No. 1-24-0875

IN THE APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

CHICAGO JOHN DINEEN LODGE #7,

Plaintiff – Appellant,

v.

CITY OF CHICAGO, DEPARTMENT OF POLICE, BRANDON JOHNSON, in his official capacity as MAYOR, and LARRY SNELLING, in his official capacity as Superintendent of the Chicago Police Department, and the CHICAGO CITY COUNCIL,
Defendants – Appellees.

On Appeal from the Circuit Court of Cook County, Illinois,
Cook County Circuit, No. 2024-CH-00093
The Honorable Michael T. Mullen, Judge Presiding

BRIEF OF *AMICUS CURIAE* ACADEMICS AND POLICY GROUPS FOR POLICE ACCOUNTABILITY IN SUPPORT OF DEFENDANTS-APPELLEES

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TABLE OF CONTENTS

I. INTEREST OF AMICUS CURIAE

II. BACKGROUND 2

A. Effective and Transparent Administrative Police Disciplinary Systems are Essential to Community Trust in Policing Which is Essential to Public Safety. 3

1. Administrative Disciplinary Systems are Essential to Police Accountability..... 3

2. Transparency Related to Police Disciplinary Systems Builds Community Trust Which is Essential to Public Safety..... 6

B. Research Demonstrates that Arbitration is an Imperfect Appellate Mechanism for Police Disciplinary Matters Thereby Requiring Public Observation To Ensure Fairness. 8

C. Historically, CPD has Struggled to Achieve Effective Police Discipline, Necessitating Continued Public Vigilance..... 9

D. The Current System for Adjudicating Serious Disciplinary Matters Involving CPD Members Is Highly Complex Requiring Ongoing Public Monitoring and Oversight. 12

E. In Pushing for Arbitration as an Alternative to the Chicago Police Board, the Union Seeks to Reduce Accountability for CPD Officers. 14

III. ARGUMENT 16

A. The Circuit Court Correctly Concluded that the State of Illinois has a Well-defined and Dominant Public Policy Requiring Transparency and Accountability Related to Police Disciplinary Matters That Can Be Ascertained from Several Sources of Legal Authority. 17

1. Illinois courts have recognized a well-defined and dominant public policy of holding law enforcement officers accountable for serious misconduct. 18

2. Illinois's well-defined and dominant public policy of transparency and accountability in police disciplinary matters is clearly established by the State's litigation with the City of Chicago. 19

3. Illinois courts have recognized a well-defined and dominant public policy in favor of an open, transparent government which applies to police discipline. 24

4. The Illinois statutory scheme for decertifying police officers reflects a well-defined and dominant public policy regarding

transparency and accountability in addressing serious police misconduct. 25

B. The Circuit Court Correctly Concluded that Private Arbitration Proceedings Would Undermine Illinois' Well-defined and Dominant Policy of Transparency and Accountability Related to Police Disciplinary Matters. 26

1. Private arbitration proceedings would undermine Illinois's well-defined and dominant public policy of transparency and accountability for police disciplinary matters 28

a. Private arbitration proceedings would impair the public's ability to assess the effectiveness of the various components of Chicago's police accountability system. 28

b. Lack of transparency around arbitration, a critical stage in the process for adjudicating serious police misconduct matters, will undermine public confidence in the accountability system. 32

2. Private arbitration proceedings would undermine the effectiveness of Illinois' scheme for decertifying officers who commit serious misconduct. 33

3. Private Arbitration proceedings would undermine the States' ability to comply with its constitutional and statutory obligations to provide favorable evidence to criminal defendants. 34

C. Private Arbitration Proceedings are Neither Necessary nor Legally Required. 36

IV. CONCLUSION 37

TABLE OF AUTHORITIES

BACKGROUND **2**

Statutes

720 ILCS 5/7-5(1)…… 4

Municipal Codes

Chicago Municipal Code § 2-56……... 11

Chicago Municipal Code § 2-78…….. 11, 13

Chicago Municipal Code § 2-78-120……... 11

Case Filings

In the Matter of the Arbitration between City of Chicago and Fraternal Order of Police, Chicago Lodge No. 7, L-MA- 18-016, AAA 01-22-0003-6534, Arb. Ref. 22.372, Supplemental Final Opinion and Award, Jan. 4, 2024…… 8, 37

Chicago John Dineen Lodge #7 v. City of Chicago, et. al., No. 2024CH00093, Mar. 21, 2024…….…….…… 14, 17, 18, 21

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Rachel Moran, *Police Privacy*, 10 UC IRVINE L. REV. 153, 185-86 (2019)…… 6, 7, 22, 35

Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 572 (1980)…… 6

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Gabriella Leyhane, *To Serve and Protect: An Analysis of Recent Law Enforcement Legislation in Illinois and A Call for Reform*, 66 DEPAUL L. REV. 1133 (2017)……..... 7

Tracey Meares, *Policing and Procedural Justice: Shaping Citizens' Identities to Increase Democratic Participation*, 111 Nw. U. L. Rev. 1525 (2017)……. 7

Rachel Moran & Jessica Hodge, *Law Enforcement Perspectives on Public Access to Misconduct Records*, 42 CARDOZO L. REV. 1237 (2021)……. 7, 8, 26

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ARGUMENT **16**

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448 U.S. 555 (1980)……. 24

405 U.S. 150 (1972) …… 33

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Ill. Const. Art. I, § 25…….…….... 34

Ill. Const. (1970), Art. I, § 25(a) …….. 34

Illinois Statutes

50 ILCS 705/6.1……... 25
50 ILCS 705/6.3(c)(2) ……..... 26
50 ILCS 705/6.3(d) ……. 31
5 ILCS 315/2…… 34
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Illinois Rules

IL. Supreme Court Rule 412……. 32
134 Ill. 2d R. 412…….. 33

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City of Chicago v. Fraternal Ord. of Police, 2020 IL 124831……..…… 17, 22, 35
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State of Illinois v. City of Chicago, NDIL, No 17-cv-06260, Docket #1…….. 19, 20, 21, 23, 27
Fraternal Order of Police, Lodge No. 5 v. City of Philadelphia, 812 F.2d 105, 116-17 (3d Cir. 1987)……... 22
Valio v. Bd. of Fire & Police Comm'rs of Vill. of Itasca, 311 Ill. App. 3d 321, 331 (2nd Dist. 2000)……..... 27
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I. INTEREST OF AMICUS CURIAE

The *Amici Curiae*, a coalition of academics, attorneys, former government officials and organizations (listed in Appendix A), respectfully offer the court an important and compelling perspective on the issues raised in this appeal based on an in-depth understanding of complex police accountability systems acquired from their collective experience and knowledge. This brief will discuss the importance of an open process for adjudicating police misconduct within the context of how these systems actually operate, considering the needs and concerns of the various stakeholders involved. Moreover, reflecting that the outcome of this matter has the potential to impact police accountability beyond Chicago, the Amici Curiae include policing experts from across the United States. Grounded in research and first-hand experience working on police accountability challenges, the Amici Curiae offer a point of view unlikely to be elucidated by of any of the parties.

As outlined in the brief, the State of Illinois has an established public policy of not only ensuring that law enforcement officers are held accountable but also ensuring that the citizens of Illinois have access to the information they need to assess how well accountability systems are working in their communities. The Chicago Police Department ("CPD" or "the Department") has a troubled history when it comes to police accountability due in large part to a lack of transparency around disciplinary proceedings. The *Amicus Curiae* urge the court to consider that allowing serious police misconduct matters to be adjudicated behind closed doors via private arbitration is inconsistent with the historical practice of making these proceedings open to the public and are gravely concerned that doing so will undermine past and present police reform efforts. Moreover, transparency

regarding serious police misconduct matters through arbitration will in no way impair the due process rights owed to Chicago police officers as required by the collective bargaining agreements and other relevant legal authority. As will be discussed below, the Amici Curiae respectfully, but strongly, urge the court to affirm the district court ruling that arbitration of these matters be open to the public.

II. BACKGROUND

The Amici Curiae offer the following background information to provide the court with an understanding of the issues and challenges inherent in Chicago's increasingly complex police oversight system. First, in general, effectiveness and transparency for administrative disciplinary systems are necessary to foster trust in policing which is essential to public safety. Administrative disciplinary processes are essential to police accountability because police officers are infrequently held liable in criminal or civil law proceedings. Second, research conducted specifically in Chicago and elsewhere demonstrates that arbitration is an imperfect appellate mechanism for police discipline, thus requiring outside oversight to uncover systemic procedural flaws and correct unjust outcomes. Third, historically, CPD has struggled to create an effective police accountability system, necessitating constant external vigilance over the system. Lastly, the current process for adjudicating serious disciplinary matters involving CPD officers is highly complex, involving multiple government entities and decision-makers. Thus, openness is required to enable the public to assess which entities and decision-makers are performing their duties with the requisite care and fairness. These are among the most important considerations that the circuit court correctly recognized as creating a pressing need for open and transparent arbitration proceedings.

A. Effective and Transparent Administrative Police Disciplinary Systems are Essential to Community Trust in Policing Which is Essential to Public Safety.

1. Administrative Disciplinary Systems are Essential to Police Accountability

There are three paths to potential sanctions for police officers who commit misconduct: criminal prosecution, civil liability, and administrative disciplinary action. Today, officers are most frequently held accountable for misconduct, if at all, through administrative disciplinary action. It is well-established that the criminal justice system provides minimal accountability in police misconduct cases.[1] Prosecutors are often reluctant to charge police officers, and juries are often reluctant to convict them.[2] The civil court system also offers limited redress to victims of police misconduct because the doctrine of qualified immunity significantly limits the circumstances in which an officer is held liable.[3] Moreover, there are some forms of serious misconduct that do not rise to the level of a criminal offense or create civil liability. For example, the administrative process may provide the only accountability mechanism through which officers whose speech (e.g. racist) or association (e.g. white supremacist organizations) make them unfit for law

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[1] Kami Chavis Simmons, *Increasing Police Accountability: Restoring Trust and Legitimacy Through the Appointment of Independent Prosecutors*, 49 WASH. U. J.L. & POL'Y 137, 144 ("Criminal prosecutions of police officers are uncommon and judges and juries often exonerate the few officers who fact prosecution.")

[2] Mark Berman, *When police kill people, they are rarely prosecuted and hard to convict,* WASH. POST, Apr. 4, 2021.

