

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK SUPERIOR COURT

Docket No. 1884CV03561

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AMERICAN CIVIL LIBERTIES UNION OF MASSACHUSETTS, INC.,  
CHILDRENS LAW CENTER OF MASSACHUSETTS, GREATER BOSTON  
LEGAL SERVICES, JUSTICE CENTER OF SOUTHEAST  
MASSACHUSETTS, MUSLIM JUSTICE LEAGUE, NATIONAL LAWYERS  
GUILD, MASSACHUSETTS CHAPTER, and POLITICAL  
ASYLUM/IMMIGRATION REPRESENTATION PROJECT,

Plaintiffs,

v.

BOSTON POLICE DEPARTMENT, WILLIAM G. GROSS, in his  
Official Capacity as the COMMISSIONER OF THE BOSTON  
POLICE DEPARTMENT, BOSTON REGIONAL INTELLIGENCE  
CENTER, and CITY OF BOSTON,

Defendants.

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Brief of Amicus Curiae National Police Association

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Date: April 23, 2019

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IDENTITY AND INTEREST OF AMICUS CURIAE

The National Police Association ("NPA") respectfully submits this amicus curiae in support of the Defendants' Answer to the Plaintiff's Complaint.

The NPA is a 501(C)3 non-profit organization, EIN 82-0647764, founded to educate supporters of law enforcement in how to help police departments accomplish their goals. The NPA is supported solely through the generous contributions of individuals and organizations.

In addition to education, the NPA uses a dynamic combination of assertive legal filings, in-depth investigations, and clear communications to advance a mission of combating the influence of anti-police activists and helping to hold them accountable. The NPA uses the law as a method to highlight abuses by antipolice elected officials, change behavior, and seek corrective action. In addition, it promotes policies that encourage public officials to work with police in the public interest, not for the benefit of powerful special interests.

Amicus considers this case to be of special significance in that the use of gang data-bases is a crucial, but often misunderstood, tool used by police

departments to combat gang related crime. In making any rulings in this case, it is respectfully submitted, that the Court would benefit from a more complete understanding of the benefits of gang databases.

### ARGUMENT

#### **I. INTRODUCTION.**

While the Complaint, on its face, requests only that the Boston Police Department provide records pursuant to a public records request, much of the Complaint is spent addressing the supposedly negative impacts of the gang database. Rather than discuss the public records request aspects of this case, which is something the City of Boston will presumably do, the NPA will discuss the benefits of gang databases in general, and why police departments, including the Boston Police Department, are legally entitled to use them and keep the identities of those listed in them confidential.

#### **II. GANG MEMBERSHIP IS A FREQUENT DRIVER OF VIOLENCE AND IS AN URGENT PUBLIC HEALTH ISSUE.**

Homicide victimization rates for gang members are at least 100 times greater than that of the general

population.<sup>1</sup> In fact, far more Americans die at the hands of gang members than in acts of terror or mass shootings.<sup>2</sup> Gang members account for a disproportionate share of crime and violence. There are around 2,000 gang-related homicides every year, or 13 percent of all homicides in the U.S.<sup>3</sup> The gang-related homicide rate alone in the United States, which is about 2 per 100,000 persons, exceeds the total homicide rate in nearly every European Union country.<sup>4</sup> And numerous studies have linked gang membership to a wide range of adverse health risk behaviors, including juvenile delinquency, substance abuse, unsafe sexual practices, gun carrying, illicit drug sales, arrest, nonfatal intentional injury, homicide, and educational, economic, and familial hardship.

Conflicts between street gangs have long been noted to fuel much of the youth violence in major

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<sup>1</sup> David C. Pyrooz, Ph.D, and Gary Sweeten, Ph.D, *Gang Membership Between Ages 5 and 17 Years in the United States*, Journal of Adolescent Health (2015).

<sup>2</sup> David Pyrooz, James Densley, *The Conversation* (July 5, 2018).

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*



cities.<sup>5</sup> Put simply, gang members, including those in Boston, are involved in far more delinquent and criminal behavior than their non-gang counterparts, and engage in a wide variety of criminal behaviors, termed "cafeteria-style" offending.<sup>6</sup> Gangs today are more violent, their activities are more widespread and pervasive, and they are more entrenched within the community.<sup>7</sup> The proliferation of gangs can bring fear and violence to every block of a city.<sup>8</sup>

In addition to suffering unacceptably high numbers of deaths and injuries, gang-besieged neighborhoods are plagued by intimidation, economic and physical decay, and withdrawal from civic engagement.<sup>9</sup> As these neighborhoods decline, the bonds that hold communities together weaken: children fear going to school; parks become unusable; shopping and taking a bus to work

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<sup>5</sup> Anthony A. Braga and David M. Kennedy, "Reducing Gang Violence in Boston" NCJ190351 (2002) (citing Block and Block 1993, Klein and Maxson 1989; Curry, Ball, and Fox 1994; Miller 1977).

