IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 20-2789(L)

No. 20-3177 (XAP)

UNIFORMED FIRE OFFICERS ASSOCIATION, *et al.*,

Plaintiffs-Appellants-Cross-Appellees,

v.

BILL DE BLASIO, in his official capacity
as Mayor of the City of New York, *et al.*,

Defendants-Appellees,

COMMUNITIES UNITED FOR POLICE REFORM,

Intervenor-Defendant-Appellee-Cross-Appellant.

On appeal from the United States District Court for
the Southern District of New York, No. 20-CV-05441-KPF

BRIEF OF AMICI CURIAE
THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS
AND 31 NEWS MEDIA ORGANIZATIONS IN SUPPORT OF
INTERVENOR-DEFENDANT-APPELLEE-CROSS-APPELLANT AND
URGING AFFIRMANCE IN PART AND REVERSAL IN PART

[Caption continued on next page]

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WP Company LLC d/b/a The Washington Post is a wholly owned subsidiary of Nash Holdings LLC, a holding company owned by Jeffrey P. Bezos. WP Company LLC and Nash Holdings LLC are both privately held companies with no securities in the hands of the public.

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STATEMENT OF IDENTITY AND INTEREST OF AMICI CURIAE

Amici curiae are the Reporters Committee for Freedom of the Press, Advance Publications, Inc., The Associated Press, The Atlantic Monthly Group LLC, Boston Globe Media Partners, LLC, BuzzFeed, Daily News, LP, The E.W. Scripps Company, Gannett Co., Inc., Hearst Corporation, International Documentary Assn., The Media Institute, MPA - The Association of Magazine Media, National Journal Group LLC, National Newspaper Association, National Press Club Journalism Institute, The National Press Club, National Press Photographers Association, National Public Radio, Inc., New York News Publishers Association, New York Public Radio, The New York Times Company, The News Leaders Association, Newsday LLC, Nexstar Broadcasting, Inc., Penguin Random House LLC, Radio Television Digital News Association, Society of Professional Journalists, TIME USA, LLC, Tully Center for Free Speech, Univision Communications Inc., and The Washington Post. A supplemental statement of identity and interest of amici curiae is included as Appendix A.[1]

Amici are members of the news media and organizations that advocate on behalf of the First Amendment rights of the press and the public. Many of the

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

amici regularly report on misconduct by law enforcement officers, and all of the amici have a direct interest in ensuring that local governments and law enforcement unions do not use private contracts to abridge the public's right to access public records.

Amici urge this Court to affirm in part and reverse in part the order of the United States District Court for the Southern District of New York (the "district court") denying in part and granting in part a preliminary injunction that restrains the release of some public records related to law enforcement officers' misconduct. Amici write to explain that private contracts cannot supersede the public's statutory right to access records of law enforcement misconduct under the New York Freedom of Information Law ("FOIL"). Amici also emphasize the importance of public access to law enforcement misconduct records—including records of non-final and unsubstantiated complaints of misconduct.

SOURCE OF AUTHORITY TO FILE

Plaintiffs-Appellants-Cross-Appellees do not object to the filing of this amicus brief. Defendants-Appellees and Intervenor-Defendant-Appellee-Cross-Appellant consent to the filing of this amicus brief. Fed. R. App. P. 29(a)(2).

INTRODUCTION

On June 12, 2020, New York Governor Andrew Cuomo signed into law Assembly Bill A10611, which repealed New York Civil Rights Law Section 50-a

("Section 50-a"). Assemb. B. 10611, 243rd Sess. (N.Y. 2020); *see also* Luis Ferré-Sadurní & Jesse McKinley, *N.Y. Bans Chokehold and Approves Other Measures to Restrict Police*, N.Y. Times (June 12, 2020), https://perma.cc/44CG-4UMX. Prior to the repeal, Section 50-a shielded misconduct records for firefighters, police officers, and corrections officers (collectively, "law enforcement officers") from public scrutiny, making New York an outlier with respect to the extent of secrecy afforded such records. *See* Robert Lewis, et al., *Is Police Misconduct a Secret in Your State?*, WNYC News (Oct. 15, 2015), https://perma.cc/EC7G-EP3J.[2]

Following the repeal of Section 50-a, Defendants-Appellees New York City Mayor Bill de Blasio, the City of New York, the New York City Fire Department and its Commissioner Daniel A. Nigro, the New York City Department of Corrections and its Commissioner Cynthia Brann, the New York City Police Department and its Commissioner Dermont F. Shea, and the Civilian Complaint Review Board and its Chair Frederick Davie (collectively, the "City") announced their intention to publish records of law enforcement misconduct complaints. Br. & Special App. for Pls.-Appellants-Cross-Appellees 5–6, ECF No. 204 ("Unions' Br."). Two of the Defendant-Appellee agencies, the New York City Police Department ("NYPD") and the Civilian Complaint Review Board ("CCRB"), have

[2] Delaware is now the only state with a law explicitly deeming disciplinary records of law enforcement officers, as defined by statute, confidential. Del. Code Ann. tit. 11, § 9200.

created or are in the process of creating publicly available registries of misconduct records that Section 50-a previously shielded, including certain records of non-final and unsubstantiated complaints. *See id.* at 6–7.

