmaud Arbery, George Floyd, Breonna Taylor, and countless others, as well as the racial-justice protests that followed—inspired cities and states across the country to pass similar reforms. For example, New York repealed its regressive laws related to disclosure of police misconduct and now gives the public access to the disciplinary records, including records of even unsubstantiated complaints and technical infractions, of police officers.[73] Police unions filed suit, seeking an injunction barring release of such records. In denying the requested injunction, Judge Failla of the Southern District of New York held that it would "disserve[] the public interests," noting that the amendment was "designed to promote transparency and accountability, to improve relations between . . . law enforcement communities and their first-responders and the actual communities of people that they serve, to aid law makers in arriving at policy-making decisions, to aid underserved elements of [the] population and ultimately, to better protect the officers themselves."[74]

New Jersey responded to the events of 2020 by requiring the state to publish a synopsis of all complaints against police officers that resulted in termination, demotion, or suspension and

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71 2020 Haw. Sess. Laws Act 47, § 2 at 2-3.

72 Fujimori & Dayton, *supra* note 60 (discussing House Judiciary Chair's statements "that the bill was not a knee-jerk reaction to the Black Lives Matter movement or the death of George Floyd").

73 Luis Ferre-Sadurni & Jesse McKinley, *N.Y. Bans Chokeholds and Approves Other Measures to Restrict Police*, N.Y. Times (June 12, 2020), https://www.nytimes.com/2020/06/12/nyregion/50a-repeal-police-floyd.html; N.Y. S.B. 8496.

74 Oral Decision 41:11-42:11, *Uniformed Fire Officers Ass'n v. De Blasio*, No. 20-Civ.-05441-KPF (S.D.N.Y. Aug. 21, 2020).

to retroactively publish the same information dating back to January 1, 2000.[75] Washington, D.C. passed 20 new police reforms this year, including one requiring the disclosure of the names of officers involved in, and video footage of, police killings and other serious uses of force, regardless of whether internal investigations had even begun.[76] These reforms withstood legal challenges from law enforcement organizations.[77]

With the passage of Act 47, Hawai‘i made similar strides towards transparency and accountability. But even after the passage of Act 47, Hawaii's disclosure laws lag far behind those of other states. In 13 states, police misconduct records are generally available to the public.[78] For example, in Minnesota, the public has access to "the existence and status of any complaints or charges against" an officer, "regardless of whether [it] resulted in a disciplinary action," as well as "the final disposition of any disciplinary action together with the specific reasons for the action and data documenting the basis of the action."[79] In North Dakota, Ohio, and Florida, disciplinary records are similarly public.[80] In other states, public access to records is presumed with only narrow exemptions.[81] In New Mexico, complaints against an officer "are available to the public for inspection under IPRA [*i.e.*, the Inspection of Public Records Act]

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75 *See In re Attorney Gen. Law Enf't Directive Nos. 2020-5 & 2020-6*, 240 A.3d 419 (N.J. Super. Ct. App. Div. 2020), cert. granted 241 A.3d 579 (N.J. 2020).

76 Keith Alexander, *D.C. police union seeks court injunction to stop release of body-worn camera footage, officers' identity following fatal interactions*, Wash. Post (Aug 10, 2020), https://www.washingtonpost.com/local/public-safety/dcpolice-union-seeks-court-injunction-to-stop-release-of-body-worn-camera-footageofficers-identity-following-fatal-interactions/2020/08/10/deb8785a-db28-11ea-8051-d5f887d73381 story.html; Comprehensive Policing & Justice Reform Second Emergency Amendment Act of 2020, D.C. Act 23-336 (2020).

