SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ERIE

BUFFALO POLICE BENEVOLENT ASSOCIATION, INC.; and BUFFALO PROFESSIONAL FIREFIGHTERS ASSOCIATION INC., LOCAL 282, IAFF, AFL-CIO,

Petitioners/Plaintiffs,

vs.

BYRON W. BROWN, in his official capacity as Mayor of the City of Buffalo; the CITY OF BUFFALO; BYRON C. LOCKWOOD, in his official capacity as Commissioner of the Buffalo Police Department; the BUFFALO POLICE DEPARTMENT; WILLIAM RENALDO, in his official capacity as Commissioner of the Buffalo Fire Department; and the BUFFALO FIRE DEPARTMENT,

Respondents/Defendants.

INDEX NO: 807664/2020

Hon. Frank A. Sedita, III

MEMORANDUM OF LAW OF PROPOSED INTERVENOR THE NEW YORK CIVIL LIBERTIES UNION IN SUPPORT OF MOTION TO INTERVENE

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PRELIMINARY STATEMENT

The New York Civil Liberties Union ("NYCLU") respectfully moves to intervene in this Article 78 proceeding as an "interested" party pursuant to CPLR § 7802(d). The NYCLU is an organization whose mission includes the advancement of police transparency and accountability through public advocacy and engagement. As part of its advocacy, the NYCLU played a central role in the repeal of N.Y. C.R.L. section 50-a, which organizations such as Petitioners had used to compel police departments to withhold from public scrutiny nearly any record containing any information that could be used to evaluate the performance of a police officer. With the repeal of section 50-a now secured, the NYCLU seeks to intervene in this action to defend its interest in effectuating that repeal, by ensuring public access to government records related to police conduct, such as the records at issue in this case, which were previously withheld from the public on the basis of section 50-a.

The NYCLU's interests in this lawsuit are real and substantial. Prior to the repeal of section 50-a, the NYCLU brought litigation challenging the denial of its Freedom of Information Law ("FOIL") requests for certain Buffalo Police Department records. Those requests were denied on the basis of section 50-a. The purpose of Petitioners' lawsuit is to continue to conceal from the public records that may no longer be withheld on the basis of section 50-a. By Petitioners' own admission, these categories of documents directly relate to the conduct of police officers, conduct in which the NYCLU, as a public advocate, has a substantial interest. If Petitioners prevail in this proceeding, the NYCLU's legally protected interests would be significantly harmed, as it would in effect roll back the repeal of section 50-a, which was specifically intended to facilitate discovery and advocacy related to police reform. Continued concealment of these records would frustrate that legislative intent and directly inhibit the NYCLU's efforts to obtain relevant public records as part of its mission to advocate and, when necessary, litigate for police reform and to hold police

officers and departments accountable for their conduct. Moreover, if Petitioners were to prevail, the NYCLU's pending and future FOIL requests would be significantly and negatively impacted. New York law is clear that such implications are more than sufficient to establish that the NYCLU is an "interested" party that should be permitted to intervene in this Article 78 proceeding.

Moreover, even under CPLR §§ 1012 and 1013—which apply to non-Article 78 proceedings—intervention is appropriate.[1] The NYCLU should be permitted to intervene as of right, as the present parties do not adequately represent the interest of the NYCLU and have been and will continue to be adverse to the NYCLU as it relates to FOIL requests for the records at issue in this litigation. Importantly, the Respondents have already represented that they "do not oppose the proposed preliminary injunction" sought by Petitioners. Moreover, any determination by the Court in these proceedings will necessarily apply to FOIL requests propounded by the NYCLU, thereby making the NYCLU a necessary party here. In any event, permissive intervention is equally appropriate here, as no party would suffer prejudice if the NYCLU is permitted to intervene. First, the NYCLU seeks intervention by Order to Show Cause to expedite the Court's determination and prevent any delay in the underlying proceedings. Second, in addition to the present motion for intervention, the NYCLU is submitting a proposed responsive pleading to Petitioners' Verified Petition/Complaint (NYSCEF Doc. No. 1).[2] As such, there will be no delay in consideration of Petitioners' requested relief. Moreover, the NYCLU would provide unique expertise regarding the law and policies related to the disclosure of public records, the legislative

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[1] Indeed, counsel for Respondents actually consents to the NYCLU intervening in this action. While counsel for Petitioners has indicated that Petitioners do not consent to the NYCLU's motion or proposed briefing schedule, Petitioners will suffer no prejudice if the NYCLU is permitted to intervene, as discussed herein.