Plaintiffs-Appellants-Cross-Appellees 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, and Detectives' Endowment Association (collectively, the "Unions") brought this action against the City and sought a preliminary injunction to prohibit the City from releasing records of non-final and unsubstantiated misconduct complaints. The nonprofit Communities United for Police Reform ("Communities United") intervened to oppose the Unions' suit.

In an order read from the bench, the district court (Failla, J.) largely denied the Unions' motion, though it granted it in part to block the release of certain records. *See* Unions' Br., SPA 2–44 ("Prelim. Inj. Order"). The Unions appeal the denial in part of the preliminary injunction. Unions' Br. 5. Communities United cross-appeals the partial grant of the preliminary injunction. *See* Principal and Resp. Br. for Communities United for Police Reform 5, ECF No. 265.

SUMMARY OF ARGUMENT

The Unions argue that they are entitled to a preliminary injunction prohibiting the release of all records concerning unsubstantiated and non-final complaints because they have begun arbitration proceedings with the City under their Collective Bargaining Agreements ("CBAs") in which they claim that disclosure of these records would violate their CBAs. Unions' Br. 13. To the contrary, however, the preliminary injunction should be denied in full because the Unions are not likely to succeed on their claims in arbitration. The Unions and the City lack the authority to contract away the public's right to access the records at issue under FOIL; accordingly, any such claims in arbitration will certainly fail.

The City's proactive release of law enforcement officers' misconduct records, including through registries, is not only permissible under FOIL, but also will allow for greater transparency after many decades of secrecy under Section 50-a. The Unions' claim that the City must conduct an individualized review of all records before releasing them ignores the critical fact that the FOIL exemptions they point to are *permissive*, not mandatory; the City is not required to withhold the records even assuming, *arguendo*, that the exemptions cited by the Unions apply to them. In addition, now that the New York Legislature has repealed Section 50-a, there can be no dispute that the immediate release of law enforcement misconduct

records—including records of non-final and unsubstantiated complaints of misconduct—is in the public interest and in line with legitimate legislative goals.

For these reasons, the Court should affirm the district court's denial in part of the preliminary injunction and should reverse the partial grant of the same.[3]

ARGUMENT

I. The Unions' preliminary injunction should be denied because the Unions are not likely to succeed on their claims in arbitration.

At issue in these cross-appeals is whether the Unions and the City had the legal authority to bargain away the public's right to access records under FOIL. They did not. Because the Unions and the City lacked such authority, the Unions' claims that two specific provisions of their CBAs—referred to by the district court as "Section 7(c)" and "Section 8"—bar disclosure of certain records under FOIL would categorically fail on the merits in arbitration. For this reason, the district court correctly denied the preliminary injunction with respect to records purportedly shielded by Section 7(c). However, the district court erred in granting a preliminary injunction with respect to records purportedly subject to Section 8.

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[3] Amici address only two of the Unions' arguments on appeal: first, whether a preliminary injunction in aid of arbitration is warranted (it is not), and second, whether the City can release registries of misconduct records without considering the FOIL exemptions the Unions invoke (it can). Amici do not address the other issues on appeal, which are fully addressed by the City's and Communities United's briefs.

A. The district court's findings with respect to the CBAs.

The Unions' contractual claims involve two provisions of their CBAs. Section 7(c) of the Unions' respective CBAs provides 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 [a misconduct] investigation, are classified, exonerated, and/or unfounded." Prelim. Inj. Order at 19:13–16. Section 8 of the CBAs provides that when employees are charged with certain specific allegations known as Schedule A violations and when "such case is heard in the trial room" and results in a disposition other than guilty, the employees may petition for expungement of the "record of the case" two years after the disposition. Prelim. Inj. Order at 21:4–10.

The Unions have commenced the arbitration process under their CBAs, asserting that Section 7(c) and Section 8 bar the release of certain subsets of unsubstantiated and non-final allegations. Asserting that disclosure of records concerning unsubstantiated and non-final allegations of misconduct by the City will render any arbitration of those claims ineffectual, the Unions sought a preliminary injunction in aid of arbitration under New York C.P.L.R. § 7502(c) to prohibit their release as well as the creation of public registries containing such records.

