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**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK**

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CIVIL RIGHTS CORPS, CYNTHIA GODSOE, :	
NICOLE SMITH FUTRELL, DANIEL S. :	Case No. 21-cv-09128-VM
MEDWED, JUSTIN MURRAY, ABBE SMITH, :	
AND STEVEN ZEIDMAN	
Plaintiffs, :	
- against - :	<b><u>COMPLAINT AND DEMAND FOR</u></b> <b><u>JURY TRIAL</u></b>

GEORGIA PESTANA, Corporation Counsel of the :  
City of New York, in her official and personal  
capacity; MELINDA KATZ, the District Attorney  
for Queens County, in her official and personal  
capacity; ANDREA E. BONINA, Chair of the State  
of New York Grievance Committee for the Second,  
Eleventh, and Thirteenth Judicial Districts, in her  
official and personal capacity; DIANA MAXFIELD  
KEARSE, Chief Counsel of the State of New York  
Grievance Committee for the Second, Eleventh, and  
Thirteenth Judicial Districts, in her official and  
personal capacity; and HECTOR D. LASALLE,  
Presiding Justice of the Second Judicial Department  
of the Appellate Division of the Supreme Court of  
the State of New York, in his official capacity

Defendants.

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Plaintiffs Civil Rights Corps (“CRC”), and Professors Cynthia Godsoe, Nicole Smith Futrell, Daniel S. Medwed, Abbe Smith, and Steven Zeidman (collectively, the “Professors” or “Law Professors”), and Justin Murray, by and through their attorneys, Patterson Belknap Webb & Tyler LLP, for their Complaint against the defendants Georgia Pestana, the Corporation Counsel for the City of New York in her official and personal capacity (the “Corporation Counsel”), Andrea E. Bonina, the Chair of the State of New York Grievance Committee for the Second, Eleventh, and Thirteenth Judicial Districts in her official and personal capacity, Diana Maxfield Kearse, Chief Counsel of the State of New York Grievance Committee for the Second, Eleventh, and Thirteenth Judicial Districts, in her official and personal capacity (together, the “Grievance Committee”), Melinda Katz, the District Attorney of Queens County, in her official and personal capacity (the “Queens District Attorney”), and Hector D. LaSalle, the Presiding Justice of the Second Judicial Department of the Appellate Division of the Supreme Court of the State of New York, in his official capacity, (all collectively, the “Defendants”), allege as follows:

### **INTRODUCTION**

1. This is a civil rights action seeking redress for Defendants’ infringement of Plaintiffs’ First Amendment right to speak and advocate freely on a matter of grave public importance—prosecutorial misconduct. It is also a proceeding to declare unconstitutional under the First Amendment of the United States Constitution and under Article I, § 8, of the New York Constitution, New York State Judiciary Law § 90(10) insofar as it is applied to censor Plaintiffs’ speech and to keep confidential the disciplinary proceedings Plaintiffs have requested.

2. Prosecutorial misconduct is a scourge in New York State, and yet prosecutors are rarely disciplined for their misconduct. Bar association reports and legislative efforts to make prosecutors accountable for violating the law—and sending innocent people to prison—have failed repeatedly. So, too, have bar association and legislative efforts to open

disciplinary proceedings to the public. Even though the consequences of prosecutorial misconduct can be a wrongful conviction and decades spent behind bars, the response of those responsible for attorney discipline has been, in effect, a collective shrug of the shoulders.

3. The Plaintiffs are a group of law professors supported by the CRC who have addressed this issue head-on. They have prepared and filed complaints with relevant New York grievance committees demonstrating repeated violations of law by present and former Assistant District Attorneys in Queens County, and have asked that any resulting disciplinary proceedings take place in public. The complaints are well-documented and are based on the public record, primarily judicial findings of prosecutorial wrongdoing. Much of the misconduct was so severe that courts were required to reverse a jury's verdict. At the same time, Plaintiffs have made their campaign public by publishing their complaints on the website AccountabilityNY.org and urging the public to support reform efforts. Everything the Plaintiffs have done is in the public interest and is fully supported by the First Amendment.

4. Nonetheless, Plaintiffs' activities are threatening to some of the Defendants, who have embraced and relied upon the status quo for many decades. The Grievance Committee largely ignores the rules of conduct for prosecutors and focuses its attention instead on civil attorneys. The Queens District Attorney and the Corporation Counsel benefit from the blind eye of the Grievance Committee, which allows prosecutors to run amuck without sanction. All these Defendants use the confidentiality provisions of Judiciary Law § 90(10) as an excuse for inaction—and as a basis for threats and retaliatory actions against the Plaintiffs for their efforts at reform. And the People of the State of New York suffer from a system of justice that, too often, means injustice for the downtrodden and immunity for those in power.

5. These Defendants responded to Plaintiffs' public interest activities with an aggressive campaign of harassment and threats, which included retaliating against Plaintiffs for exercising their First Amendment rights. Specifically, the Corporation Counsel, on behalf of the City of New York and the Queens District Attorney, wrote to the Grievance Committee attacking the Law Professors for purportedly violating Judiciary Law § 90(10). He accused the Law Professors of "misus[ing] and indeed abus[ing] the grievance process to promote a political agenda" in a way that "should not be countenanced." Ex. 1 at 3. In threatening language, the Corporation Counsel asked the Grievance Committee to take action against the Professors for their complaints, and he promised further interventions in the event any more complaints were filed. At the same time, seeking to keep secret his baseless accusations, the Corporation Counsel insisted that his letter be kept confidential under Judiciary Law § 90(10) so that the People of New York would never learn about his intemperate attack on those who would try to improve the system.

6. In direct response to the Corporation Counsel's demand, the Grievance Committee promptly took adverse action against the Law Professors by stripping them of the rights that New York law accords those who complain about attorney misconduct. A complainant in an attorney misconduct proceeding has the right to learn what is happening to his or her complaint and has the right to appeal adverse decisions. Thus, as complainants, the Law Professors expected to learn what happened at each step of the review process by the Grievance Committee and why.

7. Instead, the Grievance Committee decided that it would pretend that the Law Professors were not complainants, and would instead treat any investigation—to the extent any occurs—as something initiated *sua sponte*, *i.e.*, at the Committee's own initiative and thus confidential from virtually all disclosure under Judiciary Law § 90(10). This action means that

the Professors will not learn the results of their complaints, which would remain confidential, and that the Professors would be unable to appeal any adverse decision.

8. The Grievance Committee’s decision is a charade. If the Grievance Committee does anything in response to the Law Professors’ complaints, it would not be an action taken *sua sponte*, but rather, an action taken because the Law Professors have analyzed, marshalled and presented the evidence from a variety of different publicly-available sources to the Grievance Committee. The Law Professors are complainants as clearly defined in New York law and entitled to all the rights of complainants.

9. As a consequence of this retaliatory action in violation of the First Amendment and New York law, the Law Professors—and the public—may never learn what, if anything, the Grievance Committee does with their complaints. The Grievance Committee said as much to the Professors. It wrote to the Professors that “any investigations into these allegations . . . would remain confidential pursuant to New York State Judiciary Law § 90” unless they actually resulted in any public discipline. And in case there was any doubt that the Professors should have no reason to expect any disciplinary action at all to result from their complaints, the Grievance Committee added that its letter “does not constitute confirmation as to whether any investigations will or will not be pursued.” Ex. 2. Because of the confidentiality provisions of Judiciary Law § 90(10), the public will never learn if, as is now expected, the Grievance Committee simply decides to ignore the Law Professors’ complaints and, once again, to let malfeasant prosecutors off the hook.

10. The pretext for all of these Defendants’ actions is Judiciary Law § 90(10), which purports to keep confidential everything associated with a disciplinary proceeding—including even the correspondence between the Law Professors, the Corporation Counsel, and the Grievance Committee. Judiciary Law § 90(10) is overbroad and unconstitutional both on its

face and as applied to this case. Whatever may be true in other cases, there are simply no privacy interests at stake here to justify either muzzling the Professors' free speech rights or holding any investigation of the accused prosecutors in secret. The prosecutorial misconduct alleged is all documented in the public record, principally in judicial decisions. The prosecutors themselves are public servants engaged in public business. Because Judiciary Law § 90(10) serves no valid interest in this case—let alone a compelling one—its application to the Professors' complaints is unconstitutional.

11. New Yorkers deserve better than public officials who engage in a campaign of intimidation and retaliation against those who would seek to address prosecutorial misconduct in this State. New Yorkers also deserve to know what wrongs these public officials have committed, and are committing, in their name. The First Amendment demands not only that harassment of the Plaintiffs must stop, but also that any further disciplinary proceedings of the accused prosecutors be open to the public.

#### **THE PARTIES**

12. Plaintiff CRC is a non-profit organization dedicated to challenging systemic injustice in the United States. It engages in advocacy and public education and specializes in innovative civil rights litigation with the goal of sensitizing the legal system and the public to the injustice and brutality that can occur in the contemporary United States legal system.

13. Plaintiff Cynthia Godsoe is a Professor of Law at Brooklyn Law School. Professor Godsoe teaches courses in family law, criminal law, children and the law, professional responsibility, and public interest lawyering. She is the Director of the Edward V. Sparer Public Interest Law Fellowship and the Marsha Garrison Family Law and Policy Fellowship programs. Professor Godsoe is an active member of the New York bar.

14. Plaintiff Nicole Smith Futrell is an Associate Professor of Law and Co-Director of the Defenders Clinic at CUNY School of Law. Professor Futrell's teaching and scholarship focus on criminal procedure, legal ethics, post-conviction relief, reentry, and social justice lawyering. In her clinical practice, she and her students represent clients in a variety of criminal defense-related contexts, including state court misdemeanor cases, parole and clemency petitions, wrongful conviction matters, and civil claims related to criminal convictions.

Professor Smith Futrell is an active member of the New York bar.

15. Plaintiff Daniel S. Medwed is the University Distinguished Professor of Law and Criminal Justice at Northeastern University School of Law. Professor Medwed teaches criminal law, evidence, and advanced criminal procedure. His research and pro bono activities revolve around the topic of wrongful conviction. Professor Medwed is an active member of the New York bar.

16. Plaintiff Justin Murray is Associate Professor of Law at New York Law School and Co-Director of the Criminal Justice Institute. He teaches criminal law, criminal procedure, and constitutional law and co-teaches courses covering race, bias, and advocacy in the legal system. Professor Murray is an active member of the Illinois bar.

17. Plaintiff Abbe Smith is the Scott K. Ginsburg Professor of Law, Director of the Criminal Defense and Prisoner Advocacy Clinic, and Co-Director of the E. Barrett Prettyman Fellowship Program at the Georgetown University Law Center. Professor Smith teaches and writes on criminal defense, legal ethics, juvenile justice, and clinical legal education. Professor Smith is an active member of the New York bar.

18. Plaintiff Steven Zeidman is a Professor of Law and Director of the Criminal Defense Clinic at CUNY School of Law. He teaches and works in the area of criminal defense. Professor Zeidman is an active member of the New York bar.

19. Defendant Georgia Pestana is the Corporation Counsel for the City of New York. She is sued in her official and personal capacity. The Corporation Counsel leads the New York City Law Department, which comprises approximately 1,000 lawyers and 890 support professionals.

20. Defendant Andrea E. Bonina is the Chair of the State of New York Grievance Committee for the Second, Eleventh, and Thirteenth Judicial Districts (the “Grievance Committee”). She is sued in her official and personal capacity. The Grievance Committee is an “Attorney Grievance Committee,” as defined by 22 N.Y.C.R.R. § 1240.2(d), that is endowed with the power and responsibility to investigate and sanction attorney misconduct and ethical breaches. As Chair of the Grievance Committee, Defendant Bonina is a member of the Grievance Committee and has special responsibilities and powers beyond those of an ordinary grievance committee member. *See* 22 N.Y.C.R.R. § 1240.7(e).

21. Defendant Diana Maxfield Kearse is Chief Counsel of the Grievance Committee. She is sued in her official and personal capacity. Ms. Kearse is the “Chief Attorney” of the Grievance Committee. *See* 22 N.Y.C.R.R. § 1240.5. As such, she is empowered to investigate professional misconduct complaints, and is obligated to report certain information to a complainant about any disciplinary proceedings resulting from his or her complaint. *See* 22 N.Y.C.R.R. § 1240.7.

22. Defendant Melinda Katz is the District Attorney for Queens County. She is sued in her official and personal capacity. The District Attorney for Queens County is responsible for conducting all prosecutions for crimes and offenses committed within Queens County.

23. Defendant Hector D. LaSalle is the Presiding Justice of the of the Second Judicial Department of the Appellate Division of the Supreme Court of the State of New York

(the “Second Department”). He is sued in his official capacity. The Second Department, as one of four Appellate Divisions of the Supreme Court of the State of New York, is vested by the New York legislature with the power and ultimate authority to regulate attorney admissions and conduct, including by promulgating rules concerning attorney discipline. New York Judiciary Law § 90(2).

### **JURISDICTION AND VENUE**

24. This Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. §§ 1331 (action arising under the Constitution and federal law), 1343(a) (action to redress deprivation of civil rights), and 1367 (supplemental jurisdiction).

25. This action arises under 42 U.S.C. § 1983. Plaintiffs’ claims for declaratory and injunctive relief are authorized by 28 U.S.C. §§ 2201 and 2202.

26. Venue in this judicial district is proper pursuant to 28 U.S.C. § 1391(b) because one or more Defendants reside in this judicial district and all Defendants are residents of New York, or, alternatively, because a substantial part of the events or omissions giving rise to Plaintiffs’ claims occurred in this judicial district.

