IN THE UNITED STATE COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 20-2789

No. 20-3177 (XAP)

UNIFORMED FIRE OFFICERS ASSOCIATION, UNIFORMED FIREFIGHTERS ASSOCIATION OF GREATER NEW YORK, POLICE BENEVOLENT ASSOCIATION OF THE CITY OF NEW YORK, INC.,

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK, No. 20-CV-05441-KPF

BRIEF OF AMICUS CURIAE THE NEW YORK CIVIL LIBERTIES UNION IN SUPPORT OF DEFENDANTS-APPELLEES URGING AFFIRMANCE

Molly K. Biklen
Christopher Dunn
NEW YORK CIVIL LIBERTIES UNION FOUNDATION
125 Broad Street, 19th Floor
New York, N.Y. 10004
Tel: (212) 607-3300

Jamie L. Wine
Lawrence E. Buterman
Samir Deger-Sen
LATHAM & WATKINS LLP
885 Third Avenue
New York, N.Y. 10022
Tel: (212) 906-1200

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CORRECTION OFFICERS' BENEVOLENT ASSOCIATION OF THE CITY OF NEW YORK, INC., SERGEANTS BENEVOLENT ASSOCIATION, LIEUTENANTS BENEVOLENT ASSOCIATION, CAPTAINS ENDOWMENT ASSOCIATION, DETECTIVES' ENDOWMENT ASSOCIATION,

Plaintiffs-Appellants-Cross-Appellees,

v.

BILL DE BLASIO, in his official capacity as Mayor of the City of New York, CITY OF NEW YORK, NEW YORK CITY FIRE DEPARTMENT, DANIEL A. NIGRO, in his official capacity as the Commissioner of the Fire Department of the City of New York, NEW YORK CITY DEPARTMENT OF CORRECTIONS, CYNTHIA BRANN, in her official capacity as the Commissioner of the New York City Department of Corrections, DERMOT F. SHEA, in his official capacity as the Commissioner of the New York City Police Department, NEW YORK CITY POLICE DEPARTMENT, FREDERICK DAVIE, in his official capacity as the Chair of the Civilian Complaint Review Board, CIVILIAN COMPLAINT REVIEW BOARD,

Defendants-Appellees,

COMMUNITIES UNITED FOR POLICE REFORM,

Intervenor-Defendant-Appellee-Cross-Appellant.

CORPORATE DISCLOSURE STATEMENT

The New York Civil Liberties Union states that it has no parent corporation and that no publicly held corporation owns 10% or more of its stock.

TABLE OF CONTENTS

CORPORATE DISCLOSURE STATEMENT i

INTRODUCTION 1

INTEREST OF AMICUS CURIAE 3

ARGUMENT 5

I. NEW YORK PUBLIC POLICY BARS THE UNIONS FROM ASSERTING A CONTRACTUAL RIGHT TO SHIELD FROM SCRUTINY INFORMATION PROPERLY WITHIN THE SCOPE OF FOIL. 5

II. THE UNIONS CANNOT SUCCEED ON THEIR "STIGMA PLUS" DUE PROCESS CLAIMS. 12

CONCLUSION 16

Table of Authorities

Cases ..... Page(s)

Allis-Chalmers Corp. v. Lueck, 471 U.S. 202 (1985) 11

Bd. of Ed., Great Neck Union Free Sch. Dist. v. Areman, 41 N.Y.2d 527 (1977) 6

Boss v. Kelly, 306 F. App'x 649 (2d Cir. 2009) 16

Brandt v. Bd. Of Co-op. Educ. Servs., 820 F.2d 41 (2d Cir. 1987) 16

Capital Newspapers Div. of Hearst Corp. v. Burns, 67 N.Y.2d 562 (1986) 10

City of New York v. 17 Vista Assocs., 84 N.Y.2d 299 (1994) 6

City of New York v. Uniformed Fire Officers Ass'n, Local 854, IAFF, AFL-CIO, 95 N.Y.2d 273 (2000) 6, 9

