No. 124831

IN THE
SUPREME COURT OF ILLINOIS

THE CITY OF CHICAGO, Petitioner-Appellee v. FRATERNAL ORDER OF POLICE, CHICAGO LODGE NO. 7, Respondent-Appellant.	) Appeal from the Illinois Appellate) Court, First Judicial District,) No. 1-17-2907)) There Heard on Appeal from the) Circuit Court of Cook County, Illinois,) Chancery Division, No. 2016 CH 9793)) The Honorable) SANJAY T. TAILOR,) Judge Presiding.

BRIEF OF *AMICUS CURIAE* ILLINOIS ATTORNEY GENERAL KWAME RAOUL IN SUPPORT OF PETITIONER-APPELLEE

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INTEREST OF THE AMICUS CURIAE

This case addresses the validity of an arbitration award that could require the City of Chicago to destroy decades of public records relating to allegations of police misconduct that are more than five years old. The Illinois Attorney General has an interest in the proper resolution of this question because the preservation of these records is crucial to the success of two important state initiatives addressing police misconduct and because of his role in enforcing state laws and policies relating to the preservation of public records.

To begin, the Attorney General represents the Illinois Torture and Relief Commission ("TIRC"), a state agency that was created to investigate claims of police torture dating back to the early 1980s. *See* Ill. Const. 1970, art. V, § 15; 15 ILCS 205/4; 775 ILCS 40/1 *et seq*. (2010). Because many of the claims presently pending before TIRC relate to incidents that occurred decades ago, TIRC depends on the older police misconduct records at issue in this case to carry out its statutory mandate.

The Attorney General also has an interest in the successful implementation of a federal consent decree between the State of Illinois and the City of Chicago to reform the Chicago Police Department ("CPD"), which likewise depends on the preservation of police misconduct records to achieve its goals. *See* Consent Decree, *Illinois v. City of Chicago*, No. 17-cv-6260 (N.D. Ill. Jan. 31, 2019), ECF No. 703, http://bit.ly/ConsentDec [hereinafter

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"Consent Decree"]. Relevant here, the Consent Decree includes provisions mandating the creation or improvement of systems for ensuring officer accountability, preventing future misconduct, protecting officer health and safety, and assuring transparency. All of these systems rely on the availability of older police misconduct records.

In addition to ensuring the success of these important state initiatives, the Attorney General has an interest in this case because of his role in enforcing state laws and policies relating to the preservation and accessibility of public records. The Attorney General holds a central role in administering state public records laws, including as the principal legal officer responsible for enforcing the Illinois Freedom of Information Act. *See* 5 ILCS 140/1 *et seq*. He also holds a statutorily mandated position on the State Records Commission, which, among other things, determines which state records no longer have administrative, fiscal, legal, research, or historical value and thus may be destroyed. *See id.* 160/16.

Finally, the Attorney General has an interest in his capacity as representative of the People, who benefit from the preservation of important public records like those at issue here. In addition to being critical to the success of TIRC and the Consent Decree, the continued availability of older police misconduct records is necessary to ensure that citizens may "fulfill their duties of discussing public issues fully and freely," and "mak[e] informed political judgments[.]" 5 ILCS 140/1. Police misconduct records

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also hold public value in other ways: as historical documents describing government conduct; as research material for scholars studying how government can improve; and as empirical data for policymakers engaged in reform. *See, e.g.*, *Lieberman v. State Bd. of Labor Relations*, 216 Conn. 253, 268 (1990) (describing the public value of police disciplinary records in a variety of contexts). Finally, police misconduct records also hold value for public watchdogs, who keep public officials accountable to the People. *See, e.g.*, *Doe v. Marsalis*, 202 F.R.D. 233, 238-39 (N.D. Ill. 2001) (describing the benefits of media scrutiny of police misconduct files).

Based on these unique interests in TIRC, the Consent Decree, and the enforcement of state laws and policies relating to the preservation of public records, the Attorney General can assist this Court by presenting ideas and insights not offered by the parties to this case that do not have the same institutional knowledge and experience.

