20-2789(L)

20-3177(XAP)

IN THE

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,

—against—

(*Caption continued on inside cover*)

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

BRIEF AND SPECIAL APPENDIX FOR PLAINTIFFS-APPELLANTS-CROSS-APPELLEES

ANTHONY P. COLES
DLA PIPER LLP (US)
1251 Avenue of the Americas
New York, New York 10020
(212) 335-4500

COURTNEY GILLIGAN SALESKI
DLA PIPER LLP (US)
One Liberty Place, 1650 Market Street,
Suite 4900
Philadelphia, Pennsylvania 19103
(215) 656-3300

Attorneys for Plaintiffs-Appellants-Cross-Appellees

BILL DE BLASIO, IN HIS OFFICIAL CAPACITY AS MAYOR OF THE CITY OF NEW YORK, CITY OF NEW YORK, NEW YORK CITY FIRE DEPARTMENT, DANIEL A. NIGRO, IN HIS OFFICIAL CAPACITY AS THE COMMISSIONER OF THE FIRE DEPARTMENT OF THE CITY OF NEW YORK, NEW YORK CITY DEPARTMENT OF CORRECTIONS, CYNTHIA BRANN, IN HER OFFICIAL CAPACITY AS THE COMMISSIONER OF THE NEW YORK CITY DEPARTMENT OF CORRECTIONS, DERMOT F. SHEA, IN HIS OFFICIAL CAPACITY AS THE COMMISSIONER OF THE NEW YORK CITY POLICE DEPARTMENT, NEW YORK CITY POLICE DEPARTMENT, FREDERICK DAVIE, IN HIS OFFICIAL CAPACITY AS THE CHAIR OF THE CIVILIAN COMPLAINT REVIEW BOARD, CIVILIAN COMPLAINT REVIEW BOARD,

Defendants-Appellees,

COMMUNITIES UNITED FOR POLICE REFORM,

Intervenor-Cross-Appellant.

CORPORATE DISCLOSURE STATEMENT

Plaintiffs-Appellants Police Benevolent Association of the City of New York, Inc., Correction Officers' Benevolent Association of the City of New York, Captains Endowment Association, Detectives' Endowment Association, Sergeants Benevolent Association, and Lieutenants Benevolent Association Inc. are non-stock, non-profit corporations. None of these entities has a parent corporation or a publicly held corporation that owns 10% or more of its stock. Plaintiffs-Appellants Uniformed Fire Officers Association and Uniformed Firefighters Association of Greater New York are not corporations.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Federal Statutes

State Statutes & Rules

Constitutions

Other Authorities

INTRODUCTION

Plaintiffs-Appellants are unions representing approximately 65,000 New York City firefighters, corrections officers, and police officers (the "Unions"). The Unions brought this action to prevent the Defendants-Respondents (the "City") from creating vast public online registries that effectively promote and emphasize allegations of misconduct by individually identified officers that are unsubstantiated, unfounded, exonerated, non-final, or resulted in a finding of not guilty ("Unsubstantiated and Non-Final Allegations"), or that were referred to in confidential settlement agreements between officers and the City.

Public registry and promotion of Unsubstantiated and Non-Final Allegations and of confidential settlement agreements violates officers' safety, privacy, and other rights. To preserve the status quo until a full determination on the merits of their claims, the Unions sought a preliminary injunction based on specific sections of collective bargaining agreements ("CBAs"), due process rights, settlement agreements, and rights under New York's Article 78 to be free from arbitrary and capricious government action affected by errors or law. The district court denied nearly all of the requested preliminary relief. The court's denial should be reversed.

For more than four decades, all disciplinary records of firefighters, corrections officers, and police officers were treated as confidential and not subject to public

disclosure under New York law. Until the repeal of N.Y. Civil Rights Law §50-a[1] in June 2020, the City recognized that release of Unsubstantiated and Non-Final Allegations would not only violate §50-a, but also would violate officers' privacy rights based on independent legal grounds. The repeal of §50-a did not repeal these independent legal protections, which the sponsors of repeal specifically cited. But immediately after the repeal, the City announced it intended to create, publish, and promote massive public registries whose predominant content included the very records the City previously recognized could not be disclosed without violating the safety and privacy rights of those firefighters, corrections officers, and police officers. During limited expedited discovery, the Unions learned that much of this information would be made public without meaningful pre-disclosure review of the risks of irreparable harm to officers' safety, privacy, and professional reputation.

The preliminary injunction sought by the Unions would provide temporary protection from the risk of irreparable harm until the merits of their claims can be decided by the court and, for some claims, in CBA arbitrations. For all of the reasons explained below, the district court should be reversed.

---

[1] Section 50-a provided that "[a]ll personnel records used to evaluate performance toward continued employment or promotion" of police officers, corrections officers, paid firefighters, and others, "shall be considered confidential and not subject to inspection or review without the express written consent" of the employee or as "mandated by lawful court order." CRL §50-a(1).

STATEMENT OF JURISDICTION

The district court had federal-question jurisdiction over the Unions' federal claims and supplemental jurisdiction over the related state-law claims. 28 U.S.C. §§1331, 1367. The district court denied in part the Unions' motion for a preliminary injunction on August 21, 2020, and the Unions filed a timely notice of appeal on August 24, 2020. This Court has appellate jurisdiction to review the denial of a preliminary injunction. 28 U.S.C. §1292(a)(1); *Twentieth Century Fox Film Corp. v. Marvel Enters., Inc.*, 277 F.3d 253, 257 (2d Cir. 2002).

STATEMENT OF THE ISSUES

1. Whether the district court erred in denying the Unions' motion for a preliminary injunction in aid of arbitration under CPLR 7502(c) where the Unions' pending arbitrations will be rendered ineffectual due to the district court's improper usurpation of the arbitrator's role and where the court chose between the merits of contested interpretations of contract terms, ignored some ordinary meanings of those terms, and assumed definitions of other terms that are not defined in the contracts.

2. Whether the district court erred in denying the Unions' motion for a preliminary injunction as to their claims under the Due Process and Equal Protection Clauses of the U.S. and N.Y. Constitutions, Article 78 of the New York Civil Practice Law and Rules, and for breach of confidential settlement agreements where important rights of the Unions' members hang in the balance and would be irreparably damaged by the City's planned promotion of disciplinary records and creation of officer registries.

STATEMENT OF THE CASE

The Unions appeal from the partial denial of a motion for a preliminary injunction by the U.S. District Court for the Southern District of New York (Failla, J.). The district court's oral opinion and written order were not reported. *See* SPA-1-SPA-44.

A. The City plans to create public registries of law enforcement disciplinary records

Former New York Civil Rights Law §50-a prohibited law enforcement agencies from publicly disclosing the personnel records of police officers, firefighters, and correction officers. As a categorical bar on disclosure, agencies often invoked this law as a basis for denying requests under New York's Freedom of Information Law ("FOIL") for disclosure of disciplinary records. JA-1955. On June 12, 2020, New York State repealed §50-a.

Within days of the repeal, the City announced plans to publish a massive number of police disciplinary records, including Unsubstantiated and Non-Final Allegations and confidential settlement agreements of disciplinary matters. JA-1029. On June 17, 2020, Mayor Bill de Blasio explained the City's disclosure plans in a press conference. JA-1029. He stated:

> ***With the 50-a law repealed, we now are able to ask the question, what can we do with this new ability to share information with the people.*** Today, we're going to start a massive effort to make public information regarding to police discipline. . . . [I]t will allow us to do something

> historic to create a ***comprehensive, publicly available set of disciplinary records***. This is historic because it will cover ***every active member of the police force—all records for every active member*** available in one place, online, publicly, all past trial decisions will be available. And any other formal actions that came out of those disciplinary proceedings, it'll be online, it will be easy to use and to access.[2]

The Mayor later clarified that records of firefighters and corrections officers would also be posted online to ensure "transparency across the board."[3] After the Unions filed this lawsuit, the City disclosed revised, agency-specific plans for releasing disciplinary records. These plans reveal stark differences in treatment of similar records across the four defendant agencies:

- The New York City Police Department ("NYPD") plans to create an online registry of Charges and Specifications filed against officers. JA-2238. Charges and Specifications are "accusations of misconduct against a civilian or uniform member of the Department, specifying the activity or conduct at issue, along with the date, time and place of occurrence." 38 RCNY §15-01.

- The Civilian Complaint Review Board ("CCRB") plans to create its own public registry of officer histories, including allegations the agency deems

---

[2] Transcript, Mayor de Blasio Holds Media Availability, NYC.gov (June 17, 2020), https://www1.nyc.gov/office-of-the-mayor/news/446-20/transcript-mayor-de-blasio-holds-media-availability.

[3] Michael Gartland & Rocco Parascandola, *NYC mayor wants disciplinary records for firefighters and correction officers posted online, just like police*, N.Y. Daily News (June 29, 2020), https://www.nydailynews.com/new-york/nyc-crime/ny-50-a-de-blasio-fndy-correction-department-20200629-az6br44mcbbclbg2rbcf24x6ii-story.html.

to be unsubstantiated, unfounded, or exonerated. JA-2233. CCRB is an independent city agency that investigates complaints made by members of the public against police officers involving abuse of authority, discourtesy, offensive language, and all but the most serious allegations of use of force.

- The New York City Department of Correction ("DOC") will release certain "final determinations" of disciplinary cases on its website. JA-2229.

- As of the date of its declaration, the New York City Fire Department ("FDNY") had not yet "developed a protocol or process for the public release of firefighter or fire officer disciplinary records." JA-2242.

In sum, the majority of the records the City currently plans to disclose will be police records in public officer registries maintained by NYPD and CCRB. However, each of the four agencies reserved the right to change these disclosure plans. JA-2230; JA-2234-35; JA-2239; JA-2242.

B. The officer registries will contain Unsubstantiated and Non-Final Allegations that will harm the identified officers

The *vast majority* of the records in the officer registries will relate to allegations of misconduct that were never substantiated. A recent data dump of CCRB allegations is illustrative. The day before this case was filed, CCRB disclosed nearly 300,000 allegations against active and retired police officers to the New York Civil Liberties Union ("NYCLU"), which subsequently published the allegations in its own officer registry. JA-2025. More than *92 percent* of the allegations in this officer registry fall into the category of Unsubstantiated and Non-Final Allegations. JA-2385. Many are designated as "unfounded," meaning an investigation

determined the conduct *did not occur*. JA-2305. Others are designated as "unsubstantiated," meaning investigators did not believe a preponderance of the evidence supported that the conduct described in the complaint occurred, or "exonerated," meaning an investigation found that the conduct *occurred but was not improper*. JA-2305. The release to NYCLU was limited to CCRB officer histories as of July 2020 and did not include other CCRB files, such as detailed citizen complaint reports, or records of more serious allegations lodged with NYPD. JA-2024-JA-2025. This is a small subset of the records the agencies have indicated they will release that does not affect the substance of this appeal. But the release demonstrates that the City's officer registries will contain hundreds of thousands of unsubstantiated allegations against officers, inevitably including many that were completely fabricated.