[3] *See, e.g.*, Matthew Spencer, *Restructuring Alternative Dispute Resolution Options to Improve Police Accountability*, 13 ALA. C.R. & C.L. L. REV. 145, 150(2021); Eliana Fleischer, *Stating the Obvious: Departmental Policies as Clearly Established Law,* 90 U. CHI. L. REV. 1435, 1436 (2023) (noting that qualified immunity is one of the most contentious barriers to successfully bringing a case against a government officer); Joanna Schwartz, *Shielded,* Viking Press, 2023, (detailing extensive unfairness of the qualified immunity doctrine as applied to police officers.)

enforcement employment.[4] Thus, the administrative disciplinary process may be the only legal mechanism that results in a sanction against an officer who has committed serious misconduct.

The administrative disciplinary process is particularly important because it is the only legal mechanism through which law enforcement agencies enforce their own policies and codes of conduct. Law enforcement agency policies and codes of conduct often establish a higher standard of care than that set by constitutional or state statutory law[5] because they are based on best practices in policing and are guided by community values.[6]

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[4] While neither racist speech nor association with violent far-right extremists, without more, is a crime or conduct that would result in civil liability, such conduct could violate police department policy. *See, e.g.,* Chicago Police Department, CPD's May 2023 Updates to Draft Amendments to G08-03 (May 2023), https://www.chicago.gov/content/dam/city/depts/ccpsa/policies/CPD's-May-2023-Updates-to-Draft-Amendments-to-G08-03.pdf (amending Chicago Police Department policy to prohibit participation, membership, or affiliation with criminal or biased organizations). These kinds of policy violations can result in serious disciplinary action, including termination. *See, e.g.,* City of Columbia (South Carolina) Police Department Press Release, Aug. 31, 2020 (announcing that an officer was fired after using a racial slur); *Seattle Police officer fired for off-duty racist comments*, ASSOC. PRESS, Jun. 24, 2024, available at: https://www.nbcnews.com/news/asian-america/seattle-police-officer-fired-duty-racist-comments-rcna158673; Rebecca Cohen, *San Jose police fire officer over 'disgusting' racist text messages, chief says*, NBC NEWS, Nov. 4, 2024, available at: https://www.nbcnews.com/news/us-news/san-jose-police-officer-fired-disgusting-text-messages-rcna123675; Robert Rodriguez, *'Woke witch hunt.' Ex-Fresno police officer, fired for Proud Boy ties, sues city*, FRESNO BEE, Aug. 4, 2021, available at: https://www.fresnobee.com/news/local/article253251168.html.

[5] For example, the CPD use of force policy permits an officer to use deadly force against a fleeing person only where that person "poses an imminent threat" and only as a "last resort." Chicago Police Department General Order 03-02 Section IV(D). Whereas, the Illinois state statute governing the use of force permits the use of deadly force against a fleeing subject under a broader set of circumstances. 720 ILCS 5/7-5(1).

[6] *See, e.g.,* "National Association of Civilian Oversight of Law Enforcement Code of Ethics", available at https://www.nacole_code_of_ethics; Paul a. Pastor, *Ethical Agency Cultures and Public Trust*, POLICE CHIEF ONLINE, Oct. 23, 2023 available at https://policechiefmagazine.org/ethical_agency_cultural.

Thus, it is only through the administrative disciplinary process that standards of conduct reflecting community-based values and best policing practices are enforced.

The administrative process is also the primary mechanism through which citizens have the power to seek redress for police abuse by filing a formal complaint directly with the police agency.[7] The diligence with which law enforcement agencies investigate and take action to address citizen complaints is essential to community trust in policing and police accountability.[8] When citizens feel complaints are not taken seriously, they are less likely to engage with law enforcement.[9] Because community engagement has a direct impact on public safety[10], it is imperative that cities like Chicago have well-functioning administrative accountability systems.

The arbitration process that is the subject of this litigation is a critical stage of the administrative disciplinary process for CPD officers. Pursuant to this process, the outcome of an arbitration decision will be, in most cases, the ultimate determination regarding whether a Chicago Police Officer will be held accountable for serious misconduct … at all.

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[7] U.S. Department of Justice, Office of Community-Oriented Policing Services, *Building Trust Between the Police and the Citizens They Serve* ("U.S. DOJ Report"), at 20; available at: https://portal.cops.usdoj.gov/resourcecenter/RIC/Publications/cops-w0724-pub.pdf.

[8] *See*, Rachel Moran, *In Police We Trust*, 62 VILL. L. REV. 953, 1001-102 (2017) ("Providing public access to information about misconduct complaints and resolutions would allow civilians the opportunity to assess whether their police department takes these complaints seriously, and would take a step toward removing police departments and officers from the veil of secrecy under which many of them currently operate.")

[9] U.S. DOJ Report, *supra* note 7, at 20.

[10] *See, e.g.*, Pooja , Di Giovanna and Pete Peterson, *Public Engagement for Public Safety*, Int'l City Managers Association, PM MAGAZINE, Oct. 1, 2023.

For these reasons, arbitration proceedings should at minimum be open, enabling the public to ascertain whether the administrative disciplinary process, which in most cases will conclude with arbitration, is fair and equitable.[11]

2. Transparency Related to Police Disciplinary Systems Builds Community Trust Which is Essential to Public Safety

> "People in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing."[12]

Research conducted by Amici and others demonstrates that transparency related to police discipline supports and enhances community trust in policing which is essential to public safety.[13] Communities are less likely to engage with law enforcement when they perceive law enforcement as lacking legitimacy.[14] Today, police agencies should be

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[11] Stephen Rushin, *Police Union Contracts*, 66 DUKE L.J. 1191, 1239 (2017); *see also*, Rachel Moran, *Police Privacy*, 10 UC IRVINE L. REV. 153, 185-86 (2019) ("when the public cannot access either records of allegations against officers or investigations into and assessments of those allegations, it cannot fairly judge whether its accountability system is working").

[12] *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 572 (1980).

[13] *See, e.g.,* Ash Gautam, *Balancing Interests in Public Access to Police Disciplinary Records*, 100 TEX. L. REV. 1405, 1409 (2022) ("greater transparency leads to greater public trust in the police, which in turn boosts the legitimacy of police and improves public safety by increasing public compliance and cooperation with law enforcement"); David Trausch, *Real Transparency: Increased Public Access to Police Body-Camera Footage in Texas*, 60 S. TEX. L. REV. 373, 374 (2019) ("transparency is a very important component of building and maintaining trust between police and the communities they serve, safe and secure communities, and a functional criminal justice system"); Tracey L. Meares, *The Path Forward: Improving the Dynamics of Community-Police Relationships to Achieve Effective Law Enforcement Policies*, 117 COLUM. L. REV. 1355, 1359–60 (2017) ([w]hen people believe they cannot rely on legal authorities, they take the law into their own hands and operate according to a "code of the streets") (citing Elijah Anderson, CODE OF THE STREET: DECENCY, VIOLENCE, AND THE MORAL LIFE OF THE INNER CITY, at 66-67 (1999)).

[14] Meares, *supra* note 13, at 1360; *see also*, Rachel Moran, *Police Privacy*, 10 UC Irvine L. Rev. 153, 185-86 (2019) (noting "a strong correlation between trusting the police and willingness to obey or assist police, such that communities with high trust of police may even be safer because of that trust").

"focusing on providing transparency in order to gain public trust and cooperation."[15] Increased transparency can help restore legitimacy and trust.[16]

One of the cornerstone principles of procedural justice is that "people are motivated to comply with the law, cooperate with authorities, and engage with them when they are treated fairly."[17] Transparency is one of the key factors that citizens consider when assessing the fairness of police practices.[18] As such, the public should have access to information that can be used to assess how equitable police are operating in their communities,[19] which includes how police misconduct complaints are handled.

Scholars who study police accountability have argued that public access to information related to police discipline is essential to holding officers accountable.[20] There is evidence to support that the public harm caused by lack of transparency significantly outweighs any potential harm to the privacy of police officers.[21]

But it is not merely scholars who recognize the importance of transparency, police leaders are increasingly recognizing the importance of transparency.[22] In Professor

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[15] Trausch, *supra* note 13, at 384.
[16] Gabriella Leyhane, *To Serve and Protect: An Analysis of Recent Law Enforcement Legislation in Illinois and A Call for Reform*, 66 DEPAUL L. REV. 1133 (2017).
[17] Tracey Meares, *Policing and Procedural Justice: Shaping Citizens' Identities to Increase Democratic Participation*, 111 Nw. U. L. Rev. 1525, 1531 (2017).
[18] *Id.* (noting that "people look for transparency and factuality in decision-making.")
[19] *Id.* ("[t]he public needs to have information that will allow them to make an assessment about whether they feel that the law is applied consistently and appropriately across people and situations").
[20] Rachel Moran & Jessica Hodge, *Law Enforcement Perspectives on Public Access to Misconduct Records*, 42 CARDOZO L. REV. 1237, 1250–51 (2021).
[21] *Id.* (citing Cynthia H. Conti-Cook, *A New Balance: Weighing Harms of Hiding Police Misconduct Information from the Public*, 22 CUNY L. REV. 148, 175 (2019))
[22] Rachel Moran, *Police Privacy*, 10 UC IRVINE L. REV. 153, 188 (2019) (noting "an unusual alliance of journalists, activists, lawmakers, and even police chiefs and police

Moran's research, a significant proportion of police leaders acknowledged that public disclosure of police disciplinary information can increase public trust and lead to improved community relations.[23] To be sure, police departments have accrued cognizable benefits from efforts at promoting transparency.[24]

B. Research Demonstrates that Arbitration is an Imperfect Appellate Mechanism for Police Disciplinary Matters Thereby Requiring Public Observation To Ensure Fairness.

Despite the arbitrator's irresponsible reference in the Award to published research that is critical of arbitration as "pure nonsense,"[25] several accomplished and highly respected scholars have found that arbitration as an appellate mechanism for police discipline is problematic.[26] It is well-documented that arbitrators in police misconduct cases frequently reverse or reduce disciplinary sanctions.[27] There are numerous examples of officers being terminated for committing serious acts of excessive force or gross misconduct, only to be reinstated through arbitration.[28]

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department lawyers is beginning to coalesce around the idea that increased transparency is important in improving public trust.")

[23] Moran & Hodge, *supra* note 20, at 1261.

[24] Kate Levine, *Discipline and Policing*, 68 Duke. L.J. 839, 854 (2019).

[25] *In the Matter of the Arbitration between City of Chicago and Fraternal Order of Police, Chicago Lodge No. 7*, L-MA- 18-016, AAA 01-22-0003-6534, Arb. Ref. 22.372, Supplemental Final Opinion and Award, Jan. 4, 2024 (the "Award").