With regard to Section 7(c), the district court correctly found that the right to have the records at issue removed from employees' personal files "does not give the officer the right to have the investigative report removed from the public record," and concluded that "there is simply no way in which . . . the argument being made can be made under the CBAs." Prelim. Inj. Order at 20:3–5, 15–17. With regard to the Section 8 claims, however, the district court found the record insufficient to determine whether the expungement provided for by that Section included removal from the public record. *Id.* at 22:12–13. The district court considered whether it "would be contrary to public policy" to prohibit disclosure of the Schedule A violation records under FOIL, but concluded that the public interest in those records was insufficient to "surmount the [U]nions' contractual rights." *Id.* at 22:15, 25. In doing so, it erroneously failed to consider that the Unions and the City lacked the underlying authority to contract away the public's right of access to the records at issue.

B. The Unions' Section 7(c) and Section 8 claims will fail in arbitration.

In considering whether to grant injunctive relief in aid of arbitration, a court must consider the "traditional standards governing preliminary injunctive relief." *SG Cowen Sec. Corp. v. Messih*, 224 F.3d 79, 84 (2d Cir. 2000) ("*SG Cowen*"). To determine whether a claim is likely to succeed on the merits, a court will consider whether it is likely to succeed on the merits in arbitration. *Id.* Here, because the

Unions' Section 7(c) and Section 8 claims are certain to fail in arbitration, that factor, alone, precludes a preliminary injunction with regard to both Sections.

It is a core principle of arbitration that "arbitrators derive their authority to resolve disputes only because the parties have agreed in advance to submit such grievances to arbitration." *AT&T Techs., Inc. v. Commc'ns Workers of Am.*, 475 U.S. 643, 648–49 (1986) (citing *Gateway Coal Co. v. Mine Workers*, 414 U.S. 368, 374 (1974)). Without such agreement, arbitrators fundamentally lack the authority to resolve disputes. *See id.*; *see also United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582 (1960) ("[A] party cannot be required to submit to arbitration any dispute which he has not agreed so to submit."). Accordingly, the scope of an arbitral tribunal's capacity to resolve disputes and fashion remedies is limited because its authority extends only so far as the parties have the capacity to contract. In addition, an arbitration agreement may be enforced against a non-signatory to the underlying contract only in narrow and limited circumstances that are inapplicable in this case and upon which the Unions do not rely. *See Local Union No. 38, Sheet Metal Workers' Int'l Ass'n, AFL-CIO v. Custom Air Sys., Inc.*, 357 F.3d 266, 268 (2d Cir. 2004) (collecting cases).

Members of the public were not parties to the Unions' CBAs, and neither the Unions nor the City possess the authority to bargain away the public's statutory right to access public records through FOIL. As such, the scope of that right

cannot be modified or abridged through any agreement between the Unions and the City. Because the parties fundamentally lack the authority to bargain away *the public's* right of access to law enforcement misconduct records, it cannot be subject to arbitration between them, nor can it be modified through an arbitration award. *LaRocca v. Bd. of Educ. of Jericho Union Free Sch. Dist.*, 220 A.D.2d 424, 427 (N.Y. App. Div. 2d Dep't 1995) (citing *Bd. of Educ., Great Neck Union Free Sch. Dist. v. Areman*, 362 N.E.2d 943 (N.Y. 1977)) ("[A]s a matter of public policy, the Board of Education cannot bargain away the public's right to access to public records.").

State and federal courts have consistently held that public authorities cannot bargain away the public's right to information. *See, e.g.*, *Wash. Post Co. v. U.S. Dep't of Health & Human Servs.*, 690 F.2d 252, 263 (D.C. Cir. 1982) ("[T]o allow the government to make documents exempt by the simple means of promising confidentiality would subvert FOIA's disclosure mandate."); *City of Chicago v. Fraternal Order of Police*, 2020 IL 124831, ¶¶ 42–43 (noting that "[w]hile parties are generally free to make their own contracts, this court has long held that when a conflict exists between a contract provision and state law, as it clearly does in this case, state law prevails" and holding that police union CBAs could not be used to contract around public records law); *New Orleans Bulldog Soc'y v. La. Soc'y for the Prevention of Cruelty to Animals*, 2015-1351, p. 10 (La. App. 4 Cir. 9/7/16);

200 So. 3d 996, 1002 (making clear that Louisiana's "Public Records Law cannot be circumscribed by a contract"); *N.M. Found. for Open Gov't v. Corizon Health*, 2020-NMCA-014, ¶ 19, 460 P.3d 43, 50 (explaining that using contracts to circumvent the public's right of access to public records would "thwart the very purpose of [the Public Records Act] and [would] mark a significant departure from New Mexico's presumption of openness at the heart of [New Mexico] access law") (citation omitted); *State ex rel. Dispatch Printing Co. v. Wells*, 481 N.E.2d 632, 634 (Ohio 1985) (holding that a contractual provision in a CBA between a city and its police force could not alter the duties of the city to provide access to public records); *see also City of Newark v. Law Dep't of N.Y.*, 305 A.D.2d 28, 32–33 (N.Y. App. Div. 1st Dep't 2003) (finding that confidentiality order issued in arbitration between City and the Port Authority of New York and New Jersey cannot override statutory right of access under FOIL; noting that "none of the [FOIL] 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").

