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New York Supreme Court

APPELLATE DIVISION—FIRST DEPARTMENT

NEW YORK LAWYERS FOR THE PUBLIC INTEREST,

Petitioner-Respondent,

—against—

NEW YORK CITY POLICE DEPARTMENT, and JAMES P. O'NEILL, in his official capacity as Commissioner of the New York City Police Department,

Respondents-Appellants.

CASE NO. 2020-02908

For a Judgment Pursuant to Article 78
of the Civil Practice Law and Rules.

BRIEF FOR PETITIONER-RESPONDENT

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PRELIMINARY STATEMENT

Petitioner-Respondent New York Lawyers for the Public Interest ("NYLPI") seeks affirmation of the Supreme Court's order requiring Respondent-Appellant New York City Police Department ("NYPD") to disclose unredacted body-worn camera ("BWC") footage of the fatal police shooting of Susan Muller pursuant to New York's Freedom of Information Law, Pub. Officers Law §§ 84-90 ("FOIL"). Ms. Muller was a 54-year-old woman with a history of mental health issues who was shot three times by an NYPD officer in her own home on September 17, 2018 after she had dialed 911 to report a burglary. (*See* Record on Appeal, Doc. No. 4 ("R") 18-23.) The shooting took place less than a minute after several officers entered Ms. Muller's home. (R19.)

This Court has held that BWCs are intended to promote transparency and accountability to the public. *See In re Patrolmen's Benevolent Ass'n. of N.Y., Inc. v. De Blasio*, 171 A.D.3d 636, 637 (1st Dep't 2019) ("The purpose of body-worn camera footage is for use in the service of other key objectives of the [BWC] program, such as transparency, accountability, and public trust-building."); *see also N.Y. Lawyers for Pub. Int. v. NYPD*, 64 Misc.3d 671, 676-77 (Sup. Ct. N.Y. Cnty. June 12, 2019) ("*NYLPI v. NYPD I*") (recognizing in a virtually identical case these objectives as "well established" and ordering production of BWC footage of fatal police shooting of Miguel Richards). This appeal follows a nearly two-year effort

by NYLPI to obtain the requested records.

On October 2, 2018, NYLPI requested the BWC footage and 911 call tapes of the incident under FOIL – a law itself aimed at promoting "open government and public accountability." Pub. Off. Law § 84. The NYPD failed to respond to NYLPI's FOIL request for *four* months before refusing to produce *any* records to NYLPI on the basis of an ongoing investigation and a litany of other FOIL exemptions that the NYPD did not explain. (R41; R29-30.) NYLPI brought the Article 78 Petition that is the subject of this appeal and, after briefing and oral argument, the Supreme Court granted NYLPI's Petition. The NYPD now appeals on the basis of just one of the many FOIL exemptions that were at issue before the Supreme Court – the personal privacy exemption. Pub. Off. Law § 87(2)(b).

The Supreme Court denied the NYPD's claim to the personal privacy exemption upon finding that "respondents do not identify what specific redactions they want to make." (R12.) That critical deficiency cannot be cured on appeal, and this Court should affirm the Supreme Court's ruling on that basis alone. Indeed, this Court has already denied the NYPD's attempt to enlarge the record on appeal to include BWC footage with proposed redactions that were not shown to NYLPI or the Supreme Court prior to this appeal, ordering the NYPD to submit a substitute brief. Mot. No. 2766 Order at 2.

At every stage of this proceeding, the NYPD has disregarded the fact that it

squarely bears the burden under FOIL to "articulat[e] a particularized and specific justification for denying access" to requested records. *Cap. Newspapers Div. of Hearst Corp. v. Burns*, 67 N.Y.2d 562, 566 (1986). The NYPD concedes that, prior to this appeal, it did not even raise items such as the personal privacy of Ms. Muller's home address; yet, it asks this Court to make a ruling on such issues for the first time on appeal. Each of these arguments has been waived.

Even if the NYPD had made a particularized showing under the personal privacy exemption, the Supreme Court's finding that the "inherent right of the public to know outweighs privacy concerns" in this case should be affirmed. (R12-13.) The NYPD argues that it should be allowed to redact images of Ms. Muller's "body and blood spatter" that would inevitably obscure footage of officers interacting with Ms. Muller in the critical minutes after the shooting. (R127.) The NYPD cannot claim privacy interests on behalf of a woman whom its officers shot and killed to obscure footage of those same officers' interactions with her. The Supreme Court's decision followed a similar decision in *NYLPI v. NYPD I*, in which the NYPD's argument that footage of the aftermath of the police shooting of Miguel Richards should be redacted on privacy grounds was also rejected, finding that shielding that footage violated FOIL's "requirement of providing maximum public access to government records, and frustrates the key objectives of the BWC pilot program." *NYLPI v. NYPD I* at 680.

