SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

DAVID SOARES, District Attorney of Albany County, Representing All Elected District Attorneys; ROBERT J. MASTERS, an Assistant District Attorney in Queens County, Representing All Assistant District Attorneys; and the DISTRICT ATTORNEYS ASSOCIATION OF THE STATE OF NEW YORK, *Plaintiffs,* v. THE STATE OF NEW YORK; ANDREW M. CUOMO, in his official capacity as the Governor of the State of New York; ANDREA STEWART-COUSINS, in her official capacity as the Temporary President of the New York State Senate; JOHN J. FLANAGAN, in his official capacity as the Minority Leader of the New York State Senate; CARL E. HEASTIE, in his official capacity as the Speaker of the New York State Assembly; BRIAN M. KOLB, in his official capacity as the Minority Leader of the New York State Assembly; and the COMMISSION ON PROSECUTORIAL CONDUCT, *Defendants*.	Index No. 906409-18 (Hon. David A. Weinstein)

MEMORANDUM OF LAW OF THE NEW YORK STATE ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, DKT LIBERTY PROJECT, THE LEGAL AID SOCIETY, BROOKLYN DEFENDER SERVICES, THE BRONX DEFENDERS, THE CHIEF DEFENDERS ASSOCIATION OF NEW YORK, THE NEW YORK STATE DEFENDERS ASSOCIATION, ROBERT F. KENNEDY HUMAN RIGHTS, AND DISCOVERY FOR JUSTICE AS *AMICI CURIAE* IN SUPPORT OF DEFENDANT CARL E. HEASTIE'S CROSS-MOTION FOR SUMMARY JUDGMENT

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Amici curiae the New York State Association of Criminal Defense Lawyers, the National Association of Criminal Defense Lawyers, DKT Liberty Project, the Legal Aid Society, Brooklyn Defender Services, the Bronx Defenders, the Chief Defenders Association of New York, the New York State Defenders Association, Robert F. Kennedy Human Rights, and Discovery for Justice, by their undersigned counsel, respectfully submit this brief in opposition to Plaintiffs' motion for summary judgment and in support of Defendant Carl E. Heastie's cross-motion for summary judgment.

INTEREST OF *AMICI CURIAE*

The National Association of Criminal Defense Lawyers ("NACDL") is a nonprofit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct. NACDL was founded in 1958, and has a nationwide membership of many thousand direct members, and up to 40,000 members when affiliates are included. NACDL's members include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. NACDL is the only nationwide professional bar association for public defenders and private criminal defense lawyers. NACDL is dedicated to advancing the proper, efficient, and just administration of justice.

The New York State Association of Criminal Defense Lawyers ("NYSACDL") is a not-for-profit corporation with a subscribed membership of more than 800 attorneys, including private practitioners, public defenders, and law professors, and is the largest private criminal bar in the State of New York. It is a recognized state affiliate of NACDL which, like that organization, works on behalf of the criminal defense bar to ensure justice and due process for those accused of crimes. Each year, NACDL and NYSACDL file numerous briefs as *amicus curiae* in the United States Supreme Court and other federal and state courts, seeking to provide *amicus* assistance in

cases that present issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system as a whole.

DKT Liberty Project was founded in 1997 to promote individual liberty against encroachment by all levels of government. The Liberty Project is committed to defending privacy, guarding against government overreach, and protecting every American's right and responsibility to function as an autonomous and independent individual. The Liberty Project espouses vigilance of government overreach of all kinds, but especially prosecutorial overreach. The Liberty Project has filed several briefs as *amicus curiae* with state and federal courts and with the United States Supreme Court on issues involving constitutional rights and civil liberties.

The Legal Aid Society ("LAS") is the nation's oldest and largest legal services and social justice organization and is an indispensable component of the legal, social and economic fabric of New York City. LAS operates three major practices – Criminal, Civil and Juvenile Rights. As the primary provider of indigent criminal defense services in New York City, the Society represents well over 200,000 people annually in trial, appellate, and post-conviction matters. Recently, LAS created a Wrongful Conviction Unit to bolster our representation of the most marginalized amongst us and to combat official misconduct in our criminal legal system. Our breadth of representation and experience makes us keenly aware of the unrelenting power prosecutors possess, and the devastating effect that power has on poor Black and Brown New Yorkers. Our mission includes fighting discrimination and unfairness in the criminal legal system and defending the constitutional rights of all persons accused of crimes. Consequently, LAS is deeply concerned with the unchecked power of prosecutors and the real harms that stem from a system in which the most powerful player is without accountability.

Brooklyn Defender Services ("BDS") is a public defense organization that provides criminal defense and related representation to approximately 30,000 Brooklyn residents each year who cannot afford an attorney. It is on the basis of our first-hand experience representing thousands of New Yorkers accused of crimes, some of whom were or will be impacted by serious prosecutorial misconduct, that BDS seeks leave to proffer its perspective as *amicus curiae* to urge this Court to reject prosecutors' challenge to a commission New Yorkers have deemed necessary to curtail misconduct, and to promote fairness and transparency in the criminal justice system.

The Bronx Defenders ("BXD") is a not-for-profit provider of innovative, holistic, client-centered criminal defense, family defense, immigration defense, civil legal services, and social work support to indigent people in the Bronx. The BXD's staff of almost 400 represent approximately 22,000 individuals each year and reach hundreds more through outreach programs and community legal education. BXD engages in extensive law reform and policy work centered around protecting and expanding the rights of our client communities and is committed to promoting the fairness of the criminal justice system and defending the constitutional rights of all persons accused of crimes.

The Chief Defenders Association of New York is a membership organization of appointed public and conflict defenders, executive directors of nonprofit indigent defense offices, and assigned counsel administrators throughout the state. It advocates for executive and legislative policy measures that will promote the fair treatment of indigent criminal defendants.

