**SUPREME COURT OF THE STATE OF NEW YORK**
**COUNTY OF ERIE**

BUFFALO POLICE BENEVOLENT ASSOCIATION, INC.; and BUFFALO PROFESSIONAL FIREFIGHTERS ASSOCIATION INC., LOCAL 282, IAFF, ALF-CIO,

Petitioners/Plaintiffs,

v.

BYRON W. BROWN, in his official capacity as Mayor of the City of Buffalo; the CITY OF BUFFALO; BYRON C. LOCKWOOD, in his official capacity as Commissioner of the Buffalo Police Department; the BUFFALO POLICE DEPARTMENT; WILLIAM RENALDO, in his official capacity as Commissioner of the Buffalo Fire Department; and the BUFFALO FIRE DEPARTMENT,

Respondents/Defendants.

INDEX NO: 807664/2020

**[PROPOSED] BRIEF OF AMICI CURIAE NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC., LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW, LATINOJUSTICE PRLDEF, LAW FOR BLACK LIVES, AND NYU SCHOOL OF LAW CENTER ON RACE, INEQUALITY, AND THE LAW IN OPPOSITION TO PETITIONERS'/PLAINTIFFS' APPLICATION FOR PRELIMINARY INJUNCTION**

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## INTRODUCTION

*Amici curiae* – NAACP Legal Defense and Educational Fund, Inc., Lawyers' Committee for Civil Rights Under Law, LatinoJustice PRLDEF, Law for Black Lives, and NYU School of Law Center on Race, Inequality, and the Law – are nationwide legal advocacy organizations committed to eradicating racial discrimination in the criminal justice system. They are deeply familiar with the impact of police abuse and violence on communities of color through their work and from the communities they serve. In this brief, *amici* address a limited, but critically important, issue presented by the pending request for a preliminary injunction: the public's interest in racial justice, transparency, and accountability in law enforcement.

In the wake of the killings of George Floyd and Breonna Taylor, tens of millions took to the streets to rise up against police abuse and violence, particularly against communities of color. A central demand of this movement was transformative change to America's flawed systems of police accountability. Law enforcement agencies must be subject to robust and reliable internal investigations to hold police officers accountable for misconduct, especially misconduct that violates the rights of those most vulnerable to police abuse. But these oversight mechanisms are often deeply flawed and riddled with racial bias. Officers regularly discourage members of the public from reporting abuse and ignore those who do. When police departments do conduct investigations, they are often cursory and routinely absolve officers who have committed flagrant misconduct. And, in the event officers are found to have done something wrong, they often receive trivial punishments totally out-of-step with the severity of their abuses. As a result, police officers' abuses of power remain unchecked, leaving the distinct impression among community members – and sending a signal to officers – that police can violate the law with impunity. Communities of color, disproportionately targeted for abusive policing, bear the brunt of these failures in accountability.

The New York Legislature's repeal of Civil Rights Law Section 50-a – which was among the most secretive laws of its kind in the country – directly responded to public demands for racial justice, transparency, and accountability in law enforcement. The repeal reflected a commonsense understanding that sunlight is the best disinfectant: public disclosure of police misconduct, and how the processes for investigating such misconduct operate in practice, provides citizens and legislators with access to necessary information about flaws in existing systems of police accountability, deters future misconduct, and makes clear to the public that police misconduct should not be tolerated. While police unions such as plaintiffs/petitioners in this case (hereafter, "Petitioners") urged the retention of Section 50-a, the New York Legislature, expressing the will of New York's residents, emphatically decided otherwise after robust public debate. By repealing Section 50-a, the Legislature has declared that the public interest in New York is best served by transparency and not secrecy.

Having failed before the Legislature, Petitioners now ask this Court to eviscerate New York's reform and prevent the disclosure of police misconduct records related to "unsubstantiated and pending" allegations – i.e., cases in which police investigators have deemed allegations to be "unsubstantiated, unfounded, not sustained," or which have "resulted in a finding of exoneration, or that otherwise resulted in a finding of 'not guilty.'" *See* Pet'rs' Mem. Law (Dkt. No. 7) at 9. But much of the animating force behind the repeal of Section 50-a was a healthy skepticism – indeed, an empirically well-founded distrust – of internal police investigations and their conclusions. The mere fact that police investigators have deemed an allegation "unsubstantiated" or have yet to reach a final judgment tells the public little to nothing about the credibility of the charges, the evidence in support of those charges, or the diligence of the investigators. And, without access to records relating to misconduct claims deemed

"unsubstantiated" or lingering as "pending," the public has no way of knowing whether serious misconduct is going unpunished – a necessary first step toward changing how police officers and departments operate in communities of color.

This misconduct has been hidden from public scrutiny for more than 40 years, since the enactment of Section 50-a in 1976, and every additional day of Section 50-a's secrecy is in derogation of the expressed will of the New York Legislature and the people they represent. New Yorkers must no longer be left to search in vain for the circumstances surrounding another episode of police misconduct – such as the more than 60 videotaped incidents of excessive force by New York City police during the first 10 days of protests after the killing of George Floyd,[1] or the killing of Daniel Prude from asphyxiation by Rochester police officers, who were suspended only after public protests following the release of raw police videos five months after Prude's death.[2] And Buffalonians should not be kept in the dark about the long disciplinary records of the officers who commit some of Buffalo's most notorious acts of police malfeasance. For example, the city's citizens only recently learned from police disciplinary records released pursuant to the repeal of Section 50-a about the long disciplinary history of officer Karl Schultz, whose 2012 shooting of a young man, Wilson Morales, resulted in a $4.5 million settlement.[3] Buffalonians should have had access to Karl Schultz's disciplinary record long ago, and they should not be deprived of access to officers' disciplinary records in future.

It is unfortunate, but predictable, that Petitioners – in continuation of police unions' historical resistance to curbing systemic discrimination within their ranks – have launched this

[1] *See* Larry Buchanan, Quoctrung Bui & Jugal K. Patel, *Black Lives Matter May Be the Largest Movement in U.S. History*, N.Y. Times, (July 3, 2020), https://www.nytimes.com/interactive/2020/07/03/us/george-floyd-protests-crowd-size.html.
[2] *See* Troy Closson et al, *What to Know About Daniel Prude's Death*, the N.Y. Times (Sep. 4, 2020), https://www.nytimes.com/2020/09/04/nyregion/rochester-daniel-prude.html.
[3] Ali Ingersoll, *Buffalo Police Release Disciplinary Records*, InvestigativePost (July 20, 2020), https://www.investigativepost.org/2020/07/20/buffalo-police-release-disciplinary-records/.

last-ditch effort to avoid accountability and circumvent the public's will as expressed by the New York Legislature. But in considering Petitioners' request for a preliminary injunction, the Court must "weigh the interests of the general public as well as the interests of the parties to the litigation." *Destiny USA Holdings, LLC v. Citigroup Global Markets Realty Corp.*, 69 A.D.3d 212, 223 (4th Dep't 2009) (internal quotation marks omitted) ("*Destiny USA*"). The "enormous public interests involved" in this case, *id.* (internal quotation marks omitted), require that the Court deny Petitioners' request.

## ARGUMENT

### I. PUBLIC DISCLOSURE OF POLICE MISCONDUCT AND DISCIPLINE RECORDS IS ESSENTIAL FOR TRANSPARENCY AND POLICE ACCOUNTABILITY.

#### A. Police Officers Must Be Held Accountable To The Public – Especially To Communities Of Color, Who Are Most Directly Impacted By Police Misconduct And Violence.

Police violence is a tragic and unacceptable feature of American life, and communities of color suffer disproportionately from that violence. For young men, police violence is a leading cause of death – and the violence is not color-blind.[4] About 1 in every 1,000 Black men can expect to be killed by police – a rate 2.5 times higher than for white men.[5] Black people killed by police are more than twice as likely to be unarmed as white people.[6] And, even when the results are not fatal, police use force with Black people 3.6 times more often than with white people.[7]

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[4] *See* Frank Edwards, Hedwig Lee & Michael Esposito, *Risk of Being Killed by Police Use of Force in the United States by Age, Race-Ethnicity, and Sex*, 116 Proc. of the Nat'l Acad. of Sci. 16793, 16793–94 (Aug. 2019), https://www.pnas.org/content/pnas/116/34/16793.full.pdf.

[5] *Id.*

[6] Justin Nix, Bradley A. Campbell, Edward H. Byers & Geoffrey P. Alpert, *A Bird's Eye View of Civilians Killed by Police in 2015*, 16 Criminology & Pub. Pol'y 309, 309 (Feb. 2017).

[7] Center for Policing Equity, *The Science of Justice: Race, Arrests, and Police Use of Force*, at 15 (July 2016), https://policingequity.org/images/pdfs-doc/CPE_SoJ_Race-Arrests-UoF_2016-07-08-1130.pdf.

Police also enforce laws disproportionately against communities of color. In Erie County, between 2007 and 2011, Black people accounted for 43% of arrests, despite comprising just 14% of the population.[8] From 2013 to 2015, 52% of the people arrested in Buffalo were Black, even though Black people comprised just 38% of the city's population.[9] And another study found that, in Buffalo between 2006 and 2015, Black people were greater than seven times more likely to be arrested for misdemeanor marijuana possession than white people, and Latinx people were twice as likely to be arrested than white people.[10] In conducting arrests, Buffalo police routinely use more force against people of color. For example, one report found that approximately 86% of the victims of police misconduct in western New York since 2006 have been people of color.[11]

Behind the empirical data lie the stories of families and communities whose lives have been forever changed by police violence. In the past three years, Buffalo police have killed four young men of color.[12] And this year, the City of Buffalo paid $4.5 million to settle a lawsuit filed by a young man, Wilson Morales, who was paralyzed from the waist down after being shot

[8] Partnership for the Public Good, *Collaboration, Communication and Community-Building: A New Model of Policing in 21st Century Buffalo*, https://ppgbuffalo.org/files/documents/criminal-justice/policing/criminaljustice-_collaboration__communucation_and_community-building.pdf.
[9] Anjana Malhotra, *Unchecked Authority without Accountability in Buffalo, New York: The Buffalo Police Department's Widespread Pattern and Practice of Unconstitutional Discriminatory Policing, and the Human, Social and Economic Costs*, SUNY Buffalo Law School (Aug. 30, 2017), http://ipost.wpengine.netdna-cdn.com/wp-content/uploads/2017/09/Final-executive-summary-for-release.pdf.
[10] *Id.*
[11] Charlie Specht, *15 Cases of Alleged Police Brutality, Excessive Force in WNY Since 2006*, WKBW Buffalo (June 2, 2020), https://www.wkbw.com/news/i-team/15-cases-of-alleged-police-brutality-excessive-force-in-wny-since-2006.
[12] Geoff Kelly, *Buffalo's Police Brutality Didn't Start With Martin Gugino*, The Nation (June 16, 2020), https://www.thenation.com/article/society/buffalo-police-brutality-gugino/; Jim Heaney, *The Terrifying History of Bad Cops in Buffalo*, Daily Beast (June 6, 2020), https://www.thedailybeast.com/the-terrifying-history-of-bad-cops-in-buffalo?ref=home.

by Buffalo police in 2012.[13] Instead of disciplining the officers involved in Mr. Morales's shooting, the Buffalo Police Department promoted them – including one to captain.[14]

Sadly, however, Buffalo is not an aberration; it is representative of a national problem of disproportionate law enforcement actions against people of color. In San Francisco, for example, Black people accounted for 26% of all police stops in the second half of 2018 even though they represented just 5% of the city's population.[15] In California generally, police are more likely to search Black, Latinx, and Native American people, and they are ***less*** likely to find drugs or weapons compared to searches of white people.[16] In Washington, D.C., while there is little difference in rates of drug use, there are significant disparities between white and Black people in drug arrests: almost 9 out of 10 arrests for drug possession are of Black people.[17] In Buffalo and across the country, communities of color are intentionally targeted and disproportionately charged with violations of law.[18]

These starkly disproportionate statistics are the result of racially biased police enforcement tactics. For example, in June 2012, the Buffalo Police Department began engaging in "Strike Force Unit" vehicle checkpoints, which were placed "primarily in minority neighborhoods."[19] The results were predictable: a flood of traffic and vehicle-related tickets in

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[13] Kelly, *supra* n. 12.
[14] *Id.*
[15] Darwin Bond Graham, *Black People in California Are Stopped Far More Often by Police, Major Study Proves*, The Guardian (Jan. 3, 2020), https://www.theguardian.com/us-news/2020/jan/02/california-police-black-stops-force.
[16] *Id.*
[17] Washington Lawyers' Committee for Civil Rights and Urban Affairs, *Racial Disparities in Arrests in the District of Columbia, 2009-2011*, at 2-3 (July 2013), https://www.washlaw.org/pdf/wlc_report_racial_disparities.pdf.
[18] *See, e.g.*, U.S. Dep't of Justice, Investigation of the Ferguson Police Department, at 62 (Mar. 4, 2015), https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report_1.pdf; Jamie Fellner, *Race, Drugs, and Law Enforcement in the United States*, 20 Stan. L. & Pol'y Rev. 257 (2009); Radley Balko, *There's Overwhelming Evidence that the Criminal Justice System is Racist. Here's the Proof*, Washington Post (June 10, 2020), https://www.washingtonpost.com/graphics/2020/opinions/systemic-racism-police-evidence-criminal-justice-system/.
[19] Anjana Malhotra, *Unchecked Authority without Accountability in Buffalo, New York: The Buffalo Police Department's Widespread Pattern and Practice of Unconstitutional Discriminatory Policing, and the Human,*

neighborhoods of color without any meaningful reduction in real crime.[20] The same study found that the Buffalo Police Department Housing Unit had also engaged in an aggressive pattern of suspicionless "trespass sweeps," warrant checks, and vehicle stops in "predominantly African American and minority public housing projects" in Buffalo.[21]

Police misconduct and violence persist, in substantial part, because officers who violate the public trust often face little or no accountability for their actions. Analysis of police misconduct complaints in Buffalo released after the repeal of Section 50-a revealed that only 5 out of 106 (4.7%) complaints for excessive force from 2019 and 2020 were "sustained," i.e., proven by the Buffalo Police Department's Internal Affairs Division.[22] And, even in the rare case where charges are "sustained" and/or police officers are prosecuted, grand juries may be unwilling to indict – as happened in the cases of Buffalo police officer Mark Andrzejak; and of officers Karl Schultz and Jason Whitenight, whose shooting of Wilson Morales ultimately resulted in a multi-million dollar settlement funded by taxpayer money.[23]

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*Social and Economic Costs*, SUNY Buffalo Law School (Aug. 30, 2017), http://ipost.wpengine.netdna-cdn.com/wp-content/uploads/2017/09/Final-executive-summary-for-release.pdf.

