UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Thurgood Marshall U.S. Courthouse 40 Foley Square, New York, NY 10007 Telephone: 212-857-8500

MOTION INFORMATION STATEMENT

Docket Number(s): 20-2789 Caption [use short title]

Motion for: Leave to File Amicus Curiae Brief in support of Appellees' opposition to Appellants' appeal.

Set forth below precise, complete statement of relief sought:

The moving party moves for leave to file an Amicus Curiae brief with interest in opposing Appellants' position.

Uniformed Fire Officers Association v. DeBlasio

MOVING PARTY: NYS Black, Puerto Rican, Hispanic & Asian Legislative Caucus **OPPOSING PARTY:**

☐ Plaintiff ☐ Defendant

☐ Appellant/Petitioner ☐ Appellee/Respondent

MOVING ATTORNEY: Pamela S.C Reynolds **OPPOSING ATTORNEY:**

[name of attorney, with firm, address, phone number and e-mail]

Pamela S.C. Reynolds, Littler Mendelson, P.C., 375 Woodcliff Drive, Suite 2D, Fairport, NY 14450; 585.203.3400, preynolds@littler.com

Court- Judge/ Agency appealed from: U.S. District Judge Katherine P. Failla, Southern District of New York

Please check appropriate boxes:

Has movant notified opposing counsel (required by Local Rule 27.1):
☐ Yes ☑ No (explain): the movant seeks to appear as amicus curiae. Therefore, there is no opposing counsel.

Opposing counsel's position on motion:
☐ Unopposed ☐ Opposed ☑ Don't Know

Does opposing counsel intend to file a response:
☐ Yes ☐ No ☑ Don't Know

FOR EMERGENCY MOTIONS, MOTIONS FOR STAYS AND INJUCTIONS PENDING APPEAL:

Has this request for relief been made below? ☐ Yes ☐ No

Has this relief been previously sought in this court? ☐ Yes ☐ No

Requested return date and explanation of emergency:

Is oral argument on motion requested? ☐ Yes ☑ No (requests for oral argument will not necessarily be granted)

Has argument date of appeal been set? ☐ Yes ☑ No If yes, enter date:

Signature of Moving Attorney:

/s/ Pamela S.C. Reynolds **Date:** 11/05/2020 Service by: ☑ CM/ECF ☐ Other [Attach proof of service]

MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF TO PROVIDE ASSISTANCE AND BACKGROUND TO THE COURT IN ADJUDICATING THE INSTANT APPEAL

The New York State Black, Puerto Rican, Hispanic & Asian Legislative Caucus (the "Caucus") seeks leave to file the instant amicus curiae brief to provide assistance and background to the Court in adjudicating the instant appeal. Through their undersigned counsel, the Caucus hereby requests leave of this Court to file their Brief *Amicus Curiae* in further Support of Appellees' opposition to Petitioner-Appellants' appeal of the District Court's order denying Appellants a preliminary injunction in aid of arbitration. Appellants have not provided consent to the filing of this motion.

The grounds in support of this motion are as follows:

1. The movant, *amicus curiae* the New York State Black, Puerto Rican, Hispanic & Asian Legislative Caucus (the "Caucus") is a 62-member body of New York State legislators, from both the Senate and Assembly, representing approximately 25% of residents across the entire State. Its members share a common responsibility in effectuating the purpose and function of the legislative process, specifically, the manner in which that process affects the lives and well-being of the people, in particular, those persons with ties in the Black, Puerto Rican, Hispanic and Asian communities. In furtherance of its mission, and on behalf of its members' constituents, the Caucus was instrumental in passing the recent legislation repealing

New York Civil Rights Law ("CRL") § 50-a.

2. Appellants in this matter seek to enjoin Appellees from implementing the legislation that the Caucus was instrumental in passing. The Caucus is in a particularly unique position to comment on the propriety of such an injunction, and is thus uniquely qualified to be of assistance to this Court by explaining the particular process that led to the legislation underlying this appeal. *See C & A Carbone, Inc. v. County of Rockland*, NY, No. 08–cv–6459–ER, 2014 WL 1202699, at *3-4 (S.D.N.Y. Mar. 24, 2014) ("An amicus brief should normally be allowed . . . when the amicus has unique information or perspective that can help the court beyond the help that the lawyers for the parties are able to provide.") (quoting *Ryan v. Commodity Futures Trading Comm'n*, 125 F.3d 1062, 1063 (7th Cir.1997)).

3. Based on its role in deliberating that landmark legislation, the Caucus is uniquely suited to explain the process undertaken, information considered, and reasoning employed in repealing § 50-a in a manner that may assist the Court in analyzing the issues on appeal, including the alleged imminent harm that Appellants contend their members would suffer due to the intended records disclosure and the balance of equities the governments involved considered. Insight from the legislators responsible for the drafting, negotiating, and passing of §50-a would provide helpful context in resolving these issues.

4. The proposed *Amicus Curiae's* Brief is timely under sections (a)(3) and (a)(6) of Rule 29 of the Federal Rules of Appellate Procedure. Participation by the Caucus as *amicus curiae* will not delay the briefing or argument in this case.

Thus, in accordance with Federal Rule of Appellate Procedure 29, counsel for the proposed *Amicus Curiae* respectfully requests that the Court grant its motion for leave to file its Brief to Provide Assistance and Background to the Court in Adjudicating the Instant Appeal, and that the Court accept for filing the Brief that is being submitted contemporaneously with this motion.

Dated: November 5, 2020

LITTLER MENDELSON, P.C.

