COMMONWEALTH OF MASSACHUSETTS

Supreme Judicial Court
For Suffolk County

No. SJ-2021-0129

CHRIS GRAHAM, JORGE LOPEZ, MEREDITH RYAN, KELLY AUER, COMMITTEE FOR PUBLIC COUNSEL SERVICES, and HAMPDEN COUNTY LAWYERS FOR JUSTICE,
PETITIONERS,

v.

DISTRICT ATTORNEY FOR HAMPDEN COUNTY,
RESPONDENT.

PETITIONERS' STATUS REPORT AND RESPONSE TO THIRD INTERIM ORDER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules and Regulations

Other Authorities

Constitutional Provisions

INTRODUCTION

The record in this case reflects the routine and widespread violation of defendants' rights. Exculpatory evidence exists, but it is not being delivered to criminal defendants. And *all* parties to this litigation have acknowledged this unacceptable state of affairs, in one forum or another.

In July 2020, after the U.S. Department of Justice issued a scathing report documenting excessive force and false reporting by the Springfield Police Department (SPD), the Hampden County justice system reacted with a proverbial shrug. No one in state or municipal government took the commonsense and legally necessary step of investigating the full timing and scope of the SPD's misconduct. Contra *Commonwealth v. Cotto*, 471 Mass. 97, 115 (2015). Instead, in October 2020 a former member of the SPD Narcotics Bureau, Deputy Chief Steven Kent, wrote a report purporting to identify *some* of the illustrative examples noted by the DOJ ("Kent Report").[1] SOF ¶¶ 93-95. The report itself apparently has never been delivered to the Hampden County District Attorney's Office (HCDAO) or, indeed, to any criminal defendant. What is more, the HCDAO did not obtain the documents underlying the Kent Report until July 2021—months after this lawsuit was filed—and even then it obtained documents that were "not exhaustive" of the exculpatory evidence held by the SPD.[2] See *id.* ¶¶ 91-92, 105. The first disclosures of these non-exhaustive documents were finally made in September 2021.[3]

The HCDAO defends that record—a system in which egregious government misconduct is fully committed but partially disclosed—through two basic maneuvers. First, it insists that its job is simply to "*request*" exculpatory evidence; if the SPD does not provide it, that is the defendant's problem.[4] Second, the HCDAO takes a blinkered view of what exculpatory evidence *is*. For example,

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[1] See SOF ¶¶ 145-146.
[2] HCDAO Status Report at Ex. A (Sept. 14, 2021).
[3] See Aff. of Jennifer N. Fitzgerald at 3 ¶10 (Dkt. No. 21-1), *Gulluni v. Mendell*, No. 3:21-cv-30058 (D. Mass. filed Jan. 31, 2022).
[4] HCDAO Reply to Petitioners' Supp. Filing at 4 (Sept. 24, 2021) (emphasis added).

in July 2017, someone called 911 to report that a man "pulled a gun on a bunch of people" after his friend was knocked down. SOF ¶ 39. But the HCDAO suppressed that 911 call, accepted the word of the man described as pulling the gun—an off-duty SPD officer—and prosecuted a Black motorist who the 911 caller had not described as the gunman. *Id.* ¶¶ 32, 44. That motorist, Petitioner Graham, was incarcerated for 18 months. *Id.* ¶ 37. In a July 2021 hearing in this case, and apparently to this day, the HCDAO insists that suppressing the exculpatory 911 call was proper. It was not.

This hands-off approach to exculpatory evidence is contrary to law. A district attorney cannot accept admittedly "not exhaustive" disclosures of exculpatory evidence,[5] nor withhold exculpatory 911 recordings.[6] Nor can the Commonwealth fail, for 18 months and counting, to investigate a pattern or practice of egregious misconduct called to its attention by another law enforcement agency.[7] The law is clear: when the Commonwealth's prosecutors rely on a law enforcement agency to make their cases, the burdens to disclose evidence from that agency "should fall on the Commonwealth, not the defendant." *Commonwealth v. Lykus*, 451 Mass. 310, 328 (2008).

Unable to pound the facts or the law, the HCDAO has resorted to pounding the table. This case, it insists, is just a "publicity tool."[8] The Petitioners, by questioning the fairness of the justice system, are "disrespect[ing] . . . the Rules of Professional Conduct."[9] Their affidavits are "meandering."[10] And CPCS is "disgraceful."[11] In this litigation, it is argument by adjective.

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[5] See, e.g., *Kyles v. Whitley*, 514 U.S. 419, 437-438 (1995) (prosecutor's disclosure obligations extend to evidence known only to police investigators).
[6] See, e.g., Mass. R. Crim. P. 14(a)(1)(A)(iii).
[7] See, e.g., *Cotto*, 471 Mass. at 115 ("It is imperative that the Commonwealth thoroughly investigate the timing and scope of Farak's misconduct at the Amherst drug lab").
[8] HCDAO Second Interim Status Report at 6 (Nov. 22, 2021).
[9] *Id.*
[10] *Id.*
[11] HCDAO Reply to Petitioners' Supplemental Filing at 6 n.6 (Sept. 24, 2021).

In other litigation, however, the district attorney has been more willing to acknowledge the plight of defendants in Hampden County. In May 2021, District Attorney Gulluni sued the acting U.S. Attorney for *some* documents—those reflecting falsified information—underlying the DOJ Report. SOF ¶¶ 115-116. At the time, the HCDAO issued a press release conceding that the DOJ's findings "create[d] *an ethical obligation* for the [HCDAO] to provide any potentially exculpatory material to defendants in cases in which these officers may be involved."[12] In January 2022, the district attorney moved for summary judgment, and in doing so acknowledged in stark terms that the situation for defendants in Hampden County is untenable:

- "[The DOJ] is sitting on a specific and identifiable cache of potentially exculpatory documents that could affect ***an untold number of criminal cases—past, present, and future***—in Hampden County, Massachusetts."[13]

- "[I]t is virtually certain that Hampden County defendants are ***entitled to disclosure*** of documents on which the DOJ's conclusions are based."[14]

- Failing to disclose documents on which the DOJ relied amounts to "***utter disregard for the constitutional rights of Hampden County defendants, the ethical obligations of [HCDAO] prosecutors, or, indeed, the integrity of the justice system itself***. . . ."[15]

- Under *Matter of a Grand Jury Investigation*, 485 Mass. 641, 652 (2020), officer misconduct "requires disclosure to ***defendants in potentially hundreds or even thousands*** of cases in which each officer is a potential witness," and "it requires the prosecutor to identify which cases those might be."[16]

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[12] See *Hampden District Attorney Anthony D. Gulluni Files Lawsuit Against the U.S. Department of Justice*, Hampden County District Attorney (May 20, 2021) (emphasis added), at https://hampdenda.com/hampden-district-attorney-anthony-d-gulluni-files-lawsuit-against-the-u-s-department-of-justice/.
[13] Memorandum in Support of Plaintiff's Motion for Summary Judgment at 1, *Gulluni v. Mendell*, No. 3:21-cv-30058 (D. Mass. Jan. 31. 2022) (emphasis added) (*Gulluni*, SJ Memo).
[14] *Id.* at 3 (emphasis added).
[15] *Id.* at 1-2 (emphasis added).
[16] *Id.* at 3 (emphasis added). The HCDAO's summary judgment papers characterize Petitioners as "seek[ing] to force [District Attorney Gulluni] to conduct" an investigation. *Id.* at 13-14 n.11. In fact, Petitioners contend that the Commonwealth must investigate the SPD's egregious misconduct, but Petitioners have never said that the HCDAO must or should conduct the investigation.

The HCDAO directed those statements at the DOJ, but it concedes that all documents it seeks from the DOJ "*are factual statements authored by the SPD*."[17] Thus, those statements apply equally to the SPD and, by extension, the HCDAO itself.

The justice system "cannot expect defendants to bear the burden of a systemic lapse" that is apparent from the record in this Court, and which the HCDAO has acknowledged to another court. *Bridgeman v. Dist. Attorney for Suffolk Dist.*, 476 Mass. 298, 315 (2017) (*Bridgeman II)* (quoting *Bridgeman v. Dist. Attorney for the Suffolk Dist.*, 471 Mass. 465, 487 (2015) (*Bridgeman I*)).[18] To be sure, while seeking some exculpatory evidence in federal court, the HCDAO insists that Petitioners lack standing to seek exculpatory evidence in this Court. But it would be passing strange if neither organizations that provide criminal defense (CPCS and HCLJ), nor lawyers who represent criminal defendants (Auer and Ryan), nor individuals with pending cases (Lopez), nor individuals whose cases resolved after they uncovered wrongfully withheld evidence (Graham), had standing to challenge this breakdown of the provision of exculpatory evidence.

Injustice in criminal processes—discovery, dispositive motions to suppress and dismiss, trials, and guilty pleas—continue daily while government misconduct goes uninvestigated and exculpatory information goes undisclosed. Accordingly, it is time for a "remedy [that] inure[s] to defendants," *Commonwealth v. Scott*, 467 Mass. 336, 352 (2014), instead of leaving them, the public, and the courts "without confidence" that they will ever receive evidence tending to prove their innocence.[19] Petitioners respectfully ask that the four legal questions agreed upon by the parties, as well as the additional question posed by Petitioners, be decided by this Court or the full court.