[20] *Id.*

[21] *Id.* To be clear, such racially biased law enforcement tactics are not unique to Buffalo. The New York City Police Department ("NYPD"), for example, engaged in widespread racial profiling against Black and Latinx residents for decades. *See Floyd v. City of New York*, 959 F. Supp. 2d 540, 663 (S.D.N.Y. 2013) (finding that "the NYPD implements its policies regarding stop and frisk in a manner that intentionally discriminates based on race," and that "the use of race is sufficiently integral to the policy of targeting 'the right people' that the policy depends on express racial classifications"); *see also Davis v. City of New York*, Case No. 10-cv-0699-AT (S.D.N.Y.); *Ligon v. City of New* York, Case No. 12-cv-2274-AT (S.D.N.Y.).

[22] Charlie Specht, *I-Team: Buffalo Police's Internal Affairs System Debated*, WKBW Buffalo (July 22, 2020), https://www.wkbw.com/news/i-team/i-team-buffalo-polices-internal-affairs-system-debated.

[23] Matt Gryta, *3 Officers Cleared of Wrongdoing in On-Duty Shootings*, The Buffalo News (Nov. 17, 2012), https://buffalonews.com/news/3-officers-cleared-of-wrongdoing-in-on-duty-shootings/article_b655563c-a989-5cfc-adbc-42608cb20784.html.

Outside of Buffalo, criminal prosecution of police officers is likewise rare. Nationwide, police fatally shoot on average about 1,000 people every year.[24] Of the roughly 15,000 fatal police shootings since 2005, just 110 (0.73%) ended with the responsible law enforcement officers being charged with murder or manslaughter and only 42 (0.28%) ended in convictions.[25] With respect to civil liability, only a fraction of the people who experience police misconduct – a mere 1.1%, according to the United States Department of Justice ("DOJ") – undertake the arduous process of suing the police.[26] Those who do file suit encounter another formidable obstacle: the doctrine of qualified immunity, which "operates like absolute immunity" and "protect[s] law enforcement officers from having to face any consequences for wrongdoing," as Judge Carlton Reeves forcefully explained in a recent and widely publicized opinion. *See Jamison v. McClendon*, No. 3:16-CV-595-CWR-LRA, 2020 WL 4497723, at *2 (S.D. Miss. Aug. 4, 2020).

And, even when civil liability is imposed, local governments generally indemnify individual officers against awards for money damages, resulting in 99.8% of the dollars recovered by plaintiffs in civil rights lawsuits against law enforcement to be paid by the public, and not the officers who actually violated the law.[27] Since 2015, Buffalo taxpayers have paid $11.9 million in settlements for lawsuits involving police misconduct, including $5.3 million since 2019.[28]

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[24] Amelia Thomson-DeVeaux, Nathaniel Rakich & Likhitha Butchireddygari, *Why It's So Rare For Police Officers To Face Legal Consequences*, FiveThirtyEight (June 4, 2020), https://fivethirtyeight.com/features/why-its-still-so-rare-for-police-officers-to-face-legal-consequences-for-misconduct/.
[25] *Id.*
[26] Phil Gambini, *Police Misconduct Costing Buffalo Millions*, InvestigativePost (July 20, 2020), https://www.investigativepost.org/2020/07/20/police-misconduct-costing-buffalo-millions/.
[27] Joanna C. Schwartz, *Police Indemnification*, 89 N.Y.U. L. Rev. 885-1004 (2014), https://www.nyulawreview.org/wp-content/uploads/2018/08/NYULawReview-89-3-Schwartz.pdf.
[28] Gambini, *supra* n. 26.

The limitations of external legal mechanisms as a vehicle for police accountability highlight the importance of internal investigations. But time and again, DOJ and other third-party examinations find that law enforcement's internal disciplinary processes are riddled with abuses of power, bias in favor of officers, inaccurate and incomplete records and investigations, and obstructionist policies designed to thwart accountabilty.

These problems are prevalent in Buffalo. While the city does have a Commission on Citizens' Rights and Community Relations, with jurisdiction to review police misconduct complaints, the Commission has not issued an annual report in more than ten years and it has ***never*** used its subpoena power to obtain police records.[29] Moreover, the Commission cannot implement discipline directly – it may only "recommend" action to the Buffalo Police Department ("BPD").[30] Thus, as a practical matter, the people of Buffalo must rely exclusively on the BPD to police itself.[31] And, not surprisingly, there is little police accountability in Buffalo. One study found that, between January 2014 and September 2016, the BPD's Internal Affairs Division cleared officers of wrongdoing in 58 out of 62 (93.5%) excessive force investigations.[32] Another, more recent study found that the Internal Affairs Division "sustained" only 5 out of 106 (4.7%) complaints of excessive force from 2019 and 2020.[33] Moreover, anecdotal evidence indicates that BPD officers who report misconduct by fellow officers actually

[29] Daniela Porat, *Scant Oversight of Buffalo Police*, InvestigativePost (Feb. 15, 2016), https://www.investigativepost.org/2017/02/15/scant-oversight-of-buffalo-police/.
[30] City of Buffalo Charter § 18-22.
[31] Porat, *supra* n. 29.
[32] *Id.*
[33] Specht, *supra* n. 22.

face discipline themselves.[34] And the Buffalo Police Commissioner admitted in a 2013 deposition that officers sometimes lie to protect their colleagues from misconduct complaints.[35]

Here, again, Buffalo is not an outlier, even within the State. A DOJ investigation of the Suffolk County Police Department ("SCPD") in New York – which uncovered racial bias against Latinx people, including discriminatory traffic stops and failures to timely complete investigations of hate crimes – also found serious flaws in the SCPD's investigation of police misconduct complaints.[36] In a 2011 letter, the DOJ identified a number of issues with SCPD's handling of complaints, including failures to (1) consistently investigate allegations of police misconduct, (2) maintain engagement with the complainant until resolution of the complaint, (3) properly track complaints, and (4) train supervisors on how to review and address the findings of internal misconduct investigations.[37] And in New York City, according to a report by a court-appointed independent monitor, the NYPD's Internal Affairs Bureau investigated 2,947 civilian complaints related to race-and-bias-based policing from 2014-2019 – and did not substantiate a single one.[38] At the same time, the monitor identified a number of problems with the NYPD's handling of investigations, such as "[n]ot interviewing the complainant, or witness, or subject and witness officers"; asking questions that "suggested the investigator had already reached a conclusion" and/or "doubted the validity of the complaint or the credibility of the complainant"; and "[n]ot following up on leads."[39]

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[34] Morgan McKay, *Bill to Protect Officers Who Report Police Misconduct*, Spectrum News (June 12, 2020), https://spectrumlocalnews.com/nys/buffalo/politics/2020/06/11/bill-to-protect-officers-who-report-police-misconduct-.
[35] Porat, *supra* n. 29.
[36] U.S. Dep't of Justice, Suffolk County Police Department Technical Assistance Letter at 11 (Sept. 13, 2011), https://www.justice.gov/sites/default/files/crt/legacy/2011/09/14/suffolkPD_TA_9-13-11.pdf.
[37] *Id.*
[38] Tenth Report of Independent Monitor, *Davis v. City of New York*, 10-cv-0699-AT, Dkt. No. 496, at 73.
[39] *Id.* at 75.

When lengthy records of police misconduct are ignored by internal disciplinary systems, the results are both predictable and tragic. Officers with a history of shooting civilians are 51% more likely to do so again.[40] A study of shootings by the NYPD showed that the "accumulation [of] negative marks" in an officer's personnel file was "a leading indicator for shooting risk," and that "officers rapidly accumulating negative marks in their file are at a more than three times greater risk of shooting."[41] Before Atlanta officer Garret Rolfe fatally shot Rayshard Brooks in the back while Mr. Brooks was running away, 12 complaints had been filed against him – 9 of which were dismissed.[42] Among the complaints against Officer Rolfe that had failed to result in any discipline was another shooting of an unarmed Black man – in which the officers involved filed a police report that did not even mention they had shot a man in the chest.[43] Buffalo police officers, who face no consequences for misconduct, can likewise become repeat offenders. In July of this year, for example, a police officer made headlines for calling a woman a misogynistic slur, among other things, when she asked why 10 Buffalo police officers were needed to intervene with a man who appeared to be under the influence of drugs; subsequent reporting revealed that the officer had 4 previous suspensions and 36 misconduct complaints, including for improper use of force and domestic violence.[44]

The failure to discipline police officers who abuse their authority not only leaves those officers free to repeat and escalate their misconduct, it facilitates a culture of impunity in which

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[40] James P. McElvain & Augustine J. Kposowa, *Police Officer Characteristics and the Likelihood of Using Deadly Force*, 35 Crim. Just. & Behavior 505, 515 (Apr. 2008).
[41] Greg Ridgeway, *Officer Risk Factors Associated with Police Shootings: A Matched Case-Control Study*, 3 Stat. & Pub. Pol'y 1, 5 (2016), https://www.tandfonline.com/doi/pdf/10.1080/2330443X.2015.1129918?needAccess=true.
[42] Curtis Gilbert, *Atlanta Cop Who Killed Rayshard Brooks Had Prior Controversial Shooting*, American Public Media (June 17, 2020), https://www.apmreports.org/story/2020/06/17/officer-garrett-rolfe-atlanta-shooting.
[43] *Id.*
[44] NBC New York, *NY Officer in Viral Video Had 4 Previous Suspensions, 36 Misconduct Complaints* (July 9, 2020), https://www.nbcnewyork.com/news/local/ny-officer-in-viral-video-had-4-previous-suspensions-36-misconduct-complaints-report/2507079/.

other officers are more likely to engage in violence. A study in Chicago, for example, found that "police violence is contagious": officers' exposure to colleagues who previously shot civilians increases the risk that the officers would themselves shoot civilians.[45] "[W]ithin two years, exposure to a single shooting more than doubles a [peer officer's] probability of a future shooting."[46] Another study found that a 10% increase in peer officers' prior misconduct increases an officer's later misconduct by 8%.[47] These empirical findings are buttressed by the DOJ's in-depth examinations of police department abuses. The DOJ's investigation of the Chicago Police Department, for example, concluded that the department's "failure to ensure the accurate reporting, review, and investigation of officers' use of force has helped to create a culture in which officers expect to use force and never be carefully scrutinized about the propriety of that use."[48]

### B. Public Disclosure Of Police Misconduct And Discipline Records Is Critical To Police Accountability And, In Turn, Public Safety.

There is a "paramount public interest in a free flow of information to the people concerning public officials, their servants." *Garrison v. Louisiana*, 379 U.S. 64, 77 (1964). This "paramount public interest" manifestly extends to information about whether police officers conduct themselves properly while acting under color of law and while being paid with taxpayer money. *Id.* After all, police officers are not simply public officials. They have enormous power – the authority to stop, detain, arrest, and, in some cases, use deadly force against members of the public – that is "subject to potential abuse." *United States v. Robinson*, 414 U.S. 218, 248 (1973)

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[45] Thibaut Horel et al., *The Contagiousness of Police Violence* at 1 (Nov. 2018), https://www.law.uchicago.edu/files/2018-11/chicago_contagiousness_of_violence.pdf.
[46] *Id.*
[47] Edika G. Quispe-Torreblanca & Neil Stewart, *Causal Peer Effects in Police Misconduct*, 3 Nature Human Behaviour 797, 797 (Aug. 2019).
[48] U.S. Dep't of Justice, *Investigation of the Chicago Police Department*, at 46 (Jan. 13, 2017), https://www.justice.gov/opa/file/925846/download.

