

20-2400

IN THE

United States Court of Appeals
FOR THE SECOND CIRCUIT

Uniformed Fire Officers Association, Uniformed Firefighters Association of Greater New York, Police Benevolent Association of the City of New York, Inc., Correction Officers' Benevolent Association of the City of New York, Inc., Sergeants Benevolent Association, Lieutenants Benevolent Association, Captains Endowment Association, Detectives' Endowment Association,

Plaintiffs-Appellants,

(Caption continued on inside cover)

**BRIEF OF AMICUS CURIAE THE LEGAL AID SOCIETY IN SUPPORT OF
THE NEW YORK CIVIL LIBERTIES UNION**

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

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—against—

Bill de Blasio, in his official capacity as Mayor of the City of New York, City of New York, New York City Fire Department, Daniel A. Nigro, in his official capacity as the Commissioner of the Fire Department of the City of New York, New York City Department of Corrections, Cynthia Brann, in her official capacity as the Commissioner of the New York City Department of Corrections, Dermot F. Shea, in his official capacity as the Commissioner of the New York City Police Department, New York City Police Department, Frederick Davie, in his official capacity as the Chair of the Civilian Complaint Review Board, Civilian Complaint Review Board,

Defendants-Appellees,

Communities United for Police Reform, The New York Times Company,

Intervenors.

TABLE OF CONTENTS

	<u>PAGE</u>
TABLE OF AUTHORITIES	ii
CORPORATE DISCLOSURE STATEMENT	iii
STATEMENT OF INTEREST OF <i>AMICUS CURIAE</i>	1
BACKGROUND	4
ARGUMENT	6
I. APPELLANTS' REQUEST FOR A PRIOR RESTRAINT PREVENTING THE PUBLICATION OF INFORMATION OF SIGNIFICANT PUBLIC IMPORTANCE HAS FAR-REACHING IMPLICATIONS FOR OTHER NON-PARTIES, INCLUDING LEGAL AID.	6
II. THE DISTRICT COURT LACKED JURISDICTION TO ENJOIN NYCLU COMPOUNDING THE FIRST AMENDMENT VIOLATION	14
CONCLUSION	16
CERTIFICATE OF COMPLIANCE WITH FRAP 32(A)	18

TABLE OF AUTHORITIES**Page(s)****Rules and Statutes**

N.Y. Pub. Officers L. § 84	4
----------------------------------	---

Cases

<i>Alemite Mfg. Corp. v. Staff</i> , 42 F.2d 832 (2d Cir. 1930).....	14
<i>Alexander v. United States</i> , 509 U.S. 544 (1993).....	7
<i>CBS Inc. v. Davis</i> , 510 U.S. 1315 (1994).....	8
<i>N.Y. Times Co. v. United States</i> , 403 U.S. 713 (1971).....	7-8
<i>Neb. Press Ass’n v. Stuart</i> , 427 U.S. 539 (1976).....	7
<i>People v. Gissendanner</i> , 48 N.Y. 2d 543 (1979).....	15
<i>Pitt. Press Co. v. Pitt. Commission on Human Rels.</i> , 413 U.S. 376 (1973).....	7
<i>Spin Master Ltd. v. 158</i> , No. 18-CV-1774 (LJL), 2020 WL 2766104 (S.D.N.Y. May 28, 2020)	14-15
<i>United States v. Quattrone</i> , 402 F.3d 304 (2d Cir. 2005).....	7

CORPORATE DISCLOSURE STATEMENT

The Legal Aid Society states that it has no parent corporation and that no publicly held corporation owns 10% or more of its stock.

Amicus curiae the Legal Aid Society (“Legal Aid”), a long-time advocate for police reform on behalf of itself and its clients, respectfully submits this brief in support of *amicus curiae*-appellee New York Civil Liberties Union (“NYCLU”) and in opposition to the emergency appeal of plaintiff-appellants Police Benevolent Association of New York; Correction Officers’ Benevolent Association of the City of New York; Sergeants Benevolent Association; Lieutenants Benevolent Association; Captains’ Endowment Association; Detectives’ Endowment Association; Uniformed Fire Officers Association; and Uniformed Firefighters Association of Greater New York (collectively, the “Appellants” or the “Unions”) seeking to reinstate a temporary restraining order vacated by the District Court (Failla, J.) against NYCLU that prohibited disclosure of certain officer disciplinary records (the “Records”) received by NYCLU from defendant Civilian Complaint Review Board (“CCRB”) pursuant to the N.Y. Freedom of Information Law (“FOIL”).