Cty. of Suffolk, New York v. First Am. Real Estate Sols., 261 F.3d 179 (2d Cir. 2001) 11

Cohane v. Nat'l Collegiate Athletic Ass'n, 612 F. App'x 41 (2d Cir. 2015) 15

DiBlasio v. Novello, 344 F.3d 292 (2d Cir. 2003) 14

Filteau v. Prudenti, 161 F. Supp. 3d 284 (S.D.N.Y. 2016) 14

Fink v. Lefkowitz, 47 N.Y.2d 567 (1979) 8

Ford v. D.C. 37 Union Local 1549, 579 F.3d 187 (2d Cir. 2009) 6

Gould v. New York City Police Dep't, 89 N.Y.2d 267 (1996) 11

In re Buffalo Police Benevolent Ass'n (City of Buffalo), 4 N.Y.3d 660 (2005) 7

In re Patrolmen's Benevolent Ass'n of N.Y., Inc. v. N.Y. State Pub. Emp't Relations Bd., 6 N.Y.3d 563 (2006) 7

Jewish Press, Inc. v. N.Y.C. Dep't of Educ., 183 A.D.3d 731 (2d Dep't 2020) 11

Kass v. Kass, 91 N.Y.2d 554 (1998) 6

Kraut v. Morgan & Brother Manhattan Storage Co., 38 N.Y.2d 445 (1976) 7

Larocca v. Bd. of Educ. of Jericho Union Free School Dist., 220 A.D.2d 424 (2d Dep't 1995) 10

Lee T.T. v. Dowling, 87 N.Y.2d 699 (1996) 15

Leon v. Murphy, 988 F.2d 303 (2d Cir. 1993) 5

M. Farbman & Sons, Inc. v. N.Y.C. Health & Hosps. Corp., 62 N.Y.2d 75 (1984) 10

NYCLU v. N.Y.C. Police Dep't, 32 N.Y.3d 556 (2018) 3

Paul v. Davis, 424 U.S. 693 (1976) 13

People v. David W., 95 N.Y.2d 130 (2000) 16

SG Cowen Sec. Corp. v. Messih, 224 F.3d 79 (2d Cir. 2000) 5

Swinton v. Safir, 93 N.Y.2d 758 (1999) 16

In re Sprinzen (Nomberg), 46 N.Y.2d 623 (1979) 6

Uniformed Fire Officers Ass'n v. De Blasio, 973 F.3d 41 (2d Cir. 2020) 3

Valmonte v. Bane, 18 F.3d 992 (2d Cir. 1994) 14, 15

Victor v. Office of Administrative Trials and Hearings, Index No. 100890/15 (N.Y. Cnty. Sup. Ct. June 4, 2018) 3

Washington Post Co. v. New York State Ins. Dep't, 61 N.Y.2d 557 (1984) 12

Weston v. Sloan, 84 N.Y.2d 462 (1994) 10

159 MP Corp. v. Redbridge Bedford, LLC, 33 N.Y.3d 353 (2019) 6

390 W. End Assocs. v. Harel, 298 A.D.2d 11 (1st Dep't 2002) 10

Statutes, Rules and Regulations

N.Y. Pub. Off. Law § 84 8

N.Y. Pub. Off. Law § 86(6) 8

N.Y. Pub. Off. Law § 89 (2-b) 8

N.Y. Pub. Off. Law § 89 (2-c) 8

29 U.S.C. § 152(2) 6

Other Authorities

Christopher Robbins et al., *Here Are the Current NYPD Officers with the Most Substantiated Misconduct Complaints*, Gothamist (July 28, 2020), https://gothamist.com/news/here-are-current-nypd-officers-most-substantiated-misconduct-complaints 13

NYCLU, Report: Five Years of Civilian Review: A Mandate Unfulfilled (1998), https://www.nyclu.org/en/publications/report-five-years-civilian-review-mandate-unfulfilled-1998 4