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ARGUMENT

As the lower courts recognized, the General Assembly has enacted a series of public records laws to provide a comprehensive, publicly accountable method for determining which records should be maintained and for how long, according to their value to the public. *See City of Chicago v. Fraternal Order of Police, Chicago Lodge No. 7*, 2019 IL App (1st) 172907 ¶¶ 27-34 (describing the operation of the Local Records Act, State Records Act, and Illinois Freedom of Information Act); *City of Chicago v. Fraternal Order of Police, Chicago Lodge No. 7*, No. 2016-CH-09793, 2017 WL 11318382, at *3-5 (Ill. Cir. Ct. Oct. 18, 2017) (same). The Fraternal Order of Police, however, would upend that carefully constructed regulatory scheme by subjecting the decision about when to destroy public records to a contractual negotiation between a police union and a municipal employer.

For all of the reasons outlined by the City of Chicago, such a result would be contrary to established public policy requiring preservation of important public records. *See* Appellee Br. at 15-16. In Illinois, an arbitration award cannot be enforced if doing so would violate public policy. *Fraternal Order of Police*, 2019 IL App (1st) 172907, ¶ 23. And here, public policy clearly favors retention of the records that the Fraternal Order of Police seeks to destroy. *Id.* ¶ 34. Indeed, as the appellate court correctly explained, this clear public policy can be found in "the statutory framework" constructed by the General Assembly through the Local Records Act, the

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State Records Act, and the Freedom of Information Act, *id.* ¶ 27, and in the extensive reports written by the Police Accountability Task Force ("Task Force") and the United States Department of Justice ("DOJ"), *id.* ¶ 33; *see also Lieberman*, 216 Conn. at 271 (holding that the destruction of police disciplinary records under a union arbitration award violates public policy, because such records "implicate[] fundamental rights of access by the public and must be subject to the confines of the established public records management system").

The Attorney General writes separately, however, to describe two additional and complementary sources of the clear public policy favoring proper retention of police misconduct records: (1) the TIRC Act, which created a state agency designed to investigate and remedy police torture, and (2) the Consent Decree, which resulted in large part from the findings of the Task Force and DOJ reports. The Attorney General also seeks to emphasize the vital importance of the records at stake in this case to the events that gave rise to the creation of TIRC and the adoption of the Consent Decree, as well as to the ongoing success of these state initiatives. TIRC relies on these records as it continues to investigate and correct wrongful convictions caused by police torture that occurred years ago. Likewise, many of the Attorney General's specific reform efforts under the Consent Decree—including the creation of an early intervention system for troubled officers—depend on the

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availability of these records. The Attorney General thus urges affirmance of the decision below.

I. Older Police Misconduct Records Laid The Foundation To Create TIRC And Reform CPD.

Two major government reform efforts in the past decade—TIRC and the Consent Decree—were the result of investigations that gathered, analyzed, and corroborated years of complaint register files and other records maintained by CPD and other city agencies. These efforts demonstrate the importance of the State's strong public policy favoring the preservation of records relating to allegations of police misconduct, which exists not only to allow the public to understand the work of government, but also to expose official misconduct, so it can be remedied. The misconduct records at issue in this case played such a role in the creation of TIRC and the implementation of the Consent Decree.

A. Older Misconduct Records Were Central In The Investigations That Led To The Creation Of TIRC.

Misconduct records maintained by CPD were key sources of evidence to substantiate the torture allegations against former Chicago Police Commander Jon Burge and officers under his command. As far back as the 1980s, Burge and his subordinates engaged in torture to coerce confessions from more than one hundred Chicagoans as a means of securing wrongful convictions. *See generally* Andrea J. Ritchie & Joey L. Mogul, *In the Shadows of the War on Terror: Persistent Police Brutality and Abuse of People of Color*

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in the United States, 1 DePaul J. Soc. Just. 175, 184-89 (2008) (detailing the Burge tortures). Allegations against Burge and his subordinates included, among other things, using electric shocks on suspects and smothering them with a plastic bag. *See, e.g.*, *People v. Wilson*, 116 Ill. 2d 29, 35 (1987).

