Commonwealth of Massachusetts
Supreme Judicial Court

No. SJC-13386

CHRIS GRAHAM, JORGE LOPEZ, MEREDITH RYAN, KELLY AUER, COMMITTEE FOR PUBLIC COUNSEL SERVICES, AND HAMPDEN COUNTY LAWYERS FOR JUSTICE,
Petitioners-Appellants,

v.

DISTRICT ATTORNEY OF HAMPDEN COUNTY,
Respondent-Appellee.

BRIEF (SOLICITED) OF THE INSTITUTE FOR JUSTICE AS AMICUS CURIAE IN SUPPORT OF PETITIONERS-APPELLANTS

ON RESERVATION AND REPORT FROM
THE SUPREME JUDICIAL COURT FOR SUFFOLK COUNTY

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Appellate Procedure Rule 17(c)(1) and Supreme Judicial Court Rule 1:21, I certify that amicus curiae Institute for Justice is a nonprofit organization, that it does not issue any stock or have any parent corporation, and that no publicly held corporation owns stock in it.

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INTEREST OF AMICUS CURIAE

The Institute for Justice (IJ) is a nonprofit public interest law firm dedicated to defending the nation's constitutional structure and the foundations of a free society. IJ believes it is critical for courts to enforce constitutional limits on government power and ensure that the public can hold government officials accountable when they violate constitutional rights. In pursuit of those goals, IJ regularly litigates and files amicus briefs in federal and state courts across the country regarding judicial or statutory doctrines that hinder the enforcement of constitutional rights and blunt government accountability. IJ also recently authored a comprehensive report on the immunities and other doctrines—judicial and statutory—that thwart accountability under each state's laws. Massachusetts, unfortunately, receives only a C+ grading, given the many obstacles to meaningful relief faced by individuals subject to government abuse in the state. *See* Institute for Justice, 50 Shades of Government Immunity (Jan. 25, 2022), https://ij.org/report/50-shades-of-government-immunity/.

This brief is about those obstacles, and why the relief Petitioners seek in this case is therefore particularly crucial. IJ respectfully brings to the Court's attention the ramifications and implications of its decision here concerning a pattern or practice of police and prosecutorial misconduct in Springfield. Specifically, IJ discusses the importance of rigorously and systematically enforcing the district

attorney's investigation and disclosure obligations for a pattern or practice of police or prosecutorial misconduct under this Court's precedents, in light of the fact that a litany of immunities and other doctrines close the courthouse doors (both federal and state) on victims who would otherwise individually seek accountability for such misconduct in the form of compensatory damages or injunctive relief. In short, with other avenues for the vindication of rights closed, the one Petitioners seek is necessary to achieve some measure of accountability for a pattern of unredressed abuses.

DECLARATION OF AMICUS CURIAE

Pursuant to Appellate Procedure Rule 17(c)(5), I certify that (A) no party or party's counsel authored any of this brief; (B) no party or party's counsel, or any other person or entity, other than the amicus curiae, its members, or its counsel, contributed money that was intended to fund the preparation or submission of this brief; and (C) neither amicus curiae nor its counsel represents or has represented one of the parties to the present appeal in another proceeding involving similar issues, or was a party or represented a party in a proceeding or legal transaction that is at issue in the present appeal.

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SUMMARY OF ARGUMENT

When police or prosecutors violate constitutional rights, justice demands two things: accountability for the offending officials and vindication for their victims. One way to achieve that is a victim's civil damages suit against the offending officials and their government employer; alternatively, one might file a suit seeking to enjoin an ongoing policy that caused their harm.

But a litany of doctrines close the courthouse doors for such claims—under both federal and state law—against police, prosecutors, and their employers. This brief explains how several of those doctrines prevent accountability and vindication via individual suits in the particular circumstances of this case—namely, a pattern of unwarranted police violence covered up by unwarranted criminal convictions, secured in part by the unlawful withholding of exculpatory evidence by police and prosecutors. With the damages and injunctive relief doors all but closed to the victims of these abuses, the investigation and disclosure obligations Petitioners seek here are essentially all that remain—making it crucial for this Court to reverse.