Nor can a municipality expand FOIL's limited exemptions through a contractual agreement. Even if the Unions and the City purported to agree to the confidentiality of certain public records in the CBAs, they lack the authority to narrow the scope of records that FOIL requires be disclosed. FOIL permits an

agency to withhold only those records that are exempted from disclosure under the statute. N.Y. Pub. Off. Law § 87(2). And although agencies may withhold records "specifically exempted from disclosure by state or federal statute," *id.* § 87(2)(a), the City does not have the authority to enact state or federal legislation, and certainly cannot do so through a provision in a collective bargaining agreement. *Sheehan v. City of Syracuse*, 137 Misc. 2d 438, 440 (N.Y. Sup. Ct. Onondaga Cty. 1987). In short, "[a] local agency . . . cannot immunize a document from disclosure under state law by designating it as confidential." *Journal News v. City of White Plains*, No. 7781/11, 2012 WL 8262794, at *3 (N.Y. Sup. Ct. Westchester Cty. Mar. 20, 2012) (invalidating a local law that sought to make ethics proceedings confidential). Thus, provisions of the CBAs providing for confidentiality of misconduct records are not an effective statutory exemption to FOIL.

Contrary to the Unions' assertion, their likelihood of success on the merits in arbitration does not turn on interpretation of a contractual term. *See* Unions' Br. 19–21. Nor is it possible an arbitrator might "reach an equitable result" in the form of the abridgement of the public's right of access. *Id.* at 18 (quoting *Sprinzen v. Nomberg*, 389 N.E.2d 456, 458 (N.Y. 1979)). Because the public is not a party to the CBAs, and the Unions and the City lack the authority to modify the public's

right of access under FOIL through contract, the Unions' claims must fail on the merits in arbitration.

For this reason, alone, this Court should affirm the district court's denial of a preliminary injunction with respect to the Section 7(c) records and reverse the district court's grant of a preliminary injunction with regard to the Section 8 records. *See SG Cowen*, 224 F.3d at 84. Even if Section 7(c) and Section 8 purport to preclude public access to certain investigative reports or expunged records, respectively, the Unions and the City were never lawfully permitted to bargain away the public's right to know. Accordingly, the preliminary injunction should be denied in full.

II. Proactive release of law enforcement officers' misconduct records, including through registries, will benefit the public.

The Unions assert that the district court erred in allowing public release of unsubstantiated and non-final records of police misconduct and discipline. Unions' Br. 5–7, 12. They allege further that the release of these records in registries without individualized review of each record to determine whether any FOIL exemptions apply violates Article 78 of the New York Civil Practice Law and Rules, a statute that permits a party to challenge an agency action that was affected by an error of law or was arbitrary and capricious. *Id.* at 44–51; N.Y. C.P.L.R. § 7803(3). However, the release of these records, including in registries,

is not only permissible under FOIL but will benefit the public at large by increasing transparency after many decades of secrecy under Section 50-a.

A. The record registries are permissible under FOIL.

Contrary to the Unions' assertion, FOIL does not require the NYPD and CCRB to review individual records for privacy and safety exemptions prior to disclosure in the registries. *See* Unions' Br. 45. The Unions assert that the City erroneously interpreted the repeal of Section 50-a as "reliev[ing] agencies of the responsibility to consider whether individual records should be withheld based on privacy or safety concerns." *Id.* They state further that "the City views the repeal of [Section] 50-a as *carte blanche* to ignore other legal protections on disclosure, such as the specific exemptions in FOIL." *Id.* Although the Unions do not cite to specific FOIL provisions, they repeatedly mention privacy and safety. *See id.* at 45–47.

However, FOIL makes clear that its privacy and safety exemptions are permissive, not mandatory; agencies *may* withhold records on those grounds if they wish, but they are not required to do so. *See* N.Y. Pub. Off. Law § 87(2) (noting that agencies "*may* deny access" to records that, if disclosed, "would constitute an unwarranted invasion of personal privacy" or "could endanger the life or safety of any person" (emphasis added)); *Capital Newspapers Div. of Hearst Corp. v. Burns*, 496 N.E.2d 665, 668 (N.Y. 1986) (noting that "the language of

[FOIL's] exemption provision contains permissive rather than mandatory language, and it is within the agency's discretion to disclose such records, with or without identifying details, if it so chooses"); *accord Hanig v. State Dep't of Motor Vehicles*, 588 N.E.2d 750, 752–53 (N.Y. 1992). The NYPD and CCRB may, in their discretion, disclose the records at issue even assuming these FOIL exemptions would permit the NYPD and CCRB to withhold them.[4] Accordingly, the NYPD's and CCRB's decision to exercise their discretion to release the records is neither arbitrary and capricious nor based on an error of law.