NYCLU, Testimony Before the New York State Senate Committee on Codes in Support of S.3695, Repealing Civil Rights Law Section 50-a (Oct. 17, 2019 4

INTRODUCTION

This marks the second time New York's repeal of its police-misconduct secrecy law has been before this Court. Previously, Plaintiff-Appellant Cross-Appellee uniformed officer unions ("the Unions") sought to block amicus curiae the New York Civil Liberties Union ("NYCLU") from making publicly available a database of over 323,000 complaints filed against NYPD officers dating back to 1985.[1] This Court rightly rejected that challenge, and the NYCLU promptly made the database available on its website on August 20, 2020. In the first week the database was available, it was visited over 100,000 times.

The Unions have now returned and seek even broader relief, namely an order from this Court barring Defendants-Appellees (collectively, "the City") – including the NYPD and the Civilian Complaint Review Board (CCRB) – from releasing through New York's Freedom of Information Law a vast range of misconduct information while the Unions pursue an arbitration process that undoubtedly will be protracted. Throughout that period, the public would be deprived of essential information about CCRB investigations, NYPD disciplinary practices, and allegations of officer misconduct.

[1] Pursuant to Fed. R. App. P. 29(a)(4)(E) and Local R. 29.1(b), amicus states that no party's counsel authored the brief in whole or in part, and no party, party's counsel, or any person other than amicus curiae or their counsel contributed money that was intended to fund preparing or submitting this brief.

This amicus submission focuses on the Unions' arbitration and due process arguments that they claim bar the City from releasing disciplinary information in response to FOIL requests. The reality is they do no such thing. First, setting aside that the collective bargaining agreements do not by their own terms even relate to the disclosure of disciplinary information by the City, the Unions' argument is foreclosed by well-established New York State law that invalidates collective-bargaining-agreement provisions that conflict with public policy. Here, the strong public policy underlying FOIL would render unenforceable any provision that purported to nullify New York City's obligations under the law. And as evidenced by the extraordinary interest in the database the NYCLU released, those public-policy considerations are particularly weighty given the sustained and intense debate in New York and across the country about police discipline, accountability, and misconduct.

The Unions' due process argument about the public release of records regarding potential misconduct of police officers in the line of duty is equally misguided. The Unions fail to establish a due process right in avoiding such public disclosure because they do not identify a tangible constitutional interest other than alleged reputational harm as is necessary to establish a "stigma-plus" claim. Accordingly, amicus urges the Court to reject the Unions' efforts to evade public scrutiny of these important government functions.

All parties have consented to the filing of this brief.

INTEREST OF AMICUS CURIAE

Amicus Curiae the NYCLU, the New York State affiliate of the American Civil Liberties Union, is a not-for-profit, non-partisan organization with more than 180,000 members and supporters. The NYCLU's mission is to defend and promote civil rights and liberties as embodied in the United States Constitution, the New York State Constitution, and state and federal law. Defending New Yorkers' rights to be free from discriminatory and abusive policing is a core component of that mission. To that end, the NYCLU long has been involved in efforts to challenge and ultimately repeal section 50-a of the New York Civil Rights Law.

The NYCLU has been engaged in this case since its inception, serving as amicus in the district court and on motion practice before this Court. *See Uniformed Fire Officers Ass'n v. De Blasio*, 973 F.3d 41 (2d Cir. 2020). Prior to its repeal, the NYCLU frequently litigated issues concerning the application of section 50-a. *See, e.g.*, *NYCLU v. N.Y.C. Police Dep't*, 32 N.Y.3d 556 (2018) (addressing application of section 50-a to NYCLU request for NYPD disciplinary decisions); *Victor v. Office of Administrative Trials and Hearings*, Index No. 100890/15 (N.Y. Cnty. Sup. Ct. June 4, 2018) (amicus curiae in dispute addressing application of section 50-a to disciplinary decisions involving Department of Correction officers). The NYCLU also was deeply involved in the years-long legislative process

concerning the repeal of section 50-a, testifying regularly at public hearings concerning relevant proposals and advocating with lawmakers in support of the June 2020 repeal bill. *See, e.g.*, NYCLU, Testimony Before the New York State Senate Committee on Codes in Support of S.3695, Repealing Civil Rights Law Section 50-a (Oct. 17, 2019), JA 1034-1042.