### **BACKGROUND**

#### **A. New York’s Grievance Committees Allow Prosecutors to Run Amok**

27. The fair operation of the criminal legal system is a matter of overriding public importance. The New York Court of Appeals has recognized that “it is not enough for a District Attorney to be intent on the prosecutions of his case.” *People v. Bailey*, 58 N.Y.2d 272, 276-77 (1983) (cleaned up). Rather, “his paramount obligation is to the public, [and so] he must never lose sight of the fact that a defendant, as an integral member of the body politic, is entitled to a full measure of fairness.” *Id.* (internal modifications and citations omitted). The “public at large,” in addition to each defendant, is “entitled to assurance that there shall be full observance

and enforcement of the cardinal right of a defendant to a fair trial.” *People v. Crimmins*, 36 N.Y.2d 230, 237-38 (1975).

28. Central to achieving a fair trial is the obligation of prosecutors to “deal fairly with the accused and be candid with the courts.” *People v. Colon*, 13 N.Y.3d 343, 349 (2009) (internal quotation marks and citation omitted). Prosecutors have a “heightened duty of candor to the courts and in fulfilling other professional obligations.” 2017 American Bar Association Standard 3-1.4(a) for the Prosecution Function.

29. Prosecutorial misconduct can have devastating consequences; it can cause the imprisonment of innocent people. A 2020 study of more than 2,000 exonerations found that prosecutorial misconduct was a factor in 30% of the exonerees’ convictions. National Registry of Exonerations, *Government Misconduct and Convicting the Innocent* (September 1, 2020), *available at*

[https://www.law.umich.edu/special/exoneration/Documents/Government\\_Misconduct\\_and\\_Convicting\\_the\\_Innocent.pdf](https://www.law.umich.edu/special/exoneration/Documents/Government_Misconduct_and_Convicting_the_Innocent.pdf).

30. In New York, Grievance Committees have a crucial—and singular—role in regulating prosecutorial misconduct. Unlike other practicing attorneys admitted to the New York state bar and other law enforcement officials, prosecutors alone have “absolute immunity” from civil suit. *Imbler v. Pachtman*, 424 U.S. 409, 427 (1976). The doctrine of “absolute immunity” has been justified based on the assumption that “associations of [] peers,” like the New York grievance committees, will regulate prosecutors through “professional discipline,” such that civil suits are not necessary to deter and punish prosecutorial misconduct. *Imbler*, 424 U.S. at 429.

31. Unfortunately, this crucial pillar supporting the doctrine of “absolute immunity” is illusory. A 2013 report from the Center for Prosecutor Integrity identified 3,625

cases of prosecutorial misconduct in the 50 years from 1963 to 2013. Of those, only 63—less than 2 percent—ever resulted in any public sanction. Center for Prosecutor Integrity, *White Paper: An Epidemic of Prosecutor Misconduct* (December 2013), available at [www.prosecutorintegrity.org/wp-content/uploads/EpidemicofProsecutorMisconduct.pdf](http://www.prosecutorintegrity.org/wp-content/uploads/EpidemicofProsecutorMisconduct.pdf). Neither judges nor fellow lawyers regularly report prosecutorial misconduct to disciplinary committees, and these committees rarely discipline prosecutors for misconduct when such reporting occurs. Bruce Green & Ellen Yaroshefsky, *Prosecutorial Accountability 2.0*, 92 Notre Dame L. Rev. 51, 65 (2017).

32. The problem is particularly acute in New York. An analysis of New York state and federal court decisions from 2001 to 2011 found 30 decisions overturning convictions explicitly because of prosecutorial misconduct. Joaquin Sapien and Sergio Hernandez, *Who Polices Prosecutors Who Abuse Their Authority? Usually Nobody*, ProPublica (April 3, 2013), available at <https://www.propublica.org/article/who-polices-prosecutors-who-abuse-their-authority-usually-nobody>. This analysis revealed that *only one* of the prosecutors found by a court to have committed misconduct was publicly disciplined by a New York grievance committee; none of the other implicated prosecutors was disbarred, suspended, or publicly censured. *Id.* Some were even promoted and given raises after courts publicly cited them for their abuses. *Id.*

33. In 2019, the most recent year for which statewide data is available, not a single New York prosecutor was publicly disciplined by a grievance committee for on-the-job misconduct. Rory Fleming, *How New York Lets Prosecutors Off The Hook for Misconduct*, New York Focus (September 1, 2021), available at <https://www.nysfocus.com/2021/09/01/how-new-york-lets-prosecutors-off-the-hook-for-misconduct/>.

34. In one isolated instance, in 2021, former prosecutor Glenn Kurtzrock was suspended from practice for two years. This is the exception that proves the rule—that the disciplinary system for prosecutors is broken. In 2017, Kurtzrock was fired mid-trial by the Suffolk County District Attorney after the trial judge found he had engaged in extreme misconduct by withholding critical *Brady* material. The district attorney referred Kurtzrock to the grievance committee. Even with a referral from the District Attorney and a judicial finding of misconduct, it took the grievance committee more than three full years to resolve the matter. The grievance committee's extraordinary failure to act for years on end was the subject of critical press commentary, Nina Morrison, *What Happens When Prosecutors Break the Law?* New York Times (June 18, 2018), *available at* <https://www.nytimes.com/2018/06/18/opinion/kurtzrock-suffolk-county-prosecutor.html>, and litigation. *In the Matter of the Application of The Innocence Project, Inc.*, No. 2019-05674 (N.Y. App. Div. July 12, 2019).

35. Prosecutorial misconduct—and the failure of New York's grievance committees to serve their crucial role of disciplining prosecutors for misconduct—inflicts devastating consequences on innocent New Yorkers. Since 1989, at least 234 cases in New York have resulted in the exoneration of a wrongly-convicted defendant. Eighty-eight of those cases involved prosecutors wrongly withholding exculpatory material. Susan DeSantis, *Judges Ordered to Direct Prosecutors to Turn Over Information Favorable to Defense*, New York Law Journal (November 7, 2017), *available at* <http://www.law.com/newyorklawjournal/sites/newyorklawjournal/2017/11/07/judges-ordered-to-direct-prosecutors-to-turn-over-information-favorable-to-defense/>. Such misconduct has caused people to suffer decades of imprisonment with accompanying physical and mental trauma and separation from family and loved ones.

36. The lack of discipline for prosecutors who commit misconduct is a topic of tremendous public importance. In recent years, two advisory bodies created by the Chief Judge of the New York Court of Appeals have issued recommendations about this issue.

37. In September 2015, the Commission on Statewide Attorney Discipline recommended putting in place a process “to ensure that judicial determinations of prosecutorial misconduct are promptly referred to the appropriate disciplinary committee” and that sanctions meted out for misconduct be “publicly released” because “the public has every right to scrutinize the conduct of those it entrusts with public office.” NYS Commission on Statewide Attorney Discipline, Final Report to Chief Judge Jonathan Lippman, the Court of Appeals, and the Administrative Board of the Courts (September 24, 2015) (the “Lippman Commission Report”), 78-79, *available at* <http://ww2.nycourts.gov/sites/default/files/document/files/2020-10/AttyDiscFINAL9-24-1.pdf>.

38. Just 15 months later, the New York State Justice Task Force recommended that grievance committees “proactively review available court decisions” and undertake investigations “where a finding of attorney misconduct has been made in a court decision.” New York State Justice Task Force, Report on Attorney Responsibility in Criminal Cases (February 2017), 5, *available at* <http://www.nyjusticetaskforce.com/pdfs/2017JTF-AttorneyDisciplineReport.pdf>.

39. Beginning in 2018, New York State has attempted to implement legislation creating a first-in-the-nation State Commission on Prosecutorial Conduct. That reform effort has been met with unrelenting opposition from the District Attorney Association of New York, which filed suit immediately after the law was enacted. In response to the lawsuit, the State amended the law, and the District Attorneys sued again. They won an order invalidating the new law in January 2020. With no acknowledgement of the disingenuity of their position,

opponents of the Commission have argued that the solution is not a State Commission, but rather more of the same—for “grievance committees [to] focus more carefully on prosecutors in appropriate cases.” But, of course, that has not happened and is not likely to happen anytime soon.

40. In June 2021, New York tried for a third time to obtain some control over misbehaving prosecutors. It passed new legislation in June 2021—much watered-down from its earlier attempts—to address the challenges to the prior legislation. Nick Reisman, *Cuomo signs bill creating prosecutor conduct panel*, Spectrum News 1 (June 18, 2021), available at <https://spectrumlocalnews.com/nys/central-ny/ny-state-of-politics/2021/06/18/cuomo-signs-bill-creating-prosecutor-conduct-panel>. Even if this iteration of the legislation survives intact, it is just one insufficient step to address an enduring problem.

## **B. New York Law Keeps Disciplinary Proceedings Confidential**

41. The grievance proceedings that are supposed to protect New Yorkers from unethical lawyers, including prosecutors who engage in misconduct, are almost invariably conducted in secret. In that respect, New York Judiciary Law § 90(10) is a rarity among the attorney discipline procedures throughout the Nation. It requires confidentiality of attorney disciplinary proceedings and all papers related to the proceedings unless and until discipline is recommended, or more often, disciplinary charges are sustained by the Appellate Division. Technically, the Appellate Division could make proceedings and documents public sooner “upon good cause being shown,” but this almost never happens in practice.

42. For example, despite considerable public attention and an amicus brief from prominent news organization, the Second Department denied the Innocence Project’s application to unseal any records or hearing concerning disciplinary proceedings against Glenn Kurtzrock. In a one-paragraph ruling, the court held, without analysis, that the petition “had

failed to establish good cause to disclose the documents, if any, relating to the alleged investigation described in the application” or “to establish good cause to open to the public any hearings which may be held in connection with the alleged disciplinary proceeding.” *In the Matter of the Application of The Innocence Project, Inc.*, No. 2019-05674, at 1 (N.Y. App. Div. July 12, 2019).

43. For many years, the American Bar Association, the New York courts, and various committees of the New York State Bar Association have recommended amending § 90(10) so that disciplinary proceedings become public once the disciplinary authorities find probable cause to believe that an attorney has violated the Code of Professional Responsibility. For instance, in 2015, the so-called McKay Commission concluded, “secret records and secret proceedings create public suspicion regardless of how fair the system really is.” NYS Commission September 2015 Final Report at 26. Secrecy “create[s] an atmosphere of public suspicion and skepticism.” *Id.* at 12. The report concluded that “[i]f it is true that the public is suspicious of the attorney discipline process because it is secret, then proceedings should be opened at the earliest practical point.” *Id.* at 25.

44. The extreme secrecy attached to New York’s attorney disciplinary proceedings makes them an outlier nationally. As of mid-2014, “the vast majority of jurisdictions open proceedings upon the filing of a formal charge following a finding of probable cause.” The Lippmann Commission Report at 62. “New York is one of only 9 jurisdictions which do not permit public dissemination of information concerning disciplinary proceedings until, at the earliest, a recommendation that discipline be imposed, and usually upon a final adjudication.” *Id.*

45. Moreover, courts in other jurisdictions have consistently found that overbroad confidentiality rules for attorney disciplinary processes violate the First Amendment.

*See Doe v. Supreme Court of Fla.*, 734 F. Supp. 981, 988 (S.D. Fla. 1990) (Florida Bar Rule prohibiting speaking about a meritorious grievance filed against an attorney violates the First Amendment); *In re Petition of Brooks*, 678 A.2d 140, 143-46 (N.H. 1996) (New Hampshire Supreme Court Rule prohibiting complainant “from revealing the fact that a complaint had been filed, what information or testimony the complainant provided the committee, any action taken by the committee in response to the complaint, and any information acquired by the complainant through interaction with the committee” violates the First Amendment); *R.M. v. Supreme Court*, 883 A.2d 369, 377-82 (N.J. 2005) (New Jersey Supreme Court Rule prohibiting speech on a “given disciplinary matter and the associated written records” violates the First Amendment); *In re Warner*, 21 So. 3d 218, 262 (La. 2009) (Louisiana Supreme Court Rule prohibiting speech about attorney disciplinary proceedings until formal charges are filed violates the First Amendment).

46. The secrecy of New York’s disciplinary process, together with the New York’s failure to supervise and discipline prosecutors, makes the process doubly deficient and deprives the public of any substantial insight into, and protection against, prosecutorial misconduct.

#### **C. Plaintiffs File Complaints Against Prosecutors Who Engaged in Misconduct**

47. Plaintiffs, like many other members of the public, are concerned about prosecutorial misconduct and the grievance committees’ consistent failure to meet their responsibility to discipline prosecutors who violate New York’s Rules of Professional Conduct. They are likewise concerned about the extent to which the work of the grievance committees is conducted under a veil of secrecy.

48. On May 3, 2021, with support from CRC, the Law Professors filed 21 discrete complaints pursuant to New York Judiciary Law § 90(10) against individual attorneys

currently or formerly employed by the Queens District Attorney's Office for misconduct committed while working as an assistant district attorney. Each of the complaints recited the sorry history of prosecutorial misconduct in New York State. Each complaint carefully identified and marshalled public records and relied on judicial findings that the subject attorney had committed professional misconduct during the course of a criminal prosecution. The complaints are well documented and do not rely on any private or off-the-record sources. The Law Professors requested that the respective grievance committees investigate and discipline each attorney for his or her misconduct, and that they do so publicly. According to publicly-available records maintained by the New York State Unified Court System, none of the accused prosecutors has ever been publicly disciplined.