(Marshall, J. dissenting). When police officers overstep their authority or misuse their power, they risk violating the most fundamental rights of members of the public.

Yet, this country's systems of police accountability too often operate in the dark. In many states, police misconduct records are still not publicly available.[49] *See infra* at 18-19. As a result, citizens and legislators are deprived of the information they need to evaluate whether police departments are effectively holding officers accountable when they violate departmental policy or the law. The public cannot know whether a law enforcement agency has properly investigated serious charges of police misconduct, or whether it imposes proportional discipline when abuses are found.[50] Without insight into how systems of police accountability function, or fail to function, the public can only guess at the right solutions to end police violence and misconduct.

The important goals served by transparency are severely undermined when the public is deprived of access to "unsubstantiated and pending" complaints of misconduct. When an allegation is deemed "unsubstantiated," it simply means that the investigating entity has concluded there is not enough evidence to prove that misconduct did or did not occur. Carefully examining patterns of unsubstantiated complaints, whether for a particular officer or across squads, units, or commands, can reveal potential systemic problems in the investigations of complaints and in officer supervision.

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[49] Approximately 21 states treat misconduct records as completely confidential. Robert Lewis et al., *Is Police Misconduct a Secret in Your State?*, WNYC, (Oct. 15, 2015), https://www.wnyc.org/story/police-misconduct-records/ (cataloguing the 50 state approaches to disclosure of police misconduct records). Those states are: Alaska, Colorado, Delaware, District of Columbia, Idaho, Iowa, Kansas, Maryland, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, North Carolina, Oregon, Pennsylvania, Rhode Island, South Dakota, Virginia, and Wyoming. Prior to the repeal of Section 50-a, this list included New York. And before the passage of SB1421 ("The Right to Know Act") in 2018, this list included California. *See* Katherine J. Bies, *Let the Sunshine In: Illuminating the Powerful Role Police Unions Play in Shielding Officer Misconduct*, 28 Stan. L. & Pol'y Rev. 109, 128 (2017).

[50] Kendall Taggart, Mike Hayes, *The NYPD's Secret Files*, Buzzfeed News (Apr. 16, 2018), https://www.buzzfeednews.com/article/kendalltaggart/nypd-police-misconduct-database-explainer.

And because police accountability systems are often deeply flawed, *see supra* at 7-10, the bare fact that an allegation of misconduct has been deemed "unsubstantiated," or that an investigation is still pending, tells the public little if anything about the credibility of the underlying charges or the thoroughness of the investigation. Burdensome evidentiary requirements on complainants, like rules which require complaints to be made in writing or which allow departments to disregard or dismiss allegations of serious misconduct on technical grounds, can result in the dismissal of meritorious complaints.[51] When civilian complainants do manage to meet a department's procedural requirements, police officials may cast aside complaints and deem them meritless without any investigation at all. In Baltimore, for example, police officials systematically misclassified complaints – including charges that officers committed criminal assault, theft, domestic violence, and sexual assault – as "supervisor complaints," a designation which allowed the complaint to be closed without an investigation.[52]

And when police officials do investigate a complaint, their investigations may be heavily biased in favor of the officers. In Buffalo, one recent examination of 18 months of newly released misconduct records found that only 26% of misconduct claims were deemed "sustained" (or proven) and 1% were deemed "unfounded" (i.e., the "alleged facts did not occur or the officer was not involved").[53] The vast majority of claims (73%) were designated either "not sustained" (i.e., "insufficient evidence exists to clearly prove the allegation") or "exonerated" (i.e., the "alleged facts were justified"). These are "determinations" which Buffalonians clearly have a legitimate right to call into question and scrutinize, especially in light of the rampant and well-documented problems with internal police investigations within Buffalo and throughout the

[51] United States Dep't of Justice, *Investigation of the Baltimore City Police Department*, at 140 (Aug. 10, 2016), https://www.justice.gov/opa/file/883366/download.
[52] *Id.* at 141–42.
[53] Specht, *supra* n. 22.

country. A DOJ review of the Chicago Police Department, for example, uncovered, among other things, a widespread failure to interview witnesses or accused officers, biased questioning in favor of officers, and "witness coaching by [police] union attorneys."[54] A separate DOJ investigation in Cleveland found that the officers conducting use-of-force investigations made "little effort to determine the level of force that was used and whether it was justified," and that investigations were "cursory" and "appear to be designed from the outset to justify the officers' actions."[55] And examinations of internal police investigations in Suffolk County and New York City revealed similar patterns of deficient and biased investigations of officer misconduct. *See supra* 10-11.

These systemic failures reveal the central problem with Petitioners' efforts to shield so-called "unsubstantiated and pending" complaints from public scrutiny: the public is left without the ability to know ***why*** civilian complaints result in no finding of misconduct or discipline, or linger without coming to a conclusion. Such "determinations" might simply reflect a failure to follow basic investigative procedures, such as interviewing witnesses, crediting uncontested witness testimony, and gathering and reviewing available evidence. Shielding "unsubstantiated and pending" complaints from public scrutiny, therefore, would have the perverse effect of allowing the most abysmal systems to operate under the highest levels of secrecy.

The value of information about "unsubstantiated and pending" complaints is clear from police departments' own "early-intervention systems." In 1981, the United States Commission on Civil Rights recommended that all police departments employ these "data-based tool[s] . . . to

[54] Investigation of the Chicago Police Department, *supra* n. 48, at 47.
[55] U.S. Dep't of Justice, *Investigation of the Cleveland Division of Police*, at 31 (Dec. 4, 2014), https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2014/12/04/cleveland_division_of_police_findings_letter.pdf.

identify officers whose behavior is problematic and provide a form of intervention to correct that performance."[56] A key input in these systems is civilian complaints; officers who are the subject of a specified number of complaints within a given timeframe are frequently designated as candidates for intervention to prevent serious misconduct in the future.[57] Even though these "early warning" systems typically rely on the mere fact that complaints have been filed, research indicates that they can have a "dramatic effect on reducing citizen complaints and other indicators of problematic police performance."[58] Indeed, even the NYPD has long considered ***both*** substantiated and unsubstantiated complaints when determining whether officers need to enter performance monitoring.[59]

Preventing the disclosure of records related to misconduct complaints that are "pending" would likewise impede the public's understanding of how law enforcement operates and thereby block long-overdue change. Experience from across the country shows that internal disciplinary investigations can drag on for years – often under circumstances suggesting that the delay is designed to thwart accountability altogether. In Syracuse, for example, at least 47 officers in the last three years have evaded discipline because the police department failed to complete misconduct investigations within the 18-month period required by law.[60] Likewise, after Chicago police officer Bruce Asken cracked Greg Larkins' skull with a baton, more than five years passed before the Independent Police Review Authority filed charges of excessive force

[56] Samuel Walker, Geoffrey P. Alpert & Dennis J. Kenney, *Early Warning Systems: Responding to the Problem Police Officer*, National Institute of Justice: Research in Brief, at 1 (July 2001), https://www.ncjrs.gov/pdffiles1/nij/188565.pdf.
[57] *Id.* at 2.
[58] *Id.* at 3.
[59] *See Floyd v. City of New York*, Resp. to Pls.' Submissions on Department's Response to Court Order Regarding Facilitator's Recommendation No. 1, 1:08-cv-01034-AT, Dkt. No. 729-1, at 9.
[60] Patrick Lohmann & Chris Libonati, *Syracuse Police Took So Long on Misconduct Investigations that Some Officers Can't be Disciplined*, Syracuse.com (July 13, 2020), https://www.syracuse.com/news/2020/07/syracuse-police-took-so-long-on-misconduct-investigations-that-some-officers-cant-be-disciplined.html.

against the officer – just long enough for Illinois' five-year statute of limitations on disciplinary action to expire.[61] And in New York City, the officers involved in the killing of Eric Garner in 2014 did not face internal departmental charges until 2018,[62] and former officer Daniel Pantaleo, who committed the chokehold killing of Eric Garner, was not fired from the NYPD until 2019.[63] Indeed, it was not disclosed until Pantaleo's administrative trial that the NYPD's Internal Affairs Bureau had previously determined that Pantaleo violated department policy by using a forbidden chokehold but nevertheless took no action against him for years.[64]

Allowing police departments to withhold records so long as an investigation is unfinished would create additional, perverse incentives to postpone resolution of investigations. Indeed, if a lapsed investigation is deemed "pending," records might be forever insulated from public scrutiny. At the very least, such an approach would deprive the public of access to important information for substantial periods of time – including during the immediate aftermath of an incident of police misconduct, when the public's interest in pertinent information is often the most pronounced – while a potentially dangerous officer continues to walk the streets.

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[61] Annie Sweeney & Jeremy Gorner, *Police Misconduct Cases Drag On for Years*, Chi. Tribune (June 17, 2012) https://www.chicagotribune.com/news/ct-met-cop-investigations-delayed-20120617-story.html.
[62] Daniel Arkin, *NYPD Officers in Eric Garner Case Face Disciplinary Action*, NBC News (July 19, 2018), https://www.nbcnews.com/news/us-news/nypd-officer-eric-garner-case-will-finally-face-disciplinary-action-n892761.
[63] Ashley Southall, *Daniel Pantaleo, Office Who Held Eric Garner in Chokehold, Is Fired*, N.Y. Times (Aug. 19, 2019), https://www.nytimes.com/2019/08/19/nyregion/daniel-pantaleo-fired.html.
[64] Ashley Southall, *Police Investigators Determined Officer Choked Eric Garner*, N.Y. Times (May 13, 2019), https://www.nytimes.com/2019/05/13/nyregion/eric-garner-death-daniel-pantaleo-trial-chokehold.html.

## II. IN RESPONSE TO A NATIONAL CONVERSATION ABOUT POLICE MISCONDUCT, THE NEW YORK LEGISLATURE REPEALED SECTION 50-a TO REVERSE THE EXTREME SECRECY OF POLICE MISCONDUCT INFORMATION.

### A. Prior To The Repeal Of Section 50-a, New York Was A National Outlier In Non-Disclosure Of Police Misconduct And Discipline Records.

Until 2020, New York was one of only two states in the country with a statute which specifically exempted law enforcement officers' personnel records from public disclosure.[65] As the New York State Committee on Open Government observed, Section 50-a made "New York . . . virtually unique among the states in its refusal to apply the same transparency to police and other uniformed services as applies to all other public employees."[66] To be sure, the absence of transparency into police misconduct records is a national problem, with some 21 states still shielding police misconduct records from almost all public disclosure.[67] But New York's approach under Section 50-a made it an extreme outlier.

In about 12 states, by contrast, police misconduct records are generally available to the public.[68] In Minnesota, the public has access to "the existence and status of any complaints or charges against" an officer, "regardless of whether the complaint or charge resulted in a disciplinary action," as well as "the final disposition of any disciplinary action together with the specific reasons for the action and data documenting the basis of the action." Minn. Stat.

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[65] Robert Lewis et al., *supra* n. 49. "Delaware is the only other state in the country that also has a law comparable to CRL 50-a that restricts the scope of law enforcement information available to the public." New York City Bar, *Report on Legislation by the Civil Rights Committee* at 2, https://s3.amazonaws.com/documents.nycbar.org/files/2017285-50aPoliceRecordsTransparency.pdf; *see* Del. Code Ann. tit. 11, ch. 92, § 9200(d) (2018). Prior to the passage of SB1421 (The Right to Know Act) in 2018, California also had a statute specific to law enforcement, SB1436 (The "Pitchess Law"), which "made police officer personnel information confidential, including information relating to third-party complaints and resulting investigation reports." Bies, *supra* n. 49, at 128.

[66] Comm. on Open Gov't, State of New York, Dep't of State, *Annual Report to the Governor and State Legislature*, at 5 (Dec. 2014), https://www.dos.ny.gov/coog/pdfs/2014AnnualReport.pdf.

[67] *See supra* n. 49.

[68] Alabama, Arizona, Connecticut, Georgia, Florida, Ohio, Maine, Minnesota, North Dakota, Utah, Washington, and Wisconsin. Lewis et al., *supra* n. 49.

§ 13.43(2). In North Dakota and Ohio, discipline records are similarly public. N.D. Cent. Code § 44-04-18; Ohio Rev. Code § 149.43. Some of these states presume public access but allow for nondisclosure of records which fall under narrow exemptions based on personal privacy. Washington, for example, protects against disclosure of disciplinary records which are "not of legitimate concern to the public," the release of which would be "highly offensive." Wash. Rev. Code § 42.56.050. Other states, like Wisconsin, withhold only those records which pertain to an active investigation. Wis. Stat. § 19.34(10)(b).