77 *See, e.g.*, *In re Attorney Gen. Law Enf't Directive Nos. 2020-5 & 2020-6*, 240 A.3d 419; Oral Opinion Denying Temporary Restraining Order, *Fraternal Order of Police et al. v. District of Columbia*, 2020 CA 003492B (D.C. Super. Ct. Aug. 14, 2020). But these states are not alone: New Hampshire, Illinois, and California have also revised their laws regarding transparency in policing, and have successfully defended them in court. *Seacoast Newspapers, Inc. v. City of Portsmouth*, 239 A.3d 946, 951-55 (N.H. 2020); *Chicago v. Fraternal Order of Police*, No. 124831, 2020 WL 3273050, at *1 (Ill. June 18, 2020); *Becerra v. Superior Ct*., 257 Cal. Rptr. 3d 897 (Ct. App. 2020), review denied (May 13, 2020).

78 Robert Lewis, et al., *Is Police Misconduct a Secret in Your State?*, WNYC News (Oct. 15, 2015), https://www.wnyc.org/story/police-misconduct-records/. Since the Lewis article was authored, New York recently repealed Section 50-a and became a public records state.

79 Minn. Stat. § 13.43(2).

80 N.D. Cent. Code § 44-04-18; Ohio Rev. Code § 149.43; Fla. Stat. § 112.533(2)(a)–(b).

81 *See, e.g.*, Wash. Rev. Code § 42.56.050.

unless an exception protects their disclosure." *See Cox v. New Mexico Dep't of Pub. Safety*, 148 N.M. 934, 938 (2010). In Texas, records are available where officers were reprimanded through a suspension or the loss of pay.[82] And in Oklahoma, police disciplinary records are available so long as they are final and resulted in a loss of pay, suspension, demotion, or termination.[83]

Act 47's critical but measured changes to the disclosure rules have come not a moment too soon. The Act's reforms are not radical, but they are a necessary step in Hawaii's journey to restoring faith in law enforcement among the public.

D. The Public's Legitimate Concern for Transparency, Accountability, and Trust in Law Enforcement Justifies Disclosure of Officers' Names, and SHOPO's Articulated Concerns Are Pretextual and Unfounded.

SHOPO has sought to prevent any transparency in law enforcement discipline since at least 1994, when then-SHOPO President Bennie Atkinson "vowed that SHOPO would 'do whatever it takes to keep [officers'] name[s] from being disclosed in the media.'"[84] After students at the University of Hawai'i requested disciplinary records from HPD,[85] SHOPO promised that it would "begin to take a very active role in politics and do whatever needs to be done to elect [its] friends into office" and "no longer permit [its] rights to be trampled or compromised."[86] In successfully lobbying the Legislature to pass privacy legislation for police officers under UIPA in the 1990s,[87] SHOPO argued that law enforcement differed from other

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82 *See* Tex. Gov. Code § 552; Tex. Local Gov. Code § 143.

83 *See* Okla. Open Records Act § 51-24A.7. Arkansas, Indiana, Kentucky, and New York also require the disclosure of disciplinary action less than a final determination of discharge. *See* Ark. Code § 25-19-105(c)(1); Ind. Code § 5-14-3; KRS § 61.878(1)(a); N.Y. Civ. Rights Law § 50-a.

84 Nick Grube, *In the Name of the Law: UH Students vs. The Police*, Honolulu Civil Beat (February 26, 2013), https://www.civilbeat.org/2013/02/in-the-name-of-the-law-uh-students-vs-the-police/.

85 Jeffrey S. Portnoy & Gerald Kato, *Legislature should let the public see police misconduct records*, Honolulu Star-Advertiser (June 15, 2020), https://printreplica.staradvertiser.com/?publink=17e2b82af.

86 Nick Grube, *In the Name of the Law: Hawaii Police Union 'Outguns' Students*, Honolulu Civil Beat (February 27, 2013), https://www.civilbeat.org/2013/02/in-the-name-of-the-law-hawaii-police-union-outguns-students/ [hereinafter *Hawaii Police Union 'Outguns' Students*].