49. The Law Professors' complaint against Jesse Sligh is representative of the complaints. In 1988, Sligh prosecuted and obtained a conviction against Clinton Turner for first degree robbery. Turner maintained his innocence, but he was convicted and spent ten years in prison. After his parole, Turner discovered that his conviction was the result of pervasive misconduct by Sligh and he sought habeas relief. A federal court set aside the conviction, finding that Sligh's extensive *Brady* violations had deprived Turner of a fair trial. The Queens District Attorney declined to retry Turner. When Turner later sued New York State for compensation, the state court "conclude[ed] that by clear and convincing evidence Clinton Turner [was] innocent of the crimes charged to the jury." To date, so far as the public record reflects, Sligh has not been sanctioned for his misconduct, and he continues to practice law in New York State.

50. Also representative is the Professors' complaint against Charles Testagrossa. Testagrossa's prosecutorial misconduct led to the wrongful conviction of three defendants. Each was imprisoned for 24 years. In March 2021, Testagrossa's misconduct was

finally confirmed by a court and the convictions were reversed. The presiding judge concluded that Testagrossa – who was still a prosecutor 24 years later – had lied to the court in defending his conduct. The judge stated, “This was, in short, not a good-faith misstatement; it was a deliberate falsehood.” *People v. Bell*, 71 Misc. 3d 646, 664 (N.Y. Sup. Ct. 2021). Based on Testagrossa’s misconduct, the Queens District Attorney dropped the charges against the three men on June 4, 2021. To date, so far as the public record reflects, Testagrossa has not been sanctioned for his misconduct, and he continues to practice law in New York State.

51. Recognizing that one of the failures of New York’s disciplinary proceedings was pervasive and unnecessary secrecy, the complaints urged that the proceedings be conducted in public. “For the legitimacy of and public trust in the criminal system, and the bar, the investigation should be public at every stage possible.” Moreover, the complaints called for more expansive investigations of prosecutorial misconduct, also to be conducted in public. “[W]e also call for the implementation of an independent public commission empowered to investigate all cases handled by this prosecutor and vacate convictions where appropriate. To be clear, we do not mean a closed-door, cloaked process at the Queens District Attorney’s Office, but rather a commission that operates transparently and includes members of the public, including members of impacted communities of color, public defenders and other criminal defense attorneys, civil rights attorneys, and people who have been incarcerated and their loved ones.”

52. To bring awareness to their complaints and to the pervasive failure to discipline prosecutors for misconduct, Plaintiffs created a website, AccountabilityNY.org, and posted the full text of their complaints. The website’s homepage provides an overview of the problem of prosecutorial misconduct and notes that the “majority of these violations are likely never discovered or disclosed to New Yorkers.” It continues: “The biggest reason prosecutorial

misconduct continues to be widespread is that courts, district attorneys, and bar associations rarely hold prosecutors accountable for their misconduct.” Thus, the website explains, “Accountability NY – a group of law professors and activists with the support of Civil Rights Corps – filed grievances in instances where New York courts found prosecutors committing misconduct and those prosecutors had not yet faced public discipline. In the grievances, the professors urge the Grievance Committees to act.” *See* <https://accountabilityny.org/>.

53. In addition to disseminating information on prosecutorial misconduct and publishing the Professors’ complaints, the website also encourages visitors to put public pressure on grievance committees to hold prosecutors accountable for misconduct. There is a red button in the website’s navigation bar that says, “Take Action.” *See* <https://accountabilityny.org/complaints/>. A suggested action is to send an email to “your Grievance Committee” saying “I am deeply concerned by prosecutorial misconduct in New York City. I ask that you please hold prosecutors publicly accountable when they violate the rights of New Yorkers. Thank you for making a more accountable New York.”

54. The website also contains a link to a “social media toolkit” with draft messages and images that concerned members of the public can post on social media to express support for holding prosecutors accountable when they engage in misconduct. *See* <https://accountabilityny.org/wp-content/uploads/2021/06/AccountabilityNY-Toolkit-2.pdf>.

**D. Defendants Threaten and Retaliate Against the Professors For Engaging in Protected Speech**

**1. The Corporation Counsel’s Threats**

55. On June 2, 2021, James E. Johnson, then the Corporation Counsel for the City of New York, sent an extraordinary letter to each grievance committee before which the Professors had filed their complaints. A copy of each letter was also sent to the Law Professors. Other than the names of the relevant grievance committee to which the letter was directed and

the subject attorney, the substance of the letters is identical. An example letter is attached under seal to this complaint as Exhibit 1.

56. In the letter, the Corporation Counsel makes clear that he is acting in his official capacity under color of state law. He explains that he is writing in his capacity as the Chief Legal Officer of the City of New York and also as counsel to the Queens District Attorney. Defendant Melinda Katz. The letter then “express[es] my deep concern” about the grievance complaints filed by the Law Professors regarding present and former Queens Assistant District Attorneys. Ex. 1 at 1.

57. In inflammatory language, the Corporation Counsel then accuses the Law Professors of violating “the law and the principles on which the grievance process is based”—in particular, Judiciary Law § 90(10)—because the Professors’ complaints are part of a “public campaign.” *Id.* The Corporation Counsel asks the grievance committee members to “consider the manner in which [each complaint] was filed” as they review that complaint—implying that the complaint should be disregarded, or the Professors sanctioned, or both—because the complaints were filed as part of “an orchestrated campaign to upend the attorney grievance process to advance [the Law Professors’] stated goal of holding prosecutors accountable.” Ex. 1 at 1-2.

58. In the letter, the Corporation Counsel accuses the Law Professors of engaging in unethical conduct by simultaneously filing the complaints with the grievance committee and at the same time publishing the complaints and advocating for reform. He accuses the Professors of “misus[ing] and indeed abus[ing]” the grievance process “to promote a political agenda,” which is “harmful to the profession and the process and should not be countenanced.” *Id.* at 2-3. Repeatedly citing Judiciary Law § 90(10), he claims that the “law professor complainants should well know” that “the grievance process is not the proper venue”

for achieving systemic reform, and that they should have instead addressed their advocacy “to the legislature, the courts, and the Bar at large.” *Id.* at 3. The approach taken by the Professors, according to the Corporation Counsel, “is both abusive and wrong.” *Id.*

59. Nowhere in his letter on behalf of the City of New York and the Queens District Attorney does the Corporation Counsel explain why there is any inconsistency between filing well-documented complaints that should be acted upon and publicly advocating for reform of the disciplinary process. Nor does he explain why what the Law Professors are doing is not fully within their First Amendment rights, which should protect them from such governmental harassment. Indeed, he does not even deny that the Law Professors’ complaints document real, pervasive and unchecked misconduct in the Office of the Queens District Attorney or that it is the public interest to raise such issues. In fact, he does not dispute anything of substance any of the professors complaints; he actually goes out of his way to say that he is “taking no position on the substance of the allegations involving the individual ADAs.”

60. The Corporation Counsel’s letter to the Grievance Committee expresses particular ire about the Law Professors’ decision to publish their complaints on the Accountability NY website to help educate the public about this State’s plague of prosecutorial misconduct. He claims that the Law Professors have violated the law—suggesting that they should be punished—because, he says, Judiciary Law § 90(10) makes attorney disciplinary records “including the complaint” private and confidential.

61. The supposed secrecy of a complaint by a member of the public would be news to the many aggrieved parties who, exercising their First Amendment rights, have told relatives, colleagues, and the press about the complaints they have filed about particular lawyers. It would also be news to those who filed complaints with grievance committees with respect to Rudolph Giuliani over his role in the 2020 election and January 6, 2021 Capitol riots, and then

published their complaints widely in the press. The list of these individuals—whom the Corporation Counsel would also presumably dub lawbreakers acting in a manner “harmful to the profession”—reads like a Who’s Who of the American bar, including retired federal and state judges, former federal and state prosecutors, past presidents of the American Bar Association, and the like. Particularly relevant here, it included 20 retired New York State judges and seven former members of New York State Grievance Committees.

62. Speaking for the City of New York and the Queens District Attorney, the Corporation Counsel found it particularly offensive that the Law Professors were not personally the victims of the alleged misconduct and that their complaints were all documented from the public record. They “readily concede,” he says, that they have “no first-hand knowledge” the misconduct that is copiously documented in their complaints. The letter does not explain why the grievance process is, or should be, limited to complaints from victims. In particular, the letter ignores the fact that the attorney’s reporting obligations are far broader. As the New York State Bar Association has made clear, “a lawyer is always free to report evidence of what may constitute improper conduct by another attorney.” New York State Bar Assoc., Committee on Professional Ethics, Opinion 854 (March 11, 2011). All that is needed is “a good faith belief or suspicion that misconduct has been committed.” *Id.* There was no impropriety in the Law Professors’ relying on judicial findings of prosecutorial misconduct.

63. The Corporation Counsel’s letter calling the Law Professors unethical is not simply an idle threat to them. Rather it involves some of the most powerful figures in the New York legal community. The letter itself is on behalf of the City of New York and the Queen District Attorney. Meanwhile, the grievance committees to which he wrote are empowered to investigate and punish the Law Professors—each of whom is admitted to and an active member of the New York bar—for any breaches of professional conduct. By stating that

the Law Professors had violated the law and were knowingly “abusing” the judicial process in violation of Judiciary Law § 90(10) the Corporation Counsel was accusing the Law Professors of violating (at the least) New York Rule of Professional Conduct 8.4(d) (“A lawyer shall not engage in conduct that is prejudicial to the administration of justice”). And by insisting that the Professors’ conduct “should not be countenanced,” the Corporation Counsel was suggesting that the grievance committees investigate and punish the Professors for their supposed breach.

64. The Corporation Counsel also made it clear that he was not yet finished with his campaign of threats and harassment. He said that “at this juncture” all he was doing was alerting the grievance committees to the fact that the Law Professors were engaged in a “very public campaign” that supposedly “runs afoul of the confidentiality provisions of the law and the purpose of the grievance process.” But he asserted ominously that all five of New York City’s five district attorneys—and the Special Narcotics Prosecutor as well—are supposedly “concerned about this abuse of the grievance process.” And he threatened that if the Professors “continue on their quest to publicly disclose grievance complaints,” he may be “compelled” to continue his abusive threats, wrongful accusations of misconduct and demands for punitive action against the Law Professors. *Id.*

65. The Law Professors have published their complaints, and aired their mission, relying on the dictum that “sunlight is the best disinfectant” and it is sorely needed here to help rehabilitate the New York grievance process. The Corporation Counsel apparently believes the opposite and, in particular, that the people of New York should not know about his outrageous effort to interfere with the Law Professors exercise of their First Amendment rights. He ends his letter by insisting that it is, for some reason, “private and confidential under Judiciary Law 90(10).” And he adds yet another threat: “any disclosure of this letter” by the Professors “would be unlawful under the Judiciary Law.” Ex. 1 at 3, n. 4. (As a result of this

threat and another from the current Corporation Counsel, Plaintiffs have filed these letters and other related correspondence under seal).

66. In response to complaints from the Law Professors about this baseless effort to threaten them for their exercise of their First Amendment rights (Exs. 3 & 4), New York City's chief legal counsel wrote again to the Grievance Committee on July 8, 2021. Ex. 5. In this later letter addressed to the Grievance Committee for the Second, Eleventh & Thirteenth Judicial Districts, the Defendant Corporation Counsel Georgia Pestana (Mr. Johnson having resigned) apparently recognized that the Law Professors were entitled to publish their complaints, but she maintained—albeit in softer language—that the Law Professors were improperly “using the confidential grievance process to wage a public campaign for prosecutorial reform.” This supposed abuse of the process—publicly filing complaints in an attempt to seek reform of the disciplinary process while at the same time bringing ethical violations to the attention of the Grievance Committee—required the Grievance Committee to “consider this context” in addressing the complaints. As before, the Corporation Counsel did not attempt to defend the accused prosecutors, even while implicitly suggesting that the Grievance Committee not treat the complaints seriously. And, as before, the Defendant Corporation Counsel insisted that under Judiciary Law § 90(10) her letter—the views of the chief legal officer of New York City writing on behalf of the City of New York and the Queens District Attorney, Defendant Katz, about a matter of great public importance—must be treated as secret and withheld from the public.

67. The July 8, 2021 letter did add one more allegation of supposed misconduct by the Plaintiffs. The Corporation Counsel noted that the Accountability NY website, maintained by Plaintiff Civil Rights Corps, allows members of the public to “create automated emails” that can be sent to grievance committees, asking that prosecutors be held “publicly accountable when they violate the rights of New Yorkers.” The Corporation Counsel

seems to suggest this is somehow improper. According to the letter, that is because “these emails do not identify any attorney or any alleged misconduct, but merely express a policy position about accountability.” The letter does not identify why the First Amendment does not fully protect any such communications with the Grievance Committee or why they are in any way improper. Nor does it explain why it is somehow wrong to ask members of the public to lobby the Grievance Committee to do its job. Ironically, the Corporation Counsel seemingly believes that it is proper for her to communicate to the Grievance Committee about matters of public policy without focusing on “any attorney or any alleged misconduct”—as is true of both Corporation Counsel letters—but somehow improper for members of the public to do the same.

## **2. The Grievance Committee Excludes the Law Professors From the Process**

68. The Law Professors had filed their complaints in strict compliance with the rules set forth in 22 N.Y.C.R.R. § 1240. Under the rules, the Law Professors were the “complainants,” a defined term that simply means “a person or entity that submits a complaint to a Committee.” 22 N.Y.C.R.R. § 1240.2(e). Complainants are entitled to certain rights and information under the law. This includes notification of the disposition of the matter, the ability to appeal a disposition, and notification of the outcome of the challenge. 22 N.Y.C.R.R. § 1240.7(d), (e). In practice, complainants are automatically given a copy of any response filed by the accused attorney for comment. When they filed their complaints on May 3, 2021, the Law Professors had every right to expect that they would receive all of these rights with respect to the 21 complaints that they filed.