Founded in 1967, **the New York State Defenders Association** ("NYSDA") is a not-for-profit membership association of more than 1,700 public defenders, legal aid attorneys, 18-b counsel and private practitioners throughout the state. With funds provided by the state of New York, NYSDA operates the Public Defense Backup Center, which offers legal consultation,

research, and training to nearly 6,000 lawyers who serve as public defense counsel in criminal cases in New York. The Backup Center also provides technical assistance to counties that are considering changes and improvements in their public defense systems.

Robert F. Kennedy Human Rights is a nonprofit organization that was founded in 1968 to carry on Robert F. Kennedy's commitment to creating a more just and peaceful world. The organization works alongside local activists to ensure lasting positive change in governments and corporations. Its team includes leading attorneys, advocates and entrepreneurs united by a commitment to social justice. Whether in the United States or abroad, the organization's programs have pursued strategic litigation on key human rights issues, educated millions of students in human rights advocacy and fostered a social good approach to business and investment. Its advocacy and litigation program seeks to ensure that the United States respects, protects, and fulfills its international human rights obligations with respect to its criminal justice system, including ending prosecutorial misconduct, eliminating discriminatory police practices, curbing the over reliance on incarceration, and eliminating unjust and inefficient cash bail and pre-trial detention policies that disproportionately affect the poor and communities of color. Robert F. Kennedy Human Rights has organized thematic hearings before the Inter-American Commission on Human Rights on impunity for police killings and excessive use of force by the police in the United States. In addition to holding the United States accountable before international human rights mechanisms, Robert F. Kennedy Human Rights works with domestic activists to reform the criminal justice system via policy change, innovative disruptions that bolster the case for reform, and public engagement and mobilization.

Discovery for Justice is a community-based organization that primarily focuses on nonpartisan education and advocacy on improvements in the law, the legal system, and the

administration of justice. In line with our mission on improving the administration of justice, we fully support the creation of the Commission on Prosecutorial Conduct. If the goal of the criminal justice system is to hold citizens responsible for their actions, we must create accountability for those who are dispensing this justice. No one is above the law. For New York to enforce this creed, we must create the Commission on Prosecutorial Conduct.

This case presents a question of great importance to *amici* and the clients many of their attorneys represent. Many of *amici*'s members frequently litigate against the prosecutors whose conduct the newly enacted Commission on Prosecutorial Conduct will review. The organizations' members—and their clients—are unfortunately all too familiar with the frequency of prosecutorial misconduct and the consequences that follow for criminal defendants. In order to guarantee the just and fair administration of justice, *amici* have a strong interest in ensuring that the Commission will be able to pursue its critical work, and that the Commission's important mandate is not threatened by questions about that body's constitutionality.

SUMMARY OF ARGUMENT

Prosecutors exercise awesome power in our criminal justice system. The abuse of that power has devastating consequences for the individual defendants who are unethically investigated, inappropriately charged, pressured to accept a plea, convicted, or incarcerated—and for the rule of law. For far too long, there has been an absence of any meaningful method of ensuring accountability for prosecutorial misconduct.

Courts therefore should be keen to further innovative efforts to police, remedy, and deter prosecutorial misconduct. Defendants have established the sound constitutional basis for the Commission, and *amici* fully support Defendants' arguments on why the Commission on Prosecutorial Conduct (the "Commission") does not implicate any separation of powers concerns. *Amici* write separately, however, to underscore that the Legislature acted well within its authority

in establishing the Commission—and had every reason to do so, given the reality that prosecutors rarely face accountability for even the most egregious misconduct.

The New York State Legislature's decision to establish the Commission represents an admirable effort to devise a new—and more effective—means for holding prosecutors to account for misconduct. The Legislature has considerable authority to regulate New York's prosecutors in this way. Plaintiffs claim that the Commission usurps prosecutors' exercise of discretion. But the Commission does not withdraw or limit prosecutors' ability to exercise discretion in any way. Instead, the Commission merely creates an oversight mechanism to enforce existing law if prosecutors abuse their discretion.

Indeed, Plaintiffs' motion for summary judgment makes plain that their true concern is that the Commission will chill *how* prosecutors choose to exercise their discretion. They cite the United States Supreme Court's decision in *Imbler v. Pachtman*—which imported the doctrine of prosecutorial immunity into federal Section 1983 actions. But it would be within the Legislature's authority to abrogate entirely, through statute, any common law immunities that prosecutors traditionally have enjoyed from civil liability for misconduct. Thus, the Legislature's determination to take the more limited step of creating a mechanism to evaluate and police misconduct and enforce existing limits on prosecutors' discretion is well within the Legislature's authority. Plaintiffs cannot invoke cases applying the doctrine of prosecutorial immunity in an effort to claim that the Legislature has impinged upon a purportedly sacrosanct prosecutorial function. To the contrary, the state has a fundamental interest in the integrity of the offices of the District Attorney, and those offices are plainly subject to comprehensive state regulation. In an effort to ensure that prosecutors are held accountable for misconduct, the New York State

Legislature has now twice passed, and Governor Cuomo has signed, legislation establishing the Commission. That policy choice should be respected.

The Legislature was fully justified in believing that the Commission is necessary to ensure that prosecutors are held accountable. Evidence from across the country over the past several decades makes clear—beyond doubt—that existing mechanisms for holding prosecutors accountable are either rarely invoked or lack the ability to meaningfully deter and police misconduct. Internal disciplinary systems, bar referral and professional disciplinary bodies, reversal of criminal convictions, and judicial efforts to curb misconduct through civil and criminal liability have each failed to punish misconduct or deter future misconduct. Study after study has made clear that only a mere handful of prosecutors ever face any consequences for misconduct.