By: *s/Pamela S. C. Reynolds*

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AMICUS BRIEF

20-2789-cv(L), 20-3177-cv(XAP)

United States Court of Appeals

for the

Second Circuit

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

(For Continuation of Caption See Inside Cover)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR *AMICUS CURIAE* NEW YORK STATE BLACK, PUERTO RICAN, HISPANIC & ASIAN LEGISLATIVE CAUCUS IN SUPPORT OF DEFENDANTS-APPELLEES

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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

Pursuant to Federal Rule of Appellate Procedure Rule 26.1, the New York State Black, Puerto Rican, Hispanic & Asian Legislative Caucus hereby states that it is a caucus of the New York State Legislature and has no parent company. No publicly-held company owns 10% or more of the New York State Black, Puerto Rican, Hispanic & Asian Legislative Caucus.

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SOURCE OF AUTHORITY TO FILE

The New York State Black, Puerto Rican, Hispanic & Asian Legislative Caucus submits this brief pursuant to the bases set forth in its motion for leave to file. In brief, the Caucus was instrumental in passing the recent legislation that repealed § 50-a. Appellants in this matter seek to enjoin Appellees from implementing that legislation. As such, the Caucus is in a distinctive position to comment on the propriety of such an injunction. Thus, the Caucus respectfully submits that it is uniquely qualified to be of assistance to this Court by explaining the particular process that led to the legislation underlying this appeal. *See C & A Carbone, Inc. v. County of Rockland*, NY, No. 08–cv–6459–ER, 2014 WL 1202699, at *3-4 (S.D.N.Y. Mar. 24, 2014) ("An amicus brief should normally be allowed . . . when the amicus has unique information or perspective that can help the court beyond the help that the lawyers for the parties are able to provide.") (quoting *Ryan v. Commodity Futures Trading Comm'n*, 125 F.3d 1062, 1063 (7th Cir.1997)).

INTEREST OF AMICUS AND SUMMARY OF ARGUMENT

The New York State Black, Puerto Rican, Hispanic & Asian Legislative Caucus (the "Caucus") submits this brief,[1] pursuant to the Court's leave, to provide assistance and background to the Court in adjudicating the instant appeal.

[1] No party's counsel authored this brief in whole or in part. No party or their counsel contributed money intended to fund the preparation or submission of this brief. No person other than the filing amicus or its counsel contributed money to fund preparation or submission of this brief.

The Caucus is a 62-member body of New York State legislators, from both the Senate and Assembly, representing approximately 25% of residents across the entire State. Its members share a common responsibility in effectuating the purpose and function of the legislative process, specifically, the manner in which that process affects the lives and well-being of the people, in particular, those persons with ties in the Black, Puerto Rican, Hispanic and Asian communities. In furtherance of its mission, and on behalf of its members' constituents, the Caucus was instrumental in passing the recent legislation repealing New York Civil Rights Law ("CRL") § 50-a.

Based on its role in deliberating that legislation, the Caucus is uniquely suited to explain the process undertaken, information considered, and reasoning employed in repealing § 50-a in a manner that may assist the Court in analyzing the issues on appeal. For example, Appellants comment upon harms they face from disclosure of the records at issue and the balance of equities the governments involved considered. Insight from the legislators responsible for the drafting, negotiating, and passing of §50-a may provide helpful context in resolving these issues.

This amicus curiae brief details the origin of § 50-a as a legislative reaction to the civil rights movement, its expansion and interpretation by the courts into a near boundless obstruction on police transparency, and its ultimate repeal. It details the perspectives the Legislature considered from affected community groups that informed and supported that repeal. Based on those perspectives, and the

deliberative process they informed, this brief then touches on certain arguments presented by Appellants that relate to the justification for § 50-a's repeal, the record disclosures at issue, and the District Court's order permitting those disclosures to go forward.

LEGISLATIVE BACKGROUND TO THE REPEAL OF § 50-A

I. THE HISTORY OF CIVIL RIGHTS LAW § 50-A AND ITS GROWTH INTO A NEAR-TOTAL BARRIER TO POLICE TRANSPARENCY

A. The Legislature Passed § 50-a to Mitigate Police Union Backlash Against the Civil Rights Movement

"50-a was passed at a distinctive moment in American history," following the battles and early triumphs of the civil rights movement. Nick Pinto, *How New York's Law Shielding Cops From Scrutiny Became One of the Toughest in the Country*, GOTHAMIST (March 10, 2020), https://gothamist.com/news/ny-police-nypd-50a-cops-crime. Those battles transformed public discourse around law enforcement, and strengthened support for expanded police transparency. *Id.* In 1966, for example, New York City Mayor John Lindsay tried restructuring the Civilian Complaint Review Board ("CCRB") to allow civilian oversight at the highest level for the first time in City history. *Id.* In response to such a modest reform, "police unions rebelled." *Id.* More than 5,000 officers, led by the Patrolman's Benevolent Association ("PBA"), stormed City Hall. *Id.* The PBA President at the time, John

Cassese, commented: "I am sick and tired of giving in to minority groups, with their whims and their gripes and shouting." *Id.* Mayor Lindsay was forced to concede to the PBA's power when it advocated for and won a referendum barring civilians from having oversight of the police. *Id.*

In 1973, when the New York Legislature passed the Freedom of Information Law ("FOIL") granting public access to government records, the police unions objected as before, and lobbied legislators to qualify FOIL's purpose by passing CRL § 50-a "over the objections of legislators, civil liberties groups, and law enforcement officials who accurately predicted the kind of unaccountability for police violence and corruption the law would foster." *Id.*

The sponsors of this legislation endeavored to limit any restrictions on the public's access to police records. As enacted in 1976, § 50-a provided that "all personnel records used to evaluate performance toward continued employment or promotion, under the control of any police agency . . . shall be considered confidential and not subject to inspection or review without the express written consent of such police officer . . . except as may be mandated by lawful court order." *See* CRL § 50-a(1) (repealed June 12, 2020). While the legislature assumed this would limit criminal defense attorneys from sidetracking prosecutions with irrelevant impeachment of police officers for prior acts, it was ***never*** intended to hide police misconduct records from the public, as Section 50-a's chief sponsor, the late

Senator Frank Padavan, made clear. *See* New York City Bar, Report on Legislation by the Civil Rights Committee, NEW YORK CITY BAR ASSOCIATION 1, 2 (2020), https://bit.ly/3jK6O2O; Brendan J. Lyons, *Court rulings shroud records*, TIMES UNION (Dec. 10. 2016), https://www.timesunion.com/tuplus-local/article/Court-rulings-shroud-records-10788517.php (quoting Padavan in 2016, who stated "That was the intent…If the law is being misused then obviously an amendment might be in order.")

