20-3530

To Be Argued By:
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IN THE
United States Court of Appeals
FOR THE SECOND CIRCUIT

Connecticut State Police Union,
Plaintiff-Appellant,

v.

James Rovella, Commissioner of Department of Emergency Services & Public Protection,
Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

BRIEF OF DEFENDANT-APPELLEE

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1. Whether the District Court abused its discretion in denying Plaintiff's motion to preliminarily enjoin public interest legislation that promotes police transparency and accountability by making state troopers' disciplinary records subject to public scrutiny under Connecticut's Freedom of Information Act.

INTRODUCTION

The Connecticut General Assembly passed Public Act 20-1 ("the Act") in response the recent death of George Floyd, which prompted mass and sustained protests and public demands for immediate police reform. Included among the Act's many provisions are two sections subjecting state troopers' disciplinary records to the Freedom of Information Act ("FOIA"), and providing that FOIA's disclosure requirements prevail over any contrary language in collective bargaining agreements. In adopting those provisions the General Assembly plainly acted for the public good to ensure public access to government records and promote police accountability and transparency.

Despite the clear public purposes behind these measures and the State's ongoing power to legislate in the public interest—even when doing so impairs a state contract—Plaintiff seeks to enjoin the Act's transparency and accountability provisions based on an alleged Contract Clause violation. The District Court denied a preliminary injunction in a thoughtful and thorough decision, and this Court should affirm for three reasons.

First, Plaintiff cannot demonstrate a clear or substantial likelihood of success on the merits. The Act is legitimate public interest legislation that reasonably advances the important public interests in providing access to government records and promoting police accountability and transparency. This Court must defer to that legislative policy choice regardless of the extent to which it impairs any contract.

Second, the public interest weighs strongly against an injunction. The challenged provisions were adopted in response to the public's demand for police reform and align with FOIA's longstanding policy in favor of public disclosure. Enjoining the disclosure provisions of the Act plainly would harm those public interests, not protect them.

Third, Plaintiff has not established that its members will be irreparably harmed absent an injunction. Plaintiff has not even identified what tangible harm its members may suffer from any potential disclosure, much less presented evidence to demonstrate that those unidentified harms are likely to occur and cannot be remedied in other ways. In the absence of such evidence, Plaintiff is not entitled to the extraordinary relief it seeks.

STATEMENT OF THE CASE

A. FACTUAL BACKGROUND

Like all other states, Connecticut has enacted a comprehensive Freedom of Information Act that governs the disclosure of public records. Conn. Gen. Stat. § 1-200 *et seq.* With limited exceptions, FOIA requires that "all records maintained or kept on file by any public agency, whether or not such records are required by any law or by any rule or regulation, shall be public records" that are subject to disclosure. Conn. Gen. Stat. § 1-210(a). FOIA thus "expresses a strong legislative policy in favor of the open conduct of government and free public access to government records." *Bd. of Trustees of Woodstock Acad. v. Freedom of Info. Comm'n*, 181 Conn. 544, 550 (1980) (citations and quotation marks omitted).

Before 2018, all state police disciplinary records were subject to disclosure under FOIA. For the 2015-2018 collective bargaining agreement between the State and state police employees in the NP-1 bargaining unit, for which Plaintiff is the recognized bargaining representative, the parties agreed to a contractual provision that required the Department of Emergency Services and Public Protection ("DESPP") to notify state troopers of any FOIA request related to their

personnel files. If a trooper objected to disclosure, they could then petition the Freedom of Information Commission for a stay and to prohibit disclosure as an invasion of privacy. Compl., ¶ 16; *see* Conn. Gen. Stat. § 1-210(b)(2) (providing that disclosure not required when disclosure "would constitute an invasion of personal privacy").

The parties subsequently negotiated the 2018-22 Collective Bargaining Agreement ("CBA"), which the legislature ratified on May 31, 2019. Compl., ¶ 20. In addition to the notice and petition language discussed above, the CBA included new language providing that "[a]n employee's [Official Personnel File] and internal affairs investigations with only a disposition of 'Exonerated, Unfounded or Not Sustained' shall not be subject to the Connecticut Freedom of Information Act" (the "non-disclosure provision"). *Id.*, ¶¶ 21-22.

The records covered by the CBA's non-disclosure provision clearly are public records for purposes of FOIA, and there is nothing in FOIA that exempts them from disclosure. The non-disclosure provision nevertheless initially was permissible, because when the CBA was ratified General Statutes § 5-278(e) provided that a properly-ratified collective bargaining agreement trumps conflicting statutory language.

Shortly after the CBA was ratified, the public, and Connecticut public policy, were shocked into awareness and change. In response to "a Minneapolis police officer's killing of George Floyd" on May 25, 2020, which led to mass protests and "awoke[] the public's demand for reforms to our law enforcement agencies and progress toward a just and equitable society," the Governor issued a proclamation calling the state legislature into special session.[1] The Governor made clear that "these recent events and the justifiable public anger over them once more confront us with what Dr. Martin Luther King, Jr. called 'the fierce urgency of now,'" and that legislation was necessary to address the public's concerns. The General Assembly responded by passing the Act, two sections of which are relevant here.