The record in New York is no different. Recent studies confirm that, despite dozens of demonstrated cases of misconduct, prosecutors rarely (if ever) are held accountable for misconduct. The result is that prosecutors otherwise inclined to engage in misconduct are only further emboldened to do so—knowing that they are unlikely to face consequences. Given the importance of conviction rates to advancement, even the majority of prosecutors otherwise inclined to act ethically and honestly may face pressure to engage in or cover-up misconduct if they know they will not be punished.

In the face of the mounting evidence that existing methods of prosecutorial accountability have failed, the Legislature understandably concluded that the Commission is necessary to police misconduct and protect the rule of law. This Court should deny Plaintiffs' motion for summary judgment, grant Defendants' cross-motion for summary judgment, and uphold the Commission's constitutionality.

ARGUMENT

I. The Legislature, Empowered To Regulate State Prosecutors, May Exercise Its Policy Judgment To Hold Prosecutors Accountable For Misconduct Or Otherwise Abrogate Traditional Immunities.

One of Plaintiffs' primary arguments against the Commission's constitutionality is their claim that the mere "existence" of the Commission will interfere with prosecutors' discretion and thereby chill prosecutors' exercise of their core constitutional function. *See* Pls.' Mem. Supp. Mot. for Summ. J. at 19 (Dkt. No. 76) ("Pls.' Mem. Supp."). But in holding prosecutors accountable for how they have elected to exercise their discretion when they have engaged in misconduct, the Commission in no way withdraws or limits prosecutors' ability to exercise that discretion in the first instance. And, in any event, any chilling effect that additional oversight may have on prosecutors who would otherwise engage in misconduct is a perfectly appropriate exercise of the Legislature's authority to abrogate common law immunities and regulate prosecutors' conduct.

To support their claim that the Commission unconstitutionally impinges on prosecutors' constitutional authority, Plaintiffs rely on cases holding that the legislature cannot wholly transfer the powers and duties of an elected constitutional officer to an appointed officer.[1] These cases hardly immunize prosecutors' exercise of their constitutional duties from any oversight. Instead,

[1] *See, e.g.*, *Matter of Haggerty v. Himelein*, 89 N.Y.2d 431, 436 (1997) (holding that the District Attorney's powers may not be given to the Attorney General without proper authority); *Schumer v. Holtzman*, 60 N.Y.2d 46, 53 (1983) (holding that a District Attorney lacked the authority to unilaterally transfer her full power and discretion to an independent prosecutor); *People v. Di Falco*, 44 N.Y.2d 482, 487 (1978) (holding that a special prosecutor could not assume the District Attorney's power to bring grand jury cases "without express legislative authority"); *People ex rel. Wogan v. Rafferty*, 208 N.Y. 451, 456-57 (1913) (explaining that the transfer of "the substance of [an] office itself" is "not a legitimate exercise of the right to regulate the duties or emoluments of the office," but rather "an infringement upon the constitutional mode of appointment" (quotation marks omitted)); *People ex rel. McEwan v. Keeler*, 64 How. Pr. 478, 482-83 (N.Y. Gen. Term 1883) (distinguishing between "a mere regulation of the sheriff's duties and powers," which is "permissible under the constitution," and the "transfer[]" of the office's "duties and powers to an appointed officer" which would "infringe the meaning of that instrument").

these decisions merely stand for the more narrow—and distinguishable—proposition that the legislature cannot transfer a constitutional officer's job to another official in all but name.

Moreover, it is simply inaccurate to claim that Article 15-A, which creates the Commission, removes or transfers prosecutors' discretionary authority to the Commission, or that the Commission's function is to exercise such discretionary authority in lieu of prosecutors. Article 15-A in no way transfers prosecutors' powers or duties. With or without the Commission, prosecutors have been granted the same amount of discretion; Article 15-A merely establishes a Commission that will monitor for instances of misconduct in the exercise of that discretion.

In fact, considerable legal restrictions already govern prosecutors, and prosecutors therefore are *already* subject, at least in theory, to some version of the very oversight which Plaintiffs complain will restrict their discretion. "[P]rosecutorial discretion," while "broad," "is not unfettered." *Wayte v. United States*, 470 U.S. 598, 608 (1985) (internal quotation marks omitted). The Constitution itself places certain limitations on prosecutors. Prosecutors are subject to *Brady* disclosure requirements. *Brady v. Maryland*, 373 U.S. 83 (1963). The guarantees of equal protection and due process also place substantive limitations on prosecutorial authority, as "the decision to prosecute may not be deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification, including the exercise of protected statutory and constitutional rights." *Wayte*, 470 U.S. at 608 (internal quotation marks omitted). Nor may a prosecutor, during trial, make remarks so prejudicial as to deny the accused due process of law, *Donnelly v. DeChristoforo*, 416 U.S. 637, 643-44 (1974), or knowingly present false testimony to obtain a conviction, *Napue v. Illinois*, 360 U.S. 264, 269-70 (1959). And the Fifth Amendment prohibits prosecutors from commenting on the accused's decision not to testify. *Griffin v. California*, 380 U.S. 609, 619 (1965).

Beyond these constitutional constraints, prosecutors are also bound, of course, by the Legislature's enactment of the criminal code. *People v. Cajigas*, 19 N.Y.3d 697, 702 (2012) (finding evidence of legislative intent to afford prosecutors discretion through the classifications of offenses). A court also may dismiss a prosecution for insufficient evidence—which might suggest that a charging decision was unsound. *Cf. People v. Biggs*, 1 N.Y.3d 225, 229 (2003) (explaining that "dismissal of a count due to insufficient evidence is tantamount to an acquittal for purposes of double jeopardy and protects a defendant against additional prosecution for such count"). And judges also have inherent authority to address prosecutorial misconduct—*Brady* violations being just one example. *See, e.g.*, *Martinez v. City of Chicago*, No. 09 C 5938, 2014 WL 6613421, at *5-7 (N.D. Ill. Nov. 20, 2014) (imposing sanctions under the court's inherent authority against individual prosecutor and his office for producing hundreds of documents after "recklessly adher[ing] to the position" that those documents "did not exist"), *aff'd*, 823 F.3d 1050 (7th Cir. 2016).