B. Once Modest, CRL § 50-a Evolved to Hide Virtually All Police Discipline from Public Oversight

Despite the Legislature's original intent, the law enforcement community sought with success to "expand[] [§ 50-a] in the courts to allow police departments to withhold from the public virtually any record that contain[ed] any information that could conceivably be used to evaluate the performance of a police officer." *Daily Gazette Co. v. City of Schenectady*, 93 N.Y.2d 145, 155 (1999). CRL § 50-a came to be interpreted as a rule of secrecy rather than an exception to open disclosure. Subsequent courts would rule the following as insulated from disclosure:

- Officer training information and settlements for the disciplined officer. *Malcolm v. New York City Police Dep't*, 100466/2017, 2018 NYLJ LEXIS 2874, *22 (Aug. 29, 2018);
- Records of off-duty misconduct. *Daily Gazette Co.*, 93 N.Y.2.d at 159;
- CCRB records regarding whether officers have been accused of misconduct, whether the allegations were substantiated, and even whether officers were

disciplined for proven misconduct. *Luongo v. CCRB Records Officers and Daniel Pantaleo*, 150 A.D.3d 13 (1st Dep't 2017), *leave den.*, 30 N.Y.3d 908 (2017) (reversing order granting access to former NYPD Police Officer Daniel Pantaleo's substantiated CCRB disciplinary history);

- Personnel records, even with redactions. *N.Y. Civil Liberties Union v. N.Y. City Police Dep't*, 32 N.Y.3d 556, 570 (2018).

Emboldened and compelled by these decisions, police departments like the NYPD increasingly cited § 50-a to end their own longstanding voluntary disclosure programs. *See, e.g.*, Rocco Parascandola & Graham Rayman, EXCLUSIVE: NYPD suddenly stops sharing records on cop discipline in move watchdogs slam as anti-transparency, N.Y. DAILY NEWS (Aug. 24, 2016), https://www.nydailynews.com/new-york/exclusive-nypd-stops-releasing-cops-disciplinary-records-article1.2764145. More and more, communities affected by police misconduct have been denied access to information about officers who patrol their streets, as well as their hard-won roles in overseeing police agencies.

C. Delays Resulting from Law Enforcement Using § 50-a as a Shield

The impact § 50-a has had in recent years has been devastating. Police agencies and unions were able to weaponize § 50-a to delay and refuse to disclose accusations of police misconduct under FOIL. *See* The Honorable Mary Jo White, The Honorable Robert L. Capers, The Honorable Barbara S. Jones, *The Report of the Independent Panel on the Disciplinary System of the New York City Police Department*, at 19 (Jan. 25, 2019) https://www.independentpanelreportnypd.net/

assets/report.pdf (describing obstacles faced by a mother who fought for 6 years to obtain results of disciplinary cases against the officers who shot her son to death, and reports from citizens who were never informed that officer disciplinary cases were closed). *See, e.g.*, *Luongo*, 150 A.D.3d at 26 (denying application to disclose police officer's disciplinary history due to alleged risk of "hostility and threats" resulting from the Eric Garner case, despite that case having no relation to the litigation at bar); *Luongo v. Records Access Appeals Officer, NYPD*, 160232/2016, 2017 N.Y. Misc. LEXIS 2102 (Sup. Ct. N.Y. Co. June 1, 2017), *aff'd*, 168 A.D.3d 504 (1st Dep't Jan. 17, 2019) (holding § 50–a bars disclosure of Personnel Orders, finding they are used to evaluate performance and a potential for harassment might materialize if disclosed).

The public's only avenue to secure an exemption from § 50-a's mandatory confidentiality provision is to obtain a "lawful court order." CRL § 50-a(1). But as the Caucus knows well from its own members' experience and from CPR's testimony (detailed below), this paper exception means little to the families that must balance personal and societal challenges against the years it takes fighting the entrenched systems to obtain restricted information. *See The Report of the Independent Panel on the Disciplinary System of the New York City Police Department*, at 19. Even upon disclosure, several layers of in camera review stand between the police and the public they serve, providing additional opportunities for

law enforcement to impinge transparency. *Id.* The culture of delay and obfuscation that evolved out of the broadening interpretation of § 50-a by courts and police departments spun out of the Legislature's own hands. This is the system Petitioners seek to restore and perpetuate.

II. THE LEGISLATURE REPEALS 50-A

A. Community Groups Showed the Legislature How In Excluding the Public from Police Accountability 50-a Undermined Social Justice and Public Safety

In October 2019, the New York State Senate Standing Committee on Codes ("the Committee"), chaired by Caucus member Senator Jamaal Bailey, held two hearings on whether to repeal § 50–a. *See* Senate Standing Committee on Codes, *Public Hearing: Policing (S3695), repeals provisions relating to personnel records of police officers, firefighters, and correctional officers* (Oct. 17, 2019), available at https://www.nysenate.gov/calendar/public-hearings/october-17-2019/public-hearing-policing-s3695-repeals-provisions-relating ("Oct. 17 Hearing"); Senate Standing Committee on Codes, *Public Hearing: Policing (S3695), repeals provisions relating to personnel records of police officers, firefighters, and correctional officers* (Oct. 24, 2019), available at https://www.nysenate.gov/calendar/public-hearings/october-24-2019/public-hearing-policing-s3695-repeals-provisions-relating ("Oct. 24 Hearing").