These allegations led to an internal investigation within CPD and then the appointment of a special prosecutor, both of which relied in part on older police misconduct files to substantiate the alleged torture. Michael Goldston, *Chi. Police Dep't Office of Prof'l Standards, History of Allegations of Misconduct by Area Two Personnel* (Nov. 2, 1990), http://bit.ly/Goldston; Edward J. Egan & Robert D. Boyle, *Report of the Special State's Attorney* 116 (2006), http://bit.ly/EganReport. Additional allegations and corroborating evidence were uncovered through individual criminal appeals, post-conviction proceedings, and civil litigation. *See, e.g.*, *Wilson v. City of Chicago*, 6 F.3d 1233, 1240 (7th Cir. 1993), *as modified on denial of reh'g* (Dec. 8, 1993); *People v. Wrice*, 2012 IL 111860, ¶¶ 40-41; *People v. Patterson*, 192 Ill. 2d 93, 141-46 (2000); *People v. Cannon*, 293 Ill. App. 3d 634, 637 (1st Dist. 1997).

As evidence of torture accumulated, public outcry grew, as did demands that torture victims be provided an additional avenue to have their convictions reexamined. *See* Kim D. Chanbonpin, *Truth Stories: Credibility Determinations at the Torture Inquiry and Relief Commission*, 45 Loy. U. Chi. L.J. 1085, 1103-05 (2014). The General Assembly responded in 2009 with the passage of the TIRC Act, which created a state agency to investigate

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allegations of torture committed by Burge or his subordinates. *See* 775 ILCS 40/1 *et seq*. (2010). And in 2016, the legislature amended the TIRC Act so others allegedly tortured by officers *not* connected to Burge could also seek relief through TIRC. *See* Pub. Act. 99-688 (eff. July 29, 2016) (amending 775 ILCS 40/5).

The Act established a process for victims of police torture to file claims with TIRC and seek to have their convictions overturned with the assistance of TIRC's investigative findings. 775 ILCS 40/50. TIRC initially screens claims for procedural and jurisdictional compliance, then informally investigates them—which may include compelling evidence by subpoena—and, finally, formally investigates certain claims using a full range of investigative measures. *See* 2 Ill. Admin. Code §§ 3500.340, 3500.360, 3500.375. Indeed, in its investigations, TIRC routinely subpoenas the complaint register files of the accused officers to help it assess the credibility of the allegations. In some instances, for example, the files include other complaints asserting that the officer at issue engaged in the same conduct alleged by the TIRC claimant, lending credibility to the claimant's allegations. But other times, the complaint register files lack such patterns or otherwise fail to corroborate, and thus cast doubt on, the claimant's allegations.

If, after an investigation, TIRC concludes that there is sufficient evidence of torture to merit judicial review, the case is then referred to the

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Chief Judge of the Circuit Court of Cook County, along with TIRC's findings of fact. *Id.* § 3500.385. The court can receive evidence, make findings, and order relief with respect to the claimant's criminal conviction or sentence. 775 ILCS 40/50. Since 2012, 31 claimants have been referred for judicial review, where many of the cases remain pending. But of those individuals whose cases have been decided, 13 have either had their charges dropped, reached an agreement with prosecutors for a reduced sentence, or are being retried.

In short, the availability of older misconduct records was critical not only to exposing the Burge scandal, but also to the creation of TIRC as a means of obtaining relief for his victims, as well as other victims of police misconduct that resulted in a wrongful conviction.

B. Older Misconduct Records Influenced Recent Investigations Of CPD, Resulting In The Consent Decree.

The records at issue in this case also played a central role in the investigations resulting in the Consent Decree between the State of Illinois and the City of Chicago. The Consent Decree, entered in January 2019, requires the implementation of reforms to CPD and other city agencies under the supervision of an independent monitor, to ensure the City and CPD engage in lawful, constitutional policing. Consent Decree, ¶ 2. The foundation for these reforms was laid by two investigations that benefitted from access to the police misconduct records at issue in this case.

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First, in April 2016, the Task Force issued an extensive report with recommendations to address systemic problems of unconstitutional policing at CPD. *See* Police Accountability Task Force, Recommendations for Reform (Apr. 2016), http://bit.ly/TaskForce2016 [hereinafter "Task Force Report"]. Second, after a year-long investigation, the DOJ issued a report in January 2017 that detailed widespread deficiencies at the City and CPD, including inadequate training and supervision, insufficient support for officer wellness, a lack of effective systems for holding officers accountable for misconduct, and data systems that lacked or impeded transparency. *See* DOJ Civil Rights Division and U.S. Attorney's Office Northern District of Illinois, Investigation of Chicago Police Department (Jan. 13, 2017), http://bit.ly/DOJCPD [hereinafter "DOJ Report"].