Thus, despite Plaintiffs' claim that their discretion is being curtailed, the work of the Commission is hardly unprecedented. Article 15-A does not add to or alter existing restrictions on prosecutorial discretion. Rather, it merely establishes an oversight body through which existing limitations on prosecutors' discretion can consistently be enforced, and which may hold prosecutors accountable when they abuse their authority and violate currently applicable law.

Because the legal requirements the Commission will enforce are not new, it is clear that Plaintiffs' *actual* concern is that the Commission will cause prosecutors to reconsider how they choose to exercise their powers. They argue that the Commission's "existence will chill, and create the appearance of chilling, unpopular or aggressive investigative and prosecutorial decisions," and they cite *Imbler v. Pachtman*, 424 U.S. 409, 422-23 (1976)—the Supreme Court's canonical

decision discussing prosecutorial immunity. *See* Pls.' Mem. Supp. at 19-23. Plaintiffs' true aim appears to be to resist the additional scrutiny that will follow from the establishment of a Commission empowered to enforce existing legal and ethical requirements placed on prosecutors.

But if that is Plaintiffs' claim, there can be no doubt that the question of how to police prosecutors' exercise of their discretion is a policy decision appropriately entrusted to the Legislature. In fact, the very case law Plaintiffs cite demonstrates that the Legislature is specifically charged with the regulation and oversight of prosecutors. The state has "a fundamental and overriding interest in ensuring the integrity and independence of the office of district attorney." *Matter of Hoerger v. Spota*, 21 N.Y.3d 549, 553 (2013). The Legislature may decide exactly how to preserve this integrity and independence. There can be no dispute that "[t]he office of district attorney is plainly subject to comprehensive regulation by state law." *Id.* As the New York Court of Appeals has explained: "The Constitution provides for the offices of Governor, Attorney-General, and District Attorneys, but it does not identify particular—let alone exclusive—prosecutorial duties or allocate the responsibility among them. Rather, the delineation of law enforcement functions has consistently been left to the Legislature." *Johnson v. Pataki*, 91 N.Y.2d 214, 225 (1997). While prosecutorial duties are well-established as a statutory matter, "[t]he authority of the legislature to regulate the duties of constitutional officers to some extent has frequently been recognized by the courts." *People ex rel. Wogan v. Rafferty*, 208 N.Y. 451, 456 (1913). How prosecutors may be held accountable for misconduct is a question for the Legislature to answer.

For similar reasons, Plaintiffs' invocation of *Imbler* and the judicial policy concerns against chilling prosecutors' discretion that animate the doctrine of absolute prosecutorial immunity are inapt. *See* 424 U.S. at 425-26. The Supreme Court has made clear that prosecutorial immunity is

a common law doctrine. *Id.* at 422-24. As a common law doctrine, the Legislature is fully empowered to abrogate that immunity if it sees fit. "[I]t is always within the power of the Legislature, subject to constitutional limitations, to change the common law rule or to create exceptions to it." *People v. Dethloff*, 283 N.Y. 309, 314 (1940). This power is no different when it comes to common law immunities. "[P]ersonal common-law immunities—which Congress can lawfully override if it chooses to do so—must bend to the congressional will." *In re Perry*, 882 F.2d 534, 543 (1st Cir. 1989); *see also Sharapata v. Town of Islip*, 56 N.Y.2d 332, 336 (1982) (explaining that the legislature may abrogate sovereign immunity if it wishes).

Indeed, courts have consistently recognized that legislatures have the authority to abrogate as a matter of policy common law personal immunities, like legislative and judicial immunity, which have been established to protect officers' exercise of discretion, if the legislature chooses to do so. *Pulliam v. Allen*, 466 U.S. 522, 543 (1984) ("[I]t is for Congress, not this Court, to determine whether and to what extent to abrogate the judiciary's common-law immunity."); *see also Chappell v. Robbins*, 73 F.3d 918, 922 (9th Cir. 1996) ("[W]e must decide whether Congress even has the power to abrogate legislative common-law immunity. We agree that it can."). Because prosecutorial immunity has been construed as serving the same policy goals as legislative and judicial immunity, *see, e.g.*, *Imbler*, 424 U.S. at 422-23, there can be no doubt that if a legislature so chooses, it can abrogate prosecutors' common law immunity.

Accordingly, Plaintiffs' attempts here to invoke the policy considerations that underlie prosecutorial immunity do not demonstrate that the Legislature has exceeded its constitutional role in establishing the Commission. The Legislature has determined that the establishment of the Commission best serves its "overriding" interest in the "integrity" of New York's District Attorneys. *Matter of Hoerger*, 21 N.Y.3d at 553. This the Legislature is authorized to do. *Courts'*

reluctance to chill prosecutors' discretion does not bear on the *Legislature's* authority to properly police that exercise of discretion.

II. Because Existing Mechanisms Fail To Hold Prosecutors Accountable For Misconduct, It Is Unsurprising That The Legislature Concluded The Commission Is Necessary.