[2] *See* Exhibits B and C to the Affirmation of Joshua Ebersole ("Ebersole Aff.").

history and intent underlying section 50-a's repeal, and the public interest in police transparency and accountability. Given this unique perspective, as well as the fact that the NYCLU has been and will continue to be affected by the determinations Respondents make in response to its FOIL requests related to Petitioners' members, intervention is appropriate here.

For these reasons and those set forth below, the NYCLU satisfies the requirements for intervention under the CPLR. As such, the motion should be granted.

FACTUAL BACKGROUND

I. The NYCLU's Organizational Mission

The NYCLU, the New York State affiliate of the American Civil Liberties Union, is a not-for-profit, non-partisan organization with more than 120,000 members and supporters with nine offices around New York State, including an office in Buffalo. (*See* Affirmation of Michael Sisitzky in Support of the New York Civil Liberties Union's Motion to Intervene ["Sisitzky Aff."]. ¶ 2.) The mission of the NYCLU is to defend and protect civil rights and liberties as embodied in the United States Constitution, the New York State Constitution, and state and federal law. (*Id.* ¶ 3). As part of that mission, the NYCLU is committed to police transparency and accountability and has frequently engaged with communities, organizers, and policymakers throughout New York State, including Buffalo, on proposals to create or strengthen systems for independent oversight of law enforcement. (*Id.*) The NYCLU's offices throughout New York State have engaged with local police departments and civilian or citizen review boards.

The NYCLU routinely files requests for documents and data sets under the New York FOIL and the federal Freedom of Information Act ("FOIA"). (*Id.* ¶ 5). It also regularly releases to the public the information it obtains through its FOIL and FOIA requests as part of its advocacy and public education. (*Id.*) The NYCLU also produces and makes public reports it prepares as the result of obtaining such information. (*Id.*) To take one relevant example, the NYCLU filed a

FOIL request with 23 police departments in 2015, including the Buffalo Police Department, seeking 39 categories of records, including policies and data related to officer use of force, complaints about misconduct, and rules and procedures related to disciplinary investigations. (*Id.*) The NYCLU released two public reports as a result of this FOIL project, including a report discussing police departments' responsiveness to FOIL and a website in which the departments' FOIL productions were published and analyzed. (*Id.*)[3]

As part of its police-accountability work, the NYCLU was heavily involved in FOIL requests related to section 50-a, including requests seeking public records related to the Buffalo Police Department. (*Id.* ¶ 6). In this work, the NYCLU frequently encountered government agencies invoking section 50-a as the basis for withholding relevant public records, and the NYCLU brought several cases challenging the application of section 50-a to its FOIL requests, including against the Buffalo Police Department. (*Id.* ¶¶ 6, 9).

The NYCLU has strongly advocated for increased transparency surrounding issues of police misconduct and discipline, including playing a central role in the recent successful advocacy efforts to repeal section 50-a. (*Id.* ¶ 6).

II. Repeal Of Section 50-a

Until this summer, the greatest obstacle to police transparency was section 50-a, which generally excluded from disclosure "police personnel records used to evaluate performance towards continued employment or promotion" that were otherwise presumptively public. (C.R.L. § 50-a[1] [repealed June 12, 2020]). Although the intended breadth of section 50-a was narrow,

[3] *TAKING COVER, How New York Police Departments Resist Transparency*, *available at* https://www.nyclu.org/sites/default/files/field_documents/taking_cover_20170918.pdf; Behind the Badge, Western Region Buffalo, *available at* https://www.behindthebadgeny.org/police_departments/buffalo/).

its scope quickly expanded, with unions like Petitioners leading the charge.[4] Indeed, by 2014, section 50-a was "expanded in the courts to allow police departments to withhold from the public virtually any record that contains any information that could conceivably be used to evaluate the performance of a police officer."[5] In 2018, in a matter in which the NYCLU was a direct party, the New York Court of Appeals held that section 50-a even prohibited the release of redacted information in response to FOIL requests. (*Matter of N.Y. Civil Liberties Union v. N.Y. City Police Dept.*, No. 133, 2018 WL 6492733, at *5 [N.Y. Dec. 11, 2018]).