COUNTERSTATEMENT OF THE CASE

On September 17, 2018, Susan Muller called the NYPD for assistance; within a minute of arriving at her home, an NYPD officer shot Ms. Muller three times, killing her. (R19.) Ms. Muller was experiencing a mental health crisis at the time—she had a history of mental illness, which the NYPD was aware of after providing assistance to Ms. Muller in the past. *Id.* The NYPD had responded to a total of nine 911 calls to her home since August 2000. *Id.* During at least two of the incidents, Ms. Muller was reported to have been acting irrationally. (R22.) During the most recent incident on September 9, 2018—a mere eight days before the fatal shooting—Ms. Muller was taken to the hospital for mental health treatment. *Id*.

On the day of the fatal shooting, Ms. Muller called 911 to report a burglary. *Id.* Ms. Muller reported to the dispatcher that there was a woman with a knife and a razor inside her home. *Id.* When police officers arrived, Ms. Muller met them at the front of the house and identified herself as the 911 caller. *Id.* Ms. Muller then followed the police officers into her home. (R23.) When the officers did not find the reported burglar, they asked Ms. Muller if she had, in fact, seen an intruder. *Id.* Ms. Muller allegedly then approached the officer who was questioning her, carrying a kitchen knife. *Id.* After telling Ms. Muller to drop the knife, the officer shot Ms. Muller three times in the torso. *Id.* Ms. Muller was pronounced dead at the scene. *Id.* The entire deadly encounter took just over fifty seconds,

beginning from the time the officers entered the apartment. *Id.* The incident was captured on the BWCs of officers on the scene. *Id.*

On October 2, 2018, NYLPI filed a request pursuant to FOIL with the NYPD for unedited audio and video files from the BWCs worn by the officers involved in the deadly shooting of Susan Muller, as well as the 911 audio files related to Ms. Muller's request for help on that date. (R28-29.) The NYPD responded to NYLPI's FOIL request with an acknowledgment of receipt, indicating that it would respond to the FOIL request by February 22, 2019, with no explanation regarding the lengthy, unilateral, and unauthorized extension to the legal deadline. (R29.)

The NYPD did not respond until March 5, 2019, eleven days after its self-selected February 22, 2019 deadline. *Id.* The NYPD's response contained six perfunctory bullets of FOIL exemptions, without explaining how the exemptions applied to the requested records. (R29-30.) On April 3, 2019, NYLPI filed an administrative appeal of the denial with the NYPD. (R30.) The appeal explained that the NYPD had not provided sufficient justification for withholding records, did not provide a specific justification for each claimed FOIL exemption, and did not satisfy the statutory requirements for denying NYLPI's FOIL request. *Id.*

On April 15, 2019, the Records Access Appeals Officer denied the appeal. *Id.* The NYPD primarily relied upon the law enforcement exemption under Public Officers Law § 87(2)(e)(i), stating that "disclosure of the records would

interfere with a pending criminal investigation" as "the NYPD's internal investigation into the incident remains active and ongoing." *Id.* The NYPD further stated: "[t]o the extent that the requested records may become available for public disclosure following the completion of the investigation, certain portions of the records are exempt from disclosure" based on most of the exemptions cited in the initial denial. *Id.* The letter also introduced new exemptions. *Id.* The NYPD merely recited the statutory language of all the other claimed exemptions, including the exemption for an unwarranted invasion of personal privacy under Public Officers Law § 87(2)(b), without explaining its reasons for claiming them or describing which portions of records were subject to each exemption. *Id.* Following the NYPD's denial of the appeal, NYLPI sought reconsideration, which the NYPD denied. (R31.)

NYLPI timely commenced an Article 78 proceeding before the New York County Supreme Court, seeking an order mandating the NYPD to comply with its obligations under FOIL and provide NYLPI with all of the records responsive to the FOIL request. *Id.* In responding to the Petition, the NYPD argued that it was entitled to withhold all of the requested records pursuant to the law enforcement exemption, but that several other exemptions, including the personal privacy exemption (Pub. Off. Law § 87(2)(b)), required that "responsive body-worn camera footage would have to be redacted if the Court finds that it must be turned

over to Petitioner." (R226.) Again, the NYPD did not indicate which portions of BWC footage should be redacted under each exemption or specify the scope or nature of any redactions to the footage. (R254.)

On March 4, 2020, the parties participated in a hearing in the Supreme Court before the Honorable Melissa A. Crane. During the hearing, the NYPD indicated that it would propose redactions to the requested footage under the personal privacy exemption if ordered to produce footage. In response to the NYPD having not even specified which portions of the footage it believed needed to be redacted, Justice Crane stated, "you can't do this piecemeal. It's too important." Supplemental Record on Appeal, Doc. No. 19 ("SR") 19, Hr'g Tr. at 19:18-19, *NYLPI v. NYPD II*, No. 158010/2019 (Sup. Ct. N.Y. Cnty. Mar. 4, 2020). The court went on to conclude that the NYPD had not "made a redaction argument" and, therefore, the court would not consider redactions. SR23, Hr'g Tr. at 23:6-7. The NYPD did not seek to reargue the Supreme Court's oral ruling regarding the NYPD's waiver.