The New York Legislature had ample reason for choosing to exercise its authority in an effort to police and prevent prosecutorial misconduct. Prosecutors are among the most influential actors in the American criminal justice system. Because prosecutors wield immense power, when prosecutorial misconduct occurs, it has devastating consequences both for individual defendants and for the rule of law. *See* Bidish Sarma, *Using Deterrence Theory to Promote Prosecutorial Accountability*, 21 Lewis & Clark L. Rev. 573, 579 & n.19 (2017). And when an innocent person is convicted of a crime that did occur, the real perpetrator will remain unpunished—free to potentially commit additional crimes against other victims. Yet, experience has demonstrated that, nationwide, prosecutors are rarely held accountable—even for egregious misconduct. Studies show the same specifically in New York: prosecutors rarely face consequences for misconduct. Put bluntly, "there are currently no effective deterrents for prosecutorial misconduct." Rachel E. Barkow, *Organizational Guidelines for the Prosecutor's Office*, 31 Cardozo L. Rev. 2089, 2093 (2010).

Given this experience, it is entirely unsurprising that the Legislature created the Commission. The Commission is necessary in order to consistently identify, address, and deter prosecutorial misconduct in New York. In light of these realities, this Court should uphold the Commission's constitutionality.

A. That Prosecutors Rarely Face Accountability For Misconduct Is A Widespread, Long-Standing, And Well-Documented Problem.

Countless studies examining accountability for prosecutorial misconduct point to the undeniable shortcomings of the current system. The existing mechanisms of accountability are rarely used, and even when they are, discipline is unlikely to follow.

For one thing, prosecutors' offices' internal disciplinary systems—where they even exist—have not proven effective. Such internal disciplinary systems "offer very little transparency" and the evidence that has been gathered to date "suggests they function poorly and fail to hold prosecutors to account." Sarma, *Using Deterrence Theory*, *supra*, at 593. This is unsurprising. Prosecutors often are reluctant to police their own colleagues. *See* Innocence Project, *Prosecutorial Oversight: A National Dialogue in the Wake of* Connick v. Thompson 17 (Mar. 2016).[2]

Nor do external disciplinary systems, like those maintained by bar organizations or state judiciaries, fare any better. These external systems rarely hear cases against prosecutors. And even more rarely do they impose discipline on prosecutors. "[V]irtually every commentator has criticized the absence of professional discipline of prosecutors, even in cases of obvious and easily provable violations and even in cases in which a court issued a stinging rebuke of the prosecutor." Bennett L. Gershman, *Bad Faith Exception to Prosecutorial Immunity for* Brady *Violations*, Amicus, Harv. Civ. Rights-Civ. Liberties L. Rev., at 34 (Aug. 10, 2010); *id.* at 31 n.157 (citing various commentators).[3]

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[2] https://www.innocenceproject.org/wp-content/uploads/2016/04/IP-Prosecutorial-Oversight-Report_09.pdf.

[3] https://harvardcrcl.org/wp-content/uploads/sites/10/2010/08/Gershman_Publish.pdf.

This is a longstanding problem, as multiple studies over the past forty years have shown. *See* Bidish Sarma, *Private: After 40 Years, Is It Time to Reconsider Absolute Immunity for Prosecutors?*, ACSBlog (July 19, 2016) (reviewing the studies).[4] As just one example, in 1987, Professor Richard Rosen examined several compilations of ethics decisions and other published sources and surveyed each state's bar counsel in an effort to determine how frequently prosecutors who violated *Brady* faced professional discipline. *See* Richard A. Rosen, *Disciplinary Sanctions Against Prosecutors for* Brady *Violations: A Paper Tiger*, 65 N.C. L. Rev. 693, 718-19 (1987). His review uncovered only nine total instances in which discipline was even considered. Thirty five states reported in response to Professor Rosen's inquiries that no complaints had *ever been filed*. *Id.* at 719-31.

Criminal or civil liability for misconduct is also a rarity. By definition, any effort to bring criminal charges against prosecutors must be initiated by other prosecutors. Thus, "the leveling of criminal charges against a prosecutor for conduct occurring in the course of a prosecution is all but unheard of." Malia N. Brink, *A Pendulum Swung Too Far: Why the Supreme Court Must Place Limits on Prosecutorial Immunity*, 4 Charleston L. Rev. 1, 27 (2009). Indeed, one study in 2010 found that, in the prior twenty five years, only two criminal prosecutions had been brought against prosecutors related to deliberate *Brady* violations. *See* Gershman, *supra*, at 32-33. In both cases the prosecutor was acquitted. *Id.* Put otherwise, "prosecution for malfeasance is all-but-unheard-of and always unsuccessful in the rare instances in which it occurs." James S. Liebman, *The Overproduction of Death*, 100 Colum. L. Rev. 2030, 2121-22 (2000). In 2013, one former prosecutor—who had since become a Texas state court judge—was convicted, after pleading

[4] www.acslaw.org/expertforum/after-40-years-is-it-time-to-reconsider-absolute-immunity-for-prosecutors/.

guilty, for failing to disclose evidence that sent an innocent man to prison for 25 years. But that conviction was made "newsworthy and novel" only because it was an instance in which "a prosecutor was *actually punished* in a meaningful way for his transgressions." Mark Godsey, *For the First Time Ever, a Prosecutor Will Go to Jail for Wrongfully Convicting an Innocent Man*, Huffington Post (Nov. 8, 2013)[5]; *see also* Sarma, *Using Deterrence Theory*, *supra*, at 586 & n.53 (referring to this instance as among the few instances in which a "prosecutor has ever gone to jail for deliberate constitutional violations").

And civil liability is also rarely available. Civil litigants must overcome nearly insurmountable hurdles erected by case law, including that of prosecutorial immunity. *See e.g.*, Bruce Green & Ellen Yaroshefsky, *Prosecutorial Accountability 2.0*, 92 Notre Dame L. Rev. 51, 59 (2016). Civil liability against prosecutors' offices for insufficiently or improperly training prosecutors is even more difficult to invoke. And, in the unlikely event the prosecutor is found liable for misconduct, the county or state that employs that prosecutor would almost certainly indemnify him or her for damages. *See Bd. of Cty. Comm'rs v. Brown*, 520 U.S. 397, 436 (1997) (Breyer, J., dissenting).