> First, section 8 amends § 5-278(e) to provide that:
>
> > [f]or any agreement or arbitration award approved before, on or after the effective date of this section, . . . where any provision in such agreement or award pertaining to the disclosure of disciplinary matters or alleged misconduct would prevent the disclosure of documents required to be disclosed under the provisions of [FOIA] . . . the provisions of the [FOIA] shall prevail. Compl., ¶ 27.

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[1] https://portal.ct.gov/-/media/Office-of-the-Governor/News/20200717-Call-of-July-2020-Special-Session.pdf (last visited August 16, 2020).

Second, section 9 provides that:

> [n]o collective bargaining agreement or arbitration award entered into before, on or after the effective date of this section, by the state and any collective bargaining unit of the Division of State Police within the Department of Emergency Services and Public Protection may prohibit the disclosure of any disciplinary action based on a violat[ion] of the code of ethics contained in the personnel file of a sworn member of said division. Compl., ¶ 28.

Collectively, sections 8 and 9 of the Act supersede the CBA and require that the records contemplated by the CBA's non-disclosure provision are again subject to FOIA, just as they had been prior to the CBA's adoption in 2018. Importantly, however, in bringing those records back in line with the established policy in favor of disclosure, the legislature retained the same privileges, exemptions, and defenses that always exist under FOIA. *See Perkins v. Freedom of Info. Comm'n*, 228 Conn. 158, 167-75 (1993). Even after the Act, therefore, the records at issue still cannot be disclosed if doing so "would constitute an invasion of personal privacy." Conn. Gen. Stat. § 1-210(b)(2). And DESPP still has an affirmative obligation to determine whether a potential invasion of privacy exists, and to notify state troopers and refuse disclosure if it does. Conn. Gen. Stat. § 1-214(b) and (c).

The Act's changes do not apply just to the CBA or the state police. After the Act, FOIA prevails over any contrary contract language in all state collective bargaining agreements that are or were approved under §§ 5-270 to 5-280. That includes state law enforcement officers other than the state police. Further, the same disclosure requirements under FOIA already apply to municipal police officers throughout the State. *See generally, e.g., City of Hartford v. FOIC*, 201 Conn. 421 (1986). The legislature thus acted broadly for the public good and not to target any particular contract or class of state employees.

B. PROCEDURAL HISTORY

1. District Court Proceedings

Plaintiff filed this action alleging that Sections 8 and 9 of the Act violate the Contract Clause, and then moved for a preliminary injunction. JA13—JA29; JA190—JA193. Plaintiff argued in its motion that its members would be irreparably harmed if the Act is not immediately enjoined, but failed to present any evidence or analysis to support that conclusion. In particular, Plaintiff provided no evidence to demonstrate whether any FOIA requests for state trooper disciplinary records currently are pending, or whether and to what extent DESPP has

determined that those requests might constitute an invasion of privacy triggering the notification and non-disclosure requirements of § 1-214(b) and (c). Even assuming that some records may be disclosed absent an injunction, Plaintiff also presented no evidence to demonstrate whether or how that disclosure would harm its members. Plaintiff instead relied exclusively on the alleged Contract Clause violation as the basis for its members' purported irreparable harm.

The District Court denied Plaintiff's motion in a comprehensive and thoughtful decision. The District Court assumed without deciding that the Act substantially impairs the CBA,[2] JA278—JA279, but nevertheless held that any such impairment is constitutional because the Act is a reasonable means to achieve legitimate public interests. JA279—JA289. In doing so, the District Court rejected Plaintiff's argument that the "less deference" standard articulated in *Buffalo Teachers Fed'n v. Tobe*, 464 F.3d 362 (2d Cir. 2006) applies. Relying on this Court's more recent discussion in *Sullivan v. Nassau Cty. Interim Fin. Auth.*, 959 F.3d

[2] Plaintiff incorrectly states that the District Court ruled in its favor on this issue. Pl. Br. at 24. The District Court did no such thing, and instead stated that whether the Act substantially impairs the CBA is "an open [question]" and that the Court would "assume ***without deciding***" that it does. JA278—JA279 (emphasis added).

54 (2d Cir. 2020), the District Court instead upheld the Act under the rational basis standard because the Act is public interest legislation that was not passed out of self-interest. JA280—JA286. Even if "less deference" scrutiny applies, however, the Court held that the Act is constitutional under that framework as well. JA286—JA289.

With regard to the non-merits prongs of the analysis, the District Court declined to address whether Plaintiff established irreparable, but held that "enjoining Sections 8 and 9 of the Act would not serve the public interest, and that the balance of equities does not tip in favor of the CSPU," because the challenged provisions of the Act "promote disclosure under FOIA, were adopted in response to the public's demand for police reform, and align with FOIA's legislative policy in favor of disclosure of governmental records." JA289—JA290.