Such case law, and its underlying rationale, is, however, no longer valid. On June 12, 2020, Governor Andrew Cuomo signed the #Repeal50a Bill (S8496/A10611). This repeal was the result of years of hard work and advocacy by many organizations, including the NYCLU, which itself fought for years against section 50-a through litigation, lobbying, and public advocacy. (Sisitzky Aff. ¶ 6). The repeal of section 50-a has already provided valuable transparency to the people of Buffalo.[6]

For as long as the NYCLU has fought for the rescission of section 50-a, both Petitioners and Respondents have relied on it to prevent the disclosure of relevant public records. In fact,

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[4] New York City Bar, *Report on Legislation by the Civil Rights Committee et al.*, New York City Bar Association 1, 2 (2020), https://bit.ly/3jK6O2O (initial scope of section 50-a "to, among other things, prevent 'harassment' by criminal defense attorneys who sought to impeach officers with unsubstantiated prior bad act[s]").

[5] State of New York, Department of State Committee on Open Government, *Annual Report to the Governor and State Legislature*, Department of State 1, 3 (Dec. 2014), https://on.ny.gov/3fbCxGO.

[6] *See* News Editorial Board, *The Editorial Board: Lieutenant's disciplinary record shows value of transparency law*, The Buffalo News, Jul. 9, 2020, ("Buffalo Police Lt. Michael A. DeLong's disciplinary record includes 36 complaints of misconduct, 13 of those involving excessive use of force. Before his current suspension he served at least four others. Those facts would still be under lock and key were it not for the repeal last month of a state law that shielded police records from the public.").

Respondents for years relied on section 50-a in preventing the release of a 2016 video of a brutal attack by a cellblock attendant of an individual at the Buffalo City Court.[7]

III. Petitioners' Lawsuit

On July 22, 2020, Petitioners filed the instant lawsuit seeking to prevent Respondents from disclosing Buffalo Police and Fire Department records relating to "matters that are still pending, as well as matters which were unsubstantiated, which were unfounded, which resulted in exoneration, or which concerned members who were otherwise found not guilty ('Unsubstantiated and Pending Allegations')." (Dkt. No. 1 ["Compl."] at ¶ 1). "In the wake of the repeal of New York State Civil Rights Law § 50-a," Petitioners also seek to withhold information "concern[ing] confidential settlement agreements." (*Id.*) As a basis for these claims, Petitioners argue that the release of information concerning these purported Unsubstantiated and Pending Allegations would (i) violate their collective bargaining agreements with Respondents, (ii) violate the Due Process Clause of the New York State Constitution, (iii) breach settlement agreements entered into in good faith with the Respondents, and (iv) "arbitrarily and capriciously reverse longstanding City and State practice of deeming unsubstantiated allegations to be protected from disclosure." (*Id*. at ¶ 3).

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[7] *See* News Editorial Board, *Editorial: A cover for police misconduct*, The Buffalo News, Nov. 2, 2019, ("When Buffalo Mayor Byron W. Brown's administration fought the public release of a videotape of a cellblock attendant mistreating a suspect in the basement of Buffalo City Court in a 2016 incident…[t]hey cited Section 50-a, which holds that 'personnel records' of police and corrections officers, along with firefighters, are confidential and may not be released without the officer's permission."); *see also* Matthew Spina, *Judge again lets Mayor Brown keep video of jail beating sealed*, THE BUFFALO NEWS, Aug. 2, 2017, ("The criminal case is over, and federal prosecutors say they have no problem with the public seeing video of a defendant's brutal mistreatment inside the City of Buffalo cell block. But for a second time, a judge has decided Mayor Byron W. Brown may conceal the government record that shows one of his employees inflicting bloody punishment and two of his police officers doing nothing to stop it.").

