IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

UNIFORMED FIRE OFFICERS ASSOCIATION, et al.,

Plaintiffs,

-v.-

DE BLASIO, et al.,

Defendants.

Case No. 20-cv-05441 (KPF)

BRIEF OF JUSTICE COMMITTEE INC. AS *AMICUS CURIAE*
IN OPPOSITION TO PLAINTIFF'S MOTION FOR A PRELIMINARY INJUNCTION

David L. Kornblau, Esq.
Russell M. Squire, Esq.
Covington & Burling LLP
The New York Times Building
620 Eighth Avenue
New York, New York 10018-1405
(212) 841-1000
dkornblau@cov.com
rsquire@cov.com

Counsel for Amicus Curiae Justice Committee Inc.

August 14, 2010

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INTRODUCTION

In June 2020, to promote transparency and accountability by law enforcement personnel throughout New York State, the New York State Legislature repealed New York Civil Rights Law Section 50-a, which for decades had hidden most law enforcement misconduct and discipline records from public scrutiny. To carry out the legislature's intent, the NYPD planned to make police misconduct and discipline records available online. In this case, Plaintiff unions seek a preliminary injunction that would in effect nullify the repeal of Section 50-a by prohibiting the NYPD's release of all misconduct and discipline records except for a narrow category of records reflecting final, litigated adjudications of wrongdoing by police officers.

Plaintiffs' request should be denied because, among other reasons, the immediate release of all police misconduct and discipline records is of vital importance to victims of police violence and the public at large. For years, New York City residents have tried in vain to obtain these records, only to see their efforts blocked by Section 50-a. This Court should not re-impose Section 50-a's obstacles to transparency, accountability, and justice.

In determining whether to issue a preliminary injunction, the Court is required to balance the equities and consider the public interest. Both of these factors weigh heavily against a preliminary injunction. Plaintiffs allege potential reputational harm to police officers subject to disciplinary proceedings, but such concerns are far outweighed by the ongoing threat to public safety and harms to victims of past police violence caused by the unavailability of police misconduct and discipline records. The distinction Plaintiffs draw between accusations that have resulted in adjudicated discipline and those that have not sweeps far too broadly, and ignores the reality that the failure of most allegations to lead to any meaningful disciplinary action is the *result* of ongoing lack of access to misconduct and discipline records. This is precisely the

problem that the New York State Legislature determined to solve by lifting the veil of secrecy from the police disciplinary process.

Victims and advocates for police reform have already had to wait decades for access to misconduct and discipline records. For many survivors of police misconduct and violence and the families of people killed by police, denial of access to those records has also deprived them of compensation for their injuries, accountability for those who harmed them, the opportunity to meaningfully advocate for reform, the ability to feel safe and secure in their communities, and even basic information about the circumstances that led to the death of a loved one. Now that the legislature has spoken, the time for that access is now. The Court should therefore deny Plaintiffs' request for a preliminary injunction.

INTEREST OF AMICUS CURIAE

Amicus Justice Committee Inc. has a strong interest in this case. Justice Committee is a non-partisan non-profit grassroots organization dedicated to ending police violence and systemic racism in New York City. Since its founding in 1981, Justice Committee has supported family members of New Yorkers killed by police and empowered them to be advocates for social change. The organization's programs and strategies are led by more than 160 volunteer members who are people of color impacted by police and state violence. Justice Committee provides training and education programs, monitors and documents police activity, organizes for policy change to decrease police violence and promote community safety, and leads and participates in campaigns to end discriminatory policing. As part of its Families and Cases Program Area, Justice Committee advises survivors of police misconduct and violence and families who have lost loved ones to the police, provides resources and secures attorneys, and mobilizes communities in support of police accountability. To date, Justice Committee has provided support to hundreds of survivors and victims' families.

For decades, Justice Committee has experienced first-hand the harm caused by lack of access to police misconduct and discipline records. Justice Committee members who have been victims of police violence or whose family members have been killed by police have been unable to obtain any information about prior misconduct by the police officers involved and often have been unable to obtain information about disciplinary proceedings—or lack thereof—related to their own cases. The unavailability of this information not only frustrates the basic human need to seek answers in the face of tragedy, but also directly undermines the ability of survivors and victims' families to seek accountability and obtain just compensation for the harms they have suffered at the hands of rogue police officers. In addition, lack of access to misconduct and discipline records has stunted efforts to promote transparency and accountability for police misconduct, with the result that violent cops who might have been fired or seriously disciplined have instead remained on the street and continued to victimize New Yorkers.