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[17] *Id.* at 18 (emphasis added).
[18] See also *Commonwealth v. Scott*, 467 Mass. 336, 354 n.11 (2014); *Lavallee v. Justices in the Hampden Superior Court*, 442 Mass. 228, 246 (2004).
[19] *Gulluni* SJ Memo at 6.

DISCUSSION

I. Legal Issues

The parties have filed their proposed legal issues under separate cover. For ease of reference, the four contested material legal issues proposed by the parties are as follows:

1. Has the DOJ Report, together with other evidence of misconduct by the SPD, triggered the Commonwealth's duty to investigate and, if so, what does that duty entail?

2. When a police department has been alleged by an investigating agency to have engaged in a "pattern or practice" of misconduct, what evidentiary disclosures must a state prosecutor make in order to satisfy the duty to "learn of and disclose to a defendant any exculpatory evidence that is 'held by agents of the prosecution team'" in matters involving that police department? See *Commonwealth v. Cotto*, 471 Mass. 97, 112 (2015).

3. What obligations does the prosecution have when a police department declines to turn over exculpatory evidence concerning police officers who are members of prosecution teams?

4. Do the Petitioners have standing to bring this case and invoke the Court's superintendence power?

The Petitioners' additional proposed legal question is as follows:

5. If the duty to investigate has been triggered, should any interim measures be imposed while the investigation proceeds?

II. Statement of Facts

The parties have filed their statements of facts under separate cover.

III. There are no other indispensable parties to this litigation, but it may be desirable to invite input from the City of Springfield, the Massachusetts Attorney General, and relevant federal agencies.

Because this case centers on the legal obligations of a district attorney's office to disclose information about prosecution team members who have been credibly accused of egregious misconduct, that office, the HCDAO, is appropriately the sole respondent. No indispensable parties are absent. Cf. *Cotto*, 471 Mass. at 111. Nevertheless, input from other entities—such as the Massachusetts Attorney General, the U.S. Attorney for the District of Massachusetts, the Special

Litigation Section of the U.S. Department of Justice's Civil Rights Division, or the City of Springfield—might assist the Court. Petitioners therefore suggest that, for the reasons explained below, the single justice invite such input.

A. The HCDAO is the only indispensable or necessary party because the court can fashion meaningful relief among the current parties.

The Hampden County District Attorney's Office is the only necessary respondent in this case because it is the governmental agency prosecuting defendants with the SPD's assistance, and thus it is the agency with the daily responsibility to disclose exculpatory evidence in those prosecutions. Complete relief—every remedy sought by Petitioners—can be ordered with the HCDAO as the sole respondent. The proposed remedies include ensuring that SPD misconduct is disclosed in cases that the HCDAO chooses to prosecute, a declaration that the Commonwealth's duty to investigate SPD misconduct has been triggered, and the entry of an order setting appropriate interim remedies while an investigation unfolds.

Rules 19 and 20 of the Massachusetts Rules of Civil Procedure govern the required and permissive joinder of parties. Rule 19(a) provides that an entity "shall be joined as a party" in certain circumstances, including when "in his absence complete relief cannot be accorded among those already parties." Rule 20(a) provides that "[a]ll persons may be joined in one action as defendants if there is asserted against them . . . any right to relief in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all defendants will arise in the action." Generally speaking, these rules mean that an entity must be joined as a party if their participation is so vital that the case should not proceed in their absence, for example, because that entity's rights and obligations would be determined without its participation. See, e.g., *Service Employees Int'l Union, Local 509 v. Dep't of Mental Health*, 469 Mass. 323, 338 (2014) (vendors who could lose contracts as a result of legal determinations in the suit needed to be joined as parties).

Whether a potential party is necessary or indispensable turns on whether the court can "fashion meaningful relief . . . between the [existing] parties," *Bacardi Int'l Ltd. v. Suarez & Co.,* 719 F.3d 1, 10 (1st Cir. 2013), quoting *Northrop Corp. v. McDonnell Douglas Corp.,* 705 F.2d 1030, 1043 (9th Cir. 1983), and not on whether all possible legal questions affecting other persons or entities will be answered. The fact that a lawsuit may raise questions about an unresolved dispute with an absent party does not make the absent party necessary. *Northrop Corp.*, 705 F.2d at 1046 ("Speculation about the *occurrence* of a future event ordinarily does not render all parties affected by that event necessary or indispensable parties under [federal] Rule 19").

For example, in *Bridgeman*, only district attorneys were deemed necessary respondents. *Bridgeman* began when three individuals sued the two district attorneys who had prosecuted them with the assistance of former state chemist Annie Dookhan. After the full court allowed CPCS's motion to intervene, *Bridgeman I*, 471 Mass. 465, the single justice joined other district attorneys as respondents, citing a need to identify and develop appropriate notice methods for "every person who was a so-called 'Dookhan defendant.'" See Memorandum and Order (Dkt. #79), *Bridgeman*, SJ-2014-0005 (Dec. 31, 2015). Neither the Department of Public Health, which had employed Ms. Dookhan, nor any other entity, was joined to the case. Cf. *Commonwealth v. Andover*, 378 Mass. 370, 373 (1979) (rejecting argument that Commonwealth had impermissibly failed to join other municipalities, where complete relief could be afforded among existing parties).

1. The district attorney is the only indispensable or necessary party.

Here, similar to *Bridgeman*, the only necessary respondents are Massachusetts agencies with prosecution teams that include SPD officers who have committed egregious misconduct. To Petitioners' knowledge, there is only one such agency: the Hampden County District Attorney's Office.

The joinder of other parties is not strictly necessary because the legal issues in this case center on the obligations of prosecutors and their client, the Commonwealth, in cases arising from the SPD. A district attorney's obligation to disclose exculpatory evidence includes the duty to appropriately inquire about, and effectively garner, "[a]ny facts of an exculpatory nature" that are in the possession, custody, or control of any member of the prosecution team. Mass. R. Crim. P. 14(a)(1)(A)(iii); see *Kyles,* 514 U.S. at 437-38; *Commonwealth v. Ware*, 471 Mass. 85, 95 (2015); *Commonwealth v. Martin,* 427 Mass. 816, 823-24 (1998). Because the obligation rests with the district attorney, there is no other entity in whose "absence complete relief cannot be accorded among those already parties" within the meaning of Rule 19(a).

The Court made this conclusion plain in *Cotto*. There, following egregious government misconduct by a chemist, and in a case where the Commonwealth was represented solely by the HCDAO, the full court announced a deadline for the Commonwealth to state "whether it intends to undertake . . . an investigation." 471 Mass. at 115. That order was logical and appropriate given that district attorneys are both lawyers for and agents of the Commonwealth. G. L. c. 12, § 12 ("There shall be a district attorney for each district"); G. L. c. 12, § 27 ("District Attorneys within their respective districts shall appear for the commonwealth in the superior court in all cases, criminal or civil, in which the commonwealth is a party"); G. L. c. 218, § 27A (g) (providing that "[t]he district attorney . . . shall appear for the commonwealth in the trial of all [district court jury cases] and may appear in any other [district court criminal] case").

Here, similarly, complete relief can be fashioned with the HCDAO as the sole respondent. The HCDAO would not necessarily conduct the investigation. Other entities of the Commonwealth can indicate their willingness to do that, as discussed below. Regardless, the HCDAO, as the Commonwealth's representative, can make the Commonwealth's position known. Moreover, both

before and after the investigation, ongoing deficiencies of the HCDAO's disclosure practices can be addressed via orders in this case.

B. Soliciting input from other entities is desirable.

Even when joinder is not required, soliciting input from non-parties can be helpful. That is what occurred in *Lunn v. Commonwealth*, 477 Mass. 517 (2017), a case involving a state court's detention of a noncitizen based solely on a detainer request issued by U.S. Immigration and Customs Enforcement (ICE). Although the initial parties were Mr. Lunn and the Commonwealth (represented by a district attorney's office), the single justice solicited input from non-parties when reserving and reporting the case. Specifically, the single justice instructed the court clerk to "immediately notify" the Boston Office of Chief Counsel of ICE, the DOJ's Criminal Division, the U.S. Attorney's Office for the District of Massachusetts, and the Suffolk County Sheriff's Department "to insure that they [would] have an opportunity to intervene in the full court case, or to file an amicus brief, if they wish." See Reservation and Report (Dkt. #3), *Lunn v. Commonwealth*, SJ-2017-0060 (Feb. 7, 2017), at https://www.ma-appellatecourts.org/docket/SJ-2017-0060.[20]

A similar approach makes sense here. Petitioners respectfully suggest that the following non-parties be given an opportunity to seek to intervene, be permissively joined, or submit an amicus brief.

1. The City of Springfield

In this case there has been significant finger-pointing. The HCDAO has acknowledged that until Petitioners filed this lawsuit, it "ha[d] not received any of th[e] documents" it sought from the SPD. H.D.A. R.A. 4 (Fitzgerald Aff. dated May 25, 2021). The City could be invited to explain both its actions and inaction, including why, after receiving the Kent Report in October 2020, the City took

[20] Similarly, in *Bridgeman*, before joining non-party district attorneys as respondents, the single justice sent letters soliciting their assistance. See Docket Nos. 36, 37, 39, 40, 41, *Bridgeman v. District Attorney for the Suffolk Dist.*, SJ-2014-0005, at https://www.ma-appellatecourts.org/docket/SJ-2014-0005.

nine months to turn over to the HCDAO the underlying documents, and what investigation, if any, it has undertaken to root out misconduct in its ranks. SOF ¶ 89.

