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Court of Appeals

of the

State of New York

In the Matter of the Application of

TALIB W. ABDUR-RASHID and SAMIR HASHMI,

Petitioners-Appellants,

– against –

NEW YORK CITY POLICE DEPARTMENT, *et al.*,

Respondents-Respondents.

For a Judgment Pursuant to Article 78 of the
New York Civil Practice Laws and Rules

BRIEF FOR *AMICUS CURIAE* NEW YORK CITY COUNCIL'S BLACK, LATINO AND ASIAN CAUCUS IN SUPPORT OF PETITIONERS-APPELLANTS

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INTEREST OF *AMICUS CURIAE*, BLACK, LATINO AND ASIAN CAUCUS OF THE NEW YORK CITY COUNCIL

This matter before the Court of Appeals is of critical importance to the 24 duly elected members of the City Council who make up the Black, Latino, and Asian Caucus ("the Caucus"). The Caucus collectively represents nearly half of New York City's nine million residents from all five boroughs. Members of the Caucus are charged with the "…order, protection and government of persons and property; for the preservation of the public, health, comfort, peace and prosperity of the city and its inhabitants." N.Y. City Charter § 28(a).

Amici submit this brief to help the court consider the concerning implications of the New York City Police Department's ("NYPD") expansive interpretation of the Freedom of Information Law ("FOIL") and its disparate impact on the Muslim and African American community, and other minority communities of New York State. For the first time since the inception of the FOIL statute, a municipal law enforcement entity seeks to unilaterally adopt a federal doctrine known as *Glomar* and arbitrarily side-step FOIL's comprehensive scheme.

The First Department Appellate Division's ruling vitiates the necessary checks and balances established in New York's FOIL statute – ultimately handing the NYPD boundless legislative authority to reclassify gathered information and

arbitrarily deny the right of transparency to minority petitioners. *Amici* urge this court to reverse.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case arose out of two distinct 2012 FOIL requests submitted in response to the Pulitzer Prize-winning findings by the Associated Press ("AP") revealing the NYPD's Muslim surveillance program. The AP report alleged that organizations with which Imam Talib Abdur-Rashid and Mr. Samir Hashmi (a Rutgers University student and officer in the Muslim Students Association) were affiliated had been subject to surveillance. Accordingly, both applicants sought files concerning any such investigation or surveillance of themselves and of the organizations to which they belong. The NYPD responded that it could neither confirm nor deny the existence of any records, relying on a federal doctrine invoked in regards to national security interests, first recognized in *Phillippi v CIA*, 546 F.2d 1009 (D.C. Cir. 1976), and known colloquially as a "Glomar Denial" ("*Glomar*"). In so doing, the NYPD circumvented New York State's FOIL policies and procedures.

To the knowledge of *amici*, this case represents the first time a local law enforcement agency in the United States has relied upon the *Glomar* doctrine in response to a FOIL request. Establishing this precedent would create on-going constitutional violations that ignore the legislative intent and statutory safeguards

thoughtfully implemented by the elected officials of New York State in the FOIL statute.

Accordingly, the order of the court below should be reversed for three reasons:

First, the NYPD's position conflicts with the statutory framework of New York's FOIL. In evoking *Glomar*, the NYPD undermine traditional statutory interpretation and the intent of State Legislature by relying upon a federal doctrine that governs classification of secret records exclusively by federal agencies.

Second, the NYPD's application of *Glomar* disregards constitutionally necessary federal checks and balances, and is preempted by the federal legislature.

In its application of *Glomar*, the NYPD ignores the importance of a federal system built on the robust participation of the President and Congress. Presidents from Eisenhower to Obama have maintained a classification system through the issuance of consecutive executive orders that places burdens upon the classifying agency to safeguard and then declassify national security information. *Glomar* is merely one element of this carefully regulated, purposively balanced system. The NYPD has not demonstrated it has any similar system of checks and balances in operation.

In addition, federal preemption principles preclude the NYPD from applying *Glomar*. Since the NYPD does not operate within the framework of the federal

government, or under its direction, the NYPD cannot cherry-picking the powers of the *Glomar* doctrine without State or City legislative authority or guidance. In using *Glomar*, and the "NYPD Secret" classification mechanism, the NYPD is impermissibly regulating in a field presently and historically occupied by the federal government.