Justice Committee was deeply involved in advocacy to repeal Section 50-a, beginning when repeal legislation was first introduced in the Assembly in 2016. In 2018 and 2019, the Committee submitted written memoranda to the state legislature and written testimony from its leadership and members providing first-hand accounts of the harmful impact of Section 50-a. Declaration of Loyda Colon Exs. A-G. Justice Committee and its members also met with and called legislators, engaged in traditional and social media campaigns, and organized and participated in protests in support of repeal. Colon Decl. ¶ 5.

The preliminary injunction Plaintiffs seek would erase the gains from repeal of Section 50-a and would inhibit the access to misconduct and discipline records for which Justice Committee and its members and clients have long fought. Consequently, Justice Committee has a keen interest in the issues before the Court.

ARGUMENT

I. The Balance of Hardships and Public Interest Weigh Against a Preliminary Injunction.

In addition to establishing likely success on the merits and irreparable harm (elements we do not address), a plaintiff seeking a preliminary injunction must demonstrate that "the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008).

Both the balance of equities and the public interest fatally undermine Plaintiffs' request for a preliminary injunction. A preliminary injunction would frustrate the legislature's repeal of Section 50-a by continuing to obstruct efforts by survivors and victims' families to demand accountability for police misconduct; continuing to undermine advocacy for transparency and reform that can save lives; and continuing to foster a culture of unaccountability that has endangered New York City residents and contributed to fear and mistrust of law enforcement. These harms outweigh the reputational interests asserted by Plaintiffs. *See Alexandria Real Estate Equities, Inc. v. Fair*, No. 11 CIV. 3694 LTS, 2011 WL 6015646, at *3 (S.D.N.Y. Nov. 30, 2011); *cf.* New York City Joint Remedial Process Final Report, *Floyd v. City of New York*, No. 1:08-cv-01034-AT, Docket No. 597, p. 267 (S.D.N.Y. May 15, 2018) (finding that Section 50-a "undervalue[d] public access to information relating to officer accountability for misconduct in the name of officer privacy and safety concerns"). Indeed, the legislature determined as much when it prioritized the public's interest in disclosure, transparency, and accountability over the privacy and reputational concerns of officers accused of misconduct.

A. A preliminary injunction would delay or deny justice for victims of police misconduct.

If the preliminary injunction sought by Plaintiffs were granted, families who have lost loved ones to police and survivors of police violence and misconduct would continue to have just

compensation for their injuries curtailed or denied due to lack of access to police misconduct and discipline records. In the wake of police violence, survivors and victims' families usually attempt to obtain information regarding involved officers' identification and misconduct records. One reason for seeking this information is to attempt to make sense of what has happened to them—to try to understand how they or their family members came to be victimized by the very public servants charged with preserving their safety. Another reason is to bolster demands for accountability and legal claims for compensation for the harms suffered at the hands of police. Declaration of Royce Russell ¶ 5. The lack of availability of these records through an easily accessible database, as Defendants are poised to make available, would make misconduct and discipline records significantly more difficult to obtain and thus many survivors of police misconduct and violence and victims' families, along with the general public, would continue to be barred from access. This was the consistent experience of survivors and victims' families who sought misconduct and discipline records prior to the repeal of Section 50-a. A preliminary injunction would continue to frustrate the efforts of survivors and victims' families to obtain justice, accountability, transparency, and compensation.

Requests for misconduct and discipline records under New York's Freedom of Information Law (FOIL) would not be an adequate alternative to public access to the NYPD's database of police misconduct records. The process for making and pursuing a FOIL request with the City of New York and Civilian Complaint Review Board (CCRB) for police misconduct records is complex and burdensome. Without legal assistance, the FOIL process is nearly inaccessible to survivors and victims' families. Colon Decl. ¶ 14. Even with that legal assistance, FOIL requests are likely to be rebuffed with rejection or partial-rejection letters, just as they were when Section 50-a was still in effect. Russell Decl. ¶ 6. Prior to repeal of Section

50-a, such responses were so common and the burden of continuing to seek records so great that Justice Committee did not actively encourage its members and clients to request records of police misconduct via FOIL. Colon Decl. ¶ 15.

Similarly, when survivors and victims' families pursue litigation against the NYPD and the City of New York, Plaintiffs' proposed preliminary injunction would likely present the same roadblock to transparency that Section 50-a did before. Civil plaintiffs would have to negotiate for the partial release of heavily redacted records through discovery stipulations rather than having unobstructed access to the records they seek from a public database. As was the case prior to repeal of Section 50-a, civil plaintiffs would likely receive only limited access to misconduct and discipline records, which would unfairly prejudice victims' civil claims and perpetuate police misconduct by keeping the public in the dark about it. *See* Russell Decl. ¶ 7.