87 *Background on the SHOPO Case*, Society of Professional Journalists, http://www2.hawaii.edu/~jour/spj/bckgrnd.html (last visited Dec. 26, 2020).

government employees and that officers and their families should not be publicly humiliated on top of the disciplinary action they faced within their department.[88]

More than 20 years later, in opposition to the bill that became Act 47, SHOPO renewed many of its same arguments against transparency—this time, without success.[89] Despite its aggressive, unfounded claims about the theoretically widespread and injurious effects of Act 47, SHOPO has made zero effort to demonstrate that any of its proposed hypothetical horribles have come to fruition in the states that have adopted a more transparent approach to law enforcement discipline. And SHOPO's articulated fears have not, in fact, come to pass.[90]

SHOPO's articulated parade of horribles also ignores the narrow impact of Act 47's requirement of disclosure of the names of officers whose grievance processes are not yet final. Since 2014, on average less than 14 HPD disciplinary incidents per year remained "pending" at the conclusion of the reporting period,[91] affecting only 12 officers[92]—a drop in the bucket of HPD's 1,820 sworn officers.[93]

In its Complaint, SHOPO argues that disclosing the names of suspended or discharged officers to the Legislature prior to completion of their grievance processes will violate officers' due process rights.[94] This argument is no more than a strawman, which was rejected by the Legislature, and should be rejected by this Court, too. As an initial matter, police officers simply do not have a constitutional right to privacy in conduct that has resulted in the imposition of a suspension or discharge pending final arbitration. *See SHOPO v. Soc'y of Prof'l Journalists-Univ. of Hawai'i Chapter*, 83 Haw. 378, 403-06, 927 P.2d 386, 411-14 (1996). This information

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88 *Hawaii Police Union 'Outguns' Students*, *supra* note 86; Gordon Y.K. Pang, *UH group still waiting for that list from HPD*, Star-Bulletin (Sept. 5, 1996), http://archives.starbulletin.com/96/09/05/news/story1.html.

89 *See supra,* p. 12.

90 *See supra*, p. 2.

91 *See* Honolulu Police Department, *Legislative Disciplinary Report* (2014-2019). This number was calculated by averaging the number of pending new disciplinary incidents in the given reports. Of note, many of the reports contained incidents that first appeared on reports from years prior; those "prior" incidents were not factored into this average. The reporting period for each report is January 1 to December 31 of the year prior to the year of submission. *See* HRS § 52D-3.5 (2020).

92 *See* Honolulu Police Department, *Legislative Disciplinary Report* (2014-2019).

93 *About Us*, Honolulu Police Department, https://www.honolulupd.org/about-us/ (last visited Dec. 26, 2020).

94 *See* Compl. ¶ 10, Dkt. No. 1.

is not "highly personal and intimate," but rather information about which there is a legitimate public concern. *Id.* And extensive due process protections are already built into the disciplinary process as a result of SHOPO's collective bargaining agreement.

In stark contrast to the specious reasons put forward by SHOPO for this requested injunction, there are real harms to the public in allowing the pre-Act 47 status quo to continue, and real benefits in allowing the Act to take effect. Transparency is essential to effective governance. By timely receiving the names of malfeasant officers, the public—through the Legislature—has the opportunity to monitor police departments, hold them to their own standards, and incentivize them to improve themselves from within. The Legislature will also have the information necessary to detect when existing training, monitoring, and disciplinary systems are failing, and to enact necessary reforms.

But perhaps most importantly, transparency into police misconduct is crucial to restoring public trust in policing. The Legislature noted that "public trust in law enforcement is critical to ensuring justice for all under the law," and law enforcement's job "is safer, easier, and more effectively executed when citizens trust those empowered to serve and protect them."[95] And as the Department of Justice has observed, "community members' willingness to trust the police depends on whether they believe that police actions reflect community values and incorporate the principles of procedural justice and legitimacy."[96] When this trust is eroded and the legitimacy of police is questioned—as in the case of discrimination, over-policing, and unchecked police brutality—marginalized communities are less likely to report crimes or cooperate with law enforcement.[97] Without transparency and accountability, police-public relations will continue to suffer, thus increasing risk for the police and public alike.[98]

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95 2020 Haw. Sess. Laws Act 47, § 1 at 1.