2. Proceedings On Appeal

Plaintiff appealed to this Court and then moved in the District Court for an injunction pending appeal, which the District Court denied. Dist. Ct. ECF No. 35. Plaintiff then filed a similar motion for injunction pending appeal with this Court, which this Court similarly denied. In doing so, the Court held that Plaintiff "fail[ed] to meet the applicable

standard" for an injunction pending appeal, and cited the Supreme Court's recent decision *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 66 (2020) (per curiam). App. ECF No. 84. Under *Roman Catholic Diocese*, to obtain an injunction pending appeal a litigant must "clearly establish[]" that: (1) they "are likely to prevail" on the merits; (2) "denying them relief would lead to irreparable injury;" and (3) "granting relief would not harm the public interest." 141 S. Ct. at 66.

Plaintiff filed its Appellant's brief on December 30, 2020. App. ECF No. 60.[3] The arguments in that brief are slightly more detailed iterations of the same arguments Plaintiff made unsuccessfully in support of its motion for injunction pending appeal. Further, Plaintiff concedes that the requirements for a preliminary injunction are essentially the same now as they were on its motion for injunction pending appeal. *See* Pl. Br. at 18, citing *Libertarian Party of Connecticut v. Lamont*, 977 F.3d 173, 176 (2d Cir. 2020). The Court already held that Plaintiff failed to clearly establish those requirements for an injunction pending appeal. The Court should reach the same conclusion now on the substantive appeal.

[3] Plaintiff's Appellant's brief is cited herein as "Pl. Br." Page citations are to the ECF paginations at the top of each page.

SUMMARY OF ARGUMENT

The Court should affirm the judgment for three reasons.

First, Plaintiff cannot demonstrate a clear or substantial likelihood of success on the merits. Given the comprehensive regulatory program under FOIA and the State's long history of requiring disclosure of the records at issue here, Plaintiff's members simply had no reasonable expectation that the legislature could not act in the manner it did if the public interest required it. Any impairment of the CBA is therefore insubstantial for purposes of the Contract Clause, and Plaintiff's fail on that basis. But even if the impairment were substantial, the Contract Clause does not impede the State's ability to govern, and legislative impairments of contracts are therefore constitutional—even if the State is a party to the contract—as long as they are a reasonable means to achieve a legitimate public purpose. The Act certainly is that, under both the rational basis standard that applies and under the "less deference" standard that Plaintiff incorrectly requests.

Second, both the equities and the public interest weigh strongly against an injunction. The challenged provisions promote public disclosure, were adopted in response to the public's demand for police

reform, and align with FOIA's longstanding policy in favor of public access to government records. That public policy is clear and important, especially in light of the recent death of George Floyd and other similar tragedies across the country. As this Court recently held in *Uniformed Fire Officers Ass'n v. De Blasio*, Nos. 20-2789-cv(L), 20-3177-cv(XAP), 2021 U.S. App. LEXIS 4266 (2d Cir. Feb. 16, 2021)—which involved a request to enjoin disclosure of the exact same types of records at issue here—these public interests outweigh whatever interests state troopers may have in shielding their disciplinary records from public scrutiny.

Third, *Uniformed Fire Officers Ass'n* likewise makes clear that Plaintiff has not established irreparable harm. Unlike the plaintiffs in that case—who at least presented evidence and analysis on this issue—Plaintiff has not even identified what harms its members allegedly will suffer if their records are disclosed, much less presented evidence that those harms are likely to occur and cannot be remedied in other ways.

ARGUMENT

I. STANDARD OF REVIEW

A. This Court Reviews The District Court's Decision For An Abuse Of Discretion

This Court reviews the District Court's decision for abuse of discretion. *Mirlis v. Greer*, 952 F.3d 36, 50 (2d Cir. Mar. 3, 2020). A District Court abuses its discretion only if it "bases its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence, or render[s] a decision that cannot be located within the range of permissible decisions." *Gomez v. City of New York*, 805 F.3d 419, 423 (2d Cir. 2015) (quotation marks omitted). In carrying out such review, this Court assesses any factual determinations under the "clearly erroneous" standard. *See* Pl. Br. at 18, citing *Oneida Nation of New York v. Cuomo*, 645 F.3d 154, 164 (2d Cir. 2011). In this case, the clearly erroneous standard applies to the District Court's factual determinations that: (1) the legislature acted for the public good and not out of self-interest, *see* JA281—JA286; and (2) the legislature did not consider impairing the contracts on par with other policy alternatives, or impose a drastic impairment when a more moderate course would do. *See* JA286—JA289.

B. The Preliminary Injunction Standard

Whether the District Court abused its discretion hinges on its application of the preliminary injunction standard. "[A] preliminary injunction is an extraordinary and drastic remedy" that "should not be granted unless the movant, by a clear showing, carries the burden of persuasion." *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997). To do so Plaintiff must establish "that [it] is likely to succeed on the merits, that [it] is likely to suffer irreparable harm . . . , that the balance of equities tips in [its] favor, and that an injunction is in the public interest." *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 20 (2008).