Nor should survivors and victims' families have to rely on the discretion of the CCRB or District Attorneys as to whether those offices choose to voluntarily provide records in the absence of a statute or rule requiring it. The Court should allow Defendants to proceed with making police misconduct and discipline records easily accessible to the public so that survivors and victims' families can finally be assured of obtaining these records as they pursue accountability and justice.

B. A preliminary injunction would disserve the public interest because it would undermine police reform and accountability.

A preliminary injunction would prolong the obstruction of advocacy efforts for police reform and accountability and perpetuate the fear and anxiety of the community in connection with police violence. For years, Justice Committee and its members have advocated for disclosure of misconduct and disciplinary records to combat the lack of accountability for police brutality.

Maintaining secrecy over police misconduct removes incentives for internal discipline and change. Sunshine, as has been demonstrated time and again, is the best disinfectant. Transparency breeds accountability. Public access to information puts pressure on public servants to conform their conduct to the public's expectations and on government agencies to implement changes to address or stave off valid public criticism. By the same token, when the actions of public servants, such as the police, are kept hidden from view—as they were by Section 50-a—they are more likely to engage in abusive conduct because they know they can do so without public scrutiny, and agencies such as the police department are disincentivized to impose meaningful discipline for misconduct.

Lack of access to records also hinders the public's ability to advocate for policy changes aimed at reducing police killings and saving lives. Making the case for policy reform requires concrete data, and lack of access to data has inhibited such efforts in the law enforcement context. For example, Justice Committee is participating in the Joint Remedial Process in the wake of the finding by this Court, in *Floyd v. City of New York,* that the NYPD's stop-and-frisk practices were unconstitutional. As part of that process, Justice Committee has advocated for the NYPD to develop, with community input, a disciplinary matrix that would be available to the public, and for the NYPD to document level one and two stops (in which a police officer may ask questions, but the person being questioned is free to refuse to answer or leave).[1] Justice Committee believes the NYPD has a pattern of not disciplining officers and a pattern of abusive policing in the context of those stops. Police misconduct records would strengthen the

[1] *See* Investigative Encounters Reference Guide (Sept. 16, 2015), http://nypdmonitor.org/wp-content/uploads/2016/02/InvestigativeEncountersRefGuideSept162015Approved.pdf.

Committee's ability to make the case for the disciplinary matrix and the recording of level one and two stops, but those records have not been available due to Section 50-a.

In addition, Justice Committee was part of a coalition working to pass the Right to Know Act, City Council legislation addressing police searches and other encounters with the community. It took five years to get the legislation passed, and the legislation was heavily watered down. Access to police misconduct records would have enabled Justice Committee to bolster its case for the legislation with statistics showing police searching people without their consent, refusing to identify themselves when stopping people, and otherwise abusing their authority during everyday encounters. The Committee believes that such records would have sped the enactment of stronger legislation. Colon Decl. ¶ 17.

Finally, Justice Committee's members and clients routinely express their grave concern that police officers who have engaged in misconduct—often violent or deadly—remain on the streets. Survivors of police misconduct and violence and victims' families often seek misconduct and discipline records simply to have an understanding of whether some disciplinary action has been taken, or if instead they remain at risk from the police officers who victimized them or killed their loved ones. Despite the repeal of Section 50-a, a preliminary injunction would continue to prevent the release of this information, which would perpetuate and exacerbate fear and anxiety within communities over their safety from police brutality.

C. Plaintiffs' access restrictions would undermine the public interest.

The public should have access to all police misconduct and discipline records, not merely the small subset deemed acceptable by Plaintiffs. Plaintiffs would limit public access to misconduct and discipline records reflecting only "proven and final disciplinary matters." *See* ECF No. 5-2 ¶ 2. But such a limited database would not adequately protect the public against police misconduct and would continue to shield the disciplinary process from meaningful public

scrutiny and reform. Contrary to Plaintiffs' assertions, there is enormous value to the public from access to all misconduct and discipline records, including information regarding "unsubstantiated, unfounded, exonerated, or pending disciplinary matters." ECF No. 9. Moreover, Plaintiffs' effort to conceal from the public the results of settled disciplinary proceedings makes no sense, as such settlements may often evidence serious misconduct. These restrictions on public access would have the effect of preserving the systematic lack of meaningful discipline for misconduct that repeal of Section 50-a was meant to change.

