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Mazzeo, Michael

City of Rochester
Warren, Lovely A.
Herriott-Sullivan, Cynthia

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF MONROE

ROCHESTER POLICE LOCUST CLUB, INC. and MICHAEL MAZZEO,

Petitioners,

vs.

CITY OF ROCHESTER, LOVELY A. WARREN, as Mayor of the City of Rochester and CYNTHIA HERRIOTT-SULLIVAN, in her official capacity as Interim Chief of Police for the City of Rochester,

Respondents.

INDEX NO: E2020010093

Hon. Ann Marie Taddeo

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 has a real, tangible, and substantial interest in the matter, namely ensuring that Respondents provide all police disciplinary records authorized under the law without delay or limitation that might result from the overbroad relief sought in the Petition. The NYCLU's intervention is necessary in this case to ensure that the public's interest in prompt and full disclosure of the police disciplinary records is fairly and aggressively represented in this Court, which cannot be guaranteed if Respondents are the only parties opposing the Petition.

Indeed, Respondents have already failed to sufficiently respond to the NYCLU's FOIL request, in which the NYCLU sought some of the very same documents that Petitioners here seek to delay from disclosure. Respondents' insufficient response led the NYCLU to initiate its own Article 78 proceeding against the City of Rochester and the Rochester Police Department (the "NYCLU Article 78 Proceeding") on December 14, 2020, which is currently pending before this Court (Index No. E2020009879). Importantly, Respondents' interests here may actually conflict with their interests in the NYCLU Article 78 Proceeding. In short, the NYCLU has a substantial interest here that simply cannot be adequately represented by Respondents. Notably, in a similar recent case involving a police union challenging the planned release of disciplinary records, the NYCLU was granted intervenor status for these same reasons. (*See* Decision and Order, dated December 29, 2020, *Schenectady Police Benevolent Association, et al. v. City of Schenectady, et al.*, Index No. 2020-1411 at 6 (Sup. Ct. Schenectady Cty.) (NYSCEF Doc. No. 13) (Ebersole Aff. at Exhibit I)). Here, just as in that case, it is critically important that the NYCLU be permitted to intervene in this proceeding pursuant to CPLR § 7802(d), or, in the alternative, CPLR §§ 1012 and

1013—which apply to non-Article 78 proceedings—to ensure full and adequate oppositions to Petitioners' demands for unnecessary delay.[1]

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 in Genesee Valley. (*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, 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 twenty-three police departments in 2015, seeking thirty-nine categories of

[1] Counsel for the NYCLU reached out to counsel for Petitioners and Respondents to determine whether they consent or oppose the NYCLU's motion. At the time of filing the present motion, neither Petitioner nor Respondents has indicated whether they oppose or consent to the motion.

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.*)[2]

As part of its current efforts to ensure prompt public access to police disciplinary records made public by the repeal of Civil Rights Law section 50-a in June 2020, the NYCLU was recently granted intervenor status in a lawsuit between a local police union and a municipality—Schenectady—regarding the union's attempts to prevent Schenectady from releasing certain records publicly consistent with the new statutory scheme. (*See Schenectady Police Benevolent Association*, Index No. 2020-1411 (Ebersole Aff. at Exhibit I) [dismissing the police union's suit and ordering disclosure].)

II. Repeal of Section 50-a

Until last 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 when it originally passed, its scope quickly expanded, with unions like Petitioner leading the charge.[3] Indeed, by 2014, section 50-a was "expanded in the courts to allow police departments

[2] *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, Genesee Valley - Rochester, *available at* https://www.behindthebadgeny.org/police_departments/rochester).

[3] 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]").

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."[4] 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 involving 50-a materials. (*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.)

III. Corresponding FOIL Amendments

On June 12, 2020, the same day section 50-a was repealed, Governor Cuomo signed into law an amendment to section 86(6) of FOIL. The amendment provided that "law enforcement disciplinary records"[5] are now subject to *mandatory disclosure*. (*See* Senate Bill 8496.) Section 87 of FOIL was similarly amended on June 12, 2020, which created certain carefully

[4] 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.

