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Subject:	Amicus brief in SFPOA v. SF Police Commission, et al.
Date:	Friday, February 2, 2018 10:18:54 AM
Attachments:	2018.01.30 App to File Joint Brief.pdf 2018.01.30 Joint Brief.pdf

Dear Commissioners:

Please find attached an *amicus* brief that Alan Schlosser of ACLU and I, on behalf of the Bar Association, filed earlier this week in support of the Commission in the ongoing litigation with SFPOA over DGO 5.01. Have a nice weekend.

Regards,
David Rizk

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No. A151654

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT, DIVISION 2

SAN FRANCISCO POLICE OFFICERS' ASSOCIATION,

Plaintiff-Appellant,

v.

SAN FRANCISCO POLICE COMMISSION, ET AL.,

Defendants-Respondents.

San Francisco Superior Court
Case No. CPF 16-515408
Honorable Judge Newton Lam

JOINT BRIEF OF *AMICI CURIAE* THE BAR ASSOCIATION OF SAN FRANCISCO AND AMERICAN CIVIL LIBERTIES UNION OF NORTHERN CALIFORNIA IN SUPPORT OF DEFENDANTS-RESPONDENTS SAN FRANCISCO POLICE COMMISSION, *ET AL.*

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CERTIFICATE OF INTERESTED ENTITIES OR PERSONS (CAL. RULE OF COURT 8.208)

There are no interested entities or persons to list in this certificate (Cal. Rule of Court 8.208(e)(3)).

Dated: January 30, 2018

/s/ John W. Keker
JOHN W. KEKER

I. INTRODUCTION

Settled case law from the Supreme Court and the Court of Appeal teaches that the constitutional power to manage police departments by placing policy restrictions on the use of force is vested in accountable public officials, and is not subject to collective bargaining. *Claremont Police Officers Ass'n v. City of Claremont*, 39 Cal. 4th 623, 632-33 (2006) (citing *San Jose Peace Officer's Ass'n v. City of San Jose,* 78 Cal. App. 3d 935, 946 (1978)). Formulating policies that preserve life and promote trust between police agencies and the communities they serve is a fundamental duty of local government. *Id.* "'[T]he heavy responsibility and delicate balancing . . . involved in a use of force policy, are best exercised by the appropriate legislative and executive officers, who are then directly responsible to the people for such decisions.'" *San Jose,* 78 Cal. App. 3d at 948-49 (quoting *Long Beach Police Officers Ass'n v. City of Long Beach*, 61 Cal. App. 3d 364, 371 (1976)).

The San Francisco Police Commission properly exercised its managerial duty and prerogative when it announced, with the Mayor's support, that it would commence a process to "re-engineer" San Francisco Police Department's ("SFPD") use-of-

force policy, Department General Order 5.01 ("DGO 5.01"). The policy, which had not been revised in over 20 years, had become the subject of great public controversy and community outrage in the wake of the officer-involved shooting of Mario Woods, a 26-year-old African American man, in late 2015.

To revise the policy and restore eroding community trust, the Police Commission created a Working Group comprised of police officials, police union representatives including the San Francisco Police Officers Association ("SFPOA"), and community stakeholders including the Bar Association of San Francisco ("BASF") and the American Civil Liberties Union of Northern California ("ACLU"). For five months, the Working Group members proposed revisions, submitted written comments, and met to discuss drafts. Ultimately, based on consensus, the Working Group recommended sweeping reforms to the policy, which the Commission unanimously endorsed in June 2016.

Although SFPOA was deeply involved in this entire collaborative process, it disagreed with two policy provisions approved by the Police Commission: (1) the ban against carotid restraint, and (2) the ban on shooting toward or from moving vehicles. The City and County of San Francisco's labor

negotiators therefore voluntarily met and conferred with SFPOA, while reserving the City's position that the disputed policy provisions were management matters not within the scope of the union's representation. After five months of such meetings, during which time the new policy was held in abeyance, the City concluded that no agreement was possible. The City ended talks over the two disputed issues, and only then did the Police Commission formally adopt the new use-of-force policy.