The registries will include other allegations and accusations, including Charges and Specifications, that are "substantiated" through a process that does not provide officers a meaningful opportunity to be heard. The CCRB and NYPD investigatory processes offer few procedural protections for officers. In serious cases, the CCRB or NYPD may recommend that the officer be served with Charges and Specifications, which are departmental "accusations" detailing the specific provisions of NYPD's rules and regulations alleged to have been violated. 38 RCNY §15-01. But the NYPD Patrol Guide does not provide officers with a right to cross-

examine witnesses or present evidence, either before the investigating entity issues a recommendation or before Charges and Specifications are issued by NYPD. In addition, the evidentiary standard for issuing Charges and Specifications is undefined, and officers do not receive a hearing until after charges are filed. Thus, these records are not the result of a process based on any articulated standard of proof and do not constitute final determinations that allegations are true.

C. Procedural history

On July 14, 2020, the Unions filed a complaint seeking injunctive relief to prevent the City's publication of Unsubstantiated and Non-Final Allegations. JA-53.[4] The case was removed from New York County Supreme Court to the U.S. District Court for the Southern District of New York the next day. The district court entered a temporary restraining order on July 22, 2020, finding the Unions raised "serious issues" regarding the effect of the City's release "that transcend reputation, that affect employment, that affect safety" and accepted those "harms as not speculative and imminent." JA-723. The district court also found the Unions "raised sufficiently serious questions going to the merits" and the City would not be not harmed by the restraining order. JA-723. Finally, the court found that, without

[4] As of this filing, the operative complaint in the district court is the First Amended Complaint. (Dist. Ct. Dkt. No. 226.)

injunctive relief, "the case is over." JA-722.

The Unions sought a preliminary injunction to prevent the City from releasing Unsubstantiated and Non-Final Allegations while the court determined the merits of their claims and the pending arbitrations, which are described below. On August 21, 2020, the district court denied the Unions' motion for a preliminary injunction in substantial part. SPA-1. Except for a narrow category of police records,[5] the court concluded there was no likelihood of irreparable harm or success on the merits.

This appeal followed. On September 17, 2020, a motions panel of this Court stayed the district court's order.

SUMMARY OF THE ARGUMENT

The district court erred and abused its discretion:

Point I of the Argument is that the district court was wrong in denying preliminary injunctive relief in aid of arbitration under CPLR 7502(c). CPLR 7502(c) authorizes preliminary injunctive relief to prevent an arbitration from being

[5] The district court enjoined NYPD and CCRB from disclosing "records of 'Schedule A' command discipline violations, for cases heard in the Trial Room, and for which the disposition of the charge at trial or on review or appeal therefrom is other than 'guilty,' which records have been, are currently, or could in the future be the subject of a request to expunge the record of the case pursuant to §8" of CBAs of the PBA, SBA, and LBA. SPA-1. Intervenor Communities United for Police Reform ("CPR") has noticed a cross-appeal from this portion of the district court's order. No. 20-3117 (2d Cir.).

"rendered ineffectual." The Unions have started their CBA arbitration process claiming rights under what has been referred to as CBA "Section 7(c)" are violated by disclosures of Unsubstantiated and Non-Final Allegations. Without a preliminary injunction, the City will publicly disclose information that will render any arbitration ineffectual because the information will already be public. The court denied relief based on its conclusion that the Unions' §7(c) grievance "is not a grievance at all" because "there is simply no way in which this provision is—or which the argument being made can be made under the CBAs." SPA-21. But the court improperly chose between contested meanings of §7(c)'s terms by ignoring some ordinary meanings of words, and by assuming meanings for other terms in §7(c) that are undefined in the CBAs and whose meaning should be determined by the arbitrator. The court ignored the power of arbitrators to award equitable relief a court could not award. And the court did this without the full record that would be presented to an arbitrator.

Point II of the Argument is that the district court was wrong in denying preliminary injunctive relief on the Unions' other claims, above all by improperly minimizing evidence of irreparable harm to professional reputation, privacy interests, and the safety of officers and their families.

The district court also improperly analyzed likelihood of success, concluding it could not apply the "serious questions" standard. That standard applies because the City's plans are policy-driven decisions that run *counter* to a statutory scheme.

On the Unions' claims that the City's planned registries violate due process rights barring "stigma-plus" injuries, the court was wrong in minimizing evidence that the registries improperly stigmatize officers and deprive them of a liberty interest in future employment without adequate pre-deprivation procedures.

On the Unions' CPLR Article 78 claims, the court was wrong in disregarding the City's failure to provide meaningful pre-disclosure review to protect privacy and safety interests. CCRB recently released some 81,000 records without individualized review. CCRB's position was that "there was no need to do a line by line of every—of all 81,000-plus officers" to determine the need for individual privacy or safety protection. JA-1644. The City's review was arbitrary and capricious because it was perfunctory and ignored past practice.

On the Unions' breach of settlement agreement claim, the court misapplied the law. On their equal protection claims, the court erred in concluding that law enforcement officers are not similarly situated to other public employees and by failing to consider evidence of disparate treatment among the defendants.

Finally, the district court erred in concluding that the balance of hardships does not tip decidedly in the Unions' favor. If the City is not enjoined from releasing Unsubstantiated and Non-Final Allegations, any future relief for the Unions would be ineffectual. In contrast, temporarily preventing disclosure of records that have been confidential for four decades while this litigation proceeds would constitute a

de minimis injury to the City or no injury at all.

ARGUMENT

I. THE DISTRICT COURT ERRED IN FAILING TO ISSUE A PRELIMINARY INJUNCTION TO PROTECT THE UNIONS' RIGHT TO ARBITRATE DISPUTES UNDER THEIR COLLECTIVE BARGAINING AGREEMENTS.

The district court erred and abused its discretion when it denied the Unions' motion for a preliminary injunction to protect their right to arbitrate the interpretation and application of "Section 7(c)" of the Unions' CBAs. SPA-20. The Unions' motion was based on New York arbitration law authorizing preliminary injunctive relief to prevent an arbitration from being "rendered ineffectual." CPLR 7502(c). Relief is proper when a party demonstrates risk of irreparable harm, likelihood of success on the merits, and a balance of the equities in favor of the party seeking relief. *SG Cowen Sec. Corp. v. Messih*, 224 F.3d 79, 81-84 (2d Cir. 2000). This Court reviews a lower court's denial of a preliminary injunction for abuse of discretion. *See Louis Vuitton Malletier v. Dooney & Bourke, Inc.*, 454 F.3d 108, 114 (2d Cir. 2006).

The district court refused to protect the Unions' right to arbitrate over §7(c) because, in the court's view, the Unions' §7(c) grievance "is not a grievance . . . at all" because "there is simply no way in which this provision is—or which the argument being made can be made under the CBAs." SPA-21. The court reached its decision by ruling on the merits of the parties' contested interpretations of the

undefined key terms in §7(c). The court decided the meaning and effect of §7(c)'s terms by ignoring some ordinary meanings of the words used and by assuming meanings for other key terms in §7(c) that are undefined in the CBAs. The court ignored the power of arbitrators to award equitable relief that a court could not award. And the court did all this without the full record that would be presented to an arbitrator on those issues. The court's decision is the equivalent of granting summary judgment or a motion to dismiss on the Unions' §7(c) claim. The court effectively usurped the role of the arbitrator and eliminated the Unions' bargained-for grievance and arbitration rights under their CBAs.

The district court's refusal to grant a preliminary injunction will result in the arbitration over §7(c) being rendered ineffectual. The evidence shows irreparable harm, likelihood of success, and a balance of the equities in favor of relief. The court's decision is contrary to the Unions' rights under CPLR 7502(c), the policy of enforcing arbitration rights, and New York's "strong and sweeping" public policy supporting collective bargaining rights. *City of Watertown v. State of N.Y. Pub. Relations Bd.*, 733 N.E.2d 171, 173 (N.Y. 2000).

A. The Unions' CBA grievance and arbitration demand on the interpretation and application of CBA §7(c).

Four police unions have started the grievance and arbitration process to challenge the City's disclosure of Unsubstantiated and Non-Final Allegations because the City's planned disclosure will violate §7(c) of their CBAs. One of the

CBA provisions at issue was referred to by the district court as "§7(c)." SPA-20. Section 7(c) is in the Police, Sergeants', Lieutenants', Captains', and Corrections' CBAs in substantively the same form. JA-210; JA-145; JA-249; JA-298; JA-391. Section 7(c) says the NYPD "will, upon written request to the Chief of Personnel remove from the Personal Folder investigative reports which, upon completion of the investigation, are classified 'exonerated' and/or 'unfounded.'" The Unions have demanded arbitration on:

> Whether the City of New York violated Article XVI, Section 7(c) of the Collective Bargaining Agreement between the Police Benevolent Association of the City of New York, Inc. and the City by publishing information regarding unfounded, exonerated, unsubstantiated, unadjudicated and non-final allegations of misconduct against police officers.

JA-2321 (abbreviations removed); *see also* JA-2336; JA-2342; JA-2350.

The Unions contend §7(c) prevents public disclosure of exonerated or unfounded reports of misconduct against police officers. If public release of records covered by §7(c) were permitted, the right to remove records would be meaningless. Any future removal of the reports will have no practical effect because the information will already be public.

To protect their right to arbitrate CBA grievances, the Unions sought a preliminary injunction under CPLR 7502 to prevent public disclosure of the relevant records pending a decision by the arbitrator on the meaning and application of §7(c).

CPLR 7502(c) provides that a preliminary injunction in aid of arbitration may issue "upon the ground that the award to which the applicant may be entitled may be rendered ineffectual without such provisional relief." The court wrongly denied relief. As explained below, all requirements for relief are met.

B. Without a preliminary injunction, the Unions will be irreparably injured because their right to arbitrate will be rendered ineffectual.