STATEMENT OF INTEREST OF *AMICUS CURIAE*¹

Legal Aid is the oldest and largest provider of legal services to low-income families and individuals in the United States. Founded in 1876, Legal Aid annually

¹ Pursuant to Local Rule 29.1(b) and Federal Rules of Appellate Procedure 29(c)(5), Legal Aid declares that no party's counsel authored this brief, in whole or in part; nor did any party, their counsel, or any other person contribute money toward preparation or submission of this brief.

provides legal assistance to families and individuals in hundreds of thousands of matters in every borough of New York City. Legal Aid serves as the primary public defender of low-income people prosecuted in the New York court system in all five New York City boroughs. For years, Legal Aid has used police and correction officer disciplinary records in its representation of individual clients and worked towards transparency and accountability in the City through litigation, policy reform and advocacy to ensure public access to officer discipline records.

Transparency in officer misconduct records is critical for all actors in the criminal justice system,² but few people are more directly impacted by issues of officer credibility than those who are prosecuted for crimes based on officer observations, statements, and testimony. Within the first seventy-two hours of an arrest, prosecutors make charging decisions and judges decide whether to remand, release, or set bail, often based on the word of police officers. When relevant information on an officers' misconduct record is available, Legal Aid's criminal defense attorneys provide this information to prosecutors and judges, often leading to better outcomes for Legal Aid's clients, including the dismissal of charges or pre-trial release. Timely access to police misconduct records can mean the difference

² See, e.g., James C. McKinley, Jr., *Manhattan District Attorney Demands Access to Police Records*, N.Y. Times (July 8, 2018), <https://www.nytimes.com/2018/07/08/nyregion/manhattan-district-attorney-police-records.html>.

between being released from police custody versus spending months or even years incarcerated pre-trial, losing a job, losing custody of children, and other devastating collateral consequences of facing criminal charges. Public access to these records is critical because the vast majority of criminal cases are resolved by plea agreement before the complicated and time-consuming process of criminal discovery of such records can be completed.

Legal Aid maintains and publishes the nationally recognized Cop Accountability Project (“CAP”) database, which collects information on police misconduct and abuses. Legal Aid has also filed and litigated numerous FOIL requests seeking access to the records that the Unions seek to enjoin the City and NYCLU from disclosing in this case, and has pursued every available opportunity known to secure information falling into those broad categories of records, including by advocating strenuously for City agencies to proactively disclose them.

Further, Legal Aid’s law reform units use officer misconduct records in civil rights litigation on behalf of victims of police misconduct and to contribute to public and policymaker understanding of the failings of the NYPD’s systems for holding officers accountable for misconduct. Every day that the information possessed by NYCLU is kept from the public harms Legal Aid’s ability to serve its clients and raises serious questions on whether such far-reaching orders, applied to non-parties to the litigation, could be extended to Legal Aid itself, further hampering its ability

to serve its clients and perform its role in advising policymakers and the media on issues of police misconduct.

BACKGROUND

FOIL presumptively provides members of the public access to *all* state and local government records unless an exemption applies. *See* N.Y. Pub. Officers L. § 84 (“[G]overnment is the public’s business and [] the public, individually and collectively and represented by a free press, should have access to the records of government”). Prior to June 2020, Section 50-A of New York’s Civil Rights Law served as one such exemption, providing a categorical bar to disclosure of certain officer disciplinary records. In June, as part of a set of reforms to enhance government transparency and police accountability, New York repealed Section 50-a. The express purpose of the repeal was to permit public access to officer disciplinary records in order to bring greater public accountability to policing in the state.

Following the repeal of Section 50-a, NYCLU and dozens of other organizations, including Legal Aid, submitted FOIL requests to the City for officer disciplinary records that were previously blocked from disclosure by Section 50-a. NYCLU’s FOIL request was submitted to defendant CCRB, which had publicly announced following Section 50-a’s repeal that it planned to release a database for police misconduct allegations. NYCLU, Legal Aid, and other members of the public

participated in pre-release, public demonstrations of the database. On July 14, the CCRB responded to NYCLU's FOIL request and produced a data file containing disciplinary records for approximately 81,000 current and former NYPD officers through the New York City open records portal. Legal Aid, media organization ProPublica, and dozens of others also possess subsets of the database.