With this litigation, SFPOA seeks to subject these fundamental policy decisions, made by the Police Commission in an open and inclusive public process, to reconsideration, so that SFPOA may try to overturn the Commission's ban on the carotid restraint and prohibition against shooting toward or from moving vehicles. Through grievances filed under its labor contract, SFPOA seeks a ruling by an arbitrator that would, at minimum, suspend the use-of-force policy pending further meet-and-confer talks, and absent an agreement between the parties, lead to impasse resolution procedures and binding interest arbitration. In other words, SFPOA ultimately aims to have arbitrators review—and potentially rewrite—SFPD's use-of-force policy. *Amici* urge this Court to affirm the Superior Court's judgment

that use-of-force matters do not belong at the bargaining table or in arbitration, consistent with fundamental principles enshrined in the Constitution, California's labor laws, long-standing case law, and the San Francisco Charter.

II. ARGUMENT

A. The Supreme Court and the Court of Appeal have held that use-of-force policies are the prerogative of management, not subject to collective bargaining.

The Meyers-Milias-Brown Act ("MMBA") governs labor relations for local government employees in California. It distinguishes between "wages, hours and working conditions," which are within the scope of union representation, and matters of "merits, necessity or organization of any service," the determination of which is a fundamental managerial responsibility and not subject to collective bargaining. *Claremont*, 39 Cal. 4th at 629 (citations and internal quotation marks omitted). A body of case law has developed to delineate the contours of these two categories, but the latter generally refers to "fundamental management or policy choices." *Id.* at 631-32 (citations and internal quotation marks omitted). In the context of policing, the Court of Appeal, First Appellate District has held that formulation of use-of-force policies are

fundamentally managerial in nature, because they govern matters of life and death for the public as well as the officers and implicate public trust in law enforcement. *Id.* at 632. Use-of-force policymaking is therefore committed to the discretion of government officials who are accountable to the public.

For example, in *San Jose*, the city proposed a new use-of-force policy to limit the circumstances in which officers could use deadly force and firearms. The union claimed that the new policy implicated officer safety, and therefore impacted working conditions, and triggered the city's obligation to meet and confer with the union. 78 Cal. App. 3d at 945–46. The Court of Appeal rejected that position, holding that the power to regulate deadly force is an "exercise of the police power granted by Article XI, section 7 of the California Constitution," which "a governmental agency may not suspend, *bargain, or contract away*." *Id.* at 947 (emphasis added). The Court held: "[W]e can imagine few decisions more 'managerial' in nature than the one which involves the conditions under which an entity of the state will permit a human life to be taken." *Id.* at 946. "The forum of the bargaining table with its postures, strategies, trade-offs, modifications and compromises [citation omitted] is no place for

the 'delicate balancing of different interests: the protection of society from criminals, the protection of police officers' safety and the preservation of all human life, if possible.'"' *Id.* at 948 (quoting *Long Beach,* 61 Cal. 3d at 371). The Court therefore reversed the Superior Court's judgment that the city must meet and confer.

The Court of Appeal subsequently recognized that, even without life-and-death consequences, policies that implicate community trust in law enforcement also require publicly accountable decision-making processes, not bargaining with a union behind closed doors. In *Berkeley Police Association v. City of Berkeley*, 76 Cal. App. 3d 931 (1977), the city authorized a citizen police review commission to participate in disciplinary proceedings against police officers accused of misconduct. The Court held that because these policies dealt with "a matter of police-community relations," the city's challenged policies "constitute[d] management level decisions which are not properly within the scope of union representation and collective bargaining[.]" *Id.* at 937. "To require public officials to meet and confer with their employees regarding fundamental policy decisions such as those here presented, would place an

intolerable burden upon fair and efficient administration of state and local government." *Id.*

Similarly, in *Claremont*, the California Supreme Court, citing the foregoing authorities, considered a data-collection policy designed to determine whether police officers were engaging in racial profiling. *See* 39 Cal. 4th at 628. The Court noted that the city's racial-profiling study was intended to "improve relations between the police and the community and establish the Claremont Police Department as an open and progressive agency committed to being at the forefront of the best professional practices in law enforcement." *Id.* at 632-33. The Court accordingly held that such a "fundamental managerial or policy decision" was beyond the scope of representation and did not trigger an obligation to meet and confer. *Id.* at 632.