69. Nothing happened for over a month after the complaints were filed. Then, as outlined above, on June 2, 2021, the Corporation Counsel wrote to the Grievance Committee accusing the Law Professors of “misus[ing] and indeed abus[ing]” the grievance process in violation of Judiciary Law § 90(10). On behalf of the City of New York and the Queens District

Attorney, the Corporation Counsel urged the Grievance Committee to take adverse action against the Law Professors or their complaints—to “consider the manner in which [each complaint] was filed” and “this broader context as you evaluate [each] complaint.”

70. With these outrageous allegations before it from the city’s chief legal officer, the Grievance Committee did take adverse action against the Professors. It baselessly denied the Law Professors their statutory right to participate in the review process by denying them their statutory status as “complainants.” On June 11, 2021, just 9 days after the Corporation Counsel’s letter, Defendant Kearse, Chief Counsel of the Grievance Committee, wrote a letter to the Law Professors. Ex. 2. The letter is on the official letterhead of the Grievance Committee. On information and belief, the letter was sent with the approval of Defendant Andrea Bonina, chair of the Grievance Committee. The upshot of Defendant Kearse’s letter is that the Grievance Committee is **not** going to treat the Law Professors as complainants and the Professors will **not** receive the information to which complainants are entitled under the law.

71. Seizing on the fact—previously emphasized by the Corporation Counsel—that the complaints are all “based on information derived from public sources,” Defendant Kearse asserted without elaboration that—supposedly for that reason—the Professors were not complainants and instead “any investigations into these allegations would be initiated by the Grievance Committee, *sua sponte*.” The Law Professors would have not access to the process, which would instead “remain confidential pursuant to New York State Judiciary Law § 90”. Defendant Kearse even refused to confirm “whether any investigations will or will not be pursued,” leaving the Professors out in the cold. *Id.* This was all double-talk designed to penalize the Law Professors for asserting their First Amendment rights and to exclude them from the process that they initiated and to which they are entitled to participate.

72. The Grievance Committee does have the right to institute an investigation “*sua sponte*.” 22 N.Y.C.R.R. § 1240.7(a)(1). But those words mean “on its own motion,” an action undertaken without formal prompting from another party. Of course, the Grievance Committee can undertake an investigation based on its own—based on something in a newspaper or a judicial opinion. Sometimes the Grievance Committee may expand the scope of a previously filed complaint on its own initiative. *See, e.g., In re Mays*, 132 A.D.3d 241, 243 (2d Dep’t 2015); *In re Reid*, 149 A.D.3d 114, 115 (1st Dep’t 2017). Sometimes a judge may forward an opinion, but has no interest in participating in the ongoing proceedings as a complainant. But “*sua sponte*” simply does not describe the facts here. The Grievance Committee has 21 complaints before it. They reflect an extraordinary amount of work and include the formal request signed by members of the New York bar that the Grievance Committee investigate their complaints. It is true that the complaints are based on public records, but there is no reason to think the Committee would otherwise look at those records, which sometimes are years old and had to be collected and assembled with great care, if the complaints had not been filed by the complainants—the Law Professors. Defendant Kearse cited no authority—and we are aware of none—to refuse to treat a complainant as a complainant.

73. The principal effect of Defendant Kearse’s decision is to exclude the Law Professors from the grievance process, denying them the right of complainants. In response, the Law Professors noted that Defendant Kearse’s letter came on the heels of the Corporation Counsel’s baseless attack on them and her decision “suggests that, at the urging of Mr. Johnson, the Committee is rejecting the complaints and taking action against the professors for the exercise of their First Amendment rights.” Ex. 6.

74. On behalf of the Grievance Committee, Defendant Kearse responded with a terse letter sent on July 26, 2021. Ex. 7. ***Notably, she did not deny that the Committee action***

*was taken in response to the Corporation Counsel's demands.* Instead, she asserted that the *sua sponte* review of “complaints filed against attorneys based upon public records” is somehow based on the Rules for Attorney Disciplinary Matters and “the long-standing policy of the Appellate Division, Second Judicial Department.” She cited nothing for this proposition. And of course, the recent discipline of Rudolph Giuliani was not *sua sponte*, but was based on “numerous complaints of [Mr. Giuliani’s] alleged professional misconduct,” all based on the public record. *Matter of Giuliani*, No. 2021-00491, 2021 WL 2583536, at \*1 (1st Dep’t June 24, 2021). Indeed, the Grievance Committee’s position is a *non-sequitur*. The logic of Defendant Kearse’s position is that when “complaints [are] filed against attorneys based upon public records,” there is no complainant. But if a complaint is filed, the person who filed it is a complainant as defined by, and with rights under, under New York law. Defendant Kearse’s transparent fiction has only one purpose—to exclude the Professors from the ongoing process that their complaints have generated and thereby punish them for exercising their First Amendment rights.

75. In the ordinary course, a complaint is initially reviewed by the Chief Attorney for the Committee—Defendant Kearse. She may decline to investigate a complaint for a proper reason, but if she does, the law requires that “[t]he complainant shall be provided with a brief description of the basis of any disposition of a complaint by the Chief Attorney.” 22 N.Y.C.R.R. § 1240.7(d). Thereupon, the complainant has a right to seek reconsideration of the decision by the chair of the Committee, Defendant Bonina. *Id.* § 1240.7(e)(3). By treating the Professors' complaints as *sua sponte* inquiries, the professors are denied these rights. Ms. Kearse can now refuse to investigate the 21 complaints—**and tell no one**. The Law Professors and the public will be kept in the dark forever. In effect, in retaliation against the Law Professors for what the Corporation Counsel, and presumably the Grievance Committee, view as an abuse of

the grievance process, Defendant Kearse has turned the investigatory process into a black box, in which complaints go in and no one can assess whether anything comes out. Prosecutors who have violated the law, such as Jesse Sligh and Charles Testagrossa, have dodged any discipline for decades for their misconduct. The Law Professors and the public have a right to know if the Grievance Committee is prepared finally to intervene.

**E. On-going Injury**

76. Unless remedied by the Court, it is impossible to quantify the ongoing injury that the actions of the Corporation Counsel and the Grievance Committee may cause. The Law Professors have done nothing remotely improper. They have respectfully exercised their First Amendment rights to speak out against flaws in the New York system for attorney grievance and to petition their government for the redress of their grievances. Their grievances are both particular to named individuals—the failure of the system to discipline the subjects of the 21 complaints filed by the Law Professors, and to do so in public. And they are general to the system at large—its failure systematically to impose justice on misbehaving prosecutors throughout the state and its wrongful insistence on secrecy. There is no inconsistency in pursuing those grievances simultaneously. And public officials—the Corporation Counsel, the Queens District Attorney and the Grievance Committee Chief Counsel and Chair—and the public bodies that they represent have no business threatening or punishing the Professors for their conduct.

77. The threats and retaliation will continue unless enjoined. The Corporation Counsel has all but promised more inflammatory accusations if the Law Professors continue filing complaints—as they fully intend to do. The Corporation Counsel asserts that this endeavor is supported by New York City’s five district attorneys and the Special Narcotics Prosecutor, all of whom are supposedly “concerned about this abuse of the grievance process.” Meanwhile, the

Grievance Committee Chief Counsel and Chair will seemingly continue baselessly treating well-documented complaints filed by the Law Professors as not complaints at all and have reserved the right to bury them without public notice. There is now no reason to expect a good-faith investigation of the accused prosecutors by the Grievance Committee. Indeed, as matters now stand, the Grievance Committee may actually decide instead to investigate the Law Professors—rather than the prosecutors—for imaginary misconduct.

78. Even if the Grievance Committee does undertake an investigation based on the Law Professors' complaints, under Judiciary Law § 90(10) that investigation will take place in secret. On the facts of this case, that is, by itself, a First Amendment violation. The public has a right to see and hear the proceedings against these disgraced prosecutors in order to judge whether their public servants are performing their jobs and whether justice is being done. There is no countervailing reason for secrecy here. The allegations against the prosecutors are already known and part of the public record. Secrecy serves only to permit justice to be denied.

79. Meanwhile, for their part, the Law Professors have to assess whether, as members of the bar, they wish to continue to submit themselves to baseless accusations of abuse of the system by law enforcement and other officials, threatening potential disciplinary investigations, when all they are doing is so plainly in the public interest and protected by First Amendment. The Plaintiff Civil Rights Corps will incur unnecessary difficulty in soliciting more professors to join in its campaign to reform the disciplinary process. And professors who have not yet submitted a complaint, such as plaintiff Justin Murray, will think twice about whether they want to subject themselves to unnecessary abuse and threatened discipline.

80. All of this directly harms the public and will continue to do so unless enjoined. There is already a serious gap in reporting and addressing instances of prosecutorial misconduct. The prosecutors who misbehave do not have clients who can report them to the

Grievance Committee. Defense lawyers who may be aware of misconduct must nonetheless engage daily with the Queens District Attorney and her office, and so are discouraged from reporting misconduct for fear that whistleblowing will have a negative effect on their relations with the prosecutors. And when independent legal experts like the Professors are attacked by powerful government officials for the offense of making public their request that the Grievance Committee do its job, that operates to perpetuate the disrepair of the current system. All of this erodes the legitimacy of the grievance process and the claim that the bar is able to govern itself. All of these harms above and beyond the direct threat of professional discipline are intangible, but they are real, they are irreparable and they are ongoing.

**FIRST CLAIM FOR RELIEF**

**Against Defendants Bonina, Katz, Kearse, And Pestana For Violating Plaintiffs' First Amendment Rights**

81. Plaintiffs reallege and incorporate by reference the allegations set forth in paragraphs 1-80 above with the same force and effect as if fully set forth herein.

82. The acts of the Corporation Counsel, the Queens District Attorney, the Grievance Committee Chief Counsel and Chair constitute conduct under color of state law that deprived the Law Professors of rights, privileges, and immunities under the First and Fourteenth Amendments to the United States Constitution.

83. The First Amendment protects the right to "freedom of speech" and to "petition the Government for a redress of grievances." U.S. Const., amend. I. "The First Amendment is applicable to the States through the Due Process Clause of the Fourteenth Amendment." *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 750 n.1 (1976).

84. The state and its officials acting under color of law are barred by the First Amendment from threatening, harassing and retaliating against individuals for engaging in protected speech.

85. The Law Professors have a First Amendment right to make complaints to the Grievance Committee, to publish these complaints, and to engage in a political activity to encourage greater accountability for prosecutorial misconduct. These activities involve freedom of speech, freedom to petition the government and freedom of association, all protected by the First Amendment. They are all matters of compelling public concern. They cannot be investigated or sanctioned by state officials for engaging in these activities.

86. The Corporation Counsel, the Queens District Attorney and the Grievance Committee Chief Counsel and Chair have engaged in an ongoing effort to harass, threaten, and punish the Law Professors for their exercise of their First Amendment rights.

### **SECOND CLAIM FOR RELIEF**

#### **Against Defendants Bonina And Kearse For Violating the Equal Protection Clause**

87. Plaintiffs reallege and incorporate by reference the allegations set forth in paragraphs 1-80 above with the same force and effect as if fully set forth herein.

88. The Equal Protection Clause of the Fourteenth Amendment “requires that the government treat all similarly situated people alike.” *Harlen Assocs. v. Inc. Vill. of Mineola*, 273 F.3d 494, 499 (2d Cir. 2001).

89. Under New York law, “a person or entity that submits a complaint to [an attorney grievance committee]” is called the “complainant.” 22 N.Y.C.R.R. §§ 1240.2(d), 1240.2(e). Grievance committees do not possess any discretion to deny a person or entity that submits a complaint of their “complainant” status. A complainant is given certain rights—and the grievance committee certain obligations—in connection with any disciplinary process that

arises from their complaints. Those rights include notice of grievance committee decisions, the reasons therefor and the right to appeal those decisions.

90. By determining that any investigations of the misconduct recounted in the Law Professors' complaints would be undertaken "*sua sponte*," the Grievance Committee Chief Counsel and Chair have deprived or threatened to deprive the Law Professors of their status as "complainants" and the rights that flow therefrom, and they have treated the Law Professors differently than other similarly-situated individuals who file grievance complaints. These actions were undertaken to retaliate against the Law Professors for activities protected by the First Amendment and they deny the Professors equal protection of the law.

### **THIRD CLAIM FOR RELIEF**

#### **Against All Defendants For Enforcing New York Judiciary Law § 90(10) In Violation of Plaintiffs' First Amendment Right To Speak Freely Under The United States Constitution And Article I § 8 of the New York State Constitution (As-Applied and Facial Challenge)**

91. Plaintiffs reallege and incorporate by reference the allegations set forth in paragraphs 1-80 above with the same force and effect as if fully set forth herein.

92. New York Judiciary Law § 90(10) provides that "all papers, records and documents . . . upon any complaint, inquiry, investigation or proceeding relating to the conduct or discipline of an attorney or attorneys, shall be sealed and be deemed private and confidential." The same statute allows for public disclosure of such documents only "in the event that charges are sustained by the justices of the appellate division" or "upon good cause being shown." *Id.*

93. Insofar as New York State Judiciary Law § 90(10)'s confidentiality provision limits the Professors' right to speak freely, it violates the First Amendment of the United States Constitution and its New York State counterpart, Article I § 8 of the New York State Constitution. Section 90(10) cannot constitutionally be applied to preclude the Professors from publishing (1) the 21 complaints they filed and any future complaints they may file, (2) the

letters written by and between Defendants and the Professors regarding those complaints, and (3) any information Plaintiffs may receive from Defendants in the future in connection with those complaints. When applied to muzzle the Plaintiffs, New York State Judiciary Law § 90(10) is a content-based prior restraint on speech that is not narrowly tailored to serve a compelling government interest.