Another 16 or so states adopt various intermediate positions.[69] In Tennessee, "all law enforcement personnel records" are open for inspection by the public, subject to certain special procedures, Tenn. Code § 10-7-503, but "local departments may still withhold such records by claiming they're pertinent to an active or recently-concluded criminal case."[70] In Hawaii, disclosure of police officers' disciplinary records is appropriate where "the public interest in access to the records outweighs [the officer's] privacy interest." *Peer News LLC v. City & Cty. of Honolulu*, 138 Haw. 53, 55 (2016).

The chasm between New York's secretive approach under Section 50-a, and the more transparent approaches adopted in a majority of states, can lead to starkly different results. In October 2014, Chicago police officer Jason Van Dyke shot and killed Black teenager Laquan McDonald while he walked past the officers in the middle of a street.[71] As a result of Illinois' comparatively transparent approach to police disciplinary records, Chicagoans were quickly in a

[69] Arkansas, Hawaii, Illinois, Indiana, Kentucky, Louisiana, Massachusetts, Michigan, New Mexico, Oklahoma, South Carolina, Tennessee, Texas, Vermont, West Virginia, and California. Lewis et al., *supra* n. 49; California joined this category following the 2018 passage of SB1421. *See* Rachel Moran, *Police Privacy*, 10 U.C. Irvine L. Rev. 153, 155 (2019), https://scholarship.law.uci.edu/ucilr/vol10/iss1/6.
[70] Lewis et al., *supra* n. 49.
[71] Monica Davey & Mitch Smith, *Chicago Protests Mostly Peaceful After Video of Police Shooting Is Released*, N.Y. Times (Nov. 24, 2015), https://www.nytimes.com/2015/11/25/us/chicago-officer-charged-in-death-of-black-teenager-official-says.html.

position to question whether there had been a breakdown in their police disciplinary system. The public learned that Van Dyke had been the subject of civilian complaints on at least 20 prior occasions.[72] They learned that Van Dyke had been accused of excessive force multiple times, including one instance in which a Black Chicagoan was awarded $350,000 after Van Dyke used force so extreme the man needed shoulder surgery.[73] They learned that complaints against Van Dyke included allegations that he had used a racial slur.[74] And they learned that none of the complaints against Van Dyke had resulted in discipline.

Likewise, after Derek Chauvin killed George Floyd, the public discovered – as a result of Minnesota's more transparent approach – that Chauvin had been the subject of at least 17 prior complaints, including for the shooting of a civilian.[75] The discovery that only two of those complaints resulted in discipline, and that the stiffest punishment Chauvin received was a letter of reprimand, fueled calls for reform of the Minneapolis Police Department's dysfunctional disciplinary system.[76]

In contrast, in New York, after former NYPD Officer Daniel Pantaleo choked Eric Garner to death, not even Mr. Garner's family could obtain access to Pantaleo's disciplinary records. Attempts by the family's attorneys to secure those records under New York's Freedom of Information Law were rejected by the NYPD, citing Section 50-a.[77] It was not until after the repeal of Section 50-a that the Civilian Complaint Review Board released the records and the public finally learned that Pantaleo had been the subject of no fewer than 17 complaints in the

[72] Elliot C. McLaughlin, *Chicago Officer Had History of Complaints before Laquan McDonald Shooting*, CNN (Nov. 26, 2015), https://www.cnn.com/2015/11/25/us/jason-van-dyke-previous-complaints-lawsuits/.
[73] *Id.*
[74] *Id.*
[75] Shaila Dewan & Serge F. Kovaleski, *Thousands of Complaints Do Little to Change Police Ways*, N.Y. Times (May 30, 2020), https://www.nytimes.com/2020/05/30/us/derek-chauvin-george-floyd.html.
[76] *Id.*
[77] Eric Evans, *Police Secrecy Law Keeps Public in the Dark about Police Misconduct*, NBC News (May 19, 2019), https://www.nbcnews.com/news/us-news/police-secrecy-law-keeps-public-dark-about-police-misconduct-n1006786.

five years before he killed Eric Garner. Here in Buffalo, it was not until the New York Legislature's repeal of Section 50-a that the public was allowed to see the disciplinary records of some of Buffalo's most notorious police officers. In July, pursuant to the repeal of Section 50-a, the BPD released the disciplinary records of the 10% of Buffalo police officers with the most misconduct complaints. Among them were the disciplinary records of the officer who shot a young man in 2012, resulting in a $4.5 million settlement with the City of Buffalo, and another officer recently caught red-handed intimidating a citizen who was filming an incident of potential police misconduct.[78] *See supra* at 11.

### B. The New York Legislature Repealed Section 50-a To Promote Police Transparency And Accountability.

For years, advocates and family members of New Yorkers killed by police tried, in vain, to persuade the Legislature to repeal Section 50-a.[79] Mothers like Gwen Carr and Iris Baez, both of whom lost their sons in deadly police chokeholds, cried out for reform that did not come.[80] But the national movement following the killings of George Floyd and Breonna Taylor spurred renewed and intense focus on New York's flawed and secretive systems of police discipline.

This year, millions have taken to the streets to rise up against police abuse and violence, particularly against communities of color.[81] By some estimates, this has been the largest protest movement in the history of the country.[82] Central to these protests has been a demand for greater

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[78] Ali Ingersoll, *Buffalo Police Release Disciplinary Records*, InvestigativePost (July 20, 2020), https://www.investigativepost.org/2020/07/20/buffalo-police-release-disciplinary-records/; *see also* Jim Heaney and Ali Ingersoll, *Suspended Cop Has Been Disciplined a Lot*, InvestigativePost (July 7, 2020), https://www.investigativepost.org/2020/07/07/suspended-cop-has-been-disciplined-a-lot/.
[79] Rachel Silberstein, *Advocates Push for Repeal of 50-a Ahead of Session*, Times Union (Dec. 24, 2018), https://www.timesunion.com/news/article/NYS-50-a-13488713.php.
[80] Dean Meminger, *Advocacy Rally to Repeal 50a Law*, NY1 (Oct. 17, 2019), https://www.ny1.com/nyc/all-boroughs/news/2019/10/17/advocates-rally-to-repeal-50a-law.
[81] Larry Buchanan, Quoctrung Bui & Jugal K. Patel, *Black Lives Matter May Be the Largest Movement in U.S. History*, N.Y. Times (July 3, 2020), https://www.nytimes.com/interactive/2020/07/03/us/george-floyd-protests-crowd-size.html.
[82] *Id.*

accountability and transparency from law enforcement. In Los Angeles, protesters demanded an end to the culture of police impunity.[83] As Patrisse Cullors (a leader in the Black Lives Matter movement) put it, accountability is at the core of what the protesters expect from their government: after police violence, "[w]e barely get a sorry, we rarely get accountability and we never get change."[84] In Houston, as thousands of protesters marched through the city's downtown, Black Lives Matter organizers similarly called for the city's police department "to be more transparent and to hold . . . officers accountable after fatal police shootings."[85]

In New York, focus quickly turned to Section 50-a. Marchers held signs calling for the law's repeal,[86] and "Repeal 50-a" became a "rallying cr[y]" at protests.[87] A broad coalition of community groups, including labor unions, children's advocates, temples and church networks, public defenders, civil rights organizations, and civil libertarians, signed letters calling for reform.[88] Hundreds of businesses did so as well.[89]

This time, the public calls for reform were answered. After a more than two-thirds majority in both the New York State Assembly and Senate voted to repeal Section 50-a,

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[83] Ashley Riegle, *Black Lives Matter Co-Founder Says What Protestors Want is Simple: Accountability*, ABC News (June 2, 2020), https://abc7.com/black-lives-matter-co-founder-says-what-protesters-want-is-simple-accountability/6226038/.
[84] *Id.*
[85] Mike Hixenbaugh, *Houston's Police Chief Wins National Praise—but Faces Local Anger over Shootings and Transparency*, NBC News (June 3, 2020), https://www.nbcnews.com/news/us-news/houston-s-police-chief-wins-national-praise-faces-local-anger-n1223911.
[86] Andrew Flanagan, *Over 750 Artists, Companies Call for Repeal of N.Y. Law Shielding Police Records*, NPR (June 9, 2020), https://www.npr.org/sections/live-updates-protests-for-racial-justice/2020/06/09/872899147/over-750-artists-companies-call-for-repeal-of-ny-law-shielding-police-records.
[87] Annie McDonough, *Police Reform Activists and Experts React to 50-a Repeal*, City & State New York (June 12, 2020), https://www.cityandstateny.com/articles/policy/criminal-justice/police-reform-activists-and-experts-react-50-repeal.html.
[88] Letter to Majority Leader Stewart-Cousins and Speaker Heastie, Communities United for Police Reform (June 1, 2020), https://www.changethenypd.org/sites/default/files/snya_repeal50a_letter_to_leader_speaker_6-1-2020_final_-_85.pdf.
[89] Flanagan, *supra* n. 86.

Governor Andrew Cuomo swiftly signed the repeal into law.[90] As Senator Jamaal Bailey explained on the floor of the New York State Senate, "[t]he silver lining on this incredibly dark cloud is that the sun is finally starting to shine on injustice. Maybe it's the unmistakable . . . video evidence that we saw a live murder on TV, but it's done something to the consciousness of America."[91] Governor Cuomo likewise explained that the repeal of Section 50-a reflected New York's judgment that "[p]olice reform is long overdue, [as] Mr. Floyd's murder is just the most recent murder."[92]

New York's legislators have thus affirmed that the public interest in New York is best served by transparency and not secrecy. In a case virtually identical to the instant matter, the United States District Court for the Southern District of New York recently rejected an attempt by New York City's police, firefighters and corrections unions to overrule the judgment of the New York Legislature and correctly determined that their requested preliminary injunction would have disserved the "public[] interests" in "transparency and accountability." (*See* Exhibit 1, Motion of Plaintiff-Appellant Exh. D at 41:20-42:2, *Uniformed Fire Officers Ass'n v. De Blasio*, No. 20-2789 (2d Cir. Aug. 25, 2020), ECF No. 17.) There, as here, the plaintiff unions did not offer even a scintilla of evidence that their speculation about the danger from public disclosure of misconduct records had actually materialized – either in the several states where there is more disclosure of police misconduct records than in New York under Section 50-a, or in

[90] *See* Denis Slattery, *New York Lawmakers Vote to Repeal 50-a, Making Police Disciplinary Records Public*, N.Y. Daily News (June 10, 2020) https://www.nydailynews.com/news/politics/ny-legislature-50a-transparency-george-floyd-20200609-yew7soogazfmdg3cr3xlsbmwye-story.html; *see also* Luis Ferré-Sadurní & Jesse McKinley, *N.Y. Bans Chokeholds and Approves Other Measures to Restrict Police*, N.Y. Times, (June 12, 2020) https://www.nytimes.com/2020/06/12/nyregion/50a-repeal-police-floyd.html.
[91] Slattery, *supra* n. 90.
[92] Ellen Moynihan, Denis Slattery & Chris Sommerfeldt, *Cuomo Signs Historic 50-a Repeal Bill, Making N.Y. Police Disciplinary Records Public after Decades of Secrecy*, N.Y Daily News (June 12, 2020), https://www.nydailynews.com/news/politics/ny-cuomo-police-reform-disciplinary-records-20200612-5zryohkuwjew7ksjowhtswmsk4-story.html.

New York City, where there had been prior disclosures to the media of the very same kinds of records at issue in that case (and this case as well). *Id.* at 12:1-13:25, 17:10-20.

## III. THIS COURT SHOULD NOT ALLOW PETITIONERS' NARROW AND PRETEXTUAL INTERESTS TO OVERRIDE THE PUBLIC'S INTEREST IN RACIAL JUSTICE, TRANSPARENCY, AND ACCOUNTABILITY.

Petitioners' asserted interest in "privacy" – a stalking-horse for their desire to avoid repercussions for misconduct by police officers – does not, and legally cannot, outweigh the substantial public interests in racial justice, transparency, and accountability in law enforcement vindicated by the people of New York's decision to repeal Section 50-a. *See Winston Plywood and Veneer LLC v. Dunollie Resources, Inc.*, No. 651851/2014, 2015 WL 5823043, at *3 (N.Y. Sup. Ct. Sep. 5, 2015) ("[W]hen the court balances the equities in deciding upon injunctive relief, it must consider the 'enormous public interests involved.'") (quoting *Seitzman v Hudson Riv. Assoc*, 126 A.D.2d 211, 214 (1st Dep't 1987)); *see also De Pina v. Educational Testing Serv.*, 31 A.D.2d 744, 745 (2d Dep't 1969) ("In ruling on a motion for a preliminary injunction, the courts must weigh the interests of the general public as well as the interests of the parties to the litigation.") (quotation marks omitted). Indeed, Petitioners' vigorous efforts to block the repeal of Section 50-a – and, with that abject failure, their filing of this lawsuit – are part of their longstanding resistance to greater police transparency, accountability, and racial equity.