Finally, in *Association for Los Angeles Deputy Sheriffs v. County of Los Angeles*, 166 Cal. App. 4th 1625, 1644 (2008), *as modified on denial of reh'g* (Oct. 6, 2008), the Court likewise held that because a new policy of restricting officers from "huddling" with counsel before speaking with homicide detectives or internal affairs was meant "to foster greater public trust in the investigatory process," it was "a fundamental or managerial

decision, and, thus, was outside the meet-and-confer requirements of the MMBA." *Id.*

B. The Police Commission properly exercised its managerial power to recalibrate SFPD's use-of-force practices in a manner that promoted accountability in the face of eroding public trust.

The Police Commission's Working Group process for revising DGO 5.01 was designed to balance many interests and respond to community demands regarding transparency and accountability, public safety, and SFPD's use-of-force practices. It is a paradigmatic example of a police commission exercising its managerial authority to regulate law enforcement's use of force in order to maintain public trust.

On December 2, 2015, Mario Woods, a 26-year-old African American, was shot to death by SFPD officers. A video of the shooting provoked protests and calls for change to SFPD's policies. A week later, on December 9, 2016, scores of community leaders and protesters attended the Police Commission's meeting to demand reforms at SFPD and changes to its use-of-force practices.[1]

[1] *See* S.F. Police Comm'n, Meeting Minutes (Dec. 9, 2015), *available at* http://sanfranciscopolice.org/meeting/police-commission-december-9-2015-minutes. Such government records

In an effort to restore public trust, the Police Commission immediately initiated a process to review DGO 5.01, which had not been revised since 1995. *See* Appellant's App. ("AA") (prior use-of-force policy). To develop recommended reforms, the Commission, with the support of the Mayor, established a collaborative process that included extensive input from police and community stakeholders.[2] AA 181-82. According to the Mayor, the goal was to "fundamentally re-engineer the way police officers use force" in order to "help our sworn officers strengthen their ties with the community and keep our City safe through a culture change in how we handle conflicts on our streets."[3]

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are subject to judicial notice and not reasonably subject to dispute. *See* Cal. Evid. Code § 452 & cmt (records of county planning commission subject to judicial notice); *see also Fremont Indem. Co. v. Fremont Gen. Corp.*, 148 Cal. App. 4th 97, 113 (2007) (courts may take judicial notice of the existence of statements or documents, without accepting contents as true).

[2] The participants included SFPD, SFPOA, officer affinity groups such as Officers for Justice and Pride Alliance, the S.F. Office of Civilian Complaints (now the Department of Police Accountability), the S.F. District Attorney/Blue Ribbon Panel, the S.F. Public Defender, the U.S. Department of Justice, and *amici* BASF and ACLU, among others.

[3] *See* News Release, "Mayor Lee Announces Comprehensive Police Department Reforms" (Feb. 22, 2016), *available at* http://sfmayor.org/article/mayor-lee-announces-comprehensive-police-department-reforms; *and* Letter from S. Loftus and G. Suhr to E. Lee, (Feb. 19, 2016), *available at*

SFPOA participated fully in this process. Its representatives regularly attended meetings, submitted written comments, and succeeded in having many of its recommendations incorporated into the policy.

The Working Group reached consensus on the vast majority of the changes to DGO 5.01, and the Commission unanimously voted to endorse the recommended revisions on June 22, 2016. AA 182-83. The new policy effected sweeping changes to SFPD's practices. The new DGO 5.01 emphasizes "minimal reliance" on the use of force, and thus establishes a higher bar than the constitutional "reasonableness" standard in *Graham v. Connor*, 490 U.S. 386 (1989). AA 189. The policy also incorporates key modern policing principles, such as de-escalation, crisis intervention, and proportionality. *Id.* at 189-90.

The policy, and the transparent public process that produced it, were publicly hailed by the Mayor, the Board of Supervisors, and the U.S. Department of Justice, as important steps to restoring public trust in SFPD. AA 233-34 (Mayor's press release); AA 236–238 (S.F. Board of Supervisors

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http://sfmayor.org/sites/default/files/FileCenter/Documents/484-Suhr%20_%20Loftus%20Letter1.pdf. *See infra* n.1 (judicial notice).