<sup>6</sup> *Id.*

<sup>7</sup> Meagan Cahill and David Hayeslip, *Findings From the Evaluation of OJJDP's Gang Reduction Program, Introduction.*

<sup>8</sup> National League of Cities Institute for Youth, Education, and Families, *Preventing Gang Violence and Building Communities Where Young People Thrive: A Toolkit for Municipal Leaders*, at 1.

<sup>9</sup> *Id.*

become a dangerous venture.<sup>10</sup> Further, perceptions of crime and disorder in the city cause businesses to close or relocate outside the city, which in turn leads to lost tax revenues and jobs.<sup>11</sup>

Making matters worse, the gang population, and gang related violence, continue to increase steadily.<sup>12</sup> In 2011, the National Gang Intelligence Center ("NGIC") reported that gang membership across the United States had increased 40%, from 1 million members in 2009 to 1.4 million in 2011.<sup>13</sup> In that same report, the NGIC attributed 48 percent of violent crimes across country to gang members.<sup>14</sup> In fact, the figures maintained by law enforcement officials relating to gang membership numbers are likely much lower than those found by non-law enforcement studies. One such study found that there were more than one million juvenile gang members in the United States, more than three times the estimated number produced by National Youth Gang Survey.<sup>15</sup> According to the 2012

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<sup>10</sup> *Id.*

<sup>11</sup> *Id.* at 7.

<sup>12</sup> NAT'L GANG INTELLIGENCE CENTER, *2013 NATIONAL GANG REPORT*, 9.

<sup>13</sup> NAT'L GANG INTELLIGENCE CENTER, *2011 NATIONAL GANG THREAT ASSESSMENT*, 11.

<sup>14</sup> *Id.* at 15.

<sup>15</sup> Pyrooz and Sweeten, *supra*.

National Youth Gang Survey, the most recent estimate of more than 30,000 gangs represents a 15 percent increase from 2006 and is the highest annual estimate since 1996.<sup>16</sup> Twice as many juveniles reported that they are gang members than are recorded in police records.<sup>17</sup> The police are likely undercounting gang members just like they undercount crime, not overcounting.<sup>18</sup>

### **III. GANG DATABASES ARE USED THROUGHOUT THE COUNTRY TO EFFECTIVELY COMBAT GANG VIOLENCE.**

Anti-gang units have been gathering intelligence on gang activity in one form or another since the 1950s and 1960s.<sup>19</sup> Given the link between gang membership and violence, and the growing gang population, it is crucial that law enforcement is able to use every available modern technique and tool available to it. To be able to effectively allocate resources and develop programming to combat gang violence, a critical first step is to accurately

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<sup>16</sup> 2012 National Youth Gang Survey.

<sup>17</sup> Pyrooz and Densley, *supra*.

<sup>18</sup> *Id.*

<sup>19</sup> *National Youth Gang Survey Analysis*, National Youth Gang Center, Part III (2007), <http://www.iir.com/nygc/nygsa/>, (discussing intelligence gathering procedures).

estimate the magnitude and nature of a particular gang population.<sup>20</sup>

And to effectively prosecute gang-related crimes, which by their very nature are more difficult to prosecute, it is critical to understand the interconnected relationships and complex dynamics between rival gangs.<sup>21</sup> Gang Unit investigators need to familiarize themselves with the dynamics of gangs, including, but not limited to their membership size, territory, local hangouts, rivalries, and types of crimes committed, as well as the identification and personal and criminal backgrounds of individual members.<sup>22</sup>

Because the character of criminal and disorderly youth gangs and groups varies widely both within and across cities, one of the key tools used available to law enforcement to understand, track, and prosecute gang membership and violence are gang databases.<sup>23</sup> Such databases are not only used in Boston, but

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<sup>20</sup> Pyrooz and Sweeten, *supra*.

<sup>21</sup> U.S. Dept. of Justice, *Gang Prosecution Manual*, 1 (2009).

<sup>22</sup> *Id.* at 5.