2. The Massachusetts Attorney General

Because the Attorney General is the Commonwealth's chief law enforcement officer, *Commonwealth v. Twitchell*, 416 Mass. 114, 129 (1993), this Court may benefit from hearing the position of the Attorney General's Office (AGO). See generally G. L. c. 12, § 3. For example, the AGO may be in a position to weigh in on the question whether the Commonwealth's duty to investigate SPD misconduct has been triggered and, if so, who on behalf of the Commonwealth will conduct it. See *Cotto*, 471 Mass. at 115; Office of the Attorney General, *Investigative Report Pursuant to "Commonwealth v Cotto," 471 Mass. 97 (2015)*, (April 1, 2016), at https://archives.lib.state.ma.us/handle/2452/392891.

3. The U.S. Attorney for the District of Massachusetts and the Special Litigation Section of the DOJ's Civil Rights Division

The DOJ Report was prepared by the U.S. Attorney's Office for the District of Massachusetts and the Special Litigation Section of the DOJ's Civil Rights Division. It found that SPD Narcotics Bureau officers engaged in a pattern or practice of excessive force; that those officers submitted false or misleading reports to conceal the unlawful use of force; and that the DOJ's investigation did not uncover all of their misconduct. See Corrected Pet. at 8-10. These findings suggest that it would be appropriate to allow the DOJ an opportunity to express views in this case. So, too, does the HCDAO's allegation that the DOJ has acted "with utter disregard for the constitutional rights of Hampden County defendants." *Gulluni*, SJ Memo at 1.

C. Proposed Order

Although, as discussed, this case can proceed without adding parties, input from other entities could assist the Court in achieving justice. Drawing from the single justice's reservation and report in *Lunn*, Petitioners respectfully recommend the following order:

> [T]he Clerk [of the county court or, upon reservation and report, of the full court] shall immediately notify the following, to ensure that they will have an opportunity to intervene, or to file an amicus brief, if they wish: the Attorney General for the Commonwealth; the United States Attorney for the District of Massachusetts; the Special Litigation Section of the Civil Rights Division of the U.S. Department of Justice; and the City of Springfield.

IV. Each petitioner has standing to challenge the adequacy of disclosure practices in Hampden County, including the inadequate investigation of SPD misconduct.

Standing requirements ensure that parties litigate matters in which they have an "interest affecting their liberty, rights or property." *Cambridge St. Realty, LLC v. Stewart*, 481 Mass. 121, 128–29 (2018). "For a legal dispute to qualify as a genuine case or controversy, *at least one* plaintiff must have standing to sue." *Dep't of Commerce v. N.Y.*, 139 S. Ct. 2551, 2565 (2019) (emphasis added). This is a particularly flexible inquiry where, as here, parties invoke this Court's superintendence authority. Even if a party lacks standing, the Court will nevertheless decide the case if dismissal "would work a manifest injustice to nonparties." *Brantley v. Hampden Div. of Prob. & Fam. Ct. Dep't*, 457 Mass. 172, 175 (2010). Consistent with these principles, Massachusetts courts have repeatedly permitted parties such as Petitioners here—including CPCS and HCLJ—to bring cases like this one. See, e.g., *Comm. for Pub. Counsel Servs. v. Chief Just. of Trial Ct.*, 484 Mass. 431, 442, *aff'd as modified*, 484 Mass. 1029 (2020) (petition by CPCS and a defense organization); *Comm. for Pub. Counsel Servs. v. Attorney General*, 480 Mass. 700, 702-03 (2018) (petition by CPCS, HCLJ, and two individual defendants); *Bridgeman II*, 476 Mass. 298 (petition by three individual defendants, with CPCS as intervenor).

Here, too, CPCS and HCLJ have standing. But they are not alone. As shown below, each Petitioner has been harmed by the under-investigation and under-disclosure of exculpatory evidence in Hampden County. And thus, each Petitioner has standing to seek a declaration that the Commonwealth's duty to investigate the timing and scope of SPD officers' egregious misconduct has been triggered; to seek interim remedies pending the resolution of any such investigation; and to ensure that the HCDAO's disclosure practices comply with the law.

A. Petitioners CPCS and HCLJ have both direct and third-party standing.

An organizational plaintiff can establish standing by showing a legally cognizable injury, known as direct standing, or by showing legally cognizable injury to persons with whom the organization has a professional relationship, which is known as third-party standing. CPCS and HCLJ have established both direct and third-party standing.[21] Indeed, the HCDAO has relied on both CPCS and HCLJ to distribute exculpatory evidence to defense attorneys and, through them, to criminal defendants. SOF ¶¶ 65, 73. It cannot be true that CPCS and HCLJ are integral to the system for distributing exculpatory evidence, but without standing to challenge its deficiencies.

1. CPCS and HCLJ have direct standing because they are directly harmed by the failure to investigate and disclose SPD officers' misconduct.

CPCS and HCLJ have direct standing because they suffer harm from the under-investigation and under-disclosure of egregious government misconduct by members of prosecution teams in Hampden County. To have direct standing, an organization must have suffered a harm that is fairly traceable to the challenged act and be able to establish "a likely benefit should the contested point be resolved in [its] favor." *New England Div. of Am. Cancer Soc'y v. Comm'r of Admin.*, 437 Mass. 172, 177 (2002). An injury is fairly traceable where an organization can show (1) a diversion of resources to identify or counteract the allegedly unlawful action, or (2) frustration of its mission. *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982). Further, the SJC has stated that it is likely to find organizational standing in circumstances where no other party is likely to have any greater standing to challenge the action. *Brookline v. Governor*, 407 Mass. 377, 384 n.10 (1990) ("We would be reluctant to tolerate a situation in which allegedly unconstitutional conduct would be free from judicial scrutiny even on the request of an entity most directly affected by the alleged unlawful conduct").

[21] HCLJ also has associational standing because its member attorneys, including Petitioners Auer and Ryan, are harmed by the practices of the HCDAO. See SOF ¶ 69; *Hunt v. Wash. State Apple Adver. Comm'n.*, 432 U.S. 333, 343 (1977); *supra*, n. 22.

For example, in *New England Div. of Am. Cancer Soc'y*, eight organizations petitioned for a declaratory judgment that actions taken by state officials, namely the reduction of allotments for certain expenditures, violated the state constitution and laws. 437 Mass. at 173. The petitioning organizations "sponsor[ed], support[ed], or administer[ed]" programs and other initiatives that would have been impacted by the reduced allotment, and several of the organizations had state contracts that were impacted. *Id.* at 176. The full court held that these organizations had standing, reasoning that they had been "directly and specially" affected by the state officials' actions because they were forced to alter their programs. *Id.* at 177 (citing *Brookline*, 407 Mass. at 384 n.10). The Court also observed that the organizations had pointed to a likely benefit if their suit was successful: the receipt of funding that would restore their programs. *Id.* "That [was] enough to confer standing in these circumstances." *Id.* (citations omitted).

Consistent with those principles, in *Bridgeman I* the full court allowed CPCS's motion to intervene in litigation concerning the Hinton Lab scandal. The Court noted that "CPCS is an entity established by statute to 'plan, oversee, and coordinate the delivery of criminal and certain noncriminal legal services' to indigent defendants." 471 Mass. at 485 (quoting G. L. c. 211D, § 1). The Court also noted that CPCS's resources and mission were directly implicated by the litigation "given its current and future responsibility for providing representation to thousands of indigent Dookhan defendants," and because "CPCS has been and will be asked to expend significant resources to handle countless numbers of these cases." *Id.* at 485-486. Although the Court addressed those issues in the context of a motion to intervene, it surely could not have allowed that motion if CPCS had lacked standing.

For similar reasons, and under both a diversion-of-resources and a frustration-of-mission theory, CPCS and HCLJ have standing here. With respect to resources, because the Commonwealth has not affirmatively investigated SPD misconduct, and because the HCDAO did not begin making disclosures due to the DOJ Report until after this lawsuit was filed, see SOF ¶¶ 80, 89, both CPCS

and HCLJ diverted resources (and continue to do so) to track down exculpatory evidence concerning the SPD and distributing that evidence to their attorneys. See *id.* ¶¶ 66, 74, 77-78, 86. As just one example, after receiving a 712-page SPD document batch from the HCDAO, *id.* ¶ 90, CPCS sought from the HCDAO a list of defendants whose cases may have been affected by the misconduct because CPCS understood that it would need to assign counsel to review impacted cases; however, the HCDAO refused to provide such a list. SOF ¶¶ 112-13. For its part, HCLJ expends resources to locate counsel for new cases and, as HCLJ President David Hoose has explained, the organization's capacity to assign counsel has been impeded at least in part by the need for its attorneys to file and litigate extensive discovery motions in existing cases. *Id.* ¶¶ 61, 72. The under-investigation and under-disclosure of SPD misconduct also frustrates the purpose of these organizations, which is to ensure the effective representation of indigent defendants in Hampden County. *Id.* ¶¶ 63-64, 70-71. See also Ruling on Def. Motion for Partial Judgment on the Pleadings, *Larocque v. Turco*, docket no. 2084CV00295 (Suffolk Sup. Ct. Jan. 28, 2022) (organization had direct standing because prison lockdown caused it to divert resources to identify, meet, and counteract "the significant disruption in its ability to further its mission of protecting the" rights of incarcerated people).