[5] "Law enforcement disciplinary records" means any record created in furtherance of a law enforcement disciplinary proceeding, including, but not limited to:

(a) the complaints, allegations, and charges against an employee;

(b) the name of the employee complained of or charged;

(c) the transcript of any disciplinary trial or hearing, including any exhibits introduced at such trial or hearing;

(d) the disposition of any disciplinary proceeding; and

(e) the final written opinion or memorandum supporting the disposition and discipline imposed including the agency's complete factual findings and its analysis of the conduct and appropriate discipline of the covered employee.

demarcated protections for law enforcement agency employees whose privacy might be impacted by the mandatory disclosure of "law enforcement disciplinary records." These new protections, found in newly enacted sub-sections 89(2)(b)-(c) of FOIL, require the redaction of specific limited categories of information—medical records; home addresses, personal telephone and cell phone numbers, personal e-mail addresses; social security numbers; or use of employee assistance programs, mental health services, or substance abuse assistance services—and permit the redaction of certain other categories of information. (*Id.*)

IV. Rochester Fails to Adequately Respond to FOIL Request Following Death of Daniel Prude

Despite this push for transparency in New York, the City of Rochester continues to shield crucial information regarding police misconduct from the public. Last year, Rochester withheld body camera footage of RPD officers' interaction with Daniel Prude, a Black man who died one week after being hooded and pinned to the ground by RPD officers on March 23, 2020.[6] The City of Rochester spent months refusing to disclose this footage to the public, despite a FOIL request submitted by the Prude family's attorney on April 3, 2020 (*See* Affirmation of Joshua Ebersole in Support of the New York Civil Liberties Union's Motion to Intervene ["Ebersole Aff."] at Exhibit D. This footage was not released to Prude's family until August 12, 2020. (*Id.*)

V. The NYCLU's FOIL Request to Respondents and Ongoing Article 78 Proceeding

The NYCLU submitted a FOIL request to the RPD on September 15, 2020, seeking records related to RPD conduct, many of which had previously been shielded from the public by section 50-a. The request sought documents related to RPD disciplinary records, use of force, stops,

[6] *Report: Daniel Prude's death shows a culture of 'callousness' in Rochester Police Dept.*, available at https://www.washingtonpost.com/national/report-daniel-prudes-death-shows-a-culture-of-callousness-in-rochester-police-dept/2020/09/14/2174b7b8-f6da-11ea-be57-d00bb9bc632d_story.html.

civilian complaints, policies, investigative reports, diversity, trainings, and collective bargaining agreements (*see* Ebersole Aff. at Exhibit E). For months, the City of Rochester has refused to respond to this request other than stating in an email this past September that "[d]ue to the volume or complexity" of the request and because the "records are extensive and require more time for a complete search, legal review and redaction," the City estimated that the request "will be completed on or about 3/31/21." The email did not clarify whether the City was granting or denying any part of the request, and it implied that the City would not make even that threshold determination until March 2021, over six months after the request was filed (*see* Ebersole Aff. at Exhibit F.)

On November 10, 2020, after several efforts to engage with the City over two months without success, the NYCLU filed an administrative appeal for the constructive denial of its FOIL request (*see* Ebersole Aff. at Exhibit G). The City of Rochester did not respond to this appeal, and on December 14, 2020, the NYCLU initiated the NYCLU Article 78 Proceeding. That Article 78 proceeding—which was filed before Petitioners here initiated the present Article 78 proceeding—remains ongoing before this Court.

VI. Petitioners' Lawsuit

In early July 2020, the City of Rochester "publicly announced its intention to create an online database of information relating to disciplinary actions against Rochester police officers" (Pet. at ¶ 23). Links to disciplinary records subject to disclosure in this database were made available to individual officers on the morning of December 16, 2020. (*Id.*) On December 21, 2020, Petitioners filed the instant lawsuit seeking to prevent Respondents from disclosing police officer disciplinary records before each individual record can be reviewed by each officer associated with that record and, if the officers so choose, the Locust Club (Pet. at ¶ 54). Petitioners did not provide a timeline for their proposed review process.