1. <u>Misconduct and discipline records are relevant even where allegations did not result in discipline.</u>

Misconduct and discipline records of law enforcement officers are relevant to holding officers accountable even where corroborating evidence is not available or no disciplinary action is taken. Numerous police officers involved in killings and violence have had multiple unsubstantiated allegations against them, and records of those allegations are highly relevant to ensure accountability and protect communities from harm. Examples of NYPD officers who had records of alleged misconduct prior to being involved in killings of New Yorkers amply illustrate this point.

In June 2012, Officer Phillip Atkins fatally shot an unarmed Black woman, Shantel Davis, while she was sitting in a car. *See* Declaration of Russell Squire Ex. A. From March 2004 to February 2012, Officer Atkins had been the subject of 41 allegations of misconduct, 37 of which were found to be "unsubstantiated." *See* Squire Decl. Ex. B. Surely, the sheer number of allegations against Officer Atkins was an indication that he may have been prone to using excessive force. To suggest that the large number of allegations is entirely irrelevant because most of them were deemed unsubstantiated strains credulity.

Former NYPD Officer Richard Haste fatally shot teenager Ramarley Graham in 2012. Over the course of 13 months, Officer Haste had had six unsubstantiated CCRB complaints lodged against him. Squire Decl. Ex. C.

In March 2013, NYPD Sergeant Mourad Mourad and Detective Jovaniel Cordova were both involved in the fatal shooting of 16-year-old Kimani Gray. Together, the officers fired eleven shots, including seven that struck Kimani. Squire Decl. Ex. D. Prior to killing Kimani, Sergeant Mourad and Detective Cordova were named as defendants in five federal law suits alleging various civil rights violations and both had prior involvement in at least one officer-involved shooting. Squire Decl. Ex. E. Before killing Kimani Gray, Sergeant Mourad received a total of fourteen allegations, all of which were found unsubstantiated or in which Mourad was exonerated. *See* Squire Decl. Ex. F. Detective Cordova had a total of thirteen allegations, eleven of which were unsubstantiated, prior to the shooting, and he has since had *another* complaint involving abuse of authority, which was substantiated. *See* Squire Decl. Ex. G. The volume and seriousness of allegations and federal lawsuits against Sergeant Mourad and Detective Cordova should have been an indication to the NYPD of problematic behavior.

The NYPD's failure to hold police officers accountable for even the most egregious misconduct is highlighted by the Department's treatment of Officer Daniel Pantaleo. In July 2014, Officer Daniel Pantaleo used a prohibited chokehold on Eric Garner. Squire Decl. Ex. H. Despite Mr. Garner's plea of "I can't breathe" and collapse to the ground, Officer Pantaleo continued excessive and unnecessary force. *Id.* Prior to killing Mr. Garner, Officer Pantaleo had an extensive record of eighteen total CCRB allegations, including four substantiated allegations of misconduct in which Officer Pantaleo's penalty was instruction, forfeited vacation, or no penalty at all. Squire Decl. Ex. I. Remarkably, the NYPD did not begin disciplinary

proceedings against Officer Pantaleo until 2018, more than four years after Mr. Garner's death, three years after New York City reach a settlement with Mr. Garner's family, and months after federal prosecutors recommended charges against him. Squire Decl. Ex. H. Officer Pantaleo was finally fired by the NYPD in July 2019, one day before the fifth anniversary of Mr. Garner's death. *Id.*

Officer Wayne Isaacs was off-duty when he fatally shot Delrawn Small in July 2016 in front of Mr. Small's partner and three children. Squire Decl. Ex. J. While Officer Isaacs' disciplinary history has never been released, other individuals have filed civil suits against Officer Isaacs for misconduct. *See, e.g.*, *Footman v. City of New York et al.*, No. 1:14-cv-06594-JBW-JO (E.D.N.Y.); *Whaley v. City of New York et al.*, No. 1:14-cv-07334-JG-RER (E.D.N.Y.).

Former Officer Francis Livoti was sentenced by a federal judge to seven and a half years in prison for violating the civil rights of Anthony Baez by using an illegal chokehold. Squire Decl. Ex. K. Judge Shira Scheindlin of this Court indicated at sentencing that the nine prior police brutality complaints against Officer Livoti should have "alert[ed] those in charge to the fact that Mr. Livoti should be off the streets, if not off the force" and instead, the NYPD allowed Officer Livoti to continue patrolling "knowing that one day a real tragedy would occur." *Id.*

Plaintiffs' overly sweeping access restriction would include CCRB complaints that go to mediation, since they do not result in adjudicated findings of wrongdoing, no matter how serious and well founded the allegations. Complainants to the CCRB have a choice of whether to request investigation or mediation, and mediation has no path to accountability for the officers involved in the incident. For that reason, Justice Committee advises its members and clients not to choose mediation if they want accountability, but many complainants do not have the benefit of that advice, and in some cases complainants are steered toward mediation by investigators.