At these hearings, the Committee heard extensively from the officers unions who opposed, as they had for decades, the transparency community demanded. They raised the same specters of harm to reputation and safety as they raise here once more.

But the Committee also heard from numerous police accountability organizations, legal aid groups, and community members impacted by police misconduct testified about the barriers that § 50–a posed to police transparency. Their testimony provided crucial insight on the sort of barriers that might not occur to those without the same lived experience.

For example, the legislature heard testimony on why even the most seemingly trivial and unsubstantiated disciplinary violations should be subject to disclosure. Specifically, community groups testified about how when seeking disclosure of such violations, the public may disagree with an agency's characterization of what misconduct is "serious," and further highlighted how even low-level violations could result in a pattern of practice, as officers feel they can "get away" with increasingly worse misconduct. Oct. 24 Hearing at 3:07:13. The disciplinary record of Daniel Pantaleo, the former police officer who infamously killed Eric Garner via chokehold, provided one glaring example. The Committee heard testimony that prior to the Garner incident, Panteleo had faced four (4) substantiated individual allegations, ten (10) unsubstantiated individual allegations, and seven (7) disciplinary complaints.

Id. at 2:52:13. Witnesses explained that the NYPD's proposed approach would keep the cascade of unsubstantiated allegations hidden so that the public would be none-the-wiser until that officer committed substantiated misconduct, possibly escalating to the point of tragic violence. *Id.* at 2:52:29. Keeping determinations of "seriousness" or substantiation behind closed doors, witnesses noted, thoroughly erodes the public trust. *Id.* at 3:13:25. The public, as the Committee heard, has the right to review these incidents, and is capable and poised enough to distinguish material from immaterial instances of misconduct. *Id.* at 3:06:58. In other words, it is unacceptable to limit the public's access to information based on the false assumption that the public lacks the sophistication to know the difference between an allegation and confirmed misconduct.

Second, disclosure of non-serious or even unsubstantiated instances of officer misconduct was important to these community organizations in allowing the public able to keep police departments (including certain Appellants here) accountable for their own internal disciplinary processes. Throughout the hearings, the Government Appellees here testified at length about how officers are kept accountable by the agencies they serve. *See e.g. id.* at 1:17:47. But hearing witnesses explained to the committee how the NYPD, in fact, has consistently failed to actually enforce that accountability. It cited to the United States District Court for the Southern District of New York's finding in *Floyd v. City of New York*, which noted that "when

confronted with evidence of unconstitutional stops, the NYPD routinely denies the accuracy of the evidence, refuses to impose meaningful discipline, and fails to effectively monitor the responsible officers for future misconduct." *Id.* at 2:41:34; Senate Standing Committee on Codes, Oct. 24 Public Hearing on Discovery Reform Written Testimony at 47, available at https://www.nysenate.gov/sites/default/files/oct_24th_public_hearing_on_discovery_reform.pdf ("Oct. 24 Written Testimony") (quoting *Floyd v. City of New York*, 959 F. Supp. 2d 540, 617 (S.D.N.Y. 2013)).

The same witnesses also detailed recent report findings by New York City's Office of the Inspector General that showed "disturbing and continuing problems with regards to addressing racial profiling allegations in the NYPD—not one of nearly 2,500 complaints of racial profiling or biased policing between 2014 and 2017 has been substantiated by the department." *Id* at 47-48 (citing NYC Dep't of investigation, Off. of the Inspector Gen., Complaints of biased Policing in New York City: an Assessment of NYPD's Investigation, Policies, and Training 2 (2019), http://www1.nyc.gov/assets/doi/reports/pdf/2019/Jun/19BiasRpt_62619.pdf).

This testimony demonstrated to the Committee that for every complaint substantiated, considerably more lie behind unsubstantiated, and behind those even

more are left unreported by New Yorkers who have lost all trust in the process. [2] Full transparency was the only solution.

B. The Legislature Closely Considered Testimony From Citizens Directly Affected by § 50-a and its Barriers to Police Transparency.

The Caucus also paid close consideration to the mothers of children slain by police violence, who shared with the Committee their struggles to obtain disciplinary records and even the identities of the officers responsible. Every single testifying mother attributed her struggle, and some fraction of her pain, to § 50-a:

- Gwen Carr, the mother of Eric Garner, who died on Staten Island due to the use of a chokehold by NYPD officer Pantaleo. Oct. 24 Written Testimony at 35. *See also* Oct. 24 Hearing at 00:10:19. Ms. Carr explained that she did not find out information about Pantaleo's discipline history until 3 years after her son's killing due to "a widespread cover-up related to the scope of misconduct in my son's murder" by Respondents. *Id.* She pled for the Committee "to repeal 50-a because mothers like me shouldn't have to rely on whistleblowers risking their job to find out about the misconduct record of a public employee – a police officer – who killed our children" and remarked that "[i]f Pantaleo had been disciplined the right way earlier, maybe he would not have still been NYPD and maybe my son would be alive today." *Id.* at 37.