On June 3, 2020, the Supreme Court entered an order and decision granting NYLPI's Petition and directing the NYPD to provide all of the requested records to NYLPI within 20 days of the e-filed date of the decision—unredacted copies of all BWC footage that police officers recorded during the fatal shooting of Susan Muller, in addition to recordings of the requested 911 calls. (R7-13.) In finding for NYLPI, the court rejected the NYPD's argument that disclosure of the footage would

interfere with an ongoing internal investigation of the incident, finding that "the investigation is no longer ongoing." (R10.) It also found "unconvincing" the NYPD's argument that "the NYPD should produce redacted videos because otherwise there would be an unwarranted invasion of Susan Muller's personal privacy." (R12.) As addressed during oral argument, the court held that "respondents do not identify what specific redactions they want to make." *Id.* The court also concluded that "[t]he inherent right of the public to know outweighs privacy concerns" and "[t]o hold otherwise is contrary to the spirit of the FOIL law and objectives of the NYPD's body-worn camera footage program." (R12-13.)

Following the Supreme Court's order, on June 22, 2020, the NYPD filed a notice of appeal. (R3-4.) The NYPD then filed a motion to enlarge the record with the requested BWC footage in redacted form that was produced to NYLPI on June 23, 2020, along with the requested 911 call tapes. Doc. No. 5. On October 6, 2020, this Court denied the NYPD's motion and struck the NYPD's appellate brief in its entirety. Mot. No. 2766 Order at 2. This Court then permitted the NYPD to file "a substitute brief, which omits any information pertaining to their disclosure of the aforesaid redacted footage[.]" *Id.*

On December 7, 2020, NYPD filed its substitute brief. Doc. No. 11. NYLPI now submits this brief in response to the NYPD's appellate brief.

ARGUMENT

I. THE NYPD HAS WAIVED ARGUMENTS RAISED FOR THE FIRST TIME ON APPEAL

The NYPD attempted on appeal to enlarge the record to include redacted BWC footage of the incident provided to NYLPI on June 23, 2020, but this footage was not provided to NYLPI during the administrative stage of the proceeding or submitted to the Supreme Court, nor were specific portions of footage identified for redaction at either the administrative stage or before the Supreme Court. As a result, this Court denied the NYPD's motion. Mot. No. 2766 Order at 2. It further ordered that the NYPD's brief be stricken and that its substitute brief "omit[] any information pertaining to their disclosure of the . . . redacted footage." *Id.* Nevertheless, the NYPD attempts to sidestep this Court's ruling by arguing repeatedly that it should be permitted to disclose footage of the incident with new "proposed redactions" that were never proposed below. *See, e.g.*, App. Br. at 3, 11, 14.[1] The NYPD obliquely refers to categories of footage in its substitute brief. This is improper.

Whether or not the NYPD's particular "proposed redactions" are justified is a question that should have been raised before the Supreme Court and is now waived. *See 141 E. 47th St. Assocs. v. ABR Mgmt.*, 225 A.D.2d 341, 342 (1st Dep't 1996) (finding an argument "not advanced at trial in any fashion . . . is . . . waived and may

[1] "App. Br." refers to Appellants' Substitute Brief (Doc. No. 11).

not be raised for the first time on appeal"); *Arthur Cab Leasing Corp. v. Sice Mois Hacking Corp.*, 137 A.D.3d 828, 830 (2d Dep't 2016) (declining to address an argument "raised for the first time on appeal and not properly before this Court").

Furthermore, the NYPD argues on appeal that certain portions of the BWC footage should be redacted because they contain Ms. Muller's home address or reveal bystanders' faces. The NYPD concedes that it never raised this before the Supreme Court. App. Br. at 2 ("To be sure, the Department's papers below failed to raise the privacy interests relating to Muller's address and the faces of passersby."); *id.* at 17 (stating "the Department did not specify that it sought to redact audio relaying Muller's home address over the radio"). The NYPD thus not only failed to furnish the Supreme Court with the specific video redactions that it argues are necessary to protect personal privacy on these bases, but failed even to argue generally before the court that these categories of footage should be redacted.

The proper forum for the NYPD to have raised whether and how these portions of BWC footage should be redacted was the Supreme Court by means of a Vaughn Index. *See Forsyth v. City of Rochester*, No. E2018007067, 2018 WL 11210512, at *2 (Sup. Ct. Monroe Cnty. Dec. 19, 2018) (ordering production of "equivalent of 'privilege log'" of BWC footage "detailing which sections of the video must be redacted *and for what reason*" without which the "Court has no ability to determine whether Respondent's actions complied with the requirements of

§ 87(2)"); *Buffalo Broad. Co. v. N.Y. State Dep't of Corr. Servs.*, 155 A.D.2d 106, 112-13 (3d Dep't 1990) (requiring "respondents to prepare and submit a description of the redacted portions [of videotape] sufficient to allow Supreme Court to determine the applicability of the exemption").