Without a preliminary injunction, the Unions will be irreparably harmed by the loss of their right to meaningful arbitration on §7(c) when the City publishes the protected disciplinary records. "The deprivation of [a party's] contractual right to arbitrate its claims, a right protected by international, federal, and state law, constitutes irreparable harm." *Paramedics Electromedicina Comercial Ltda. v. GE Med. Sys. Info. Techs., Inc.*, 2003 WL 23641529, at *12 (S.D.N.Y. June 4, 2003), *amended in part*, 2003 WL 21697884 (S.D.N.Y. July 21, 2003); *see, e.g.*, *Reliance Nat. Ins. Co. v. Seismic Risk Ins. Servs.*, 962 F. Supp. 385, 391 (S.D.N.Y. 1997) (stating that plaintiff "will suffer irreparable harm if it is deprived of its federal and state contractual right to arbitrate its disputes"); *Olde Disc. Corp. v. Tupman*, 805 F. Supp. 1130, 1141 (D. Del. 1992) (stating that "loss of [the] federal substantive right to arbitrate, should injunctive relief be denied, constitutes irreparable harm clearly distinguishable from purely economic losses").

C. The Unions are likely to succeed in arbitration.

When parties agree to arbitrate disputes, generally the arbitrator, not a court, decides the merits of the claims. New York law, which governs the CBAs and the arbitrations in this case, provides that: "In determining any matter arising under this article [Art. 75, titled 'Arbitration'], the court shall not consider whether the claim with respect to which arbitration is sought is tenable, or otherwise pass upon the merits of the dispute." CPLR 7501. Normally, "[i]n disputes subject to arbitration, interpretation of particular contract terms must be left for the arbitrators." *Sisters of St. John the Baptist, Providence Rest Convent v. Phillips R. Geraghty Constructor, Inc.*, 494 N.E.2d 102, 103 (N.Y. 1986). This is modified to some extent when a court decides whether to issue a preliminary injunction under CPLR 7502 because one of the factors that must be considered is the likelihood of success on the merits of the arbitration claim. However, as this Court has explained, assessing likelihood of success in arbitration is necessarily different from assessing it in a court proceeding because of the unique role in arbitration of equitable analysis, procedure, and relief. In considering whether to issue a preliminary injunction under CPLR 7502, the likelihood of success "will naturally have greatly reduced influence":

> *[A]rbitration is frequently marked by* great flexibility in procedure, choice of law, legal and *equitable analysis, evidence, and remedy*. *Success on the merits in arbitration therefore cannot be predicted with the confidence a court would have in predicting the merits of a dispute awaiting litigation in court*, and it can be expected that *when the*

> *merits are in the hands of an arbitrator, this element of the analysis will naturally have greatly reduced influence*.

SG Cowen Sec. Corp. v. Messih, 224 F.3d 79, 84 (2d Cir. 2000) (emphases added).

It is fundamental that "[u]nder New York law arbitrators have power to fashion relief that a court might not properly grant." *Sperry Int'l Trade, Inc. v. Gov't of Israel*, 689 F.2d 301, 306 (2d Cir. 1982). "[T]he arbitrator is not bound to abide by, absent a contrary provision in the arbitration agreement, those principles of substantive law or rules of procedure which govern the traditional litigation process." *Sprinzen v. Nomberg*, 389 N.E.2d 456, 458 (N.Y. 1979). "An arbitrator's paramount responsibility is to reach an equitable result, and the courts will not assume the role of overseers to mold the award to conform to their sense of justice." *Id.* "Thus, an arbitrator's award will not be vacated for errors of law and fact committed by the arbitrator[.]" *Id.*; *see, e.g.*, *ReliaStar Life Ins. Co. of N.Y. v. EMC Nat'l Life Co.,* 564 F.3d 81, 86 (2d Cir. 2009) (arbitration award will be upheld if there is a "barely colorable" justification for it) (internal quotation marks and citation omitted); *Sperry Int'l Trade, Inc.*, 689 F.2d at 306.

This Court should reverse the decision that likelihood of success requires denying a preliminary injunction under CPLR 7502(c) on the Unions' §7(c) claim:

First, the district court was wrong when it disregarded the broad scope and power afforded to an arbitrator under New York law to fashion an "equitable result," and impermissibly "assume[d] the role of [an] overseer[] to mold the award to

conform to [its] sense of justice." *See* the discussion of the law *supra* 18-19, including *Sprinzen*, 389 N.E.2d at 458; *Sperry Int'l*, 689 F.2d at 306. The court ignored this issue. SPA-18-SPA-20.

Second, the district court was wrong when it disregarded the "reduced influence" of the likelihood-of-success factor when the dispute is to be arbitrated. *See* the discussion of the law *supra* 17-18, including *SG Cowen*, 224 F.3d at 81-84. The court ignored this issue. SPA-18-SPA-20.

Third, the district court was wrong when it held there was only one possible meaning of the key terms in §7(c), and the meaning did not support the Unions. Contrary to the court's interpretation, the ordinary meaning of "remove" is not limited to "move to a different place" so that what is removed from the Personal Folder under §7(c) can at the same time be made available to everyone in the world in a public registry. The ordinary meanings of "remove" also include "to get rid of" and "eliminate" entirely, and therefore the ordinary meaning of "remove" supports the Unions' position that records removed under §7(c) are eliminated completely, not broadcast publicly.[6] The court also erred when it wrongly concluded that the language of §7(c) was deficient in ways that CBA §8 was not, and it granted

[6] *See* definitions of "remove" at https://www.merriam-webster.com/dictionary/remove, and https://ahdictionary.com/word/search.html?q=remove.

preliminary injunctive relief for arbitration of §8 claims but not for §7(c) claims. SPA-21-SPA-22. The court contrasted the term "remove" in §7(c) with the term "expunge" in CBA §8, but that wrongly ignores the fact that one meaning of "expunge" is "to remove." Black's Law Dictionary (11th ed. 2019). Moreover, the term "Personal Folder" in §7(c) is not defined in the CBA and should not be interpreted in a way that makes §7(c) effectively meaningless by allowing full public disclosure or what is "removed," as further explained below. The term "investigative reports" in §7(c) is also undefined and ambiguous, and the ordinary meanings of these words are broad (as further discussed below, in the paragraph beginning "*Fifth*"). The court should not have interpreted it narrowly but instead allowed the arbitrator to determine the intent of the parties on a full record.

The court's analysis of §7(c) was perfunctory, speculative, and based on a preliminary record. It preempted the role of the arbitrator, deciding contested meanings of ambiguous and undefined terms on an attenuated record and improperly rendering any arbitration on the issue ineffectual. It is for the arbitrator to interpret key terms, the intent of the parties, and CBA practice and context to determine its meaning. The district court's decision was effectively the equivalent of granting summary judgment or a motion to dismiss because the court ruled that the Unions had no grievance at all and no right to arbitrate their grievance, and it left the parties in circumstances where the arbitration will be rendered ineffectual. But "[w]here

contractual language is ambiguous and subject to varying reasonable interpretations, intent becomes an issue of fact and summary judgment is inappropriate." *Perreca v. Gluck*, 295 F.3d 215, 224 (2d Cir. 2002) (quoting *Thompson v. Gjivoje*, 896 F.2d 716, 721 (2d Cir. 1990)); *see also Eternity Glob. Master Fund Ltd. v. Morgan Guar. Tr. Co. of N.Y.*, 375 F.3d 168, 178, 190 (2d Cir. 2004) ("[I]f a contract is ambiguous as applied to a particular set of facts, a court has insufficient data to dismiss a complaint for failure to state a claim"; reversing dismissal of breach of contract claim); *Sayers v. Rochester Tel. Corp. Supplemental Mgmt. Pension Plan*, 7 F.3d 1091, 1096 (2d Cir. 1993); *Info. Superhighway, Inc. v. Talk Am., Inc.*, 274 F. Supp. 2d 466, 470 (S.D.N.Y. 2003) ("Where a contract is ambiguous, it cannot be decided as a matter of law on a motion to dismiss.").

Fourth, the district court was wrong because, under the court's interpretation, §7(c) becomes meaningless because "removed" records will still be broadcast publicly to everyone by the City disclosures. A right to "remove" records that still allows those records to be broadcast in a public registry has no purpose or point. Basic principles of contract law reject interpretations that render provisions meaningless. "Under New York law an interpretation of a contract that has the effect of rendering at least one clause superfluous or meaningless is not preferred and will be avoided if possible. Rather, an interpretation that gives a reasonable and effective meaning to all terms of a contract is generally preferred to one that leaves a part

unreasonable or of no effect." *Galli v. Metz*, 973 F.2d 145, 149 (2d Cir. 1992) (internal quotation marks and citation omitted).

Fifth, the district court was wrong when it apparently concluded that the term "investigative reports" did not apply to NYPD charges and specifications that the Unions' seek to protect from disclosure. As noted above, the term "investigative reports" is not defined in the CBAs. The ordinary meaning of these words is broad, and information in investigative reports may be part of NYPD Charges and Specifications whose disclosure should be protected. All of this is for an arbitrator to decide, not the court in a decision that essentially dismisses the entire claim.

D. The balance of equities tips decidedly in the Unions' favor.

The final factor to be considered for preliminary injunctive relief in aid of arbitration is whether the balance of equities tips in favor of the Unions. *SG Cowen*, 224 F.3d at 81-84. The balance is sharply in the Unions' favor. The risk of irreparable harm includes not only loss of rights to meaningful arbitration, but all of the irreparable harm discussed in detail below in connection with other causes of action. In contrast, other parties will experience only delay until the arbitration determines if the pending releases are lawful. Public policy strongly favors arbitration rights, and protecting meaningful arbitration advances the public interest. The public interest is not served by rushing to what is in effect a final determination on the merits before a full hearing on the merits in the arbitration.

II. THE DISTRICT COURT ERRED IN DENYING A PRELIMINARY INJUNCTION ON THE REMAINING CLAIMS.

"For the last five decades, this circuit has required a party seeking a preliminary injunction to show '(a) irreparable harm and (b) either (1) likelihood of success on the merits or (2) sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly toward the party requesting the preliminary relief.'" *Citigroup Glob. Markets, Inc. v. VCG Special Opportunities Master Fund Ltd.*, 598 F.3d 30, 35 (2d Cir. 2010) (citation omitted). This Court reviews for abuse of discretion. *See Louis Vuitton*, 454 F.3d at 114.

A. The Unions demonstrated a likelihood of irreparable harm.

The district court erred in determining that there was not a likelihood of irreparable harm. As this Court has often stated, a showing of irreparable harm is "the single most important prerequisite for the issuance of a preliminary injunction." *Reuters Ltd. v. United Press Int'l, Inc.*, 903 F.2d 904, 907 (2d Cir. 1990) (internal quotation marks and citation omitted). In this context, irreparable harm "is a continuing harm which cannot be adequately redressed by final relief on the merits and for which money damages cannot provide adequate compensation." *Kamerling v. Massanari*, 295 F.3d 206, 214 (2d Cir. 2002) (internal quotation marks and citation omitted). It exists where, "but for the grant of equitable relief, there is a substantial chance that upon final resolution of the action the parties cannot be

returned to the positions they previously occupied." *Brenntag Int'l Chems., Inc. v. Bank of India*, 175 F.3d 245, 249 (2d Cir. 1999); *see also Time Warner Cable v. Bloomberg L.P.*, 118 F.3d 917, 925 (2d Cir. 1997) (adverse consequence "that could not be adequately remedied after the fact" established irreparable harm). "The standard for preliminary injunctive relief requires a *threat* of irreparable harm, not that irreparable harm already have occurred." *Mullins v. City of N.Y.*, 626 F.3d 47, 55 (2d Cir. 2010).