94. The Plaintiffs wish to draw public attention to the Grievance Committee's failure appropriately to investigate and discipline prosecutors who engage in misconduct. New York State Judiciary Law § 90(10) injures them by preventing them from engaging in core political speech and advocacy.

95. Moreover, if Defendants' interpretation of Judiciary Law § 90(10) is correct, then the law is constitutionally overbroad on its face. It purports to keep confidential the most mundane and routine communications, from correspondence setting a date for a proceeding to a notice stating the Grievance Committee offices will be closed on a particular date. On the facts set forth above, that overbreadth is patent. The Corporation Counsel and the Queens District Attorney contend Judiciary Law § 90(10) bars disclosure of the letters written by the Corporation Counsel on behalf of the Queens District Attorney to the Law Professors. These letters attack the Law Professors for engaging in First Amendment activities and say nothing at all about the underlying allegations of prosecutorial misconduct that are the subject of the Law Professors' complaints. Indeed, the letters disclaim taking any position on those allegations at all. While the letters are surely embarrassing to the Corporation Counsel and the Queens District Attorney, they disclose nothing that can remotely be thought to be confidential. There is no legitimate governmental interest in keeping such letters confidential.

**FOURTH CLAIM FOR RELIEF**

**Against All Defendants For Enforcing New York Judiciary Law § 90(10) In Violation Of Plaintiffs' Right To Access Government Proceedings And Records Under The First Amendment Of The United States Constitution, Article I § 8 Of The New York State Constitution, and New York Judiciary Law § 4 (As-Applied)**

96. Plaintiffs reallege and incorporate by reference the allegations set forth in paragraphs 1-80 above as if fully set forth herein.

97. In addition to explicitly prohibiting the disclosure of “all papers, records and documents . . . upon any complaint, inquiry, investigation or proceeding relating to the conduct or discipline of an attorney or attorneys,” the New York Court of Appeals has also interpreted New York Judiciary Law § 90(10) as mandating confidentiality for attorney disciplinary hearings. *Johnson Newspaper Corp. v. Melino*, 564 N.E.2d 1046, 1050-51 (N.Y. 1990).

98. The First Amendment of the United States Constitution, Article I § 8 of the New York Constitution, and New York Judiciary Law § 4 provide the public with a qualified right of access to government proceedings and records. New York Judiciary Law § 90(10)’s confidentiality provision—as applied to any hearing and any materials “upon” any of the 21 complaints Plaintiffs filed—violates the public’s right of access.

99. Attorney disciplinary hearings are “judicial proceedings” and the grievance committees that investigate and hear misconduct complaints act as a “quasi-judicial body” and “an arm of the Appellate Division.” *Wiener v. Weintraub*, 29 N.E.2d 540, 541 (N.Y. 1968). There is a long history in the United States that judicial and quasi-judicial proceedings are open to the public. New York law affirmatively requires that “[t]he sittings of every court within this state shall be public, and every citizen may freely attend the same.” New York Judiciary Law § 4. Even if these proceedings were viewed as administrative, rather than judicial or quasi-judicial, they are “administrative hearings at which individual rights are adjudicated,”

which is a type of administrative hearing that has “traditionally been open [to the public].” *New York Civil Liberties Union v. New York City Transit Auth.*, 684 F.3d 286, 302 n. 12 (2d Cir. 2011).

100. In New York, attorney disciplinary complaints were historically heard in a public forum: “Petitions or complaints charging professional misconduct of an attorney” that are “now usually filed with the Grievance Committee” were, “in the past,” “presented to the General Term of the Supreme Court.” *Wiener*, 39 N.E.2d at 541.

101. In addition to being out-of-step with the state’s past tradition of openness, Judiciary Law § 90(10) is an outlier nationally. As of mid-2014, “the vast majority of jurisdictions open proceedings upon the filing of a formal charge following a finding of probable cause.” The Lippman Commission Report at 62. “New York is one of only 9 jurisdictions which do not permit public dissemination of information concerning disciplinary proceedings until, at the earliest, a recommendation that discipline be imposed, and usually upon a final adjudication.” *Id.*

102. Even if grievance proceedings involving private disputes can lawfully be conducted in secret, that is not the case when Judiciary Law § 90(10) is applied here, to keep confidential hearings relating to discipline of the prosecutors charged by the Professors with misconduct. Both the conduct of prosecutors and the discipline of prosecutors who commit misconduct are issues of great public importance. Absent access to these proceedings, the public will be unable to determine whether the system currently in place to investigate and discipline prosecutors is effective or if further reforms are needed.

103. The confidentiality provision of Judiciary Law § 90(10) purportedly “serves the purpose of safeguarding information that a potential complainant may regard as private or confidential and thereby removes a possible disincentive to the filing of complaints of

professional misconduct.” It also purportedly “evinces a sensitivity to the possibility of irreparable harm to a professional’s reputation resulting from unfounded accusations.” *Matter of Johnson Newspaper Corp. v. Melino*, 564 N.E.2d 1046, 1051 (N.Y. 1990). Neither of these concerns applies here.

104. The Professors have already chosen to publicize their complaints, so there is no need to “safeguard[] information [that the] complainant[s] may regard as private or confidential.” Meanwhile, the Professors’ complaints are based on information already in the public record—namely, public findings of prosecutorial misconduct by courts—so the accused prosecutors have already suffered whatever reputational harm may result from their conduct. Moreover, the fact that the complaints are based on judicial findings significantly reduces the risk of “unfounded accusations.” In any event, “injury to official reputation is an insufficient reason ‘for repressing speech that would otherwise be free.’” *Landmark Commc’ns, Inc. v. Virginia*, 435 U.S. 829, 841–42 (1978). Thus, application of Judiciary Law § 90(10) in this case serves no legitimate government interest whatsoever.

105. As applied to these facts, the First Amendment of the United States Constitution, Article I § 8 of the New York Constitution, and New York Judiciary Law § 4 require that all records and proceedings arising out of the complaints that the Law Professors have filed, and any similar complaints that they may file, be public.

#### **FIFTH CLAIM FOR RELIEF**

##### **Against All Defendants Under Judiciary Law § 90(10) Allowing Plaintiffs Access To Disciplinary Records and Proceedings For Good Cause Shown**

106. Plaintiffs reallege and incorporate by reference the allegations set forth in paragraphs 1-80 above as if fully set forth herein.

107. Upon a showing of “good cause,” Judiciary Law § 90(10) permits the public a right of access to disciplinary proceedings and all records of such proceedings. Good cause exists here. The public interest in, and the importance of, disciplining prosecutors for misconduct is intense. The 21 complaints detail proven instances of misconduct that go back decades without redress. There are no confidentiality issues at stake. Meanwhile, the Grievance Committee has shown a willingness to disregard the complaints and keep even the complainants themselves from being apprised of any investigation. The only way to assure the public that these complaints will be considered promptly and fairly is to let the public in. Good cause has been shown for opening the proceedings involving the 21 complaints filed by the Law Professors.

**PRAYER FOR RELIEF**

The conduct alleged herein, unless and until enjoined by an order of this Court, will cause great and irreparable injury to Plaintiffs. A judicial declaration is necessary and appropriate at this time so that all parties may know their respective rights and act accordingly.

WHEREFORE, Plaintiffs demand judgment against Defendants:

A. Declaring that Defendants Bonina, Katz, Kearse, and Pestana’s harassment, threats and retaliation against Plaintiffs violate the First Amendment of the United States Constitution;

B. Preliminarily and permanently enjoining Defendants Bonina, Katz, Kearse, Pestana, and their employees, agents, and any and all persons acting in concert with them from harassing, threatening or retaliating against Plaintiffs because of their exercise of their First Amendment rights;

C. Declaring that the Defendants Bonina and Kearse unlawfully denied the Law Professors the status of “complainant” as defined in N.Y.C.R.R. § 1240.2(e) in violation of the First and Fourteenth Amendments of the United States Constitution;

D. Preliminarily and permanently enjoining the Defendants Bonina, Katz, and their employees, agents, and any and all persons acting in concert with them from depriving the Plaintiffs of the equal protection of the law by treating their complaints differently than those of other similarly situated complainants in retaliation for their exercise of their First Amendment rights;

E. Declaring that Judiciary Law § 90(10) violates the First Amendment of the United States Constitution and Article I Section 8 of the New York State Constitution, insofar as it is applied to prevent Plaintiffs from publishing information that is in their possession or that comes into their possession relating to any complaints of prosecutorial misconduct that they have filed or may file;

F. Preliminarily and permanently enjoining all Defendants and their employees, agents, and any and all persons acting in concert with them from enforcing or attempting to enforce Judiciary Law § 90(10) to preclude Plaintiffs from publishing information that is in their possession or that comes into their possession relating to any complaints of prosecutorial misconduct that they have filed or may file;

G. Declaring that Judiciary Law § 90(10) violates the First Amendment of the United States Constitution, Article I, § 8, of the New York State Constitution and New York Judiciary Law § 4 insofar as it is applied to deny public access to any and all records and proceedings that may result from the complaints of prosecutorial misconduct that the Law Professors have filed or may file;

H. Preliminarily and permanently enjoining all Defendants and their employees, agents, and any and all persons acting in concert with them from enforcing or attempting to enforce Judiciary Law § 90(10) insofar as it is applied to deny public access to any and all records and proceedings that may result from the complaints of prosecutorial misconduct that the Law Professors have filed or may file;

I. Ordering the Defendants Bonina, Kearse and LaSalle and their employees, agents, and any and all persons acting in concert with them to make public any and all records that may result from the complaints of prosecutorial misconduct that the Law Professors have filed or may file and to hold any and all proceedings arising from those complaints in public;

J. Declaring that there is "good cause" pursuant to Judiciary Law § 90(10) to unseal and divulge any and all disciplinary proceedings and records that may result from the complaints of prosecutorial misconduct that the Law Professors have filed or may file;

K. Awarding monetary damages in an amount to be proven at trial of \$1 or more;

L. Awarding Plaintiffs their costs and reasonable attorneys' fees in this action; and

M. Any other or further relief the Court deems appropriate.

Dated: New York, New York  
November 4, 2021

Respectfully submitted,

PATTERSON BELKNAP WEBB & TYLER LLP



Gregory L. Diskant  
Jeffrey F. Kinkle

Jeffrey C. Skinner  
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*Attorneys for the Plaintiffs*

# EXHIBIT 1



**THE CITY OF NEW YORK  
LAW DEPARTMENT**

**JAMES E. JOHNSON**  
*Corporation Counsel*

100 CHURCH STREET  
NEW YORK, NY 10007

(212) 356-0800  
jajohnso@law.nyc.gov

June 2, 2021

Via email to ad2-grv9@nycourts.gov

State of New York Grievance Committee for the  
Ninth Judicial District  
Crosswest Officer Center  
399 Knollwood Road, Suite 200  
White Plains, N.Y. 10603

**Re: May 3, 2021 Grievance Complaints Filed Against Current and Former  
Queens County Assistant District Attorneys**

**Taylor Piscionere, State Bar No. 5212717**

Dear Grievance Committee Members:

As the Chief Legal Officer of the City of New York and as legal counsel to the Office the District Attorney for Queens County, I write to express my deep concern with a series of grievance complaints represented to have been filed with your Committee regarding the conduct of the aforementioned former Queens Assistant District Attorney. With full appreciation of the vital role that the grievance process plays in ensuring the integrity of our profession, I believe that the very public campaign surrounding this and other similar complaints is contrary to both the law and the principles on which the grievance process is based. As your office reviews this complaint, I respectfully request that your Committee consider the manner in which it was filed.

On May 3, 2021, a complainant group of law professors claimed to have filed twenty-one simultaneous complaints with four New York State Judicial District grievance committees—including this Committee—regarding the conduct of twenty-one current and former Queens ADAs. Some of these complaints concern conduct that is over twenty years old.<sup>1</sup> My office became aware

<sup>1</sup> Each of the complaint letters follow a similar format and note that the complainants do “not have personal knowledge of any of the facts or circumstances of [the ADA] or the cases mentioned” and that the “grievance is based entirely on the court opinions, briefs and other documents.”

of these complaints because the complainants posted the documents to a public website ([www.accountabilityny.org](http://www.accountabilityny.org)), began a social media campaign to “shin[e] a light” on these complaints, engaged the media regarding these complaints, and publicly stated their intent to deploy the same strategy against ADAs from other prosecutorial offices.<sup>2</sup>

As you know, New York State Judiciary Law § 90(10) designates attorney disciplinary records—including the complaint—private and confidential. Only the Appellate Division, upon good cause being shown, is empowered to permit all or any part of such papers, records and documents to be divulged. In holding that attorney disciplinary complaints are made in the context of a judicial proceeding and thus are entitled to absolute immunity, the Court of Appeals specifically found that any risk of prejudice to attorneys by the filing of such complaints is eliminated by Judiciary Law 90(10), which deems all papers private and confidential. *Wiener v. Wientraub*, 22 N.Y.2d 330, 332 (1968).