As part of assessing the integrity and effectiveness of police accountability systems, the NYCLU has also long advocated for greater scrutiny of the high rates at which oversight agencies do not substantiate allegations of police misconduct. *See, e.g.*, NYCLU, Report: Five Years of Civilian Review: A Mandate Unfulfilled (1998), https://www.nyclu.org/en/publications/report-five-years-civilian-review-mandate-unfulfilled-1998. After the repeal of section 50-a, the NYCLU launched an effort to submit open-records requests for information related to police misconduct and disciplinary systems to shed light on how police departments police themselves and handle officer misconduct, beginning with the NYPD. In response, the NYCLU obtained CCRB complaint history data and posted over 300,000 complaint records. *See*, *e.g.*, https://www.nyclu.org/en/campaigns/nypd-misconduct-database.

ARGUMENT

I. NEW YORK PUBLIC POLICY BARS THE UNIONS FROM ASSERTING A CONTRACTUAL RIGHT TO SHIELD FROM SCRUTINY INFORMATION PROPERLY WITHIN THE SCOPE OF FOIL.

Although the Unions attempt to avoid it, they must establish the traditional factors for a preliminary injunction in aid of arbitration, including a likelihood of success on the merits. *See SG Cowen Sec. Corp. v. Messih*, 224 F.3d 79, 84 (2d Cir. 2000). They cannot do so. The Unions point to a provision in their collective bargaining agreements—referred to by the district court as section 7(c)—that they contend bars the City from disclosing any and all complaints of official misconduct against officers.[2] Br. for Pls.-Appellants-Cross-Appellees 19-20, ECF No. 204 ("Unions' Br."). Even if the Unions could stretch the plain language of the collective bargaining agreements in this way, such a term would plainly be unenforceable as against public policy.[3]

[2] The Unions' reading of the CBAs as creating a sweeping restriction on public dissemination of allegations of misconduct is simply wrong. The CBA provision does no such thing, *see* Br. Intervenor-Defendant-Appellee-Cross-Appellant 32-37, ECF No. 265, Br. Defendants-Appellees, 28-29, ECF No. 267, and the district court did not abuse its discretion in denying the preliminary injunction with respect to section 7(c).

[3] The public policy argument was briefed below, *see* SPA 23, and provides an alternative ground for affirming the district court's denial of the preliminary injunction in aid of arbitration. *Leon v. Murphy*, 988 F.2d 303, 308 (2d Cir. 1993) ("[The Court] may affirm . . . on any basis for which there is a record sufficient to permit conclusions of law, including grounds upon which the district court did not rely."). New York's strong public policy in favor of open records also supports reversal of the district court's narrow injunction with respect to the section 8 provision at issue in the cross-appeal.

As the New York Court of Appeals explained recently, under New York law, a "contractual provision [is] unenforceable where the public policy in favor of freedom of contract is overridden by another weighty and countervailing public policy." *159 MP Corp. v. Redbridge Bedford, LLC*, 33 N.Y.3d 353, 360 (2019) (citation omitted); *see also Kass v. Kass*, 91 N.Y.2d 554, 565 n.4 (1998) ("Parties' agreements may, of course, be unenforceable as violative of public policy[.]"); *In re Sprinzen (Nomberg)*, 46 N.Y.2d 623, 630 (1979) ("[I]t is the established law in this State that an award which is violative of public policy will not be permitted to stand.").[4] Accordingly, a "City is restricted from bargaining and agreeing to schemes or arrangements beyond public policy and procedures prescribed by the law." *City of New York v. 17 Vista Assocs.*, 84 N.Y.2d 299, 306 (1994). Any such agreement is void *ab initio*. *See, e.g.*, *City of New York v. Uniformed Fire Officers Ass'n, Local 854, IAFF, AFL-CIO*, 95 N.Y.2d 273, 282 (2000) (Wesley, J.) (enjoining arbitration because CBA provision limiting the power of the New York City Department of Investigation to interrogate city employees in a criminal investigation was against public policy); *Bd. of Ed., Great Neck Union Free Sch.*