In the circumstances implicated by this case, perhaps the most potent of the damages-immunizing doctrines is the *Heck* bar for federal constitutional claims and that bar's state analog, as recognized by this Court. *See Heck v. Humphrey*, 512 U.S. 477 (1994) (federal claims); *Tinsley v. Town of Framingham*, 485 Mass. 760 (2020) (state claims). *Heck* and *Tinsley* foreclose claims (against individual officials and

their employing governments) that would impugn an outstanding criminal conviction. Of course, the question in this case is the extent to which, "to justify their own excessive force, [Springfield Police Department] officers engendered wrongful convictions for crimes like assault and battery on a police officer, resisting arrest, or disorderly conduct." Brief for Petitioners-Appellants at 10. *Heck* and *Tinsley* make impugning such wrongful convictions via civil damages impossible.

But even for claims that *Heck* and *Tinsley* do not bar, a host of other doctrines make civil damages suits, as well as injunctive suits, essentially nonstarters:

- Police officers enjoy qualified immunity against federal and state claims. This judge-made doctrine is a notoriously high hurdle in the context of both excessive force and the withholding of exculpatory evidence, both of which are among the patterns of misconduct described in this case.
- Prosecutors enjoy absolute immunity against federal and state claims related to their prosecutorial functions—including the withholding of exculpatory evidence—no matter how egregious their misconduct.
- Under federal law, municipal liability has been strictly cabined by narrowly construing what constitutes a municipal policy or custom, particularly when it comes to the withholding of exculpatory evidence.

- Relatedly, even if a plaintiff can adequately plead such a policy or custom, they almost certainly lack standing to enjoin it going forward, whether under federal or state law.
- The Massachusetts Tort Claims Act forecloses any state or municipal liability for intentional torts, which would include the police violence described in this case.
- The Massachusetts Civil Rights Act forecloses any state or municipal liability at all, and it forecloses personal liability for the use of police violence or withholding of exculpatory evidence—no matter how excessive or baseless—if it does not happen to be accompanied by separate threat, intimidation, or coercion.[1]

This is, of course, not how amicus believes the state of accountability should be. But it is. And with these immunities barring the vindication of rights in the form of civil damages and injunctions, the investigation and disclosure obligations Petitioners seek here are especially pressing. While such relief is limited (especially for its lack of redress for completed harms), it remains meaningful. The district

[1] Many of the state law barriers discussed here are summarized in amicus's recent report on the immunities and other doctrines—judicial and statutory—that thwart accountability under each state's laws. Massachusetts, unfortunately, receives a middling C+ grade for its accountability regime. *See* Institute for Justice, 50 Shades of Government Immunity (Jan. 25, 2022), https://ij.org/report/50-shades-of-government-immunity/.

attorney's thorough investigation of a pattern or practice of potentially abusive police and prosecutors can bring accountability in several ways, as recently recognized by this Court in *Matter of Grand Jury Investigation*, 485 Mass. 641 (2020), *Committee for Public Counsel Services v. Attorney General*, 480 Mass. 700 (2018), and *Commonwealth v. Cotto*, 471 Mass. 97 (2015).

ARGUMENT

I. Petitioners seek investigation and disclosures of a disturbing pattern of police and prosecutorial misconduct, implicating excessive force, false convictions, and undisclosed exculpatory evidence.

As detailed in Petitioners' opening brief, this case seeks thorough investigation and disclosures by the Hampden County District Attorney's Office (HCDAO) of an apparent pattern of misconduct within the Springfield Police Department (SPD) and prosecutions arising from it. Relying on a substantial set of publicly known instances, including those recounted in a U.S. Department of Justice report, Petitioners rightly argue that HCDAO's investigation and disclosure requirements are triggered under this Court's precedents because: (1) SPD officers regularly engage in excessive or baseless violence; (2) SPD officers then submit false reports and bring false charges against the victims of that violence, for a common trifecta of crimes (assault on the officer, resisting arrest, and disorderly conduct); and (3) HCDAO prosecutors then secure convictions against those victims for that trifecta of false crimes in instances where undisclosed video or other

evidence would or reasonably might exonerate them by showing that SPD officers were at fault or that their reports were false.