If this litigation succeeds, CPCS and HCLJ will benefit by the freeing of their resources for other matters and by being better able to serve their missions on behalf of criminal defendants. These impacts and consequences confer standing. See *CPCS v. Att'y Gen.*, 480 Mass. at 703 (addressing petition to hear CPCS and HCLJ claims of "misconduct by the district attorneys and members of the Attorney General's office" affecting numerous defendants); *N.Y. Civil Liberties Union v. N.Y.C. Transit Auth.*, 684 F.3d 286, 295 (2d Cir. 2012) (organization had standing where challenged act denied it access to information necessary to represent clients).

2. CPCS and HCLJ have third-party standing to assert the rights of the defendants to whom they are charged with providing effective representation.

HCLJ and CPCS also have third-party standing to assert the rights of criminal defendants tried in Hampden County, which the HCDAO has implicitly recognized by its choice to use these organizations to make its disclosures of exculpatory evidence. SOF ¶¶ 65, 73, 103.

To establish third-party standing, (1) "the relationship of the litigant to the third party whose right the litigant seeks to assert must be such that the enjoyment of the right is inextricably bound up with the activity the litigant wishes to pursue" and (2) "there must be some genuine obstacle" which makes it "difficult or impossible for the actual rightholders to assert their claims." *CPCS v. Chief Just. of Trial Ct.*, 484 Mass. at 447; see also *Planned Parenthood League of Mass., Inc. v. Bell*, 424 Mass. 573, 578 (1997); cf. *S. Poverty L. Ctr. v. U.S. Dep't of Homeland Sec.*, 2020 WL 3265533, at *13 (D.D.C. June 17, 2020) (legal aid organization had third-party standing where agency's actions made it more difficult for organization to effectively represent its clients); *NAACP v. Harris*, 567 F. Supp. 637, 639-40 (D. Mass. 1983) (organization has standing to assert the rights of their constituency, *i.e.*, "all the black people in metropolitan Boston").[22]

In *CPCS v. Chief Justice of the Trial Court*, for example, the full court held that CPCS and the Massachusetts Association of Criminal Defense Lawyers had standing "as representatives of incarcerated individuals" to bring a petition under G. L. c. 211, § 3, challenging the continued

[22] In *Harris*, the district court analyzed the organization's standing using the test articulated by the Supreme Court in *Hunt*, 432 U.S. at 343. In *Animal Legal Defense Fund, Inc. v. Fisheries & Wildlife Bd.*, 416 Mass. 635, 638 n.4 (1993), the SJC explicitly adopted the three-part *Hunt* test: "(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit," 432 U.S. at 343. In analyzing the third prong, the district court in *Harris* held that formal membership is not required. 567 F. Supp. at 640. Rather, it held that the NAACP is a recognized and appropriate advocate of the interests of its "defined and discrete constituency" and, therefore, had standing to assert the rights of Black people in Boston. *Id.* Both CPCS and HCLJ would likewise satisfy the three prongs of the *Hunt* test as recognized and appropriate advocates for the interests of defendants in Hampden County.

incarceration of individuals in light of the severity of the Covid-19 pandemic. 484 Mass. at 447. First, the Court determined that "the relationship between the petitioners and the detainees and incarcerated individuals, now focused on having their clients released from custody, clearly is 'inextricably bound up with the activity the litigant wishes to pursue,' e.g., obtaining release through litigation in this court." *Id.* Second, the Court noted that it was "difficult, at best, for incarcerated individuals to assert their claims" due, in part, to delays caused by the pandemic, as well as "the apparent belief by some trial judges that they have no authority to allow" the requested relief. *Id.*

Both conclusions apply here. First, CPCS and HCLJ are charged by statute and contract, respectively, with ensuring that each indigent defendant in Hampden County has effective representation, including by ensuring the constitutional and legal rights of those defendants to receive exculpatory evidence. SOF ¶¶ 62-63, 67, 68, 70. As in *CPCS v. Chief Justice of the Trial Court*, their relationships with criminal defendants are "inextricably bound up" with the activity they wish to pursue: obtaining the release of exculpatory information.

Second, it is difficult at best for individual criminal defendants to obtain relief. Until SPD misconduct is fully investigated and disclosed, individual defendants have no way of knowing what exculpatory evidence is being withheld in their cases. Compare *Cotto*, 471 Mass. at 110 (referencing "eight known cases" affected by Sonja Farak's misconduct, before a court-instigated investigation revealed thousands of them), with SOF ¶¶ 118-140 (describing two cases in which defendants have filed motions for exculpatory evidence, which have been partly unsuccessful for lack of specificity as to the records sought). Even when defendants successfully seek exculpatory evidence, they will be hard-pressed to argue that the *full* "timing and scope" of SPD officers' misconduct must be disclosed in their case, see *Cotto*, 471 Mass. at 111; rather, any one defendant might arguably be harmed only by the misconduct of the specific officers involved in their case. And, of course, when a defendant learns that exculpatory evidence was not disclosed in his case, as Petitioner Graham did, the district attorney

might enter a *nolle prosequi* and then argue that the defendant no longer has an interest in seeking any relief. See SOF ¶¶ 46, 79 (citing examples of the district attorney filing a *nolle prosequi* in cases involving evidence of police misconduct). But because CPCS and HCLJ supply representation across a range of defendants in Hampden County, in past, current, and future cases, they have a profoundly important interest in the thorough investigation and complete disclosure of SPD officers' misconduct.

Thus, CPCS and HCLJ have third-party standing here. A contrary holding would impair the rights of countless third-party criminal defendants by forcing them to litigate their criminal cases in the dark, unaware of the full timing and scope of SPD officers' misconduct. See *Eisenstadt v. Baird,* 405 U.S. 438, 445 (1972) ("more important than the nature of the relationship between the litigant and those whose rights he seeks to assert is the impact of the litigation on the third-party interests"); see also *Ryan v. U.S. Immig. & Customs Enf't*, 382 F. Supp. 3d 142, 154-55 (D. Mass. 2019) (holding CPCS, two district attorneys, and nonprofit organization had standing to challenge immigration arrests at courthouses as "participants in the state civil and criminal justice systems" who "represent stakeholders affected by civil immigration arrests in state courthouses"), *aff'd with respect to standing but vacated on other grounds*, *Ryan v. U.S. Immigr. & Customs Enf't*, 974 F.3d 9, 17 n.4 (1st Cir. 2020).

B. Petitioners Ryan and Auer have direct and third-party standing because the under-investigation and under-disclosure of SPD misconduct impairs their representation of their clients and requires them to expend significant resources.

The standing principles articulated above apply with equal force to individual lawyers representing criminal defendants in the face of egregious government misconduct that has gone under-investigated and under-disclosed. These problems divert resources from and frustrate the obligations of criminal defense lawyers, including Petitioners Auer and Ryan.

Like CPCS and HCLJ, Petitioners Ryan and Auer have direct standing under *Havens Realty Corp.*, 455 U.S. at 379 and *New England Div. of Am. Cancer Soc'y*, 437 Mass. at 177. They maintain legal practices in Hampden County, SOF ¶¶ 56, 59, and have been forced to divert resources to make up

for the HCDAO's lack of disclosures of exculpatory evidence. See *id.* ¶¶ 57, 60, 77-78, 86, 108-110. For example, Petitioner Ryan has had to file public records requests, then file and litigate discovery motions based on the results of those public records requests in order to obtain exculpatory evidence regarding police officers. *Id.* ¶ 58. Petitioner Auer billed over $7,500 due in part to the need to file and litigate discovery motions over a period of 17 months, a bill which triggered an automatic CPCS audit (further diverting her and CPCS's resources), which in turn found the time that Petitioner Auer expended appropriate. See *id.* ¶ 61; see also C.R.A. 409, Auer Aff. ¶ 21. The HCDAO's practices frustrate Petitioners Ryan and Auer's representation of their clients. *Id.* ¶¶ 58, 61.

Petitioners Ryan and Auer also have third-party standing similar to CPCS and HCLJ to assert the rights of their clients due to the close and confidential nature of the attorney-client relationship. As the U.S. Supreme Court has held, "[t]he attorney-client relationship . . . is one of special consequence," and where it is credibly alleged that governmental conduct may "materially impair the ability of" a client to exercise their constitutional rights, the attorney has standing to challenge that conduct. *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617, 623 n.3 (1989). This is so especially where, as here, their clients may otherwise be unable to assert their rights to exculpatory evidence.

An advocate's standing to protect third-party rights has been recognized by the SJC as well as the Supreme Court. In *Eisenstadt*, the Supreme Court held "[t]here can be no question, of course," that the relationship "between an advocate of the rights of persons to obtain contraceptives and those desirous of doing so" is sufficient to grant Article III standing. 405 U.S. at 444-45. Though the advocate was not directly impacted by the challenged Massachusetts statute, he had an "adequate incentive" to litigate the rights of those who were. *Id.* at 446. The SJC adopted the reasoning of *Eisenstadt* in *Leigh v. Bd. of Registration in Nursing*, 399 Mass. 558, 561 (1987), where it held that a midwife could raise the due process rights of pregnant women with whom she had a professional relationship. Third-party standing for Petitioners Auer and Ryan is well-grounded in these cases.

C. Petitioners Lopez and Graham are both at substantial risk of irreparable harm, yet their substantive claims may continually evade the Court's review.