Having failed to provide a sufficient explanation for its claims to this FOIL exemption before the lower court, the NYPD has waived the ability to offer new arguments that NYLPI had no opportunity to contest during the Article 78 proceeding. *See Douglas Elliman-Gibbons & Ives, Inc. v. Kellerman*, 172 A.D.2d 307, 308 (1st Dep't 1991) ("An appellate court should not, and will not, consider different theories or new questions, if proof might have been offered to refute or overcome them had those theories or questions been presented in the court of first instance."). The NYPD's waiver should not be rewarded by allowing the NYPD on appeal to unilaterally determine which footage may be withheld. The NYPD's new arguments made for the first time before this Court should be rejected.

II. THE SUPREME COURT PROPERLY HELD THAT THE NYPD'S INVOCATION OF THE PERSONAL PRIVACY EXEMPTION WAS NOT WARRANTED

The Supreme Court found "unconvincing" the NYPD's argument that "the NYPD should produce redacted videos because otherwise there would be an unwarranted invasion of Susan Muller's personal privacy." (R12.) The court found not only that the NYPD made an insufficient showing to invoke the exemption by

failing to "identify what specific redactions they want to make," but also concluded that "[t]he inherent right of the public to know outweighs privacy concerns." (R12-13.). The Supreme Court's holdings were proper and should be affirmed.

A. The NYPD Did Not Make The Particularized Showing Necessary to Invoke the Personal Privacy Exemption

The NYPD had the burden at all times in this proceeding of demonstrating a particularized and specific justification for denying access to the requested records. Under FOIL, all records of a public agency are presumptively open to public inspection and copying, unless specifically exempted. *See, e.g.*, *Cap. Newspapers Div. of Hearst Corp. v. Burns*, 67 N.Y.2d 562, 566 (1986); Pub. Off. Law §§ 84, 87(2). "Exemptions are to be narrowly construed to provide maximum access, and the agency seeking to prevent disclosure carries the burden of demonstrating that the requested material falls squarely within a FOIL exemption by articulating a particularized and specific justification for denying access." *Cap. Newspapers Div. of Hearst Corp*., 67 N.Y.2d at 566, 570 (rejecting exemption claim that was "conclusory and not supported by any facts"); *see also Gould v. NYPD*, 89 N.Y.2d 267, 275 (1996) (same).

The NYPD has repeatedly failed to meet this burden. In responding to NYLPI's FOIL request and appeal of its FOIL denial at the administrative stage of this proceeding, the NYPD merely listed the personal privacy exemption (Public Off. Law § 87(2)(b)) without *any* explanation or justification for its assertion. *See*

R166-67 ("To the extent that the requested records may become available for public disclosure following the completion of the investigation, certain portions of the records are exempt from disclosure where the records contain information that, if disclosed . . . would constitute an unwarranted invasion of personal privacy.").

The NYPD again failed to make a particularized showing on the privacy exemption before the Supreme Court. The NYPD only described in general and sweeping terms the types of footage that it believed should be withheld on the basis of this exemption. *See* R211 (¶ 73). The NYPD did not, however, specify which portions of footage were subject to the exemption, the scope or length of time of any redactions, or the nature of the redactions (*e.g.*, whether they required blurring video or muting audio). *Id.*

The NYPD now argues that it "identified the redactions it sought to make" (App. Br. at 11), but it did not do so with the requisite particularity, despite bearing the burden. Notably, the court in *NYLPI v. NYPD I*, at 674, 680 recognized that the NYPD did not satisfy its burden to invoke the personal privacy exemption even after submitting a "Vaughn Index"[2] of redactions to the trial court. Here, the NYPD did not even endeavor to specify the footage that was supposedly subject to redaction. R12 (finding that "respondents do not identify what specific redactions they want to

[2] No. 156731/2018, Doc. No. 24 (Sup. Ct. N.Y. Cnty. Sept. 27, 2018) (specifying privacy redactions made to disclosed footage).

make"). As the trial court recognized, the NYPD utterly failed to make any showing in support of its burden. SR23, Hr'g Tr. at 23:6-7 (concluding that the court would not consider potential redactions because the NYPD had not properly presented "a redaction argument").

The NYPD submits that the Court should order redactions under the personal privacy exemption even where the NYPD fails to make *any* showing, but this is contrary to FOIL's broad standard of open disclosure and the heavy burden of justifying exemptions to access to records that FOIL places on government agencies. *See, e.g.*, *Cap. Newspapers Div. of Hearst Corp*., 67 N.Y.2d at 566; *Data Tree, LLC v. Romaine*, 9 N.Y.3d 454, 463 (2007) (recognizing in deciding claim to the personal privacy exemption that "the burden of proof rests solely with the [respondent] to justify the denial of access to the requested records."). Indeed, New York's appellate courts have regularly required disclosure of records under FOIL when agencies fail to adequately demonstrate an unwarranted invasion of personal privacy. *See e.g.*, *Laveck v. Vill. Bd. of Trs. of Lansing*, 145 A.D.3d 1168, 1171 (3d Dep't 2016) (requiring disclosure of unredacted personal identifying information where "respondent failed to establish that disclosure of the participants' names, home addresses or other personal identifying information would constitute an unwarranted invasion of personal privacy"); *Daily News, L.P. v. N.Y. City Off. of Payroll Admin.*, 9 A.D.3d 308 (1st Dep't 2003) (finding agency "failed to satisfy its burden of