This Court's recent decisions recognize that the relief Petitioners seek is important because it implicates prosecutors' fundamental constitutional and ethical obligations, as well as the judiciary's supervisory authority and responsibility to protect individual rights and the integrity of the criminal justice system. *See Matter of Grand Jury Investigation*, 485 Mass. 641 (2020); *Committee for Public Counsel Services v. Attorney General*, 480 Mass. 700 (2018) (*CPCS*); and *Commonwealth v. Cotto*, 471 Mass. 97 (2015). But the relief Petitioners seek is important for another reason too: As explained in the next section, suits for damages or injunctions are essentially nonstarters in the circumstances of the misconduct at issue here. Accountability for public officials—and some measure of vindication for their victims—hinges on a robust and unwavering enforcement of the investigation and disclosure obligations Petitioners seek under this Court's recent precedents.

II. A litany of doctrines immunize police, prosecutors, and their employing governments from damages or injunctions, particularly in circumstances implicated by this case, so the investigation and disclosure obligations Petitioners seek are particularly crucial to government accountability and the vindication of rights.

When police or prosecutors abuse their power, justice requires accountability for them and vindication for their victims. But, due to a variety of judicial and statutory immunity doctrines, both things are all but impossible to come by in the

form of lawsuits seeking damages or prospective injunctions, particularly when the abuse entails, as it does here, some combination of excessive force, false convictions, and withheld exculpatory evidence. The investigation and disclosure obligations Petitioners seek here are therefore both fundamental in their own right, as recently and repeatedly recognized by this Court, but also as a crucial backstop to the evisceration of accountability for violations of constitutional and other rights.

1. Several doctrines immunize police, prosecutors, and their employing governments from damages under federal and state law. With respect to the types of abuses implicated by this case (baseless violence covered up by the trifecta of convictions for assault on the officer, resisting arrest, and disorderly conduct, secured by withholding exculpatory evidence), perhaps the most potent immunizers are the federal *Heck* bar against claims under 42 U.S.C. § 1983 and its Massachusetts *Tinsley* analog against claims under state law. *See Heck v. Humphrey*, 512 U.S. 477 (1994); *Tinsley v. Town of Framingham*, 485 Mass. 760 (2020). No matter how "disturbing [the] case," *Heck* and *Tinsley* bar any damages claim (against any defendant) that impugns an outstanding criminal conviction—no questions asked about the circumstances in which that conviction was obtained, including the potential withholding of exculpatory evidence. *Tinsley*, 485 Mass. at 761–62.

In practice, this means victims of the pattern at issue here—especially those subject to the most egregious SPD and HCDAO misconduct—have no avenue to

compensation. First, a damages claim arising from the withholding of exculpatory evidence that a plaintiff claims will reveal his innocence necessarily seeks to impugn a wrongly obtained conviction and is almost certain to run into the *Heck* and *Tinsley* bars. Second, with respect to claims arising from the underlying violence: "to the extent that [a plaintiff] argues his complete innocence, the argument is impermissible." *Tinsley*, 485 Mass. at 768. And both of these problems are exacerbated in this state: Unlike several other federal circuits, the First Circuit applies *Heck* to claims brought even by individuals who are not in custody and therefore cannot or could not impugn their convictions via habeas (and this Court in *Tinsley* did not suggest that the state rule differs). *See Figueroa v. Rivera*, 147 F.3d 77 (1st Cir. 1998) (*Heck* bar applies regardless of plaintiff's custody status, even if plaintiff could never instead impugn their conviction via habeas).[2] So, for the victims of the misconduct at issue here—who could not meaningfully invoke habeas relief precisely because exculpatory evidence has been withheld—*Heck* and *Tinsley* take