Petitioners have alleged that the Commonwealth's failure to investigate the full extent and timing of SPD officers' egregious misconduct creates a substantial risk that defendants are systemically denied their due process rights in Springfield. Without an investigation, the HCDAO cannot plausibly claim that it is fulfilling its constitutional duty to disclose exculpatory evidence. See *Gulluni*, SJ Memo at 6 (noting that incomplete information about the cases and officers referenced in the DOJ Report "is trampling on the constitutional rights of thousands of individual defendants"). These allegations establish standing for Petitioners Lopez and Graham, who seek relief for the substantial risk they face of being prosecuted without due process.

1. Defendants have standing to challenge a system that deprives them of due process.

To have standing to seek injunctive relief, an individual must satisfy three criteria. *Sullivan v. Chief Just. for Admin. & Mgmt. of Trial Ct.*, 448 Mass. 15, 21-22 (2006). First, they must have suffered an "injury in fact," *i.e.*, "an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not 'conjectural' or 'hypothetical.'" *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992) (internal citations omitted). Second, "the complained-of injury must be a direct and ascertainable consequence of the challenged action." *Sullivan*, 448 Mass. at 21. Third, it must be likely that the injury will be "redressed by a favorable decision." *Lujan*, 504 U.S. at 561. "Redressability does not require certainty, but only a substantial likelihood that the injury will be redressed by a favorable judicial decision." *Washington Env't Council v. Bellon*, 732 F.3d 1131, 1146 (9th Cir. 2013) (citation omitted).

When analyzing standing requirements against challenges to a criminal legal system that constructively deprived defendants of their constitutional rights, such that no lawyer, "even a fully competent one, could provide effective assistance," courts have found that defendants have the right

to seek systemic reform to vindicate their rights.[23] *Tucker v. State*, 162 Idaho 11, 20 (2017). In determining injury in this context, courts have ruled that an allegation that systemic inadequacies result in constructive denial of counsel "suffices to show an injury in fact." *Id.* at 19-20 (citing *Luckey v. Harris*, 860 F.2d 1012, 1016-17 (11th Cir. 1988)). Where criminal defendants seek prospective relief in civil court, courts have stated it is not necessary "to undertake case-by-case inquiries into Appellants' individual criminal cases." *Id.* at 19; see also *Lavallee*, 442 Mass. at 237 ("We need not wait for . . . the articulation of a specific harm before we may remedy the ongoing" systemic issue). In determining redressability, it is enough that "[w]ere the requested relief ordered, the State would be obligated to create a plan to ensure public defense is constitutionally adequate." *Tucker*, 162 Idaho at 25.

This rule of standing is applicable here. No less than access to counsel, access to exculpatory evidence is vital to the proper functioning of the criminal legal system. *CPCS v. Attorney General*, 480 Mass. at 730-31; *Commonwealth v. Bing Sial Liang*, 434 Mass. 131, 135-36 (2001). The Massachusetts Rules of Criminal Procedure recognize the importance of this right by imposing an automatic and continuing duty on prosecutors to disclose any facts of an exculpatory nature held by members of the prosecution team. Mass. R. Crim. P. 14(a)(1)(A), (a)(4). This duty is also an ethical one. Mass. R. Prof. C. 3.8(d) (as amended effective Apr. 1, 2016).

As shown below, systemic inadequacies deprive defendants of their due process rights in Hampden County, and they have standing to challenge those inadequacies. See *Kaplan v. Bowker*, 333 Mass. 455, 459 (1956) ("[P]ersons . . . who are in danger of suffering . . . legal harm can compel the courts to assume the difficult and delicate duty of passing upon the validity of the acts of a coordinate branch of the government").

[23] Although these cases have generally involved challenges to inadequate funding for public defense, a systemic breakdown in the availability of counsel is analogous to a systemic breakdown in the availability of exculpatory evidence. See, e.g., *Kuren v. Luzerne Cty.*, 637 Pa. 33, 69 (2016) ("Appellants make no individual claims of ineffective assistance of counsel . . . [they] challenge the system itself").

2. Petitioner Lopez has standing because he is at risk of being denied access to potentially exculpatory evidence that is vital to his defense.

Petitioner Lopez is incarcerated, awaiting trial in Hampden County Superior Court on drug and other charges, based on evidence provided by some of the SPD Narcotics Bureau officers whose reports were at issue in the DOJ Report. SOF ¶¶ 50-51, 144. Officer credibility is an issue in his case, and evidence of officer misconduct is vital to his defense. *Id.* ¶ 52. Yet he is at risk of being tried without access pre-trial to potentially exculpatory evidence concerning the misconduct of these officers, which is a violation of his procedural rights. *Id.* ¶ 55. He has suffered a legal injury.

This injury is due, at least in part, to the HCDAO's decision to prosecute him without undertaking to obtain potentially exculpatory evidence. See *Gulluni*, SJ Memo, at 3 (HCDAO stating that the officer misconduct described in the DOJ Report "requires disclosure to defendants in . . . cases in which each officer is a potential witness"). Although Petitioner Lopez's counsel filed a Rule 14 motion and the superior court ordered the Commonwealth to produce records of any known instances where involved officers were found to have made a false statement, including during an investigation into another officer's conduct, see SOF ¶ 53, the Commonwealth cannot disclose what it has not undertaken to discover. See *id.* ¶ 139 (Commonwealth asking the court to hold that its Rule 14 duties have been discharged by the SPD's limited search of its files). Despite persistent follow-up by Petitioner Lopez's counsel and several status hearings, nine months passed after the court ordered relief before the Commonwealth produced even a single document, namely redacted summaries of involved officers' Internal Investigation Unit (IIU) histories. See *id.* ¶ 54; see also *id.* ¶ 136 (SPD stating that it was informed by the HCDAO that it only needed to turn over redacted IIU summaries to Petitioner Lopez). In response, the superior court supplemented its initial order by allowing defense counsel to review the full IIU files of the involved officers. *Id.* ¶ 141.

But, as the HCDAO has acknowledged, so long as the SPD's misconduct remains under-investigated and under-disclosed, Lopez must proceed "without confidence" that the disclosure

process has yielded all evidence to which he is entitled. *Gulluni* SJ Memo 6. This is an ongoing due process harm that cannot be adequately addressed if he is convicted, because he will then be subject to strenuous post-conviction standards. Compare *Commonwealth v. Tucceri*, 412 Mass. 401, 406-07 (1992) (establishing materiality standards to be applied postconviction), with *Matter of Grand Jury Investigation*, 485 Mass. 641, 650 (2020) (determining that the materiality standard is not applicable pre-trial when determining duty to disclose evidence). Lopez would derive a benefit from the requested relief, including interim remedies and an investigation, and he therefore has standing now.

3. Petitioner Graham has standing because he is still at risk of being prosecuted.

Petitioner Graham has suffered a direct injury caused by the under-investigation and under-disclosure of exculpatory evidence in Hampden County, and he has standing to bring this case. Although the HCDAO has filed a *nolle prosequi* in his case, after Graham served an 18-month sentence, "[t]he point here is that the system is broken to such an extent that . . . the individual defendant is not represented in any meaningful way, and actual innocence could conceivably go unnoticed and unchampioned." *Wilbur v. City of Mount Vernon*, 989 F. Supp. 2d 1122, 1127 (W.D. Wash. 2013).

Graham was convicted of firearms charges and then incarcerated for 18 months after a trial in which the HCDAO failed to disclose a 911 call portraying an off-duty SPD officer, and not Graham, as the person who possessed a firearm. SOF ¶¶ 37, 39-45. The 911 call was quintessential exculpatory evidence. In it, the caller explained that there was a man on the ground; that the friend of that man pulled a gun on a bunch of people; and that the person with the gun was not the Black driver. *Id.* ¶ 39. The Black driver was Graham; the person threatening people with a firearm was the officer. In December 2019, the superior court judge who had presided at Graham's trial granted him a new trial based in part on that court's assessment of the 911 call and its assessment that it was unreasonable for trial counsel not to have requested 911 recordings. *Id.* ¶¶ 45, 182. These assessments necessarily

encompassed a finding that the 911 call was exculpatory evidence that the prosecution withheld; otherwise counsel's failure to obtain it could not have prejudiced Graham.

In March 2021, more than a year after the court's order granting a new trial, the HCDAO filed a *nolle prosequi*, SOF ¶ 46. For three reasons, that filing does not deprive Graham of standing here.

First, the *nolle prosequi* neither confesses error by the HCDAO nor commits the HCDAO to a decision not to revive the charges against Graham. To the contrary, the HCDAO wrote that it filed the *nolle prosequi* simply because, during Graham's postconviction challenge, he "completed the period of incarceration" to which he had been sentenced. *Id.* ¶ 184. Thus, just as the HCDAO kept the charges hanging over Graham long after he won a new trial, the HCDAO could try to revive those charges, though it claims no present intent to do so. *Id.* ¶¶ 187-188; see also *Wynne v. Rosen*, 391 Mass. 797, 801 (1984) (discussing impact of *nolle prosequi* in context of malicious prosecution standard). These circumstances keep Graham in peril.