The district court abused its discretion in disregarding key evidence demonstrating the likelihood of at least two distinct types of irreparable harm.

First, the district court erred when it rejected the Unions' concrete showing of increasing threats of violence and harassment against officers.

Courts have often found that threats to safety, which cannot be quantified or remedied after the fact, constitute irreparable harm. *See, e.g.*, *Henrietta D. v. Giuliani*, 119 F. Supp. 2d 181, 214 (E.D.N.Y. 2000), *aff'd sub nom. Henrietta D. v. Bloomberg*, 331 F.3d 261 (2d Cir. 2003) (irreparable harm exists where movants "face imminent risk to their health, safety, and lives"); *see also Roe v. United States*, 428 F. App'x 60, 66-67 (2d Cir. 2011) (affirming injunction on dissemination of documents where publication would cause irreparable harm by placing movant's safety at risk). Once these records are released, officers will face these types of threats in perpetuity. As this Court recognized in another context, once private

information is made public, the damage is done. *Gambale v. Deutsche Bank AG*, 377 F.3d 133, 144 (2d Cir. 2004) ("We simply do not have the power, even were we of the mind to use it if we had, to make what has thus become public private again.").

The court erred in discounting evidence of risks to officer safety for lack of a direct link to "disclosure or the potential for disclosure" of disciplinary records. SPA-16. In so doing, the court held the Unions to an unreasonably high burden for a preliminary showing of likelihood of irreparable harm. Even so, the evidentiary record establishes a rising tide of threats against officers that is fairly traceable to perceived officer misconduct.

Sworn testimony explains how the increase in threats and violence against officers has coincided with recent protests against misconduct. Officer Joseph Alejandro attested to the rise in threats against officers, in some cases based on perceptions of officer misconduct. JA-2361. The affidavit provided statistics from NYPD's Threat Assessment and Protection Unit ("TAPU"), which investigates threats against police officers. According to statistics maintained by TAPU, more often than not, threats against police officers are motivated by the subject's previous interactions with police officers. JA-2361. The affidavit also addressed the threat of harassment of officers, referencing one activist's chilling statement at a legislative hearing: "'Name a cop and I'll find their address, phone numbers and relatives, I'll find them all on Google.'" JA-2361-JA-2362. The publication of officers' full

names endangers the life and safety of officers and their families because of the ease with which that information can be used to learn an officer's home address and other family information. JA-2361-JA-2362. Moreover, NYPD has not taken assassinations or attempted assassinations of officers into account in determining whether to withhold records on safety grounds, despite NYPD's direct knowledge of increasing threats and violence against officers. JA-1977-JA-1979. As courts recognize, this kind of evidence shows a "possibility of endangerment" to officers that justifies protection under statutory safety protections that are separate and apart from §50-a. *Luongo v. Records Access Officer, CCRB*, 150 A.D.3d 13, 25-26 (N.Y. App. Div. 2017) (internal alteration omitted).

Second, the district court failed to account for evidence that the City's disclosures would cause irreparable damage to officers' privacy interests as well as their professional reputations and long-term career prospects. SPA-13-SPA-16.

For decades, courts have recognized that "disclosure of private, confidential information 'is the quintessential type of irreparable harm that cannot be compensated or undone by money damages.'" *Airbnb, Inc. v. City of N.Y.*, 2019 WL 91990, at *23 (S.D.N.Y. Jan. 3, 2019) (quoting *Hirschfeld v. Stone*, 193 F.R.D. 175, 187 (S.D.N.Y. 2000)); *accord Providence Journal Co. v. FBI*, 595 F.2d 889, 890 (1st Cir. 1979); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Bishop*, 839 F. Supp. 68, 72 (D. Me. 1993); *Metro. Life Ins. Co. v. Usery*, 426 F. Supp. 150, 172 (D.D.C.

1976). Relatedly, the diminishing of professional reputation and opportunities constitutes irreparable harm. *Register.com, Inc. v. Verio, Inc.*, 356 F.3d 393, 404 (2d Cir. 2004) (stating that "loss of reputation, good will, and business opportunities" from a breach of contract can constitute irreparable harm); *Ticor Title Ins. Co. v. Cohen*, 173 F.3d 63, 69 (2d Cir. 1999) (finding irreparable harm where "it would be very difficult to calculate monetary damages that would successfully redress the loss of a relationship with a client"); *Dino DeLaurentiis Cinematografica, S.p.A. v. D-150, Inc.*, 366 F.2d 373, 375-76 (2d Cir. 1966) ("[I]ssuance of a preliminary injunction may be called for when damages are difficult to compute"; "Such difficulty is especially common when damage to reputation, credibility or good will is present"); *Madison Square Garden Boxing, Inc. v. Shavers*, 434 F. Supp. 449, 452 (S.D.N.Y. 1977) (concluding that loss of professional "credibility" constitutes irreparable harm).

The Unions established that the release of Unsubstantiated and Non-Final Allegations will permanently damage the professional reputations of the identified law enforcement officers. The Unions' expert Dr. Jon Shane, a professor at the John Jay College of Criminal Justice, demonstrated that, if released, allegations of officer misconduct will follow the identified officers and permanently affect their professional standing, even in cases where the agency did not substantiate the allegation or the officer was not disciplined. JA-2247. He explains that these

ramifications would adversely affect future job applications, blacklisting officers and branding them with "guilt by accusation." JA-2247-JA-2249. The long-term injuries to officers' professional reputations and career opportunities constitutes incalculable and irreparable harm. Rule 30(b)(6) witnesses for NYPD and DOC acknowledged the risk that release of these records could cause lasting reputational harm. JA-1983 (NYPD has "contemplated certain consequences that might flow to somebody by our release of records" and has "thought about whether or not there will be post[-]employment consequences based on records that we could release"); JA-1857-JA-1858 (stating that DOC "is aware [it] is a concern" that the release of unsubstantiated allegations could damage officer reputations and affect future employment opportunities).

The district court erred in concluding, as a blanket proposition, that "any reputation harm can be remedied by money damages." SPA-15-SPA-16. The court relied on cases involving individual plaintiffs, such as unlawful discharge cases, where damages are reasonably calculable and remedies such as reinstatement are available.[7] The Unions bring claims on behalf of tens of thousands of individual

[7] *See Guitard v. U.S. Sec'y of Navy*, 967 F.2d 737, 742 (2d Cir. 1992) (stating in the context of a military discharge that injuries attending discharge are not irreparable) (citing *Sampson v. Murray*, 415 U.S. 61, 89-92 (1974)); *Savage v. Gorski*, 850 F.2d 64, 68 (2d Cir. 1988) (concluding that three plaintiffs alleging unlawful discharge could be made whole by reinstatement and money damages);

officers, alleging reputational harm on a far larger scale that cannot be quantified.

B. The Unions are likely to prevail on the merits.

The district court failed to apply the proper standard in this case and, in any event, erred in determining that the Unions were not likely to succeed on the merits of their constitutional and contractual claims. The proper standard here was the "serious questions" standard, which the Unions met. In any event, the Unions likewise established that they are likely to succeed on the merits on their claims for violation of due process, equal protection, breach of contract, and arbitrary and capricious government action. The district court erred in determining otherwise.

1. The district court erred in failing to apply the "serious questions" standard.

As an initial matter, the district court erred in concluding that the "serious questions" standard is not available in this case. *Scarangella v. Grp. Health, Inc.*, 731 F.3d 146, 151 (2d Cir. 2013) ("A court necessarily abuses its discretion when it applies an incorrect legal standard."). As a result, the court applied the higher standard of likelihood of success to each of the Unions' claims.[8] The Unions satisfy

---

Nicholas v. Bratton, 2016 WL 3093997, at *4 (S.D.N.Y. June 1, 2016) (concluding that *pro se* plaintiff's potential loss of future employment opportunities based on revocation of press pass did not constitute irreparable harm).

[8] The court stated that application of the serious questions standard would not have changed the result, but it did not apply the standard in the merits inquiry. SPA-11

either standard, but the proper standard is the serious questions standard.

As a default rule, a preliminary injunction is appropriate when a plaintiff demonstrates irreparable harm and sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly in the movant's favor. *See Trump v. Deutsche Bank AG*, 943 F.3d 627, 635-36 (2d Cir. 2019), *rev'd on other grounds by Trump v. Mazars USA, LLP*, 140 S. Ct. 2019 (2020). There is an exception to this rule: when a party seeks to stay governmental action "pursuant to a statutory or regulatory scheme," it must show a likelihood of success on the merits. *Id.* at 637-39 (quotation marks and citation omitted). Challenges to government action do not automatically require a higher showing on the merits. *See Haitian Ctrs. Council, Inc. v. McNary*, 969 F.2d 1326, 1339 (2d Cir. 1992) (stating that "the 'likelihood of success' prong need not *always* be followed merely because a movant seeks to enjoin government action" (emphasis added)), *vacated on other grounds sub nom. Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 918 (1993). The serious questions standard is available where a challenged government action is based on enforcement of an "informal policy, hastily adopted without the benefit of either specific statutory instructions or regulations issued after

---

("But even were I to use the serious-questions standard, the result would be the same.").

a public notice-and-comment process." *Otoe-Missouria Tribe of Indians v. N.Y. State Dep't of Fin. Servs.*, 769 F.3d 105, 111 (2d Cir. 2014); *see also Trump*, 943 F.3d at 695 (Livingston, J., concurring in part and dissenting in part) (stating that serious questions standard is available when the challenged government conduct does not "constitute governmental action pursuant to a statutory or regulatory scheme and do[es] not reflect the presumptively public-interested actions of *both* the legislative and executive branches" (emphasis added)).

The district court was wrong to determine that this case involves governmental action pursuant to a statutory or regulatory scheme. SPA-11. As a simple factual matter, NYPD and CCRB's comprehensive online registries of disciplinary records will be separate from any responses to FOIL requests. But these two registries will apparently be quite different from one another. CCRB's registry will include most allegations against officers, including those considered "unsubstantiated, unfounded, and truncated," but not other types of cases. JA-2233. After initially announcing a plan to release all *pending* misconduct allegations, NYPD changed course and said its registry would be limited to Charges and Specifications, regardless of whether they have been adjudicated. JA-2238. DOC will release certain "final determinations" of disciplinary cases on its website, and FDNY has not yet determined what it will release, if anything. JA-2229; JA-2242.) These haphazard and disparate plans, no two of which are alike, are completely

unmoored from any statutory or regulatory scheme; indeed, they are a product of the *absence* of such a scheme. The City is not being guided by specific statutory instructions, but rather by the lack thereof. The serious questions standard applies.