That burden is particularly heavy here given that Plaintiff seeks to alter the status quo of current legislation. *Bronx Household of Faith v. Bd. of Educ. of City of New York*, 331 F.3d 342, 349 (2d Cir. 2003). To reverse the status quo, Plaintiff must demonstrate a "clear" and "substantial" likelihood of success. *New York Progress & Protection PAC v. Walsh*, 733 F.3d 483, 486 (2d. Cir. 2013). And it must do so with an evidentiary record that supports its claims. *Otoe-Missouria Tribe of Indians v. N.Y. State Dep't of Fin. Servs.*, 769 F.3d 105, 115 n.6, 118 (2d Cir. 2014).

II. THE DISTRICT COURT PROPERLY DETERMINED THAT PLAINTIFF'S CLAIMS FAIL AT EACH STAGE OF THE PRELIMINARY INJUNCTION ANALYSIS

A. Plaintiff Has No Likelihood Of Success On The Merits, Much Less A Clear And Substantial Likelihood

The Contract Clause does not bar the State from impairing contracts. *Buffalo Teachers Fed'n*, 464 F.3d at 367. To the contrary, the Clause preserves the State's sovereign power to legislate in the public interest, and courts must defer to those legislative policy choices even if they "ha[ve] the result of modifying or abrogating contracts already in effect." *City of El Paso v. Simmons*, 379 U.S. 497, 508-09 (1965) (quotation marks omitted). That is true even if the State is a party to the contract. *Sullivan*, 959 F.3d at 65-67.

To determine whether such laws violate the Contract Clause, the Court must first consider whether the contractual impairment is substantial. If not, there is no violation. Even if the impairment is substantial, the Court still must uphold the law if it serves a legitimate public purpose and the means chosen to accomplish that purpose are reasonable. *Id.* at 64, citing *Buffalo Teachers*, 464 F.3d at 368. The Act clearly is constitutional under this framework.

1. Any Impairment Of The CBA Is Not Substantial For Purposes Of The Contract Clause

The Act's impairment of the CBA is not "substantial" because Plaintiff's members had no reasonable expectation that the legislature could not supersede the CBA if the public interest required it.

Plaintiff bears the burden to demonstrate that any impairment of the CBA is substantial. *Nat'l R.R. Passenger Corp. v. Atchison Topeka & Santa Fe Ry. Co.*, 470 U.S. 451, 472 (1985). The mere fact that a contractual provision was negotiated and is important does not mean that any impairment of it is "substantial" for constitutional purposes. Rather, "[t]he substantiality of an impairment depends upon the extent to which reasonable expectations under the contract have been disrupted." *Sullivan*, 959 F.3d at 64 (quotation marks omitted).

It is well established that such expectations do not exist when the contractual provision relates to a topic that is subject to pervasive government regulation, because in such areas the potential for further regulation is foreseeable. *All. of Auto. Mfrs., Inc. v. Currey*, 984 F. Supp. 2d 32, 54 (D. Conn. 2013) ("*AAM I*"), aff'd 610 F. App'x 10 (2d Cir. 2015) ("*AAM II*"). That is especially true when the particular topic at issue has been regulated in the past and when the impairment "covers the same

topic . . . and shares the same overt legislative intent to protect [the parties protected by the prior regulation]." *Elmsford Apartment Assocs., LLC v. Cuomo*, 469 F. Supp. 3d 148, 169 (S.D.N.Y. 2020); *see AAM II*, 610 F. App'x at 13.

Plaintiff has not met its burden under this framework. Its analysis boils down to nothing more than an assertion that the parties negotiated and agreed to the CBA. Pl. Br. at 23-25. That is true of every provision in every State collective bargaining agreement, and it does nothing to illustrate why future legislation in this heavily regulated area was unforeseeable. The cases upon which Plaintiff relies for this argument are inapposite and do not compel a different conclusion, as they all involved impairments of wages and payroll provisions that are not subject to a comprehensive regulatory program like FOIA. *See id.* at 17, citing *Sullivan*, 959 F.3d at 64-64; *Univ. of Hawaii Professional Assembly v. Cayetano*, 183 F.3d 1096, 1102 (9th Cir. 1999); *Toledo Area AFL-CIO Council v. Pizza*, 154 F.3d 307 (6th Cir. 1998); *Condell v. Bress*, 983 F.2d 415 (2d Cir. 1993); *Ass'n of Surrogates & Supreme Court Reporters v. New York*, 940 F.2d 766 (2d Cir. 1991).

Contrary to Plaintiff's conclusory and unsupported assertions, its members had no reasonable expectation that the State could not override the contractual provisions at issue if the public interest required it. That is true for three reasons.

First, the disciplinary records at issue clearly are public records the disclosure of which is subject to extensive regulation by the State through FOIA. That statutory program has existed for decades, and it provides a comprehensive framework that governs whether, when, and how public records may be disclosed. Standing alone, the existence of that longstanding regulatory program on this exact topic not only "greatly diminishe[s]" Plaintiff's expectations in this area, it should eliminate those expectations altogether. *AAM*, 984 F. Supp. at 54; *see AAM II*, 610 F. App'x at 13.