demonstrating that the requested material indeed qualifies" for the personal privacy exemption); *In re DeCorse v. City of Buffalo*, 239 A.D.2d 949, 950 (4th Dep't 1997) (finding petitioner "is entitled to unredacted copies" of reports where the city "has failed to establish factually that production of the reports would . . . constitute an unwarranted invasion of privacy").[3]

Requiring the NYPD to make a specific showing with respect to BWC footage of a police shooting is particularly important given the immense public interest in full disclosure of the footage of these incidents and the possibility that redactions may easily obscure the scene and the conduct of officers involved. *See NYLPI v. NYPD I* at 679 (finding NYPD's redactions under the privacy exemption "cloak in secrecy the actions of the police officers in the moments following the shooting"); R12 (finding that "the public's interest in disclosure is at its highest" with respect to a police shooting).

B. The NYPD's Invocation of the Personal Privacy Exemption Lacks Merit

Even if this Court determines that it is appropriate to consider the NYPD's

[3] *In re N.Y. Committee for Occupational Safety & Health v. Bloomberg*, 72 A.D.3d 153 (1st Dep't 2010) cited by the NYPD (*see* App. Br. at 10, 16) is distinguishable. The First Department found that disclosure would directly implicate Pub. Off. Law § 89(2)(b)(iv) which expressly prohibited disclosure of personal information related to workers' compensation claimants, whereas the NYPD here relies on generic claims to the privacy exemption that require balancing public and privacy interests. *In re N.Y. Comm. for Occupational Safety & Health*, 72 A.D.3d at 16.

personal privacy arguments, the exemption does not warrant reversal of the Supreme Court's decision. Public Officers Law § 87(2)(b) permits agencies to deny access to records that "if disclosed would constitute an unwarranted invasion of personal privacy" under provisions set forth in Public Officers Law § 89(2). That provision cannot be invoked to protect against all invasions of privacy, only those that are *unwarranted*, such as the enumerated disclosures of employment, medical, or credit histories under Public Officers Law § 89(2) that consist of "painfully personal type information." *Thomas v. City of N.Y. Dep't of Hous. Pres. & Dev*., 12 Misc. 3d 547, 553 (Sup. Ct. N.Y. Cnty. 2006). In the absence of any proof establishing the applicability of any enumerated category, the determination of whether disclosure of the information sought constitutes an unwarranted privacy invasion requires a "balancing [of] the privacy interests at stake against the public interest in disclosure of the information." *Harbatkin v. N.Y.C. Dep't of Recs. & Info. Servs.*, 19 N.Y.3d 373, 380 (2012). An unwarranted invasion of privacy is determined by "what would be offensive and objectionable to a reasonable [person] of ordinary sensibilities." *Thomas v. N.Y.C. Dep't of Educ.*, 103 A.D.3d 495, 497 (1st Dep't 2013). The balancing of public and private interests weighs strongly in favor of disclosure of images and audio that the NYPD argues should be redacted.

1. The Balancing of Public and Private Interests Favors Disclosure of Unredacted Footage of Ms. Muller After the Shooting

The NYPD argues that the Supreme Court erred by not permitting it to redact images of Ms. Muller's body and blood spatter following her shooting by NYPD officers. As argued above, the NYPD never provided adequate support before the Supreme Court to justify these redactions, but even if it had made such a showing, the NYPD's claim to the exemption still fails. The public interest in disclosure plainly outweighs the privacy interests the NYPD attempts to invoke on behalf of a woman whose ability to enjoy privacy has been lost due to her untimely and tragic death at the hands of NYPD police officers. The impropriety of the NYPD's invocation of privacy interests on behalf of individuals killed by the police under these circumstances was succinctly identified by Justice Crane during oral argument of the Article 78 Petition: "you can't shoot somebody and then say" that the "right to privacy is why we can't release anything." SR11, Hr'g Tr. at 11:16-18; *see also* SR12, Hr'g Tr. at 12:6-13.

The NYPD's contention that the Supreme Court "erred by failing to even engage" in the required balancing analysis (App. Br. at 15) is belied by the record. The Supreme Court recognized that "[p]ublic accountability is particularly important with respect to police shootings of civilians, where the public's interest in disclosure is at its highest." (R12.) It further found, after comparing the similar facts in this

case to the Supreme Court's decision in *NYLPI v. NYPD I*, the "inherent right of the public to know outweighs privacy concerns." (R12-13.) Thus, the Supreme Court did indeed conduct the required balancing.