[26] *See, e.g.* Stephen Rushin, *Police Disciplinary Appeals*, 167 U. Pa. L. Rev. 545 (2019); Mark Iris, *Police Discipline in Chicago: Arbitration or Arbitrary*, 89 J. Crim. L. & Criminology 215 (1998); Joseph Ferguson and Deborah Witzburg, City of Chicago Office of Inspector General, *Review of the Disciplinary Grievance Procedure for Chicago Police Department Members*, May 2021.

[27] *Id.*

[28] Conor Friedersdorf, *How Police Unions and Arbitrators Keep Abusive Cops on the Street*, The Atlantic (Dec. 2, 2014), available at: https://www.theatlantic.com/politics/archive/2014/12/how-police-unions-keep-abusive-cops-on-the-street/383258/ (citing situations in Oakland, Philadelphia, Pittsburgh, Sarasota, Miami, Washington State, and Texas where abusive cops maintained their jobs after initially being fired by the police department).

As such, Loyola University Law Professor Stephen Rushin suggests that arbitration can be an "anti-democratic limitation on public oversight of law enforcement behavior" because it advances the decisions of arbitrators, a third party who may not even be a member of the community, over those of police supervisors or civilian oversight entities.[29] This is certainly the case in Chicago where the panel of five arbitrators called upon to arbitrate grievances lacks diversity: all five are male and at least four of the five are white.[30] At least three of the five members of the panel are apparently not Chicago residents, one of whom lives in another state.[31] Moreover, the methods parties typically employ to select arbitrators create an incentive toward compromise that may systemically lead to reduced accountability such as terminations being downgraded to mere suspensions.[32]

C. HISTORICALLY, CPD HAS STRUGGLED TO ACHIEVE EFFECTIVE POLICE DISCIPLINE, NECESSITATING CONTINUED PUBLIC VIGILANCE.

The challenges of creating and operating an effective system for holding police officers accountable has vexed the city of Chicago since at least the early 1900's. In 1904, concerns about corruption, malfeasance and inefficiency within the police department prompted the mayor of Chicago to bring in a police expert from New York City to

[29] Rushin, *supra* note 11, at 1239.
[30] Statement of Chicago Police Board President Ghian Foreman, Dec. 7, 2023, available at: https://www.chicago.gov/city/en/depts/cpb/provdrs/police_discipline/news/2023/december/president-foreman-s-statement-on-arbitration-of-police-disciplin.html (noting that all five members of the panel are male and at least four are white).
[31] *Id.*
[32] Stephen Rushin, *Police Arbitration*, 74 VAND. L. REV. 1023, 1032 (2021).

investigate police discipline.[33] According to the expert, the problem was Chicago police force suffered from "practically no discipline."[34]

By the middle of the 20th century, there had been little, if any, improvement in the police department's accountability efforts.[35] By then, the Chicago Civil Service Commission was responsible for police discipline and was not very effective at ridding the department of errant officers.[36] In 1961, the city council took responsibility for serious police misconduct matters away from the Civil Service Commission and gave it to the newly empaneled Chicago Police Board because the department had been "having great difficulty in removing allegedly incompetent officers through the channels of the Civil Service Commission."[37] From this auspicious beginning, Chicago Police Board proceedings related to the adjudication of serious misconduct allegations have been open to the public.[38]

In 2015, in the wake of the police accountability crisis arising from the officer-involved shooting of LaQuan McDonald, Mayor Rahm Emanuel empaneled a Police Accountability Task Force to identify potential solutions to the city's decades-long police accountability challenges.[39] The task force engaged in a painstakingly thorough process

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[33] Alexander R. Piper, *Report of Investigation of the Discipline and Administration of the Police Department of the City of Chicago*, Published by the City Club of Chicago, Mar. 17, 1904, at 3 ("Piper Report 1904").
[34] Piper Report 1904, *supra* note 33, at 5.
[35] Donald E. J. MacNamara, *American Police Administration at Mid-Century*, Public Administration Review, Vol. 10, No. 3 (Summer, 1950), pp. 181-189, at 186.
[36] *Id.*
[37] Ralph Knoohuizen and the Chicago Law Enforcement Study Group, *The Chicago Police Board* (1973), at 5 ("Knoohuizen, Chicago Police Board").
[38] Knoohuizen, Chicago Police Board, *supra* note 37, at 32.
[39] Police Accountability Task Force, *Recommendations for Reform: Restoring Trust between the Chicago Police and the Communities They Serve* (Apr. 13, 2016),

seeking input from citizens across the city and ultimately recommending a new oversight structure.[40] It included creating a new civilian investigative agency, now established as the Civilian Office of Police Accountability (COPA) and a new office of the Deputy Inspector General for Public Safety.[41] In October 2016, the democratically elected City Council enacted an ordinance that established these two new oversight entities.[42] By law, COPA has jurisdiction to conduct independent investigations, make findings, and recommend discipline for officers who are accused of certain kinds of police misconduct or involved in serious police-citizen encounters.[43] As will be described in Part II(D) *infra*, COPA investigations can lead to the CPD disciplinary decisions that can be appealed via the arbitration process at issue here.

The fatal shooting of LaQuan McDonald also prompted the Illinois Attorney General to request the United States Department of Justice (DOJ) to initiate an investigation of the Chicago Police Department.[44] The DOJ agreed to do so, and in January 2017, announced its findings, which included that "Chicago's deficient police accountability systems contribute to CPD's pattern or practice of unconstitutional conduct."[45] When the DOJ failed to litigate the issue to seek reform, the Illinois Attorney General stepped in and filed a lawsuit through which, in April 2019, the City and the State

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https://chicagopatf.org/wp-content/uploads/2016/04/PATF_Final_Report_4_13_16-1.pdf, (PATF Report 2016), at 14 (labeling Chicago's police accountability system as "broken" and "riddled with legal and practical barriers to accountability").

[40] *Id.*

[41] PATF Report 2016, *supra* note 39.

[42] Chicago Municipal Code §§ 2-56 and 2-78.

[43] Chicago Municipal Code § 2-78-120.

[44] Mark Guarino, *Illinois attorney general asks Justice Department for civil rights investigation into Chicago police*, WASH. POST, Dec. 1, 2015.

[45] Dept of Justice, Investigation of the Chicago Police Department, Jan. 13, 2017, ("DOJ Findings Report") at 46.

entered into a settlement agreement ("Consent Decree") outlining numerous reforms to be implemented by CPD and the other entities that comprise Chicago's police accountability infrastructure.[46]

D. The Current System for Adjudicating Serious Disciplinary Matters Involving CPD Members Is Highly Complex Requiring Ongoing Public Monitoring and Oversight.

At present, Chicago has one of the most complex police oversight systems in the country, with multiple entities working to promote effective policing and police accountability in various contexts.[47] As graphically depicted in Appendix B, Figure 1, there are at least five separate and distinct government entities that can impact the CPD disciplinary process: COPA, OIG, the Chicago Police Board, the Community Commission for Public Safety and Accountability ("CCPSA"), and the City of Chicago Department of Law.

As outlined in the proceedings below, prior to the most recent round of contract negotiations between the Union and the City, serious misconduct matters were adjudicated before the Chicago Police Board via public proceedings. Although the Illinois Public Relations Act, adopted in 1984, generally provides employees in public unions the right to arbitrate grievances, yet for the past forty years, the Chicago police union conceded and accepted that the Chicago Police Board had exclusive jurisdiction to publicly hear the most serious police disciplinary cases (those involving dismissal or suspension of a year or more). Now the police union has withdrawn that concession. Pursuant to the Arbitration Award,

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[46] *Illinois v. City of Chicago*, No. 1:17-cv-06260 (N.D. Ill.), Dkt. 703-1 ("Consent Decree").
[47] Sharon R. Fairley, *Survey Says: The Development of Civilian Oversight of Law Enforcement Skyrockets in the Wake of George Floyd's Killing*, 31 S. Cal. Rev. L. & Soc. Just. 283, 300 (2022).

CPD officers accused of serious misconduct will now have the option to choose private arbitration over adjudication by the Chicago Police Board (and most officers currently facing serious disciplinary charges have opted for private arbitration.)[48]. Even before this most recent development, the process for imposing serious discipline on CPD officers was quite complex.

As depicted in Appendix B, Figure 2, the process for adjudicating serious misconduct matters involves investigative work, analysis, and decision-making by several City of Chicago entities and decision-makers. There are three City entities with jurisdiction to investigate police misconduct matters: COPA, OIG, and CPD's Bureau of Internal Affairs.[49] Each of these entities conducts an investigation, makes findings, and recommends disciplinary action based on the evidence obtained.[50] Once a misconduct investigation is complete, the matter is referred to CPD leadership for review and concurrence.[51] It is in the CPD Superintendent's discretion to determine whether a disciplinary sanction will be sought, and if so, what that sanction should be.[52] Once the Superintendent has decided to impose serious discipline (a penalty of a suspension of 365 days or more, up to including separation from the Department), the matter is then handed

[48] According to the Chicago Police Board website as of September 22, 2024, motions to transfer cases to arbitration had been filed in at least 13 of the 18 cases currently pending before the Board.
[49] City of Chicago Municipal Code Chapters 2-78 (defining COPA's investigatory jurisdiction) and 2-56 (defining OIG's investigatory jurisdiction); City of Chicago, Office of the Inspector General, A Guide to the Disciplinary Process for Chicago Police Department Members, Sep. 2022, (CPD Discipline Overview) available at: https://igchicago.org/cpd-disciplinary-overview/.
[50] *Id.*
[51] CPD Discipline Overview, *supra* note 30.
[52] CPD Discipline Overview, *supra* note 30.

off to the city's Department of Law to draft and serve the formal charges on the officer.[53] Unless the officer agrees to accept the penalty, proceedings to adjudicate the matter commence.[54] It is then the responsibility of the Department of Law to prosecute the disciplinary matter before the adjudicating body. Pursuant to the Award, an officer will have the option to choose to have their case heard either by the Chicago Police Board, or by an arbitrator. Proceedings before the Chicago Police Board involve a public hearing, followed by decision-making by the 9-member board.[55] Prior to the arbitrator's award, private arbitration was not available for serious misconduct matters.[56] Since the arbitrators' decision, the vast majority of the officers facing serious disciplinary charges have sought to have their cases transferred from the Police Board to private arbitration, as the Chicago Police Board website confirms at the "Recent News" Section.[57]

As will be discussed in Part III(B)(1)(a) *infra*, transparency around the proceedings and decision-making related to police discipline, particularly for the most serious disciplinary matters, is essential for the public to be in a position to assess how fairly and effectively each of the involved entities and decision-makers are fulfilling their respective roles and responsibilities.