Second, that conclusion is confirmed by the broad and inclusive public policy reflected in FOIA, and the fact that the CBA's non-disclosure provision is a clear outlier that squarely conflicts with that policy. It is well established that "the Freedom of Information Act expresses a strong legislative policy in favor of the open conduct of government and free public access to government records." *Bd. of*

Trustees of Woodstock Acad., 181 Conn. at 550 (citations and quotation marks omitted). The Act thus requires "diligent protection of the public's right of access to agency proceedings," and "[t]he general rule under the act is disclosure" such that "every public record and every public meeting [should be] open to the public at all times with certain specified exclusions." *Id.*; *City of Stamford v. Freedom of Info. Comm'n*, 241 Conn. 310, 313 (1997). Those "specified exclusions" must be "narrowly construed" to ensure that the legislature's emphatic "policy favoring disclosure" is effectuated. *City of Stamford*, 241 Conn. at 313.

Given the extensive and pervasive nature of the FOIA regulatory program, the public policy it is intended to achieve, the fact that the non-disclosure provision squarely conflicts with that overriding policy, and the fact that the legislature retains its sovereign authority to implement and amend that public policy as it sees fit, Plaintiff's members simply had no reasonable expectation that the legislature could not change course if events required it to do so in the public interest.

Third, any expectation that Plaintiff's members may have had is further eroded by the history of regulation of the disciplinary records at issue. As Plaintiff concedes, the CBA's non-disclosure provision did not even arise until 2018. For the entire period prior to 2018, therefore, FOIA applied to and required disclosure of these exact same records.[4] By bringing those records back within the disclosure requirements that apply to all other public records, the Act clearly "covers the same topic" as the prior regulatory scheme "and shares the same overt legislative intent to protect" the general public. *Elmsford*, 2020 WL 3498456, at *12–13. Under such circumstances, Plaintiff and its members again had no reasonable expectation that the legislature could not act in the manner that it did.

[4] This fact distinguishes this case from *Toledo*, in which the state had not previously regulated or prohibited the payroll checkoffs at issue. *See* Pl. Br. at 24; *id.* at 37-38, citing *Toledo Area*, 154 F.3d at 326–27. In any event, *Toledo* is a 23-year-old out-of-circuit decision that conflicts with this Court's more recent Contract Clause decisions, and it does not control here.

B. The Act Is A Reasonable Means To Achieve A Legitimate Public Purpose

Even if the Court concludes that Plaintiff has adequately demonstrated a substantial impairment of the CBA, Plaintiff still cannot succeed on the merits because the Act is a reasonable means to achieve a legitimate public purpose. This Court must defer to that legislative policy choice, which the legislature made in the public interest and not out of self-interest.

1. The Challenged Provisions Of The Act Advance Legitimate Public Interests

As an initial matter, the Act clearly advances important public interests. For purposes of the Contract Clause, "[a] legitimate public purpose is one aimed at remedying an important general social or economic problem, rather than providing a benefit to special interests." *Buffalo Teachers*, 464 F.3d at 368 (internal quotation marks omitted). On their face, the challenged provisions of the Act advance two such interests: (1) the public interest of ensuring transparency and accountability of law enforcement; and (2) the public interest embodied through FOIA in favor of the open conduct of government and free public access to government records.

Contrary to Plaintiff's assertions, these are not "post-hoc" rationalizations that Defendant has concocted out of whole cloth. Pl. Br. at 26. They are the indisputable and clearly stated public interests that underlie both the disclosure requirements of FOIA and the goals of the Act, and they are the same public interests that the Governor specifically identified when he called for the Special Session that led to the Act. *See supra* at 8-9. Indeed, the title of the Act is "An Act Concerning Police Accountability," and the legislative history is replete with references to the accountability and transparency interests behind the Act's various provisions. *See generally* Conn. House of Representatives, Transcript of Proceedings (July 23, 2020), *available at* https://tinyurl.com/y8kk4lrk (last visited March 2, 2021). Plaintiff's suggestion that the interests motivating the entire Act somehow were not the interests served by sections 8 and 9 in particular is absurd, as it ignores the purpose of the Act, the circumstances that led to its passage, and the established and undisputed goal of promoting access to government records that is the foundation of FOIA.

In fact, the legislative history that Plaintiff cites to support its argument actually refutes its claim. Plaintiff regurgitates at length a colloquy between Representatives Stafstrom and Rebimbas to demonstrate that the legislature knew the Act would impair the CBA. But of course the legislature knew it was impairing the contract. The question is whether that legislative impairment was driven by a legitimate public purpose. On that point, Plaintiff omits key portions of the colloquy in which Representative Rebimbas acknowledged the "laudable" and "very important" public interests in making these "very important" records subject to FOIA. *Id.* at p.435-36. Plaintiff's suggestion that those laudable and important public interests somehow were not the goals of sections 8 and 9 is thus contrary not only to basic logic and commonsense (and how courts read statutes), it also is contrary to the very same legislative record upon which Plaintiff relies.