Just as it did before the Supreme Court, the NYPD attempts to downplay the public's significant interest in a full understanding of the fatal shooting of a woman in her own home who was experiencing a mental health crisis. The NYPD argues that its proposed redactions "do not pertain to the officers' conduct or affect a viewer's understanding of that conduct" (App. Br. at 14-15); however, redactions to the footage of Ms. Muller's "body and blood spatter" necessarily also obscure footage of the officers surrounding and interacting with Ms. Muller in the critical minutes after she was shot. The actions of officers in those moments are at the heart of the public's interest in a full disclosure of the BWC footage of this incident. The redactions to Ms. Muller's "body and blood spatter" may obscure details of significant interest to the public, such as whether Ms. Muller survived the initial shooting, whether she was handcuffed after she was shot, whether officers ever retrieved a knife from her, and whether officers provided her with appropriate medical aid, including cardiopulmonary resuscitation as reported by the press and claimed by the NYPD in its appellate brief. *See* R23.

Full transparency into the interaction between NYPD police officers and Ms. Muller in a controversial police shooting that has received significant public

attention is vital so that it can be learned from and used to help prevent similar tragic outcomes in the future. *See NYLPI v. NYPD I* at 679 ("[C]ontrary to respondents' claim that petitioner failed to show that the footage already disclosed is insufficient to meet the public's need to be informed, this court finds that there is significant public interest in disclosing the redacted footage as it would illuminate the officers' immediate response after the shooting and their interactions with Mr. Richards who was fatally shot after apparently suffering from a mental crisis."); *see also In re Patrolmen's Benevolent Assn. of N.Y., Inc*, 171 A.D.3d at 637 (recognizing purposes of BWC program to promote "transparency, accountability, and public trust-building"); *N.J. Media Grp. v. Twp. of Lyndhurst*, 229 N.J. 541, 551, 163 A.3d 887, 892 (2017) (recognizing "the public's powerful interest in disclosure" of dashboard camera footage "in the case of a police shooting").

The NYPD argues that the Supreme Court's reliance on *NYLPI v. NYPD I* was "misplaced" (App. Br. at 12), but that case presented a strikingly similar set of facts. The NYPD similarly argued in *NYLPI v. NYPD I* that footage of Miguel Richards' body and blood spatter needed to be redacted to protect Mr. Richards' personal privacy, but the *NYLPI v. NYPD I* court held that the proposed redactions would "shield several minutes of video footage immediately following the shooting" and would "cloak in secrecy the actions of the police officers in the moments following the shooting, and how the officers continued to interact with Mr. Richards after they

shot him," shielding video footage "of significant interest to the public." *NYLPI v. NYPD I* at 679. The unredacted footage that was ultimately ordered to be produced in fact showed that officers greatly delayed providing aid to Mr. Richards while they focused on searching for a weapon at the scene, which could not have been known if the NYPD had been permitted to redact the BWC footage as it proposed. *See* R256 (citing Cindy Rodriguez, *Rethinking 911: Are Police The Right Response When Mental Illness Is Involved? Advocates Say No*, The Gothamist (Oct. 29, 2019), https://gothamist.com/news/rethinking-911-are-police-right-response-when-mental-illness-involved-advocates-say-no ("While the edited video police initially released showed what happened up to the shooting, the video [NYLPI] won in court showed the chaotic scene that ensued after. The officers are breathing heavy and appear to be shaken. One of them believes Richards is still alive, yet no one renders aid for roughly three minutes. Instead they are focused on finding a weapon and they handcuff and search him.")).

The redactions to Ms. Muller's "body and blood spatter" will similarly cloak in secrecy actions taken by police officers following the shooting of Ms. Muller. Just as in *NYLPI v. NYPD I*, the Supreme Court recognized that allowing the NYPD's redactions to these scenes would be "contrary to the spirit of the FOIL law and objectives of the NYPD's body-worn camera footage program." R13; *see also NYLPI v. NYPD I* at 679.

Against this strong public interest in disclosure must be weighed a diminished privacy interest due to Ms. Muller's death at the hands of police officers. *See NYLPI v. NYPD I* at 680 (finding that "the diminished claims of privacy asserted by respondents" were outweighed by a "strong public interest in disclosure"); *Harbatkin*, 19 N.Y.3d at 379-80 (requiring disclosure of certain transcripts of interviews of deceased school employees upon finding "diminished claims of privacy"). The only individuals possessing any privacy interest in the footage are surviving relatives of Ms. Muller. *See N.Y. Times Co. v. FDNY*, 4 N.Y.3d 477, 485 (2005) (holding "surviving relatives have an interest protected by FOIL in keeping private the affairs of the dead"). However, despite bearing the burden of proof, at no time did the NYPD assert that any family members of Ms. Muller wished to keep any BWC footage of the incident private, or indicate that it even attempted to determine those wishes. *Showing Animals Respect & Kindness v. U.S. Dep't of Interior*, 730 F. Supp. 2d 180, 1994 (D.D.C. 2010) (holding family members had minimal privacy interest in content of videos where "Defendants have produced no evidence that the family members . . . objected to this footage").