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[53] Chicago Discipline Overview, *supra* note 30, at 20.
[54] Chicago Discipline Overview, *supra* note 30, at 12.
[55] Chicago Discipline Overview, *supra* note 30, at 20.
[56] *Chicago John Dineen Lodge #7 v. City of Chicago, et. al*., No. 2024CH00093, Mar. 21, 2024 ("Circuit Court Opinion") at 19 ("The more serious discipline cases, *i.e.* cases where discipline could result in dismissal or suspension in excess of 365 days, have always proceeded before the Police Board in an open forum.")
[57] *See supra* note 48.

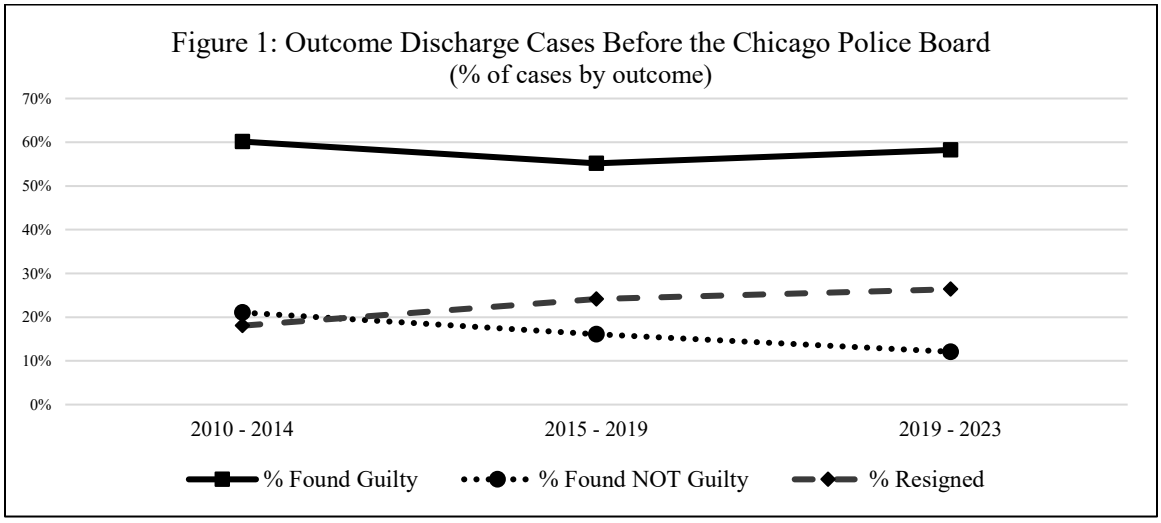
E. In Pushing for Arbitration as an Alternative to the Chicago Police Board, the Union Seeks to Reduce Accountability for CPD Officers.

As DOJ outlined in its report of findings, throughout its history, the Chicago Police Board (the "Board") has not always been effective at holding CPD officers accountable.[58] In fact, according to the DOJ, the Board "has a long history of overturning the Superintendent's misconduct findings and proposed discipline."[59] To be sure, there were significant flaws in the Board's procedures and decision-making that undermined accountability.[60] However, the DOJ also noted, that trend had begun to change in the wake of reforms implemented after the LaQuan McDonald incident.[61]

Over the past 10 years, the union has come to see the Board as a less desirable forum, as the Board's decision-making has continued to trend toward greater accountability. As depicted in Figure 1, among the cases in which the Department had sought to discharge an officer, the percentage of cases in which the Board had found the officer "not guilty" of the alleged misconduct fell from 21% during the five-year period of 2010 to 2014 to 12% during the most recent five-year period of 2019 to 2023.[62] In addition, the percentage of cases in which officers have resigned prior to the resolution of the case before the Board increased from 18% during the five-year period of 2010 to 2014 to 26% to the five-year

[58] DOJ Findings Report, *supra* note 45, at 84.
[59] DOJ Findings Report, *supra* note 45, at 84.
[60] DOJ Findings Report, *supra* note 45, at 9 ("[w]e also found deficiencies with the Chicago Police Board's systems, which impair its ability to be an effective component of CPD's accountability structure).
[61] DOJ Findings Report, *supra* note 45, at 87 (noting that, in 2016, the Board had tended to more frequently uphold the Superintendent's discharge recommendations).
[62] The data was obtained from Chicago Police Board Annual Reports from 2010 to 2023.

period of 2019 to 2023. All in all, in recent years, more officers have felt compelled to resign or been terminated through Board proceedings.



Based on this data, it is abundantly clear why, after decades of agreement to Chicago Police Board proceedings, the Union has recently sought arbitration as an alternative appellate mechanism. This matter was not brought to ensure Due Process rights for officers. Rather, the Union's goal here is to reduce the number of officers to be terminated or subject to lengthy suspensions despite having committed egregious policy violations such as the use of excessive force resulting in death and making false statements. This is yet another important consideration for why a transparent arbitration process is imperative to ensure that arbitration is fair and equitable for all constituencies, not just the officers.

III. ARGUMENT

While arbitration awards are generally afforded a substantial degree of deference, Illinois courts have vacated an arbitration award based on a collective bargaining agreement by applying "the common law doctrine that a court may refuse to enforce

contracts that violate law or public policy."[63] As the Illinois Supreme Court explained, "[w]hen public policy is at issue, it is the court's responsibility to protect the public interest at stake."[64] When assessing whether an arbitration award should be vacated on public policy grounds, courts undertake a two-step analysis to determine: (1) whether there exists a relevant "well-defined and dominant public policy;" and (2) whether the arbitrator's award contravenes the identified public policy.[65] The question at issue here is a matter of law which this court reviews *de novo*.[66] Here, the circuit court correctly concluded that the arbitrator's award requiring private arbitration proceedings for serious disciplinary matters violates a well-defined and dominant Illinois public policy in favor of transparency and accountability related to police discipline, where serious misconduct impacting public safety is charged.[67]

A. THE CIRCUIT COURT CORRECTLY CONCLUDED THAT THE STATE OF ILLINOIS HAS A WELL-DEFINED AND DOMINANT PUBLIC POLICY REQUIRING TRANSPARENCY AND ACCOUNTABILITY RELATED TO POLICE DISCIPLINARY MATTERS THAT CAN BE ASCERTAINED FROM SEVERAL SOURCES OF LEGAL AUTHORITY.

The need for transparency and accountability regarding police discipline is so foundational that support for such policy can be found in numerous sources of Illinois law.

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[63] *City of Chicago v. Fraternal Ord. of Police*, 2020 IL 124831, ¶ 25 ("*Chicago v. FOP 2020*") (citing *American Federation of State, County & Municipal Employees., AFL-CIO v. Department of Central Management Services*, 173 Ill. 2d 299, 306-07, (1996) ("*AFSCME*")).
[64] *AFSCME, supra* note 63, at 333.
[65] *Id.* at 308 (citing *United Paperworkers International Union v. Misco, Inc.*, 484 U.S. 29 (1987)).
[66] *Chicago v. FOP 2020*, *supra* note 63.
[67] Circuit Court Opinion, *supra* note 56, at 15.

1. Illinois courts have recognized a well-defined and dominant public policy of holding law enforcement officers accountable for serious misconduct.

Illinois courts have consistently recognized that effective enforcement of the State's criminal law is an important and compelling public policy.[68] In *Palmateer v. International Harvester Co.*, the Illinois Supreme Court explicitly stated, "[t]here is no public policy more basic, nothing more implicit in the concept of ordered liberty, than the enforcement of a State's criminal code."[69] As outlined *supra* in Part II(A), inherent in the State's public interest in effective enforcement of criminal law, is law enforcement's need to maintain the trust and respect of the public, which can only be achieved through effective police discipline.[70]

Illinois courts have recognized that, without effective discipline, law enforcement agencies risk losing the respect of the public, thereby undermining their ability to enforce criminal law.[71] Illinois courts have also recognized that "[a]n effective process for evaluating fitness of police officers is essential to ensuring public safety and maintaining a reliable, responsible police force."[72] As stated by the Appellate Court of Illinois, Third District, "[d]iscipline is not only vital but absolutely essential to [the police] force of armed men who protect the life and property of the citizens."[73] Illinois courts have enforced Illinois's well-established public policy to promote effective discipline by holding police

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[68] *See, e.g. Palmateer v. Int'l Harvester Co.,* 85 Ill. 2d 124, 132 (1981); *Velez v. Avis Rent A Car System, Inc*., 308 Ill.App.3d 923, 298 (1st Dist. 1999); *Illinois State Police v. Fraternal Order of Police Troopers Lodge No. 41*, 323 Ill.App.3d 322 (4th Dist. 2001).
[69] *Palmateer v. Int'l Harvester Co.,* 85 Ill. 2d 124, 132 (1981).
[70] *Davenport v. Bd. of Fire & Police Comm'rs of City of Peoria*, 2 Ill. App. 3d 864, 869 (3rd Dist. 1972).
[71] *Id.* at at 869-70
[72] *Turner v. Fletcher*, 302 Ill. App. 3d 1051, 1056 (4th Dist. 1999)
[73] *Davenport v. Bd. of Fire & Police Comm'rs of City of Peoria*, 2 Ill. App. 3d at 869

officers accountable for using excessive force,[74] an issue that is at the heart of the matters to be adjudicated via the arbitration that is the subject of this litigation. Illinois courts have also, for example, consistently recognized a public policy interest in weeding out untruthful law enforcement officers.[75]

2. Illinois's well-defined and dominant public policy of transparency and accountability in police disciplinary matters is clearly established by the State's litigation with the City of Chicago.

Illinois case law is not the only legal authority conveying Illinois' public policy in favor of transparency and accountability. The lower court correctly concluded that "accountability and transparency as it relates to the CPD is a well-defined and dominant public policy of the State of Illinois."[76] The Attorney General's complaint which initiated the litigation against the City of Chicago which resulted in the current Consent Decree is clear evidence of Illinois' public policy.[77]

In the Complaint, the Illinois Attorney General clearly and directly expressed the State's public policy goals in seeking reform of CPD. The Attorney General explicitly

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[74] *City of Des Plaines v. Metro. All. of Police Chapter No. 240*, 2015 IL App (1st) 140957, ¶ 24, 30 N.E.3d 598, 605 (1st Dist. 2015); *see also*, *City of Springfield, Ill. (Police Dep't) v. Springfield Police Benev. & Protective Ass'n, Unit No. 5*, 229 Ill. App. 3d 744, 751, 593 N.E.2d 1056, 1060 (1992) (stating that that the use of excessive force by law enforcement officers is against public policy).