- Valerie Bell, the mother of Sean Bell, who died on the morning of his wedding in 2006 after NYPD officers fired nearly 50 shots at him as he approached his vehicle. Senate Standing Committee on Codes, Testimonies on Policing S3695 Repeals Provision at 2, available at https://www.nysenate.gov/sites/default/files/testimonies_on_policing_s3695_repeals_provisions_101719.pdf (last visited Aug. 13, 2020) ("Oct. 17

[2] At least one Respondent, Reverend Frederick Davie, Chair of the Civilian Complaint Review Board agreed, noting how community members had told him that filing complaints with the CCRB was "not worthwhile." Oct. 24 Hearing at1:08:50.

Written Testimony"); *See also* Oct. 24 Hearing at 00:4:10. Prosecutors would not tell Ms. Bell the name of the officers who took her son's life, and she had to wait until the officers' criminal trials, which occurred two years after her son's death. *Id.* She explained that "[n]ot being able to get answers was like losing Sean over and over again. You cannot imagine the pain this causes parents and family members, unless you go through it." *Id.* She stated that that was why she "ha[s] been fighting to repeal 50-a. People of color continue to be killed by the police and I understand what it's like for the families who have fought tooth and nail for transparency." Oct. 24 Written Testimony at 85.

- Victoria Davis, the mother of Dellrawn Smalls, who died in July 2016 due to an NYPD officer's road rage. Oct. 17 Written Testimony at 8; *see* Oct. 24 Hearing at 00:19:58. She testified that, "50-a keeps us from knowing the extent to which the NYPD and other New York police departments are failing to discipline officers that are killing, beating, and harassing us and letting them keep their jobs." *Id.*

- Constance Malcolm, the mother of Ramarley Graham, an unarmed teen gunned down by an NYPD officer in 2012. *See* Oct. 24 Written Testimony at 27. Like Ms. Carr and Ms. Bell, she struggled to obtain information about her son's killers due to § 50-a's restriction.

The testimony of these mothers demonstrated how § 50-a has impacted their families and communities— devastating life changes that Petitioners would ask this Court to ignore. Their courage prompted Senator Bailey to name them in his floor speech: "[T]o Gwen Carr and Valerie Bell, Constance Malcolm and more, I'm in debt to you for permitting me the opportunity to learn from you and learn your strength and resolve." Senate Floor Transcript at 1891:20-24.

The legislation repealing 50-a passed overwhelmingly; in the senate by 40 to 22 and in the assembly by 101 to 43. See N.Y. State Senate, Senate Bill S8946 (N.Y. 2020), https://tinyurl.com/ydcuxnms (last visited Oct. 29, 2020); N.Y. State

Assembly, Summary of S8946, https://tinyurl.com/y2qehcyx (last visited Oct. 29, 2020). Its effective dates made plain that both houses of the legislature, and Governor Cuomo agreed that this day had been too long coming. The act they passed provided for its immediate effect. Senate Bill, S8946 (N.Y. 2020), https://tinyurl.com/ydcuxnms.

ARGUMENT

I. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION TO DENY THE UNIONS PRELIMINARY INJUNCTIVE RELIEF

The Unions attack the District Court's order on several grounds; it fails to protect their right to arbitration, it deprives them of due process, it violates equal protection. No attack holds merit or finds support in the evidence.

In considering a motion for preliminary injunction, the District Court properly considers whether the movant is "likely to succeed on the merits, . . . likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tipped in [its] favor, and that than injunction is in the public interest." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20, 22 (2008). The same standard applies under the CPLR as relevant to the Union's specific request for an injunction in support of arbitration. *See SG Cowen Sec. Corp. v. Messih*, 224 F.3d 79, 81-84 (2d Cir. 2000); *W.T. Grant v. Srogi*, 52 N.Y.2d 496, 517 (1981) (superseded by statute on other grounds). This Court reviews the District Court's ultimate decision to deny a

preliminary injunction for abuse of discretion. An appellate court reviews for abuse of discretion a district court's denial of a preliminary injunction. *See* A district court abuses its discretion when it rests its decision on a clearly erroneous finding of fact or makes an error of law. *Id*.

On each element, the District Court held the Unions' arguments wanting, and did not abuse its discretion in doing so.

A. The Unions Cannot Demonstrate a Likelihood of Success on Any of Their Claims

1. The Unions Cannot Show that Their Contractual Right to Arbitration Required an Injunction

First, the Unions contend that the District Court improperly ignored the role of an arbitrator to fashion equitable relief, and assumed the role of overseer. *See* Appellants Brief at 18-9. The Unions provide no support for this statement whatsoever. The Union further contend that the District Court disregarded the "reduced influence" of the likelihood of success on the merits factor, without any support. *See id*. Thus, the Court should consider those positions abandoned on appeal.

The Unions' third contention is that the District Court erred in interpreting the term "remove" in the various collective bargaining agreements at issue. *See* Appellants' Brief at 19. The Court's interpretation of "remove" followed the

ordinary meaning found in a dictionary, and Appellants' brief makes it abundantly clear that the definition they desire is much closer to "obliterate" or "destroy," the impact of which would be far beyond what was ever contemplated. *See id*. It need not be added that ~~it~~ if Appellants were ever concerned about the possible misinterpretation of an undefined word in their collective bargaining agreements, the time to remedy that should have been during the numerous collective bargaining negotiations held since the inception of NY CSL § 50-a and FOIL, not only when it serves their litigation interests.

Fourth, Appellants' argument that the District Court's interpretation of the word "remove" would render Section 7(c) of their respective collective bargaining agreements "meaningless" is baseless. *See* Appellants' Brief at 21. As noted above, the impending publication of disciplinary records would consist of disclosing the same unsubstantiated allegations that would occur in a disciplinary proceeding open to the public or in a lawsuit.