On July 14, after CCRB provided the Records to NYCLU, the Unions filed an action (the "Action") in state court to enjoin CCRB and other agencies and officials (collectively, the "City")³ from proactively releasing unproven or non-final disciplinary records and settlement agreements. The records at issue in the Action include some, but not all, of the Records produced to NYCLU. The Unions brought the Action more than a month after Section 50-a was repealed, and well after the City and cities across New York announced plans to disclose records.

The City removed the Action to federal court. After removal, NYCLU moved to participate as *amicus curiae* in the proceedings and appeared in that capacity at a July 22 hearing on the Unions' motion for a temporary restraining order against the City. The District Court found during that hearing that NYCLU "acted in concert" with the CCRB to release the Records it received pursuant to FOIL and enjoined

³ The City defendants are Bill de Blasio; Daniel Nigro; Cynthia Brann; Dermot F. Shea; and Frederick Davie, all in their official capacities, as well as the CCRB; the Fire Department of the City of New York; the New York City department of Correction; the New York City Police Department; and the City of New York.

NYCLU from “disclos[ing] [the records] further, internally or externally” (the “TRO”). *See* Hr’g Tr. (“July 28 Tr.”) at 79:13–15; 80:6–13, 88:8–11, 88:14–19, *Uniformed Fire Officers Ass’n v. Bill de Blasio, et al.*, No. 20-cv-5441 (S.D.N.Y. July 28, 2020).

At a hearing the following week on July 28, and after receiving briefing on the injunction, the District Court reversed its prior decision. The District Court held that it lacked jurisdiction over NYCLU because NYCLU received the Records before any injunctive relief was entered by a state or federal court; the District Court also acknowledged that, irrespective of the jurisdictional issue, NYCLU’s argument that the TRO constituted a prior restraint in violation of the First Amendment was “quite strong.” July 28 Tr. at 30:2–4. Consequently, the District Court entered an order lifting the TRO against NYCLU, but extended it for 24 hours after entry to provide an opportunity for the instant appeal. *Order, Uniformed Fire Officers Ass’n v. Bill de Blasio, et al.*, No. 20-cv-5441 (S.D.N.Y. July 29, 2020), ECF No. 38; July 28 Tr. at 30:6–11.

ARGUMENT

I. APPELLANTS' REQUEST FOR A PRIOR RESTRAINT PREVENTING THE PUBLICATION OF INFORMATION OF SIGNIFICANT PUBLIC IMPORTANCE HAS FAR-REACHING IMPLICATIONS FOR OTHER NON-PARTIES, INCLUDING LEGAL AID.

The Court should reject Appellants' request to reinstate the TRO because the TRO was an unjustified prior restraint in violation of the First Amendment, infringing not only the NYCLU's right to publish but on the public's – and Legal Aid's – right of access to information of significant public interest. Prior restraints occur when speech is suppressed “before an adequate determination that [the speech] is unprotected by the First Amendment,” *Pitt. Press Co. v. Pitt. Commission on Human Rels.*, 413 U.S. 376, 390 (1973). Prior restraints constitute “the most serious and the least tolerable infringement on First Amendment rights,” *Neb. Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976), and are subject to a “heavy presumption” against constitutional validity. *United States v. Quattrone*, 402 F.3d 304, 310 (2d Cir. 2005). “Temporary restraining orders and permanent injunctions – *i.e.*, court orders that actually forbid speech activities – are classic examples of prior restraints.” *Alexander v. United States*, 509 U.S. 544, 550 (1993).

The presumption against prior restraints may only be overcome under exceptional circumstances such as where speech would impact national security in a way to “surely result in direct, immediate, and irreparable damage to our Nation

or its people.” *N.Y. Times Co. v. United States*, 403 U.S. 713, 730-33 (1971) (Stewart, J., concurring); *CBS Inc. v. Davis*, 510 U.S. 1315, 1317 (1994) (“Even where questions of allegedly urgent national security, or competing constitutional interests are concerned, [the Supreme Court has] imposed this ‘most extraordinary remed[y]’ only where the evil that would result from the reportage is both great and certain and cannot be mitigated by less intrusive measures.”) (citing *N.Y. Times*, 403 U.S. at 713, *Neb. Press Assn.*, 427 U.S. at 559)). The Unions do not even try to defend the TRO under that standard, nor could they.