Finally, individual review of criminal convictions does not provide a meaningful opportunity to hold prosecutors accountable for misconduct or to deter future misconduct. When reviewing a particular conviction, courts understandably are focused on whether the misconduct had a prejudicial effect on the specific prosecution. Reversal is therefore uncommon, and individual review of cases thus provides little to no deterrent effect. *See, e.g.*, Sarma, *Using Deterrence Theory*, *supra*, at 584-85; Daniel S. Medwed, Brady*'s Bunch of Flaws*, 67 Wash. &

[5] https://www.huffpost.com/entry/for-the-first-time-ever-a_b_4221000.html.

Lee L. Rev. 1533, 1540 (2010) (discussing studies finding dramatically low levels of reversal in *Brady* cases).

In fact, a 2003 study by the Center for Public Integrity, which examined 11,452 cases since 1970 in which appellate courts reviewed charges of prosecutorial misconduct, found that in the overwhelming majority of cases, alleged misconduct was either not addressed or simply ruled harmless error. *See* Margaret Z. Johns, *Reconsidering Absolute Prosecutorial Immunity*, 2005 B.Y.U. L. Rev. 53, 60. What is more, appellate courts rarely, if ever, name in their published opinions prosecutors found to have committed misconduct. *See* Adam M. Gershowitz, *Prosecutorial Shaming: Naming Attorneys to Reduce Prosecutorial Misconduct*, 42 U.C. Davis L. Rev. 1059, 1062 (2009). It is clear that "many judges are reluctant to challenge prosecutors specifically or to instigate professional disciplinary proceedings." The Open File, *LA: Weak Enforcement of Prosecutorial Ethics Just Got Weaker in the Nation's Hotbed of Misconduct*, Oct. 24, 2017.[6]

Prosecutors also may be able to escape judicial scrutiny of their actions altogether. Prosecutors can offer pleas, drop charges, or dismiss cases entirely if misconduct is uncovered before trial. It goes without saying that cases are dramatically more likely to conclude in this fashion. Fewer than two percent of all federal criminal defendants' cases result in conviction through trial. *See, e.g.*, John Gramlich, *Only 2% of Federal Criminal Defendants Go to Trial, and Most Who Do Are Found Guilty*, Pew Research Center (June 11, 2019).[7] In New York, conviction rates are consistent with these federal statistics. Just four percent of all felony cases in New York

[6] http://www.prosecutorialaccountability.com/2017/10/24/la-weak-enforcement-of-prosecutorial-ethics-just-got-weaker-in-the-nations-hotbed-of-misconduct/.

[7] www.pewresearch.org/fact-tank/2019/06/11/only-2-of-federal-criminal-defendants-go-to-trial-and-most-who-do-are-found-guilty/.

in 2018 proceeded to trial. And of those four percent of cases that do proceed to trial, a quarter result in acquittal—likewise depriving courts of any opportunity to consider, and remedy, misconduct. *See* New York State Division of Criminal Justice Services, *Criminal Justice Case Processing Arrest Through Disposition New York State January – December 2018*, at 24-25, Tables 11-12 (May 2019).[8] In other words, in a staggering majority of cases, courts both in New York and at the federal level are deprived of any opportunity to consider or remedy prosecutorial misconduct.

Collectively—and as studies over more than four decades have dramatically quantified—the failings of internal and external disciplinary mechanisms, criminal and civil liability, and case-by-case review of criminal convictions mean that prosecutors rarely, if ever, face accountability for even demonstrated instances of misconduct. A 1999 Chicago Tribune investigation found that, of 381 nationwide homicide cases in which convictions were reversed because of the use of false evidence or the concealment of evidence suggesting innocence, only one prosecutor was fired (but was reinstated with back pay). A second prosecutor was suspended for 30 days. And a third prosecutor's law license was suspended for 59 days (but due to other misconduct). But none of the prosecutors were disbarred or received any public sanction. *See* Ken Armstrong & Maurice Possley, *Part 1: The Verdict: Dishonor*, Chicago Trib., Jan. 11, 1999[9]; Maurice Possley & Ken Armstrong, *Part 2: The Flip Side of a Fair Trial*, Chicago Trib., Jan. 11, 1999.[10]

Similarly, a more recent study by the Innocence Project of 660 cases from 2004 to 2008 involving prosecutorial misconduct found that in only a single case was a prosecutor disciplined.

[8] www.criminaljustice.ny.gov/crimnet/ojsa/dar/DAR-4Q-2018-NewYorkState.pdf.

[9] https://www.chicagotribune.com/investigations/chi-020103trial1-story.html.

[10] https://www.chicagotribune.com/investigations/chi-020103trial2-story.html.

Innocence Project, *Prosecutorial Oversight: A National Dialogue*, *supra*, at 12. And a study of misconduct in California found that only six attorneys were disciplined in 707 cases of appellate-court-determined misconduct from 1997 to 2009. *See* Kathleen M. Ridolfi & Maurice Possley, N. Cal. Innocence Project, Santa Clara Univ. Sch. of Law, *Preventable Error: A Report on Prosecutorial Misconduct in California 1997-2009*, at 3 (Oct. 2010).

Studies like these demonstrate there that is a staggering discrepancy between the severe consequences of prosecutorial misconduct for the victims of such misconduct and the public and the minimal (or non-existent) consequences for the very prosecutors who engage in that misconduct. Out of hundreds of instances in which defendants were wrongly convicted and incarcerated (sometimes for decades) despite glaring violations of their rights, or faced the stigma and collateral consequences that flow from a conviction of any kind, a mere handful of prosecutors faced any potential or actual consequences for their misconduct. And those few prosecutors who faced punishment often escaped with minor suspensions or other minimal consequences.