[2] If presented with the question under state law, this Court should join the Second, Fourth, Sixth, Ninth, Tenth, and Eleventh Circuits in rejecting the First Circuit's categorical rule because they recognize that, at least in some circumstances, it does not serve the *Heck* bar's purpose (and is wholly unjust) if a person, through no fault of their own, is denied judicial review of an unconstitutional conviction via both habeas and in damages. *See Huang v. Johnson*, 251 F.3d 65 (2d Cir. 2001); *Wilson v. Johnson*, 535 F.3d 262 (4th Cir. 2008); *Powers v. Hamilton Cnty. Pub. Def. Comm'n*, 501 F.3d 592 (6th Cir. 2007); *Nonnette v. Small*, 316 F.3d 872 (9th Cir. 2002); *Cohen v. Longshore*, 621 F.3d 1311 (10th Cir. 2010); *Harden v. Pataki*, 320 F.3d 1289 (11th Cir. 2003).

judicial oversight (and the attendant accountability and vindication) all but off the table.

In short, it is the very individuals who the DOJ and other public reports have found are the victims of the most egregious SPD and HCDAO misconduct—those innocent of wrongdoing but criminally convicted to cover up police violence, with exculpatory evidence potentially withheld—who cannot seek compensation at all for the violations of their most fundamental constitutional rights. And, with HCDAO still refusing to thoroughly investigate and disclose exculpatory evidence in cases that track these fact patterns or involve officers known to be implicated in documented abuses, currently unknown victims of this pattern of abuse have no chance of otherwise overturning their convictions. Moreover, because of that intransigence by HCDAO, still unknown instances of this misconduct cannot serve as potentially exculpatory impeachment evidence in other people's criminal prosecutions—which would potentially spare them from a similar fate of unwarranted convictions that cover up police abuse and trigger the *Heck*/*Tinsley* bar. *Accord Matter of Grand Jury*, 485 Mass. at 648–50.

2. To be sure, some violence in these cases might be outside the *Heck*/*Tinsley* bar's scope. As the Court explained in *Tinsley*, "[e]ven where the use of force to effect an arrest is reasonable in response to an individual's resistance, the continued use of force may well be unreasonable, as an individual's conduct prior to arrest or

during an arrest does not authorize a violation of his or her constitutional rights." *Tinsley*, 485 Mass. at 771–72; *see id.* at 771 (collecting federal authority to the same effect under *Heck*). But the line from warranted to gratuitous force is usually going to be a fine one. And where fine lines are involved in the assessment of a police violence claim, qualified immunity is likely to shut the door that *Heck* and *Tinsley* nominally leave ajar. *See generally Saucier v. Katz*, 533 U.S. 194 (2001); *Mullenix v. Luna*, 577 U.S. 7 (2015). Indeed, again in *Tinsley* itself, this Court conspicuously raised the specter that qualified immunity (under state law) might shield the officers for gratuitously beating an unresisting man on the ground while shouting racist epithets at him until he had broken bones and needed stitches in his head. 485 Mass. at 764, 773 n.23. And when it comes to federal claims against police officers for *Brady* violations arising from their withholding of exculpatory evidence, overcoming qualified immunity in the First Circuit requires showing—at the pleading stage, without any discovery—that the officer (1) did so deliberately while (2) knowing that the evidence would be reasonably likely to avoid a conviction. *Drumgold v. Callahan*, 707 F.3d 28, 42–45 (1st Cir. 2013). It will be the exceedingly rare case that an individual can, without discovery, make that showing sufficiently

to defeat qualified immunity.[3] So, again, the district attorney's investigation and disclosure obligations are uniquely important.