The Court should affirm the order lifting the TRO without further delay. So long as the TRO constrains NYCLU’s speech, the public will continue to be denied access to important information and the TRO will thwart efforts to hold government officials accountable for wrongdoing and inform the public and policymakers about critical issues relating to police misconduct, an issue that in recent months has consumed public and political attention. The Records withheld by the TRO reflect allegations of unconstitutional and unlawful conduct by numerous officers, including information suggesting the use of excessive force, unjustified searches and seizures, discrimination on the basis of protected status, and other inappropriate and offensive conduct. The public entrusts law enforcement officers with substantial authority over the life and liberty of members of the public, with limited real-time oversight as compared to other civil servants. The Records also reflect information

about police and municipal responses to such allegations of wrongdoing, shedding light on the operation of New York's systems for holding officers accountable. Publication of the Records returns to the public a much-needed means of holding both officers and those trusted to supervise them accountable that has been missing for decades because of Section 50-a, which was used as a shield to prevent such information from being publicly disclosed.

The TRO also directly impacts Legal Aid's representation of its clients involved in criminal proceedings. Legal Aid routinely uses officer disciplinary history in connection with cross-examinations and suppression motions. However, those records are generally not available at the earliest stages of a criminal proceeding. Legal Aid therefore generally has no opportunity to collect and present evidence about disciplinary histories when a state court criminal judge is deciding whether to grant bail or remand based on the statements of individual officers. If the TRO is lifted and the Records are published, Legal Aid and other defenders across the City will have access to this critical information about individual officers and be able to provide it to state court judges before they make these important decisions, as well as using it to provide accurate advice to clients in developing legal strategies in their defense.

Additionally, Legal Aid's law reform units use officer misconduct in civil rights litigation on behalf of victims of police misconduct. Information on officers'

past misconduct and whether or not the officers received discipline is often directly relevant to the claims Legal Aid raises on behalf of its clients in civil rights litigation.⁴ While Legal Aid is sometimes able to obtain officer misconduct records in criminal court discovery, Legal Aid's clients include individuals who were mistreated by the police but never arrested.⁵ Without publicly available police misconduct records or discovery in criminal cases, Legal Aid's ability to analyze the failings of the disciplinary system that contributed to abuses of its clients' rights is significantly hampered.

Further, the TRO directly impacts Legal Aid's ability to analyze police misconduct patterns and contribute to public and policymaker understanding of issues related to police accountability.⁶ The records obtained by NYCLU through

⁴ For example, the 37 CCRB allegations of misconduct against NYPD Detective Fabio Nunez, who brutally assaulted Legal Aid client Tomás Medina, are directly relevant to the Legal Aid's *Monell* claim against the City of New York for failing to supervise and discipline officers for unlawful use of force. *See Complaint, Medina v. City of N.Y.*, No. 19-CV-09412-AJN-OTW (S.D.N.Y. Oct. 10, 2019), ECF No. 1 at ¶¶ 5, 10, 140-41.

⁵ *See, e.g., Amended Complaint, Belle v. City of N.Y.*, No. 19-CV-02673-VEC (S.D.N.Y. Jan. 3, 2020), ECF No. 35 (alleging policy of detention without reasonable suspicion).

⁶ Legal Aid regularly reports to the public and policymakers on issues of police accountability. *See, e.g.,* The Legal Aid Society, *Racial Disparities in NYPD's COVID-19 Policing*, (May 2020), https://legalaidnyc.org/wp-content/uploads/2020/05/LAS_Racial-Disparities-in-NYPDs-COVID-19-Policing_5.20.20_5PM_FINAL.pdf; Press Release, Redmond Haskins, *In 2019 Alone, New Yorkers Filed Roughly 1,400 Lawsuits Against the NYPD for Alleged*

the FOIL process represent a more complete dataset than has been previously released. This data has the potential to shed light on many important issues related to civilian complaints against the NYPD, the CCRB's investigations into these complaints, and the NYPD's disciplinary process in response to these complaints. A much smaller subset of this dataset was published by ProPublica in late July, and already the press and members of the public have identified significant patterns in police misconduct that were previously obscured by the now-repealed Section 50-a: One in nine NYPD officers has had a complaint against them substantiated, 34 officers in the database have faced 40 or more allegations, and 303 officers have had five or more substantiated allegations, yet remain employed.⁷ Though the available

Misconduct (Jan. 31, 2020), <https://legalaidnyc.org/wp-content/uploads/2020/01/01-31-20-New-Yorkers-Filed-Roughly-1400-Lawsuits-Against-The-NYPD-For-Alleged-Misconduct.pdf>.