2. The Unions are likely to succeed on their federal and state due process claims.

The U.S. and New York State Constitutions each provide that no person shall be deprived of life, liberty, or property without due process of law. U.S. Const. amend. XIV; N.Y. Const. s. 1, art. 6. Both provisions protect against "stigma-plus" injury, which is "injury to one's reputation (the stigma) coupled with the deprivation of some 'tangible interest' or property right (the plus), without adequate process." *DiBlasio v. Novello*, 344 F.3d 292, 302 (2d Cir. 2003); *see also Swinton v. Safir*, 720 N.E.2d 89, 92 (N.Y. 1999).

The City's disclosure of Unsubstantiated and Non-Final Allegations will violate due process because it will deprive the subject officers of future liberty interests without adequate procedures. The release of Unsubstantiated and Non-Final Allegations threatens to (1) stigmatize the identified officers and (2) interfere with their future employment opportunities without the due process guaranteed by the U.S. and N.Y. Constitutions. *See People v. David W.*, 733 N.E.2d 206, 211 (N.Y. 2000) ("This Court has held that the mere likelihood of dissemination to prospective employers of allegations of rape and abuse in a fired public employee's personnel

file sufficiently impaired that employee's liberty interest to warrant due process protections.") (citing *Swinton*, 720 N.E.2d at 92).

a. The publication of Unsubstantiated and Non-Final Allegations will stigmatize the identified officers.

The City's worldwide publication and promotion in registries of Unsubstantiated and Non-Final Allegations will stigmatize the identified officers and result in "'public opprobrium' and damage to [their] reputation[s]." *Valmonte v. Bane*, 18 F.3d 992, 999 (2d Cir. 1994); *cf. U.S. Dep't of Justice v. Reporters Comm.*, 489 U.S. 749, 764 (1989) ("Plainly there is a vast difference between the public records that might be found after a diligent search of courthouse files, county archives, and local police stations throughout the country and a computerized summary located in a single clearinghouse of information."). There seemed to be no dispute below that the allegations to be contained in the registries of disciplinary records will include allegations that are false and misleading. But the district court erred in adopting the City's argument that the Unions cannot satisfy the "stigma" prong because the disciplinary records will be accompanied by an accurate dispositional term (*e.g.*, unsubstantiated, unfounded, etc.). SPA-29-SPA-30. That conclusion was wrong.

The due process claims are not defeated merely because false and defamatory allegations are accompanied by a description of the agency's disposition of the investigation or adjudication. For example, the City's use of a term such as

"unsubstantiated" alongside provably false allegations does not eliminate their defamatory connotations. The investigative terms, as defined by the City, neither confirm nor refute the truth of underlying allegation. They simply state the outcome of the related investigation and do not cleanse falsity embedded in the allegations themselves. These false allegations will stigmatize officers, negatively affecting their professional reputations by imputing to them misconduct or unfitness for the profession.

The mere accusation of misconduct is enough to call an officer's good name and reputation into question. The district court's decision to the contrary was wrong for at least three reasons. ***First***, the district court's reliance (at the behest of the City) on *Wiese v. Kelley* was misplaced. SPA-30 (citing *Wiese v. Kelley*, 2009 WL 2902513 (S.D.N.Y. Sept. 10, 2009)). The dissemination and widespread promotion of these Unsubstantiated and Non-Final Allegations can hardly be compared to the publication of letters that merely announced changes to employment status in *Wiese*. As the *Wiese* court noted, that case did not involve charges that the plaintiff "was guilty of dishonesty or immorality, or accusations that called into question [his] good name, reputation, honor, or integrity." *Wiese*, 2009 WL 2902513, at *4 (internal quotation marks, alteration and citation omitted). Accusations of misconduct necessarily call into question the professionalism and integrity of the identified

officers, and the attendant reputational harm will be swift and serious. (*See supra* 23 (discussing irreparable harm)).

Second, in analyzing the "stigma" component, courts look to state substantive law of defamation. *See Paterno v. City of N.Y.*, 2018 WL 3632526, at *4 (S.D.N.Y. July 31, 2018). Under New York law, when "a reasonable listener could have concluded that the statement was conveying a fact about [the plaintiff] that was susceptible of a defamatory connotation," the statement is actionable. *Greenberg v. Spitzer*, 62 N.Y.S.3d 372, 389 (N.Y. App. Div. 2017). "Words which affect a person in his or her profession by imputing to him or her any kind of fraud, dishonesty, misconduct, or unfitness in conducting one's profession may be actionable." *Wasserman v. Haller*, 627 N.Y.S.2d 456, 457 (N.Y. App. Div. 1995). Members of the public could reasonably read Unsubstantiated and Non-Final Allegations as being true when they are not, even when dispositional terms such as "unsubstantiated" are attached, as such terms lack sufficient context.

The district court erred again by wrongly focusing on the fact that truth is a defense to defamation. SPA-31. The words at issue are capable of defamatory interpretation and, thus, actionable. Take, for example, a registry entry that says Officer Smith had an unsubstantiated rape complaint in 2020. Unsubstantiated, according to the City, means the investigatory process did not determine the conduct occurred by enough evidence to warrant formal charges. The publication and

promotion of that complaint through a registry—despite the unsubstantiated tag, which actually makes no comment on veracity—is capable of misleading and "susceptible of a defamatory connotation." *Greenberg*, 62 N.Y.S.3d at 389. Moreover, New York law recognizes defamation by implication in circumstances where a communication conveys defamation intended by the speaker, even where the statement is not itself literally false. "[D]efamation by implication does not require that a direct statement is, in and of itself, false; rather, it is premised on 'false suggestions, impressions and implications arising from otherwise truthful statements.'" *Partridge v. State*, 100 N.Y.S.3d 730, 734 (N.Y. App. Div. 2019) (quoting *Armstrong v. Simon & Schuster, Inc.*, 649 N.E.2d 825, 829 (N.Y. 1995)).

Press coverage following CCRB's recent public disclosures demonstrates: (1) these disciplinary records are susceptible of a defamatory connotation; (2) the false suggestions, impressions, and implications flowing from release; and (3) that the City will allow such defamatory and false impressions. Following CCRB's releases of disciplinary records in June and July, the Guardian published a cartoon of "NYPD's 10 Most Unwanted" officers, depicting and identifying ten police officers and purporting to list the number of allegations lodged against each officer, with

citation to CCRB data.[9] But the underlying data reveals that the vast majority of the allegations were unfounded (meaning by the CCRB's own standard there was a preponderance of the evidence that the acts alleged did not occur) or unsubstantiated (meaning, according to the CCRB, there was insufficient evidence to establish whether or not there was an act of misconduct). The reputations of these officers were tarnished without any regard for the veracity of the underlying allegations. CCRB has done nothing to quell the misleading and defamatory impressions from this data dump. The damage to reputation of guilt by accusation—particularly where the agencies intend such damage and including those the agency investigated and found to be without merit—is done.

Third, a plaintiff is "required only to raise the falsity of these stigmatizing statements as an issue, not prove they are false" to show entitlement to a name clearing hearing. *Patterson v. City of Utica*, 370 F.3d 322, 330 (2d Cir. 2004); *see Brandt v. Bd. of Coop. Educ. Servs.*, 820 F.2d 41, 43-44 (2d Cir. 1987). The district court erred in requiring proof of falsity.

---

[9] Mona Chalabi, *Which NYPD officers have most complaints against them?*, The Guardian (Aug. 4, 2020), https://www.theguardian.com/us-news/datablog/2020/aug/04/new-york-police-department-allegations-complaints.

b. Officers have a protected liberty interest in future employment opportunities.

The publication and promotion of this stigmatizing information in public registries will create lasting burdens for the identified officers when they seek new employment. Under both federal and New York law, a likelihood of dissemination of stigmatizing information to potential employers implicates a liberty interest and triggers due process protections. *See Brandt v. Bd. Of Coop. Educ. Servs.*, 820 F.2d 41, 43 (2d Cir. 1987); *Swinton v. Safir*, 720 N.E.2d 89, 93 (N.Y. 1999); *Knox v. N.Y.C. Dep't of Educ.*, 924 N.Y.S.2d 389, 389 (N.Y. App. Div. 2011) (stating that "plus" is satisfied when the plaintiff shows "a likelihood of dissemination of the stigmatizing material that could significantly impair [the plaintiff's] ability to gain employment" in a chosen field).

Based on the City's statements, the NYPD and CCRB officer registries will have similar consequences to being listed on the New York's Statewide Central Register of Child Abuse and Maltreatment (the "Central Register"). In *Valmonte v. Bane*, 18 F.3d 992 (2d Cir. 1994), this Court held that the dissemination of a plaintiff's information from the Central Register to potential employers, coupled with the defamatory nature of inclusion on the list, implicates a liberty interest by placing "a tangible burden" on employment prospects. *Id.* at 1001; *see also Lee TT. v. Dowling*, 664 N.E.2d 1243, 1250 (N.Y. 1996) (concluding that plaintiffs' inclusion in Central Register "harmed their personal reputations, . . . affected their

present employment and effectively foreclosed them from any future employment in the child care area"). Covered employers are statutorily required to consult the Central Register. *Valmonte*, 18 F.3d at 1001. Here, the officer registries are the functional equivalent of the Central Register: potential employers will check the officer registries before hiring a current or former NYPD officer. JA-2248. The purpose of the widescale promotion of the registries is to ensure potential employers and other police departments access these records. A single allegation of misconduct in either registry—substantiated, unsubstantiated, or otherwise—could cause an officer to lose out on a future job. JA-2248.

The district court erred in concluding that the "plus" prong was not satisfied because the release of Unsubstantiated and Non-Final Allegations would not interfere with officers' future employment prospects. SPA-33. The court dismissed the Unions' evidence of this harm as "vague allegations of future loss of employment," SPA-34, rejecting as inapposite binding federal and state case law holding that adequate procedures must be provided when there is a likelihood that stigmatizing information in an employee personnel file will be disseminated to future employers. *See, e.g.*, *Brandt*, 820 F.2d at 45 (stating that if plaintiff "is able to show that prospective employers are likely to gain access to his personnel file and decide not to hire him, then the presence of the charges in his file has a damaging effect on his future job opportunities," satisfying the "plus" prong); *Swinton*, 720

N.E.2d at 93 (holding that due process protections are triggered by "a likelihood of dissemination" of stigmatizing material in a police officer's personnel file). The court also ignored the sworn testimony of the 30(b)(6) witnesses for NYPD and DOC regarding consequences of disclosure for the future employment opportunities of officers. JA-1983 (NYPD has "contemplated certain consequences that might flow to somebody by our release of records" and has "thought about whether or not there will be post[-]employment consequences based on records that we could release."); JA-1857-JA-1858 (stating that DOC "is aware [it] is a concern" that the release of unsubstantiated allegations could damage officer reputations and affect future employment opportunities).