In *Johnson Newspaper Corp. v. Melino*, 77 N.Y.2d 1 (1990), the Court of Appeals recognized the dual policy purposes served by keeping disciplinary proceedings involving licensed professionals confidential until they are finally determined. It safeguards information a potential complainant may regard as private or confidential, thereby removing any disincentive to filing a complaint. But it also “evinces a sensitivity to the possibility of irreparable harm to a professional’s reputation resulting from unfounded accusations,” recognizing that “a professional reputation ‘once lost, is not easily restored.’” *Id.* at 10-11 (quoting *People ex rel. Karlin v. Culkin*, 248 N.Y. 465, 478 (1928) (citations omitted)). And in *In re Capoccia*, 59 N.Y.2d 549, 554 (1983), the Court made clear that Judiciary Law 90(10)’s confidentiality provisions “were enacted primarily, if not only, for the benefit of the attorney under investigation.”

Yet, in direct contravention of this legal directive and long-established public policy, the complainant law professors not only posted the complaints online, but designed a special website to host these and future grievance complaints. They then took various additional steps to call attention to both their website and the complaints, and even created a “social media toolkit” that can be downloaded to facilitate further sharing of this information on various social media platforms by others. And they further encourage readers to review the grievances and then reach out to their local grievance committees to seek prosecutorial accountability, thus improperly seeking to interject public opinion into the grievance process in response to specific grievances.<sup>3</sup> See *Johnson Newspaper Corp.* 77 N.Y.2d at 7-8 (holding that there has been “no showing that [] public access plays ‘a significant positive role’ in the functioning of [disciplinary] proceedings”) (citation omitted).

Rather than respect the integrity of the process or seek reform through proper means, the complainant law professors are engaging in an orchestrated campaign to upend the attorney grievance process to advance their stated goal of holding prosecutors accountable. Their misuse and

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<sup>2</sup> George Joseph, *Prosecutors Wrongfully Convicted Three Men Who Spent 24 Years Behind Bars. Will They Be Disbarred?* Gothamist, May 6, 2021, <https://gothamist.com/news/prosecutors-wrongfully-convicted-three-men-who-spent-24-years-behind-bars-will-they-be-disbarred>. For other media references, please visit [www.accountabilityny.org](http://www.accountabilityny.org).

<sup>3</sup> <https://accountabilityny.org/complaints/>

indeed abuse of the grievance process to promote a political agenda is harmful to the profession and the process and should not be countenanced.

Whereas the stated purpose of the grievance process is for the Committee to review and determine complaints of *individual* professional misconduct, the contents of and manner in which these complaints were filed make clear that the complainants have other motives. The complaints, as written, are more an attack on prosecutors generally. The complainants are not the aggrieved parties. Nor do they purport to be discharging any reporting obligation under Rule 8.3 of the New York Rules of Professional Conduct. Rather, they readily concede that they have no first-hand knowledge of any of the conduct alleged in their complaints, but instead have obtained their information from court decisions and other documents that were already before the courts. Moreover, the complainants' website demonstrates that their broader mission is to promote prosecutorial accountability generally and make the attorney disciplinary process public.

As a former federal prosecutor, I fully appreciate the push to ensure that our prosecuting authorities operate at the highest levels of integrity. That said, as the law professor complainants should well know, the grievance process is not the proper venue for achieving such industry-wide policy goals. Such systemic reforms should be addressed to the legislature, the courts, and the Bar at large as opposed to through improperly publicized complaints regarding individual prosecutors. *See Doe v. Office of Prof'l Med. Conduct*, 81 N.Y.2d 1050, 1052-53 (1993) (recognizing that "there are substantial reasons favoring open disciplinary proceedings," but that "the Legislature is in the best position to weigh conflicting policy values represented by these two approaches as they affect the various professions and enact consistent provisions for them giving appropriate protection to the interests of the parties and witnesses and the public interest"). No matter how well-intentioned their objectives, the law professors' approach is both abusive and wrong.

To be clear, in sending this letter I am taking no position on the substance of the allegations involving the individual ADAs.<sup>4</sup> Rather, at this juncture, I am writing to make sure that the Committee is aware that this complaint is part of a broader and very public campaign involving multiple grievances sent *en masse* to four different committees, and a campaign which, I submit, runs

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<sup>4</sup> However, this letter is sent in response to specific grievances and, thus, is private and confidential under Judiciary Law 90(10). As such, any disclosure of this letter by complainants without proper court permission would be unlawful under the Judiciary Law.

afoul of the confidentiality provisions of the law and the purpose of the grievance process. Respectfully, I request that you consider this broader context as you evaluate this complaint.<sup>5</sup>

Sincerely,



James E. Johnson

cc: Cynthia Godsoe  
Professor of Law  
Brooklyn Law School

Steven Zeidman  
Professor of Law  
CUNY School of Law

Nicole Smith Futrell  
Associate Professor of Law  
CUNY School of Law

Daniel S. Medwed  
University Distinguished Professor of  
Law and Criminal Justice  
Northeastern University

Abbe Smith  
Scott K. Ginsburg Professor of Law  
Director, Criminal Defense & Prisoner Advocacy Clinic  
Co-Director, E. Barrett Prettyman Fellowship Program  
Georgetown University Law School

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<sup>5</sup> As mentioned above, this letter is submitted on behalf of the City of New York and the Queens District Attorney's Office. Should the complainants continue on their quest to publicly disclose grievance complaints involving the City's other prosecuting offices, as their website suggests, this Office may be compelled to send a similar letter on behalf of those offices. New York City's five district attorneys and the Special Narcotics Prosecutor are concerned about this abuse of the grievance process, as all members of the legal profession should be.

# EXHIBIT 2



ANDREA E. BONINA, ESQ.  
Chair

*State of New York*  
*Grievance Committee for the*  
*Second, Eleventh and*  
*Thirteenth Judicial Districts*

Renaissance Plaza  
 335 Adams Street – Suite 2400  
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DIANA MAXFIELD KEARSE  
Chief Counsel

MARK F. DEWAN  
Deputy Chief Counsel

SUSAN KORENBERG  
SUSAN B. MASTER  
KATHRYN DONNELLY  
THOMAS GRAHAM AMON  
SASHA N. HOLGUIN  
DAVID W. CHANDLER  
SARA MUSTAFA  
THOMAS J. MURPHY  
Staff Counsel

June 11, 2021

**PERSONAL AND CONFIDENTIAL**

Cynthia Godsoe  
 Nicole Smith Futrell  
 Abbe Smith  
 Steven Zeidman  
 Daniel S. Medwed  
[professors@accountabilityny.org](mailto:professors@accountabilityny.org)

Dear Professors:

This letter will acknowledge receipt of your recent complaints against current or former Assistant District Attorneys. Please be advised that while some of these complaints were addressed to other Grievance Committees (*viz.*, the Grievance Committee for the Ninth Judicial District, the Grievance Committee for the Tenth Judicial District and the Attorney Grievance Committee for the First Judicial Department), they have all been transferred to this office.

By your own acknowledgement, your allegations are based on information derived from public sources, specifically, court decisions and court records. Under such circumstances, any investigations into these allegations would be initiated by the Grievance Committee, *sua sponte*, and remain confidential pursuant to New York State Judiciary Law §90, unless they resulted in public discipline imposed by the Appellate Division. Nevertheless, the Grievance Committee thanks you for bringing these matters to its attention and appreciates your interest in preserving the standards of the legal profession.

This letter does not constitute confirmation as to whether any investigations will or will not be pursued. Please be guided accordingly.

Very truly yours,

Diana Maxfield Kearse  
Chief Counsel

DMK/mfd

# EXHIBIT 3

# Patterson Belknap Webb & Tyler LLP

1133 Avenue of the Americas New York, NY 10036-6710 212.336.2000 fax 212.336.2222 [www.pbwt.com](http://www.pbwt.com)

June 22, 2021

Gregory Diskant  
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State of New York Grievance Committee for the  
Ninth Judicial District  
Crosswest Officer Center  
399 Knollwood Road, Suite 200  
White Plains, N.Y. 10603

**Re: May 3, 2021 Grievance Complaints Filed  
Against Current and Former Queens County  
Assistant District Attorneys**

**Taylor Piscionere, State Bar No. 5212717**

Dear Grievance Committee Members:

This firm represents law professors Daniel Medwed, Cynthia Godsoe, Abbe Smith, Nicole Smith Futrell and Steven Zeidman (“the professors”). Under the sponsorship of the Civil Rights Corps, and with the support of other public interest groups and concerned citizens, they have filed a total of twenty-one grievance complaints against current and former assistant district attorneys (“ADAs”). The complaints concern some of the most egregious instances of prosecutorial misconduct that have been reported in Queens County, New York. We write in response to the ill-advised letter of June 2, 2021 from James E. Johnson, the former Corporation Counsel of the City of New York, on behalf of the City of New York and the Office of the District Attorney for Queens County.

Mr. Johnson’s beef is that the professors have made public their grievance complaints about prosecutorial misconduct on the website Accountability NY. The complaints are all based on a thorough analysis of publicly-available information (largely findings by appellate courts on complete records) about serious abuses of prosecutorial authority. Mr. Johnson does not deny the misconduct, but he seems to think that there is no need for a public airing of such issues. Indeed, he does not even think it is his obligation to take a position on whether misconduct occurred. Rather, he devotes his fire to criticizing the professors, even while insisting that his criticism of them be kept secret from the public. This is wrong in every way.

Mr. Johnson’s claim that Judiciary Law Section 90(10) somehow bars a lawyer from making public a grievance that he or she has filed with the Grievance Committee is preposterous. Needless to say, the law professors sought legal counsel before publishing their complaints, both from this firm and from Professor Stephen Gillers of NYU Law School, one of the nation’s leading experts on professional ethics. There is no basis for Mr. Johnson’s objection. We could not identify a single instance of a lawyer being disciplined for publishing a complaint that he or

she has filed – and Mr. Johnson cites none. Indeed, the First Amendment plainly bars sanctioning the professors for their exercise of protected speech.

Examples abound of distinguished members of the bar publishing grievance complaints that they have filed. Most recently, complaints have been filed, and well publicized, concerning the activities of the former Mayor of New York City, Rudolph Giuliani. For instance, Lawyers Defending American Democracy filed and published an ethics complaint against Mr. Giuliani, with a list of over 3000 signers. The list is a Who's Who of leaders of the American bar, including retired federal and state judges, former federal and state prosecutors, past presidents of the American Bar Association, and the like. Particularly relevant here, the signers included 20 retired New York State judges and seven former lawyers or members of New York State Grievance Committees.<sup>1</sup> The New York City Bar Association has endorsed the importance of public dissemination of this and similar complaints against Mr. Giuliani. It stated, "The Association believes that it is important for the public to understand the basis for the disciplinary complaints that have been filed, and the disciplinary process that will be followed in connection with those complaints."<sup>2</sup>

We are aware of no complaints about public disclosure of the complaints against Mr. Giuliani. In particular, to our knowledge, the City of New York Law Department and Mr. Johnson seemingly have had no problems with publication of these complaints, even though Mr. Giuliani, like the prosecutors about whom the professors have complained, is a former member of New York City government and, indeed, a former prosecutor. Why have our complaints prompted this response? And why does Mr. Johnson wish to keep his letter secret?

The answer may lie in the Corporation Counsel's attempt to draw attention away from the plague of unchecked prosecutorial misconduct that has diminished public confidence in the justice system. As the professors explain in their grievances:

"[M]isconduct by prosecutors remains widespread and unchecked in the New York criminal legal system. A 2013 analysis of ten years of state and federal decisions revealed more than two dozen instances in which judges reversed convictions explicitly because of prosecutorial misconduct. Yet these appellate courts 'did not routinely refer prosecutors for investigation by the state disciplinary committees,' and the disciplinary committees 'almost never took serious action against prosecutors. In the 30 cases where judges overturned convictions based on prosecutorial misconduct, only one prosecutor was publicly disciplined by a New York disciplinary

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<sup>1</sup> <https://ldad.org/letters-briefs/ldad-files-grievance-against-giuliani>

<sup>2</sup> <https://www.nycbar.org/member-and-career-services/committees/reports-listing/reports/detail/grievance-complaints-filed-against-rudolph-giuliani>

committee. None of the other implicated prosecutors were disbarred, suspended or publicly censured and, according to personnel records gathered by ProPublica, several prosecutors were promoted and given raises soon after courts cited them for abuses.”

Efforts by New York State to address this pervasive problem have been met with vigorous opposition by State District Attorneys. Beginning in 2018, New York State has attempted to enact the first-in-the-nation State Commission on Prosecutorial Conduct. That reform effort has been met with unrelenting opposition from the District Attorney Association of New York, which filed suit immediately after the law was first enacted. In response to the lawsuit, the State amended the law, and the District Attorneys sued again. They won an order invalidating the new law in January 2020. Just a few days ago, the Governor signed into law a third effort to gain some statewide oversight over prosecutorial misconduct.<sup>3</sup> More litigation may well be expected. Opponents of the Commission have argued that the solution is not a State Commission, but rather more of the same – for “grievance committees [to] focus more carefully on prosecutors in appropriate cases.”<sup>4</sup>

The work of the professors under the sponsorship of the Civil Rights Corps and their submission to the Grievance Committee is a response to this sorry state of affairs and it is undeniably in the public interest. For example, one of the professors’ complaints is against Charles Testagrossa, a former ADA whose prosecutorial misconduct led to the wrongful conviction and imprisonment of three defendants for 24 years.<sup>5</sup> In March 2021, Mr. Testagrossa’s misconduct was confirmed and the convictions were reversed. The presiding judge concluded that Mr. Testagrossa – who was still a prosecutor 24 years later – had lied to the court in defending his conduct. The judge stated, “This was, in short, not a good-faith misstatement; it was a deliberate falsehood”<sup>6</sup> Ironically, the charges against the three men

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<sup>3</sup> <https://www.governor.ny.gov/news/governor-cuomo-signs-legislation-bolstering-commission-prosecutorial-conduct>. *See generally* <http://cardozolawreview.com/the-new-york-prosecutorial-conduct-commission-and-the-dawn-of-a-new-era-of-reform-for-prosecutors/>

<sup>4</sup> Daniel R. Alonso, *Prosecutorial Conduct Commission Statute and Chapter Amendment Bill: Part I*, New York Law Journal (January 25, 2019 2:30PM), available at <https://www.law.com/newyorklawjournal/2019/01/25/prosecutorialconduct-commission-statute-and-chapter-amendment-bill-parti/?slreturn=20190028145414>.