<sup>23</sup> Braga and Kennedy, *supra* (noting that character of criminal and disorderly youth gangs and groups varies widely both within and across cities).

throughout the United States, and have been commonplace in large cities since the early 2000's.<sup>24</sup>

The data collected by police departments helps solve gang-related crimes and identify gang members who might benefit from social services and might even leave gang life.<sup>25</sup> And including information from previous attacks in a database provides the police with evidence about how and when each specific gang likes to retaliate.<sup>26</sup> Failure to gather and disseminate intelligence about the city's specific gang issues can result in misunderstanding and mishandling of gang situations.<sup>27</sup> Police departments can also station officers near areas the database flags as "hot," deterring gang members from congregating there and committing violence and

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<sup>24</sup> Pyrooz and Densley, *supra*.

<sup>25</sup> Pyrooz and Densley, *supra*; U.S. Dept. of Justice, *Gang Prosecution Manual*, 14 (2009) (noting that databases are invaluable tools that can provide instant access to up-to-date information on gang membership, expedite investigations, and lead to successful prosecution of gang cases).

<sup>26</sup> Megan Behrman, *WHEN GANGS GO VIRAL: USING SOCIAL MEDIA AND SURVEILLANCE CAMERAS TO ENHANCE GANG DATABASES*, Harvard Journal of Law & Technology, Volume 29, Number 1 Fall 2015, at 324.

<sup>27</sup> National League of Cities Institute for Youth, Education, and Families, *Preventing Gang Violence and Building Communities Where Young People Thrive: A Toolkit for Municipal Leaders*, at 20.

thwarting future gang recruitment efforts.<sup>28</sup> Further, databases allow police departments to quickly verify if a particular suspect is involved in a gang that is not local to where the criminal activity occurred.<sup>29</sup>

Gang tracking systems can be used to: (1) identify offenders and suspects; (2) gauge the nature and extent of local gang problems; (3) evaluate the effectiveness of police programs; (4) examine regional and national trends; and (5) make policy decisions regarding resource allocation and funding at both the local and national levels.<sup>30</sup> In fact, "by using such databases, along with public surveillance cameras equipped with facial recognition technology to track gang members, the police can investigate and curb

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<sup>28</sup> John Buntin, *Social Media Transforms the Way Chicago Fights Gang Violence*, GOVERNING, 336-337 (Oct. 2013) <http://www.governing.com/topics/public-justice-safety/gov-social-media-transforms-chicago-policing.html> [<http://perma.cc/43YB-3J5H>].

<sup>29</sup> Jim McKay, *Law Enforcement Database Tracks Gang Members Statewide* (June 21, 2009) (discussing how gangs in Mass. travel from city to city and how databases, such as MassGangs database are used to verify gang involvement that would not otherwise be known).

<sup>30</sup> Charles M. Katz, *Issues in the Production and Dissemination of Gang Statistics: An Ethnographic Study of a Large Midwestern Police Gang Unit*, 49 CRIME & DELINQ. 485, 485 (2003).

gang-related violence" in an event more immediate and effective manner.<sup>31</sup> This is similar to CODIS, a computer database system that compiles suspects' DNA profiles into a database that law enforcement uses to match suspects' DNA to known or suspected perpetrators.<sup>32</sup>

The benefits of gang-databases is evident in several cities across the United States. In New York City, information from gang-databases is used to determine who might retaliate and who is likely to be targeted, so the police can defuse the situation and stop the killing.<sup>33</sup> Further, knowing criminal group

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<sup>31</sup> See Douglas A. Fretty, *Face-Recognition Surveillance: A Moment of Truth for Fourth Amendment Rights in Public Places*, 16 VA J. L. & Tech. 430, 441 (2011); Mark Hansen, *No Place to Hide*, ABA J., Aug. 1997, at 44; see also *California v. Ciraolo*, 476 U.S. 207, 209 (1986) (no reasonable expectation of privacy against police officers who used plane flown 1 thousand feet above defendant's backyard to observe illegal marijuana plants); *United States v. Pineda-Moreno*, 591 F.3d 1212, 1217 (9th Cir. 2010) (gov't continuous monitoring of suspect's car via numerous mobile tracking devices for four months did not constitute search).

<sup>32</sup> See Elizabeth E. Joh, *Policing by Numbers: Big Data and the Fourth Amendment*, 89 WASH. L. REV. 35, 50-53 (2014); Molly Bruder, *Say Cheese! Examining the Constitutionality of Photostops*, 57 AM. U. L. REV. 1693, 1721-25 (2008).