The repeal of Section 50-a occurred over the vociferous and misleading opposition of Petitioner Buffalo Police Benevolent Association ("Buffalo PBA"). In online postings, the Buffalo PBA dishonestly claimed that those in favor of repealing Section 50-a "would rather have the officer's disciplinary record the focal point of a suspect's trial rather than the evidence

against the perp."[93] And the Buffalo PBA also claimed to the media that its opposition to the repeal of Section 50-a was based on its fears over the disclosure of police officers' sensitive personal information,[94] an assertion belied by the fact that a public employee's personal information continues to be protected from disclosure[95] even after the repeal of Section 50-a. Meanwhile, the Buffalo PBA has changed tack with this lawsuit, and ***now*** seeks to prevent the disclosure of disciplinary records (and not personal information, which is already protected). In repealing Section 50-a, the people of New York, through their elected representatives, rejected the Buffalo PBA's shifting position and made emphatically clear that the public interest lies elsewhere.

Of course, police union opposition to efforts to increase police accountability and to rein in the chronic police abuses of communities of color in New York State is nothing new. During the mid-1960s, when the country last experienced mass uprisings to protest racial injustice, then-Mayor of New York City John Lindsay first attempted to bring civilian oversight to police discipline matters – an effort the New York City PBA successfully blocked.[96] One poster from the union "showed a young middle-class white woman emerging from the subway onto the darkened street, looking frightened, with accompanying text that read, 'The Civilian Review Board must be stopped! Her life … your life … may depend on it.'"[97] As John Cassesse, then-

[93] *Current events....From the Prez....*, Buffalo Police Benevolent Association (last visited September 9, 2020), http://buffalopba.com/index.cfm?zone=/unionactive/view_page.cfm&page=Dooley27s20daily20musings.
[94] Mike Desmond, *Assembly Leader Says State Legislature Will Repeal Police Privacy Law Today*, WBFO (June 8, 2020), https://news.wbfo.org/post/assembly-leader-says-state-legislature-will-repeal-police-privacy-law-today.
[95] Pete DeMola, *With shroud lifted, FOIL remains default for accessing police disciplinary records*, The Daily Gazette (July 3, 2020), https://www.dailygazette.com/2020/07/03/with-shroud-lifted-foil-remains-default-for-accessing-police-disciplinary-records/ ("Personal information, including home addresses, personal phone numbers and email addresses, will be redacted from the documents ahead of their release.").
[96] Civilian Complaint Review Board, *History*, https://www1.nyc.gov/site/ccrb/about/history.page.
[97] William Finnegan, *How Police Unions Fight Reform*, The New Yorker (July 27, 2020), https://www.newyorker.com/magazine/2020/08/03/how-police-unions-fight-reform.

president of the New York City PBA, explained, he was "sick and tired of giving in to minority groups with their whims and their gripes and shouting."[98] Later, when Mayor David Dinkins, New York's City's first and only Black mayor, made a renewed effort to create a civilian review board in 1992, the New York City PBA staged a "ferocious protest at City Hall" – with members "carrying guns" and "crude drawings of Dinkins," along with "racist placards" referring to Dinkins as "the Washroom Attendant."[99]

In Buffalo, the BPD chose to deal with potential protests in response to police killings of unarmed civilians via creation of the "Emergency Response Team" ("ERT"), which, according to the president of the Buffalo PBA, is "a kind of junior varsity to the department's SWAT team."[100] Two members of this "junior varsity" squad were recently caught on viral video shoving a 75-year-old man to the ground during a protest against police violence, fracturing the man's skull.[101] To protest the filing of criminal charges against those two officers, the Buffalo PBA pressured the other ERT officers to resign from the unit, warning them that "they would no longer be supported by the organization if they did not agree to resign."[102] Yielding to the Buffalo PBA's pressure, all 57 officers in the ERT resigned, apparently in some kind of show of police union solidarity – even when this crystal-clear case of police misconduct was caught on tape.[103]

Police unions' histrionic predictions of chaos and disorder – put forward every time the public has demanded greater police accountability – have not come to fruition in the past, and they will not come to fruition here. Indeed, while Petitioners raise the specter that public

[98] Civilian Complaint Review Board, *supra* n. 96.
[99] Finnegan, *supra* n. 97.
[100] Kelly, *supra* n. 12
[101] *Id.*
[102] Maria Cramer, *2 Buffalo Police Officers Charged in Shoving of 75-Year-Old Demonstrator*, NY Times (June 6, 2020), *available at* https://www.nytimes.com/2020/06/06/nyregion/Buffalo-police-charged.html.
[103] *Id.*

disclosure of the misconduct records at issue will somehow "destroy[] the reputations and privacy, and imperil[] the safety" of officers, Pet'rs' Mem. Law (Dkt. No. 7), at 10, they offer no evidence that any such thing has occurred in the states which have adopted a more transparent approach to police records. (*See generally* Exhibit 1, Motion of Plaintiff-Appellant Exh. D at 16:8-17:1, *Uniformed Fire Officers Ass'n v. De Blasio*, No. 20-2789 (2d Cir. Aug. 25, 2020), ECF No. 17 ("As noted by the amici, there are numerous states with more robust disclosure practices than New York's have been, with no correlative uptick in violence or threats of violence to officers and their families.").)

Allowing Petitioners to prevail in their current effort to thwart the repeal of Section 50-a would be a significant setback to racial justice, as well as to the public's efforts to hold the Buffalo Police Department accountable for abuses in Buffalo's Black and Latinx communities. It would send a message that not even the most important state legislative action to arise out of the largest mass demonstrations in our country's history can rein in police secrecy. And it would deprive Buffalonians of necessary information to transform an institution that has systematically violated the rights of communities of color. Petitioners' requested injunction is not in the public interest and should be denied. *See Destiny USA*, 69 A.D.3d at 223.

**CONCLUSION**

For the foregoing reasons, Petitioners' request for a preliminary injunction should be denied. The will of the people of New York is clear: the repeal of Section 50-a was necessary for racial justice, transparency, and accountability in law enforcement. It is time for that will to be effectuated.

Dated: September 14, 2020

Respectfully submitted,

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# EXHIBIT 1

K8LLUNID

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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UNIFORMED FIRE OFFICERS ASSOCIATION *et al*,

Plaintiffs,

v. 20 Civ. 05441-KPF

BILL DE BLASIO *et al*,

**Decision**

Defendants.

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New York, N.Y.
August 21, 2020
12:00 p.m.

Before:

HON. KATHERINE POLK FAILLA,

District Judge

APPEARANCES

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BY: DOMINIQUE F. SAINT-FORT
REBECCA GIBSON QUINN
KAMI ZUMBACH BARKER

DEPUTY CLERK: First, this is a public courtroom, even if it's remote. And members of the media and/or public have been known to dial in and listen to proceedings N this instance, we have 126 participants listening in to that point, I'm going to ask that all listening -- listen-only participants place their phones on mute at this time.

We do have a court reporter on the line. I'm going to ask that if you do need to speak during this conference, that you will give your name before you do speak so that way it's clear to the court reporter on who is speaking and the transcript is accurate.

The recording and/or rebroadcasting of this conference is not permitted by any participant. That includes listen-only participants. We will be recording it on our end as a backup to the court reporter T court reporter's transcript is the official transcript for this conference.

I'm just going to remind everybody once again because it's very important with the number of people who we have on the line that you put your phones on mute so that way there is no background noise or feedback interrupting the conference.

With that, do I have any questions regarding the instructions that I have given?

Hearing nothing, I will be bringing in the Judge. Please hold.

(Case called)

DEPUTY CLERK: Counsel for the parties please state your names for the record, beginning with plaintiffs.

Good afternoon, your Honor.

MR. COLES: Tony Coles, for the plaintiffs. And I'm here with Courtney Saleski.

THE COURT: Good afternoon. And thank you very much.

And representing the defendants?

MS. SAINT-FORT: Dominique Saint-Fort, representing defendants, along with Rebecca Quinn and Kami Barker.

THE COURT: Thank you very much. Good afternoon to each of you.

I know there are many amici and other interests parties who are on this call. I'm aware that there are over a hundred lines on this call. So I won't go through the trouble of reading off everyone's appearance. But I did hear my deputy take those appearances this afternoon, so I know that you're all there. And I thank you for appearing. I suspect the beeping that we're now hearing are people joining or exiting the conversation is going to plague us throughout the conversation, but we will deal with it.

Let me please ask the court reporter if she has any difficulty in hearing me.

Okay. Thank you.

I am going to ask everyone else please to mute their phones. I'm going to give the decision now on plaintiffs'

motion for preliminary injunction. And what I can say to you is that it is quite a long decision and so I will do my best to read it carefully. But it will go much easier if I'm not hearing background noises. So since I'm not speaking to any of you specifically at this time, please, please set your phones to mute. Thank you very much. I will now begin.

On June 12th of 2020, Governor Cuomo signed legislation that, in relevant part, repealed New York Civil Rights Law, Section 50-a. That provision, summarily speaking, protected from disclosure under New York's Freedom of Information Law -- or "FOIL" -- certain records regarding police, sheriffs, firefighters, correction officers and peace officers. And as made clear from the submissions of the parties (and even more so, the amici) the repeal was the product of extensive debates, including debates over the continued protection of a narrower class of information derived from these same records. Concurrently, with the repeal, the New York legislature passed amendments to the New York Public Officers Law that added Section 89(2-b) and 89(2-c), the former of which mandated redaction of certain types of personal identifying information and the latter of which allowed (but did not require) law enforcement agencies to "redact records pertaining to technical infractions."

On July 14th, 2020, plaintiffs brought this action in New York State Supreme Court, seeking "to temporarily and

permanently enjoin defendants from releasing unsubstantiated and non-final disciplinary records of firefighters, police, and correction officers" under a variety of theories. On July 15, 2020, defendants removed the matter to this Court, by which time the state court judge had ordered either injunctive relief or a stay until the Court could consider the matter. On July 22nd of 2020, the Court entered a temporary restraining order, finding in relevant part that there were serious issues that transcend reputation, that affect employment, that affect safety, which were accepted as speculative and imminent for purposes of today's proceeding.

Excuse me. I'm sorry. I'm going to pause for a moment. I'm hearing someone in the background. I'm just going to ask again if folks could please mute their phones.

Returning to the decision. I did also find that the plaintiffs had raised sufficiently serious questions going to the merits, particularly on their contractual claims that a TRO was warranted. I ordered expedited discovery. I scheduled a hearing on the application for a preliminary injunction to be held on August 18th of 2020. And on July 28th of 2020, after receiving briefing from the parties and from the New York Civil Liberties Union, I modified the TRO order so that it no longer applied to NYCLU. Plaintiffs appealed that modification to the Second Circuit, and yesterday the Second Circuit denied plaintiffs' motion for a stay pending appeal. And it is my

understanding that NYCLU have posted those records in searchable form on its website.

Between July 22 of 2020, and August 14th of 2020, I received substantial briefing and supporting materials from the parties, as well as the many submissions of the amici. I heard several hours of oral argument on August 18th of 2020. And I want to reiterate my thanks and my appreciation to all of you who prepared materials to aid me in resolving these significant issues.

From oral argument, I understand plaintiffs to be asking me to enjoin defendants from producing reports and records of allegations that were determined to be unsubstantiated, unfounded, truncated, or exonerated; those matters that are non-final; and those allegations that were addressed by settlement agreements between law enforcement officers and agencies entered into before the repeal of Section 50-a. During the TRO hearing, I also directed defense counsel to provide what I call the "final answer from each of the organizational defendants concerning precisely what materials were contemplated to be disclosed."

I learned that CCRB planned "to establish an online database that would allow members of the public to search for CCRB officer histories," including "cases that were substantiated, unsubstantiated, unfounded, and truncated." Of the NYPD plan to publicly release on its website charges and

specifications regardless of whether they had been adjudicated, and responses to FOIL requests for the disciplinary records of members of service received following the repeal of Section 50-a where the requested disciplinary records resulted in a substantiated final determination. I also understood that the FDNY had not yet developed a protocol or a process for the public release of firefighter or fire officer disciplinary records. and the Department of Corrections has not yet made a plan, but has assured plaintiffs it would not release unsubstantiated and non-final allegations. In light of those responses, I understood the focus of plaintiffs' PI motion to be on the NYPD and CCRB materials that I've mentioned earlier, particularly the unsubstantiated, unfounded, truncated, exonerated, non-final, and those addressed by settlement agreements, and I have focused my analysis accordingly. For the reasons set forth in the remainder of this oral opinion, with a very limited exception for certain NYPD materials that I believe to be squarely covered by certain collective bargaining agreements, I am denying plaintiffs' motion.

We'll begin with the relevant legal standard. And "in general, a district court may grant a preliminary injunction if the moving party establishes that it is likely to suffer irreparable injury if the injunction is not granted, and either a likelihood of success on the merits of its claim, or the existence of serious questions going to the merits of its claim

and a balance of hardships tipping decidedly in its favor." I'm quoting there from *Plaza Health Laboratories v. Perales*, a Second Circuit decision from 1989, reported at 878 F.2d, 577.