The district court erred again by mixing the stigma prong with the plus prong and holding that future law enforcement employers would be able to interpret law enforcement reports properly such that there would be no impact on future job prospects. The district court's reliance on the dispositional terms to alleviate the plus was wrong. These defamatory and misleading registries will undermine future law enforcement job prospects for the named officers.

c. The City does not provide adequate procedures before depriving officers of a liberty interest.

Finally, having triggered the requirement of due process, the City must establish adequate "procedural safeguards" to prevent the deprivation of officers' liberty interests. *Valmonte v. Bane*, 18 F.3d 992, 1003 (2d Cir. 1994). But the City

provides absolutely no process by which officers might prevent the constitutional deprivation in this case—*i.e.*, the inclusion of Unsubstantiated and Non-Final Allegations against them in the NYPD and CCRB registries or other public disclosures.

"'[D]ue process . . . calls for such procedural protections as the particular situation demands.'" *Monserrate v. N.Y. State Senate*, 599 F.3d 148 (2d Cir. 2010) (quoting *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972)). Because the deprivations in this case involve irretrievable dissemination of information to the public, officers are entitled to "some kind of hearing *prior to depriving them*" of their professional reputations and future employment opportunities. *DiBlasio*, 344 F.3d at 302 (internal quotation marks and citation omitted) (emphasis added). A post-deprivation name-clearing hearing, through an Article 78 proceeding or otherwise, would not vindicate this right. *See Hellenic Am. Neighborhood Action Comm. v. City of N.Y.*, 101 F.3d 877, 880 (2d Cir. 1996) ("When the deprivation occurs in the more structured environment of established state procedures, rather than random acts, the availability of post[-]deprivation procedures will not, ipso facto, satisfy due process."); *Lee TT.*, 664 N.E.2d at 1252 ("it makes obvious sense in most cases to 'minimize substantially unfair or mistaken deprivations' by insisting that the hearing be granted at a time when the deprivation can still be prevented"). (citation omitted)

The district court erred by considering the adequacy of irrelevant procedures provided to officers *in the investigations of the underlying allegation* (SPA-35), ignoring the Unions' argument about the lack of pre-deprivation procedures related to the registries (JA-2212). There is no process by which officers can avoid inclusion in the registries, which is the constitutional deprivation at issue. But even if investigatory procedures are somehow relevant to the deprivation of publishing Unsubstantiated and Non-Final Allegations in online registries (which they clearly are not), these procedures do not satisfy due process. NYPD does not provide officers an opportunity to present evidence or cross-examine witnesses in the investigative phase preceding issuance of Charges and Specifications, which NYPD plans to release and promote in its registry. The standard for issuance of Charges and Specifications is not defined in the NYPD Patrol Guide. The Patrol Guide requires officers to answer all questions posed in "interrogations," but it does not permit officers to present evidence of their own.[10] The Patrol Guide also requires officers to cooperate with CCRB interviews, but neither CCRB procedures nor the Patrol Guide provides officers the opportunity to present or contest evidence in the

[10] NYPD Patrol Guide §206-13, *Interrogation of Members of the Service*, https://www1.nyc.gov/site/nypd/about/about-nypd/patrol-guide.page.

investigative process.[11] Thus, officers have no opportunity, in the investigative phase or otherwise, to prevent the stigmatizing information from being released.

The lack of procedural protections here is similar to what the Court considered in *Valmonte*. In that case, there was an "unacceptably high risk" of individuals being added to the Central Register in error because the state relied on inadequate procedures and a low standard of proof that merely required "'some credible evidence.'" 18 F.3d at 1004. This standard did not satisfy due process because it did "not require the factfinder to weigh conflicting evidence" or "judge competing versions of events" and gave one side a "greater ability to assemble its case." *Id.* at 1004; *see also Lee TT.*, 664 N.E.2d at 1246 (concluding that "some credible evidence" standard does not satisfy due process and holding that reports of child abuse "must be substantiated by a fair preponderance of the evidence before information regarding the subject may be disseminated" to potential employers). Here, the procedural protections are far worse. Unlike the Central Register, there is no mechanism for officers to challenge their inclusion on the list. And instead of a low standard of proof, there is *no* standard of proof: even totally baseless allegations

---

[11] NYPD Patrol Guide §211-14, *Investigations by Civilian Complaint Review Board*, https://www1.nyc.gov/assets/ccrb/downloads/pdf/investigations_pdf/pg211-14-investigations-by-ccrb.pdf.

will be added to the CCRB's database without regard for evidentiary showing. Meanwhile, NYPD's evidentiary standard for issuing Charges and Specifications is undefined, and there is no hearing provided until after charges are issued. *See* 38 RCNY 15-03, 15-04.

The Unions have established both serious questions and a likelihood of success on the merits of their due process claim, and the district court's conclusion to the contrary was an abuse of discretion.

3. The Unions are likely to succeed on their Article 78 claims.

Article 78 of New York Civil Practice Law and Rules enables a party to challenge a threatened or actual determination by the government that was, *inter alia*, affected by an error of law or arbitrary and capricious. *See Mulgrew v. Bd. of Educ. of City of N.Y.*, 87 A.D.3d 506, 507 (N.Y. App. Div. 2011). It was an error of law and arbitrary and capricious under CPLR 7803(3) for the City (1) to decide to release Unsubstantiated and Non-Final Allegations without individualized and particularized review for safety and privacy concerns, and (2) to break with longstanding practice in determining not to assert the privacy and safety exemptions as a basis for withholding those records.

a. The City violated Article 78 by deciding to release Unsubstantiated and Non-Final Allegations without subjecting them to individualized and particularized review for privacy and safety concerns.

The City's plans to proactively release Unsubstantiated and Non-Final Allegations in online registries without subjecting those allegations to individual review violates CPLR 7803(3). The decision was "affected by an error of law" because it was based on the incorrect legal conclusion that the repeal of §50-a was a directive to release all disciplinary records that relieved agencies of the responsibility to consider whether individual records should be withheld based on privacy or safety concerns. Under the "error of law" standard, government decisions based on "pure statutory reading and analysis, dependent only on accurate apprehension of legislative intent," are entitled to little, if any, deference. *Kurcsics v. Merchants Mut. Ins. Co.*, 403 N.E.2d 159, 163 (N.Y. 1980). In such a case, courts are "free to ascertain the proper interpretation from the statutory language and legislative intent." *In re Gruber*, 674 N.E.2d 1354, 1358 (N.Y. 1996). Moreover, the City's decision was "arbitrary and capricious" because it was made "without a sound basis in reason and generally without regard to the facts." *Nestle Waters N. Am., Inc. v. City of N.Y.*, 121 A.D.3d 124, 127 (N.Y. App. Div. 2014).

The evidentiary record suggests the City views the repeal of §50-a as *carte blanche* to ignore other legal protections on disclosure, such as the specific exemptions in FOIL. In light of this evidence, the district court clearly erred in

finding the City continues to properly consider and apply the privacy and safety exemptions in FOIL. SPA-39-40. For example, CCRB's Rule 30(b)(6) representative testified that the agency's records access officer can choose, in her sole discretion, not to conduct *any review at all* for the privacy and safety exemptions because applying any FOIL exemption is always optional. JA-1654 ("CCRB isn't required to assert or look for any of those FOIL exemptions. They're permissive exemptions. So there's no requirement that the agency engage in any analysis. To the extent that the records access officer does and choose to assert it, then the records access officer can."). CCRB's representative also testified that a large tranche of 81,000 officer histories released to a FOIL requestor in July 2020 were not reviewed individually. CCRB's position was that "there was no need to do a line by line of every—of all 81,000-plus officers" to determine the need for individual privacy or safety protection. JA-1644.

The district court also clearly erred in finding that the registries are in accord with the legislative purposes of FOIL and the repeal of §50-a. The legislation to repeal §50-a does not evince any legislative intent to mandate or direct law enforcement agencies to release disciplinary records indiscriminately and on a wholesale basis in a public registry. On June 12, 2020, the New York State Legislature repealed §50-a when the Governor signed Senate Bill S8496 into law. The clear intent of the repeal legislation was to eliminate the statutory basis for

categorically withholding all police personnel records. The Sponsor Memorandum for Senate Bill S8496 states that §50-a was an "unnecessary" law that could be removed because there are "additional safeguards" and "protections" in New York law that are intended to protect the rights of officers, including the exemptions in FOIL.[12] The Sponsor Memorandum for Assembly Bill A9332 states that "FOIL already provides all public employees, including those protected under §50-a, the protections necessary to guard against unwarranted invasions of privacy and from disclosures that could jeopardize their security or safety."[13]

Thus, in repealing §50-a, the legislature *removed one barrier* to the release of disciplinary records while emphasizing the continuing application of other protections. The City's plan to release Unsubstantiated and Non-Final Allegations without subjecting them to individualized review to consider those other protections is based on an error of law and would be arbitrary and capricious.

---

[12] Sponsor Mem., N.Y. Senate Bill S8496, https://www.nysenate.gov/legislation/bills/2019/s8496.

[13] Sponsor Mem., N.Y. Assembly Bill A9332, https://nyassembly.gov/leg/?default_fld=&bn=9332&term=2015&Summary=Y&Memo=Y.

b. The City broke with its established practice of withholding unsubstantiated allegations of misconduct without a rational basis for doing so.

It also was arbitrary and capricious for the City to change its long-established position of withholding unsubstantiated allegations on privacy grounds without providing a sound basis in reason for the shift.

It is a bedrock principle of New York law that an agency may not reach different conclusions based on similar facts and law without explaining the reason for the inconsistent decisions. *Matter of Charles A. Field Delivery Serv., Inc.*, 488 N.E.2d 1223, 1225 (N.Y. 1985) ("It is per se arbitrary and capricious for an agency to reach different results on substantially similar facts and law without explaining on the record the reason for same."). The same rule applies in cases under the federal Administrative Procedure Act. *See Dep't of Homeland Sec. v. Regents of Univ. of California*, 140 S. Ct. 1891, 1913 (2020) ("When an agency changes course, as DHS did here, it must be cognizant that longstanding policies may have engendered serious reliance interests that must be taken into account. It would be arbitrary and capricious to ignore such matters.") (internal quotation marks and citations omitted).