While Petitioners initially claim that the injunction they seek is limited to preventing disclosure of information concerning Unsubstantiated and Pending Allegations or information implicated by settlement agreements, they go on to seek a bar on an any "disciplinary records that *implicate the privacy and safety concerns of officers*"—a much broader and more ill-defined category of information without any apparent limits. (*Id*. at ¶¶ 72, 78 [emphasis added]). Petitioners further request that the Court "annul" any attempt to release any record before conducting a "case-by-case analysis to determine whether disclosure is warranted." (*Id*. ¶¶ 97, 98).

On July 24, 2020, the Court entered an Order to Show Cause, granting Petitioners' request for a temporary restraining order "restraining Respondents, and those acting in concert with them, from publicly disclosing any records concerning Unsubstantiated and Pending Allegations or settlement agreements entered into prior to June 12, 2020." (Dkt. No. 10). In the same order, the Court set a preliminary injunction hearing for August 26, 2020, at 9:30 a.m., and ordered Respondents to file opposition papers, if any, by August 14, 2020, and Petitioners to file reply papers, if any, by August 19, 2020. (*Id.*) Finally, the Court's July 24 order permitted Petitioners to serve "expedited document discovery requests" and ordered that Respondents produce any responsive documents to such requests within seven days of their being served. (*Id.*) Petitioners served these document requests on Respondents on August 4, 2020. (Dkt. No. 12). Respondents filed an answer to the document requests on August 12, 2020. (Dkt. No. 14). Respondents filed an answering affirmation to Petitioners' order to show cause on August 14, 2020, in which Respondents stated that they "do not oppose the proposed preliminary injunction, but request guidance regarding the injunction's intended scope." (Dkt. No. 18).

ARGUMENT

I. The NYCLU Has a Strong Interest in this Proceeding and Should be Permitted to Intervene

The NYCLU should be permitted to intervene in this matter for two reasons. First, the NYCLU is an "interested person" under CPLR § 7802(d), the sole requirement for intervention in Article 78 proceedings like this one. Second, because Respondents' representation of the NYCLU's interest in this matter would be inadequate and because the NYCLU's FOIL requests will be subject to this Court's ultimate determination, the NYCLU has the right to intervene under CPLR § 1012.

A. Intervention is Proper Under CPLR § 7802(d)

Petitioners allege that Respondents' release of Unsubstantiated and Pending Allegations constitute actions affected by an error of law or actions that are arbitrary and capricious in violation of CPLR § 7803(3). (*See* Compl. at 23-26). Given that Petitioners' complaint is brought pursuant to Article 78, the Court "may allow other interested persons to intervene" in the proceedings. (CPLR § 7802[d]).

"Pursuant to CPLR 7802(d), a court may allow other interested persons to intervene in a special proceeding," thereby granting "the court broader authority to allow intervention in an article 78 proceeding than is provided pursuant to CPLR 1013 in an action, which requires a showing that the proposed intervenor's claim or defense and the main action have a common question of law or fact." (*Greater New York Health Care Facilities Ass'n v. DeBuono*, 91 N.Y.2d 716, 720 [N.Y. 1998] [internal citations and quotations omitted]); (*see also Toll Land V Ltd. P'ship v. Planning Bd. of Vill. of Tarrytown*, 12 N.Y.S.3d 874, 882 [Sup. Ct., Westchester County, 2015] ["The sole criteria for intervention in a CPLR article 78 proceeding is whether the person is 'interested' and, thus, a party seeking intervention need not necessarily show that the

representation of [its] interest by the parties is or may be inadequate."] [internal quotations omitted]); (*Elinor Homes Co. v. St. Lawrence*, 494 N.Y.S.2d 889 [2d Dept 1985]). An "interested person" within the meaning of CPLR § 7802(d) is any party with a "real and substantial interest in the outcome of the proceedings." (*Cnty. of Westchester v. Dept. of Health*, 645 N.Y.S. 2d 534 [2d Dept 1996]); (*see also Bernstein v. Feiner*, 842 N.Y.S. 2d 556 [2d Dept 2007]); (*cf. St. Joseph's Hosp. Health Ctr. v. Dept. of Health of State of N.Y.*, 637 N.Y.S.2d 821, 823 [4th Dept 1996] [reversing trial court and finding intervention warranted under CPLR 1013 because "[t]he proposed intervenors have a real and substantial interest in the outcome of the action"]). Such an interest need not be "akin to a financial stake or property right in the outcome of the proceeding." (*Toll Land*, 12 N.Y.S.3d at 882).