Second, the HCDAO has staked out an unsupportable legal position that tends to augur a further prosecution of Graham—on old charges or new ones—without the benefit of all exculpatory evidence to which he is entitled. In this litigation, the HCDAO has claimed that it was under no obligation to disclose the 911 call that accused someone who matched the description of an off-duty SPD officer, but not Graham, of threatening people with a firearm. See, e.g., Resp. to SOF ¶ 44. Petitioners are aware of no legal basis for this claim. To be exculpatory, evidence must simply tend to negate guilt; it need not be "absolutely destructive of the Commonwealth's case or highly demonstrative of the defendant's innocence." *Commonwealth v. Daniels*, 445 Mass. 392, 401 (2005); see also *Commonwealth v. McMillan*, 98 Mass. App. Ct. 409, 414 (2020). Indeed, the full court recently reminded the HCDAO that evidence can be both "in and of [itself] inculpatory" but "exculpatory" in context. *Commonwealth v. Rodriguez-Nieves*, 487 Mass. 171, 177 (2021). Here, at a minimum, the 911 call tended to inculpate the SPD officer and exculpate Graham. The HCDAO's contrary claim suggests a

willingness to repeat mistakes that have already cost Graham a year and a half of his freedom. Cf. *Fontenot v. Allbaugh*, 402 F. Supp. 3d 1110, 1163 (E.D. Okla. 2019), *aff'd sub nom. Fontenot v. Crow*, 4 F.4th 982 (10th Cir. 2021) (district attorney's "failure to grasp that exculpatory evidence shows that defendant did not commit the crime, and is material to the case at hand, is the clearest indication of his ability to discern what evidence should be disclosed").

Third, the threat of further prosecution arises not only from the actions of the HCDAO but from the actions of the City. Graham reports being repeatedly stopped by SPD officers following his arrest, *id.* ¶ 48, and was lambasted by Springfield's mayor, who pledged "to keep negative individuals such as Mr. Christopher Graham off our streets and out of our neighborhoods." *Id.* ¶ 38.

It simply has not been Mr. Graham's experience that he will be arrested and prosecuted in Hampden County only if he commits a crime.[24] See *id.* ¶¶ 33-35. Thus, not only has he been injured by the under-investigation and under-disclosure of SPD misconduct, he has reason to fear that further injury hangs over him like the sword of Damocles. These systemic deficiencies would be redressed by the requested relief, which, if implemented, would ensure the proper investigation and disclosure of SPD misconduct and, accordingly, a diminishment of the risk that Graham will be improperly charged or convicted. He has standing to seek this relief.

4. The harm to individual Petitioners is capable of repetition yet evading review.

This case also fits the exception to standing requirements for issues that are "capable of repetition yet evading review." *Superintendent of Worcester State Hosp. v. Hagberg*, 374 Mass. 271, 274 (1978). Courts invoke this doctrine "where the issue [is] one of public importance, where it [has been]

[24] Given Graham's personal experience, and the incomplete disclosure of exculpatory evidence underlying the DOJ Report, this is not a case in which a petitioner is merely speculating that he might break a law, be prosecuted, and be being subjected to allegedly unconstitutional practices. *Cf. Spencer v. Kemna*, 523 U.S. 1, 15 (1998) (denying standing because and courts generally presume that people will follow the laws such that they will not be subject to re-arrest on the same or similar charges).

fully argued on both sides, where the question was certain, or at least very likely, to arise again in similar factual circumstances, and especially where appellate review could not be obtained before the recurring question would again be moot." *Lockhart v. Att'y Gen.*, 390 Mass. 780, 783 (1984). "An issue apt to evade review is one which tends to arise only in circumstances that create a substantial likelihood of mootness prior to completion of the appellate process." *Harmon v. Comm'r of Correction*, 487 Mass. 470, 475 (2021), quoting *First Nat'l Bank of Boston v. Haufler*, 377 Mass. 209, 211 (1979).

That is the situation here. Precisely because SPD misconduct is under-investigated and under-disclosed, a defendant may be entirely unable to establish a problem while their criminal case is actually ongoing. The limited production of records, the impossibility of knowing whether some undisclosed exculpatory evidence remains, and defendants' desire to resolve charges—particularly in the case of someone, like Petitioner Lopez, in pretrial custody—will inevitably lead to the resolution of individual cases without the resolution of the systemic issues raised by this litigation. See, e.g., SOF ¶¶ 118-35 (describing discovery process which has taken more than a year yet until recently has produced only one document); *id.* ¶ 140 (Superior Court noting the problem of the SPD setting itself up as the gatekeeper of evidence). And if the defendant actually finds exculpatory evidence that the prosecution withheld, as in the case of Petitioner Graham, then the criminal case might resolve.

This is a recipe for ensuring that the full extent of SPD misconduct is never known and never disclosed. If a defendant is deemed to lack standing to bring a systemic case like this one so long as their criminal case is pending, and *also* to lack standing once their criminal case resolves, they will always be too early, or too late, to bring a lawsuit. Indeed, the HCDAO's position here is not that some hypothetical petitioner is well-suited to seek the relief sought in this petition, but that no petitioner ever could. The implication of this position is that Petitioners Lopez and Graham have raised issues that are capable of repetition yet evading review.

V. General Laws c. 231A, § 1 and c. 211, § 3 are appropriate vehicles to address the legal issues presented in this case.

The HCDAO has written that government agencies should not "play[] a meaningless 'shell game' in circumstances that are constitutionally significant to the HCDAO and thousands of state court defendants." *Gulluni* SJ Memo at 20. Petitioners agree. It has been 18 months since the DOJ Report, and no one on behalf of the HCDAO, the Commonwealth, or any other agency has accepted responsibility for determining how much misconduct the SPD has committed, and for gathering all evidence of that misconduct from the SPD. Nor has any agency accepted responsibility for disclosing that evidence to defendants. But the HCDAO is still prosecuting people, and using SPD officers on its prosecution teams, without this vital and constitutionally required information. In fact, the HCDAO has acknowledged in federal court that SPD misconduct has affected "an *untold* number of criminal cases" *Id.* at 1 (emphasis added). The number is untold because no one has tried to tell it.

This petition is the best, and likely only, vehicle capable of redressing this ongoing injustice. It seeks to ensure that defendants are prosecuted fairly, that the judiciary maintains its integrity, and that justice is administered effectively. This Court's authority under c. 211, § 3, and c. 231A, § 1, exists for situations like this.

A. This Court has the authority to protect the integrity of the judicial system, ensure the administration of justice, and safeguard constitutional rights.

This Court has "general superintendence of all courts . . . to correct and prevent errors and abuses." G. L. c. 211, § 3. This authority includes the inherent power "to do whatever may be done under the general principles of jurisprudence to insure to the citizen a fair trial," *O'Coin's Inc. v. Treas. of the County of Worcester,* 362 Mass. 507, 509-510 (1972) (internal quotations and citations omitted), and "to protect and preserve the integrity of the judicial system and to supervise the administration of justice." *In re De Saulnier*, 360 Mass. 787, 807-808 (1972). Similarly, this Court "may on appropriate proceedings make binding declarations of right, [and] duty." G. L. c. 231A, § 1. "[A] complaint for

declaratory relief is an appropriate way of testing … the propriety of practices involving violations of rights, which are consistent and repeated in nature." *Frawley v. Police Comm'r of Cambridge*, 473 Mass. 716, 725 (2016) (citations omitted).

In exercising its general superintendence and declaratory authorities, the full court has resolved "'important issues with implications for the effective administration of justice' and 'matter[s] of public interest that may cause further uncertainty within the courts.'" *Ware*, 471 Mass. at 93, quoting *First Justice of the Bristol Div. of the Juvenile Court Dep't v. Clerk–Magistrate of the Bristol Div. of the Juvenile Court Dep't*, 438 Mass. 387, 391 (2003). "When exercising [its] supervisory powers, [this Court is] not limited to correcting error, but may be guided by whatever is needed to ensure that cases are tried fairly and expeditiously." *Commonwealth v. O'Brien*, 432 Mass. 578, 584 (2000).

Consequently, when there is "a lapse of systemic magnitude," *Scott*, 467 Mass. at 352, this Court does not allow that lapse to continue harming untold numbers of defendants simply because each government agency insists that fixing the problem is someone else's job. This Court instead steps in and exercises its superintendence authority so that "the burden of a systemic lapse is not . . . borne by defendants." *Lavallee*, 442 Mass. at 246; *Bridgeman II*, 476 Mass. at 300 (fashioning remedy to be implemented "by the single justice in the form of a declaratory judgment"); *Cotto*, 471 Mass. at 114-15 (implementing procedures in Farak cases in light of absence of a thorough investigation); *Scott*, 467 Mass. at 352 (requiring conclusive presumption of misconduct in Dookhan cases).

B. Where multiple members of prosecution teams have engaged in egregious misconduct that affects an untold number of criminal cases, the Court should exercise its superintendence authority.

The facts here warrant the exercise of this Court's superintendence authority. The HCDAO has identified 30 officers who may be involved in specific incidents listed in the DOJ Report. See SOF ¶ 95; HCDAO's First Status Report, Ex. G, Letter from Hampden County Assistant District Attorney Jennifer Fitzgerald to City Solicitor Edward Pikula (Sep. 1, 2021) at 1. Unlike the drug lab cases, which

arose after the Commonwealth had stopped working with the discredited chemists, many relevant SPD officers are still at work, helping the Commonwealth to produce new criminal convictions.[25] Yet the precise extent of their misconduct is unknown. The HCDAO readily concedes that, despite continuing to use these officers on its prosecution teams, the HCDAO is "without confidence that participants in the specific incidents described in the DOJ report have been completely and correctly identified." *Gulluni* SJ Memo at 20. Worse yet, those under-identified incidents are, according to the DOJ, "merely examples" of a broader, unidentified universe of misconduct. SOF ¶ 4(e); see also *id.* ¶ 4(d), (g). This means that pre-trial defendants, like Petitioner Lopez, cannot be sure that they are receiving appropriate disclosures of exculpatory evidence.