[4] The Unions' arguments regarding the CBA are subject to state, not federal, law because the defendants are political subdivisions exempt from Section 301 of the Labor Management Relations Act. *See* 29 U.S.C. § 152(2) (exempting from the definition of employer "any State or political subdivision thereof"); *Ford v. D.C. 37 Union Local 1549*, 579 F.3d 187, 188 (2d Cir. 2009) ("As the language of the LMRA makes plain, public employees are not covered by that statute.").

Dist. v. Areman, 41 N.Y.2d 527, 533 (1977) (holding that a board of education cannot bargain away the right to inspect teacher personnel files).

The Second Circuit has not considered this question in the context of collective bargaining agreements, but the New York Court of Appeals regularly has vacated arbitral awards and restricted bargaining where such provisions were contrary to public policy. It has repeatedly applied this principle to provisions of police collective bargaining agreements that, for example, purport to limit the "strong . . . policy favoring authority of public officials over the police." *In re Patrolmen's Benevolent Ass'n of N.Y., Inc. v. N.Y. State Pub. Emp't Relations Bd.*, 6 N.Y.3d 563, 575-76 (2006). In *Patrolmen's Benevolent Ass'n*, the Court of Appeals held that this strong public policy did not allow the City of New York and the Town of Orangetown to bargain over certain police discipline subjects. *Id.* at 576. For this same reason, the Court of Appeals elsewhere held that public policy forbade a Buffalo police commissioner from casually giving up the right to select "an officer to fill a position important to the safety of the community." *In re Buffalo Police Benevolent Ass'n (City of Buffalo)*, 4 N.Y.3d 660, 664 (2005).

"Although 'public policy' is a vague term, it 'is to be ascertained by reference to the laws and legal precedents . . . .'" *Kraut v. Morgan & Brother Manhattan Storage Co.*, 38 N.Y.2d 445, 451-52 (1976) (citation omitted). New York's FOIL reflects the State's strong public policy in favor of open government

and public scrutiny of official misconduct. FOIL was enacted to promote a "free society," which "is maintained when a government is responsive and responsible to the public, and when the public is aware of governmental actions," creating a "more open [] government," which, in turn, allows the public to have a "greater [] understanding and participation . . . in government." N.Y. Pub. Off. Law § 84 (McKinney). FOIL "proceeds under the premise that the public is vested with an inherent right to know and that official secrecy is anathematic to our form of government." *Fink v. Lefkowitz*, 47 N.Y.2d 567, 571 (1979). The New York Legislature underscored this purpose in the repeal of Civil Rights Law § 50-a, and the corresponding FOIL amendments. The Legislature made clear that the State's public policy favors disclosure of all allegations of official misconduct, including those by police officers. *See* N.Y. Pub. Off. Law § 86(6) (broadly defining "law enforcement disciplinary records" to include "complaints, allegations and charges[,] . . . the name of the employee complained of or charged, the transcript of any disciplinary trial or hearing . . . [and] the disposition of any disciplinary proceeding"); §§ 89(2-b), -(2-c) (setting forth specific information to be withheld under FOIL).

The information the Unions contend must be withheld by the contracts relates to the most basic governance of the police department and the CCRB: whether complaints against police officers are substantiated, or not, and any

discipline that is applied, or not. In the midst of a nationwide debate about policing, there is a strong public interest in knowing how the NYPD and CCRB handle complaints and discipline, which is even stronger given that the public has not had access to that information for decades.

Under the Unions' theory, however, the terms of their CBAs prohibit dissemination of this information that is otherwise subject to public disclosure under FOIL. *See* Unions' Br. at 19. Reading the contracts in such a manner would be contrary to New York's strong public policy in favor of open government, and thus render the relevant statutory provisions and the repeal of section 50-a a nullity.