Notably, CPLR § 7802(d) "grants the court broader power to allow intervention in an article 78 proceeding than is provided pursuant to either CPLR 1012 or 1013," which respectively govern intervention by right and by permission in general civil actions. (*Elinor Homes*, 494 N.Y.S. 2d at 889); (*see also Greater New York Health Care Facilities*, 91 N.Y.2d at 720). Further, "[t]he bases for permissive intervention are broader than they are for standing to originate the proceeding." (*O'Brien v. Barnes Bldg. Co.*, 380 N.Y.S. 2d 405 [Sup. Ct. Suffolk Cnty. 1974], *aff'd sub nom. O'Brien v. Biggane*, 372 N.Y.S. 2d 992 [2d Dept 1975]). Thus, the "general rule is that intervention *should be permitted* where the intervenor has a real and substantial interest in the outcome of the proceedings." (*Bernstein*, 842 N.Y.S. 2d at 556 [emphasis added]).

The NYCLU has a real and substantial interest in the outcome of this litigation. Petitioners seek to establish sweeping and novel rights stemming from collective bargaining agreements, settlement agreements, and the New York State Constitution in contravention of the clearly

expressed legislative intent behind the repeal of section 50-a. (Compl. at ¶¶ 7-9). If granted, this would have an immediate and long-term impact on the NYCLU and its work.

The NYCLU has at least three cognizable interests that have frequently been deemed sufficient by New York courts in permitting intervention:

Interest in judicially enforceable public right of access. First, the NYCLU has a "real and substantial interest" in this action because the relief sought by Petitioners would directly hinder the NYCLU's direct, judicially enforceable interest in the public right of access to documents, and similar interests of individuals on whose behalf the NYCLU advocates. The NYCLU frequently relies upon FOIL requests—which make "full disclosure by public agencies a public right"—to obtain access to police disciplinary records and intends to do so in the future. (*Capital Newspapers Div. of Hearst Corp. v. Burns*, 67 N.Y.2d 562, 566-567 [1986]); (*see also* Sisitzky Aff. ¶ 5). Indeed, the NYCLU has previously propounded FOIL requests on Respondents here and Respondents withheld disclosure on the basis of section 50-a. (Sisitzky Aff. ¶ 9). The NYCLU therefore has a strong interest in the presumptive public right of access to information that Petitioners seek to inhibit through this action.

This interest has been deemed sufficient by New York courts to permit intervention where the confidential treatment of presumptively public materials is at stake, including in the specific context of this case in which police departments seek to shield documents from public disclosure. (*See Victor v. N.Y.C. Office of Admin. Trials & Hearings* [Sup. Ct., N.Y. Cnty, May 26, 2016], Index No. 100890/15 [granting The New York Times' motion to intervene in Article 78 proceeding where a party argued section 50-a prohibited public disclosure of reports issued by the Office of Administrative Trials and Hearings]); (*Mulgrew v. Bd. of Educ. of City School Dist. of City of New York*, 31 Misc. 3d 296, 298 [Sup. Ct., N.Y. Cty., 2011], *affd*, 87 A.D.3d 506 [1st Dept 2011]

[permitting news organizations to intervene in Article 78 proceeding touching upon confidentiality of information sought through prior FOIL requests]). Intervention is similarly warranted here.