Instead, the NYPD invents a "presumption" that "family members *typically* do not want images of their loved one's death shared publicly." App. Br. at 12 (emphasis added). However, the only relevant presumption in this case is that of access to all records of a public agency under FOIL. *See Cap. Newspapers Div. of*

Hearst Corp., 67 N.Y.2d at 566 ("FOIL provides that all records of a public agency are presumptively open to public inspection and copying unless otherwise specifically exempted."). The NYPD cites no support for the dubious contention that family members of victims of police shootings prefer that the NYPD assert privacy interests on their behalf, apparently without even consulting them, after fatally shooting their loved one.[4] That is contrary to the demands of the family of Miguel Richards in *NYLPI v. NYPD I* and other families of victims of controversial police shootings[5] for the full release of police BWC footage so that these tragic incidents can be fully understood and used to prevent similar tragedies in the future.

The NYPD relies upon *New York Times Company v. FDNY*, 4 N.Y.3d 477 (2005) to argue that the balance of interests generally favors privacy. App. Br. at 15. The Court of Appeals in that case, however, concluded that the public interest in learning the words of deceased 911 callers during the World Trade Center attacks on September 11, 2001, was outweighed by the interest in privacy of those family

[4] The NYPD attempts to distinguish *NYLPI v. NYPD I*, by wrongly suggesting that it requires a petitioner bear the burden of presenting consent to disclosure by the victim's family members. *See* App. Br. at 12. The family member affidavits in that case, however, affirmed that the victim's parents not only supported disclosure but that they "were never contacted by the NYPD to determine their privacy interest in the footage." *NYLPI v. NYPD I* at 676.

[5] *See, e.g., N.Y. Lawyers for Pub. Interest v. NYPD*, No. 152402/2020, Doc. No. 1 at 8 (Sup. Ct. N.Y. Cnty. March 4, 2020) (referencing press conference in which family of Michael Cordero, a New York man who was shot by the police while experiencing a mental health crisis, said that it "demands that the NYPD release the [BWC video] that exists that they refuse to release.").

members "who prefer that those words remain private." *Id.* at 487. Here, the NYPD has offered no evidence that any of Ms. Muller's family members prefer that any of the BWC footage at issue remain private. In addition, the *New York Times* court emphasized specific risks to privacy during the unique tragedy of the September 11, 2001 terrorist attacks, noting the "enormous – perhaps literally unequalled – public attention" of the September 11 attacks under which tapes and transcripts would be "replayed and republished endlessly, and . . . in some cases . . . exploited by media seeking to deliver sensational fare to their audience." *Id.* at 486. Footage of Ms. Muller's shooting, an incident that has not received anything resembling the "enormous" and "unequalled" attention of the September 11 attacks, poses no similar risk of being "replayed and republished endlessly." Following the *New York Times* decision, moreover, the Court of Appeals has required disclosure of records of decedents upon finding that a strong public interest in disclosure outweighed diminished claims of privacy. *Harbatkin*, 19 N.Y.3d at 379-80 (requiring disclosure of transcripts of interviews of deceased school employees who had been suspected of being members of the Communist Party, but precluding disclosure of material that would identify informants who were specifically promised confidentiality). A weighing of those interests similarly requires

disclosure here.[6]

2. The Balancing of Public and Private Interests Favors Disclosure of Unredacted Footage of Ms. Muller's Home Address and Faces of Passersby

As discussed *supra*, the NYPD waived the argument that Ms. Muller's home address should be redacted by not raising it before the Supreme Court. This Court should not consider the argument for the first time on appeal because NYLPI "has had no opportunity to refute the new matter by other proof . . . ." *Bouchardeau v. Bouchardeau*, 63 A.D.2d 975, 975 (1st Dep't 1978); *see also* 4 N.Y. Jur. 2d *Appellate Review* § 573 (2020) (citing same). Namely, there are no privacy concerns implicated by revealing Ms. Muller's home address because it has already been widely publicly disclosed. Multiple press outlets reported on Ms. Muller's address at the time of her death.[7] Public disclosures of records significantly diminish any

[6] The NYPD cites one other case under FOIL in which an Appellate Division court found that privacy interests weighed against the disclosure of records. *See* App. Br. at 13 (citing *Edwards v. N.Y. State Police*, 44 A.D.3d 1216, 1217 (3d Dep't 2007)). That case, however, is easily distinguishable, as the court found there was "no significant interest to the public" in disclosure of crime-scene photographs sought by a person convicted of victim's murder.