Both the Task Force and DOJ investigations included access to older police misconduct records, which proved to be key sources of information. For example, the Task Force reviewed, among other things, the complaint register histories of all CPD officers between 2007 and 2015. Task Force Report at 97. At the outset of its investigation, the DOJ requested that the City and CPD preserve "the City's entire misconduct complaint database." DOJ Report at 21. In the course of that investigation, DOJ reviewed a representative sample of investigative files relating to civilian complaints about officer misconduct, and also evaluated complaint data going back to January 2010. *Id.* at 21, 114.

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The results of the Task Force and DOJ investigations not only brought about a determination that a consent decree was necessary, but also provided a template for many of the specific reforms that were ultimately included in the Consent Decree. And, both investigating bodies determined that the preservation of older police misconduct records is central to the needed reforms. For its part, the Task Force Report concluded that the provision in the collective bargaining agreement mandating destruction of older files should be eliminated because, among other reasons, it "impedes the development of early intervention systems" and deprives "police oversight bodies of evidence of potential patterns of bad behavior." Task Force Report at 72-73. The DOJ Report likewise stated that destruction of misconduct records older than five years could "impair the investigation of older misconduct in a timely fashion" and deprive "CPD of important discipline and personnel documentation." DOJ Report at 52.

In sum, older misconduct records provided key evidence for the Task Force and DOJ investigations to identify specific reform measures later included in the Consent Decree. Moreover, both investigations concluded that older misconduct records must be maintained for these reforms to succeed.

II. The Destruction Of Older Misconduct Records Would Be Detrimental To TIRC And The Consent Decree.

Not only were the records at issue in this case instrumental to events giving rise to TIRC and the Consent Decree, their destruction would harm

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these two ongoing state initiatives. Losing older misconduct records would undermine the work of TIRC to address wrongful convictions; the destruction of these records would also interfere with the successful completion of reforms required by the Consent Decree.

A. TIRC Needs Access To Older Misconduct Records To Carry Out Its Mission.

When the General Assembly created TIRC, it recognized that TIRC would need the ability to seek out old evidence of torture—including police misconduct records—to complete its statutory aims. Accordingly, the General Assembly granted TIRC the authority to use "any measure provided in the Code of Civil Procedure and the Code of Criminal Procedure of 1963 to obtain information" in carrying out its formal investigations. 775 ILCS 40/40(d).

In practice, TIRC routinely exercises this authority to subpoena and examine CPD officers' complaint records that are more than five years old. When TIRC was created in 2009, Burge had not been employed by the Chicago Police Department for more than 15 years. *See United States v. Burge*, 711 F.3d 803, 807 (7th Cir. 2013) (noting that "Burge was fired in 1993"). Thus, by their nature, all of Burge's complaint history records—and many of the records for his supervisees—were and are more than five years old. TIRC's work, however, is not limited to instances of torture conducted by known perpetrators or based on previously discovered or publicized misconduct records. In fact, TIRC has received many claims that have no connection to Burge, his subordinates, or other known perpetrators. Thus,

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TIRC needs continued access to older police misconduct records to be able to fully investigate each of the claims currently pending before it.

Indeed, these records often provide important insight into whether the allegations of abuse are credible. In cases where there is no physical evidence of abuse, for example, the complaint register files of the officers at issue often play a large role in determining whether there is sufficient credible evidence to refer the case to the judicial process. In at least two such cases, these historical files were critical in reaching the decision to refer. If these older police misconduct records were destroyed, TIRC would be left to undertake its analysis without access to a key source of evidence. This result would harm claimants who have credible claims despite a lack of physical or other corroborating evidence.

Furthermore, although the period for filing claims under the TIRC Act closed in August 2019, *see* 775 ILCS 40/70, 40/99, TIRC has not yet completed its review of all of those claims. As a practical matter, this means TIRC has not yet identified and requested records for the full universe of officers whose complaint register files may be relevant to claims pending before it. In fact, identifying the officers involved in each claim can be a time-consuming process, as some claimants provide only a generic last name for an officer (e.g., Jones), which does not permit TIRC to easily identify the officer in question. And other claimants report abuse by officers whose names were unknown to them. In cases like these, TIRC may request photographs of

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every officer involved in the case and, based on the claimant's identification of photographs, further request the identified officer's misconduct files.