Fifth, Appellants offer no record evidence supporting that they were likely to succeed on their Article 78 claims. *See* Appellants' Brief at 44. Under New York's FOIL, an agency "may deny access to records or portions thereof," for various reasons including if disclosure would constitute an unwarranted invasion of privacy. See Pub. Off. L. § 87(2) (emphasis added). Appellants are correct that there is no mandate for agencies to release disciplinary records on a "wholesale basis" –

whether Appellants like it or not, agencies have always had the discretion to determine whether and when to release records. An exercise of that discretion does not become an error of law simply because Appellants wish it so.

Finally, the District Court properly denied the Unions a preliminary injunction because they were unlikely to succeed on breach of contract claims. The contractual rights of union members cannot supersede FOIL. *City of Newark v. Law Dept. of NY*, 305 A.D.2d 28, 32 (1st Dep't 2003) ("None of the statutory exemptions empowers a government agency to immunize a document from FOIL disclosure by designating it as confidential, either unilaterally or by agreement with a private party."

B. The Unions Cannot Show They Will Suffer Constitutionally Unequal Protection

The Unions argue that the Government Appellees' implementation of the repeal legislation "violate[s] equal protection because it unreasonably treats law enforcement officers differently than similarly situated public employees." They neglect the obvious differences that warrant any difference in treatment, which the Caucus well considered in repealing 50-a.

At the onset, there is no question that the Legislature or Government Appellees needed only a rational basis to distinguish between the Unions' members and other categories of public employee. In applying that standard, the Unions must

"negative every conceivable basis which might support" the government's action. *Progressive Credit Union v. City of N.Y.*, 889 F.3d 40, 49 (2d Cir. 2018). The Caucus notes here x bases, none of which the Unions can refute.

First, the Legislature reasonably concluded that the Unions' members are not similarly situated to other public employees because they alone are empowered to use violent, even deadly, force, in maintaining public order. Appellants concede this point, that officers' responsibilities "set them apart" from other employees, which concedes their entire equal protection argument. (Appellant Br. at 56). Thus, courts in this Circuit have acknowledged that police officers "occup[y] a ***unique*** position," in part because of the power they hold to devastate communities forever. *Baker v. Cawley*, 459 F. Supp. 1301, 1306 (S.D.N.Y. 1978), aff'd, 607 F.2d 994 (2d Cir. 1979) (emphasis added).

The half century since 50-a's passage has put such impacts increasingly under the public radar. Almost weekly, the media reports that another person of color has fallen at the hands of police. The names of George Floyd, Eric Garner, Breonna Taylor, and Michael Brown appear on protest placards and headlines throughout the nation. The long cry of Black and Brown communities for police transparency has finally won the ear of legislatures. Starkly, it informed the last question in the last presidential debate of the contentious 2020 election, when moderator Kristen Walker asked the candidates their thoughts on "the talk" that many Black parents feel they

must have with their children about how they should behave so that police will not shoot them. Maggie Astor, *Addressing systemic racism, Kristen Welker asks the candidates about 'The Talk."*, N.Y. Times (Oct. 22, 2020), available at https://www.nytimes.com/2020/10/22/us/politics/the-talk-race-america.html. No presidential debate in recent memory included a question about how parents should talk to their children about encounters with sanitation workers.

Second, the law permits the Unions' members not only to use and misuse violence, but to do so in secrecy. The public perceives a "Blue Code of Silence" that shields the responsible officers from the public they serve, further justifying 50-a's repeal. Such a code rests on clandestine processes of internal discipline, the ability of police to control the evidence required to substantiate misconduct, the fierceness of the Unions' reactions against examinations of officer character, and legal roadblocks like 50-a itself. Cynthia H. Conti-Cook, *A New Balance: Weighing Harms of Hiding Police Misconduct Information from the Public*, 22 CUNY L. Rev. 148, 154 (2019). No other class of public servants are chastised for erecting such a code of silence. The power and responsibility police uniquely wield demand that "there must be in the eyes of … the public the greatest confidence in the integrity of the officer." *Baker*, 459 F. Supp. at 1306. Without transparency, true confidence is impossible. Similarly, no evidence suggests that other public employees or their unions benefit from such a "code of silence."

Third, the legislature and Government Appellees have acted with a rational basis in seeking to offset the imbalance of power such a code silence interposes between public and police. Whereas, even now the Unions seek to hide the allegations of misconduct against their officers, they and police agencies have often acted to smear the very victims of such misconduct. Scholars have noted that in many instances, responsible officers escape accountability while police put the slain on trial before the public. Conti-Cook, *A New Balance: Weighing Harms of Hiding Police Misconduct Information from the Public* at 154 (citing Michael Tomasky, *Rudy's Rap Sheet*, N.Y. Mag (Apr. 24, 2000), https://perma.cc/6GQH-PR6V (reporting that then-Police Commissioner Howard Safir argued that the NYPD could leak arrest records after someone dies, and detailing two instances where sealed arrest records of men who survived police encounters were released by police sources); Rebecca Davis O'Brien et al., *New York City Police Officer Won't Face Criminal Charges in Eric Garner Death*, Wall St. J., https://perma.cc/H9EG-J3Y3 (last updated Dec. 4, 2014, 1:15 AM) (reporting Eric Garner's arrest record and including information from "[a]n official" that the charges included the sale of unlicensed cigarettes); *Sources to CBS2: Officer Accidentally Shot Unarmed Man While Opening Door With Gun in Hand*, CBS N.Y. (Nov. 21, 2014, 11:04 PM), http://perma.cc/9ZTE-CUC2 ("Gurley ha[d] 24 prior arrests on his record, police said."); Robert Lewis, *The Double Standard of NYPD Leaks*, WNYC News (Mar.