Third, the NYPD's use of *Glomar* raises Equal Protection concerns under the Fourteenth Amendment. In the more than forty years since the enactment of New York FOIL statute, the NYPD has only recently applied *Glomar* and then only to Muslim and African American applicants concerned about surveillance, such as in the case of the instant applicants. These three cases reveal a two-tiered FOIL regime: one tier for members of certain minority groups, and another tier for the rest of society.

ARGUMENT

I. The NYPD's Application of *Glomar* Undermines the Legislative Intent of New York State's FOIL Statute

A. New York State's FOIL is Intended to Ensure that the Public has Open Access to Government Records

The statutory text, and legislative background, behind New York State's FOIL statute clearly indicates the legislature's intention to ensure that the public has open access to government records.

The central importance of transparency in regards to state activity is clearly expressed in the FOIL legislative declaration which states:

> … a free society is maintained when government is responsive and responsible to the public, and when the public is aware of governmental actions. The more open a government is with its citizenry, the greater the understanding and participation of the public in government... The people's right to know the process of governmental decision-making and to review the documents and statistics leading to determinations is basic to our society. Access to such information should not be thwarted by shrouding it with the cloak of secrecy or confidentiality. The legislature therefore declares that government is the public's business and that the public, individually and collectively and represented by a free press, should have access to the records of government in accordance with the provisions of this article.[1]

Section 89(3)(a) of the New York FOIL statute codifies the legislature's intent to ensure open access to agency documents.[2] The statute mandates that public agencies "shall" either make the records requested available, or deny disclosure based on a *prescribed* exemption.

This policy of free information exchange is carefully balanced by the requirements of national security within the statute, on its face. The statute's inclusion of the eleven enumerated exemptions under which a public agency may deny access to certain records demonstrates the legislature's recognition that agencies need to maintain confidentiality in specific instances. Evidently, the state legislature intentionally adopted a statute which comprehensively balances the civil liberty and security interests at issue, with preclusive weight. The overarching

[1] Public Officers Law Art. 6, § 84.

[2] Id. at § 89(3)(a).

mandate however, as recognized by this Court, is for the FOIL statute "to be liberally construed and its exemptions narrowly interpreted so that the public is granted maximum access to the records of the government." *Capital Newspapers Division of Heart Corp. v Whalen*, 69 N.Y.2d 246, 252 (1987).

The State legislature clearly intended that public agencies either make their records available or invoke an exemption justifying the decision not to do so.

B. Recognition of the *Glomar* Doctrine has been Explicitly Rejected by the New York State Legislature

Although the FOIL is modeled after the Federal Freedom of Information Act ("FOIA")[3], the lack of an equivalent *Glomar* doctrine in the state statute highlights the legislature's unwillingness to make such a response available to state agencies. The concept of *Glomar* denial was first recognized in 1976 by the D.C. circuit in *Phillippi v CIA*, 546 F.2d 1009, 1013 (D.C. Cir. 1976). In 1977, a year later, a reconstituted FOIL was enacted. The revised state statute presumed greater accessibility of public records than its 1974 edition and established no analogous provision to the *Glomar* doctrine. Subsequent amendments to the FOIL, most

[3] 5 U.S.C. § 552, *et. seq.*

significantly in 1982[4], 1989[5], 2005[6], 2006[7], 2008[8], and in December 2017 have reinforced the legislature's objective of ensuring record availability, not limiting it. The most recent amendments provide a remedy to a requesting party in the form of attorney's fees from governmental agencies that unreasonably refuse to release documents.

To allow the NYPD to invoke a provision that does not exist in the statute, and to allow the judiciary to give credence to such an argument, undermines the role of the state legislature and undercuts its constitutional function. These core issues of access to government, public accountability, and security should not be decided by a local police official or creative counsel, but instead through the rigorous consideration of duly elected state officials.

II. *Glomar* is a Purely Federal Doctrine that has No Application for State and City Agencies like the NYPD

A. The *Glomar* Doctrine is Designed to Operate within a Carefully Regulated Federal System for which NYPD Procedure has No Analog

[4] See, e.g., Michael J. Grygeil, *New York Open Government Guide*, 6 RCFP i, 1 (2011) (describing the full history of the New York State FOIL Amendments).

[5] *Id.* (discussing the addition of a prohibition against the willful concealment or destruction of any record with the intent of preventing public inspection).

[6] *Id.* (discussing the addition of a specific timeframes available to an agency to respond to a request for records).

[7] *Id.* (discussing the requirement atht all agencies that have "reasonable means available" to accept record requests in email format and to respond via email when requested to do so).