Previously, the City stated that disclosure of police personnel records "'concerning any matters that were not substantiated'" would "'represent an unreasonable invasion of privacy.'" *Hughes Hubbard & Reed LLP v. CCRB*, 53 Misc. 3d 947, 950 (N.Y. Sup. Ct. 2016) (citation omitted). In another case, the City

denied a request for disclosure of allegations brought against a specific police officer, not only on §50-a grounds, but because a "request for records relating to unsubstantiated matters would constitute 'an unreasonable invasion of privacy.'" *Luongo v. Records Access Officer, CCRB*, 150 A.D.3d 13, 16 (N.Y. App. Div. 2017) ("In addition to the statutory exemptions, CCRB noted that the request for records relating to unsubstantiated matters would constitute 'an unreasonable invasion of privacy.'"). That position was consistent with statements by the Committee on Open Government, New York's authority on the proper application of FOIL.[14]

The City abruptly changed this practice—upsetting the reliance interests it had engendered—in the wake of the repeal of §50-a, and it did so without a sound basis in reason or regard for the relevant facts. In a 30(b)(6) deposition, the representative for CCRB acknowledged that the agency does not analyze whether privacy or safety are implicated in the release of Unsubstantiated and Non-Final Allegations. JA-1626 ("[T]he CCRB does not assert the unwarranted invasion of privacy exception based

---

[14] *See, e.g.*, Comm. on Open Gov't, Adv. Op. No. FOIL-AO-12005 (Mar. 21, 2000), https://docs.dos.ny.gov/coog/ftext/f12005.htm ("In numerous contexts, it has been advised that records relating to unsubstantiated charges, complaints or allegations may be withheld to protect the privacy of the accused."); Comm. on Open Gov't, Adv. Op. No. FOIL-AO-19775 (July 27, 2020), https://docs.dos.ny.gov/coog/ftext/f19775.html (discussing Committee's "long-standing interpretation that *requires* an agency to determine if an unsubstantiated or unfounded complaint against an employee would, if disclosed, constitute an unwarranted invasion of personal privacy" (emphasis added)).

on [what] the outcome of the case was. That does not factor into whether or not that exception is asserted."); JA-1627 ("[W]e've never done an analysis of whether or not an allegation is unsubstantiated or exonerated, unfounded doesn't have to be—it's not an exception that needs to be asserted."). But the witness could not account for the change from CCRB's prior practice of withholding unsubstantiated and unfounded complaints as invasions of privacy apart from §50-a, as described in *Luongo* and *Hughes Hubbard*, explaining she "did not work at the CCRB at the time." JA-1665.

CCRB's new practices contradict the agency's own website, which states that "[a]ll government records are subject to the exemptions stipulated in FOIL" and links to the website of the Committee on Open Government. A recent advisory opinion from the Committee emphasizes that FOIL, separate and apart from §50-a, "*requires* an agency to determine if an unsubstantiated or unfounded complaint against an employee would, if disclosed, constitute an unwarranted invasion of personal privacy."[15]

The repeal of §50-a did not affect the City's continuing responsibility to conduct careful, record-by-record review to ensure proper application of these

[15] Comm. on Open Gov't, Adv. Op. No. FOIL-AO-19775 (July 27, 2020), https://docs.dos.ny.gov/coog/ftext/f19775.html (emphasis added).

additional safeguards and protections in the law. For these reasons, the Unions are likely to succeed on their Article 78 claims or at least have raised sufficiently serious questions going to the merits to make them a fair ground for litigation.

4. The Unions are likely to succeed on their breach of contract claim.

The City's release of negotiated settlement agreements between police officers and NYPD would breach the confidentiality protection expected by the parties and afforded to those contracts by §50-a. The court abused its discretion in at least two respects.

First, the court's decision rested on the faulty premise that "an agency cannot bargain away the public's right to access public records." SPA-26 (citing *Washington Post Co. v. N.Y. State Ins. Dep't*, 463 N.E.2d 604 (N.Y. 1984); *LaRocca v. Bd. of Educ. of Jericho Union Free Sch. Dist.*, 632 N.Y.S.2d 576 (N.Y. App. Div. 1995)). When the settlement agreements were executed, the public did not have any right to access law enforcement personnel records, including disciplinary settlement agreements, all of which were protected by §50-a. This expectation of nondisclosure was incorporated by operation of law as a "valid applicable law existing at the time" the agreements were executed. 11 Williston on Contracts §30:19 (4th ed. 2020). Thus, the public had no right that could be bargained away at the time of contracting. But even in the absence of §50-a, the right of access is still significantly qualified because of the numerous exemptions in FOIL, which permit agencies to withhold

records on a number of different grounds. *See generally* Public Officers Law §87(2)(b)-(g).

The district court was wrong to rely on *Washington Post*. In that case, the New York Court of Appeals held that minutes of insurance company board meetings submitted to a regulator were subject to public disclosure under FOIL, notwithstanding the regulator's promises of confidentiality to the companies. *See* 463 N.E.2d at 606-07. Because no FOIL exemptions applied, the court held that the regulator had no authority to withhold the minutes. *See id.* at 608. In essence, the regulator provided a "long-standing promise of confidentiality" without a statutory basis for delivering on that promise. *Id.* at 607. In contrast, the City's settlement agreements with officers were confidential by law when made. The confidentiality guarantee of §50-a "form[ed] a part of the contract as fully as if expressly incorporated in the contract." 11 Williston on Contracts §30:19 (4th ed. 2020). This guarantee was grounded in exactly the kind of "clear legislative intent to establish and preserve confidentiality" found lacking in *Washington Post*. 463 N.E.2d at 607. *LaRocca* is of no help, either. That court concluded that an agency should not disclose records of disciplinary "charges which were denied and/or not admitted" by the accused because release of such allegations "would constitute an unwarranted invasion of privacy." *LaRocca*, 632 N.Y.S.2d at 579. Privacy continues to be protected under FOIL after repeal of §50-a.

Second, the district court abused its discretion in declining to reach the merits of the Unions' breach of contract claim based on a purported lack of evidentiary support. SPA-26-SPA-27. Rather than gauge whether the Unions raised serious questions or were likely to succeed on the merits, the court simply stated that it would not "speculate as to what rights the settlement agreements provide to other parties." SPA-26-SPA-27. But the Unions do not rely on any written contractual right, and examination of the agreements themselves would not bear on the merits of the claim. The prohibition on disclosure in former §50-a (and the parties to the contracts related expectations of the same) is the only provision relevant to this analysis. *See* 5 Corbin on Contracts §24.26 (stating that incorporation of existing law "does not at all depend upon the parties' having mentioned the statute in the contract" and citing cases). Similarly, the lack of testimonial evidence about officers relying on the protections of §50-a in entering the agreements is irrelevant, as reliance is not an element of a contract claim.

The Unions present serious questions going to the merits and are likely to succeed on the breach of contract claim. Settlement agreements executed before June 12, 2020 were protected from disclosure under §50-a. That statutory protection was implicitly incorporated into and formed a part of the settlement agreements. *2 Tudor City Place Assocs. v. 2 Tudor City Tenants Corp.*, 924 F.2d 1247, 1254 (2d Cir. 1991) ("Laws and statutes in existence at the time a contract is executed are

considered a part of the contract, as though they were expressly incorporated therein."); *Bona v. Barasch*, 2003 WL 21222531, at *6 (S.D.N.Y. May 27, 2003) (concluding that provisions mandated by ERISA should be read into agreements as implied terms). This is so even though the agreements themselves are silent on the subject of confidentiality. *City of Troy Unit of Rensselaer Cnty. Chapter of Civil Serv. Emp. Ass'n v. City of Troy*, 319 N.Y.S.2d 106, 108 (N.Y. App. Div. 1971) ("Whether the ordinance is incorporated into the contract by reference or not is immaterial.").

This statutorily prescribed confidentiality did not lose its force when §50-a was repealed because "changes in the law subsequent to the execution of a contract are not deemed to become part of agreement unless its language clearly indicates such to have been intention of parties." 11 Williston on Contracts §30:23 (4th ed. 2020); *see also Kia Motors Am., Inc. v. Glassman Oldsmobile Saab Hyundai, Inc.*, 706 F.3d 733, 738 (6th Cir. 2013) ("Contracting parties are free to agree that their rights and duties will track the law as it changes, but because the terms of their bargain could be significantly altered, they must make their intent to do so clear."); *Pioneer Transp. Corp. v. Kaladjian*, 481 N.Y.S.2d 136, 137 (N.Y. App. Div. 1984) ("In the absence of a clear expression in the contract that such is the parties' intention, a court may not construe an agreement so that it is modified by a subsequent statutory enactment which changes the rights and obligations of the

parties."). This rule of construction "limits the applicability of changes in the law" to preexisting contracts. 11 Williston on Contracts §30:23. No party suggests the agreements express any intention to track the law as it changes. Thus, the Unions have established that the proposed release of settlement agreements is an anticipatory breach of the confidentiality protections of §50-a, which was incorporated into those agreements and continues to bind the City.

5. The Unions are likely to succeed on their equal protection claims.

The release of Unsubstantiated and Non-Final Allegations will violate equal protection because it unreasonably treats law enforcement officers differently than similarly situated public employees. Here, too, the district court's analysis was fatally flawed.

First, the district court misapplied *Engquist v. Oregon Dep't of Agriculture*, 553 U.S. 591 (2008). The district court stated that *Engquist* "precludes equal protection claims challenging different applications of discretion to different employees." SPA-36. In *Engquist*, the Supreme Court stated that "[t]here are some forms of state action . . . which by their nature involve discretionary decision making based on a vast array of subjective, individualized assessments. In such cases the rule that people should be 'treated alike, under like circumstances and conditions' is not violated when one person is treated differently from others, because treating like individuals differently is an accepted consequence of the discretion granted."

Engquist, 553 U.S. at 603. But *Engquist* is inapposite because the Unions do not bring "a challenge based on the arbitrary singling out of a particular person." *Id.* The Supreme Court drew a contrast to cases—like this one—which involve "treating distinct groups of individuals categorically differently" based on "class-based decisions." *Id.* at 605. The Unions' claims are not based on "subjective and individualized" analysis, but instead raise classic group-based equal protection issues. *Ross v. Moffitt*, 417 U.S. 600, 609 (1974) ("'Equal protection' . . . emphasizes disparity in treatment by a State between classes of individuals whose situations are arguably indistinguishable.").