<sup>33</sup> Dermot Shea, Chief of Detectives NYC, *Criminal Group Database is vital tool to controlling gang violence* (July 12, 2018),

membership helped guide the New York Police Department's efforts through programs like Ceasefire to wean young men away from gang life, by offering genuine alternatives, before it is too late.<sup>34</sup>

In Boston and Cincinnati, a strategy to reduce violence called "Focused Deterrence" relied on such data to audit the gang landscape of cities, and target offenders with deterrence messaging.<sup>35</sup>

In Boston, using information gathered about the local gang landscape, "law enforcement officials, probation officers, and Department of Youth Services (DYS) caseworkers, flooded the specific gang's turf to openly show their lingering presence within the gang's neighborhood."<sup>36</sup> Boston police officers currently use their gang-database "to prevent ongoing conflicts among street gangs through direct interaction within

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<https://www.nydailynews.com/opinion/ny-oped-criminal-group-database-20180612-story.html>

<sup>34</sup> *Id.*

<sup>35</sup> Pyrooz and Densley, *supra*.

<sup>36</sup> Matthew J. Cannata, *Achieving Peace in the Streets: How Legislative Efforts Fail in Combating Gang Violence in Comparison to Successful Local Community-Based Initiatives*, 35 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 243, 248-51 (2009) (describing the success of Boston's Ten Point Coalition and its Ceasefire program, a partnership task force which included members from law enforcement, probation officers, Department of Youth Services, the Boston Police Department, and prosecutors).



individuals and groups.”<sup>37</sup> Officers “not only respond to but anticipate retaliatory violence between grounds, and make every effort to deter further violence.”<sup>38</sup>

Similarly, in Cincinnati, police and researchers at the University of Cincinnati’s Institute of Crime Science created a gang database filled with information gathered from monitoring suspects’ social media accounts.<sup>39</sup> Because of this database, police were not only able to obtain evidence that highlighted various gang member’s participation in crimes, but also to link suspects together.<sup>40</sup> As a result, in 2008 Cincinnati Police arrested 71 people and dismantled the North Side Taliban gang.<sup>41</sup>

Without access to gang-databases, these successes in combating and reducing gang-violence would not have been possible.

**IV. FOR A GANG DATABASE TO BE EFFECTIVE IT MUST BE KEPT CONFIDENTIAL.**

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<sup>37</sup> Boston Police Department Rules and Procedures, Rule 335 - Gang Assessment Database, p. 1.

<sup>38</sup> *Id.*

<sup>39</sup> Behrman, *supra*.

<sup>40</sup> Behrman, *supra*. See Gordan Graham, *Police Use Social Media to Catch Criminals*, FOX19 (Sept. 4, 2012, 5:44 PM), <http://www.fox19.com/story/1954817/cincinnati-police-using-social-media-to-catch-criminals>

<sup>41</sup> *Id.*

One of the primary attacks on gang-databases is that they afford those who are included with no notification that they are in the database and no ability for them to seek removal of their name. Additionally, concerns regarding the overinclusion of minorities in the databases are often raised.

While due process and discrimination concerns always need to be taken into consideration, those concerns need to be weighed against the severe consequences of notifying those included in the gang database of their inclusion. As a starting point, it should be remembered that while the use of this technology depends on human judgment, all of the information contained in the databases stem from either public documents or information obtained legally and constitutionally by the police.<sup>42</sup> Inclusion in a database is not considered proof of any crime or grounds for any arrest or other punitive action.<sup>43</sup> Such databases thus represent merely an organizational method of culling documents and

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<sup>42</sup> Behrman, *supra* at 332.

<sup>43</sup> Shea, *supra*.

information that individuals themselves make public.<sup>44</sup>  
This is data that the police have anyway.<sup>45</sup>

Moreover, research shows that even innocent people who were friends or even friends of friends of homicide victims from gang violence were one hundred times more likely to be involved in a future homicide than people who were not.<sup>46</sup> Thus, even if an innocent person is swept into the database and classified as a suspected gang member based on his or her connection to a gang member, that person still possesses a statistically heightened risk of being involved in a homicide, whether as the victim or the perpetrator.<sup>47</sup>

Further, the overrepresentation of people of color in gang databases is not solely an artifact of how the police collect information.<sup>48</sup> Studies show that when people self-report that they are gang members, blacks and Latinxs are twice as likely as

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<sup>44</sup> Behrman, *supra* at 332.

<sup>45</sup> McKay, *supra* (quoting Professor Robert Bloom: "Police operate based on uncertainties. Probable cause or reasonable suspicion is not something precise," Bloom said, "so to the extent they're providing information that may be useful, in terms of law enforcement, I think it's useful information.")

<sup>46</sup> Behrman, *supra* at 334.

<sup>47</sup> Behrman, *supra* at 334; Buntin, *supra*.