Lest you think otherwise, I do recognize that there are other factors in the mix. In the most recent decision from the Second Circuit, *New York v. the United States Department of Homeland Security,* a decision that has not yet been given, an F.3d cite that is contained at West Law 2020 WL4457951. Judge Lynch, writing for the Court and citing to the *Winter* decision, also noted the factors of the balance of equities tipping in favor of the movant and that the injunction be in the public interest. He noted as well for the panel that where the government was a party to the suit, the final two factors merged.

During the TRO proceedings, I recognized both formulations of the standard set forth in *Plaza Health Labs*, and I focused in particular on the serious question standard, because that was the basis for my TRO release. The Amicus CPR reminded me, however, that the Second Circuit has held that where the moving party seeks to stay governmental action taken in the public interest pursuant to a statutory or regulatory scheme, the district court should not apply the less rigorous fair ground for litigation standard and should not grant the injunction unless the moving party establishes, along with irreparable injury, a likelihood that he will succeed on the

merits of his claim.

I'm citing there to *Plaza Health Labs*, but also to the decision this year by the Second Circuit in *Trump v. Deutsche Bank AG*, which was reversed on other grounds by the Supreme Court in the case *Trump v. Mazars, USA*. The Second Circuit has explained that this exception reflects the idea that governmental policies implemented through regulations developed through presumptively reasoned democratic processes are entitled to a higher degree of deference and should not be enjoined lightly. And in so doing, they were citing to their prior decision in *Able v. United States* in 1995.

Now, during the PI hearing, plaintiffs' counsel disagreed with CPR's analysis and argued directing my attention to *Otoe-Missouria Tribe of Indians v. New York State Dep't of Fin. Servs*, 769 F.3d 105 from 2014, that where the Government engages in policy-making and does not take action pursuant to a statutory scheme, the serious-questions standard applies.

I'll note in my review of that case, after the argument, the challenged conduct was actually subjected to review under a likelihood of success standard, which is the standard that I'm finding applicable here today. And it may well be the case that plaintiffs' counsel was, in fact, directing my attention to a case cited within *Otoe-Missouria*, that is, *Haitian Centers Council v. McNary*. And in that case the Second Circuit used the "fair ground for litigation"

standard in upholding an order enjoining INS from limiting Haitian asylum applicants' contact with counsel while detained at Guantanamo Bay. But that case was distinguished in its own text and in *Otoe-Missouria*, the latter of which noted that there the government was seeking to enforce an informal policy "hastily adopted without the benefit of either specific statutory instructions or regulations issued after a public notice-and-comment process." I'm quoting there from 769 F.3d at 111. That reasoning is simply inapplicable here.

Plaintiffs' counsel has emphasized to me that plaintiffs are not litigating the repeal of Civil Rights Law Section 50-a, and so I have focused on whether defendants' post-repeal approaches to responding to FOIL requests qualify as "government action taken in the public interest pursuant to a statutory or regulatory scheme so as to preclude application of the less rigorous serious-questions standard." And I do find that these actions so qualify, and thus that the higher likelihood of success standard applies. With one exception relating to this limited category of NYPD materials I'll talk about later, plaintiffs have not met their burden. But even were I to use the serious-questions standard, the result would be the same. And plaintiffs fail to show that the balance of hardships tips decidedly in their favor.

Turning now to the issue of irreparable harm. It is defined by the Second Circuit as "injury that is neither remote

nor speculative, but actual and imminent that cannot be remedied by an award of monetary damages." I'm quoting here from the 2015 Second Circuit decision in *New York ex rel Schneiderman v. Actavis PLC*. This is the issue on which my prior TRO hearing and ruling was predicated, and it's the issue on which, with a more complete record, I am finding to the contrary.

And I want to make a preliminary observation about irreparable harm. And it relates to the many disclosures that were made by CCRB in the time period between June 12, 2020, the repeal, and July 14, 2020, the filing of this lawsuit. Plaintiffs' counsel argued to me at the PI hearing that these disclosures were immaterial to my analysis, except insofar as they were further indications of violations of their rights. And yet, I fail to see the logic of having me enjoin defendants from disclosing prospectively materials that have already been produced and that are already being published and analyzed by third parties. This would include the CCRB records that NYCLU has just published. To my mind, any injunctive relief that I would order could not put that particular horse back in the bank. But putting the issue aside, I find the plaintiffs have failed to satisfy their burden of showing irreparable harm. Broadly speaking, plaintiffs posit two categories of harm: Reputational harm and loss of privacy; and risk of harm to the officers and their families.

Turning first to the issue of reputation harm: The plaintiffs proffer the expert report of Dr. Jon Shane, who opines in a rather brief expert report that, based on his experience, training and education "to a reasonable degree of professional certainty, publication of unsubstantiated and non-final allegations will have a disproportionate and unfairly damaging and stigmatizing effect on a police officer's future employment prospects. Publication of these allegations will decrease future job prospects and may cause an officer to be deprived of a position he or she applies for. This damaging effect is likely even when allegations are characterized as unsubstantiated or unfounded, and even when they result in exonerated or not-guilty determination."

The defendants have moved to strike Dr. Shane's report based on the timing of the disclosure and his qualifications. I am denying that motion and I am accepting the report. But given it the weight to which it is entitled, it does not suffice to demonstrate irreparable harm. Dr. Shane presents no empirical evidence to support his findings and no anecdotal evidence. His opinion at base is rumination -- reasoning, for example, that if an officer decides to move from one department or law enforcement agency to another, the hiring department or agency will likely give undue and unfair weight to the unsubstantiated and non-final allegations, rendering them stigma, regardless of the agency's intention behind the

release. And yet he has not one law enforcement officer's statement to substantiate his claim. And it's not as though there isn't a universe of information from which he can draw. Quite to the contrary, the NAACP Amicus brief identifies 12 states -- Alabama, Arizona, Connecticut, Georgia, Florida, Ohio, Maine, Minnesota, North Dakota, Utah, Washington, and Wisconsin -- where police conduct records, including unsubstantiated complaints and complaints where no disciplinary action resulted from the investigation, are generally available to the public. On this point, I actually found the declaration of Brendan Cox, who was engaged in the hiring process as chief of the Albany Police Department, to be far more compelling.

Moreover, as defendants note, plaintiffs do not offer any specific evidence that evidence plaintiffs do not offer any specific evidence that anyone is imminently facing something like this. For example, evidence about officer seeking employment, prospective employers, information employers can access already regarding misconduct and disciplinary histories, how they interpret that information, and how public access to data would therefore change any employment calculus. And I am concerned -- and I think I disagree with one of Dr. Shane's underlying premises, which is that it is somehow appropriate to withhold information of this type from prospective law enforcement employers because they are unable to appreciate the dispositional designations used by agencies such as the CCRB.

Here too, I am persuaded by Mr. Cox's statements at paragraph 21 of his declaration regarding the importance of a prospective law enforcement employer having all of this information available and perhaps more importantly for this motion, having the ability to contextualize that information properly. On the record before me I reject the argument that law enforcement officers cannot interpret law enforcement reports from other jurisdictions

Plaintiffs' counsel has also repeatedly focused on the fact that approximately 92 percent of CCRB complaints are resolved using a designation other than substantiated. But that suggests that such a disclosure is more likely to redound to a reputational harm benefit. It appears that plaintiffs are eliding the distinction between the underlying allegation, which may be about conduct that never happened, and the actual record being released which record states the outcome of an investigation into that complaint. As well, any reputation harm can be remedied by money damages. And for those propositions I'm citing *Guitard, v, United States Secretary of the Navy*, 976 F.2d, 737, a Second Circuit decision from 1992; citing the Supreme Court decision of *Sampson v. Murray*, 415 U.S. 61 from 1974; another Second Circuit decision, *Savage v. Gorski*, 850 F.2d 64, a Second Circuit decision from 1998; and a recent decision from a colleague of mine, Judge Oetken, in *Nicholas v. Bratton*, not reported at 2016 WL 3093997, from June

of 2016.

Now, I did not understand plaintiffs to be claiming privacy-based harms separate and apart from reputational harm, and I also don't see a generalize privacy right inherent in the disciplinary records of public employees, so I'm turning now to the second proffered category of irreparable harm. It is an increased risk of harm to law enforcement officers and their families.

(Pause)

THE COURT: And the point I wished to make before I paused was to underscore the fact that no one in this litigation wants any harm to befall any officer or any officer's family member. No one wants an increased risk of harm. But the fact remains that plaintiffs have not met their burden on this record of identifying an increased risk of harm to officers or their families that can fairly be tied to the disclosure or the potential for disclosure of these materials.

The NYPD officers cited by plaintiff who have lost their lives because of their jobs, they are remembered, they are respected. And yet, I have no argument, and there can be no argument, that their deaths were attributable to the repeal of Section 50-a and the consequent changes in how defendant agencies will respond to FOIL requests. Plaintiffs have presented speculation only that these changes in FOIL request responses will increase the risk of officer harm.

I also note that before the state legislature, plaintiffs could not provide a single example where the release of misconduct or disciplinary reports have been linked to officer safety concerns. And the legislature at that time was very keenly attuned to officer safety, which is why it later amended the public officer's law to provide for mandatory redactions of identifying information.

Plaintiffs have cited to me the increase in TAPU investigations. I don't dispute the fact of the increase, but I do not believe that plaintiffs have or can link it to the agency's new positions regarding FOIL request responses. As noted by the amici, there are numerous states with more robust disclosure practices than New York's have been, with no correlative uptick in violence or threats of violence to officers and their families. I'll mention again the NAACP brief and the 12 states that they cite. I don't see any safety issues identified in those states.

The amici have also noted the disclosure practices of the Chicago Police Department, which is a fair comparator to the NYPD. I've seen evidence regarding the Citizens Police Data Project, which contains disciplinary records from Chicago police officers in a comprehensive searchable format. I understand that the data includes more than 30,000 officers, and almost 23,000 complaints between 2000 and 2018. Again, I've been presented with no evidence of increased violence or

threat of violence because of the disclosures.

Plaintiffs' argument also seems to overlook the disclosures that have been historically been made. And I'll only note briefly the correction officer and fire officer information available on oath, since their records aren't really at the heart of this motion. But for decades, until 2016, the NYPD posted officer disciplinary outcomes outside the media room. And for a short time, the CCRB disclosed summary of officers' records in response to FOIL requests.

I'm also going to refrain from relying on the ProPublica disclosure, as it is so recent, and the NYCLU disclosure for the same reason. But there was a prior disclosure in 2018 when Buzzfeed News uploaded 1800 officer disciplinary dispositions to a publicly available online database. And the Legal Aid Society has an online database known as “CAPstat” which includes data from lawsuits against NYPD officers over several years as well as the Buzzfeed data. And I have not seen evidence of an incident in which member officers were threatened or at risk of threat because of that publication.

On the specific issue of "doxing," which came up at this hearing, the legislature took this into account in enacting the new FOIL provision requiring redactions -- not allowing redactions -- for identifying information. And while there has been disclosures made over the years, pursuant to

leaks, plaintiffs have not pointed to an example of a police officer getting doxed as a consequence. They have not explained how the specific information contained in CCRB reports, for example, would make it easier for members of the public to dox officers. That's why I've not found irreparable harm.

I'm going to turn now to the actual claims. And for analytical convenience, I've divided plaintiffs' claims into contractual and constitutional. And beginning with the former, plaintiffs argue that their respective CBAs give them rights that would be violated by the NYPD's and CCRB's contemplated disclosures and databases. I've reviewed the CBAs attach to plaintiffs' petition at Docket entry No. 10. In particular, I've seen CBAs from the Sergeants' Benevolent Association, the Police Benevolent Association, the Lieutenants' Benevolent Association, and the Captain's Endowment Association. And I might be referring to those by abbreviations during this portion of my opinion.

I'm aware, for example, that the SBA, the LBA, the PBA, and the CEA filed grievances with deputy commissioner of the police, Beirne, on July 15th of 2020, claiming that the City had violated their respective CBA rights when it announced the imminent publication of information regarding unsubstantiated, unfounded, exonerated, and unadjudicated departmental allegations against active and retired department

members. I was made aware as well that the City and the NYPD have filed a petition challenging the abitrability with the New York City Board of Collective Bargaining.

All of the CBAs that I've been given contain a section that is typically titled "Personal Folder." It's typically found in Section 7(c) of one of the Articles of the provision. So for the SBA, it's Article 15 Section 7(c). In the PBA's CBA, it is Article 16 Section 17. In the LBA's CBA, it is Article 16 Section 7(c). And in the CEA's CBA -- it's the one outlier -- it's in Article 14 Section 6(c). I'm going to call it Section 7(c) nonetheless -- or maybe it's better for me to call it the "personal folder section." But what it provides is that the department will, upon written request to the chief of personnel by the individual employee, remove from the personal folder investigative reports which, upon completion of the investigation, are classified, exonerated, and/or unfounded.