3. The two limitations on damages discussed above are at least nominally bounded. The next is not: Under federal and state law, prosecutorial immunity is an absolute shield for prosecutors who, as relevant here, withhold exculpatory evidence in the course of criminal prosecutions—no matter how much "their treatment of citizens does not reflect well on these attorneys, the agency they represent, the office of the Attorney General, and the bar." *Dinsdale v. Commonwealth*, 424 Mass. 176, 182 (1997). It simply does not matter, for purposes of damages liability, that "*Brady* violations have reached epidemic proportions in recent years, and the federal and state reporters bear testament to this unsettling trend." *United States v. Olsen*, 737 F.3d 625, 631–32 (9th Cir. 2013) (Kozinski, J., dissenting from denial of rehearing en banc) (collecting dozens of cases). Luckily, however, this Court has not shrunk in recent years from recognizing and remedying widespread prosecutorial *Brady*

[3] This discussion of qualified immunity (and the other doctrines discussed in this brief) is, of course, the state of the law whether amicus wishes it so or not. But, to be clear, amicus does not endorse the current formulation (or any formulation) of qualified immunity under federal or state law. In both instances, it is an atextual, ahistorical judge-made policy choice that does not even serve its purported ends. *See, e.g.*, Alexander A. Reinert, *Qualified Immunity's Flawed Foundation*, 111 Calif. L. Rev. 201 (2023); Joanna C. Schwartz, *The Case Against Qualified Immunity*, 93 Notre Dame L. Rev. 1797 (2018); Joanna C. Schwartz, *Police Indemnification*, 89 N.Y.U. L. Rev. 885 (2014); William Baude, *Is Qualified Immunity Unlawful?*, 106 Calif. L. Rev. 45 (2018).

violations in the form of the very relief requested by Petitioners in this case. *See generally Matter of Grand Jury*, 485 Mass. 641; *CPCS*, 480 Mass. 700.

4. Finally, some additional limitations on judicial review of the violations at issue in this case bear briefly mentioning, because they show that the closing of the courthouse doors is not limited to claims against the pockets of individual officials, but also the coffers of the governments that employ them.

(a) Under federal law, municipal damages liability has been strictly cabined by narrowly construing what constitutes an official policy or custom, particularly when it comes to a prosecutor's office's regular withholding of exculpatory evidence. *See Connick v. Thompson*, 563 U.S. 51 (2011). The same exacting standard applies to claims seeking injunctive relief. *See Los Angeles County v. Humphries*, 562 U.S. 29 (2010).

Even in the exceedingly rare instance that a plaintiff can satisfy that standard in a prospective relief case seeking to enjoin practices of the sort at issue here (excessive or baseless violence, followed by unwarranted convictions based on withheld exculpatory evidence), they will almost certainly be dismissed—whether under federal or state law—on the rationale that their re-exposure to that particular misconduct is too speculative to confer standing to sue. *See Los Angeles v. Lyons*, 461 U.S. 95 (1983) (federal claims); *Pugsley v. Police Dep't of Boston*, 472 Mass. 367 (2015) (state claims). Luckily (and rightly), however, no such barrier stands in

the way of Petitioners' investigation and disclosure claims here, for the reasons explained in Petitioners' opening brief and in accordance with *CPCS*, 480 Mass. 700. To the contrary, recognizing Petitioners' standing in these circumstances is precisely how the Court fulfills its responsibility to identify systemic problems and devise appropriately tailored investigation and disclosure remedies. *Id.* at 725–34.

(b) Under state law, the Massachusetts Tort Claims Act forecloses any state or municipal liability for intentional torts, which would likely include the pattern of police violence and other misconduct underlying this case. *See* G. L. c. 258, § 10(c) (excluding from statute's scope "any claim arising out of an intentional tort, including assault, battery, false imprisonment, false arrest, intentional mental distress, malicious prosecution, malicious abuse of process, libel, slander, misrepresentation, deceit, [or] invasion of privacy"). Lastly, the Massachusetts Civil Rights Act forecloses any state or municipal liability at all, and it forecloses personal liability for the use of police violence or withholding of exculpatory evidence—no matter how excessive or baseless—if it does not happen to be accompanied by separate threat, intimidation, or coercion. *See Howcroft v. Peabody*, 51 Mass. App. Ct. 573 (2001) (no state or municipal liability); *Longval v. Commissioner of Correction*, 404 Mass. 325 (1989) (no personal liability for "direct" violations for constitutional rights).