31, 2017), https://perma.cc/4UJU-2P5Y (discussing how the NYPD leaked sealed arrest records of Ramarley Graham); Eric Lipton, Giuliani Cites Criminal Past of Slain Man, N.Y. Times (Mar. 20, 2000), https://perma.cc/8UC3-5EL4 ("[M]ayor [Giuliani] ... confirmed that he had authorized the release of Mr. Dorismond's arrest record immediately after the shooting, citing the public's 'right to know.'")). Students who might suffer abuse from their teachers do not face such treatment.

Lastly, the unequally ***superior*** treatment police have long enjoyed over other public employees has uniquely sapped the public trust. As one recent study demonstrated, calls to the police drop precipitously after high-profile incidents of police brutality. Juleyka Lantigua-Williams, *Police Brutality Leads to Thousands Fewer Calls to 911*, Atlantic (Sept. 28, 2016), https://perma.cc/4HD9-DDCP. By contrast, including the public in the work of police accountability "fosters an appearance of fairness, thereby heightening public respect for the . . . process." *Globe Newspaper Co. v. Superior Court for the Cty. of Norfolk*, 457 U.S. 596, 606 (1982). Such goals are eminently rational.

C. The Unions Cannot Show Their Interests Risk Deprivation Without Due Process or Face Irreparable Harm

The Unions complain that if the Government Appellees are permitted to comply with state legislation and release the records at issue, their members will face such injury to their reputations and safety as to the violate federal and state due

process. Such argument, whether presented under that constitutional claim, or to show irreparable harm, rests on groundless speculation.

Regarding the threat of reputational harm, the Unions have contended that the disclosure of disciplinary allegations, including those unsubstantiated, will harm their members' prospects of future employment. In support, they have consistently relied in this litigation on generalized statements from their expert, Dr. Jon Shane, about how the disclosure of disciplinary records can impact officers' reputation. But the District Court already considered Dr. Shane's report. It qualified him as an expert but accorded his opinion little weight, explaining that:

> 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
> *Id.* at 12:18-13:2.

Against such discredited testimony, the District Court found the testimony of one former police chief more compelling when he spoke to prospective employers' "ability to contextualize [misconduct and disciplinary records] properly." SPA14-15. Prospective law enforcement employers are able to "appreciate the dispositional designations used by agencies such as the CCRB" and are capable of "interpret[ing] law enforcement reports from other jurisdictions." SPA14-15. Thus, the District Court properly "reject[ed] the foundational argument that no one -- law enforcement

or civilian -- can appreciate the distinctions between substantiated, unsubstantiated, exonerated, unfounded and non-final claims." Transcript at 42:8-11.

The Caucus and Legislature heard testimony to the same effect, showing the skill and wisdom of the electorate to properly distinguish between allegations of police misconduct based on their disposition. The Unions insist this is not enough, because the disposition of proceedings "do[es] not cleanse falsity embedded in the allegations themselves." Appellants' Brief at 34. But the Unions seek not to cleanse falsity, but to redact fact. They insist that the public cannot review a record that reads "Was Officer Smith found to have committed misconduct? No." without acquiring a belief that Officer Smith committed misconduct. They demand instead that the public never learn of the allegation against Officer Smith.

Such secrecy only creates gossip mills and does not protect officers' reputations. As the Codes Committee heard from the Mayor of Kingston, New York, in many instances § 50-a had relegated citizens "to reliance on the occasional leak by a whistleblower to receive any important negative information concerning the performance of a police officer." October 24 Written Testimony at 13. Gwen Carr and the movement of supporters protesting the death of her son, Eric Garner, for example, had to receive information on Officer Pantaleo's disciplinary record from such a whistleblower. "Such secrecy," the Mayor fairly opined, "only breeds contempt." *Id.* These whistleblower reports can often take an ascorbic tone at

officers, and their necessity in the first place exacerbates public outcry in the way that actual public transparency could mitigate.

In repealing § 50-a, the Legislature took a vital step in ***rehabilitating*** officer reputations and the public trust. The Unions' ongoing efforts to limit transparency, by contrast, seek to undo those repairs.

Similarly, the Caucus heard the Unions' allegations regarding the risk of physical harm their members faced, but determined that any such harm would result from public experience with police misconduct, not the disclosure of the records at issue. When the legislature asked the Unions' representatives in Caucus hearings for evidence of threats to their officers, the Unions conceded that they had no such evidence. Instead, the Unions focused their testimony on the general dangers of law enforcement, and the public's anger at certain policing practices in the current political climate.

The Legislature and Caucus members took these concerns, for what they were, very seriously. Throughout the Committee's two hearings, Senator Bailey and his colleagues repeatedly affirmed their commitment to officer safety, sharing their own experiences living under credible death threats, and asking Petitioners to also consider the harms that lack of transparency has historically posed communities of color. *See e.g.* Oct. 24 Hearing at 1:35:10. Indeed, Caucus Member and Assembly Member Philip Ramos, who served as a Suffolk County Police Detective long before

he was elected to the Assembly, sponsored the bill to repeal § 50-a.

However, the Unions left the Legislature unconvinced that transparency of the records at issue would create new dangers or exacerbate old ones. In this, the Legislature had the benefit of other jurisdictions' examples. For example, the Codes Committee reviewed testimony showing that the Philadelphia, Los Angeles, and Chicago Police Departments had made the sort of records at issue here publicly available without incident. October 24 Written Testimony at 68. The NAACP Legal Defense and Educational Fund quoted one observer in Chicago, recounting how there the police unions had "argued that various horrible consequences would ensure if officers names were made public-officers would be target, their families harassed, the security of police operations undermined." *Id.* But "[i]n the three years since we made the first limited release of police disciplinary information, nothing of that nature has been reported." *Id.* The District Court referenced the Chicago example too, finding that the Chicago Police Department, a "fair comparator to the NYPD," makes tens of thousands of misconduct records available "in a comprehensive searchable format," "with no evidence of increased violence or threat of violence because of the disclosures." SPA16-17; see JA2140-42 (describing Chicago database).