<sup>48</sup> Pyrooz and Densley, *supra*.

whites to be gang members in adolescence and three to four times more likely in adulthood.<sup>49</sup> Since gang databases, like the ones used in New York City and Boston, are overwhelmingly populated with adults, the research indicates that racial and ethnic disparities should be expected.<sup>50</sup> There is also high, but not perfect, correspondence between self-reports of gang-membership and the names found in gang-databases.<sup>51</sup>

Weighed against these factors is the strong need of law enforcement to gather intelligence to investigate crimes in a discrete and controlled manner. "It would often defeat the idea of intelligence gathering to notify the target that he or she has been identified as a criminal threat."<sup>52</sup> Much like there is no automatic right to know you have been named as a gang member by a confidential informant, there is no right to know that the police have identified you as a gang member. In Boston, officers can only access and use the gang database for a

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<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> James B. Jacobs, *Gang Database Context and Questions*, 2009 American Society of Criminology, Criminology & Public Policy, Volume 8, Issue 4, at 707.

"legitimate law enforcement purpose, which may include an ongoing investigation or in support of a prosecution."<sup>53</sup> The Plaintiffs, in their public records request, seek "each entry in the databases."<sup>54</sup> To disclose such information would force the Boston Police to reveal confidential sources of information and would not be in the public interest.<sup>55</sup>

**V. THE PLAINTIFFS' COMPLAINT CONTAINS NO ALLEGATION OF HARM FLOWING FROM INCLUSION IN A GANG DATABASE.**

The Plaintiffs' Complaint, while technically only seeking documents, lays out an argument as to why the Boston Police should not be entitled to use gang-databases. In making this argument, however, the Complaint fails to indicate that any individuals supposedly listed in the gang database actually suffered any harm. The Complaint contains a laundry-

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<sup>53</sup> Boston Police Department Rule 335, at 3.

<sup>54</sup> The NPA recognizes that the Plaintiffs exclude the names and other personal information from their request. Despite this exclusion, much of the Plaintiffs' complaint is spent arguing why individuals need to know whether they are included in the Gang Database.

<sup>55</sup> See M.G.L. c. 4 § 7 (f); see also *Bougas v. Chief of Police of Lexington*, 371 Mass. 59, 62 (1976) (police reports, which constituted "basic working documents of the police force's investigatory programs" and contained information from confidential sources, leads, and tips, not subject to disclosure).

list of the supposedly dire consequences that individuals may suffer if included in the gang-database, but fails to list even a single instance of any individuals actually suffering any of those negative consequences. At most the Complaint only mentions that Green Card applications may have been jeopardized. And it is unclear whether the individuals mentioned in the Plaintiffs' complaint were, in fact, involved with gangs, and whether their detentions were related to solely being listed in a database, or other information/evidence of gang involvement. Without any allegation that a specific individual was harmed because of the inclusion of their name in a gang-database, the Plaintiffs' fears regarding gang-databases are entirely unsupported and based on pure speculation.

**VI. POLICE OFFICERS ARE ENTITLED TO CONDUCT POLICE INVESTIGATIONS IN ANY MANNER THEY CHOOSE AS LONG AS THEY ACT IN GOOD FAITH.**

The Complaint calls into question the process by which the Boston Police, and its Commissioner, William G. Gross, include names in its gang-database, in particular the point system used. The insinuation is that mistakes are likely made and that there are no ways for individuals to learn of that mistake and seek

a correction. This argument ignores the reality of police work, namely that mistakes are not only inevitable, but also acceptable, as long as the officer making the mistake acts in good faith.<sup>56</sup> In fact, this is the basis for providing individual officers with qualified immunity.<sup>57</sup> If an officer's actions are reasonable based on the context within which they are taken, i.e. the officer acted in "good faith," then the officer is entitled to qualified immunity.

Applying this standard to the use of gang-databases, as long as individual officers add names to the database in "good faith" and based on reasonable criteria, there is no reason to find that such inclusion violates the law.<sup>58</sup>

#### CONCLUSION

Given the importance of gang data-bases in fighting against gang violence, this case is of critical importance to law enforcement, their employers, and the citizens they protect. Police Departments need to be able to discretely collect and

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<sup>56</sup> See *Saucier v. Katz*, 533 U.S. 194, 205 (2001).

<sup>57</sup> *Id.*

<sup>58</sup> See *id.*

aggregate data on suspected gang members to be able to effectively deter and prosecute gang related crime. As long as the police departments collecting and using this information do so in "good faith" the legality of using such data-bases should not be in question.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify, under the penalties of perjury,  
that on April 23, 2019, I have made service of this  
Brief upon the attorney of record for each party, or  
if the party has no attorney then I made service  
directly to the self-represented party

/s/ [Bernard D. Posner]

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