The preliminary injunction would conceal allegations that went to mediation even for allegations that would have resulted in discipline had the complainant chosen to pursue that route, despite the obvious relevance such allegations would have in exposing and protecting the public from police officers prone to misconduct.

Public access to misconduct and discipline records will enable accountability for police officers who have escaped consequences for unlawful behavior due to past inaction by the NYPD, and will build pressure on the department to avoid making the same mistake in future.

2. Public access to all misconduct and discipline records is essential because of the NYPD's failure to hold police accountable for misconduct.

For years, victims of police violence and abuse, family members whose loved ones were killed by police, and concerned members of the community have expressed outrage that allegations of misconduct rarely result in serious discipline or other consequences for the police officers involved. One of the principal reasons for seeking increased access to misconduct and discipline records through repeal of Section 50-a was to expose the lack of meaningful discipline and pressure the NYPD to hold police officers accountable for misconduct.

Plaintiffs' requested preliminary injunction would effectively block necessary reform by continuing a vicious cycle: officers are not disciplined adequately for misconduct; in the absence of discipline, records of allegations against those officers are not released; and the lack of transparency stymies pressure for greater accountability. To break this cycle, shine a light on the NYPD's broken disciplinary system, and carry out the will of the legislature, this Court should allow all NYPD misconduct and discipline records to be published online.

D. A preliminary injunction would be at odds with the intent of the legislature's repeal of Section 50-a.

New York State repealed Section 50-a to help the public regain trust in law enforcement by promoting transparency and accountability for police misconduct. Justice Committee and its

members spent hundreds of hours organizing and educating New Yorkers on the deleterious effects of Section 50-a, preparing written testimony and memoranda, traveling to Albany for hearings and lobbying meetings, engaging in traditional and social media campaigns, and organizing and participating in protests, all on behalf of survivors of police misconduct and violence and victims' families. Colon Decl. ¶ 5. An injunction preventing Defendants from publishing most misconduct and discipline records contravenes the intent of the repeal of Section 50-a and would undo the hard work that led to repeal.

Those who were involved in the repeal effort understood that the intended result of the repeal was the full disclosure of all records concerning disciplinary matters, including those that are "non-final, unsubstantiated, unfounded, exonerated, or resulted in a finding of not guilty." *See* ECF No. 5-1 ¶ 1; Colon Decl. Ex. D at 2 (testifying that all misconduct complaints about Officer Haste should have been public); Colon Decl. Ex. G at 2 (providing examples of misconduct allegations that should be public); Colon Decl. Ex. C at 2 (providing examples of records that should be made public). Indeed, Justice Committee specifically addressed the limitations of a partial amendment to Section 50-a as being insufficient to hold law enforcement accountable; instead, Justice Committee urged legislators to repeal Section 50-a in its entirety to ensure transparency and access to information. *See* Colon Decl. Ex. 5. As the advocacy efforts of Justice Committee demonstrate, the intention of the repeal of Section 50-a was to ensure transparency and accountability by allowing public access to all police misconduct records, including unsubstantiated and non-final allegations. The legislature considered all of the alleged harms asserted by the Plaintiffs in this litigation against all of the evidence it had before it—including an escalating public distrust of racially discriminatory police violence and police secrecy—and found that the asserted interests of police offers accused of misconduct are

outweighed by the compelling public interest in transparency and accountability of officers sworn to protect the people.

Therefore, this Court should deny the Plaintiffs' motions for injunctive relief to uphold the intent of the New York State Legislature to fully repeal Section 50-a. To do otherwise would be to drag New York City back into an atmosphere of police secrecy that has been decisively rejected by the people's elected representatives.

CONCLUSION

The preliminary injunction Plaintiffs seek would drag the police disciplinary system back into the shadows just as the legislature decreed that it must emerge into the light. Lack of public access to police misconduct and discipline records would undermine accountability and transparency in the police disciplinary system, fairness and closure for survivors of police misconduct and violence and victims' families, and safety and confidence in the criminal justice system for all New Yorkers. For these reasons, Justice Committee respectfully urges the Court to deny Plaintiffs' request for a preliminary injunction.

Dated: August 14, 2020
New York, New York

COVINGTON & BURLING LLP

/s/ David L. Kornblau
David L. Kornblau, Esq.

Russell M. Squire, Esq.
The New York Times Building
620 Eighth Avenue
New York, New York 10018-1405
(212) 841-1000
dkornblau@cov.com
rsquire@cov.com

Counsel for Amicus Curiae Justice Committee Inc.