B. There is significant public interest in release of the records at issue.

The City's proactive release of law enforcement officers' misconduct records will allow for meaningful reporting regarding the abuse of power by public servants, a matter of abiding public concern. This is particularly true with regard to police misconduct, an issue that the May 2020 killing of George Floyd by a Minneapolis police officer with numerous past misconduct complaints has brought to the forefront of the public's consciousness. *See* Shaila Dewan & Serge F. Kovaleski, *Thousands of Complaints Do Little to Change Police Ways*, N.Y. Times (updated June 8, 2020), https://perma.cc/XS5L-F2HJ. Indeed, the Legislature prioritized repeal of Section 50-a in large measure as a response to heightened

[4] Amici do not concede that any of the records at issue may properly be withheld under N.Y. Pub. Off. Law § 87(2).

public awareness of the importance of holding police officers accountable for misconduct and concomitant calls for increased transparency. *See* Stephanie Wykstra, *The Fight for Transparency in Police Misconduct, Explained*, Vox (June 16, 2020), https://bit.ly/30vGRg4.

Access to government records of law enforcement misconduct and discipline has made possible powerful reporting in the public interest across the nation. For example, in 2019, USA Today reported about the records of 85,000 officers who had been investigated or disciplined for misconduct and created a database of more than 30,000 police officers who lost their law enforcement certification in 44 states. *See* John Kelly & Mark Nichols, *Tarnished Brass*, USA Today (last updated June 11, 2020), https://perma.cc/RE6Y-RCF7. USA Today relied on state open records laws to obtain records of more than 110,000 internal affairs investigations by hundreds of individual departments. *See id*. Obtained from thousands of state agencies, prosecutors, police departments and sheriffs, the records detail at least 200,000 incidents of alleged misconduct, much of it previously unreported. *Id.*

USA Today's reporting was motivated, in part, by the notion that "[d]espite their role as public servants, the men and women who swear an oath to keep communities safe can generally avoid public scrutiny for their misdeeds." *Id*. The reporting seeks to help identify decertified officers who continue to work in law

enforcement. *Id*. Such transparency is, as Laurie Robinson, co-chair of the 2014 White House Task Force on 21st Century Policing, has stated, "a very key step along the way to repairing [] relationships" between law enforcement and the communities they serve. *Id*.

Meaningful reporting and tangible reform have flowed from public access to records of even non-final or unsubstantiated allegations of misconduct. For example, in 2018 BuzzFeed News published and analyzed a collection of disciplinary findings for approximately 1,800 NYPD officers shielded by Section 50-a that were provided by a confidential source, including records of disciplinary proceedings in which officers were found not guilty. Kendall Taggart & Mike Hayes, *Here's Why BuzzFeed News Is Publishing Thousands of Secret NYPD Documents*, BuzzFeed News (Apr. 16, 2018), https://perma.cc/XK2L-9NZB. BuzzFeed's reporting based on these records revealed unequal and inconsistent application of NYPD disciplinary policies, *id.* (reporting that some officers told BuzzFeed that the disciplinary system "lets guilty officers off the hook"), prompting the commission of an independent panel to investigate the NYPD's disciplinary system. Kendall Taggart, *NYPD Discipline Needs More Transparency, A Panel of Experts Said*, BuzzFeed News (Feb. 1, 2019), https://perma.cc/2MGV-ELUX.

More recently, the New York Civil Liberties Union ("NYCLU") published an online database of more than 300,000 NYPD misconduct records it received through a FOIL request following the repeal of Section 50-a. Ashley Southall, *323,911 Accusations of N.Y.P.D. Misconduct Are Released Online*, N.Y. Times (Aug. 20, 2020), https://perma.cc/4XJ8-5TXU. NYCLU's preliminary analysis of this vast trove of data revealed that "less than 3 percent of the 323,911 complaints resulted in a penalty for officers." *Id.* The database also includes records of non-final or unsubstantiated complaints. *Id.* As one former chairman of the CCRB explained, these records can "support reform" that actually benefits officers, because their release can "put[] pressure on the [NYPD] to change how unsubstantiated claims affect officers' careers." *Id.*