The HCDAO's suit against the U.S. Attorney makes clear that, unless this Court intercedes, this problem will continue indefinitely. At best for criminal defendants, the federal suit will result in the disclosure of some exculpatory evidence—relating to false reporting—at some point time in the future. There is no telling how many criminal defendants will be prosecuted and imprisoned, without full access to exculpatory evidence, in the meantime.

If the agency prosecuting human beings in Hampden County is "without confidence" that it is adequately disclosing the SPD's misconduct, then the judiciary cannot have confidence that it is presiding over adequate proceedings. The "integrity of the judicial process [is] vitiated" where the court is missing facts. *Matter of Neitlich*, 413 Mass. 416, 423 (1992). Courts are making important decisions every day, such as issuing search warrants and holding people pursuant to c. 276, § 58A, without material facts concerning excessive force and false reporting by SPD officers. Fabrication of evidence by the government is constitutional error. *Commonwealth v. Francis*, 474 Mass. 816, 825 (2016).

[25] For example, Detective Kalish is implicated in the misconduct, but he is on the prosecution team in Petitioner Lopez's case and in *Commonwealth v. CS*, Docket No. Redacted (Springfield Dist. Ct.). Officer Carter is implicated in the misconduct and is on the prosecution team in *Commonwealth v. IS1*, Docket No. Redacted (Hampden Super. Ct.). Officer Aguirre is implicated in the misconduct and is on the prosecution team in *Commonwealth v. IS2*, Docket No. Redacted (Hampden Super. Ct.).

Filing false reports is "an affirmative government misrepresentation" that "strikes at the integrity of the prosecution as a whole." *Scott*, 467 Mass. at 348, quoting *United States v. Fisher,* 711 F.3d 460, 466 (4th Cir. 2013); see also *Commonwealth v. Charles*, 466 Mass. 63, 89 (2013).

By exercising its superintendence authority in this case, including by answering the four disputed legal questions jointly advanced by the parties, the Court can facilitate a meaningful solution for a situation that is wholly incompatible with the rights of past, present, and future defendants in Hampden County. See *supra*, Part I. And by answering Petitioners' proposed additional question concerning interim remedies, see *id.*, the Court can mitigate the ongoing harm to criminal defendants that continues every day.

A combination of comprehensive and interim remedies would mirror the Court's exercise of superintendence authority in *Ware* and *Cotto*. There, a member of the prosecution team (Sonja Farak) had committed egregious misconduct in at least eight cases which "raised significant concerns about the administration of justice in criminal cases" in which she provided evidence, and yet the Commonwealth had not conducted an investigation to determine "the precise time frame and scope of her misconduct." *Ware*, 471 Mass. at 93. In exercising its authority under G. L. c. 211, § 3, the Court noted, "the potential implications of such behavior on defendants who have been convicted of drug offenses based on evidence that [Farak] analyzed, present exceptional circumstances warranting this court's immediate attention." *Id.* The Court also held that "a measure of relief," in the form of interim remedies, was appropriate even before the investigation concluded. *Cotto*, 471 Mass. at 108. Those remedies took the form of trial court procedures that depended on whether the putative drug sample had been destroyed. *Id.* at 114-115.

Because this case involves not only past misconduct but also the HCDAO's ongoing reliance on SPD officers accused of misconduct, both comprehensive and interim remedies are particularly appropriate here. Reports and testimony from officers implicated by the DOJ Report—officers that

the DOJ found "made false reports" and submitted "inaccurate or falsified information," SOF ¶ 4(j)—have been used and are apparently still being used as evidence in proceedings that cause people to be detained or imprisoned. The risk to defendants' liberty, and to the justice system's integrity, is grave.

C. Litigation in individual criminal cases is inadequate to the task of identifying and disclosing systemic misconduct.

The criminal legal system, which is designed to administer justice one case at a time, is not capable of handling systemic issues like those presented here. Criminal discovery, trial, and appeal in individual cases is not set up to probe the contours of, and then disclose, misconduct that affects hundreds or thousands of cases. In short, systemic wrongs require systemic solutions.

The last 18 months in Hampden County confirm that routine criminal processes are ill-suited to address systemic challenges. Defendants awaiting trial still may not have access to all exculpatory evidence to which they are legally entitled because no agency in the Commonwealth has investigated the timing and scope of SPD misconduct. Defendants who have already been convicted or who accepted a plea do not have access to the information they need to file a motion for new trial under Mass. R. Crim. P. 30(b) because it has not yet been uncovered. The Commonwealth's failure to investigate renders defendants unable to obtain relief.

There is no end in sight. To Petitioners' knowledge, no court has ordered an investigation into any individual police officer implicated by the DOJ Report, much less a full investigation into SPD officers' misconduct. This is not surprising; trial courts may believe that they lack the authority to issue such an order. Nor, to Petitioners' knowledge, has any court ordered the SPD to produce the full suite of documents reflecting the misconduct outlined by the DOJ. Again, this is not surprising; trial courts are generally constrained to make orders specific to the facts of a single defendant's case. Nor, to Petitioners' knowledge, has any court purported to make findings concerning the excessive force and false reporting flagged by the DOJ. Once again, this is not surprising; trial courts are not general fact-finding tribunals. In consequence of these predictable limitations of criminal processes, defendants

today have almost no more information now than they had back in July 2020. What little new information exists, such as the revelation of the Kent Report's existence and the disclosures that followed that revelation, seemingly have occurred only *because of this litigation*.

Nevertheless, the HCDAO seems poised to argue that, because SPD officers' misconduct has seemingly resulted in few findings by trial courts and few convictions of SPD officers, this Court should decline to exercise its superintendence authority. SOF ¶ 253. That view has things backward. When trial courts demonstrate that they cannot muster a response to stunning revelations of egregious misconduct, and when an SPD officer demonstrates that he can avoid criminal sanction despite being caught *on camera* committing and confessing to misconduct, that does not suggest that the legal issues arising from the misconduct can be addressed without this Court's involvement. Rather, it suggests that the exercise of this Court's superintendence authority is acutely needed because the criminal legal system lacks the capacity to process these issues in any other way.

"Where, as here, a systemic issue affecting the proper administration of the judiciary has been presented, resolution of the issue by this court is appropriate and should not await some fortuitous opportunity of report or ordinary appeal." *Simmons v. Clerk-Magistrate of Boston Div. of Housing Court Dep't*, 448 Mass. 57, 61 (2006) (internal quotations and citations omitted). Moreover, the full court has held that in special circumstances, a declaratory judgment is appropriate in pending cases when it would "prevent disruption of the orderly administration of criminal justice." *District Attorney for the Suffolk Dist. v. Watson*, 381 Mass. 648, 659-660 (1980). This case presents such special circumstances. The under-investigation and under-disclosure of SPD misconduct has already forced, and is still forcing, individuals defendants to face detention, conviction, and imprisonment without the benefit of all the evidence to which they are entitled. This situation is untenable, and it "has serious implications for the entire criminal justice system." *Cotto*, 471 Mass. at 115.

VI. The Kent Report remains undisclosed.

To Petitioners' knowledge, the Kent Report has not been shared with any criminal defendant or their lawyer. See SOF ¶¶ 96-97. But the HCDAO has conceded that the Report may be exculpatory as to a particular defendant, Resp. to *id.* ¶ 100, and its disclosure to defendants is therefore mandatory, Mass. R. Crim. P. 14(a)(1)(A)(iii). Defendants' attempts to obtain the Report have thus far been unsuccessful.

A. Evidence suggests that the Kent Report contains exculpatory information and thus cannot be shielded from defendants by work-product privilege.

Filings by the HCDAO in this case and by the City in Petitioner Lopez's case shed new light on the Kent Report's origins and purposes.

On January 12, 2022, after Petitioner Lopez's counsel submitted a proposed order to the superior court which included a demand for the Kent Report, the City of Springfield filed an opposition which argued that the Kent Report is protected by work-product privilege under Mass. R. Civ. P. 26(b)(3). SOF ¶ 145. The City asserted that the report was prepared "*solely* to assist legal counsel in responding to the litigation that the DOJ was likely to bring as a result of the conclusions" in the DOJ Report. *Id.* (emphasis added). In support of its opposition, the City submitted an affidavit from Former City Solicitor Edward Pikula attesting that, following the July 2020 DOJ Report, and in anticipation of litigation by the DOJ, he asked the SPD commissioner and leadership team to review the SPD's files to identify dates, officers, and any other individual referenced in the DOJ Report. *Id.* ¶ 146. According to Pikula, Deputy Chief Kent then generated a report, including his "mental impressions, conclusions and opinions," which was sent to Pikula's office on October 2, 2020. *Id.*

To be clear, the Kent Report is no *Cotto* Report. Deputy Chief Kent is not a neutral investigator. He was intimately involved in the operation of the SPD's Narcotics Bureau, has repeatedly asserted his Fifth Amendment right against self-incrimination when asked to testify about its operations, and has been specifically identified as one of the officers "involved in" incidents

described in the DOJ Report. See SOF ¶¶25-30, 94-95. Moreover, the Kent Report was allegedly prepared *solely* to defend against DOJ-related litigation. SOF ¶ 145. It cannot have discharged the Commonwealth's duty to assess the full timing and scope of the SPD's misconduct, because that was not its purpose.