⁷ See, e.g., Eric Umansky, *We're Publishing Thousands of Police Discipline Records That New York Kept Secret for Decades*, ProPublica (July 26, 2020), <https://www.propublica.org/article/nypd-civilian-complaint-review-board-editors-note>; Aaron Feis, *NYPD disciplinary records reveal a host of substantiated complaints: report*, New York Post (July 26, 2020), <https://nypost.com/2020/07/26/nypd-records-reveal-a-host-of-substantiated-complaints-report/>; Christopher Robbins et al., *Newly Released Data Shows 1 Out Of Every 9 NYPD Officers Has A Confirmed Record Of Misconduct*, Gothamist (July 28, 2020), <https://gothamist.com/news/nypd-police-ccrb-database-shows-confirmed-record-misconduct>; Jose Pagliery (@Jose_Pagliery), TWITTER (July 29, 2020, 9:48 AM), https://mobile.twitter.com/Jose_Pagliery/status/1288471444490420227; *Reportes revelan que policías de Nueva York señalados por abuso de autoridad no reciben los castigos acordados*, Univision (July 28, 2020),

data shows only brief descriptions of the alleged misconduct, ProPublica reports that the records reflect nearly 5,000 allegations relating to “physical force,” nearly 2,000 allegations concerning “frisks,” and more than 600 allegations described as “gun pointed.”⁸

As the N.Y. legislature recognized in repealing Section 50-a, officers that ultimately engage in serious misconduct often have histories of complaints that, if known and acted upon, could have prevented the wrongdoing in the first place. The dataset obtained by NYCLU promises to shed more light on a department that has historically “ke[pt] the public in the dark about police discipline, [which] breeds mistrust, and reduces accountability.”⁹ Daniel Pantaleo, the NYPD officer who killed Eric Garner, was shielded from accountability by Section 50-a and City officials’ refusal to release any records relating to his disciplinary history. Eventually, Pantaleo was found to have a police disciplinary history “among the

<https://www.univision.com/local/nueva-york-wxtv/reportes-revelan-que-policias-de-nueva-york-senalados-por-abuso-de-autoridad-no-reciben-los-castigos-acordados-video>.

⁸ Umansky, *supra* n. 7

⁹ Hon. Mary Jo White, Hon. Robert L. Capers, and Hon. Barbara S. Jones, *The Report of the Independent Panel on the Disciplinary System of the New York City Police Department*, 5 (Jan. 25, 2019), <https://www.independentpanelreportnypd.net/index.html>. See also Robert Lewis, et al., *New York Leads in Shielding Police Misconduct*, N.Y. Pub. Radio WNYC (Oct. 15, 2015), <https://www.wnyc.org/story/new-york-leads-shielding-police-misconduct/>.

worst on the force,”¹⁰ including two civilian complaints that led to settlements with the City. During debates on the repeal, Assemblywoman Catalina Cruz highlighted that Pantaleo had “seven disciplinary complaints and 14 allegations against him,” while Assemblyman Daniel O’Donnell acknowledged that, absent a repeal of Section 50-a, it would be impossible for New Yorkers to know whether a particular officer that engaged in wrongdoing had a history of such misconduct. *Tr. of Regular Session*, N.Y. State Assembly (June 9, 2020), <https://nyassembly.gov/av/session/>.

Beyond depriving Legal Aid of information that would assist in its direct representation of clients as well as its policy analysis and advocacy, the injunction against the NYCLU’s publication of the Records, especially as a non-party to the litigation, would have far-reaching implications, such as chilling the speech of other non-parties, including Legal Aid. As noted in its letter to the District Court, Legal Aid obtained records from the same database at issue in the instant TRO as part of a series of demonstrations the CCRB conducted to preview its planned database, including a preview at its July Board meeting. *Letter Motion to file Amicus Brief at 3, Uniformed Fire Officers Ass’n v. Bill de Blasio, et al.*, No. 20-cv-5441 (S.D.N.Y. July 28, 2020), ECF No. 33. Legal Aid has refrained from publishing any non-public records obtained in this manner pending resolution of the injunction, and it is unclear

¹⁰ Carimah Townes, Jack Jenkins, *EXCLUSIVE DOCUMENTS: The disturbing secret history of the NYPD officer who killed Eric Garner*, Think Progress (Mar. 21, 2017), <https://thinkprogress.org/daniel-pantaleo-records-75833e6168f3/>.

whether such publication would run afoul of the far-reaching TRO against the NYCLU or, even if it did not, lay a foundation for a new injunction that did. *Id.*; see July 28 Tr. at 79:13-15, 88:9-11.