Resolution). The reforms to DGO 5.01 also became the centerpiece of a larger package of reforms, conceived by the Commission and the Mayor, that included an exhaustive review of SFPD by the U.S. Department of Justice.[4] When the Department of Justice eventually released the results of its review in a report highly critical of SFPD, it noted that the Commission's process for reforming DGO 5.01 was a positive step in the right direction: "The process of redrafting the SFPD's use of force policies entailed significant public and stakeholder discussion and input," and "bodes well for the transparency of the guidelines that direct police officers' actions in San Francisco."[5]

C. The Court should reject SFPOA's attempt to use grievance arbitration to undermine the Police Commission's managerial responsibility to regulate SFPD's use of force.

Following the Police Commission's endorsement of the Working Group's recommended reforms in June 2016, the City

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[4] The U.S. Department of Justice report outlined 96 findings and 272 recommendations for reform—and specifically recommended that SFPD ban the carotid restraint and shooting to or from moving vehicles. U.S. Dep't of Justice, *Collaborative Reform Initiative: An Assessment of the San Francisco Police Department* ("*Assessment*") (Oct. 2016) at 46, 49, *available at* https://ric-zai-inc.com/Publications/cops-w0817-pub.pdf *and* at AA 211–31. *See infra* n.1 (judicial notice).

[5] *Assessment*, at 8-9.

voluntarily agreed to meet and confer with SFPOA over the ban on the carotid restraint and the prohibition against shooting toward or from moving vehicles.[6] AA 183. When it became clear that no agreement was possible, the City ended the discussions and the Commission moved to finalize the policy. AA 186.

SFPOA immediately filed this suit, in an effort to prolong the policymaking process and divert it into a forum outside the public's view, where the union might find a more favorable audience than the Commission and other responsible public officials. SFPOA hopes to convince an arbitrator to force the City to adopt its positions on the carotid restraint and shooting to or from moving vehicles. The union also seeks a ruling that would immediately suspend the policy pending further meet-and-confer talks and impasse procedures, which would include a final and binding arbitration over the policy provisions at issue.[7]

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[6] The parties met and conferred and eventually reached agreement concerning training and discipline issues raised by the SFPOA, *see* AA 176-77; the remaining issues in dispute here are subject to management decision-making.

[7] SFPOA's papers filed below reveal the layers of procedural complexity that it hopes to import into the policymaking process. Through its present grievances, SFPOA seeks, in part, a ruling that the use-of-force matters at issue here are subject to bargaining. If successful, SFPOA will then attempt to compel the City into binding interest arbitration under the San Francisco

The Commission's policy decisions to restrict SFPD's use of force are not subject to meet-and-confer requirements or final and binding arbitration, for the reasons set forth in *San Jose* and like cases.[8] *See, e.g.*, 78 Cal. App. 3d at 947. SFPOA therefore goes to great lengths to avoid arguing—*at this stage*—that the ban on the carotid restraint, and/or the prohibition against shooting toward or from moving vehicles, are subject to bargaining and the final and binding decision of an arbitrator. Instead, it claims its grievance is directed to a mere "preliminary procedural dispute" that arises from the City's failure to meet and confer in good faith. *See* SFPOA Reply at 10. SFPOA basic contention is that, regardless of whether the City had any duty to meet and confer

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Charter, and ask an arbitration panel to rewrite SFPD's use-of-force policy. *See* AA 11 (Complaint requesting compelled arbitration on grievance and compelled compliance with impasse procedures under San Francisco Charter or MMBA), *and* AA 444 n.3 (SFPOA Opp. to Demurrer) (acknowledging that binding interest is the next step in SFPOA's strategy).

[8] SFPOA's preemptive effort to distinguish *San Jose* as concerning the obligation to meet and confer under the MMBA, rather than the obligation to arbitrate under California Code of Civil Procedure § 1281.2 is without merit and misses the fundamental point of the opinion, which is that a city may not "bargain or contract away its police power" over use-of-force matters. *See, e.g. San Jose,* 78 Cal. App. 3d at 947. Here, no agreement to arbitrate was possible because the Commission's managerial powers are non-delegable.

at all, once it voluntarily elected to do so, the union won the right to have an arbitrator determine whether the City must continue to meet and confer, and whether the policy must be held in abeyance in the interim. This suggestion makes no sense as a matter of public policy, and does not comport with the reasoning of *San Jose*.