Similarly, the Citizens Police Data Project, published by the Invisible Institute, contains the disciplinary records of Chicago police officers in a comprehensive, searchable format, including complaints found to be not sustained or unfounded, or complaints in which an officer was exonerated. Invisible Institute, *Citizens Police Data Project* (last accessed Oct. 14, 2020), https://perma.cc/EF6M-W47N. Copious examples of meaningful analysis and reporting have flowed from this database, which covers more than 23,000 officers and more than 137,000 complaints between 2000 and 2018. *Id.* For example, The Intercept used the data to reveal striking trends in how misconduct spreads by way

of example when new officers are exposed to the problematic tendencies of other officers. *See, e.g.*, Rob Arthur, *Bad Chicago Cops Spread Their Misconduct Like a Disease*, The Intercept (Aug. 16, 2018), https://perma.cc/3SQU-524T ("The data shows that [officers prone to misconduct] also may be teaching their colleagues bad habits. . . . The officers who had been exposed to the . . . misconduct-prone cops . . . went on to show complaint rates nine times higher over the next ten years than those who hadn't."). As this report explained, some officers begin by engaging in conduct "right at the edge of what is acceptable procedure," which a reviewing authority may not recognize as misconduct, but which can "attract or repel other officers" and "escalate[] . . . to more serious violence." *Id.* A consent decree between the State of Illinois and the City of Chicago entered last year responds to the troubling trends illuminated by the Citizens Police Data Project by formalizing an "early intervention" program to "proactively identify at-risk behavior by officers" in an effort to stem the deleterious ripple effect of officer misconduct. Consent Decree at 177, *Illinois v. City of Chicago*, No. 1:17-cv-06260 (N.D. Ill. Jan. 31, 2019), ECF No. 703-1.

Nationwide, press and public access to non-final or unsubstantiated allegations of misconduct has allowed members of the public to evaluate for themselves whether the police oversight boards are timely and effectively investigating incidents of misconduct. *See* Dewan & Kovaleski, *supra* (noting the

"reluctance of investigators . . . to second-guess an officer's split-second decision," and the concomitant need for more effective, robust oversight). Moreover, disclosure of unsubstantiated and pending allegations allows for a more comprehensive identification of systemic problems in police forces. In comparing the transparency provided for by the Chicago police misconduct data to New York's former regime of secrecy under Section 50-a, one legal scholar and advocate observed: "Rather than resulting in salacious gossip of isolated instances of misconduct, the Chicago database allows community members and reporters to focus on the commanders allowing misconduct to flourish." Cynthia H. Conti-Cook, *A New Balance: Weighing Harms of Hiding Police Misconduct Information from the Public*, 22 CUNY L. Rev. 148, 174 (2019). Conti-Cook explains further:

> An informed debate about a police disciplinary system may question whether certain types of misconduct have too broad a range of penalties. It may question whether a type of lenient penalty is too often the outcome for serious misconduct like false statements. It may question whether certain types of misconduct, like unlawful stops, come more often from particular commands or whether certain high ranks are less likely to receive serious penalties. The Chicago database is the type of publication that empowers communities to push reforms with data-driven analysis . . . and to make systemic change. It enables the community to face the problem in order to change it.

Id. at 174–75.

In short, the release of police misconduct records, including records of non-final and unsubstantiated complaints, makes possible powerful investigative reporting that can serve as a catalyst for important community dialogues and reform efforts. The preliminary injunction the Unions ask the Court to grant in full would prevent or delay such reporting, to the detriment of the public's right to know about how police officers carry out their duties and how law enforcement agencies respond to officers' misconduct.

CONCLUSION

For the reasons stated herein, amici respectfully urge the Court to affirm the district court's denial in part of the requested preliminary injunction and to reverse the district court's grant in part of the same.

Respectfully submitted on this 29th day of October, 2020.

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APPENDIX A

SUPPLEMENTAL STATEMENT OF IDENTITY OF AMICI CURIAE

The Reporters Committee for Freedom of the Press is an unincorporated nonprofit association. The Reporters Committee was founded by leading journalists and media lawyers in 1970 when the nation's news media faced an unprecedented wave of government subpoenas forcing reporters to name confidential sources. Today, its attorneys provide pro bono legal representation, amicus curiae support, and other legal resources to protect First Amendment freedoms and the newsgathering rights of journalists.

Advance Publications, Inc. is a diversified privately held company that operates and invests in a broad range of media, communications and technology businesses. Its operating businesses include Conde Nast's global magazine and digital brand portfolio, including titles such as Vogue, Vanity Fair, The New Yorker, Wired, and GQ, local news media companies producing newspapers and digital properties in 10 different metro areas and states, and American City Business Journals, publisher of business journals in over 40 cities.

The Associated Press ("AP") is a news cooperative organized under the Not-for-Profit Corporation Law of New York. The AP's members and subscribers include the nation's newspapers, magazines, broadcasters, cable news services and Internet content providers. The AP operates from 280 locations in more than 100

countries. On any given day, AP's content can reach more than half of the world's population.