2. The Act Is A Reasonable Means To Achieve The Desired Public Interests

Because the Act advances legitimate public interests, the only question is whether it is a reasonable means of doing so. As the District Court found, it is – under both the rational basis standard that applies and the "less deference" standard that Plaintiff improperly requests.

a. The Deferential Rational Basis Standard Governs This Legislation Passed In The Public Interest

Because the Act is not an attempt to renege on a bad deal, and instead represents legitimate legislation passed in the public interest, the "less deference" standard that Plaintiff requests does not apply. *See* Pl. Br. at 32-38. The Court must instead analyze the Act using the deferential rational basis standard it applies to impairments of private contracts. The Act easily survives under that standard.

When confronted with an impairment to a public contract, "[t]he key" to the analysis is to determine whether the State "is acting like a private party who reneges to get out of a bad deal, or is governing, which justifies its impairing the plaintiffs' contracts in the public interest." *Sullivan*, 959 F.3d at 65. If it is the former, then the "less deference" standard applies and "the reasonableness and necessity of the government's actions must be shown." *Id.* at 65-66. But if the State legitimately is governing in the public interest the Court applies the same rational basis deference it applies to impairments of private contracts. *Id.* at 65-66. In determining which of these two standards applies, "the presence or absence of a state as a party to the contract is

not determinative." *Buffalo Teachers*, 464 F.3d at 370. The inquiry instead "focus[es] on whether the contract-impairing law is self-serving" and whether the State "alter[ed] the contract for its own benefit." *Sullivan*, 959 F.3d at 66. Such self-interest generally refers to "impairments imposed to benefit the state financially, or as a matter of political expediency." *Id.*

Importantly, *Sullivan* makes clear that it is Plaintiff's burden to demonstrate that indicia of self-interest exist, and that "'less deference' scrutiny applies only when the plaintiff has put forward some evidence tending to show that the government has engaged in reneging instead of 'genuinely acting for the public good.'" *Id.*

Applying this framework here, rational basis review applies because the legislature clearly was "acting for the public good" and not out of any self-interest to renege on a bad contract. *Id.* The challenged provisions in the Act are not limited to the CBA and instead apply broadly to all of the State's collective bargaining agreements approved under §§ 5-270 to 5-280—past, present and future. Further, the State receives no financial or other private benefit from the challenged provisions of the Act, as all benefits run directly to the public who can

now access these important records and see for themselves how state government works in this area. That clearly is a public benefit, not a private benefit that runs to the State as a contracting party. *See Dep't of Pub. Safety, Div. of State Police v. Freedom of Info. Comm'n*, 242 Conn. 79, 89 (1997). In fact, if anything the State acted against its own interest as a contracting party by subjecting itself to the increased administrative burdens associated with responding to more FOIA requests.

This conclusion is confirmed by the fact that Plaintiff does not even attempt to present evidence about the factors that this Court identified in *Sullivan* as potentially being indicative of self-interest on the part of the State.[5] *See Sullivan*, 959 F.3d at 66-67. For example, Plaintiff does not identify any politically unpopular alternatives that were available, and it is difficult to imagine what those alternatives might be given that the records are either subject to disclosure or they are not. Plaintiff also

[5] Given the nature of the legislative impairments at issue here and the clear lack of any private interest that runs to the State as a contracting party, in Defendant's view these factors are not particularly helpful or instructive in the "self-interest" analysis. *See Sullivan*, 959 F.3d at 69-70 (Park, J. concurring) (noting that the Court's discussion of "the types of evidence that might show government self-interest" is dicta). Nevertheless, for the reasons discussed herein, Plaintiff cannot establish self-interest even using these criteria.

does not identify a broader class of individuals whose disciplinary records are not subject to disclosure, much less argue that the transparency goals of the Act could be served equally well by expanding the Act's disclosure requirements to those individuals. Nor could Plaintiff make such a claim, since FOIA's disclosure requirements apply to municipal and other state law enforcement officers in the same way that they now do to the state police. *See generally City of Hartford v FOIC*, 201 Conn. 421 (1986). And finally, the impairment is a legitimate response to changed circumstances brought about by the death of George Floyd and the nationwide mass protests it prompted. Plaintiff simply ignores those events and the impetus they provided for the Act.

In fact, the only argument that Plaintiff marshals to support its claim of self-dealing is the fact that "the Connecticut Office of Labor Relations sustained an institutional grievance filed by CSPU against DESPP for violating Article 9, Section 2 of the CBA . . . ." Pl. Br. at 34. That is a non-sequitur, not an argument. Plaintiff does not present any evidence to demonstrate that the General Assembly was even aware of that grievance, much less that the legislature was motivated by it. And even if the legislature was motivated by the grievance, that does not

demonstrate self-interest. Again: the State, as a party to the contract, does not see any benefit from making the records subject to disclosure. Just like the impairment to the CBA itself, any benefits related to nullifying the OLR ruling instead run exclusively to the public, who can now access the records at issue and subject them to public scrutiny.

b. The Act Easily Survives Under The Applicable And Deferential Rational Basis Standard

Because the legislature plainly was "acting for the public good" and not out of self-interest, the Act is entitled to the same deference that courts afford to impairments of private contracts. *Sullivan*, 959 F.3d at 65-67. That deference is substantial, and is akin to the rational basis standard that applies under due process. *Sal Tinnerello & Sons, Inc. v. Town of Stonington*, 141 F.3d 46, 54-55 (2d Cir. 1998); *Ass'n of Surrogates & Supreme Court Reporters Within City of New York v. State of N.Y.*, 940 F.2d 766, 771 (2d Cir. 1991). The Act easily survives under this framework because the legislature's public access and police accountability goals are legitimate, and because requiring public disclosure of law enforcement disciplinary records unquestionably is a reasonable way to achieve those goals. Nothing else is required.