<sup>5</sup> <https://accountabilityny.org/wp-content/uploads/2021/05/Testagrossa-Grievance.pdf>

<sup>6</sup> <https://queenseagle.com/all/queens-judge-says-top-prosecutor-lied-to-convict-in-wrongful-death-penalty-case>

based on Mr. Testagrossa's misconduct were dropped two days after Mr. Johnson sent his June 2, 2021 letter.<sup>7</sup>

The law professors' complaint against Mr. Testagrossa seeks to ensure that – having gotten away with egregious misconduct for decades – he is finally fully investigated and, if the facts warrant, properly disciplined. Mr. Johnson should be joining in demands that the suitability of Mr. Testagrossa and the other accused prosecutors to practice law be thoroughly investigated, not opposing that inquiry. In any event, like the complaints against Mr. Giuliani, it is in the public interest for the concerned citizens to understand the basis of the professors' grievance complaints. As the New York Court of Appeals has observed, “[t]he proper frame of reference, of course, is the protection of the public interest, for while a disciplinary proceeding has aspects of the imposition of punishment on the attorney charged, its primary focus must be on protection of the public.” *Levy v. Ass 'n of the Bar*, 37 N.Y.2d 279, 282 (1975) (internal quotation marks omitted). The sunlight of public disclosure is the best disinfectant. That is what the professors seek.

We can dispose briefly of Mr. Johnson's legal arguments about the complaints. Mr. Johnson cites no authority – either from a court or from a grievance committee – finding that it is improper for a complainant to publicize his or her complaint. Indeed, the language of Section 90(10) is directed only to the investigation that occurs “upon,” *i.e.*, after, the filing of a complaint, not the complaint itself. When the facts complained about are both public and of public interest, there is no reason to keep them secret just because they are contained in a complaint filed with a grievance committee rather than an op-ed article or a complaint filed in court.

As a result, there is no interest in privacy here. Complainants are offered privacy in order to encourage them to come forward, “removing a possible disincentive to the filing of complaints of professional misconduct.” *Matter of Johnson Newspaper Corp. v. Melino*, 77 N.Y.2d 1, 10-11 (N.Y. 1990). This principle has no application where the complaining law professors choose to make their complaints public and thus waive any claim to confidentiality. Meanwhile, the accused is accorded privacy only to protect his or her reputation from potentially unfounded grievances. But that principle has no application where the facts on which the complaints are founded are already public. The professors' complaint about Mr. Testagrossa, for instance, adds nothing to the public record regarding his misconduct. Instead, it seeks only appropriate discipline.

Indeed, any other result would violate the First Amendment rights of the professors to publicize their legitimate grievances. While no New York court has directly addressed this issue,

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<sup>7</sup> <https://www.nbcnewyork.com/news/local/charges-dropped-against-men-jailed-for-1996-double-murder-in-queens/3091770/>

other courts that have considered the question have held that protecting the reputations of attorneys is not a sufficient reason to prohibit complainants from disclosing truthful complaints. *See In re Warner*, 2005-1303 (La. 4/17/09), 21 So. 3d 218, 256 (2009) (“While protecting the reputations of ethical attorneys is clearly an important interest, as we interpret the jurisprudence of the Supreme Court, this interest does not qualify as compelling” enough to impose confidentiality requirements on complainants); *Doe v. Supreme Court of Fla.*, 734 F. Supp. 981, 985-86 (S.D. Fla. 1990) (“[P]rotecting the reputation of an individual [attorney], or indeed the profession as a whole, would be insufficient justification for absolutely barring the dissemination” of truthful disciplinary complaints); *R.M. v. Supreme Court*, 185 N.J. 208, 227, 883 A.2d 369, 381 (NJ 2005) (“Protecting the reputations of attorneys and the bar does not justify restricting a grievant’s speech” concerning the fact that he/she filed a grievance and the content of the grievance); *In re Petition of Brooks*, 140 N.H. 813, 678 A.2d 140 (1996) (reputational interests of attorneys not sufficient reason to prohibit a complainant from “disclos[ing] the fact that he filed the [attorney] complaints and information learned through interaction with the committee, and [from stating] his opinion on [the committee’s] handling of the complaints.”).

In short, there is no basis in Section 90(10) or in the First Amendment for objecting to the professors’ right to publish their complaints about prosecutorial misconduct. To the contrary, the public interest strongly supports their disclosure.

While there is no merit to Mr. Johnson’s letter, it is extremely concerning that it was submitted by the highest-ranking legal officer in New York City. Mr. Johnson purports to agree that public prosecutors should “operate at the highest level of integrity.” But he then distorts what the professors have done, claiming that they are not “complaints of *individual* professional misconduct” – his italics – when that is exactly what they are. Each complaint contains detailed allegations involving individual prosecutors and individual instances of misconduct. As such, they are plainly within the competence of the Grievance Committee to investigate and adjudicate. The fact that there are 21 separate complaints is a reflection only on the state of public justice in Queens, not a reason to disregard the complaints *en masse*. Indeed, Mr. Johnson does not assert that any one of the complaints is without basis.

Rather than grappling with the individual merits of any complaint, Mr. Johnson proclaims, that he is “taking no position on the substance of the allegations involving the individual ADAs.” In fact, it is difficult to read his letter as anything other than a request that the Grievance Committee group the complaints together and dismiss them all out of hand—without even considering the merits of any of them—because they are, supposedly, “harmful to the profession and the process and should not be countenanced.” Why is the highest legal official in New York City government insisting that well-founded complaints against his prosecutors be ignored? Why isn’t he investigating them himself? Indeed, it is the attempt to stifle ethical

complaints against wayward prosecutors, and the failure to check prosecutorial misconduct, that harm the legal profession and the legitimacy of the legal system.

And, perhaps most troubling of all, Mr. Johnson insists that his letter be kept secret. On the merits, that is baseless. New York law plainly permits those accused of misconduct to make the allegations against them public, if they so choose. *See, e.g., In re Capoccia*, 59 N.Y.2d 549, 554 (1983); *In re Aretakis*, 16 A.D.3d 899, 900-901 (3d Dep’t 2005). But it is worse than that. Mr. Johnson has nothing at all to say about the merits of any complaints – and that is the only conceivable reason for any secrecy in the disciplinary process. Instead, he insists that his threats against the professors and his effort to thwart the disciplinary process be kept a secret from the voters of New York City, even while a contested race for District Attorney in Manhattan is underway.

We ask you to ignore Mr. Johnson’s letter. He is not a participant in the grievance process; he is neither an accuser nor an accused; he has the ability to investigate and opine on the merits of the complaints, but he disclaims any obligation to do so; and he wants to keep his spurious allegations secret. His letter is completely out of place.

More important, we ask you to take seriously and investigate each individual grievance filed by the professors. Mr. Johnson seems to think that the complaints are inappropriate because they are based on public information and are, in his crabbed view of the ethics rules, somehow inconsistent with the obligation to report attorney misconduct under Rule 8.3 of the New York Rules of Professional Conduct. To the contrary, as the New York State Bar Association has made clear, “a lawyer is always free to report evidence of what may constitute improper conduct by another attorney,” even without “actual proof of misconduct.”<sup>8</sup> All that is needed is “a good faith belief or suspicion that misconduct has been committed.”<sup>9</sup> Similarly, Simon’s New York Code of Professional Responsibility Annotated advises that “a lawyer may report another lawyer based on rumor, suspicion, or hearsay, and may report activities raising less-than-substantial questions about a lawyer’s fitness as a lawyer.”<sup>9</sup>

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<sup>8</sup> N.Y.S. Bar Assoc. Ethics Op. 635 at 4, citing Op. 480.

<sup>9</sup> Simon’s New York Code of Professional Responsibility Annotated 77 (2008 ed.)

The grievances filed by the professors are not based on rumor, suspicion on hearsay and they raise substantial questions about the accused prosecutors' fitness to act as a lawyer. The filed grievances give this Committee an opportunity to demonstrate to the public a serious commitment to enforce the ethics rules against New York State prosecutors. We ask you to silence the critics and act on the complaints.

Very truly yours,

/s/ Gregory Diskant

Gregory Diskant

cc: Georgia Pestana, Acting Corporation Counsel

# EXHIBIT 4

## Patterson Belknap Webb & Tyler LLP

1133 Avenue of the Americas New York, NY 10036-6710 212.336.2000 fax 212.336.2222 [www.pbwt.com](http://www.pbwt.com)

June 22, 2021

Gregory Diskant  
(212) 336-2710  
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Georgia Pestana  
Acting Corporation Counsel  
The City of New York  
100 Church Street  
New York, N.Y. 10007

**Re: June 2, 2021 Letter of James E. Johnson**

Dear Ms. Pestana,

I write on behalf of law professors Daniel Medwed, Cynthia Godsoe, Abbe Smith, Nicole Smith Futrell and Steven Zeidman (“the professors”) in response to the June 2, 2021, letter from the former Corporation Counsel, James E. Johnson, to multiple Grievance Committees in New York. Under the sponsorship of a civil rights organization, the Civil Rights Corps, and in collaboration with other concerned citizens, the professors have undertaken an important project to address the plague of prosecutorial misconduct in the State of New York. As part of that project, they carefully reviewed public records of alleged prosecutorial misconduct and prepared and submitted grievance complaints about prosecutors whose activities they believed warranted investigation and possible discipline. Because the professors believed the public should be informed about the misconduct documented in their complaints, they published their complaints on the Accountability NY website. In the first round of their work, they submitted 21 complaints about the actions of prosecutors in Queens County.

In response to the professors’ public-spirited activities, Mr. Johnson wrote a threatening letter to each Grievance Committee that had received one of the 21 complaints. Because you may not have seen Mr. Johnson’s letter, I am enclosing a copy of a sample (they are all the same) along with my response. In wholly inappropriate and hyperbolic language, Mr. Johnson alleged that the complaints themselves were improper and their publication was also improper. He suggested that filing 21 well-documented complaints was “abusive and wrong,” somehow “an abuse of the grievance process.” He further alleged that by making the complaints public, the professors violated Section 90(10) of the Judiciary Law, even though they did not make public any facts that were not already in the public domain. He said that all of this was “contrary to both the law and the principles on which the grievance process is based.” He threatened that if the professors continue to file and publish complaints against other prosecutors, he would feel “compelled” to send a similar threatening letter to other disciplinary committees. He emphasized that his letter reflected only his position “at this juncture”, leaving unstated what future actions he might be contemplating against the professors. He asked the Grievance Committees to consider his letter as they reviewed the professors’ complaints, leaving unstated what punitive action he thought the Committee should take, but essentially inviting the opening of disciplinary

investigations of the professors. And he incredibly insisted that the law professors were required by law to keep his threats secret.

It takes only a moment's reflection to recognize that Mr. Johnson's intimidating letter, under color of state law, is a direct attack on the First Amendment rights of the professors. The First Amendment permits the professors to file as many complaints against wrongdoing as the public record supports (and the well of documented prosecutorial misconduct is sadly bottomless). The First Amendment also protects their right to publish complaints based on publicly available facts so that the public at large can be apprised of the many problems in our system of justice. And the First Amendment protects their right to publish Mr. Johnson's letter so that the public can be apprised of the City's misguided effort to squelch public debate on this important subject. Nothing in New York law is, or can be, to the contrary.

Mr. Johnson's letter is an embarrassment, not only for its misguided attacks on the professors for their lawful exercise of their First Amendment rights, but also for its suggestion that the Grievance Committees dismiss out of hand well-founded complaints of serious misconduct by prosecutors operating in New York City. It cannot possibly represent the position of the City of New York, let alone the five District Attorneys and the Special Narcotics Prosecutor, all of whom he implausibly claims share his views. We ask that you repudiate his letter in writing no later than July 6, 2021. If you fail to do so, we will be forced to consider other options.

Very truly yours,

/s/ Gregory Diskant

Gregory Diskant

Enclosures

# EXHIBIT 5



**GEORGIA M. PESTANA**  
Acting Corporation Counsel

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LAW DEPARTMENT**  
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July 8, 2021

Via email to ad2-grv2@nycourts.gov

Grievance Committee for the  
Second, Eleventh & Thirteenth Judicial Districts  
Renaissance Plaza  
335 Adams Street, Suite 2400  
Brooklyn, New York 11201

**Re: May 3, 2021 Grievance Complaints Filed Against Current and Former  
Queens County Assistant District Attorneys**

**Kenneth Appelbaum, State Bar No. 2047603**  
**Therese Lendino, State Bar No. 1876329**  
**Francesca Basso, State Bar No. 4492708**  
**Rachel Butcher, State Bar No. 2929941**  
**George Kanellopoulos, State Bar No. 4472197**  
**Eugene Reibstein, State Bar No. 1299213**  
**Jesse Sligh, State Bar No. 2220275**

**John Kosinski, State Bar No. 2452084**  
**Patrick O'Connor, State Bar No. 2777316**  
**Nicole Aloise, State Bar No. 4682571**  
**Rosemary Chao, State Bar No. 3988425**  
**Brad Leventhal, State Bar No. 2235547**  
**Timothy Shortt, State Bar No. 4776134**  
**Denise Tirino, State Bar No. 2165249**

Dear Grievance Committee Members:

I write to briefly address misrepresentations in attorney Gregory Diskant's June 22, 2021 letter, which was sent in response to former Corporation Counsel James E. Johnson's June 2, 2021 letter to this Committee regarding the above-referenced complaints filed by Mr. Diskant's clients in early May.