The Unions fail to demonstrate on appeal how their circumstances differ from those in Chicago. Instead, they allege they provided "[s]worn testimony [that]

explains how the increase in threats and violence against officers has coincided with recent protests against misconduct." Appellants' Brief at 25. And they concede "more often than not, threats against police officers are motivated by the subject's previous interactions with police officers" rather than disclosure of CCRB dockets. *Id.* Protests, police interactions, and police misconduct may very well lead to public outcry against police officers. If such factors place officers at risk, that consequence is inexcusable and unjustifiable. For that very reason, the Legislature included limits in its repeal to permit redaction of personal identifying information. The District Court noted these, explaining that "[t]he 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." Transcript at 42:2-7.

Accordingly, the Unions fail to demonstrate irreparable harm or any unconstitutional deprivation of their rights. But further, the Caucus and Legislature thoroughly involved them in the legislative process, and appellants affirmed they felt their concerns heard throughout. *Id.* at 1:36:52 (President of the New York State Troopers Thomas H. Mungeer explaining to Senator Bailey, "I just want to say, I appreciate the open-door policy, and we will definitely take advantage of that because, again, as in prior issues, we've always had a very good relationship. And

that will continue"). Legislative opponents of repeal did also once the final legislation was passed. *E.g.*, New York State Senate, *Transcript of Reg. Ses. – Jun. 9, 2020* at 1849:23-1850:5, https://www.nysenate.gov/transcripts/floor-transcript-060920txt (Repeal opponent Senator Patrick Gallivan explaining "We've talked, we talked in committee -- we had an hour 45 minute Codes Committee that really was among the best discussions that I heard in my time here. Clearly there's points of disagreement amongst the members here, but I think we share many common goals in trying to right wrongs and ensure a system is in place to ensure accountability").

D. The Legislature Carefully Weighted the Equities, Including the Public Interest, and Found that It Favored Disclosure

Before the District Court and this Court, the Caucus balanced the equities at play here, and considered the relevant public interest. Informed by that deliberative experience, the Caucus questions whether such a balance tips as "sharply" in their favor as the Unions allege. Appellants' Brief at 22.

As already explained, the "equities" presented in the Unions' brief are largely speculative and unsupported by any concrete evidence. Notably, Caucus members and the Legislature already accounted for their concerns by drafting narrow exemptions from disclosure into the legislation they passed, specifically protecting records that: (1) might constitute an unwarranted invasion of privacy; (2) are compiled for legitimate law enforcement purposes; (3) or endanger the life or safety

of an individual. See Pub. Off. L. § 87(2)(b), (e), (f).

The Unions, for their part, allege that against the harms they risk, the Government Appellees and their constituents "will experience only delay until the arbitration determines if the pending releases are lawful." Appellants' Brief at 22. Public policy, they assert, demands that their rights to arbitration come before the public's right to prompt disclosure. This position is fundamentally inimical to the public interest.

At the onset, the public is "entitled to the prompt execution of orders that the legislature has made final." *Nken v. Holder*, 556 U.S. 418, 427 (2009). But the circumstances of delay here are particularly grievous. Impacted communities throughout New York State have suffered enough delay, waiting nearly 45 years for § 50-a's repeal. The burden that poses the families and friends of those slain through officer misconduct is extraordinarily severe, as demonstrated above. For example, Gwen Carr, Eric Garner's mother, had to sit with her son's killing for 3 years before learned about Pantaleo's disciplinary history. Sean Bell's mother, Valerie Bell, had to wait 2 years to even learn the names of her son's killers. Constance Malcolm, Ramarley Graham's mother, could not obtain information about those who killed her son without the assistance of community organizations. Such "delay" is traumatic, not trivial, as the Unions would contend

The Unions would relegate the transparent justice the public has long deserved

to private arbitration, and would characterize such a result as better "balanced." Such an argument is consistent with the Unions' historic contempt for public oversight. Bob Hennelly, Complaints Against Cops to Be Tried by CCRB, Not NYPD, WNYC News (Mar. 27, 2012), https://perma.cc/F6Q9-8MUH (quoting Patrick J. Lynch, President of the Patrolmen's Benevolent Association of New York City to state that CCRB's inexperienced investigators who conduct faulty investigations that arrive at improper conclusions and now those wrong conclusions will now be prosecuted at these kangaroo trials").

Private arbitration further fails the public interest for two reasons. First, it makes no place for the insights of communities that frequently interact with police. Such community expertise may fairly lead to disagreement with private arbitrators or even government tribunals over whether a particular allegation should be substantiated or exonerated. It may shed light on whether a particular agency's internal disciplinary process serves the interests of justice. In repealing 50-a, the legislature signaled that these questions are matters of public concern and should be resolved transparently.

Second, private or otherwise confidential processes leave the public unable to contribute to the public safety. For example, if a community does not learn that a local officer has faced a cavalcade of prior misconduct allegations, even if unsubstantiated, they cannot take appropriate precautions or urge their police

department remove that officer from their streets. The concern is far from hypothetical; Officer Pantaleo had just such a hidden record before he killed Eric Garner.

In repealing 50-a, as the District Court noted, the legislature sought 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." Transcript at 41:13-42:4. These vital public interests well supported the District Court's decision to deny the Unions' motion for a preliminary injunction.

CONCLUSION

For all of the foregoing reasons, the Caucus respectfully requests that this Court affirm the District Court order under appeal to the extent challenged by Appellants.

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This brief complies with the type-volume limitation of this Circuit's Local Rule 32.1(a)(4)(A) because it contains no more than 6,937 words.

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