[8] *Id.* (discussing the update to FOIL intended to reflect advances in information technology and the costs associated with providing access to information that is maintained electronically).

The NYPD seeks to benefit from a deliberative federal apparatus to classify sensitive information for which it has no analog and fails to operate the legal requirements that classification and retention of those records entail.

The federal *Glomar* regime does not operate in a vacuum. Federal agencies applying *Glomar* do so as one element in a broad, highly regulated federal system designed to keep in balance national security interests with the public's right to transparency. This system has a long and storied history of carefully considered, debated and calibrated regulation by Congress and the Executive.

Our modern-day system of classification was established by President Franklin Roosevelt through the issuance of Executive Order 8381.[9] Since then, presidents have re-visited this issue, as has Congress. The most recent regulation of the federal classification system, Executive Order 13526, issued by President Obama, establishes that a select, qualified number of individuals may classify information but only on the basis that disclosure could damage national security.[10] Executive Order 13526 also creates the National Declassification System.[11]

There are three levels of classification, namely: "Top Secret", "Secret", and "Confidential".[12] The designation of classification is predicated on the harm

[9] Exec. Order No. 8381, 5 F.R. § 1147 (1940).

[10] Exec. Order No. 13526, 32 C.F.R. § 2001 (2010).

[11] *Id*.

[12] 18 C.F.R. § 3a.11 (1982).

unauthorized disclosure may reasonably cause to our national security. Accordingly, the designation, "Top Secret" is applied to information where the unauthorized disclosure would reasonably create an "exceptionally grave damage" to national security.[13] The next level "Secret" would result in "serious damage" to national security.[14] For the lowest level, "Confidential," the standard requires that the information would "damage" the national security of the United States.[15]

There are a number of considerations the original classifying officer must take into account that implicate the duration of classification, how the information is stored, and declassification instruction. Pursuant to Executive Order 13526, the information must be marked for declassification "as soon as it no longer meets the standards for classification."[16] However, if the officer is unable to make a determination, then based upon sensitivity, the default is either 10 years or 25 years.[17] The presumption is upon the officer is to classify (if at all) at the lowest level necessary. Finally, the officer must also provide a "concise reason for classification that, at a minimum, cites the applicable classification categories."[18]

[13] *Id*. at § 3a.11(a)(1).
[14] *Id.* at § 3a.11(a)(2).
[15] *Id.* at § 3a.11(a)(3).
[16] 32 C.F.R. § 2001 (2010).
[17] *Id*.
[18] *Id*.

It is critical to note that for each level, the original classifying officer must identify or describe the specific danger potentially presented by the information's disclosure. The Executive Order specifically provides, "[i]n no case shall information be classified, continue to be maintained as classified, or fail to be declassified in order to: 1. conceal violations of law, inefficiency, or administrative error; (or) 2. prevent embarrassment to a person, organization, or agency.

Moreover, Executive Order 13526 establishes an internal mechanism for challenging the classification of information and equally importantly, protocols for declassification and downgrading.[19] Classified information is required to be declassified "as soon as it no longer meets the standards for classification."

The U.S. Congress has also asserted itself on these matters repeatedly over the past eight decades or so, conducting extensive hearings, passing a variety of statutes, and exercising substantial oversight authority, designed to prevent the over-classification of information and the resulting impairment of the public's access to government records. *See, e.g.*, 50 U.S.C. § 413(a)(1) (directing the President to keep the congressional intelligence committees fully informed of national intelligence practices.) This extensive system of Executive Orders, statutes, and regulations carefully balances the civil liberties enshrined in the U.S.

[19] 32 C.F.R. § 2001 (2010).

Constitution with the inherent need to protect the national security of the United States. It is within this highly regulated environment that *Glomar* was conceived and is best applied.

By contrast, the NYPD's surveillance procedure is grossly under-regulated and largely opaque. The NYPD collects vast amounts of surveillance information, stores and records the personal data of individuals without a corollary statutory framework or procedure to the federal system, ensuring civil liberties are duly considered. There is, further, a blatant lack of transparency: the public does not know the process in place for evaluating the sensitivity of this information, how long that information is prevented from authorized disclosure, or even how it is stored.

According to press reports, at some point in 2003, NYPD started labeling its documents "NYPD Secret", a label with no legal basis.[20] When press organizations requested the regulations and rules that NYPD relies upon to classify these documents, NYPD rejected their FOIL requests.[21] Fourteen years later the NYPD maintains an impenetrable structure that allows it to hold information indefinitely.