[7] *See e.g.*, Anthony M. DeStefano, *Cop Who Fatally Shot Woman in Queens First Pulled Out Taser, NYPD Says*, Newsday (Sept. 20, 2018), https://www.newsday.com/police-shooting-queens-1.21179118; Benjamin Fang, *Police Shoot Knife-wielding Maspeth Woman, Queens Ledger* (Sept. 18, 2018), http://www.queensledger.com/view/full_story/27600689/article-Police-shoot-knife-wielding-Maspeth-woman?instance=most_viewed; Trevor Boyer and Graham Rayman, *Police Shooting Victim's Boyfriend Says Alcohol is to Blame for Deadly Dust Up*, Daily News (Sept. 18, 2018), https://www.nydailynews.com/new-york/ny-metro-woman-shot-cops-alcohol-abuse-queens-20180918-story.html; *Deadly*

existing privacy interests. *See Planned Parenthood v. Town Bd.*, 154 Misc. 2d 971, 974-75 (Sup. Ct. Westchester Cnty. Jan. 10, 1992) (permitting disclosure of photographs where names and addresses of individuals had already been released); *Showing Animals Respect & Kindness*, 730 F. Supp. 2d at 192-94 (holding minimal privacy interest in videos where "cat is out of the bag" as to subjects' identity and they could not have "expected that their appearances on [the] videos would remain private"). Even if the argument had not been waived, the public interest in disclosure of this footage plainly outweighs any privacy interests at stake because there is no longer any privacy interest in Ms. Muller's home address following her death and the public disclosure of the address.

Moreover, the NYPD asserts that disclosure of Ms. Muller's address would make it "a site of lurid public fascination[.]" App. Br. at 18. But the NYPD offers no facts in support of this dramatic contention, and the NYPD's mere speculation is not enough to support a claim to the personal privacy exemption. *See In re Markowitz v. Serio*, 11 N.Y.3d 43, 51 (2008) (party seeking an exemption "cannot merely rest on a speculative conclusion"); *Cap. Newspapers Div. of Hearst Corp.*, 67 N.Y.2d at 570 (rejecting claim to personal privacy exemption that was "conclusory and not supported by any facts"); *Thomas*, 12 Misc. 3d at 554 (finding

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Police-Involved Shooting of Queens Woman Under Investigation, CBS News New York (Sept. 18, 2018), https://newyork.cbslocal.com/2018/09/18/queens-police-involved-shooting-investigation/.

"speculative" claim to privacy invasion was insufficient); *Laveck*, 145 A.D.3d at 1171 (requiring disclosure of unredacted home addresses and other information where respondent did not demonstrate invasion of personal privacy).

Meanwhile, there is a strong public interest in disclosure of the audio footage that the NYPD wishes to redact, as such redactions may mute portions of conversations taking place between officers at Ms. Muller's home that would illuminate those officers' conduct and state of mind during the incident. The weighing of these interests requires disclosure here. *See NYLPI v. NYPD I* at 680 (finding that "there exists a strong public interest in disclosure" that outweighs "diminished claims of privacy asserted by respondents"); *Harbatkin*, 19 N.Y.3d at 379-80 (requiring disclosure upon finding "diminished claims of privacy").

The NYPD also argues it should be permitted to redact the faces of passersby. This is not justified here. Disclosure in BWC footage of the likeness of bystanders is no more than a minimal privacy invasion that is *not* "unwarranted" and is outweighed by the public interest in the complete disclosure of the BWC footage of this controversial police shooting. *See, e.g.*, *Laveck*, 145 A.D.3d at 1170-71 (requiring disclosure of unredacted personal identifying information where the individuals had no "expectation that their identities would remain strictly confidential" and respondent did not show unwarranted privacy invasion). The NYPD's assertion that disclosure would cause bystanders "embarrassment" or

"humiliation" lacks any factual basis and is pure speculation. Courts have found such purported justifications to be insufficient to withhold records from public access. *See e.g.*, *Cap. Newspapers Div. of Hearst Corp.*, 67 N.Y.2d at 570 (rejecting claim to exemption that was "conclusory and not supported by any facts"); *Thomas*, 12 Misc. 3d at 554 (rejecting privacy exemption claim based on finding that refusing to release names of people on waiting lists, because they "might" reveal the income of applicants, is "speculative").[8]

CONCLUSION

NYLPI respectfully requests that the Court affirm the Supreme Court's decision granting NYLPI's Article 78 Petition for the disclosure of the BWC footage requested under FOIL.

[8] The NYPD's reliance on *In Re Prall v. N.Y.C. Dep't of Corr*., 129 A.D.3d 734 (2d Dep't 2015) is misplaced, as there was no showing made in that case that disclosure was in the public interest; rather, the petitioner intended to post the sought mugshots to a website, to be removed only if the person in the photograph made a substantial monetary payment. The NYPD's reliance on *In Re Irwin v. Onondaga Cty. Res. Recovery Agency*, is similarly misplaced. 72 A.D.3d 314, 319 (4th Dep't 2010) ("The record does not support the theory that there is a public interest in disclosure of either the unpublished photographs of individuals other than petitioner or the unpublished photographs relating to active or ongoing law enforcement investigations.").

Respectfully submitted,

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