Second, the district court erred in concluding that law enforcement officers are not similarly situated with other public employees and, even if they were, that the City had "articulated a rational and nondiscriminatory basis for treating [law enforcement officers] differently." SPA-36-SPA-37. To be sure, the unique responsibilities of law enforcement officers set them apart. But these officers also face unparalleled dangers, on the job and even in their homes. At any rate, the question "is not simply whether New York City police officers are different from all other civil service employees, but whether the different treatment they receive is rationally related to the difference between them." *Baker v. Cawley*, 459 F. Supp. 1301, 1306 (S.D.N.Y. 1978).

The City proposes proactive releases of disciplinary records, separate from the FOIL request process, including the creation of comprehensive public registries of police disciplinary records. As discussed above, the City has no discernible plan to account for privacy and safety concerns implicated by the release of particular records. This disconnect does not serve the City's proffered governmental interests. It also leaves officers with fewer protections than other public employees, whose disciplinary records are individually reviewed before release. As the Committee on Open Government recently explained, "[i]n light of the repeal of §50-a, a request for disciplinary records relating to a police officer must be reviewed in the same manner as a request for disciplinary records of any other public employee."[16] The City's plans ignore this simple command and subject law enforcement records to fewer protections than it provides other public employees without a rational basis.

The court also ignored key evidence that, even among the law enforcement agencies in this lawsuit, officers will not be treated alike. In Rule 30(b)(6) depositions, the agency defendants provided different answers regarding application of privacy protections to disciplinary records:

- FDNY testified that it has no plans to publicly release unsubstantiated allegations lodged against firefighters out of concern for causing reputational harm. JA-1765-JA-1766.

[16] Comm. on Open Gov't, Adv. Op. No. FOIL-AO-19775 (July 27, 2020), https://docs.dos.ny.gov/coog/ftext/f19775.html.

- DOC's position "has been that such disclosure could be an unwarranted invasion of privacy." JA-1849.

- CCRB testified that "the CCRB does not assert the unwarranted invasion of privacy exception based on whatever the outcome of the case was." JA-1625-JA-1626.

- NYPD "never got to [the] point" of answering this question because it relied on §50-a as a categorical bar. JA-1954-JA-1955.

Thus, police officers are inexplicably afforded fewer privacy protections than firefighters or corrections officers. Police officer records even appear to be treated differently depending on whether a complaint was investigated by the CCRB or one of the investigative arms of NYPD. The City offers no justification (rational or otherwise) for closely shielding the disciplinary records of corrections officers but not police officers.

The district court's findings regarding "governmental interests in accountability and transparency," "the role of police officers in society, the unique responsibilities they carry, [and] the harms they are capable of inflicting on the public" do not explain the differential treatment among law enforcement agencies themselves. SPA-37. The City's decision to differentiate among law enforcement officers in this way lacks "a rational relationship to an appropriate governmental interest." *Able v. United States*, 155 F.3d 628, 631 (2d Cir. 1998); *Ciechon v. City of Chicago*, 686 F.2d 511, 522 (7th Cir. 1982) (holding that city's "arbitrary, irrational decision to discriminate" among similarly situated employees violated

equal protection); *O'Brien v. Leidinger*, 452 F. Supp. 720, 723-24 (E.D. Va. 1978) (holding that defendants violated plaintiffs' right to equal protection by refusing to discuss employment matters with some union representatives while engaging in similar discussions with agents of other labor organizations where defendants "offered no explanation whatever for this disparate treatment"). The Unions raise serious questions going to the merits of this claim, and indeed are likely to succeed.

C. The balance of hardships tips decidedly in the Unions' favor.

Finally, the district court erred in concluding that the City would "suffer . . . in their efforts to comply with recent legislative developments." SPA-42. As discussed at length above, the proactive disclosure of Unsubstantiated and Non-Final Allegations in public registries is contrary to legislative intent, the views of the Committee on Open Government, and past practice by the City. In repealing §50-a, the legislature merely removed a blanket prohibition on disclosure and intended for disciplinary records, including Unsubstantiated and Non-Final Allegations, to continue to receive protection under other laws. Thus, the City would face no hardship whatsoever beyond mere delay in the release of these materials.

In contrast, the denial of an injunction would extinguish the Unions' rights permanently. As here, in cases involving the threatened and irreversible disclosure of confidential information, the balance of hardships typically favors granting an injunction. *See, e.g.*, *Jacobson & Co. v. Armstrong Cork Co.*, 548 F.2d 438, 441,

445 (2d Cir. 1977) (stating that "the potential hardship" to plaintiff of "threatened loss of good will and customers" would "outweigh[] any inconvenience that [defendant] might suffer as a result of an injunction"); *Intertek Testing Servs., N.A. v. Pennisi*, 443 F. Supp. 3d 303, 345-46 (E.D.N.Y. 2020) (concluding that "absent an injunction, plaintiff will likely lose the confidentiality of its trade secrets and confidential information" and thus had "sufficiently demonstrated that the balance of hardships weighs in its favor"). Any future victory removing Unsubstantiated and Non-Final Allegations from the registries would be hollow. The moment these allegations become publicly available, the data will cease to be confidential, and the entire world will be able to access and download or duplicate it. News organizations will move quickly to gather data and fold it into their own databases. In other words, "denial of injunctive relief would render the final judgment ineffectual." *State v. City of N.Y.*, 275 A.D.2d 740, 741 (N.Y. App. Div. 2000).

The district court also erred in concluding that the public interest is not in the Unions' favor. Importantly, the City does not hold a monopoly on the public interest. *Time Warner Cable of N.Y.C. v. Bloomberg L.P.*, 118 F.3d 917, 923 (2d Cir. 1997) (finding "public interest concerns on both sides" in lawsuit against City of New York); *Haitian Ctrs. Council, Inc. v. McNary*, 969 F.2d 1326, 1339 (2d Cir. 1992) (stating that the government does not have "an exclusive claim on the public interest" when it is a party to litigation). In this case, granting a preliminary injunction serves

the public interest in "the government maintaining procedures that comply with constitutional requirements." *ACORN v. FEMA*, 463 F. Supp. 2d 26, 36 (D.D.C. 2006) (citing *O'Donnell Const. Co. v. Dist. of Columbia*, 963 F.2d 420, 429 (D.C. Cir. 1992)). It also serves the public interest in "enforcing contractual agreements and ensuring the confidentiality" of private information. *Robert Half Int'l Inc. v. Billingham*, 315 F. Supp. 3d 419, 435 (D.D.C. 2018); *accord Human Touch DC, Inc. v. Merriweather*, 2015 WL 12564166, at *5 (D.D.C. May 26, 2015); *Saini v. Int'l. Game Tech.*, 434 F. Supp. 2d 913, 925 (D. Nev. 2006). Each of these interests are at stake here and tilt decidedly in the Unions' favor.

CONCLUSION

This Court should reverse the district court's order and remand with instructions to grant the preliminary injunctive relief requested in the Complaint.

Respectfully submitted,

Dated: October 8, 2020
New York, NY

DLA PIPER LLP (US)

By: */s/ Anthony P. Coles*

Anthony P. Coles
1251 6th Avenue
New York, NY 10020
Telephone: (212) 335-4844
Facsimile: (212) 884-8644
Email: anthony.coles@dlapiper.com

Courtney G. Saleski
1650 Market Street, Suite 5000
Philadelphia, PA 19103-7300
Telephone: (215) 656-2431
Facsimile: (215) 606-2046
Email: courtney.saleski@dlapiper.com

Attorneys for Plaintiffs-Appellants-Cross-Appellees

CERTIFICATE OF COMPLIANCE

This brief complies with Second Circuit Local Rule 32.1(a)(4) and Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 13,985 words, excluding the parts that can be excluded. This brief also complies with Federal Rule 32(a)(5)-(6) because it is prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman font.

Dated: October 8, 2020

/s/ Anthony P. Coles
Counsel for Plaintiffs-Appellants-Cross-Appellees

CERTIFICATE OF SERVICE

I filed a true and correct copy of this brief with the Clerk of this Court via the CM/ECF system, which will notify all counsel who are registered CM/ECF users.

Dated: October 8, 2020

/s/ Anthony P. Coles
Counsel for Plaintiffs-Appellants-Cross-Appellees

SPECIAL APPENDIX

TABLE OF CONTENTS

Page

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNIFORMED FIRE OFFICERS ASSOCIATION, *et al.*, Plaintiff, -v.- DEBLASIO, *et al.*, Defendants.	20 Civ. 5441 (KPF) ORDER

KATHERINE POLK FAILLA, District Judge:

For the reasons stated in open court during the conference on August 21, 2020, Plaintiffs' motion for a preliminary injunction is DENIED IN PART and GRANTED IN PART. Plaintiffs' request for an injunction is granted to the extent that Defendants NYPD and CCRB may not disclose records of "Schedule A" command discipline violations, for cases heard in the Trial Room, and for which the disposition of the charge at trial or on review or appeal therefrom is other than "guilty," which records have been, are currently, or could in the future be the subject of a request to expunge the record of the case pursuant to § 8, for those officers covered by the Police Benevolent Association, Sergeants Benevolent Association, and Lieutenants Benevolent Association collective bargaining agreements. Plaintiffs' request for an injunction is denied in all other respects.

SO ORDERED.

Dated: August 21, 2020
New York, New York

Katherine Polk Failla

KATHERINE POLK FAILLA
United States District Judge

K8LLUNID

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------x

UNIFORMED FIRE OFFICERS ASSOCIATION *et al*,

Plaintiffs,

v. 20 Civ. 05441-KPF

BILL DE BLASIO *et al*,

Decision

Defendants.

----------x

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

Before:

HON. KATHERINE POLK FAILLA,

District Judge

APPEARANCES

DLA PIPER US LLP (NY)
Attorney for Plaintiff Uniformed Fire Officers Association
BY: ANTHONY PAUL COLES
COURTNEY GILLIGAN SALESKI

NEW YORK CITY LAW DEPARTMENT
Attorney for Defendants Bill de Blasio, *et al*
BY: DOMINIQUE F. SAINT-FORT
REBECCA GIBSON QUINN
KAMI ZUMBACH BARKER

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

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

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

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

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

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

(Case called)

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

Good afternoon, your Honor.

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

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

And representing the defendants?

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

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

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

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

Okay. Thank you.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

merits of his claim.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

of 2016.

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

(Pause)

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

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

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

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

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

threat of violence because of the disclosures.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

And the records therefore have information, such as

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

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

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

the statement is actionable."

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

that was overruled on other grounds in 2008.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

together.

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

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

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

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

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

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

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

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

Is that correct.

MS. BARKER: Yes, your Honor.

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

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

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

THE COURT: Okay. Thank you.

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

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

Thank you. We are adjourned.

******