Importantly, this is not a case where a court needs to balance the public interests favoring invalidation and the State's strong interest in collective bargaining. That is because the rights that purportedly have been bargained away here are not those of the City but those *of the public*—which the City has no ability to contract away in the first place. *See City of New York*, 95 N.Y.2d at 282 ("The City (and its residents) has a significant interest in ensuring that the inner workings of the machinery of public service are honest and free of corruption. We conclude that this public policy restricts the freedom to arbitrate under the circumstances presented here . . . ."). FOIL was enacted "in furtherance of the *public's* vested and inherent 'right to know.'" *Capital Newspapers Div. of Hearst Corp. v. Burns*, 67 N.Y.2d 562, 565-66 (1986); *see also Weston v. Sloan*, 84 N.Y.2d 462, 465

(1994) ("[T]he general principle underlying FOIL [is] the presumption that the records of government should be accessible to the public under the public's inherent right to know the processes of government decision-making."); *M. Farbman & Sons, Inc. v. N.Y.C. Health & Hosps. Corp.*, 62 N.Y.2d 75, 80 (1984) ("Full disclosure by public agencies is, under FOIL, a public right and in the public interest, irrespective of the status or need of the person making the request."). FOIL thus creates a public *right* to access information about allegations of official misconduct, which the Unions seek to impair via contract. *See, e.g.*, *Larocca v. Bd. of Educ. of Jericho Union Free School Dist.*, 220 A.D.2d 424, 427 (2d Dep't 1995) ("[A]s a matter of public policy, the Board of Education cannot bargain away the public's right to access to public records."). Even in purely private settings, it is well-settled that entities cannot enter into contracts that would bargain away the statutory rights of third parties. *See 390 W. End Assocs. v. Harel*, 298 A.D.2d 11, 16 (1st Dep't 2002) (landlord and tenant could not contract to exempt apartment from rent stabilization laws because "[t]he goal of ensuring an adequate supply of affordable housing 'is frustrated when landlords and tenants attempt to contract around the regulated rent[s]'") (citation omitted); *cf. Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 211-12 (1985) (noting the established principle that "parties

to a collective-bargaining agreement [cannot] contract for what is illegal under state law").[5]

Moreover, any effort by the City to bargain away the rights created by FOIL would be particularly impermissible because FOIL's obligations are directed at *the City itself*. The law is designed to ensure both that public officials *and government agencies* are properly subject to public scrutiny. *Gould v. New York City Police Dep't*, 89 N.Y.2d 267, 274 (1996) ("[T]he FOIL imposes a broad *duty* on government to make its records available to the public[.]" (emphasis supplied)); *see also Cty. of Suffolk, New York v. First Am. Real Estate Sols.*, 261 F.3d 179, 192 (2d Cir. 2001) (explaining that the "heart" of FOIL is "providing the public access to the operation or decision-making functions of government"). The City cannot lawfully "contract out" of its own statutory obligations by agreeing with its employees to refuse to abide by applicable provisions of FOIL. *See Washington Post Co. v. New York State Ins. Dep't*, 61 N.Y.2d 557, 567 (1984) (agency "had no

[5] And if the applicable CBA provisions do not—because they cannot—bar the City from providing the relevant information in response to a FOIL request, they likewise cannot bar the City from releasing that same information voluntarily. The public's right to disclosure extends to information *subject to* disclosure under FOIL—not merely information that happens to have been requested through the FOIL process. *Jewish Press, Inc. v. N.Y.C. Dep't of Educ.*, 183 A.D.3d 731, 731-32 (2d Dep't 2020) (describing the relevant right as the "right to know" relevant information about the government, not merely the right to petition the government for information).

authority" to promise insurance companies that records covered by FOIL would not be disclosed). Indeed, taken to its logical conclusion, the Unions' theory must be that government employers can agree in their CBAs simply to refuse to honor FOIL requests across the board—and presumably opt out of all kinds of other state laws involving the rights of the public. That cannot be correct.[6]

In short, the Unions' argument that the CBAs prohibit disclosure of information properly subject to FOIL is patently meritless. Such a limitation would squarely violate New York public policy and settled law prohibiting the impairment of statutory rights. The Unions' argument should be dismissed on that ground alone and the district did not abuse its discretion in denying the preliminary injunction.