[75] *See, e.g. City of Country Club Hills v. Charles*, 2020 IL App (1st) 200546, ¶ 32 (1st Dist. 2020) (noting that keeping untruthful police officers on the force creates liability issues for law enforcement agencies); *Decatur Police Benevolent & Protective Ass'n Lab. Comm. v. City of Decatur*, 2012 IL App (4th) 110764, ¶ 44 (4th Dist. 2012) (finding it would be repugnant to public policy to continue employing an officer who has been found abusive and untruthful); *Vill. of Oak Lawn v. Hum. Rts. Comm'n*, 133 Ill. App. 3d 221, 224 (1st Dist. 1985) (noting that trustworthiness, reliability, good judgment, and integrity are all material qualifications for police work).

[76] Circuit Court Opinion, *supra* note 56, at 17.

[77] *State of Illinois v. City of Chicago*, NDIL, No 17-cv-06260, Docket #1, Paragraph 20, Page 5 (Illinois v. Chicago Complaint)

stated that her purpose in initiating the litigation was to protect "[t]he interest in the health and well-being of Illinois residents – both physical and economic."[78] The Attorney General explained that she was bringing the action to "defend the State of Illinois' quasi-sovereign interest in the prevention of present and future harm to its residents, including individuals who are, have been, or would be victims of the City's unconstitutional law enforcement practices."[79] As the Illinois Supreme Court has unequivocally stated, "[t]here is no public policy more important or fundamental than the one favoring the effective protection of the lives and property of citizens."[80]

In the Complaint, the Attorney General made clear that, to protect the citizens of Illinois, the State needed to take action to address CPD's unlawful policing that went unchecked by the City's deficient disciplinary apparatus.[81] The Attorney General specifically noted that CPD's accountability system was neither consistently holding officers accountable for engaging in misconduct, nor deterring officers from future misconduct.[82] The Attorney General explained that the City's failure to address CPD's use of excessive force and racially discriminatory practices signaled to officers that they could engage in such misconduct with impunity.[83] Further, the Attorney General made clear that State intervention was imperative because, despite the City's own attempts at reform, CPD's pattern of unconstitutional policing had persisted, resulting in an erosion community

[78] Illinois v. Chicago Complaint, *supra* note 77, at 5.
[79] Illinois v. Chicago Complaint, *supra* note 77, at 5.
[80] *Palmateer v. Int'l Harvester Co*., 85 Ill. 2d 124, 132 (1981) (citing the Preamble of the Illinois Constitution).
[81] Illinois v. Chicago Complaint, *supra* note 77, at 5.
[82] Illinois v. Chicago Complaint, *supra* note 77, at 21.
[83] Illinois v. Chicago Complaint, *supra* note 77, at 22.

trust and confidence.[84] The Attorney General also explicitly cited transparency as a key reform requirement among the court-enforceable actions to be sought through a consent decree.[85]

As the circuit court aptly pointed out, the Consent Decree, which was the product of negotiations between the State and the City, clearly reflects the State's public policy goals as to the necessary reforms that must be implemented by CPD.[86] The reforms agreed to by CPD and outlined in the Consent Decree clearly prioritize transparency and accountability and establish an expectation of continued, if not, increased public engagement in accountability procedures.[87]

As identified by the circuit court, there are numerous provisions within the Consent Decree that promote the State's public policy of transparency and accountability regarding police discipline.[88] For example, the Consent Decree requires that "the process for submitting *and pursuing* complaints that allege violations of CPD policy or the law by CPD members is open and accessible for all individuals who wish to file complaints."[89] Further, the Consent Decree states that "[m]eaningful community involvement is imperative to CPD accountability and transparency."[90] The Consent Decree acknowledges the importance of past and ongoing community involvement in police reform and police

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[84] Illinois v. Chicago Complaint, *supra* note 77, at 31.
[85] Illinois v. Chicago Complaint, *supra* note 77, at 31 (noting at Paragraph 202, that "[t]ransparency will also be a key feature of the consent decree that the State seeks").
[86] Circuit Court Opinion, *supra* note 56, at 17.
[87] Consent Decree, *supra* note 46 (The Consent Decree contains a section titled "Accountability and Transparency" which includes numerous provisions related to the handling of misconduct complaints and investigations.)
[88] Circuit Court Opinion, *supra* note 56, at 17-18.
[89] Consent Decree, *supra* note 46, ¶ 421 (emphasis added).
[90] Consent Decree, *supra* note 46, ¶ 422.

accountability and establishes an expectation that community engagement and collaboration on the issues will continue into the future.[91]

The Illinois public policy as reflected in the content of the Consent Decree is well-founded.[92] The public policy need for public participation in disciplinary proceedings is widely recognized.[93] The lack of transparency related to the investigation of police misconduct directly undermines public trust in police agencies.[94] Public monitoring can provide an important source of external accountability.[95]

The Union argues that the Consent Decree cannot be viewed as conveying state-wide public policy because the agreement and its requirements merely create obligations that are specific to Chicago.[96] This argument makes no sense. To be sure, in filing suit against the City, the Attorney General made clear that the State can and does act locally to achieve its broader public policy goals.[97] Further, the Attorney General explicitly referred to the City's unconstitutional policing as a threat to the State of Illinois's public policy and

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[91] Consent Decree, *supra* note 46, ¶ 422.
[92] Moran, *supra* note 22, at 187 (noting that "[p]reventing corruption and ensuring accountability of public servants like police officers are generally recognized as 'strong public interests.'" (citing *Fraternal Order of Police, Lodge No. 5 v. City of Philadelphia*, 812 F.2d 105, 116-17 (3d Cir. 1987).
[93] *See, e.g.* Rushin, *Police Union Contracts*, *supra* note 11, at 1249; *see also*, Evan G. Hebert, *To Protect, Serve, and Inform: Freedom of Information Act Requests and Police Accountability*, 19 TEX. TECH. ADMIN. L.J. 271, 294 (2018) ("In the context of community-police relations, reviewing patterns of civilian complaints and internal investigations can reveal aberrations in police conduct that deviate from acceptable practices.")
[94] Hebert, *supra* note 93, at 272.
[95] Hebert, *supra* note 93, at 294.
[96] Appellant Brief, *Chicago John Dineen Lodge #7 v. City of Chicago, et. al*, No. 1-24-0875 ("Union Brief"), at 26.
[97] Illinois v. Chicago Complaint, *supra* note 77, at 5 ("The Attorney General enforces the public policy of the State of Illinois to secure for all of its residents the freedom from discrimination against any individual because of his or her race, color, or national origin in connection with law enforcement.")

the nondiscriminatory treatment of its residents.[98] The Attorney General also specifically identified the constitutional harm to Illinois residents that results from CPD's systemic failure to hold officers accountable.[99]

3. Illinois courts have recognized a well-defined and dominant public policy in favor of an open, transparent government which applies to police discipline.

A public policy of transparency regarding police misconduct proceedings flows directly from the State's commitment to an open and transparent government. In another matter litigated between the parties, the Illinois Supreme Court held that the destruction of police disciplinary records would violate the State's well-defined public policy favoring the proper retention of government records because "government records are a form of property whose ownership lies with the citizens and with the State of Illinois."[100] In so finding, the court overrode an arbitration award that would have enforced a collective bargaining provision requiring the destruction of Chicago Police Department disciplinary records after a finite period of time.[101] The court found that the destruction of the disciplinary records would be incompatible with Illinois statutory law, including the Local Records Act.[102] In reaching this conclusion, the Supreme Court reiterated the importance of public access to police disciplinary records as expressed by the circuit court:

> Destruction of important public records, such as the policy disciplinary files at issue here, undermines principles of government transparency that are so vital to the rule of law. If the City is to be responsive to the citizenry, it must

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[98] Illinois v. Chicago Complaint, *supra* note 77, at 5.
[99] Illinois v. Chicago Complaint, *supra* note 77, at 13 ("As a direct and proximate result of CPD's systemic failure to provide officers with adequate training, supervision, accountability, and mental health support, numerous Illinois residents have been subjected to a repeated pattern of unconstitutional uses of force.")
[100] *Chicago v. FOP 2020*, *supra* note 63, ¶ 36.
[101] *Id.* at ¶ 42.
[102] *Id.*

> have access to historical police disciplinary and investigative records to make better-informed decisions on policing.[103]

The same principle applies here. Access to information related to police discipline should be publicly available to enable the public to make informed decisions on policing.

4. The Illinois statutory scheme for decertifying police officers reflects a well-defined and dominant public policy regarding transparency and accountability in addressing serious police misconduct.

The Illinois Law Enforcement Training and Standards Board ("ILETSB"), is a statewide body that governs law enforcement certification and decertification.[104] Having a state-managed process for certifying and decertifying officers is essential to "accountability, public trust in law enforcement, and public safety."[105] Like similar boards in other states across the U.S., the ILETSB has the "unique power to protect communities against unethical, discriminatory, or abusive policing."[106] Importantly, the ILETSB has the power to prevent harmful officers from committing further harm where their police agency fails to act.[107]

In 2021, when the Illinois legislature enacted the Illinois Safety, Accountability, Fairness and Equity-Today At (the "SAFE-T Act"), it included provisions that expand the circumstances in which the ILETSB has the discretion to rescind a police officer's state

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[103] *Id.* at ¶ 22.
[104] Illinois Police Training Act, codified at 50 ILCS 705.
[105] Ariel Hairston and Amy Thompson, *Two Years Since Taking Effect, Illinois's New Police Officer Decertification Process is Stalled*, IMPACT FOR EQUITY REPORT, May 2024 ("Impact for Equity Report on Decertification"), available online at: chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://www.impactforequity.org/wp-content/uploads/2024/05/Issue-Brief-SAFE-T-Act-Decertification.pdf
[106] Hilary Rau, Kim Shayo Buchanan, Monique L. Dixon, and Phillip Atiba Goff, *State Regulation of Policing: POST Commissions and Police Accountability*, 11 UC IRVINE L. REV. 1349, 1352 (2021).
[107] Rau, et. al., *supra* note 106, at 1381.

certification or waiver of certification, a requirement for holding a law enforcement position in the state.[108] In particular, the SAFE-T Act made it possible for citizens, not just police administrators, to notify the ILETSB of police misconduct that could be the basis for decertification.[109]

In addition, as outlined by Impact for Equity in their recent report on the status of Illinois' new decertification scheme, when enacting the SAFE-T Act, the Illinois legislature incorporated two mechanisms that promote transparency: annual reporting and new databases on officer conduct.[110]

This statutory scheme is strong evidence of the State's public policy of transparency related to police misconduct and public involvement in proceedings related to holding Illinois police officers accountable.