The paucity of consequences for misconduct means that prosecutors inclined to engage in misconduct are only further incentivized to do so. Given these realities, even ethical prosecutors may succumb to the institutionalized pressure to win cases—particularly because of the connection between conviction rate and promotion. Prosecutors "often feel pressure to obtain convictions to demonstrate their effectiveness, as convictions are the lodestar by which prosecutors tend to be judged," and this is even more likely to be the case when "a high-profile crime occurs." Barkow, *supra*, at 2091-92; *see also* Daniel S. Medwed, *The Zeal Deal: Prosecutorial Resistance to Post-Conviction Claims of Innocence*, 84 B.U. L. Rev. 125, 134 (2004) (acknowledging "the emphasis district attorneys' offices place on conviction rates"); Tracey L. Meares, *Rewards for Good Behavior: Influencing Prosecutorial Discretion and Conduct with Financial Incentives*, 64

Fordham L. Rev. 851, 882 (1995) (explaining that the "desire to 'win"' is "a central characteristic of prosecutorial culture"). To prevent these consequences, innovative and novel solutions to prevent and address misconduct, like the Commission, are necessary.

B. The Record In New York Is No Exception, And Prosecutors Currently Escape Any Accountability For Misconduct.

The record of prosecutorial accountability in New York mirrors the nationwide evidence documented above. The available evidence confirms that, like their counterparts throughout the United States, New York's prosecutors are held accountable for misconduct only on very rare occasions.

A recent ProPublica study analyzed state and federal court rulings for over a decade and found more than two dozen cases in which judges *explicitly found* that New York City prosecutors had committed misconduct—in each case, sufficiently serious to throw out the relevant conviction. *See* Joaquin Sapien & Sergio Hernandez, *Who Polices Prosecutors Who Abuse Their Authority? Usually Nobody*, ProPublica (Apr. 3, 2013, 5:30 AM).[11] And yet, those same courts "did not routinely refer prosecutors for investigation by the state disciplinary committees." *Id*. With just one exception, "[n]one of the prosecutors who oversaw cases reversed based on misconduct were disbarred, suspended," censured, or subject to punishment from superiors through internal disciplinary mechanisms. *Id*.

Worse still, "personnel records obtained by ProPublica" showed that several of the prosecutors "received promotions and raises soon after courts cited them for abuses." *Id*. Even as courts cited prosecutors for harmful misconduct and abuse of power, ProPublica found that in most of the thirty cases where convictions were reversed, the New York City district attorneys

[11] www.propublica.org/article/who-polices-prosecutors-who-abuse-their-authority-usually-nobody.

"maintain[ed] that no abuses occurred, only mistakes." *Id*. Nor is there any public transparency about the fact of or results of the even modest discipline that takes place. *Id*. ("Though prosecutors are public employees, members of the public have virtually no way to find out if they have been sanctioned privately or why.").

Another recent review of the Bronx, Brooklyn, and Queens District Attorneys' offices also demonstrates that claims that prosecutors will be adequately disciplined by their own officers or the bar are, unfortunately, false. *See* Joel B. Rudin, *The Supreme Court Assumes Errant Prosecutors Will Be Disciplined by Their Offices or the Bar: Three Case Studies That Prove That Assumption Wrong*, 80 Fordham L. Rev. 537 (2011). In the Bronx District Attorneys' office, for example, in "seventy-two cases in which courts had found improper behavior by prosecutors from 1975 through 1996," officials "could identify just one prosecutor since 1975 who, according to the Office's records, has been disciplined in any respect for misbehavior while prosecuting a criminal case." *Id*. at 544. In Queens, records from seventy three cases featuring appellate reversals for misconduct between 1985 and 1998 showed that in not a single instance through 2000 had a prosecutor been disciplined "by way of dismissal, suspension, demotion, transfer, reduction in or withholding of compensation, negative written evaluation, or referral to the court's Grievance Committee." *Id*. at 563. Findings from Brooklyn followed the same pattern. And discovery obtained in related lawsuits simply confirmed that these offices have had "no published code or rules of behavior for prosecutors, no schedule of potential sanctions for misbehavior or objective standards governing when such sanctions will be imposed, no written or formal procedure for investigating or disciplining prosecutors, and no procedure for keeping a record of prosecutors who have been cited for or are known to have engaged in improper behavior." *Id*. at 544.

As a result of these failings, prosecutors in New York escape accountability for even egregious cases of misconduct. As just one example, consider Jabbar Collins—who was falsely imprisoned for fifteen years for a 1994 Brooklyn murder as the result of prosecutorial misconduct. After an anonymous tip, three eyewitnesses identified Collins as the perpetrator during a police line-up and, on the strength of those witnesses' testimony, Collins was convicted of second-degree murder and sentenced to 34 years to life. *Collins v. City of N.Y.*, 923 F. Supp. 2d 462, 468 (E.D.N.Y. 2013). It later became clear, however, that police and prosecutors had coerced all three witnesses to testify against Collins, and withheld significant exculpatory evidence. *Id*; *see also* Stephanie Denzel, *Jabbar Collins*, The National Registry of Exonerations (Sept. 3, 2014).[12] During federal habeas proceedings, the District Attorney's office expressly admitted that it had failed to disclose a secret recantation by one of the witnesses (its chief witness)—a recantation that the prosecutor, in a sworn affidavit, had previously categorically denied ever occurred. *Collins*, 923 F. Supp. 2d at 467. Yet, not a single prosecutor was disciplined as a result. Reflecting on the injustice Collins has faced, Judge Frederic Block, who oversaw Collins's federal civil suit, has written, "I do lose sleep . . . over the Collins case and the rash of wrongful convictions that are continuing to be uncovered to this date in Brooklyn." Frederic Block, *Let's Put an End to Prosecutorial Immunity*, The Marshall Project, Mar. 13, 2018.[13]

Even prosecutors who have *repeatedly* engaged in egregious misconduct escape serious or lasting professional and other consequences under the existing regimes for prosecutorial accountability in New York. Instead, prosecutors typically face no or staggeringly light repercussions. Consider former Suffolk County Assistant District Attorney Glenn Kurtzrock.