II. THE UNIONS CANNOT SUCCEED ON THEIR "STIGMA PLUS" DUE PROCESS CLAIMS

The NYCLU, as an organization dedicated to vindicating the civil rights and civil liberties of all persons, fully supports the notion that the Due Process Clause protects all people—including, critically, government employees—from certain

[6] For this reason, the Unions' focus on whether the relevant allegations have been "substantiated" or "final" is likewise misplaced. *See* Unions' Br. at 7-8. It is no answer that the disclosures here concern instances where, following an *internal* departmental review, an employing agency has declined to discipline an officer. The reason why public scrutiny is so vital in this context is to ensure the adequacy of those very internal processes, and ensure that allegations of misconduct are being treated in a serious and even-handed way.

government action that can damage them. But these important protections are not implicated in this case, which involves government agencies providing information regarding the conduct of government officials, and specifically police officers, who are authorized to use deadly force.[7] The information at issue here is not damaging to police officers,[8] but even if it were, the Unions' due process claims would still fail because, as the district court correctly concluded, they do not establish a liberty interest implicated by the City's release to the public of disciplinary records regarding potential misconduct in the line of duty. *See* SPA 33-34.

Loss of reputation alone is insufficient to invoke the procedural protections of the Due Process Clause. *Paul v. Davis*, 424 U.S. 693, 702-12 (1976) (holding that interest in reputation alone, even where damaged by a public official, does not create a liberty or property deprivation). The Unions therefore attempt to invoke the doctrine of "stigma-plus," in which courts have recognized a protected liberty

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[7] The Unions assert that this case concerns the City's publication of "registries" of misconduct allegations—a term they use for the first time on appeal. Unions' Br. at 33. But the records here are produced in response to freedom of information requests or made available electronically; the Unions' use of the pejorative label "registries" – associated with registries of people convicted of sex offenses affirmatively disseminated by public officials and denoting a finding of guilt – does not make them so.

[8] Many officers with numerous complaints have in fact been promoted despite those records. *See, e.g.*, Christopher Robbins et al., *Here Are the Current NYPD Officers with the Most Substantiated Misconduct Complaints*, Gothamist (July 28, 2020), https://gothamist.com/ news/here-are-current-nypd-officers-most-substantiated-misconduct-complaints.

interest in "injury to one's reputation (the stigma) coupled with the deprivation of some 'tangible interest' or property right (the plus)." *DiBlasio v. Novello*, 344 F.3d 292, 302 (2d Cir. 2003). The Unions contend that the "plus" is satisfied here because the disclosure of records "will undermine future law enforcement job prospects for the named officers." Unions' Br. at 40. But Second Circuit precedent plainly forecloses that argument. *See Valmonte v. Bane*, 18 F.3d 992, 1001 (2d Cir. 1994); *see also Filteau v. Prudenti*, 161 F. Supp. 3d 284, 295 (S.D.N.Y. 2016) (Engelmayer, J.) (noting that "[u]nder settled doctrine," plaintiff's "claim of diminished job prospects is insufficient to support a claim of injury to a protected liberty interest").

In *Valmonte*, this Court concluded that "the deleterious effects which flow directly from a sullied reputation," including "the impact that defamation might have on job prospects," are insufficient to establish a protected liberty interest. 18 F.3d at 1001 (emphasis added). The court nevertheless held that the plaintiff established a tangible interest in prospective employment in her chosen field because of a state statute specifically requiring childcare employers to check applicants against the state's central registry of suspected child abusers, and further requiring employers who hire people on the registry "to explain the reasons why in writing" to the state. *See id.* Only because of this "statutory impediment," which "by *operation of law*" placed an "added burden" on employers wishing to hire the

plaintiff, did the court hold that the loss of job prospects was sufficient to establish a liberty interest. *Id.* (emphasis in original); *cf. Lee T.T. v. Dowling*, 87 N.Y.2d 699, 703 (1996) (concluding under New York Due Process Clause that plaintiff established liberty interest as to same statutory scheme, and noting consistency with *Valmonte*).