On December 22, 2020, the Court entered an Order to Show Cause, granting Petitioner's request for a temporary restraining order "enjoining respondents from publicly releasing the proposed police officer disciplinary records." (Dkt. No. 7). In the same order, the Court set a hearing date for February 3, 2019, at 2:00 p.m., and ordered Respondents to file opposition papers, if any, by January 15, 2021 at 2:00 p.m., and Petitioner to file reply papers, if any, by January 22, 2021 at 2:00 p.m. (*Id.*)

ARGUMENT

I. The NYCLU Has A Substantial Interest and Should be Permitted to Intervene in this Proceeding

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. Indeed, in response to the NYCLU's FOIL request seeking many of the same documents at issue in this proceeding, Respondents stated that it would take approximately six months to complete the request and then refused to respond to the NYCLU's further requests for an explanation of such a delay, resulting in the NYCLU initiating its own Article 78 proceeding. As such, the NYCLU is directly and adversely impacted by this proceeding to the extent it results in further delay by Respondents in responding to the NYCLU's FOIL request. Second, because Respondents' representation of the NYCLU's interest in this matter would be inadequate and because the NYCLU is adverse to Respondents regarding the same documents in the NYCLU Article 78 Proceeding, the NYCLU has the right to intervene under CPLR § 1012.

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

Petitioners allege that Respondents' release of officer disciplinary records constitute actions affected by an error of law or actions that are arbitrary and capricious in violation of CPLR

§ 7803(1)-(3). (*See* Pet. ¶ 49.) 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." (*Matter of Greater New York Health Care Facilities Ass'n v. DeBuono*, 91 N.Y.2d 716, 720 [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. West. Cty. 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." (*County of Westchester v. Department of Health*, 645 N.Y.S. 2d 534, 536 [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 892); (*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 Cty., 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 an undetermined—but already prolonged—delay in the release of Rochester police officer disciplinary records based on a potentially overbroad view of what must be redacted and a legally unsupportable view of their own entitlement to participate personally in the redaction process. These are the same records that are currently subject to the NYCLU Article 78 Proceeding, and 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. (*Matter of Capital Newspapers Div. of Hearst Corp. v. Burns*, 67 N.Y.2d 562, 566-67 [1986]); (*see also* Sisitzky Aff.

¶ 5). As discussed herein, the NYCLU previously issued a FOIL request seeking, among other things, disciplinary records for Rochester police officers. (Sisitzky Aff. ¶ 9.) Respondents stated that it would take approximately six months to respond to that request, which the NYCLU viewed as unreasonable under the circumstances. Having received no further explanation from Respondents as to why it would take nearly six months to respond to the FOIL request, and after Respondents wholly ignored the NYCLU's administrative appeal, the NYCLU was compelled to initiate its own Article 78 proceeding to compel the disclosure of the documents at issue here in a timely manner. (*Id.* ¶ 9.) Although Respondents had informed the NYCLU of their intention to release these records earlier in the year, it was only through this Petition that the NYCLU learned that any documents even potentially responsive to part of its FOIL request had actually been collected and prepared for possible disclosure, albeit with redaction and potentially even more redaction (and more delay) should Petitioners succeed. Therefore, not only does the NYCLU have a strong interest in the presumptive public right of access to information that Petitioners seeks to inhibit for an undetermined duration through this action, the NYCLU has a real and direct interest based on the NYCLU's Article 78 Proceeding.

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. (*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], *aff'd*, 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]; *see also Victor v. N.Y.C. Office of Admin. Trials & Hearings* [Sup. Ct. N.Y. Cty., May 23, 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]; *Schenectady Police Benevolent Association*, Index No. 2020-1411 at 6 (Ebersole Aff. at Exhibit I) [noting that the motion to intervene was granted "*pursuant to this Court's discretion*, under *CPLR §7802(d).*"] [emphasis added]).[7] As in the Schenectady case, 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 fostering police accountability, 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 work with those communities to promote accountability, and cannot effectively allocate its resources to best combat police misconduct within those communities. (*Id.* ¶ 7). Because Petitioners here seek to restrict public access to a large and significant category of records for an undetermined amount of time, 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, 873 (Sup. Ct. N.Y. Cty., 2010). There, the New York Criminal Bar Association moved to intervene in an Article 78 proceeding concerning a new