96 U.S. Dep't of Justice Community Relations Service, *Community Relations Services Toolkit for Policing: Importance of Police-Community Relationships and Resources for Further Readings*, at 1, https://www.justice.gov/crs/file/836486/download (last visited Jan. 7, 2021).

97 *Distrust of Police is Major Driver of US Gun Violence, Report Warns*, The Guardian (Jan. 21, 2020), https://www.theguardian.com/us-news/2020/jan/21/police-gun-violence-trust-report; *cf.* FBI, Crime Data Explorer: Honolulu Police Department (last visited Jan. 3, 2021) (indicating Honolulu Police Department is below national average in "clearing" cases, and the 2018 clearance rate was the lowest in 40 years).

98 SteVon Felton, *Criticism and Transparency Are Good for Police Departments*, R Street (Oct. 25, 2018), https://www.rstreet.org/2018/10/25/criticism-and-transparency-are-good-for-police-departments/.

III. CONCLUSION

SHOPO attempts to subvert legislative and public will by asking this Court to enjoin the disclosure of names of disciplined officers who have been suspended or discharged, but who have not yet completed the grievance process. The injunction should not be granted. Act 47's reforms will allow the Legislature, *amici*, many other organizations, and the people of Hawai'i—particularly its communities of color—to pursue more robust accountability for police misconduct and, by extension, build public trust in law enforcement. In the words of Chief Justice Recktenwald, "For those of us who work in the justice system, which promises equal justice for all, this is a time of reckoning that requires careful listening, increased education and self-reflection, and, most importantly, action. We have a collective responsibility to hear the voices that have been raised, and to address deeply rooted and systemic problems within the structures of our institutions."[99]

DATED: Honolulu, Hawaii, January 7, 2021

/s/ Jongwook "Wookie" Kim

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[99] Statement by Chief Justice Mark E. Recktenwald, Hawai'i State Judiciary (June 15, 2020), https://www.courts.state.hi.us/news_and_reports/2020/06/statement-by-chief-justice-mark-e-recktenwald.

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAI‘I

STATE OF HAWAII ORGANIZATION OF POLICE OFFICERS (SHOPO), Plaintiff, v. CITY AND COUNTY OF HONOLULU, Defendant.	CIVIL NO. 1CCV-20-1512 DEO (Declaratory Judgment) NOTICE OF MOTION

NOTICE OF MOTION

TO: Vladimir Devens
Keani Alapa
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Attorneys for Defendant

NOTICE IS HEREBY GIVEN that the undersigned has filed with the above-entitled court the motion attached hereto. Any response to said motion must be filed and served no later than 10 days after the service date indicated on the attached Certificate of Service. Pursuant to Rule 6(e) of the Hawai‘i Rules of Civil Procedure, if the motion is served by mail, any response to said motion must be filed and served no later than 12 days after the service date indicated on the attached Certificate of Service.

DATED: Honolulu, Hawaii, January 7, 2021

/s/ Jongwook "Wookie" Kim

MATEO CABALLERO
JONGWOOK "WOOKIE" KIM
ACLU of Hawai'i Foundation

SHIREEN A. BARDAY (*pro hac vice* pending)
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IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAI‘I

STATE OF HAWAII ORGANIZATION OF POLICE OFFICERS (SHOPO), Plaintiff, v. CITY AND COUNTY OF HONOLULU, Defendant.	CIVIL NO. 1CCV-20-1512 DEO (Declaratory Judgment) CERTIFICATE OF SERVICE

CERTIFICATE OF SERVICE

The undersigned hereby certifies that, on January 7, 2020, a true and correct copy of the foregoing documents was served electronically through JEFS/JIMS on the following:

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DATED: Honolulu, Hawai‘i, January 7, 2020.

Respectfully submitted,

/s/ Jongwook “Wookie” Kim
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