* * *

In short: In the absence of the investigation and disclosure obligations Petitioners seek here, the patterns of violence, convictions, and withholding of exculpatory evidence perpetrated over years by the SPD and the HCDAO are effectively immunized from accountability and vindication of rights—both on an individual and systemic level. This Court should account for that reality in granting Petitioners the reasonable relief they seek in these legal and factual circumstances.

III. The relief Petitioners seek here, though limited, would provide meaningful accountability in its own right.

With various immunities barring accountability and vindication in the form of civil damages and injunctions, the investigation and disclosure relief Petitioners seek here is especially pressing, for all the reasons discussed above. While such relief is limited (particularly because it does not offer much-needed and deserved financial redress for its victims), it remains meaningful. The district attorney's thorough investigation of a pattern or practice of potentially abusive police and prosecutors can bring accountability (even if not true vindication for its victims) in several ways, as recently recognized by this Court in *Matter of Grand Jury Investigation*, 485 Mass. 641 (2020), *Committee for Public Counsel Services v. Attorney General*, 480 Mass. 700 (2018) (*CPCS*), and *Commonwealth v. Cotto*, 471 Mass. 97 (2015). For example:

- If the investigation sought by Petitioners reveals that certain officers have engaged in "[c]oncealing police brutality" or "making false statements that might lead to an unjust conviction," the district attorney is constitutionally and ethically required to disclose that "potentially exculpatory information in unrelated criminal cases where the [officers] might be witnesses." *Matter of Grand Jury*, 485 Mass. at 642, 652.
- A "police chief needs this information to determine whether to fire or otherwise discipline [offending officers] . . . to ensure the integrity of the department and its criminal cases." *Id.* at 661–62.
- Similarly, district attorneys need this information about potentially abusive prosecutors. This is particularly important because those prosecutors enjoy absolute immunity from damages suits, making investigation and disclosure the only way to rein in and address potentially "deceptive withholding of exculpatory evidence," as implicated by this case. *CPCS*, 480 Mass. at 702.[4]
- "[T]he systemic nature of [official] misconduct [may] only c[o]me to light following a thorough investigation." *Cotto*, 471 Mass. at 111.

[4] While, in theory, prosecutors could face bar discipline, they rarely do. This Court's own docket would confirm a glaring discrepancy between the volume of cases in which it found prosecutorial misconduct (whether or not it amounted to reversible error) and the relative dearth of disciplinary cases against those very prosecutors.

> Absent that, certain individuals with adequate resources and counsel may find "a measure of relief," *id.* at 108, but only the kind of investigation and disclosure sought by Petitioners in this case will permit the judiciary to discharge its "responsibility . . . to craft a remedy suitable to the available, reliable evidence" by "balanc[ing] the rights of defendants affected by governmental misconduct and society's interest in administering justice." *CPCS*, 480 Mass. at 723, 729.

In short, the investigation and disclosure relief Petitioners seek here is important in its own right—though limited, primarily for its lack of redress to victims. With civil damages and injunctive suits for victims of the types of misconduct described in this case all but off the table, the relief sought here becomes downright crucial for ensuring a measure of accountability for government officials.

CONCLUSION

The Court should reverse and hold that Petitioners are entitled to the investigation and disclosure obligations they seek.

August 23, 2023

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with Appellate Procedure Rules 17 and 20. This brief was prepared in Times New Roman 14-point font using Microsoft Word 2016. As ascertained by that program's "word count" function, this brief contains 3,454 words.

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CERTIFICATE OF SERVICE

I certify that the foregoing Brief of the Institute for Justice as Amicus Curiae in Support of Petitioners-Appellants in Supreme Judicial Court case no. SJC-13386, *Graham et al. v. District Attorney of Hampden County*, have been sent via overnight

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