Citing the personal folder section, plaintiffs have argued that disclosing allegations of misconduct would functionally negate the rights of officers to clear their disciplinary records of unfounded and unsubstantiated allegations where that information would forever be publicly available in the future. And in short, I completely disagree with plaintiffs' broad interpretation of this provision, and in no way do I believe that it can stretch so far as to prevent the disclosure of this information.

The personal folder, as I've just read, the provision gives the officer the right to request that an investigative report be removed from a personnel file. It does not give the officer the right to have the investigative report removed from the public record. And so it remains the case that officers can and will be able to exercise their rights under this provision to have specified investigative reports removed from their personnel or personal folder, and it remains the case that the NYPD can remove such reports. And by that measure, whatever benefits the officers derived from having personal files with this information removed remain available to them, but it does not extend to exclude these materials from the public.

And so, I have thought about whether this is something that is more properly given to the arbitrator. But there is simply no way in which this provision is -- or which the argument being made can be made under the CBAs. And, therefore, this is not a grievance to be arbitrated at all. This is not a situation, as plaintiffs claimed at oral argument, where the Court would be nullifying relief an arbitrator might be able to provide because the relief sought is simply nowhere to be found in the CBA.

I do want to talk, however, about another provision which has given me more pause, and this is the one provision where I am, in part, granting injunctive relief. The CBAs

contain a provision that I will refer to as Section 8. And it appears in substantively identical form in different articles of the CBAs. But it typically provides as follows:

"Where an employee has been charged with a Schedule A violation, and such case is heard in the trial room, and disposition of the charge at trial or on review or appeal therefrom is other than guilty, the employee concerned may, after two years from such disposition, petition the police commissioner for a review for the purpose of expunging the record of the case. Such review will be conducted by a board composed of the deputy commissioner of trials, department advocate, and chief of personnel or their designees. The board will make a recommendation to the police commissioner. The employee concern will be notified of the final decision by the police commissioner -- by the deputy commissioner of trials.

The Court believes that the language of this provision, which refers to expunging the record of the case, is significantly broader than that of the personal folder section that I just mentioned. And although the CBAs are not entirely clear when defining either the scope of expungement or the "record of the case," expunging the record of the case is at least more significant than removing a file from the personnel folder.

I had also thought about defendants' argument to me that Schedule A violations are basically the same as those that

the legislature accounted for in enacting Public Officer's Law Section 89(2-c). But the language of that provision, 89(2-c), only states that a law enforcement agency may redact records pertaining to technical infractions. And so the Court is left with the distinct possibility that certain records that plaintiffs have the right to expunge under their CBAs may not be redacted or withheld. To be clear, it is not clear to me what the Schedule A violation records are and whether this is what's contemplated by the NYPD when they're talking about the disclosure of charges and specifications. And so I do believe this is something that has to be resolved through the arbitration process, or at least that I cannot resolve it on this record.

I have considered arguments that have been made to me that this would be contrary to public policy to permit the CBAs -- to permit plaintiffs through the CBAs -- to block public access to certain records. But I have also thought about the fact that Section 8 pertains only to Schedule A violations, which I understand to be the more technical violations.

And so while I do appreciate the arguments of the defendants in the amici, that the public has an interest in all disciplinary records of NYPD officers, in this particular instance, I don't believe that I can say the that the public interest is enough to surmount the union's contractual rights.

And so for this reason, this is the very limited injunction that I am granting:

The NYPD and CCRB may not disclose records of Schedule A command discipline violations for cases heard in the trial room, for which the ultimate disposition of the charge at trial, or on review or appeal, is other than guilty, which records have been, are currently, or could be in the future the subject of a request to expunge the record of the case pursuant to Section 8, for those officers covered by the PBA, the SBA, and the LBA, collective bargaining agreements.

I'm turning now to the argument of plaintiffs that the NYPD's and CCRB's releases would be an anticipatory breach of negotiated settlement agreements between police officers and NYPD that were entered into before the repeal of Section 50-a. And plaintiffs argue that by operation of law these agreements include the confidentiality protection provided by Section 507-a. Now, as an initial matter, plaintiffs provide no compelling reason why the CCRB would be bound by the settlement agreements between individual officers and the NYPD, to which they're not a party. And I, therefore, don't find that plaintiffs' claim would succeed on the merits as to the CCRB's disclosure. It really boils down to the NYPD's anticipatory breach of these agreements.

And in this regard, plaintiffs have cited *Skandia America Reinsurance Corp. v. Schenck*, 441 F.Supp. 715, a

Southern District decision from 1977, for the proposition that the law enforced at the time a contract is entered into becomes a part of the contract. I do believe the applicability of that case is limited by its fact. And in that case, as it happens, the Court just interpreted an ambiguous provision in a contract in light of then-applicable state law.

Instead, Mr. Coles pointed my attention to Williston on Contracts, which states that, even when not expressly stated, the parties to a contract are presumed to have contracted with reference to existing principles of law. But I think that provision proves too much, because plaintiffs are essentially arguing that a state legislature can never change the law, that, while not even referenced in the parties' agreement, might possibly impact a party's contractual rights. I do not believe this to be the case, as the Supreme Court recognized in the context of California law in the decision of *DirectTV Incorporated v. Imburgia*, 136 Supreme Court 463 from 2015.

And even accepting plaintiffs' arguments that the settlements were negotiated with reference to Section 50-a, the Court must also accept that such settlements were negotiated with reference to FOIL, which is, as the parties know, to be liberally construed, and its exemptions narrowly tailored so the public is granted maximum access to the records of government. I'm citing here to *Capital Newspapers, Div. of*

*Hearst Corp. v. Whalen*, 69 N.Y.2d 246 from 1987.

I also agree with defendants' argument that an agency cannot bargain away the public's right to access public records. And there are cases for this point. I bring to the parties' attention, *LaRocca v. Bd. of Educ. of Jericho Union Free School Dist.*, 632, N.Y.2d 576 (2d Dep't 1995); and *Washington, D.C. Post Company vs. New York State Insurance Department*, 61, N.Y.2d 557 from the Court of Appeals in 1984.

And in that latter case, *Washington Post*, the insurance department asserted confidentiality as ground to withhold documents from public inspection. The Court of Appeals there held that the insurance department's long-standing promise of confidentiality was irrelevant to whether the requested documents fit within the legislature's definition of records under FOIL. And it explained that because of FOIL exemption for records confidentially disclosed to an agency had been removed, the insurance companies had no authority to use its label of confidentiality to prevent disclosure. And that's effectively the same argument that plaintiffs are making here, that an agreement with an agency to keep certain records confidential can be enough to prohibit public access to such records.

But putting all of those legal issues to the side -- and they are considerable -- the plaintiffs have only provided the Court with the most cursory explanations of these purported

settlement agreements. I've not been provided with a single example of a settlement agreement with the NYPD. No witness, no declarant has explained to me that she or he entered into a settlement agreement with the NYPD in reliance on Section 50-a. I am not going to speculate as to what rights the settlement agreements provide to other parties. And instead, I'm going to turn to the constitutional claims.

Plaintiffs argue first that the release of these records will violate officers' due process by, number one, calling into question their good name, reputation, honor, or integrity, and thereby stigmatizing them; number two, becoming available to employers, credit agencies, landlords bank officers, potentially eviscerating the futures of many of the petitioners; and number three, violating what actually are rather vague reliance interests that plaintiffs claim they had in the City's guarantee of the confidentiality that such records would remain confidential when the officers decided to respond to allegations of misconduct.

I don't see this in their briefing as a basis that plaintiffs continue to advance for the due process claim. Instead, I believe the only right to confidentiality plaintiffs can claim, prior to the repeal of 50-a, was 50-a itself. And so I do not find that there is an adequately alleged or adequately demonstrated deprivation of some other liberty or property right aside from the repeal of 50-a itself. And so

plaintiffs' due process claim is really one of stigmatic or reputational harm and the alleged consequences that flow from that harm. And a loss of reputation without more is insufficient to establish a procedural due process claim. I cite to the Supreme Court's decision in *Paul vs. Davis*, 424 U.S. 693. Instead, plaintiffs are required to establish a stigma-plus claim. And in such claims, courts recognize a protected liberty interest in interest to one's reputation, which is the stigma, coupled with the deprivation of some tangible interest or property right, and that is the plus. As one of example of that, I cite to *DiBlasio v. Novello*, 344 F.3d 292, (2d Cir. 2003); and on the state court side, the matter of *Lee TT. v. Dowling*, 87 N.Y.2d 699. Plaintiffs argue that the release of "unsubstantiated and non-final allegations" will not only cause reputational or stigmatic harm, but will also interfere officers' future employment opportunities.

And so I now turn to the elements of the stigma-plus claim, and they include that the plaintiff must show the utterance of a statement sufficiently derogatory to injure his or her reputation, that is, capable of being proved false, and that he or she claims is false, and also a material state-imposed burden, or state-imposed alteration of the plaintiffs' status or rights. I'm citing here and quoting from *Vega v. Lantz*, 596 F.3d 77, a Second Circuit decision from 2010. And it, in turn, is quoting to a decision of Justice

Sotomayor, when she was a judge on the Second Circuit, *at Sadallah v. City of Utica*, 383 F.3d, 34.

Now, as to the stigma prong, I find the plaintiffs have failed to establish both that defendants' statements are false and that the release of the records is a statement sufficiently derogatory to injure plaintiffs' reputation.

First, I note that the records at issue are not false. Plaintiffs claim that defendants' worldwide transmission of unsubstantiated and non-final allegations, including those that are misleading are simply false, will stigmatize the identified officers and result in public approbrium and damage to their reputations.

But by equating records classified by the agencies as non-final and unsubstantiated with records that are false and misleading, plaintiffs misstate the nature of the records at issue here.

And as noted previously, plaintiffs are eliding the distinction between the underlying allegation, which may be about conduct that never happened, and the actual record being released, which record states the outcome of an investigation into that complaint. Even if the charge is unsubstantiated or non-final, any stigma or falsity is addressed by the record, which makes clear that the charges -- for example, unsubstantiated -- are non-final.

And the records therefore have information, such as

the agency's classification or disposition of the complaint or charges, that contextualizes adequately any description of the underlying complaint or charges.

Accurate descriptions of allegations and personnel actions or decisions that are made public are not actionable, "even when a reader might infer something unfavorable about the employee from these allegations." I'm quoting here from a decision of Judge Seibel's of this district: *Wiese vs. Kelly*, reported at 2009 WL 2902513. This is not a case, for example, where the defendants are uncritically publishing the allegations of misconduct made against officers as if these allegations were true. Disclosure of a record that an allegation was found to be unfounded or unsubstantiated is a true statement as to the outcome of an investigation of that allegation.

Plaintiffs have made no showing that any record that would be released by the City would inaccurately reflect the disciplinary or investigative process. Plaintiffs separately argue that, in analyzing the stigma component, courts look to the state substantive law of defamation. And they claim that the potential for members of the public to misunderstand the record gives rise to stigma, because specifically "under New York defamation law, when 'a reasonable listener could have concluded that the statement was conveying a fact about the plaintiff that was susceptible of a defamatory connotation,'

the statement is actionable."

I'm quoting here from the plaintiffs' brief at page 14. They're in turn citing to a second department decision in *Greenberg v. Spitzer*, reported at 155 A.D.3d 27. But to establish defamation under New York law, it is "well settled" that the statement must actually be false. And I am quoting here from *Tannerite Sports, LLC v. NBC Universal News Grp.*, 864 F.3d 236, a Second Circuit decision from 2017. And here, for example, a CCRB record's statement that an allegation is unsubstantiated is not a false statement; it is an accurate depiction of an outcome of a CCRB investigation into a complaint.

Truth does provide a defense to defamation claims, as New York courts have long recognized. Plaintiffs cite no case to the contrary, nor have they offered any evidence to support the assertion that the release of these records will lead to widespread dissemination of false statements.

One article that was brought to my attention was the Guardian article, "NYPD's 10 Most unWanted." It was discussed at the PI hearing on Tuesday. It doesn't suggest otherwise. It doesn't cause me to change my decision. That article reports information about the number of allegations that the CCRB found to be substantiated and unsubstantiated for several NYPD officers. That some of the allegations cited in the article were unsubstantiated. It's not a false statement. It

is a truthful statement about the CCRB's findings or resolution of those allegations. And the CCRB or other agency findings, as to their investigations into allegations of misconduct, are not in and of themselves false, nor have or can plaintiffs allege as such.

These records are also not sufficiently derogatory to injure plaintiffs' reputation. As discussed previously in the context of my discussion of irreparable harm, plaintiffs have not established that the publication of these records will cause any concrete, particularized, actual, or imminent injury to their reputation. And for these reasons previously discussed, they have failed to establish that any of the records are likely to cause actual injury to reputation.