The Unions incorrectly contend the records here are the "functional equivalent" of those in *Valmonte* because, the Unions assert, "future employers will check [them] before hiring a current or former NYPD officer." Unions' Br. at 39. But they identify no law *requiring* employers to do so, much less requiring employers to explain in writing their reasons for hiring a former officer who has misconduct allegations. As Valmonte makes clear, without such a statutory burden on employers, their claims fail. *See* 18 F.3d at 1001 (noting that "the impact that defamation might have on job prospects" is "normally . . . insufficient," but that the statutory scheme there "presents an entirely different situation"); *Cohane v. Nat'l Collegiate Athletic Ass'n*, 612 F. App'x 41, 44 (2d Cir. 2015) ("When . . . the loss of job prospects is merely a normal repercussion of a poor reputation, it cannot be the basis for a stigma-plus claim.") (citing *Valmonte*, 18 F.3d at 1001) (internal quotation marks omitted).

Nor do the Unions cite any precedent to the contrary, notwithstanding their misleading and selective quotation of cases. In the majority of the cases they rely

on, the "plus" was termination from government employment—not speculation that the plaintiffs *might* be fired or lose future job opportunities. *See Swinton v. Safir*, 93 N.Y.2d 758, 763 (1999); *Brandt v. Bd. Of Co-op. Educ. Servs.*, 820 F.2d 41, 44 (2d Cir. 1987); *see also Boss v. Kelly*, 306 F. App'x 649, 651 (2d Cir. 2009) (noting that under *Valmonte* loss of "job prospects" is insufficient, and concluding that plaintiff police officer failed to satisfy "plus" element where he did "not allege that he was terminated"). In *People v. David W.*, 95 N.Y.2d 130 (2000), which involved a due process challenge to a state statute classifying and publicizing a private person on a sex-offender registry, the "plus" included the fact that classification entailed "affirmative obligations" to register every 90 days with local law enforcement and "promptly advise of changes in address," as well as publication of a person's photograph, home address, and phone number. *Id.* at 137-38. That case provides no support for Unions' contention that potential loss of employment or job opportunities is sufficient.

In short, *Valmonte* and its progeny make clear that—as the district court properly concluded—the Unions have no due process claim.

CONCLUSION

For the foregoing reasons, the NYCLU respectfully submits that the district court did not abuse its discretion when it denied, in large part, the Unions' request for a preliminary injunction.

Respectfully submitted,

NEW YORK CIVIL LIBERTIES UNION FOUNDATION, by

/s/ Molly K. Biklen
MOLLY K. BIKLEN
CHRISTOPHER DUNN
125 Broad Street, 19th Floor
New York, N.Y. 10004
Tel: (212) 607-3300

On the brief: JORDAN LARIS COHEN

LATHAM & WATKINS LLP, by

/s/ Jamie L. Wine
JAMIE L. WINE
LAWRENCE E. BUTERMAN
SAMIR DEGER-SEN
885 Third Avenue
New York, N.Y. 10022
Tel: (212) 906-1200

Attorneys for Amicus Curiae New York Civil Liberties Union

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Second Circuit Local Rule 29.1 because the brief contains 4,042 words, inclusive of point headings and footnotes and exclusive of pages containing the table of contents, table of citations, and certificate of compliance; and

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Procedure 32(a)(6) because it has been prepared using 14-point Times New Roman proportionally spaced typeface, double-spaced.

Dated: November 3, 2020
New York, N.Y.

/s/ *Molly K. Biklen*
MOLLY K. BIKLEN

Attorney for New York Civil Liberties Union