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[20] Matt Sledge, *NYPD 'Secret' Classification for Documents 'Means Diddly' in Eyes of Legal Experts*, Huffington Post (Sept. 16, 2013).

[21] *NYPD Rejects Freedom of Information Law Request for their Freedom of Information Law Handbook*, Gothamist, (Mar. 21, 2014).

This is in stark contrast with the Executive Order issued by President Obama which is available online and is incredibly detailed and transparent. The rules for determining how to classify a document cannot themselves be classified; the federal system has made these rules public since the inception of the classification program.

There is no record of rule-making or any other action that would permit independent entities including the judiciary from evaluating collection and retention policies. Nor does the NYPD appear to have a process for downgrading or declassification. This lack of process and procedure leaves the NYPD's system rife with the risk of abuse, and may violate constitutional principles.

Unlike the Federal Government, elected representatives in City or State government have not had an opportunity to opine or debate these issues and create a balanced framework, akin to the federal system, to apply *Glomar*. The NYPD proposes an unfettered application of *Glomar* without the checks and balances intended and applied by the Federal Government. The dangers to civil liberties posed by the NYPD's unauthorized classification tactics are substantial and insupportable.

B. The NYPD Cannot Use *Glomar* to Bypass State Procedure and Violate General Principles of Federal Preemption

By adopting *Glomar* as their defense, the NYPD impermissibly encroaches upon the domain of the federal government. The NYPD is a state institution

operating under the supervision and regulation of the state and local government. To protect national security, local law enforcement entities obtain and share information through federal partners or in joint operations or task forces. The NYPD does not have the explicit authority to classify documents. By applying the exclusively federal doctrine of *Glomar*, the NYPD is delegating to themselves the authority of a federal agency without being given license to do so by their state legislature, and in the absence of all regulatory oversight. Such self-aggrandizing maneuvering by the NYPD amounts to regulatory preemption.

Although there is a dearth of case law concerning the preemption of local or state entities on matters of national security, case law as it relates to regulation of immigration practices is an instructive analog.

In the seminal immigration case *De Canas v Bica*, the Supreme Court established a tri-partite framework to ascertain whether there is federal preemption of a state or local law. *De Canas v Bica*, 424 U.S. 351 (1976). These tests are: 1. Constitutional preemption, 2. Field preemption, 3. Conflict preemption. If state or local regulation runs afoul of any of these three tests, it violates the Supremacy Clause of the U.S. Constitution.

Accordingly, the first question is whether the New York Police Department is seeking to regulate the classification system, despite the federal government's exclusive control. Informational classification is undeniably the province of the

executive. The Supreme Court in *Department of Navy v Egan*, stated that "[the President's] authority to classify and control access to information bearing on national security…flows primarily from this Constitutional investment of power in the President and exists quite apart from any explicit congressional grant." *Department of Navy v Egan*, 484 U.S. 518, 527 (1988).

Yet, for years the NYPD has wielded their own extra-constitutional classification authority and marked documents as "NYPD Secret". Now, FOIL requests by the Appellants yield a federal *Glomar* response even though the *Glomar* response is limited by Executive Order 13292 to federal agencies "whenever the fact of their existence or nonexistence is itself classified under this order or its predecessors."[22] The overwhelming evidence demonstrates that the NYPD's attempt to operate a classification and *Glomar* defense is federally preempted and therefore unconstitutional.

Although satisfying any one of the *De Canas* tests should end the inquiry, it is useful to examine the remaining two tests for federally preempted regulations. The second test requires ascertaining whether the federal government sought to occupy the field entire regulatory field within which the state actor seeks to regulate itself. The Supreme Court explained this form of preemption as requiring

[22] Exec. Order No. 13292, 3 C.F.R. § 13292, (2003).

a clear demonstration of the "complete ouster of state power -- including state power to promulgate laws not in conflict with federal laws…" *De Canas* at 357.

The classification of information has long been the exclusive province of the federal government, generally, and in particular the purview of the Executive. Presidents since Eisenhower, when issuing executive orders regarding classification, have cited to the statutory and constitutional authority behind their action.[23] Bolstering the executive's legislative power, in the area of classification and national security, Congress and the Judiciary have consistently given deference to the President.[24] In addition, Congress has stipulated federal, constitutional due process concerns governing the access to classified information, which must fit within the due process protections peculiar to the federal system. The federal government's, and the executive's, constitutional authority cannot be shared, nor may it be directed -- the NYPD is preempted from regulating in this field.