Allowing SFPOA to unwind the process now by sending it to final and binding arbitration, despite settled law to the contrary, would undermine public trust and deter the community from engaging with the Police Commission in future policymaking efforts. The U.S. Department of Justice's report, issued in October 2016 while the meet-and-confer process was ongoing, noted that that the Commission's Working Group process presented a model of reform. *See infra* at 15 & n.5. But the report urged all stakeholders to move "quickly and proactively" to ensure that the policy was immediately implemented and "[t]he process was not drawn out." *Id*.

Amici agree that the time for repose has come in this matter. San Franciscans demanded change on a matter of paramount public concern, and the Police Commission delivered—while affording SFPOA every opportunity to

participate in the process. This was the right result; the law requires no more and no less.

III. CONCLUSION

For all the reasons set forth above, *amici* respectfully urge this Court to affirm the Superior Court's denial of SFPOA's petition to compel arbitration.

Respectfully submitted,

Dated: January 30, 2018

KEKER, VAN NEST & PETERS LLP

By: *s/John W. Keker*
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CERTIFICATE OF COMPLIANCE

Counsel of Record hereby certifies that pursuant to Rules 8.204(c)(1) and 8.486(a)(6) of the California Rules of Court, the attached JOINT BRIEF OF *AMICI CURIAE* THE BAR ASSOCIATION OF SAN FRANCISCO AND AMERICAN CIVIL LIBERTIES UNION OF NORTHERN CALIFORNIA IN SUPPORT OF DEFENDANTS- RESPONDENTS SAN FRANCISCO POLICE COMMISSION, *ET AL*. is produced using 13-point Roman type including footnotes and contains approximately 2,8882 words, which is less than the total words permitted by the rules of court. Counsel relies on the word count of the computer program used to prepare this brief.

Dated: January 30, 2018

By: *s/John W. Keker*
JOHN W. KEKER

PROOF OF SERVICE

I am employed by Keker, Van Nest & Peters LLP, 633 Battery Street, San Francisco, CA 94111. I am over the age of eighteen years and am not a party to this action. On January 30, 2018, I served the following documents:

JOINT BRIEF OF *AMICI CURIAE* THE BAR ASSOCIATION OF SAN FRANCISCO AND AMERICAN CIVIL LIBERTIES UNION OF NORTHERN CALIFORNIA IN SUPPORT OF DEFENDANTS-RESPONDENTS SAN FRANCISCO POLICE COMMISSION, *ET AL.*

by FedEx, by placing a true and correct copy in a sealed envelope addressed as shown below. I am readily familiar with the practice of Keker, Van Nest & Peters LLP for correspondence for delivery by FedEx Corporation. According to that practice, items are retrieved daily by a FedEx Corporation employee for overnight delivery.

Clerk of the Court *for delivery to the* Honorable Judge Newton Lam
San Francisco Superior Court
400 McAllister Street, Dept. 303
San Francisco, CA 94102

I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on January 30, 2018, at San Francisco, California.

s/Laura Lind
Laura Lind

No. A151654

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT, DIVISION 2

SAN FRANCISCO POLICE OFFICERS' ASSOCIATION,

Plaintiff-Appellant,

v.

SAN FRANCISCO POLICE COMMISSION, ET AL.,

Defendants-Respondents.

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APPLICATION OF *AMICI CURIAE* THE BAR ASSOCIATION OF SAN FRANCISCO AND AMERICAN CIVIL LIBERTIES UNION OF NORTHERN CALIFORNIA TO FILE JOINT BRIEF OF *AMICI CURIAE* IN SUPPORT OF DEFENDANTS-RESPONDENTS SAN FRANCISCO POLICE COMMISSION, *ET AL.*

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Attorneys for *Amici Curiae*
The Bar Association of San Francisco and the American Civil Liberties Union of Northern California

I. APPLICATION AND STATEMENT OF INTEREST

The Bar Association of San Francisco ("BASF") and the American Civil Liberties Union of Northern California ("ACLU") respectfully request permission to file the attached joint brief as *amici curiae* in the above-captioned case. The attached brief supports Defendants-Respondents, the San Francisco Police Commission, *et al.*, and provides legal and factual context that will assist this Court in deciding the present appeal. While the attached brief supports Respondents' position, *amici* believe it includes new information and authorities that will assist the Court in deciding this important case.