[12] www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3115.

[13] http://www.themarshallproject.org/2018/03/13/let-s-put-an-end-to-prosecutorial-immunity.

Kurtzrock was found in May 2017 to have concealed dozens of pages of *Brady* material and to have altered hundreds of pages of police reports to remove exculpatory information—including evidence in the first-degree murder case against defendant Messiah Booker that another suspect had implicated himself in the crime. *See* Nina Morrison, *What Happens When Prosecutors Break the Law?*, N.Y. Times (June 18, 2018)[14]; Greg Wehner, *UPDATE: Prosecutor Resigns After Murder Case Against Messiah Booker Crumbles Due to Withheld Evidence*, The Southampton Press (May 10, 2017).[15] As a result of his blatant disregard for his ethical and legal obligations, Kurtzrock reportedly was asked to resign by the Suffolk County District Attorney. Kurtzrock did resign. But this was a negligible punishment in light of Kurtzrock's misconduct, which was subsequently found to have spanned numerous cases. Indeed, a review of Kurtzrock's caseload by the Suffolk County District Attorney's office revealed additional *Brady* violations and resulted in the office dropping charges in at least three of his other murder cases. *See* Morrison, *supra*. And yet, in the more than two years since his ethical and legal violations have come to light, Kurtzrock has faced no criminal liability or discipline from an attorney grievance committee or other external body. *See* Andrew Smith, *Ex-Prosecutor, Disciplinary Panel Oppose Innocence Project Bid to Open Proceedings*, Newsday (June 25, 2019).[16] Instead, he currently maintains a criminal defense practice, to which he brings to bear his self-described "17 years of experience as an Assistant District Attorney, including seven years as a homicide prosecutor." Law Office of Glenn Kurtzrock, *Criminal Defense Attorney New York* (last accessed Aug. 19, 2019).[17]

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[14] http://www.nytimes.com/2018/06/18/opinion/kurtzrock-suffolk-county-prosecutor.html.

[15] http://www.27east.com/news/article.cfm/Flanders/518282/Plea-Deal-Reached-In-Trial-Of-Messiah-Booker.

[16] http://www.newsday.com/long-island/suffolk/prosecutor-grievance-kurtzrock-innocence-project-1.32953575.

[17] https://www.kurtzrocklaw.com/.

It is clear that, to date, New York's disciplinary regimes have failed to hold prosecutors accountable for even the most egregious and wanton misconduct.

C. The Commission Will Provide Accountability That Is Currently Absent.

As the evidence above demonstrates, both nationwide and in New York, "the methods created to promote prosecutorial accountability have, to date, failed" and "[m]eaningful accountability may best be described as rare." Sarma, *Using Deterrence Theory*, *supra*, at 577, 595. But it bears emphasis that Supreme Court has expressly invoked the promise of attorney discipline when recognizing absolute prosecutorial immunity from civil liability or limiting the reach of legal mechanisms of accountability, like Section 1983. In *Imbler*, the Court reasoned that absolute prosecutorial immunity would not leave the "public powerless to deter misconduct or to punish that which occurs" because a prosecutor "stands perhaps unique, among officials whose acts could deprive persons of constitutional rights, in his amenability to professional discipline by an association of his peers." 424 U.S. at 429. Those "checks," the Court concluded, "undermine[d] the argument that the imposition of civil liability is the only way to insure that prosecutors are mindful of the constitutional rights of persons accused of crime." *Id.*; *see also Connick v. Thompson*, 563 U.S. 51, 66 (2011) (limiting liability under Section 1983 on failure to train theory in part because "an attorney who violates his or her ethical obligations is subject to professional discipline, including sanctions, suspension, and disbarment"). Clearly, those alternative methods of accountability have proven inadequate, and the Legislature, quite appropriately, has concluded that a different mechanism for holding prosecutors accountable and for policing misconduct is necessary. The Commission may fill the void that the failure of current methods of accountability has left.

With its subpoena and investigative powers, the Commission is particularly well suited to shine a light on prosecutorial misconduct that is rarely unearthed by existing mechanisms. This

includes *Brady* violations and misconduct that takes place during the investigative phase of a case, which can be particularly difficult to uncover and police. *See* Medwed, Brady*'s Bunch of Flaws, supra*, at 1540. A governmental body dedicated solely to ensuring prosecutorial accountability is sorely needed to help assure the consistent enforcement of prosecutors' ethical obligations, to remedy the diffusion of responsibility for prosecutorial misconduct that currently exists, and to enhance public confidence. The state has "a fundamental and overriding interest in ensuring the integrity and independence of the office of district attorney," and to do so the state may subject that office to "comprehensive regulation by state law." *Matter of Hoerger*, 21 N.Y.3d at 553. The Legislature has created the Commission to prevent prosecutorial misconduct and pursue accountability—goals that the existing mechanisms have wholly failed to accomplish. The Legislature's determination that the Commission is necessary should be respected.

* * *

CONCLUSION

For the foregoing reasons, *amici curiae* respectfully request that the Court deny Plaintiffs' motion for summary judgment and grant Defendants' cross-motion for summary judgment.

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Respectfully Submitted,

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