In short, the destruction of older police misconduct files would significantly impair TIRC's ability to pursue its mission because critical evidence would be destroyed before TIRC could gather and evaluate it.

B. The Preservation Of Older Misconduct Records Is Critical For Reforming CPD Under The Consent Decree.

The continuing availability of older misconduct records is also important for the implementation of a number of the reforms required by the Consent Decree; without these records, the reforms will likely be less effective. Indeed, both the Task Force Report and the DOJ Report concluded that the ongoing retention of older police misconduct records was critical to implementing needed reforms to CPD. *See* Task Force Report at 72-73; DOJ Report at 52. In particular, the Consent Decree anticipates that misconduct records, including records more than five years old, will be used for three distinct purposes: (1) historical trend analysis, (2) non-disciplinary early intervention systems, and (3) public transparency. *See* Consent Decree, ¶ 508.

To begin, the Consent Decree requires CPD to create a case management system that will identify and analyze trends within misconduct complaints of, for example, excessive force, retaliation, gender-based violence, CPD member substance abuse, or misconduct against a person undergoing a mental crisis. *Id.* ¶ 509. Along these same lines, the Consent Decree also

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requires CPD to retain misconduct data about each officer for the purpose of non-disciplinary trend analysis, including the nature of the allegation, the outcome of the investigation, and the disposition of the discipline. *Id.* ¶ 552. Identifying and analyzing these trends will allow CPD to develop more effective policies to guide officers' conduct, evaluate and ensure appropriate officer assignments, improve supervision of officers, assess department-wide training needs and develop trainings to address those needs, and assess whether these efforts are having an effect over time. Such historical trend analysis would be decidedly less valuable with only five years of data.

Indeed, as the DOJ Report concluded, it is more difficult for CPD supervisors to perform their duties effectively when they cannot access officers' full disciplinary histories when making assignments, providing supervision, and offering support. DOJ Report at 125. This conclusion was echoed in a recent study using data from Chicago. *See* Kyle Rozema & Max Schanzenbach, *Good Cop, Bad Cop: Using Civilian Allegations to Predict Police Misconduct*, 11 Am. Econ. J. 225 (2019). The study reviewed civilian complaints against CPD officers between 2002 and 2014 and found a statistically significant correlation between complaints and future "serious misconduct as measured by civil rights litigation." *Id.* at 227. Among other findings, the study also showed that "removing the worst 1 percent of officers (120 in total) from regular civilian contact—either by reassignment or termination—and replacing them with the average officer" would reduce the

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number of lawsuits and payouts. *Id.* at 257. These findings underscore the value of older misconduct records for CPD and its commanding officers to improve department decision-making.

Relatedly, the Consent Decree requires CPD to create an early intervention system to enable the City to "proactively identify at-risk behaviors by officers" and "provide individualized interventions and support to address the at-risk behavior." Consent Decree, ¶ 583; *see also* DOJ Report at 157 (recommending CPD create a well-functioning early intervention system); Task Force Report at 105 (same). Early intervention systems, which have been widely adopted by law enforcement agencies around the country, are management programs designed to monitor data about individual officer performance in order to identify those officers who need assistance as early as possible, before serious misconduct occurs. U.S. Dep't of Justice, *Law Enforcement Best Practices: Lessons Learned from the Field*, 62-65 (2019). Early identification allows a department to "intervene with appropriate support to prevent a future incident that would harm [officers], their careers, or the public." *Id.* at 62.

Older police misconduct records are critical for such a system. *See* Consent Decree, ¶¶ 586-87. As policing scholars have explained, "[l]imitations on the retention of citizen complaints and related information pose a barrier to one of the most important new police accountability mechanisms: Early Intervention Systems." Kevin M. Keenan & Samuel

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Walker, *An Impediment to Police Accountability? An Analysis of Statutory Law Enforcement Officers' Bills of Rights*, 14 B.U. Pub. Int. L.J. 185, 240-41 (2005). In fact, one scholar has argued that an effective early intervention system would have flagged former CPD officer Jason Van Dyke for intervention well before he shot and killed Laquan McDonald. *See* Stephen Rushin, *Police Union Contracts*, 66 Duke L.J. 1191, 1231-32 (2017) (noting that "civilians had filed twenty complaints against Van Dyke in the years leading up to the Laquan McDonald shooting").