The Court should reject Plaintiff's argument to the contrary based on its assertion that there is no public interest in disclosing "false" allegations against state troopers. *See, e.g.,* Pl. Br. at 36-37. As an initial matter, the fact that a complaint against a trooper results in a disposition of "exonerated, unfounded, or not sustained" does not necessarily mean the allegations were false. It could just as easily mean that the evidence was insufficient or disputed, or that the alleged conduct, while true, did not rise to the level of an actual violation. Even when a complaint is demonstrably false, however, that does not somehow negate the public's interest in knowing about it. To the contrary, the public has the same right and interest to know when state troopers are acting appropriately as it does to know when they are not. Indeed, making that information public would enhance the public's trust and faith in law enforcement, and in many respects would go farther towards advancing the Act's accountability and transparency goals than anything else.

More importantly, regardless of what the outcome of a particular complaint may be, the fact of the matter is that there is a "public interest in the fairness of police investigations" themselves, "even for investigative reports that exonerate police officers from the charges that

have been brought against them." *Dep't of Pub. Safety, Div. of State Police v. Freedom of Info. Comm'n*, 242 Conn. 79, 89 (1997). For example, the public has an interest in knowing what complaints are filed, who submitted them, whether and how DESPP investigates them, the process by which DESPP determines whether a violation occurred, and the facts and evidence that form the basis for that determination. That is especially true for complainants, who of course have an interest in seeing how the agency handles their complaints. *See Uniformed Fire Officers Ass'n*, 2021 U.S. App. LEXIS 4266, at *5, 13 (discussing victims' interest in "disclosure of allegations of misconduct against their members that are unsubstantiated, unfounded, or non-final, or that resulted in an exoneration or a finding of not guilty"). All of these public interests apply regardless of what the ultimate disposition of a complaint may be.

c. Even If The "Less Deference" Standard Applied, The Act Must Still Be Upheld

Even if "less deference" scrutiny applies, the District Court properly concluded that the Act is constitutional under that standard as well. For an impairment to be upheld under less deference scrutiny "it must be shown that the state did not (1) consider impairing the . . . contracts on par with other policy alternatives or (2) impose a drastic impairment

when an evident and more moderate course would serve its purpose equally well, nor (3) act unreasonably in light of the surrounding circumstances." *Buffalo Teachers*, 464 F.3d at 371. It is Plaintiff's burden to demonstrate that the Act does not satisfy "less deference" scrutiny, especially in the context of a motion for a preliminary injunction. *United Auto., Aerospace, Agr. Implement Workers of Am. Int'l Union v. Fortuno*, 633 F.3d 37, 43 (1st Cir. 2011); *but see Toledo Area AFL–CIO Council v. Pizza*, 154 F.3d 307, 323 (6th Cir. 1998); *State of Nev. Emps. Ass'n, Inc. v. Keating*, 903 F.2d 1223, 1228 (9th Cir. 1990). Plaintiff cannot satisfy that burden here.

As an initial matter, Plaintiff does not even attempt to argue that either of the first two prongs are satisfied. Indeed, the only "more moderate course" that Plaintiff identifies is that the legislature could have waited two years before implementing these reforms after the CBA expires. Pl. Br. at 37. But while that may preserve the contract, it obviously would not serve the State's public purpose goals "equally well" as the Act. *Buffalo Teachers*, 464 F.3d at 371. To the contrary, it would disregard the public's demands for reform and permit state troopers to continue shielding their records from public scrutiny for two more years.

Further, Plaintiff presents no argument to support its assertion that the legislature acted unreasonably other than its base complaint that the CBA was impaired. As the District Court correctly found, however, the legislature's decision was not unreasonable under the circumstances. *See* JA287—JA289. To the contrary, it was compelled by recent events and the public's demands for immediate police reform. Further, the legislature did not go farther than necessary in making disciplinary records subject to disclosure, and instead maintained the same privileges and exemptions that always apply under FOIA. In particular, it retained the requirements under state law that: (1) the records cannot be disclosed if their disclosure would result in an invasion of privacy, Conn. Gen. Stat. § 1-210(b)(2); (2) DESPP must independently assess whether a potential invasion of privacy exists, and if it does DESPP must notify the trooper and refrain from disclosing the records, Conn. Gen. Stat. § 1-214(b) and (c); and (3) whether an invasion of privacy exists must be determined by DESPP—and ultimately the FOIC—on a case-by-case basis. *See Dep't of Pub. Safety, Div. of State Police*, 242 Conn. at 88. There is nothing unreasonable about the legislature's decision under the circumstances.