Regardless, the Kent Report was literally designed to be a repository of exculpatory information. See SOF ¶¶93-97. It was prepared by a person who not only had access to the SPD's complete records, but also to information known to him as an SPD supervisor and as a person "involved in" some of the underlying events. See SOF ¶¶25-30, 94-95. There is no universe in which such a report is not exculpatory. Its disclosure is therefore required by Rule 14, no matter the City's claim of work-product privilege. See generally *Bing Sial Liang*, 434 Mass. at 132 (if work-product contains material, exculpatory information, "the Commonwealth must disclose such information or statements to the defendant").

Nevertheless, to this day, the Kent Report remains secret, and the HCDAO claims to lack knowledge about the scope of the SPD's search. See HCDAO Status Report at Ex. A (Sept. 14, 2021); Resp. to SOF ¶ 105. This is, to put it mildly, less than what the law requires. Yet this woefully flawed process appears to represent the entirety of the disclosures of exculpatory evidence that have thus far been made pursuant to the July 2020 DOJ Report.

B. The HCDAO has no apparent plans to compel production of the Kent Report.

Petitioners are unaware of any efforts by the HCDAO, under Rule 17 or otherwise, to compel the disclosure of the Kent Report from the City. The HCDAO did ask the City for the Kent Report at least once by letter dated August 13, 2021, *id.* ¶ 98; however, the City declined to provide it, *id.* ¶ 99. The HCDAO appears to believe that it has satisfied its legal obligations with respect to the Kent Report by asking for it, notifying defense counsel of its existence, and leaving it to defendants to try to overcome the very SPD resistance that has stymied the HCDAO. Resp. to SOF ¶ 100.

C. Defendants have been unable to obtain the Kent Report.

Defense attorneys have thus far been unsuccessful in their motions, filed under both Rule 14 and Rule 17, to obtain this report. Petitioners are not aware of any specific orders by the trial court denying access to the Kent Report; motions are either still under advisement or are pending a hearing.

Defense counsel have made Rule 17 and Rule 14 motions that either explicitly requested the Kent Report or, if granted in full, should have yielded the report. See, e.g., SOF ¶¶ 131, 148; *Commonwealth v. IS1*, Docket No. Redacted (Hampden Super. Ct.); see also *Commonwealth v. LV*, Docket No. Redacted (Springfield Dist. Ct.) (court ordering the HCDAO to make reasonable inquiries of officers to gather exculpatory evidence, including evidence related to the DOJ Report); *Commonwealth v. CS*, Docket No. Redacted (Springfield Dist. Ct.) (court ordered the HCDAO to inquire of involved officers, including those known to be implicated by the DOJ Report, whether they have used excessive force, authored false, or made false statements and to release any corroborating documents); *Commonwealth v. IS2*, Docket No. Redacted (Hampden Super. Ct.) (defense counsel filed Rule 14 motion requesting the court order the HCDAO to make reasonable inquiry of the SPD for information related to officers in case known to be implicated by the DOJ Report).

For example, in *Commonwealth v. IS1*, counsel filed a Rule 14 motion for "exculpatory material regarding any police witness" in a case involving two officers identified in the documents produced based on Deputy Chief Kent's review. SOF ¶ 154. As support for the Rule 14 motion, defense counsel provided the DOJ Report and correspondence between the HCDAO and Former City Solicitor Pikula discussing the Kent Report. *Id.* ¶ 155. On January 24, 2022, the court denied the motion "[t]o the extent that the defendant seeks this court to order the Commonwealth to make inquiry of the City of Springfield … to obtain information not already in the Commonwealth's possession, custody or control." *Id.*¶ 156. The court held that the information must be obtained via Mass. R. Crim. P. 17. *Id.*

VII. It is unclear whether the HCDAO has been following a formal *Brady* policy.

In response to public records requests, the HCDAO has previously revealed that, as of November 2020, it had no written policies regarding its legal obligations to automatically disclose exculpatory and impeachment evidence to defendants (or "*Brady* policy"), it did not maintain a list of officers known or suspected to have committed an offense about which disclosure is legally required (or "*Brady* list"), and it did not have a system to ensure the proper disclosure of exculpatory and impeachment evidence.[26] SOF ¶ 75. Although Respondent stated in its Opposition to the Petition, docketed May 28, 2021, that "since September 2020," it has "retained the services" of former SJC Associate Justice Robert J. Cordy and "convened a working group of experienced prosecutors to formulate policy, review individual cases, and provide guidance to all assistant district attorneys," Opp. at 36, Petitioners are unaware of the publication of any policies arising from those efforts.[27]

VIII. The Hampden District Attorney's Suit against the U.S. Attorney remains insufficient to fulfill the HCDAO's obligations.

District Attorney Gulluni's lawsuit against the U.S. Attorney for the District of Massachusetts, even if successful, would not uncover all documents and information required to comply with the HCDAO's disclosure obligations. That lawsuit seeks only records about excessive use of force that the DOJ believed to be "false" or "falsified"—not documents evidencing the excessive force itself.

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[26] Other district attorney offices, including Suffolk, Berkshire, and Middlesex counties, appear to have publicly available formal policies and lists. See, e.g., Berkshire District Attorney's Office *Brady* Policy and Disclosure Form, www.mass.gov/how-to/download-the-berkshire-district-attorneys-office-brady-policy-and-disclosure-form; Walter Wuthmann, *Suffolk DA Releases List Of 136 Police Officers With Possible Credibility Issues*, WBUR (Sept. 27, 2020), www.wbur.org/news/2020/09/25/rollins-suffolk-da-police-credibility-brady; Middlesex District Attorney, Police Discovery Obligations and Disclosure of Exculpatory Evidence Memo (Mar. 16, 2021), www.middlesexda.com/public-information/pages/policies-procedures-and-related-documents.

[27] In an article dated January 31, 2022, the website "The Mass Dump," which requests and publishes public records, reported that although "[t]he Hampden DAO did not maintain a Brady list in 2020," it has since started one. Andrew Quemere, *The Brady Bunch*, The Mass. Dump Dispatch (Jan. 31, 2022), https://andrewqmr.substack.com/p/the-brady-bunch.

SOF ¶ 116. It also has no clear timetable for resolution, let alone document production; briefing on the summary judgment motion is not slated to conclude until May 2022.

District Attorney Gulluni's summary judgment filing confirms the narrow scope of the lawsuit,[28] concedes that there is exculpatory information that the HCDAO has not disclosed,[29] and acknowledges that this nondisclosure imperils the rights of past, present, and future defendants.[30] It also alleges that the DOJ, by declining to provide the requested SPD documents, has acted "with utter disregard for the constitutional rights of Hampden County defendants, the ethical obligations of [HCDAO] prosecutors, or, indeed, the integrity of the justice system itself." *Gulluni*, SJ Memo at 1-2. The HCDAO thus blames the DOJ for the ongoing failure to disclose exculpatory evidence to defendants in Hampden County, stating that the DOJ has somehow secreted away documents that remain in the custody, possession, and control of the SPD. *Id.* at 1.

Yet, as the HCDAO appears to understand, it is decidedly a district attorney's obligation to turn exculpatory information over to the defendants that the district attorney, and not the DOJ, is prosecuting. *Id.* at 3-5. And because the documents at issue in the federal case belong to and remain in the custody of the SPD, the HCDAO's accusations against the DOJ necessarily apply with equal force to the SPD and, by extension, the HCDAO itself.

Just as important, it was neither the DOJ nor the DOJ Report that suddenly made documents exculpatory; it was the *misconduct* that various SPD documents memorialize. The HCDAO failed to obtain and disclose these exculpatory documents in the first place, before the DOJ investigation and report, despite being on notice of the underlying misconduct, and despite continuing to prosecute defendants with the SPD's help. See *id.* at 12. Further, the HCDAO seems willing to use legal

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[28] "*Explicitly excluded* from the *Touhy* request [for documents] were SPD documents not relating to falsified information." *Gulluni* SJ Memo at 5 (emphasis in original).
[29] "[I]t is virtually certain," the district attorney writes, "that Hampden County defendants are entitled to disclosure of documents on which the DOJ's conclusions are based." *Id.* at 3.
[30] *Id.* at 1.

processes only against the DOJ, rather than using them against the most obvious source of SPD documents: the SPD itself. See *id.* at 11, 18. That is all the more reason for the judiciary to step in, declare the Commonwealth's duty to investigate the SPD's misconduct, and ensure that all evidence of that misconduct is fully disclosed to the criminal defendants whose liberty may depend on it.

CONCLUSION

As we approach the two-year anniversary of a federal government report finding egregious government misconduct by the Springfield Police Department, there is no system in place to ensure that the misconduct is fully investigated and disclosed. This is a systemic lapse, and the burdens of that lapse are falling every day on criminal defendants in Hampden County. Petitioners therefore request that this Court, or the full court upon reservation and report, address the contested legal issues jointly proposed by the parties and the additional legal issues proposed by Petitioners. Further, Petitioners respectfully request that interim remedies be imposed until the Commonwealth's investigation is complete and the HCDAO's disclosure practices are constitutionally adequate.

Dated: February 22, 2022

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CERTIFICATE OF SERVICE

I certify that on February 22, 2022, I served the attached status report to counsel for the Respondent via email:

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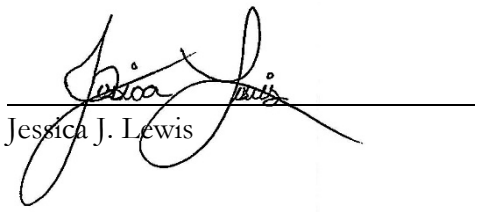

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