There may be a subset of the records at issue that are uncomplimentary in the abstract. The plaintiffs do not specify what records or what information in such records may fall into this hypothetical subset. Even so, abstract illusions to unflattering records are not evidence that public access will cause actual harm to any particular officer's reputation. And as defendants in amici have explained, the vast majority of records to be released that plaintiffs seek to enjoin simply report basic facts about a complaint or disciplinary action and the outcome of that complaint or action.

Also, as discussed repeatedly in this opinion, records disclosed by defendants will have information, dispositional

discussions, that will contextualize the description of the complaint or charges provided, allowing members of the public, and those making future hiring discussions, to evaluate the complaint, the ensuing investigation, and its outcome independently.

Now, plaintiffs have failed to establish that these records are false and they have, therefore, failed to meet the stigma prong. But for the sake of completeness, I will note here that plaintiffs have also failed to meet the plus prong of the claim. And the plus prong of the stigma-plus doctrine is satisfied by the deprivation of a plaintiff's property or some other tangible interest. The *Sadallah* case, which I discussed earlier, is indicative of that point.

Plaintiffs argue that the plus is satisfied here by the potential loss of employment or future employment opportunities caused by the release of these records. Preliminarily, and as noted above, it appears that injunctive relief may be improper to address this harm based on cases like *Savage v. Gorski* that I mentioned.

But additionally, Second Circuit precedent forecloses the argument that the plus prong is satisfied by a vague allegation of potential loss of employment due to reputational harm. In *Valmonte v. Bane*, 18 F.3d 992, a Second Circuit decision from 1994, the Second Circuit explained that "the deleterious effects which flow directly from a sullied

reputation," including "the impact the defamation might have on job prospects" are insufficient to establish a protected liberty interest.

At base, vague allegations of future loss of employment are another way of claiming stigmatic harm. And for this reason, the cases on which plaintiffs rely are inapposite, because they deal with concrete harms beyond vague suggestions that reputational harm may negatively impact future job prospects. Even assuming that such loss of employment, or that these allegations could satisfy the standard, plaintiffs' alleged harm to employment prospects is so remote that it is not proof of a tangible state-imposed burden concurrent with the disclosure. To meet their burden, plaintiffs must do more than simply say that records may lead to diminished employment prospects for some vague subset of officers in the future. Again, plaintiffs failed to explain why law enforcement officers in charge of hiring would be incapable of interpreting the records disclosed by defendants.

As noted repeatedly, the dispositional discussions will contextualize the description of the complaint or charges provided. They will allow future employers to make hiring decisions by evaluating the complaint and the investigation and its outcome independently. And as to any claim that the publication of these records may cause the immediate loss of employment for some officers, plaintiffs do not explain why an

officer would lose their job. As a result of the publication of records that the employer already has access to, but even assuming for the sake of argument that the release of these records meet both the stigma and the plus prongs -- and they do not -- plaintiffs fail to allege that the officers are deprived of the process that is due, because in the creation of the records themselves, the officers are entitled to pre-deprivation disciplinary hearings, the opportunity to respond to allegations throughout the course of the investigation, and the availability of Article 78 review. So on these many bases, there is not an adequate showing as to the due process claim.

Plaintiffs separately allege a violation of the equal protection clauses of the New York and the U.S. constitutions, claiming that defendants have singled out firefighters, police and correction officers for disclosure of unfounded disciplinary records, but have not done so for the myriad other state license professionals. I'm quoting here -- and paraphrasing a bit -- from plaintiffs' brief at page 19: In this regard, New York state equal protection guarantees are coextensive with the rights provided under the Federal Equal Protection Clause.

And the plaintiffs concede that they are not members of a protected class, such that the appropriate level of scrutiny is a rational basis review. And "as a general rule,

the equal protection guarantee of the constitution is satisfied when the government differentiates between persons for a reason that there's a rationals relationship to an appropriate governmental interest." I'm quoting here from *Able vs. United States,* 155 F.3d, 628, a Second Circuit decision from 1998.

Plaintiffs' equal protection claims fail for three independent reasons: First, they are foreclosed by Supreme Court precedent; second, plaintiffs fail to establish that they are similarly situated to the City employees they cite as comparators; and third, plaintiffs fail to establish the defendants' actions are not rationally related to the government's interest in transparency and accountability.

So to begin, plaintiffs' equal protection claims are foreclosed by the Supreme Court's decision in *Engquist v. Ore. Dep't of Agric.*, 553 U.S. 591 from 2008. And *Engquist* precludes equal protection claims challenging different applications of discretion to different employees, because permitting such claims would constitutionalize all discussions by a public employer concerning its employees. And that's exactly what plaintiffs are trying to do here.

Second, "to satisfy the 'similarly situated' element of an equal protection claim, the level of similarity between plaintiffs and the persons with whom they compare themselves must be extremely high." I'm quoting here from *Neilson v. D'Angelis,* 409 F.3d, 100, a Second Circuit decision from 2005

that was overruled on other grounds in 2008.

But plaintiffs work in law enforcement, and the very nature of their roles, vis-a-vis the public, is very different from other City employees. They are not similarly situated. And I believe plaintiffs conceded as much at oral argument. Officers patrol the streets with firearms and are authorized to use force under the aegis of state power. And therefore, a state-licensed medical physicist is just not similarly situated to a City-employed police officer or correction officer.

Third, and related to the previous point, the City has articulated a rational and nondiscriminatory basis for treating the plaintiffs differently than other City employees, if it could be found that these employees were similarly situated. As the city and the state legislature articulated, there are strong governmental interests in accountability and transparency. And the role of police officers in society, the unique responsibilities they carry, the harms they are capable of inflicting on the public, also explain why the City might choose to release records about investigations into allegations of misconduct, but might not proactively release similar records by other city employees, such as teachers or sanitation workers, who do not have similar powers.

Plaintiffs' only explanation for why this is irrational rest on an opinion of a Committee on Open Government. And this opinion opined that, even after repeal of

Section 50-a, requests for disciplinary records of law enforcement must be reviewed in the same manner as a request for disciplinary records of any other public employee. This instruction, this advisory opinion, is not -- or does not establish a constitutional violation.

And this final claim under Article 78 takes a different species -- or there are different varieties of it. The first argument of it is that the repeal of Section 50-a was in and of itself arbitrary and capricious. And I feel that claim was throughly rebutted by the Amicus briefs filed in this case, in which defendants and the amici explained that the legislature thoroughly considered and rejected plaintiffs' arguments for exempting unsubstantiated, unfounded, and exonerated allegations from disclosure. And as evidence that the legislature considered plaintiffs' concerns about privacy and safety, they made a reasoned determination to enact the provisions additional to the New York Public Officers' Law, which requires the redaction of certain information in law enforcement disciplinary histories, including a medical history, home address, personal telephone number, personal email address, and mental health service, and that that was the correct balance to strike. The legislature also added a provision permitting agencies to redact records pertaining to technical infractions. And so I'm entirely unpersuaded that the repeal itself was arbitrary or capricious.

The second version of the argument that I was able to discern from the briefing was that the error of law, it was arbitrary and capricious for defendants to interpret the repeal of Section 50-a in the way that they have and to change decades of agency practice on the protections afforded by them by 50-a in addressing, on a going forward basis, requests for information under FOIL.

But "in reviewing an administrative agency determination, courts must ascertain whether there is a rational basis for the action in question or whether it is arbitrary and capricious. I'm citing here and quoting from *Matter of Gilman v. New York State Division of Housing and Community Renewal*, 99 N.Y.2d 144 from the Court of Appeals from 2002.

On this record, I will not find that the NYPD's and the CCRB's planned disclosures, in light of the repeal of 50-a, are arbitrary and capricious. Rather, it appears that the planned disclosures accord with the legislative purposes of both the repeal of 50-a, the concurrent amendments to Public Officers' Law, Section 89, and FOIL.

And at oral argument, corporation counsel repeatedly assured the Court that the agencies have merely removed Section 50-a from their list of exemptions or considerations in responding to FOIL requests. They do, however, continue to do a review of the records in response to FOIL requests to

determine whether any of the other FOIL exemptions apply. In many cases that is done on an individualized basis; and with respect to certain officer reports, the protections are done at the outset with respect to the group of records that is produced.

But to the extent that other FOIL exemptions remain to protect officers' privacy and safety rights, those rights still exist. And so plaintiffs' final argument on this point is that the NYPD has not gone through the formal rule-making process pursuant to the City Administrative Procedures Act. And they cite a rule of the City of New York that provides for public access to NYPD disciplinary hearings. But the repeal of section 50-a simply makes the public's right broader than what the City of New York rule already provides. It is not inconsistent with the rule. And I, therefore, reject plaintiffs' citation to *Lynch v. New York City Civilian Complaint Review Bd.*, 125 N.Y.S.3d 395 from the this year. Because in that case, CCRB had amended its rules and resolution to begin investigating sexual misconduct which had previously been referred to the NYPD internal affairs bureau. Here, the CCRB and the NYPD have not amended their rules. They are merely reacting to a change in the law which they themselves did not occasion, and plaintiffs cannot show otherwise.

I'm now going to turn to balance of hardships and the balance of the equities. And I'll ask the parties for this

last section of the opinion to continue to have your phones on mute.

The Second Circuit's decision in the *Trump vs. Deutsche Bank* case that I mentioned earlier contained an extensive discussion of that Court's and the Supreme Court's that evolving standards for preliminary injunction motions. And that discussion included analysis of the standard articulated in *Winter vs. Natural Resources Defense Counsel Incorporated,* 555 U.S. 7 from 2008. And in that particular setting, there was also a requirement, in addition to the showing of a likelihood of success on the merits and the showing of irreparable harm, that the balance of equity tips in the movant's favor and that an injunction is in the public interest.

And ultimately, the *Trump* court erred in favor of inclusion. They proceeded to consider not only whether appellants had met the governing likelihood of success standard, but also whether they had satisfied the other requirements in one or more of these three standards: Sufficiently serious questions going to the merits of their claims to make them fair ground for litigation; a balance of hardships tipping decidedly in their favor; and the public interest favoring an injunction. And as I've mentioned earlier, in the most recent decision authored by Judge Lynch, there was a suggestion that the latter two would merge

together.

But beginning with the issue of the balance of hardships, the Court finds that they do not tip decidedly in plaintiffs' favor. Plaintiffs have claimed a variety of harms, contractual and constitutional. But for the reasons that I've just described, most of these claims fail even for want of actual substantiation or because the law is not what plaintiffs wish it to be. But conversely, were I to enjoin release of these materials, defendants would suffer, as they would be stymied and improperly so, in their efforts to comply with recent legislative developments. More broadly, I find that injunction disserves the public interests.

After years of discussion and debate, New York's legislature determined to repeal Section 50-a, and thereby bring themselves in line with most of the other states in their treatment of disciplinary records. And in this regard, I'm remembering one of the amici noted that -- I believe it was -- New York and Delaware were deemed to be outliers in this regard.

But turning to the public interest, the decision to amend Section 50-a was not made haphazardly. It was designed to promote transparency and accountability, to improve relations between New York's law enforcement communities and their first-responders and the actual communities of people that they serve, to aid law makers in arriving at policy-making

decisions, to aid underserved elements of New York's population and ultimately, to better protect the officers themselves. The decision to amend was also made with due regard for the safety and privacy interests of the affected officers. Amendments were made to the Public Officers' Law that mandated the redaction of certain categories of information that permitted the withholding of other categories of information. And I reject the foundational argument that no one -- law enforcement or civilian -- can appreciate the distinctions between substantiated, unsubstantiated, exonerated, unfounded and non-final claims.

I also find, contrary to plaintiffs' arguments, that the agencies in question, the defendant agencies in this case, have neither forgotten nor disregarded FOIL and its exemptions. To grant the injunctive relief sought on this record would subvert the intent of both the legislature and the electorate it serves. And with the limited exception described above regarding to Schedule A command discipline violations that have been resolved in a particular way, I am denying plaintiffs' motion for injunctive relief.

As with the modification of my injunctive motion a couple of weeks ago, I'm staying this decision until Monday at 2:00 p.m. so the plaintiffs can, if they wish to do so, appeal to the Second Circuit. That is my decision.

I believe -- and I don't mean to put her on the spot,

but I believe that Ms. Barker remains on the line.

Is that correct.

MS. BARKER: Yes, your Honor.

THE COURT: Ms. Barker, you had asked me -- and I promised to talk to you -- about a schedule for the motion to dismiss.

Given the amount of time that I have kept everyone on this call, may I ask you to confer with the plaintiffs and to propose for me a schedule for that motion?

MS. BARKER: Yes, your Honor. No problem.

THE COURT: Okay. Thank you.

That is all I have to discuss. I believe I've addressed everything with the parties. And with that, I am going to adjourn this proceeding.

I'm going to thank you for your patience. I'm going to thank the vast majority of you that knew how to use your mute buttons, and I'll smile at those of who you who did not. And I wish you all a safe weekend.

Thank you. We are adjourned.

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