This litigation is indeed very important to *amici* and their members. Both *amici* have invested significant time and resources as community stakeholders in the San Francisco Police Commission's Working Group process that led to reforms to San Francisco Police Department's ("SFPD") use-of-force policy, Department General Order 5.01 ("DGO 5.01"). Representatives from BASF's Criminal Justice Reform Task Force and ACLU attended numerous Working Group meetings over five months, researched and analyzed the law and policies from other law-enforcement agencies, submitted written comments and proposed

revisions to the policy, and negotiated with other stakeholders, including the Police Commission, SFPD command staff, and the San Francisco Police Officers' Association ("SFPOA") in order to reach consensus.

Amici believe the reforms to SFPD use-of-force practices, including the specific provisions at issue in this litigation, are critical to supporting ongoing reform efforts at the SFPD and to maintaining trust between SFPD and the San Francisco community. As set forth in the brief, granting SFPOA's requested relief by unwinding the Police Commission's Working Group process and sending this matter to arbitration would contravene settled law, undermine public trust in SFPD, and deter the community from engaging with the Police Commission in future policymaking efforts.

Finally, besides having invested significantly in the Working Group process and the specific policy reforms challenged by SFPOA, both BASF and ACLU have additional organization interests at stake in the subject matter of this litigation, as set forth below.

A. The Bar Association of San Francisco's Criminal Justice Reform Task Force

The Bar Association of San Francisco is a nonprofit voluntary membership organization of attorneys, law students, and legal professionals in the San Francisco Bay Area. Founded in 1872, BASF enjoys the support of nearly 8,000 individuals from law firms, corporate legal departments, government agencies, and law schools. BASF's mission is to champion equal access to justice and promote humanity. Through its board of directors, its committees, and its volunteer legal-services programs and other community efforts, BASF has worked to promote and achieve equal justice for all, and to oppose discrimination in all its forms, including discrimination based on race, sex, disability, and sexual orientation. BASF provides a collective voice for public advocacy, advances professional growth and education, and attempts to elevate the standards of integrity, honor, and respect in the practice of law.

The BASF Board of Directors created the Criminal Justice Reform Task Force in January 2015, following protests in Ferguson, Missouri after the officer-involved shooting of Michael Brown, and just prior to the officer-involved shooting in San

Francisco of Mario Woods, a 26-year-old African American man suffering from mental illness. The goals of the Task Force, as they relates to policing, are to support meaningful police reform, and to address deteriorating community relations with law enforcement, as well as the role of racial bias, and other shortcomings in the criminal-justice system. The Task Force is composed of judges, prosecutors, defense attorneys, civil-rights attorneys, law professors, members of law enforcement, and representatives from police-oversight agencies. Its members deploy legal skills such as legal research, writing, and advocacy, in support of the Task Force's reform work.

The Task Force has played a significant role in facilitating reforms locally and on a statewide level on a number of key criminal justice issues, including grand-jury reform, bail reform, use-of-force policy, body-camera policy, civilian oversight, and racial bias. For example, in 2016, the Task Force successfully advocated for the passage of California Senate Bill 227, which prohibits the use of criminal grand juries in cases where it is alleged that the use of excessive force by police officers resulted in a death. In 2016, the Task Force worked in conjunction with the ACLU and the San Francisco Public Defender's Officer to

negotiate with the San Francisco Police Commission and SFPD to formulate a body-camera policy that prohibits officers from reviewing body-camera footage in officer-involved shootings or where the officer is subject to a criminal investigation. As noted above, also in 2016, representatives from the Task Force's Use of Force Committee participated in the Police Commission's Working Group concerning SFPD's use-of-force policy and negotiated the final language in DGO 5.01 with SFPOA. In 2017, representatives from the Task Force's Use of Force Committee participated in the Police Commission's Working Group on Tasers to develop a policy governing the use of Electronic Control Weapons. Since 2017, representatives from multiple Task Force Committees have participated in all of SFPD's Executive Sponsor Working Groups, which are overseeing reforms to SFPD recommended by the U.S. Department of Justice. Finally and relatedly, a representative from the Task Force currently serves as an External Senior Advisor for SFPD's Strategic Plan.