Organizational Mission. Second, the relief sought by Petitioners in this action directly implicates the NYCLU's ability to advance its organizational goals of combatting police misconduct and promoting police reform. (Sisitzky Aff. ¶ 3). Transparency is critical to the NYCLU's ability to carry out this mission. For example, without access to police disciplinary records, the NYCLU cannot effectively assess the impact of particular policing practices on communities, cannot effectively educate those communities, and cannot effectively allocate its resources to best combat police misconduct within those communities. (*Id.* ¶ 3-6). Because Petitioners here seek to restrict public access to a large and significant category of records—and to set a precedent permitting such categorical restrictions going forward—the NYCLU's mission is directly implicated.

New York courts have frequently held that such organizational interests are "real and substantial" and thus sufficient to permit intervention. *New York County Lawyers' Ass'n v. Bloomberg* is instructive. 908 N.Y.S. 2d 872 (Sup. Ct., N.Y. Cnty, 2010). There, the New York Criminal Bar Association moved to intervene in an Article 78 proceeding concerning a new plan instituted by the city for the provision of conflict defense attorneys. The trial court permitted intervention because the contemplated change in law could have "affect[ed] the ability of . . . the New York Criminal Bar Association to be appointed as conflict counsel and to represent indigent criminal defendants in a manner that is consistent with constitutional mandates." (*Id.*); (*see also Mixon v. Grinker*, 556 N.Y.S. 2d 855 [1st Dept 1990] [finding that organization that "advocates for, and provides direct services to, homeless persons" had standing to seek injunction to provide housing for the homeless]).

The intervention of environmental groups is similarly analogous. For example, in *Toll Land*, the trial court held that an environmental organization was permitted to intervene in an Article 78 proceeding regarding the submission of an environmental impact statement for an alleged historically significant house because the environmental organization's "sole purpose [] to promote and preserve" the historical home constituted a "real and substantial interest" in the outcome of the proceeding. 12 N.Y.S.3d at 882; (*see also Helms v. Diamond*, 76 Misc. 2d. 253, 255 [Sup. Ct., Schenectady County, 1973] [permitting environmental group to intervene as respondent in suit regarding operation of seaplanes on certain water bodies because the group was "primarily concerned with conservation and protection of the natural and scenic resources"]); (*Clinton v. Summers*, 534 N.Y.S.2d 473 [3d Dept 1988] [finding that the trial court abused its discretion in denying association's request to intervene in Article 78 proceeding regarding construction of a property near a lake because the association's purpose was shown to be the preservation of the environmental quality of the lake, and no reason was shown why the association should not have been allowed to intervene]).

Accordingly, the NYCLU's mission to identify police misconduct and effectuate meaningful police reform will be substantially hindered if Petitioners are successful in limiting access to police disciplinary records, which constitutes a "real and substantial" interest in this action sufficient to permit intervention.

Interest in effective section 50-a repeal. Third, the NYCLU has been deeply involved in the process of seeking to repeal N.Y. C.R.L. § 50-a, which is directly at issue in this case. In particular, the NYCLU has led legislative and litigation-based reform efforts to repeal section 50-a and has frequently argued against the use of section 50-a as a shield against FOIL requests from the NYCLU to police departments throughout the State. (Sisitzky Aff. ¶¶ 6-8).

It is well settled by New York courts that "organizational parties have standing if they have aggrieved members or a specific interest (beyond merely that of concerned citizens or taxpayers) in the litigation in question." (*Matter of New York State Ass'n of Community Action Agency Bd. Members v. Shaffer*, 500 N.Y.S. 2d 838 [3d Dept 1986]). For example, in *Community Serv. Soc. v. Cuomo*, the Appellate Division affirmed the trial court's finding of standing for Medicaid membership corporations, not only because they were "advocacy and resource centers for the disabled," but also because "of their specific interest, greater than that of concerned citizens or taxpayers, in defendant's administration of the programs involved." (561 N.Y.S. 2d 461 [1st Dept 1990]). Likewise, the NYCLU's clear and specific interest in work relating to the repeal of section 50-a is sufficient to confer standing here. (*See Ball v. Town of Ballston*, 103 N.Y.S. 3d 173 [3d Dept 2019], *lv denied*, 2019 NY Slip Op 83015 [Ct. App. Oct. 29, 2019] ["Petitioner may well be correct that the developers do not have standing to bring suit to challenge his determination, but the bases for permissive intervention are broader than they are for standing to originate the proceeding."] [internal quotations omitted]).