B. THE CIRCUIT COURT CORRECTLY CONCLUDED THAT PRIVATE ARBITRATION PROCEEDINGS WOULD UNDERMINE ILLINOIS' WELL-DEFINED AND DOMINANT POLICY OF TRANSPARENCY AND ACCOUNTABILITY RELATED TO POLICE DISCIPLINARY MATTERS.

By impairing public engagement in the police disciplinary process, private arbitration proceedings would undermine police accountability in several respects. In *Richmond Newspapers, Inc. v. Virginia*, the seminal case on the right of public access to criminal trials under the First Amendment, the Supreme Court outlined numerous policy reasons why public observation of criminal proceedings are fundamental to democracy.[111] The imperatives supporting the need for public criminal trials are directly relevant in the

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[108] 50 ILCS 705/6.1
[109] 50 ILCS 705/6.3(c)(2) ("Any person may also notify the Board of any conduct the person believes a law enforcement officer has committed.")
[110] Impact for Equity Report on Decertification, *supra* note 105, at 6-7.
[111] 448 U.S. 555 (1980).

context of the arbitration of police disciplinary matters. Analogizing the key factors outlined in *Richmond Newspapers*, open arbitration proceedings have the potential to:

- enhance community understanding of the fairness of the process;
- discourage bias or partiality in the arbitrator's rulings;
- discourage perjury by both law enforcement and lay witnesses;
- allow an opportunity for rebuttal witnesses to identify themselves to counter incorrect testimony;
- provide the arbitrator, parties, and witnesses with outside scrutiny so as to motivate conscientiousness in the performance of their duties;
- instill public confidence in the disciplinary system;
- educate the public about the disciplinary system;
- allow victims an opportunity to observe to assess the fairness of the system; and
- have significant community therapeutic value.

This last point is particularly important. When the misconduct at issue involves an incident of significant public awareness and concern, such as a fatal officer-involved shooting, an open proceeding is tremendously important to the community's ability to gain a collective understanding of what actually happened, that the City investigated the matter fairly and thoroughly, and that the outcome was just under the rules and the law.

As will be outlined below, private arbitration proceedings would violate Illinois public policy in several respects. First, private arbitration proceedings would impair public monitoring and assessment of Chicago's complex police accountability system eroding trust which is essential to public safety. Second, private arbitration proceedings would undermine the effectiveness of the State's decertification system which relies, in part, on citizen information about police misconduct. Lastly, private arbitration proceedings would impede the public's ability to learn about and report police misconduct to ensure the State fulfills its obligation to provide favorable evidence to criminal defendants.

1. Private arbitration proceedings would undermine Illinois' well-defined and dominant public policy of transparency and accountability for police disciplinary matters

a. Private arbitration proceedings would impair the public's ability to assess the effectiveness of the various components of Chicago's police accountability system.

Open arbitration proceedings and reporting are necessary for citizens to be in a position to assess how well the disciplinary system is working such that reforms can be sought where and when necessary.[112] As the Attorney General stated in the Complaint, achieving the kind of "real, lasting reform" that is necessary to rebuild community confidence in CPD requires significant oversight.[113]

The Union argues that the State's public policy in favor of open government does not require real time access to arbitration proceedings, but rather, would be satisfied by the production of the arbitrator's report of findings and discipline pursuant to the Freedom of Information Act.[114] However, access to public reports will not satisfy the public need to observe these important disciplinary proceedings as they occur. Open arbitration proceedings are necessary to assess how well each component of the accountability system is performing.

As discussed *supra* in Part I(D), the process of adjudicating serious CPD misconduct matters is too complicated to be reflected in a report. It involves the substantive work and decision-making of several government entities and various decision-makers. Closed arbitration hearings will undermine the public's ability to provide oversight of and

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[112] *See*, Moran & Hodge, *supra* note 20, at 1251 (noting that public access to misconduct information can "empower civilians, journalists, and advocacy groups to identify both problematic police officers ... and patterns of violence in certain police departments."
[113] Illinois v. Chicago Complaint, *supra* note 77, at 31.
[114] Union Brief, *supra* note 96, at 36.

feedback on the integrity of the carefully crafted disciplinary system that the city of Chicago has created through democratic processes.[115] Lack of sufficient oversight can allow flaws in the disciplinary system to go unchecked allowing improper officer behavior to go undetected or unaddressed.[116] "A robust and well-functioning accountability system in which CPD members are held to the highest standards of integrity is critical to CPD's legitimacy."[117]

Illinois courts have also recognized the importance of quality disciplinary investigations.[118] Public arbitration proceedings will enable citizens to observe the thoroughness and fairness of the investigations conducted by each of the three entities (COPA, BIA, and OIG) based on the evidence presented at arbitration hearings. Historically, lack of transparency regarding the disciplinary investigations conducted by COPA's predecessor agency, the Independent Police Review Authority ("IPRA") and by CPD's BIA contributed to the City's failure to identify and correct unlawful police practices, which engendered public distrust in CPD.[119] Only by being present to hear and see the evidence first-hand, will the public be able to fully appreciate the nature and quality of the case as it is presented to the arbitrator. For example, reading summaries of witness testimony after the fact is no substitute for first-hand observation, particularly when witness

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[115] Spencer, *supra* note 3, at 161 (noting the public's significant interest in holding police officers accountable because the public provides the resources to them as state agents).
[116] Illinois v. Chicago Complaint, *supra* note 77, at 17 (noting the need to properly monitor activity and complaints); *see also*, Illinois v. Chicago Complaint, *supra* note 77, at 26 (noting the need to assess the quality of the work conducted by the investigative oversight agency).
[117] Consent Decree, *supra* note 46, ¶ 420.
[118] *Valio v. Bd. of Fire & Police Comm'rs of Vill. of Itasca*, 311 Ill. App. 3d 321, 331 (2nd Dist. 2000) ("A police department must be able to conduct accurate investigations of its officers engaged in questionable police conduct.")
[119] DOJ Findings Report, *supra* note 45, at 12.

credibility is a key factor in resolving factual disputes that are frequently outcome-determinative in police disciplinary matters.

Second, public arbitration proceedings will enable citizens *and officers* to assess whether CPD is imposing discipline consistently and fairly. It is important that CPD members have confidence in the legitimacy of the system that holds them accountable."[120] Officers, other than the accused, should have the opportunity to see how the system is working so they are better informed and can express their concerns about the system to the City and the Union.

Third, public arbitration will enable citizens to assess how well the Department of Law is managing the process of charging officers and presenting evidence before the arbitrator. For example, there could be cases in which COPA conducts a thorough investigation gathering strong evidence of serious misconduct, but then the Department of Law is delayed in filing charges against the officer such that by the time the case is presented to the arbitrator, the case is weakened, by, for example a lost witness, and the arbitrator finds insufficient evidence to impose discipline. Public arbitration proceedings will create visibility around these kinds of systemic deficiencies because the public will be in a position to observe the case presented to the arbitrator as compared to the case outlined by the COPA investigative report.

The Chicago Department of Law is also inherently subject to conflicting objectives in determining which disciplinary complaints to pursue diligently because that same department is also responsible for defending Chicago police officers in both State and

[120] Consent Decree, *supra* note 46, ¶ 420.

Federal courts in litigation resulting from officers' actions giving rise to civil rights and tort litigation. In light of those conflicting responsibilities, public oversight is especially important.

Lastly, and quite importantly, public arbitration proceedings will enable citizens and officers to observe how fairly and equitably arbitrators are adjudicating these matters. Arbitration proceedings that take place behind closed doors can undermine accountability by shielding decision-making and negotiations.[121] Unlike the broader criminal justice system, in which reviewing courts afford great deference to lower court factual determinations and legal conclusions, arbitrators hearing appeals of CPD disciplinary decisions have essentially *de novo* review.[122] Because their arbitration outcomes are binding and can effectively end the litigation, it is imperative that there be effective oversight of the quality with which these non-representative actors are managing their significant responsibilities.[123] ~~In~~ finding public arbitration proceedings unwarranted or unnecessary, the arbitrator below may merely have sought to avoid this additional scrutiny for himself and his colleagues. There is simply no principled reason why any such arbitrations cannot be conducted in public.

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[121] Spencer, *supra* note 3, at 161 ("[T]he traditional aims of arbitrations being more private in nature may serve as a counterproductive solution through shielding decision making and negotiations from public accountability.")
[122] Rushin, *supra* note 26, at 576-77 (noting that "arbitration on appeal provides officers with an opportunity to relitigate disciplinary matters with little deference to decisions made by police supervisors, city officials, or civilian review boards.")
[123] Spencer, *supra* note 3, at 175 (advocating for public transparency and accountability in arbitration proceedings).

b. Lack of transparency around arbitration, a critical stage in the process for adjudicating serious police misconduct matters, will undermine public confidence in the accountability system.

As outlined above, since 1960 when the Chicago Police Board was created, proceedings related to the adjudication of serious police misconduct matters involving CPD officers have been publicly accessible.[124] As the DOJ noted, transparency related to Chicago Police Board proceedings was intended to enhance the public's and police officers' confidence in the process for handling serious police misconduct allegations."[125] In particular, the openness with which the Board adjudicated matters was viewed as a positive attribute when compared to the opacity of private arbitration.[126] The Union claims this historical degree of transparency is irrelevant because Police Board jurisdiction over these matters will essentially disappear under the new regime. That certainly may be the case, given that the vast majority of officers are likely aware that arbitrators tend to reduce or eliminate the disciplinary action and thus would be unlikely to choose adjudication by the Board over arbitration. Yet, that is even more reason to reinforce the long-standing history of transparency regarding matters that involve serious issues and incidents of great public concern.

2. Private arbitration proceedings would undermine the effectiveness of Illinois' scheme for decertifying officers who commit serious misconduct.

Like other state-wide commissions, the ILETSB can only act to decertify errant police officers when the board is made aware of the misconduct. Thus, providing citizens greater access to information about officer misconduct will enhance the ILETSB's ability

[124] *See* Knoohuizen, Chicago Police Board, *supra* note 38.
[125] DOJ Findings Report, *supra* note 45, at 92.
[126] DOJ Findings Report, *supra* note 45, at 91.

to protect Illinois citizens from poorly performing or incompetent police officers.[127] Closed arbitration hearings would limit the public's access to information about reportable police misconduct.