B. The American Civil Liberties Union of Northern California

The American Civil Liberties Union of Northern California is a regional affiliate of the American Civil Liberties Union, a

non-profit, non-partisan membership organization with more than 1.4 million members nationwide. The ACLU is dedicated to protecting liberty and equality assured by the United States and California Constitutions. The ACLU has participated in hundreds of cases in federal and state courts that involve the interplay between police policies and procedures and the protection of individual rights and liberties.

In 1974, the ACLU of Northern California began a Police Practices Project whose specific focus was to work with San Francisco police and city officials and community members to advocate for police policies that reflected modern best practices and met constitutional standards. As part of this advocacy work, which has continued unbroken for over 40 years, ACLU was a participating stakeholder at the inception of the San Francisco Office of Citizen Complaints (now the Department of Public Accountability), in the adoption of a comprehensive SFPD Crowd Control Policy, and the promulgation of a SFPD General Order that limits police surveillance of First Amendment activities. The active role ACLU played in the Working Group that was established to revise San Francisco's use-of-force policy was a direct extension of the police advocacy work that has been one of

the organization's core activities for decades.

The ACLU has also been involved in litigation that addresses the core issue raised by this case, namely, determining the correct balance between the power of local government to decide fundamental policy and managerial issues, and the right of labor unions to bargain over issues involving working conditions. In *Berkeley Police Association v. City of Berkeley*, 76 Cal. App. 3d 931 (1977), for example, ACLU intervened to argue that city policies involving the role of a citizens' review commission in police disciplinary proceedings were not within the scope of representation and collective bargaining. In *Claremont Police Officers Association v. City of Claremont*, 39 Cal. 4th 623 (2006), ACLU filed an amicus brief in the California Supreme Court to argue that a police-department policy of collecting data on racial profiling was a fundamental managerial decision outside the scope of the mandatory bargaining. The ACLU's positions in both cases were adopted by the courts.

II. CONCLUSION

For all the reasons set forth above, BASF and ACLU respectfully request that this Court grant permission to file the attached joint brief as *amici curiae* in the above-captioned case.

Respectfully submitted,

Dated: January 30, 2018

KEKER, VAN NEST & PETERS LLP

By: *s/ John W. Keker*
JOHN W. KEKER
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DISCLOSURE OF AUTHORSHIP OR MONETARY CONTRIBUTION (CAL. RULE OF COURT 8.520)

No party or counsel for a party authored the proposed brief in whole or in part; and, no party, counsel for a party, or any other person or entity, made a monetary contribution intended to fund the preparation or submission of the proposed brief.

(Cal. Rule of Court 8.520(f)(4)(A) & (B)).

Dated: January 30, 2018

s/John W. Keker
JOHN W. KEKER

PROOF OF SERVICE

I am employed by Keker, Van Nest & Peters LLP, 633 Battery Street, San Francisco, CA 94111. I am over the age of eighteen years and am not a party to this action. On January 30, 2018, I served the following documents:

APPLICATION OF *AMICI CURIAE* THE BAR ASSOCIATION OF SAN FRANCISCO AND AMERICAN CIVIL LIBERTIES UNION OF NORTHERN CALIFORNIA TO FILE JOINT BRIEF OF *AMICI CURIAE* IN SUPPORT OF DEFENDANTS-RESPONDENTS SAN FRANCISCO POLICE COMMISSION, *ET AL.*

by FEDEX, by placing a true and correct copy in a sealed envelope addressed as shown below. I am readily familiar with the practice of Keker, Van Nest & Peters LLP for correspondence for delivery by FedEx Corporation. According to that practice, items are retrieved daily by a FedEx Corporation employee for overnight delivery.

Clerk of the Court *for delivery to the* Honorable Newton Lam
San Francisco Superior Court
400 McAllister Street, Dept. 303
San Francisco, CA 94102

I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on January 30, 2018, at San Francisco, California.

s/Laura Lind
Laura Lind