Mr. Diskant goes to great lengths to characterize the Corporation Counsel's June 2, 2021 letter as arguing that complainants are barred from making their grievance letters public. To the contrary, our letter is concerned with respecting the *process*, not with complainants' decision to publicly disclose their complaints.<sup>1</sup> Our core issue is how the

<sup>1</sup> While complainants have chosen to disclose their own correspondence with the Committee, subsequent records filed with the Committee by the Law Department and others regarding these grievance letters are

complainants are using the confidential grievance process to wage a public campaign for prosecutorial reform. Our letter outlined the various steps the complainants have taken and documented on their website, which depart from the standard grievance process.<sup>2</sup> As stated in our June 2 letter, the grievance process is not the proper forum to address the policy reforms sought by the complainants nor is it appropriate to try to use an otherwise confidential process to advance law and policy changes. Although there are certainly arguments in favor of opening the attorney grievance process to the public, and there have been attempts to do so, the Legislature has not acted on these proposed amendments.<sup>3</sup> Until the law is changed, attorney grievance proceedings, despite the complainants' desires and efforts to involve the public in these proceedings, remain confidential in New York.

Further, our letter did not, as Mr. Diskant improperly suggests, "request that the Grievance Committee group the complaints together and dismiss them all out of hand—without even considering the merits of any of them." Rather, the letter simply provided the Committee with additional information regarding the campaign around these and related grievances so the Committee could consider this context. As Mr. Diskant himself acknowledges, we have taken no position on the merits of the allegations. We have and always will fully support anyone's right to file a grievance against an attorney where they believe the attorney has engaged in misconduct. We likewise fully support everyone's right to seek reform. However, we must also respect the purpose and confidentiality of the grievance process.

Sincerely,



Georgia M. Pestana  
Acting Corporation Counsel

cc: Gregory Diskant, Esq., Counsel for Complainants

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confidential under the Judiciary Law. *Johnson Newspaper Corp. v. Melino*, 77 N.Y.2d 1 (1990) ("Section 90 (10) of the Judiciary Law requires that all papers, records, and documents relating to attorney disciplinary matters be deemed confidential unless either the charges of misconduct are sustained or the Justices of the Appellate Division, upon a showing of good cause, decide to make these materials public"). As such, it is not that "Mr. Johnson wish[es] to keep his letter secret," as Mr. Diskant erroneously states. Rather, our office wishes to act in a manner that is consistent with both the law and long-standing policy. Mr. Diskant is correct that New York law does allow for this confidentiality to be lifted when the attorneys who are the subject of the grievance letters so request, but until such waivers are requested and granted here, the law deems the Law Department's correspondence confidential.

<sup>2</sup> See generally <https://accountabilityny.org>. For example, complainants' website assists members of the public with creating automated emails to the Committee containing three generic sentences asking the Committee to "hold prosecutors publicly accountable when they violate the rights of New Yorkers." Unlike actual attorney grievances, these emails do not identify any attorney or any alleged misconduct, but merely express a policy position about accountability (see <https://accountabilityny.org/complaints/>).

<sup>3</sup> See <http://ww2.nycourts.gov/sites/default/files/document/files/2020-10/AttyDiscFINAL9-24-1.pdf>.

# EXHIBIT 6

# Patterson Belknap Webb & Tyler LLP

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June 30, 2021

Gregory Diskant  
(212) 336-2710  
[gldiskant@pbwt.com](mailto:gldiskant@pbwt.com)

## VIA EMAIL & FED EX

Diana Maxfield Kearse  
Chief Counsel  
Grievance Committee for the  
Second, Eleventh & Thirteenth Judicial Districts  
Renaissance Plaza  
335 Adams Street, Suite 2400  
Brooklyn, New York 11201-3745

**Re: May 3, 2021 Grievance Complaints Filed  
Against Current and Former Queens  
County Assistant District Attorneys**

Dear Ms. Kearse:

This firm represents law professors Daniel Medwed, Cynthia Godsoe, Abbe Smith, Nicole Smith Futrell, and Steven Zeidman (“the professors”). The professors have filed well-documented complaints with the Grievance Committee alleging serious ethical violations by 21 current and former New York prosecutors. We write in response to your June 11, 2021 letter to the professors, which we find troubling for the reasons set forth below. Notwithstanding your letter, we expect the professors’ complaints to be investigated by you and the Committee, as required by New York law. In addition, and notwithstanding your letter, we expect the professors to be accorded the rights of complainants, as also required by New York law.

Your letter appears to be a direct response to the letter of June 2, 2021 from James E. Johnson, which argued that the law professors’ complaints are “an abuse of the grievance process” and “should not be countenanced,” supposedly because they were filed simultaneously and subsequently published. Using his authority as Corporation Counsel of The City of New York, Mr. Johnson asked the Committee to take action against the professors’ complaints, in effect to reject them out of hand, because they were filed as part of a “very public campaign involving multiple grievances sent *en masse* to four different committees.” Of course, every action taken by the professors in filing and publicizing their complaints was protected by the First Amendment, in accord with Judiciary Law 90(10) and upon advice of counsel. Moreover, the professors’ public campaign is very much in the public interest, as the State’s repeated failure to discipline New York prosecutors even for flagrant misconduct has reached epidemic proportions. We explained all of that in a letter to your Committee, dated June 22, 2021, in response to Mr. Johnson’s letter. Nonetheless, your letter suggests that, at the urging of Mr.

Diana Maxfield Kearse  
June 30, 2021

Johnson, the Committee is rejecting the complaints and taking action against the professors for the exercise of their First Amendment rights.

Your letter raises multiple subjects of concern.

Initially, your letter states that the professors' complaints have been transferred to this Grievance Committee, despite the fact that some of the complaints were addressed to other Grievance Committees. Of course, the complaints were all properly filed "in the Judicial Department encompassing [each] respondent's registration address on file with the Office of Court Administration." 22 NYCRR 1240.7(a)(2). Nevertheless, we understand that a Committee "may transfer a complaint or proceeding to another Department or Committee as justice may require." *Id.*

We do not have any objection to the transfers, in and of themselves. But we fear that the transfers may be a prelude to what appears to be a pre-determined decision to reject the complaints *en masse* without considering their merits, as Mr. Johnson requested. Each complaint is separate and carefully details a specific set of facts, typically as found by a court, and analyzes those facts against the standards of the New York Rules of Professional Conduct. They cannot, and should not, be considered together merely because they share the same complainants. They cannot be rejected out of hand. Under the law, the Committee is obliged to consider each complaint separately on its own merits.

More troubling, your letter suggests that the Committee has already decided to disregard the complaints themselves and, in the process, to deprive the professors of their rights as complainants, seemingly in response to the professors' exercise of their First Amendment rights to bring their complaints to the attention of the Committee and the public. It does so by an intentional distortion of language. There is a difference between, on the one hand, responding to a complaint that was actually filed and, on the other hand, acting *sua sponte* in the absence of a complaint. Your letter conflates the two. Your letter claims that, because the complaints are based on public sources (a point that Mr. Johnson emphasizes), "any investigations into these allegations would be initiated by the Grievance Committee, *sua sponte*." You add that this "does not constitute confirmation as to whether any investigations will or will not be pursued." Quite simply, your letter denies any obligation to investigate the complaints that the professors actually filed because they are based on the public record.

Your letter cites nothing for the proposition that complaints based on the public record should not be treated as complaints, but rather should be investigated *sua sponte*, if at all. The most common instances of *sua sponte* investigations are where the Committee *expands* the scope of a previously filed complaint on its own initiative, but those common examples do not somehow vitiate the previously-filed complaint(s). *See, e.g., In re Mays*, 132 A.D.3d 241, 243 (2d Dep't 2015); *In re Reid*, 149 A.D.3d 114, 115 (1<sup>st</sup> Dep't 2017). It is contrary to New York

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law simply to refuse to investigate a complaint because the Committee might, or might not, someday undertake an investigation into the same conduct based on its own initiative.

The New York rules are drafted to define a complainant as “a person or entity that submits a complaint to a Committee.” 22 NYCRR 1240.2(e). That certainly includes the professors and the complaints they submitted. There is nothing in the definition of complainant that excludes those who make complaints based on the public record. Quite the opposite, the New York Rules of Professional Conduct 8.3(a) provide that a lawyer is obliged to report actions of another lawyer that “raise[] a substantial question as to that lawyer’s honesty, trustworthiness or fitness,” with no exception for actions that occur in public. N.Y. Rules, Rule 8.3(a). More broadly, and consistent with New York law, standard authorities state that “a lawyer is always free to report evidence of what may constitute improper conduct by another attorney,” without any exception for events that occur in public.<sup>1</sup> Most recently, the First Department disciplined Rudolph Giuliani based on “numerous complaints of [Mr. Giuliani’s] alleged professional misconduct,” all based on the public record. *Matter of Giuliani*, No. 2021-00491, 2021 WL 2583536, at \*1 (1st Dep’t June 24, 2021). Like the complaints filed against Mr. Giuliani, the professors’ complaints constitute grievance complaints in every sense of the word. And the professors are surely complainants.

Indeed, as invited by the rules, the professors’ complaints reflect a very substantial amount of work. The professors reviewed the public record and assembled the facts, which they marshalled for the convenience of the Committee. They also analyzed the relevant law and marshalled that as well. Given the large amount of information available on the public record and the limited resources of the Committee, it is disingenuous to suggest, as your letter does, that public record misconduct is investigated only *sua sponte* and not in response to complaints. Whether the Committee “would,” in other circumstances, initiate an investigation *sua sponte* has nothing to do with the fact that here it has been presented with actual complaints written by actual complainants alleging actual well-documented violations of professional standards. The uncertainty about whether the Committee will initiate investigations into these 21 prosecutors is particularly troubling, as despite strong evidence of pervasive prosecutorial misconduct existing throughout the state, none of the prosecutors named in the complaints have yet been disciplined, at least so far as the public record reveals. The Committee has no right to ignore the professors’ complaints and, if they are considered (as they must be), then the Committee is not acting *sua sponte*, but rather in response to the complaints.

We remain hopeful that, notwithstanding your letter, the Committee will review the professors’ complaints individually on the merits, as the law requires, and that the Committee

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<sup>1</sup> N.Y.S. Bar Assoc. Ethics Op. 635 at 4, citing Op. 480; *see also* Simon’s New York Code of Professional Responsibility Annotated 77 (2008 ed.) (“[A] lawyer may report another lawyer based on rumor, suspicion, or hearsay, and may report activities raising less-than-substantial questions about a lawyer’s fitness as a lawyer.”).

Diana Maxfield Kearse  
June 30, 2021

will undertake a full investigation. Whatever the Committee chooses to do, however, the law does not permit it to decline to provide information to the professors about the disposition of their complaints. Complainants are entitled to certain rights and information under the law. This includes notification of the disposition of the matter, the ability to challenge that disposition, and notification of the outcome of the challenge. 22 NYCRR § 1240.7(d), (e). The professors can hardly exercise their right to seek review of a decision declining an investigation, as permitted by Section 1240.7(e)(3), if they are not advised of such a decision. It will not do to contend that Section 90(10) of the Judiciary Law somehow provides otherwise.

\* \* \*

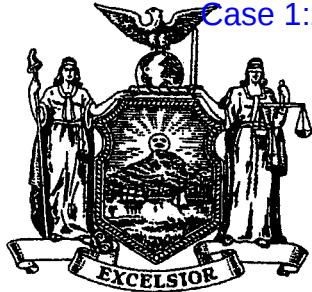
There is no basis for the Committee, acting under color of state law, to deny the professors' complaints on the grounds that they are based on public information and to deny the professors information about their complaints under the pretext that any investigation is supposedly *sua sponte*. These illegal actions are bad enough, but they are all the worse when the Committee takes them following a demand from the Corporation Counsel of the City of New York that the Committee take action against the professors for their exercise of First Amendment rights. We request that the Committee affirm by July 9, 2021 that (1) the individual complaints filed by the professors will be considered separately on the merits based on their unique facts; and (2) the professors will be properly considered complainants and afforded all of the rights of complainants under the New York rules.

Very truly yours,

s/ Gregory Diskant

Gregory Diskant

# EXHIBIT 7



ANDREA E. BONINA, ESQ.  
Chair

*State of New York*  
**Grievance Committee for the  
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July 26, 2021

**FIRST CLASS MAIL & EMAIL  
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Dear Mr. Diskant:

This is in response to your letter of June 30, 2021, concerning the Committee's letter of June 11, 2021, to your clients, law professors Daniel Medwed, Cynthia Godsoe, Abbe Smith, Nicole Smith Futrell and Steven Zeidman. Contrary to your assertions, the procedure outlined in said letter regarding complaints filed against attorneys based upon public records, comports with the Rules for Attorney Disciplinary Matters and the long-standing policy of the Appellate Division, Second Judicial Department.

Furthermore, we can assure you and your clients that all complaints filed with this Committee, whether opened *sua sponte* or not, are thoroughly and carefully evaluated on their own merit.

Very truly yours,

Diana Maxfield Kearse  
Chief Counsel

DMK/vm