III. THE EQUITIES DO NOT SUPPORT A PRELIMINARY INJUNCTION

Even if Plaintiff could establish a sufficient likelihood of success on the merits, it still is not entitled to relief because neither the public interest nor the balance of the equities support the issuance of an injunction. In *Uniformed Fire Officers Ass'n*, this Court recently addressed whether the public interest and the equities support enjoining disclosure of the exact same records at issue here; namely, police disciplinary records involving a disposition of "unsubstantiated, unfounded, or non-final, or that resulted in an exoneration or a finding of not guilty." 2021 U.S. App. LEXIS 4266, at *5, 13. The Court squarely held that they do not, and that various other public interests and "important policies"—including the right of victims to learn about how their complaints are handled and resolved—outweigh any interest officers may have in keeping their records confidential. *Id.* at *13.

Uniformed Fire Officers Ass'n is directly on point, and it should control here. But even beyond the important interests this Court identified in *Uniformed Fire Officers Ass'n*, the District Court correctly held that enjoining sections 8 and 9 of the Act would not serve the public interest for a number of other reasons. Chief among them is that the

challenged provisions of the Act promote public disclosure, were adopted in response to the public's demand for police reform, and align with FOIA's legislative policy in favor of disclosure of governmental records. These public policies are clear and important, especially in light of recent events. Far from serving the public interest, therefore, an injunction would harm the public interest by depriving the public of government records to which the General Assembly has determined they should be entitled as a matter of public policy.

IV. PLAINTIFF HAS NOT DEMONSTRATED IRREPARABLE HARM

This Court has made clear that "the irreparable harm inquiry depends on the merits of the claims," as without a constitutional violation there can be no irreparable harm. *Hsu By & Through Hsu v. Roslyn Union Free Sch. Dist. No. 3*, 85 F.3d 839, 853–54 (2d Cir. 1996). When a plaintiff fails to establish a likelihood of success, therefore, inquiry into irreparable harm is unnecessary. *E.g., Sal Tinnerello & Sons, Inc*, 141 F.3d at 56; *Echezona v. City of New York*, 125 F.3d 843 (2d Cir. 1997). Plaintiff has not established a sufficient likelihood of success on the merits here, and therefore also will not suffer irreparable harm.

Nevertheless, if the Court chooses to reach this issue, Plaintiff has not carried its burden to present a factual record demonstrating that its members will suffer irreparable harm. The only injury that Plaintiff identifies is the abstract fact that its members' disciplinary records may be disclosed, and that any such disclosure cannot be undone. Pl. Br. at 20. As this Court made clear in *Uniformed Fire Officers Ass'n*, however, the mere fact of disclosure is not enough to constitute irreparable harm. Plaintiff must instead demonstrate that its members will suffer an actual injury from that disclosure, and that said injury cannot be remedied in other ways. 2021 U.S. App. LEXIS 4266, at *8-9, 13.

Plaintiff has not even attempted to make that showing. Unlike the plaintiffs in *Uniformed Fire Officers Ass'n*, who at least argued that disclosure would adversely impact their future employment opportunities and present safety risks to officers, Plaintiff does nothing more than make the unsupported assertion in its brief that disclosure will harm its members' "privacy interests and professional reputations." Pl. Br. at 20. But Plaintiff provides no analysis or, more importantly, evidence, to support that conclusory assertion.

Contrary to Plaintiff's bald assertion, moreover, this Court already has held that disciplinary dispositions "specifying that allegations of misconduct were unsubstantiated, unfounded, or that the accused officer was exonerated" are unlikely to cause the types of reputational harms that Plaintiff fears. *Uniformed Fire Officers Ass'n*, 2021 U.S. App. LEXIS 4266, at *8-9. Further, Plaintiff presents no argument or evidence to demonstrate how its members' "privacy interests" will be injured by the Act, and it cannot do so given that FOIA expressly provides that troopers' records cannot be disclosed if it would cause an invasion of privacy. Conn. Gen. Stat. § 1-210(b)(2) and § 1-214(b) and (c). Plaintiffs conclusory assertions in an appellate brief—none of which are supported by evidence or analysis—plainly are not sufficient to justify the extraordinary and drastic remedy that Plaintiff seeks. *Otoe-Missouria Tribe of Indians*, 769 F.3d at 115 n.6, 118.

CONCLUSION

For all of the foregoing reasons, the Court should affirm the District Court's denial of Plaintiff's motion for preliminary injunction.

Respectfully submitted,

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CERTIFICATION OF COMPLIANCE WITH TYPE-VOLUME LIMIT, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

I hereby certify that this brief complies with the type-volume limitations of Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure, as modified by Second Circuit Local Rule 32.1(a)(4), in that this brief contains 7,216 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f). I further certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32 (a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Century Schoolbook font.

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CERTIFICATION OF SERVICE

I hereby certify that on this 31st day of March, 2021, I caused the foregoing brief to be filed electronically with the Clerk of the Court for the United States Court of Appeals for the Second Circuit by using the appellate CM/ECF system. I certify that service will be accomplished on registered CM/ECF users by the appellate CM/ECF system.

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