Indeed, New York courts have also cited an organization's specific interest in the outcome of proceedings regarding particular legislative action as a basis for permissive intervention. (*See Zorach v. Clauson*, 90 N.Y.S. 2d 750 [Sup. Ct., Kings County, 1949] [granting intervention to organization that had been instrumental in the passage of legislation promoting released time program for religious instruction and had supervised the operation of the program for some time, where the program was sought to be discontinued by the NYC Board of Education]); (*Cent. Westchester Humane Soc. v. Hilleboe*, 115 N.Y.S. 2d 769 [Sup. Ct., Westchester County, 1952] [granting intervention in action to repeal public health law to organization "representing the leading medical research and teaching institutions of [the] state," where the organization "assisted

in the drafting of the Act, and helped to influence its enactment"]). The NYCLU's prolonged commitment—both in resources and time—to advocating for the repeal of section 50-a establishes the exact kind of institutional interest that warrants intervention in Article 78 proceedings. (*See* Sisitzky Aff. ¶ 6).

B. Intervention is Proper Even Under CPLR §§ 1012 and 1013

In addition to showing a "real and substantial" interest in the litigation as required under CPLR § 7802(d), the NYCLU also satisfies the requirements for intervention as of right pursuant to CPLR § 1012 and, alternatively, permissive intervention under CPLR §1013, notwithstanding that New York courts have recognized that "[w]hether intervention is sought as a matter of right under CPLR § 1012(a), or as a matter of discretion under CPLR § 1013, is of little practical significance, since intervention should be permitted 'where the intervenor has a real and substantial interest in the outcome of the proceedings.'" (*Sclafani Petroleum, Inc. v. Calabro*, 100 N.Y.S.3d 558, 559 [2d Dept 2019] [internal citations omitted]).

CPLR § 1012 provides that "[u]pon timely motion, any person shall be permitted to intervene in any action . . . when the representation of the person's interest by the parties is or may be inadequate and the person is or may be bound by the judgment." "Inadequacy of representation is generally assumed when the intervenor's interest is divergent from that of the parties to the suit. (McLaughlin, Practice Commentaries, 7B McKinney's Cons.Laws of N.Y. CPLR C1012:1-1012:3, at 151, 152). Whether the intervenor "will be bound by the judgment within the meaning of [section 1012] is determined by its *res judicata* effect." (*Vantage Petroleum, Bay Isle Oil Co. v. Board Assessment Review of Town of Babylon*, 61 N.Y.2d 695, 695 [N.Y. 1984]). The NYCLU clearly meets both requirements.

First, there is no real dispute that the NYCLU's interests are divergent from the parties to the present litigation. Petitioners seek to shield from disclosure public records related to the

accountability and transparency of Buffalo Police Officers and Firefighters. (Compl. ¶ 1). These are the very same records that the NYCLU routinely seeks as part of its mission to provide the public with meaningful oversight of law enforcement. (Sisitzky Aff. ¶¶ 3-5). Moreover, Respondents are not well suited to defend the NYCLU's interests given their history of non-responsiveness to FOIL requests and their past positions supporting an overly expansive and legally-flawed interpretation of section 50-a. (Sisitzky Aff. ¶ 9). Indeed, in response to the NYCLU's 2015 FOIL request seeking thirty-nine items from the Buffalo Police Department, the Respondents here constructively denied twenty-seven items in whole or in part, including by withholding use of force and firearms use reports on the assertion that such reports were confidential under section 50-a. (*Id.*) Importantly, the reports in question were only released after the NYCLU sued the Buffalo Police Department to compel disclosure. (*Id.*) The Respondents' willingness to take such a position at obvious odds with the clear language and intent of FOIL and related statutes casts serious doubt on Respondents' ability to meaningfully defend the core transparency interest now at stake following the repeal of section 50-a. Moreover, the Respondents have made clear that they will not adequately represent the interests of the NYCLU in these proceedings as they have already represented to the Court that they "do not oppose the proposed preliminary injunction, but [rather] request guidance regarding the injunction's intended scope." (Ebersole Aff. ¶ 6). The parties therefore will not adequately represent the interests of the NYCLU in these proceedings.