The last test stipulates that a local regulation is preempted if it "conflicts in any manner with any federal laws or treaties" or for that matter "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *De Canas* at 363.

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[23] *See, e.g.,* Exec. Order 11652, 40 C.F.R. § 11 (1972) (Executive order by President Nixon regarding the Classification of National Security Information and Material detailing the statutory authority and policy considerations behind classification of information regarding the U.S.'s nuclear program).

[24] Frank J. Smist, Jr., *Congress Oversees the United States Intelligence Community, Second Edition, 1947-1994* (Knoxville: University of Tennessee Press, 1994), pp. 4-5.

The first sentence of Executive Order 13526 reads: "[t]his order prescribes a uniform system for classifying, safeguarding, and declassifying national security information, including information relating to defense against transnational terrorism." Records retained indefinitely by the NYPD, gathered themselves or obtained in cooperation with federal law enforcement through High Intensity Drug Trafficking Area program (HIDTA), Regional Information Sharing System centers (RISS), Joint Terrorism Task Force (JTTF) and other programs, may incorporate information that would be disclosable under this Order but could not be disclosed due to the NYPD's haphazard data storage practices. The inconsistency and lack of uniformity by the NYPD may frustrate the express purpose of Executive Order 13526.

C. NYPD's Use of the Glomar Response Raises Equal Protection Concerns.

To the knowledge of *amici*, NYPD has invoked the *Glomar* doctrine three times. It was raised first in the two cases consolidated in this appeal, then soon after in a case involving surveillance of Black Lives Matter protesters. Petition, *Millions March NYC v New York City Police Dep't*, Index No. 100690/17 (Sup. Ct. N.Y. County May 23, 2017). NYPD has only used this doctrine in response to attempts by community members to obtain information about police surveillance of communities of color. Because *Glomar* has, to date, only been invoked in response to requests from requestors who are members of "discrete and insular

minorities"—i.e. African-Americans and/or Muslims – and because the documents that are requested relate to whether NYPD has engaged in tactics that violated the constitutional rights of members of "discrete and insular minorities", *amici* urge this Court to consider whether the invocation of the Glomar doctrine violates the Equal Protection clause of the U.S. Constitution and the New York Constitution. *U.S. v Carolene Products Co*, 304 US 144, 152 (1938).

Facially neutral policies that are applied in an intentionally discriminatory manner violate the Equal Protection Clause of the U.S. Constitution and its corollary in the New York Constitution[25]. *See Yick Wo v Hopkins*, 118 US 356 (1886) (holding that, where Chinese-owned businesses were denied permits to operate laundries in wooden structures when laundries with non-Chinese-ownership were not denied such permits, the authorities violated the Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution) ("whatever may have been the intent of the ordinances as adopted, they are applied by the public authorities charged with their administration, and thus representing the State itself, with a mind so unequal and oppressive as to amount to a practical denial by the State of that equal protection of the laws which is secured to the petitioners, as to all other persons, by the broad and benign provisions of the Fourteenth Amendment to the Constitution of the United States"); *See also People*

[25] N.Y. Const. Art. XI

v. New York City Transit Auth., 59 N.Y.2d 343 (1983) (finding that a cause of action existed where the state's facially-neutral employment policy gave weight to seniority and so disparately impacted the promotional prospects of female transit authority workers as applied.).

A plaintiff alleging that a facially neutral policy or statute violates the Equal Protection Clause generally must "allege the existence of a similarly situated group that was treated differently" *Brown v City of Oneonta*, 221 F.3d 329, 337 (2d Cir. 2000) ("For example, if a plaintiff seeks to prove selective prosecution on the basis of his race, he 'must show that similarly situated individuals of a different race were not prosecuted.'"). Plaintiffs also must show discriminatory intent. *Chavez v Illinois State Police*, 251 F.3d 612, 635-36 (7th Cir 2001) ("To show a violation of the Equal Protection Clause, plaintiffs must prove that the defendants' actions had a discriminatory effect and were motivated by a discriminatory purpose."). Intent may be established by a clear pattern – such as that in *Yick Wo* – or by looking at the "historical background of the [allegedly racially discriminatory] decision." *Village of Arlington Heights v Metropolitan Hous. Dev. Corp*, 429 US 252, 267 (1977) ("Departures from the normal procedural sequence also might afford evidence that improper purposes are playing a role. Substantive departures too may be relevant, particularly if the factors usually considered important by the decision-maker strongly favor a decision contrary to the one reached."); *See also Hayden v*

Paterson, 594 F.3d 150, 163 (2d Cir. 2010) ("while a plaintiff must prove that there was a discriminatory purpose behind the course of action, a plaintiff need not prove that the 'challenged action rested solely on racially discriminatory purposes'" (quoting *Village of Arlington Heights,* 429 US at 264–65)]).