II. THE DISTRICT COURT LACKED JURISDICTION TO ENJOIN NYCLU COMPOUNDING THE FIRST AMENDMENT VIOLATION

The District Court correctly vacated the TRO because it lacked jurisdiction over NYCLU, which is not a party to the Action and appeared in the District Court solely as an *amicus curiae* to express its views as a public interest organization dedicated to government reform and civil rights. The District Court does not have the power to enjoin an entity that is not a party before it. Rule 65 of the Federal Rules of Civil Procedure permits injunctions only against parties and those “acting in concert” to violate a court order. *Alemite Mfg. Corp. v. Staff*, 42 F.2d 832, 832–33 (2d Cir. 1930) (Hand, J.) (“[N]o court can make a decree which will bind any one but a party; a court of equity is as much so limited as a court of law; it cannot lawfully enjoin the world at large, no matter how broadly it words its decree.”). As the District Court ultimately found, NYCLU could not have been acting in concert to violate a court order because the Action had not been filed when it received the Records in response to its FOIL request, and there was no court order in place when NYCLU received and downloaded the Records. *Spin Master Ltd. v. 158*, No. 18-CV-1774 (LJL), 2020 WL 2766104, at *20 (S.D.N.Y. May 28, 2020) (holding that to be liable for “acting

in concert[,]” the alleged aider and abettor must be found to have “had actual knowledge of the judicial decree and violated it... for the benefit of, or to assist, a party subject to the decree”). Appellants have provided this Court with no basis to disturb the correct factual finding that the NYCLU did not act in concert with the City.

If the Court were to determine otherwise, it would substantially chill Legal Aid’s right to petition government and its ability to pursue its legitimate objectives as an advocate of police reform and primary provider of criminal defense services to low-income New Yorkers. Legal Aid regularly publishes lawfully obtained police misconduct records through its Cop Accountability Project database, which is shared with public defenders across New York City. Many of these records have been obtained through discovery in state criminal court matters pursuant to state law, CRL § 50(a)(2); *People v. Gissendanner*, 48 N.Y. 2d 543 (1979), or through other lawful means of information gathering relating to public records, and those processes often involve informal discussions with the custodians of such records about sharing the information. It is neither uncommon nor improper for such discussions to expedite production of certain information or result in negotiated processes for disclosure. Holding that the NYCLU’s receipt of information pursuant to FOIL under the

circumstances discussed during the July 28 hearing constitutes “acting in concert”¹¹ with the City such that they can be made subject to an injunction against publication forces Legal Aid to put its entire database – a project in which it has invested heavily and on which people across the country rely – in jeopardy merely for exercising their right to petition government officials to fulfill their obligations under state freedom of information laws and uphold important values of transparency and accountability.

CONCLUSION

Legal Aid respectfully requests that the Court affirm the District Court’s order lifting the TRO against NYCLU.

¹¹ The Unions’ claim that the CCRB’s request of Legal Aid not to publish the data Legal Aid obtained by accessing a URL demonstrated in both public and private meetings somehow “suggests concerted action between CCRB and NYCLU” is illogical. Appellants’ Br. at 7, *Uniformed Fire Officers Ass’n v. Bill de Blasio, et al.*, No. 20-2400 (2d Cir. July 27, 2020), ECF No 95. The CCRB’s request that Legal Aid refrain from publishing any data occurred weeks after Legal Aid obtained the data and only after the Court issued the TRO, and thus cannot set a standard for assessing behavior that took place before that injunction went into effect. More to the point, the CCRB’s request illustrates the harm to Legal Aid and other providers of public defense services should the Court reinstate the TRO, as that request never would have occurred absent the TRO, and Legal Aid’s accession to that request is a manifestation of the chilling effect the District Court’s decision has had on Legal Aid’s ability to share and utilize legally obtained public records in the public interest.

Dated: August 17, 2020
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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that:

1. This brief complies with this Court's the type-volume limitations of Federal Rule of Appellate Procedure 29(a)(5) and Local Rule 29.1(c) because it contain 4402 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f); and

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14 point Times New Roman font.

/s/ Roger A. Cooper

Roger A. Cooper