The Atlantic Monthly Group LLC is the publisher of The Atlantic and TheAtlantic.com. Founded in 1857 by Oliver Wendell Holmes, Ralph Waldo Emerson, Henry Wadsworth Longfellow and others, The Atlantic continues its 160-year tradition of publishing award-winning journalism that challenges assumptions and pursues truth, covering national and international affairs, politics and public policy, business, culture, technology and related areas.

Boston Globe Media Partners, LLC publishes The Boston Globe, the largest daily newspaper in New England.

BuzzFeed is a social news and entertainment company that provides shareable breaking news, original reporting, entertainment, and video across the social web to its global audience of more than 200 million.

Daily News, LP publishes the New York Daily News, a daily newspaper that serves primarily the New York City metropolitan area and is one of the largest papers in the country by circulation. The Daily News' website, NYDailyNews.com, receives approximately 100 million page views each month.

The E.W. Scripps Company serves audiences and businesses through local television, with 60 television stations in 42 markets. Scripps also owns Newsy, the next-generation national news network; national broadcast networks Bounce, Grit,

Escape, Laff and Court TV; and Triton, the global leader in digital audio technology and measurement services. Scripps serves as the long-time steward of the nation's largest, most successful and longest-running educational program, the Scripps National Spelling Bee.

Gannett is the largest local newspaper company in the United States. Our 260 local daily brands in 46 states and Guam—together with the iconic USA TODAY—reach an estimated digital audience of 140 million each month.

Hearst is one of the nation's largest diversified media, information and services companies with more than 360 businesses. Its major interests include ownership of 15 daily and more than 30 weekly newspapers, including the San Francisco Chronicle, Houston Chronicle, and Albany Times Union; hundreds of magazines around the world, including Cosmopolitan, Good Housekeeping, ELLE, Harper's BAZAAR and O, The Oprah Magazine; 31 television stations such as KCRA-TV in Sacramento, Calif. and KSBW-TV in Monterey/Salinas, CA, which reach a combined 19 percent of U.S. viewers; ownership in leading cable television networks such as A&E, HISTORY, Lifetime and ESPN; global ratings agency Fitch Group; Hearst Health; significant holdings in automotive, electronic and medical/pharmaceutical business information companies; Internet and marketing services businesses; television production; newspaper features distribution; and real estate.

The International Documentary Association ("IDA") is dedicated to building and serving the needs of a thriving documentary culture. Through its programs, the IDA provides resources, creates community, and defends rights and freedoms for documentary artists, activists, and journalists.

The Media Institute is a nonprofit foundation specializing in communications policy issues founded in 1979. The Media Institute exists to foster three goals: freedom of speech, a competitive media and communications industry, and excellence in journalism. Its program agenda encompasses all sectors of the media, from print and broadcast outlets to cable, satellite, and online services.

MPA – The Association of Magazine Media ("MPA") is the industry association for magazine media publishers. The MPA, established in 1919, represents the interests of close to 100 magazine media companies with more than 500 individual magazine brands. MPA's membership creates professionally researched and edited content across all print and digital media on topics that include news, culture, sports, lifestyle and virtually every other interest, avocation or pastime enjoyed by Americans. The MPA has a long history of advocating on First Amendment issues.

National Journal Group LLC is the privately held publisher of National Journal. Founded in 1969, National Journal's award-winning journalism covers

political and public policy issues at the federal, state, and local levels, and its government affairs, advocacy communications, and policy research specialists serve government affairs professionals with the intelligence and tools they need to navigate the world of policy and politics.

National Newspaper Association is a 2,000-member organization of community newspapers founded in 1885. Its members include weekly and small daily newspapers across the United States. It is based in Pensacola, FL.

The National Press Club Journalism Institute is the non-profit affiliate of the National Press Club, founded to advance journalistic excellence for a transparent society. A free and independent press is the cornerstone of public life, empowering engaged citizens to shape democracy. The Institute promotes and defends press freedom worldwide, while training journalists in best practices, professional standards and ethical conduct to foster credibility and integrity.

The National Press Club is the world's leading professional organization for journalists. Founded in 1908, the Club has 3,100 members representing most major news organizations. The Club defends a free press worldwide. Each year, the Club holds over 2,000 events, including news conferences, luncheons and panels, and more than 250,000 guests come through its doors.

The National Press Photographers Association ("NPPA") is a 501(c)(6) non-profit organization dedicated to the advancement of visual journalism in its

creation, editing and distribution. NPPA's members include television and still photographers, editors, students and representatives of businesses that serve the visual journalism industry. Since its founding in 1946, the NPPA has vigorously promoted the constitutional rights of journalists as well as freedom of the press in all its forms, especially as it relates to visual journalism. The submission of this brief was duly authorized by Mickey H. Osterreicher, its General Counsel.