A citizen's ability to effectively exercise their statutory right to alert the ILETSB to misconduct warranting decertification could be extremely difficult without access to arbitration proceedings. When making these notifications, the ILETSB directs citizens to provide information that might only be made available to them through the observation of arbitration proceedings. For example, among other facts and information, the ILETSB asks citizens to provide:

- The full name, badge number, and physical description of the officer
- The full names, addresses, and physical descriptions of any witnesses
- A concise statement of facts that describe the alleged violation.[128]

Moreover, allowing public access to arbitration proceedings is important because there could be situations where an arbitrator finds an officer has, in fact, committed a violation that would be grounds for decertification, but for whatever reason imposes no discipline. For the decertification system to be effective, it is imperative that those findings make their way to the ILETSB, which citizens or other observing officers will be in a position to do after having witnessed the arbitration proceedings. ILETSB relies on facts generated from local investigations to make its determinations regarding decertification. Private arbitration would limit its access to valuable information.

Moreover, note that, even if the arbitrator finds an officer committed serious misconduct and should be terminated, that officer might still seek employment at a law

[127] Rau, et. al., *supra* note 106, at 1384.
[128] 50 ILCS 705/6.3(d).

enforcement agency somewhere else in the state.[129] It is possible that the officer's agency may not report the termination to the ILETSB. The recent fatal officer-involved shooting of Sonya Massey by a Sangamon County Sheriff's Deputy is a poignant reminder of this. The deputy who killed Ms. Massey had a troubled history of serious misconduct moving between six central Illinois police agencies in just four years prior to being hired by the Sangamon County Sheriff.[130] Yet, for some reason, this information was not shared across the agencies. Citizens who have had the opportunity to witness arbitration proceedings would be in a more informed position to report misconduct worthy of decertification to the state such that the system is not solely reliant on the diligence with which law enforcement agencies fulfill their reporting obligations.

3. Private Arbitration proceedings would undermine the States' ability to comply with its constitutional and statutory obligations to provide favorable evidence to criminal defendants.

As this court has acknowledged, a "police officer's credibility is inevitably an issue in the prosecution of crimes and in the police department's defense of civil lawsuits."[131] The State of Illinois has a constitutional obligation to disclose information or evidence that is favorable to criminal defendants.[132] In *Giglio v. United States*, the U.S. Supreme Court held that the government's failure to disclose evidence that is material to the credibility of a government witness, such as a police officer, is a constitutional violation akin to the failure to disclose exculpatory information as required by *Brady v. Maryland*.[133] In

[129] Ben Grunwald, John Rappaport, *The Wandering Officer*, 129 YALE L.J. 1676 (2020).
[130] Farrah Anderson and Sam Stecklow, *Deputy charged with murder had previous employment issues*, ILL. TIMES, Aug. 1, 2024.
[131] City of Country Club Hills v. Charles, 2020 IL App. (1st) 200546, ¶ 24 (citing *Rodriguez v. Weis*, 408 Ill. App. 3d 663, 671 (2011).
[132] IL. Supreme Court Rule 412.
[133] 405 U.S. 150 (1972).

addition to being a constitutional imperative, this disclosure requirement is codified in Illinois Supreme Court Rule 412.[134]

As this court has stated, "[p]rior allegations of police misconduct may be deemed relevant to impeach an officer on the issues of bias, interest or motive to testify falsely."[135] For example, in *People v. Tyler*, a criminal defendant argued that he deserved a new trial because the government withheld evidence of systemic police misconduct, which evidence was material and likely to change the result at trial.[136] The court agreed with the defendant, but ultimately denied the *Brady* claim because there was no evidence to suggest that the prosecutor was aware of the information.[137] This particular case is relevant to the debate in this matter because it demonstrates that sometimes prosecutors are not made aware of impeachment material related to law enforcement.

Public access to arbitration proceedings is important to ensure that the State is made aware of potential impeachment and exculpatory information that must be disclosed to criminal defendants.[138] This is particularly important for disciplinary matters involving allegations that the officer was untruthful in carrying out their duties by, for example, making false statements in reports or on the witness stand. An arbitrator could hear a case involving such allegations and find that, despite the fact that the officer lied on the job, they should not be disciplined. With private arbitration proceedings, the information about

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[134] 134 Ill. 2d R. 412.
[135] *People v. Cacini*, 2015 IL App. (1st) 130135, ¶ 66 (citing *People v. Porter-Boens*, 2013 IL App. (1st) 111074, ¶ 11.
[136] *People v. Tyler*, 2015 IL App (1st) 123470, ¶ 209-211 (recognizing that the information was material to the prosecution but denying the *Brady* claim on the basis that the law enforcement agency was unaware of the evidence at the time of the prosecution).
[137] *Id.*
[138] *See*, Moran, *supra* note 22, at 192.

the officer's misconduct could be suppressed within the Department. Whereas, with public proceedings the information about the officer's untruthfulness could be observed and conveyed to the appropriate authorities.

C. Private Arbitration Proceedings are Neither Necessary nor Legally Required.

There is neither need nor legal requirement for privacy in arbitration related to police misconduct.[139] The Union cites the Illinois Public Relations Act ("IPLRA") and the Worker's Rights Amendment to the Illinois Constitution to argue that arbitration should be private. Neither supports the Union's position on this issue. The Illinois Public Labor Relations Act was enacted to regulate labor relations between public employers and employees including issues related to conditions of employment, such as discipline, and dispute related to collective bargaining agreements.[140] The Worker's Rights Amendment reinforces the fundamental right of workers to collectively bargain to negotiate working conditions and "to protect their economic welfare and safety at work."[141] Although both sources of law are relevant to the issue of arbitration as a method of dispute resolution, neither requires private arbitration proceedings.[142]

The Union relies on Section 15 of the IPLRA for the proposition that the IPLRA takes precedence over any contrary ordinances, rules or policies and, thus, the IPLRA preference for arbitration should be honored over and above any public policy of transparency.[143] This argument is unavailing. First, there is nothing in the IPLRA that

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[139] Spencer, *supra* note 3, at 175 ("the need for privacy in police arbitrations is non-existent").
[140] 5 ILCS 315/2.
[141] Ill. Const. Art. I, § 25.
[142] *See* 5 ILCS 315; Ill. Const. (1970), Art. I, § 25(a).
[143] Union Brief, *supra* note 96, at 34.

requires private arbitration. Second, the Illinois Supreme Court has already rejected this argument. In *Chicago v. FOP 2020,* that court noted that under such a reading of Section 15, "the public-policy exception established and applied by this court in numerous decisions would cease to exist."[144]

IV. CONCLUSION

The arbitrator's award, which was delivered in a manner indicative of questionable impartiality,[145] was a striking break from the decades-long history of open proceedings related to serious police misconduct for CPD officers. The circuit court correctly concluded that arbitration of serious misconduct cases should be transparent. The prospect of open arbitration proceedings would in no way impair the due process rights of officers in their grievances. However, private arbitration would seriously undermine public oversight of and trust in Chicago's police accountability system, which, if history is any guide, continues to warrant robust community oversight and participation. Moreover, the State of Illinois has a vested interest in the proper adjudication of serious misconduct cases for several important public policy reasons. Such proceedings should remain open to support trust in law enforcement and thereby enhance public safety, to ensure that citizens of Illinois can exercise their power to participate in the State's decertification scheme as the legislature has intended, and to ensure information flows to the State, enabling it to fulfill its constitutional obligations to criminal defendants. The Amici Curiae strongly urge

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[144] Chicago v. FOP 2020, *supra* note 63, ¶47.

[145] In the Award, the arbitrator accused Mayor Johnson and members of the City Council, who collectively voted to reject the arbitrator's initial award, of violating their oath of office and ignoring the rule of law. Award, *supra* note 25, at 61. In addition, the arbitrator referred to the City's rejection of the initial award as "Chicago's Version of 'The Big Lie." *Id.* This commentary was highly inappropriate for a neutral arbiter.

the court to affirm the circuit court ruling requiring that arbitration proceedings of serious Chicago police misconduct cases be held open to the public. Holding otherwise would be a major setback for Chicago police reform and will likely undermine public safety.

Date: October 31, 2024

Respectfully Submitted,

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SUPREME COURT RULE 341(c)

CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages containing the Rule 341(d) cover, the Rule 341(h)(1) table of contents and statement of points and authorities, the Rule 341(c) certificate of compliance, and the certificate of service is 37 pages.

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CERTIFICATE OF FILING AND SERVICE

I certify that on October 31, 2024, I electronically filed the foregoing Amicus Brief In Support of Defendant- Appellees, accompanied by the proposed Amicus Brief, with the Clerk of the Court for the Illinois Supreme Court, using the Odyssey eFileIL system.

I further certify that the other participants in this appeal, named below, are registered service contacts on the Odyssey eFileIL system, and thus will be served via the Odyssey eFileIL system.

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Within five days of acceptance by the Court, the undersigned also states that she will cause thirteen copies of this Amicus Brief to be mailed with postage prepaid to the following address:

Cook County 1st District Appellate Courthouse
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Chicago, IL.

Under penalties as provided by law pursuant to section 1-109 of the Illinois Code of Civil Procedure, I certify that the statements set forth in this instrument are true and correct.