Here, the Petitioners have not pleaded a violation of the Equal Protection Clause and therefore have not alleged facts that would enable the Court to fully analyze whether a similarly situated group has been treated differently and whether discriminatory intent exists. However, the fact that the *Glomar* doctrine has only been invoked with respect to requests by people of color for information about surveillance of communities of color is highly suggestive of both discriminatory effect and discriminatory purpose. *See Village of Arlington Heights*, 429 US at 267. In particular, the fact that NYPD has departed from previous procedures and created a new doctrine and procedure to respond to requests from Muslim-Americans and African-Americans about surveillance of political and religious activity is evidence of discriminatory intent. *Id*.

It also bears noting that the petitioners in this case were seeking information about a program that is the subject of ongoing litigation, in which the Third Circuit Court of Appeals declined to dismiss claims brought under the U.S. Constitution's Equal Protection Clause. *Hassan v City of New York*, 804 F.3d 277 (3d Cir. 2015) (denying motion to dismiss plaintiffs' claim that NYPD program violated the

Equal Protection Clause when the program involved infiltrating and monitoring Muslim entities and individuals in New Jersey solely because they were Muslim or believed to be Muslim rather than based on evidence of wrongdoing). It is thus quite plausible that NYPD's invocation of the *Glomar* doctrine part of a broader program surveilling communities of color.

Nor is this the first time that NYPD's tactics have disproportionately impacted communities of color. *See, e.g. Davis v City of New York*, 902 F. Supp.2d 405 (S.D.N.Y. 2013) (denying City's motion to dismiss plaintiffs' Equal Protection claims where NYPD employed stop practices and trespass enforcement practices in NYCHA buildings, dedicated greater law enforcement attention to residences with greater concentrations of African Americans, and allowed officers to stop NYCHA residents and guests without reasonable suspicion and to arrest NYCHA residents and lawful guests for criminal trespass without probable cause); *Ligon v City of New York*, 925 F. Supp.2d 478 (S.D.N.Y. 2013) (issuing a preliminary injunction where the NYPD Trespass Affidavit Program allowed officers to make stops outside private residential TAP-designated buildings in the Bronx without reasonable suspicion and where the operative complaint alleged that the residents of buildings where TAP was in effect were disproportionately black and Latino); Complaint, *Raza v City of New York*, No. 13-cv-3448 (E.D.N.Y. July 18, 2013) (alleging that NYPD conducted surveillance and investigation against Muslim

individuals, organizations, and mosques without suspicion pursuant to its Muslim surveillance program); *Floyd v City of New York*, 959 F. Supp. 2d 540 (S.D.N.Y. 2013) (finding that NYPD stop-and-frisk policy violated plaintiffs' Fourteenth Amendment Equal Protection rights); Amended Class Action Complaint, *Stinson v City of New York*, No. 10-cv-04228 (S.D.N.Y. Aug 31, 2010) (alleging that NYPD officers had an unlawful quota for arrests and summons and that that policy had a disproportionate effect in neighborhoods with a high proportion of minority residents); Complaint, *Bandele v City of New York*, No. 07-CV-3339 (S.D.N.Y. Apr 26 2007) (complaint alleged NYPD officers arrested three members of the Malcolm X Grassroots Movement's CopWatch program and falsely charged them with assault, resisting arrest, and obstruction of governmental administration).

Amici urge this Court to take notice of the fact that NYPD has thus far only invoked the *Glomar* doctrine in response to requests from racial and religious minorities. *Amici* fear that, should NYPD be given the authority to invoke the *Glomar* doctrine, the effects of this would be disproportionate use of the doctrine in response to requests from racial and religious minorities. Furthermore, *amici* are concerned that the doctrine will be invoked – as it appears to have been in this case – to shield from public view NYPD programs that violate the Equal Protection Clauses of the New York and U.S. Constitutions.

CONCLUSION

For these reasons, the decision of the court below should be reversed.

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NEW YORK STATE COURT OF APPEALS
CERTIFICATE OF COMPLIANCE

I hereby certify pursuant to 22 NYCRR PART 500.1(j) that the foregoing brief was prepared on a computer using Microsoft Word.

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