National Public Radio, Inc. ("NPR") is a non-profit multimedia organization and the leading provider of non-commercial news, information, and entertainment programming to the American public. NPR's fact-based, independent journalism helps the public stay on top of breaking news, follow the most critical stories of the day, and track complex issues over the long term. NPR reaches approximately 60 million people each week on broadcast radio, podcasts, NPR apps, NPR.org, and YouTube video content. NPR distributes its radio broadcasts through more than 1,000 non-commercial, independently operated radio stations, licensed to more than 260 NPR members and numerous other NPR-affiliated entities.

The New York News Publishers Association is a trade association which represents daily, weekly and online newspapers throughout New York State. It was formed in 1927 to advance the freedom of the press and to represent the interests of the newspaper industry.

With an urban vibrancy and a global perspective, **New York Public Radio** produces innovative public radio programs, podcasts, and live events that touch a passionate community of 23.4 million people monthly on air, online and in person. From its state-of-the-art studios in New York City, NYPR is reshaping radio for a new generation of listeners with groundbreaking, award-winning programs including Radiolab, On the Media, The Takeaway, and Carnegie Hall Live, among many others. New York Public Radio includes WNYC, WQXR, WNYC Studios, Gothamist, The Jerome L. Greene Performance Space, and New Jersey Public Radio. Further information about programs, podcasts, and stations may be found at www.nypublicradio.org.

The New York Times Company is the publisher of *The New York Times* and *The International Times*, and operates the news website nytimes.com.

The News Leaders Association was formed via the merger of the American Society of News Editors and the Associated Press Media Editors in September 2019. It aims to foster and develop the highest standards of trustworthy, truth-seeking journalism; to advocate for open, honest and transparent government; to fight for free speech and an independent press; and to nurture the next generation of news leaders committed to spreading knowledge that informs democracy.

Newsday LLC ("Newsday") is the publisher of the daily newspaper, Newsday, and related news websites. Newsday is one of the nation's largest daily

newspapers, serving Long Island through its portfolio of print and digital products. Newsday has received 19 Pulitzer Prizes and other esteemed awards for outstanding journalism.

Nexstar Broadcasting, Inc. ("Nexstar") is a leading diversified media company that leverages localism to bring new services and value to consumers and advertisers through its traditional media, digital and mobile media platforms. Nexstar owns, operates, programs or provides sales and other services to 196 television stations and related digital multicast signals reaching 114 markets or approximately 62% of all U.S. television households.

Penguin Random House LLC publishes adult and children's fiction and nonfiction in print and digital trade book form in the U.S. The Penguin Random House global family of companies employ more than 10,000 people across almost 250 editorially and creatively independent imprints and publishing houses that collectively publish more than 15,000 new titles annually. Its publishing lists include more than 60 Nobel Prize laureates and hundreds of the world's most widely read authors, among whom are many investigative journalists covering domestic politics, the justice system, business and international affairs.

Radio Television Digital News Association ("RTDNA") is the world's largest and only professional organization devoted exclusively to electronic journalism. RTDNA is made up of news directors, news associates, educators and

students in radio, television, cable and electronic media in more than 30 countries. RTDNA is committed to encouraging excellence in the electronic journalism industry and upholding First Amendment freedoms.

Society of Professional Journalists ("SPJ") is dedicated to improving and protecting journalism. It is the nation's largest and most broad-based journalism organization, dedicated to encouraging the free practice of journalism and stimulating high standards of ethical behavior. Founded in 1909 as Sigma Delta Chi, SPJ promotes the free flow of information vital to a well-informed citizenry, works to inspire and educate the next generation of journalists and protects First Amendment guarantees of freedom of speech and press.

TIME is a global multimedia brand that reaches a combined audience of more than 100 million around the world. TIME's major franchises include the TIME 100 Most Influential People, Person of the Year, Firsts, Best Inventions, Genius Companies, World's Greatest Places and more. With 45 million digital visitors each month and 40 million social media followers, TIME is one of the most trusted and recognized sources of news and information in the world.

The Tully Center for Free Speech began in Fall, 2006, at Syracuse University's S.I. Newhouse School of Public Communications, one of the nation's premier schools of mass communications.

Univision Communications Inc. ("UCI") is the leading media company serving Hispanic America. UCI is a leading content creator in the U.S. and includes the Univision Network, UniMás and Univision Cable Networks.

The Washington Post (formally, WP Company LLC d/b/a The Washington Post) is a news organization based in Washington, D.C. It publishes The Washington Post newspaper and the website www.washingtonpost.com, and produces a variety of digital and mobile news applications. The Post has won Pulitzer Prizes for its journalism, including the award in 2020 for explanatory reporting.

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Second Circuit Local Rule 29.1(c) because this brief contains 6,707 words, excluding the parts of the brief exempted under Federal Rule of Appellate Procedure 32(f).
2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Rule 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman font.

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THE REPORTERS COMMITTEE
FOR FREEDOM OF THE PRESS

Dated: October 29, 2020
Washington, D.C.