Finally, the Consent Decree requires the City and CPD to maintain and use data to promote transparency and accountability to the public. Consent Decree, ¶¶ 508, 566-68. Such efforts could include publishing data about officers' interactions with the public, officers' uses of force, and CPD's systems for supporting officers or holding them accountable. *Id.* These requirements, too, are critical to the ultimate success of the Consent Decree; experts stress that transparency and accountability are critical to rebuilding community trust in law enforcement. *See* President's Task Force on 21st Century Policing, *Final Report of the President's Task Force on 21st Century Policing* 1 (2015) ("Law enforcement agencies should also establish a culture of transparency and accountability to build public trust and legitimacy.").

Police misconduct records, in particular, are an important source of data to promote accountability and transparency. *See, e.g.*, *Gekas v. Williamson*, 393 Ill. App. 3d 573, 585 (4th Dist. 2009) ("To monitor the

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Sangamon County sheriff's office to ensure it is being conducted in the public interest, citizens might want to see whether the Division is performing a fair and objective investigation of complaints."); *ACLU of Oregon v. City of Eugene*, 360 Or. 269, 298 (2016) ("[T]he public interest in the transparency of government operations is particularly significant when it comes to the operation of its police departments and the review of allegations of officer misconduct."). By contrast, "when the public cannot access either records of allegations against officers or investigations into and assessments of those allegations, it cannot fairly judge whether its accountability system is working." Rachel Moran, *Police Privacy*, 10 U.C. Irvine L. Rev. 153, 187 (2019). To that end, "public access to disciplinary records is an essential democratic mechanism to hold police officers and other public officials accountable." Katherine J. Bies, *Let the Sunshine In: Illuminating the Powerful Role Police Unions Play in Shielding Officer Misconduct*, 28 Stan. L. & Pol'y Rev. 109, 119 (2017). Consequently, the Consent Decree reflects that the public has an interest in knowing how CPD and the City have investigated and addressed allegations of police misconduct, and the retention of older police misconduct records is critical to serving that public interest.

* * *

This case addresses whether an arbitration award that could require the City of Chicago to destroy older police misconduct records is consistent

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with public policy. As the appellate court correctly held below, it is not. *Fraternal Order of Police*, 2019 IL App (1st) 172907, ¶ 40. Indeed, the effect of losing older police misconduct records on TIRC and on the Consent Decree confirms the grave practical consequences of permitting these important public records to be destroyed without regard to their value to the public. Losing access to these records would be especially damaging at this time, as TIRC has not completed its mandate and the implementation of the Consent Decree is only just beginning. TIRC presently has 534 claims pending before it, including approximately 115 claims related to Burge-era torture, and the Consent Decree has been in effect for less than a year. The destruction of older police misconduct records would thus undermine TIRC's mission by impairing pending TIRC claimants' opportunity to seek relief. And, without older misconduct records, valuable data would be erased before the City and CPD have the chance to build a better police department under the Consent Decree. These implications support affirmance of the appellate court's decision.

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CONCLUSION

For these reasons, Illinois Attorney General Kwame Raoul respectfully requests that this Court affirm the decision below.

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SUPREME COURT RULE 341(c)
CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages containing the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is 20 pages.

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CERTIFICATE OF FILING AND SERVICE

I certify that on February 13, 2020, I electronically filed the foregoing **Brief of *Amicus Curiae* Illinois Attorney General Kwame Raoul in Support of Petitioner-Appellee** with the Clerk of the Court for the Supreme Court of Illinois, by using the Odyssey eFileIL system.

I further certify that the other participants in this appeal, named below, are registered service contacts on the Odyssey eFileIL system, and thus will be served via the Odyssey eFileIL system.

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Under penalties as provided by law pursuant to section 1-109 of the Illinois Code of Civil Procedure, I certify that the statements set forth in this instrument are true and correct to the best of my knowledge, information, and belief.

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