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Appendix A

The Proposed Amici are individuals and organizations that have worked on this policy issue both locally and nationally. They consist of the following individuals and organizations.

a. **Sharon Fairley** is a professor and graduate of the University of Chicago Law School, who has taught at the Law School since 2015. She became a Professor from Practice in 2019. Professor Fairley's teaching responsibilities include criminal procedure, policing, and federal criminal law. Before joining the Law School, Professor Fairley spent eight years as a federal prosecutor with the United States Attorney's Office for the Northern District of Illinois, investigating and trying criminal cases involving illegal firearms possession, narcotics conspiracy, bank robbery/murder, murder for hire and economic espionage, among other criminal acts. She also served as the First Deputy Inspector General and General Counsel for the City of Chicago Office of the Inspector General. In December 2015, following the controversial officer-involved shooting death of Laquan McDonald, Professor Fairley was appointed to serve as the Chief Administrator of the Independent Police Review Authority (IPRA), the agency responsible for police misconduct investigations. She was also responsible for helping create and build Chicago's Civilian Office of Police Accountability (COPA), which replaced IPRA and of which she was the first head. Professor Fairley's areas of academic inquiry focus on criminal justice reform with an emphasis on constitutional policing and police accountability. She frequently writes and speaks about use of force by law enforcement, civilian oversight of law enforcement, and other police reform strategies.

b. **Georgetown Center of Innovation in Community Safety** is a pioneering organization dedicated to promoting safer and more equitable communities through innovative approaches to public safety that emphasize restorative justice, public health and the needs of vulnerable populations. CICS works on programs to train police officers and leads the ABLE Project (Active Bystandership for Law Enforcement), a national program designed to prevent misconduct within law enforcement agencies. CICS is also deeply committed to policy reform and advocacy, working with local, state and national partners to advance policies that reduce racial disparities, protect civil rights and enhance public safety.

c. **Impact for Equity,** formerly Business and Professional People for the Public Interest, has been a catalyst for racial, economic and social justice in Chicago and Illinois since its founding in 1969. It's areas of focus include the criminal justice system, police accountability and housing. Impact for Equality utilizes a combination of legal tools, police research, advocacy, organizing and convening to work towards transformational change. For example, the organization worked for

years in partnership with the Grassroots Alliance for Police Accountability, eventually resulting I the 2021 passage (by the Chicago City Council) of the Empowering Communities for Public safety Ordinance, which created a citywide community oversight commission with responsibility for overseeing systematic reform of the Chicago Police Department and its related disciplinary agencies.

d. **The Chicago Council of Lawyers** is a progressive bar association founded in 1969 to analyze and bring about reform in Chicago's legal systems. For the past 20 years the Council's Civil Liberties Committee has been deeply engaged in monitoring and reforming Chicago police oversight and disciplinary systems, including holding annual panels on that topic, negotiating with City and State legislators on reforms to those systems, advocating for the entry of the Chicago Consent Decree concerning the police department and related agencies, participating in various coalitions over the years to improve those systems and testifying on the present issue before the Chicago City Council.

e. **Mark Iris** is a distinguished expert in police accountability, who received his Ph.D. from Northwestern University. From 1984 to 2004, he served as the Executive Director of the Chicago Police Board, where he monitored hundreds of police misconduct cases, including cases involving former Chicago Police Cmdr. Jon Burge. In this role he also participated in the City of Chicago's First Amendment Consent Decree, ensuring protections for citizens engaged in free speech. Iris' research focuses on use of data in law enforcement. Currently a Lecturer Emeritus in Mathematical Methods in the Social Sciences at Northwestern University, he works with students on projects assisting police departments in cities like New York, Los Angeles and Chicago that assess Early Intervention Systems, which track officers behavior to prevent misconduct. Professor Iris has also contributed extensively to academic discourse, with publications on police discipline, crime hot spots and law enforcement litigation, appearing in journals such as the *Journal of Criminal Law and Criminology* and *Police Quarterly*. He has also served as an expert witness in police- related litigation.

f. **Christy Lopez** joined the Georgetown Law faculty as a distinguished Visitor from Practice in 2017 and became a Professor from Practice in 2020. From 2010 to 2017, Professor Lopez served as a Deputy Chief in Chief in the Special Litigation Section of the Civil Rights Division at the U.S. Department of Justice. Professor Lopez led the Section's group conducting pattern-or-practice investigations of police departments and other law enforcement agencies, including litigating and negotiating settlement agreements to resolve investigative findings. Professor Lopez directly led the team that investigated the Ferguson Police Department and was a primary drafter of the Ferguson Report and negotiator of the Ferguson consent decree. She also led investigations of many other law enforcement agencies, including the Chicago Police Department, the New Orleans Police Department, the Los Angeles Sheriff's Department, the Newark (New Jersey) Police Department, and the Missoula, Montana investigation. Throughout her career, Professor Lopez has been involved in police reform efforts at the state, local,

and federal levels: she has conducted independent reviews of police shootings; served on the Maryland Attorney General's Task Force on Electronic Weapons; was a contributing writer on the Prison Rape Elimination Act (PREA) Commission Report on sexual violence in prisons, jails, and lockups; was an Advisor and Project Fellow on the American Law Institute (ALI) Principles of Law, Policing; co-chaired the DC Police Reform Commission, and has served on various other commissions and working groups related to police standards and practices.

g. **Tracey Meares** is the Walton Hale Hamilton Professor of Law at Yale Law School. Prior to joining the Yale Law School faculty, she was the Max Pam Professor of Law and director of the Center for Studies in Criminal Justice at the University of Chicago Law School. She is a co-editor of the *Annual Review of Criminology.* Professor Meares has been a member of the National Research Council's Committee on Law and Justice. She was appointed by then-Attorney General Holder to serve on the Office of Justice Program's Science Advisory Board and by then-President Obama to the President's Task Force on 21st Century Policing. She was elected as a Fellow to the American Academy of Arts and Sciences in 2019 and also serves as a member of the Joyce Foundation's Board of Directors.

h. **Rachel Moran** is an associate professor and founder of the Criminal and Juvenile Defense Clinic at the University of St. Thomas School of Law. Professor Moran's work focuses on police reform, issues pertaining to police accountability, and public access to records of police misconduct. Before coming to the University of St. Thomas, Professor Moran taught as a Clinical Fellow at the University of Denver Sturm College of Law's Criminal Defense Clinic and served as an adjunct professor at Chicago-Kent College of Law. After law school Professor Moran worked at a private criminal defense firm and as an assistant appellate defender with the Office of the Illinois State Appellate Defender, where she argued numerous criminal appeals in the Illinois Appellate courts and the Illinois Supreme Court.

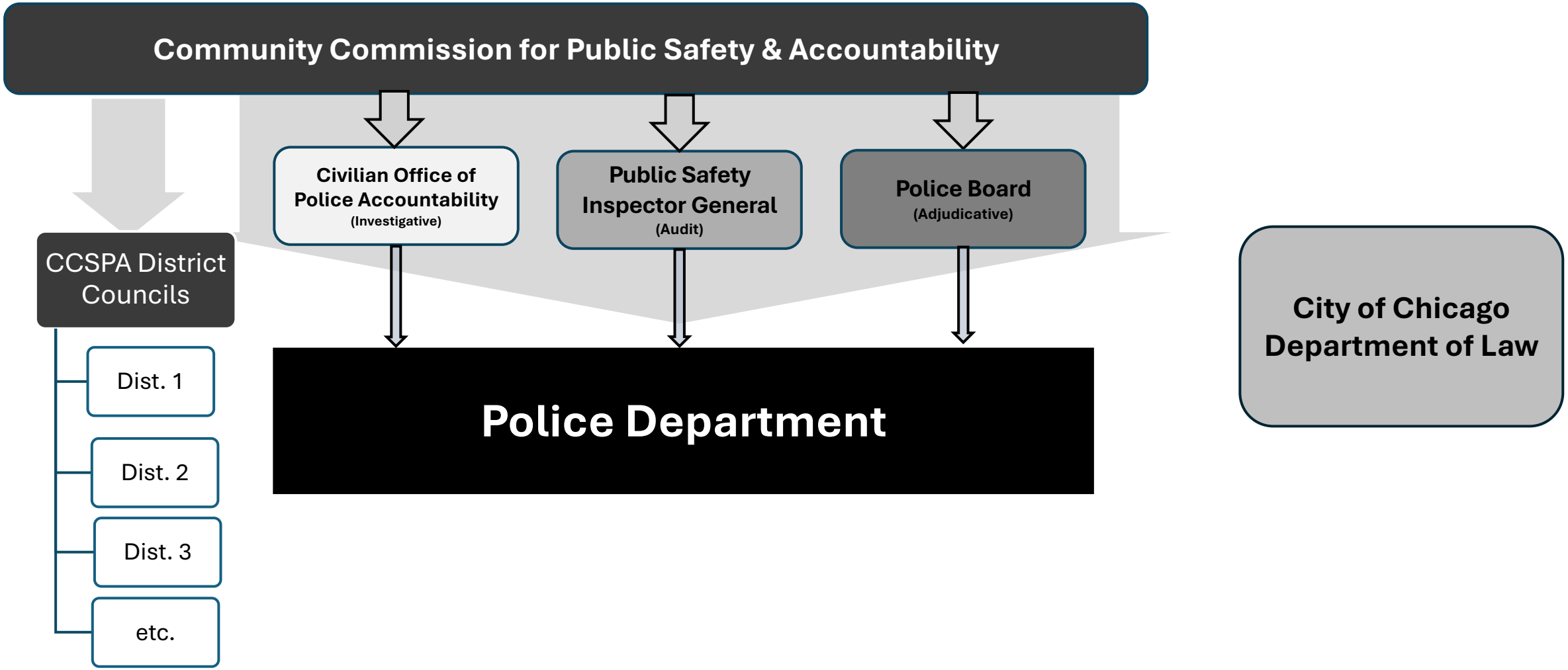
i. **Stephen Rushin** is the Judge Hubert Louis Will Professor of Law at the Chicago Loyola School of Law, where he focuses his research, writing and teaching in law enforcement reform and police accountability. He teaches a class on police accountability and has published an article on the problems with using arbitration in the police accountability system. He has also published a book on the difficulties with federal intervention in American police departments.

j. **Randolph Stone** is a legal scholar and a former Clinical professor of Law at the University of Chicago Law School. His interests include criminal law, juvenile justice, the legal profession, indigent defense, race and criminal justice, evidence and trial advocacy. Before retirement Stone's leadership positions included Director of the Criminal & Juvenile Justice Clinic, Public Defender of Cook County and he was one of five criminal justice leaders who served on Mayor Rahm Emanuel's Police Accountability Task Force in 2015.

k. **Seth Stoughton** is an Associate Professor at the University of South Carolina School of Law and a Core Faculty Member with the Rule of Law Collaborative. His study of policing primarily focuses on the use of force, agency and professional culture, training, law and policy. Professor Stoughton has served as an expert in a number of high profile police cases, including testifying in the criminal prosecution of Derek Chauvin, who was convicted of killing George Floyd. Prio to joining the faculty at South Carolina, Professor Stoughton was a Climenko Fellow and Lecturer on Law at Harvard Law School. Before attending law school, Professor Stoughton was an officer with the Tallahassee Police Department for five years, where he trained other officers, wrote policies to govern the use of new technologies, and taught personal safety and self-defense courses in the community.

End of Appendix A

Appendix B: Figure 1
Chicago Police Accountability System: 2020 to Present



Appendix B: Figure 2

CPD Disciplinary Process Overview (for serious misconduct cases)