[7] The NYCLU previously moved to intervene in two consolidated Article 78 proceedings related to the repeal of section 50-a. While the court denied the NYCLU's motions—in oral rulings—those cases are plainly distinguishable because there, unlike here, the NYCLU did *not* have a pending Article 78 proceeding seeking production of the documents at issue. The court there ultimately ruled against the police unions, *see Buffalo Police Benevolent Association, et al. v. Brown, et al.*, Index No. 807664/2020 (NYSCEF Doc Nos. 133 & 159); *Town of Tonawanda Police Club, Inc. v. Town of Tonawanda, et al.*, Index No. 809543/2020 (NYSCEF Doc. Nos. 56 & 63), one of the unions has appealed, and the NYCLU has filed notices of appeal for both decisions denying its motions to intervene.

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*. at 875); (*see also Mixon v. Grinker*, 556 N.Y.S. 2d 855, 857 [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 in lawsuits implicating their organizational priorities 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 Cty., 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]).

Even more directly than in the cases cited above, the NYCLU's mission to identify police misconduct and effectuate meaningful police reform will be substantially hindered if Petitioners

are successful in delaying 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; *see also Schenectady Police Benevolent Association*, Index No. 2020-1411 at 6 (Ebersole Aff. at Exhibit I)).

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, 841 [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, 463 [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, 175 [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 Cty., 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, 771 [Sup. Ct. Westchester Cty., 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; *see also Schenectady Police Benevolent Association*, Index No. 2020-1411 at 6 (Ebersole Aff. at Exhibit I)).

B. Intervention is Also Proper 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, 698 [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 delay the disclosure of public records related to the accountability and transparency of Rochester police officers. (Pet. ¶ 54). 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—and has done so with respect to these specific records. (Sisitzky Aff. ¶ 3.) Moreover, Respondents are not well suited to defend the NYCLU's interests because Respondents have already failed to provide a reasonable time-period to respond to the NYCLU's FOIL request for the same records, which is the subject of the NYCLU Article 78 Proceeding. (*Id.* ¶ 9.)

Second, the NYCLU will undoubtedly be directly impacted by the Court's determination in these proceedings. Petitioners seek through this litigation to delay Respondents from disclosing a broad category of otherwise public records that are the subject of multiple FOIL requests, including the NYCLU's. As such, if Petitioners' relief is granted and Respondents are ordered to withhold these records for some time in responding to FOIL requests, that determination will

necessarily apply to the FOIL requests submitted by the NYCLU. Given that the NYCLU has a pending Article 78 proceeding regarding its own FOIL request seeking the prompt production of many of the exact same records (*Id.*), it will be subject to the determination here. This is not theoretical. There is 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 impacted by 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 at 823.)

As a threshold matter, the NYCLU's defense in this dispute—*i.e.*, to defend against efforts to delay or restrict the disclosure of contents of records that fall squarely within the law—fits squarely within this case's common questions of law and fact, as its interest in the timely disclosure of public records is necessarily bound with Petitioners' efforts to delay disclosure of those same records. (*Cent. Westchester Humane Soc. v. Hilleboe*, 115 N.Y.S.2d at 771–72 ["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 a timely manner in its ongoing work surrounding police transparency and accountability. (*See* Sisitzky Aff. ¶¶ 3-5). After spending years advocating for the repeal of section 50-a, the NYCLU is uniquely positioned to defend against Petitioners' requests for relief in this case. (*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. Indeed, the very purpose of the NYCLU seeking to intervene in this proceeding is to expedite both this proceeding and the NYCLU's Article 78 Proceeding. Importantly, this motion to intervene is being submitted less than thirty days after Petitioners filed their lawsuit and is submitted alongside a proposed opposition to Petitioners' request for a preliminary injunction, on the day such oppositions are due. 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."]).

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 proper under CPLR § 1013.[8]

CONCLUSION

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

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By: /s/ *Joshua Ebersole*

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[8] In the event the Court denies the NYCLU's motion to intervene, it is well established that when intervention is denied under section 7802(d), a party denied permission to intervene may still be granted permission by the court to appear as *amicus curiae*. If the NYCLU is not permitted to intervene, but is granted status as an *amicus*, the NYCLU respectfully requests that its [Proposed] Memorandum of Law in Opposition to Petition Requesting a Preliminary Injunction be considered by the Court.