Second, the NYCLU will undoubtedly be subject to the Court's determination in these proceedings. Petitioners seek through this litigation to prevent Respondents from disclosing a broad category of otherwise public records in response to FOIL requests submitted *by any party*. This includes the NYCLU. As such, if Petitioners' relief is granted and Respondents are ordered

to withhold these records in responding to FOIL requests, that determination will necessarily apply to any FOIL requests submitted by the NYCLU. Given that the NYCLU routinely files FOIL requests with the Buffalo Police Department (Sisitzky Aff. ¶ 5), it will be subject to the determination here. Therefore, there can be no question that the NYCLU's interests will not be adequately represented by the present parties to this litigation and that the NYCLU will be subject to any determination in this action. As such, the NYCLU should be permitted to intervene as of right pursuant CPLR 1012. (*See, e.g.*, *Cavages, Inc. v. Ketter*, 392 N.Y.S.2d 755, 757 [4th Dept 1977] ["A third party will generally be permitted to intervene where he has an actual and ultimate interest in the result of the litigation."]).

Alternatively, the NYCLU should be permitted to intervene under CPLR § 1013, which provides that, where a nonparty's "claim or defense and the main action have a common question of law or fact[,]" a court may permit a party to intervene after considering "whether the intervention will unduly delay the determination of the action or prejudice the substantial rights of any party[.]" (*Jones v. Town of Carroll*, 72 N.Y.S.3d 657, 659, *lv dismissed*, 31 N.Y.3d 1064, 101 N.E.3d 974 [2018]). Moreover, the Fourth Department has found permissive intervention appropriate where "[t]he proposed intervenors have a real and substantial interest in the outcome of the action." (*St. Joseph's Hosp. Health Ctr. v. Dept. of Health of State of N.Y.*, 637 N.Y.S.2d 821, 823 [4th Dept 1996]).

As a threshold matter, the NYCLU's defense in this dispute fits squarely within this case's common questions of law and fact, as its interest in the disclosure of public records is necessarily bound with Petitioners' efforts to conceal those same records. (*Cent. Westchester Humane Soc. v. Hilleboe*, 115 N.Y.S.2d 769, 771–72 [Sup. Ct. 1952] ["it is not required that a proposed intervenor shall have a direct personal or pecuniary interest in the subject of the action. If he would be

indirectly affected by the litigation in a substantial manner, and his claim or defense with respect to the subject-matter of the litigation has a question of law or fact in common therewith, it would seem that he may be permitted to intervene."]). In fact, the NYCLU is uniquely qualified to defend this case, given the importance of accessing public records in its ongoing work surrounding police transparency and accountability. (*See* Sisitzky Aff. ¶¶ 3-10). After spending years advocating for the repeal of section 50-a, the NYCLU is uniquely positioned to defend against Petitioners' claims in this case, which seek to undermine the effect of the repealed legislation. (*Id.*)

Further, the NYCLU's intervention in this case would not cause undue delay to the proceedings or substantial prejudice to the rights of any party. This motion to intervene is being submitted less than thirty days after Petitioners filed their lawsuit and is submitted alongside a proposed responsive pleading to Petitioners' Verified Petition/Complaint. It therefore will not delay the briefing schedule on Petitioners' preliminary injunction. (*See Town of Carroll*, 72 N.Y.S. 2d at 657 [granting intervention even where the intervenor did "not seek to intervene until several years after it knew its interests in the property may be implicated in the dispute" because "intervention will not delay resolution of the action and defendants will not suffer prejudice."]). More fundamentally, Petitioners seeking to undo the legislative repeal of section 50-a would not suffer "undue prejudice" simply because proponents of the #Repeal50a Bill would be given the chance to defend the legislation in court.

As the NYCLU's intervention in this matter fits squarely within the dispute's common questions of law and fact and would not create undue delay or substantial prejudice against any party, intervention is also proper under CPLR § 1013.

CONCLUSION

For the foregoing reasons, the NYCLU respectfully requests that the Court grant its motion to intervene.

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