To Be Argued By:
MATTHEW C. DALY
Time Requested: 30 Minutes

APL-2024-00057
New York County Clerk's Index No. 159132/21

Court of Appeals

STATE OF NEW YORK

NYP HOLDINGS, INC. and CRAIG MCCARTHY,

Petitioners-Respondents,

—against—

NEW YORK CITY POLICE DEPARTMENT, DERMOT F. SHEA, in his official capacity as Commissioner of the New York City Police Department,

Respondents,

POLICE BENEVOLENT ASSOCIATION OF THE CITY OF NEW YORK, INC.,

Respondent-Appellant.

REPLY BRIEF FOR RESPONDENT-APPELLANT

MATTHEW C. DALY
GOLENBOCK EISEMAN ASSOR
BELL & PESKOE LLP
711 Third Avenue
New York, New York 10017
Telephone: (212) 907-7300
Facsimile: (212) 754-0330

FREDERICK W. VASSELMAN
OFFICE OF THE GENERAL COUNSEL
OF THE POLICE BENEVOLENT
ASSOCIATION OF THE CITY
OF NEW YORK, INC.
125 Broad Street
New York, New York 10004
Telephone: (212) 298-9144
Facsimile: (212) 233-3952

Attorneys for Respondent-Appellant

October 17, 2024

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

PRELIMINARY STATEMENT[1]

Petitioners' opposition makes the same error as the First Department below and the other Appellate Division cases they cite – disregarding the rights that the Civil Rights Law granted to police officers to protect their safety and well-being, and on which officers relied in making binding disciplinary decisions. Those rights are subject to continuing protection following the repeal of CRL §50-a pursuant to New York's statutory and common law presumption against retroactivity.

Petitioners' primary argument is inconsistent with and unsupported by the First Department's Decision on appeal. The Court correctly held that a retroactivity analysis is required, but erred by holding that the presumption against retroactivity is overcome. Petitioners now argue that no retroactivity analysis is required at all, relying on subsequently issued decisions from the Second and Fourth Departments. But those decisions did not address, and are incongruent with, GCL §93: it requires a presumption that pre-existing rights continue following a statutory repeal.

Thus, Petitioners' argument that FOIL requires disclosure unless the record falls within an exemption ignores the point. CRL §50-a has always been a FOIL exemption and, for records created while that statute was in effect, GCL §93 requires that the privacy and confidentiality rights continue "as fully and to the same extent

[1] Capitalized terms not otherwise defined have the meanings assigned them in the PBA's opening brief, dated July 12, 2024 ("PBA Br."). The opposition brief of NYP Holdings, Inc. and Craig McCarthy (together, "Petitioners"), dated September 19, 2024, is referred to as "NYP Br."

as if such repeal had not been effected." Petitioners do not cite any case holding that a retroactivity analysis can be circumvented where, as here, a statutory grant of rights is repealed. The cases they cite for this Court's narrow "future transactions" doctrine, and the out-of-state cases they cite, are inapposite because they did not address the repeal of statutory rights or GCL §93 (or any equivalent).

Petitioners' second argument that the presumption against retroactivity is overcome is also unavailing. Acknowledging that there is no express statement of retroactivity, Petitioners rely on the First Department's erroneous holding that retroactivity should be implied because the repeal is purportedly "remedial." This argument fails for three independent reasons.

First, under blackletter New York law, even for a remedial statutory change, retroactivity cannot be implied where, as here, to do so would infringe pre-existing rights. The Civil Rights Law granted officers privacy and confidentiality rights to protect them and their families from harassment and retaliation, on which officers relied for four decades in making disciplinary decisions. Those pre-existing rights cannot be swept away through judicial decision where the legislature was silent.

Second, the repeal of a statutory protection after more than 40 years is not a remedial change within this Court's precedent. The legislature accepted the broad interpretation of CRL §50-a for more than four decades and then decided to repeal

it entirely, which was not a prompt clarification, and one cannot say that the repeal is indicative of what the legislature always intended.

Petitioners focus on the context in which the repeal was passed – during the summer 2020 protests following the murder of George Floyd – but all the legislative record shows in regards to timing is that the repeal bill, initially introduced four years earlier in 2016, had sufficient support in the summer of 2020, and the legislature acted on that support. In fact, the record shows that in rushing to pass the bill over the course of less than a week, the legislature did not consider all relevant issues or hear from all stakeholders and acknowledged that issues would need to be revisited. Retroactivity was never discussed or decided. The ambiguous statements Petitioners cherry-pick from a handful of individual legislators fall far short of the necessary showing that "the legislature contemplated the retroactive impact on substantive rights and intended that extraordinary result." *Regina Metro. Co. v. N.Y. State Div. of Hous. & Cmty. Renewal*, 35 N.Y.3d 332, 370-71 (2020).

Third, even if the repeal were properly characterized as remedial, that label is not enough. Rather, a court should not write retroactivity into the legislation unless "necessary implication requires it." *Majewski v. Broadalbin-Perth Cent. Sch. Dist.*, 91 N.Y.2d 577, 584 (1988). Petitioners' argument that the repeal would be rendered meaningless absent retroactivity is demonstrably false. There are reams of records in law enforcement agencies across the State that have been generated in the more

than four years and counting since the repeal, which are now subject to disclosure. If CRL §50-a had not been repealed, those records would still be protected. Thus, the repeal effectuates a substantial change to New York policy when applied on a prospective basis. For a court to imply retroactivity would overstep into the legislative role to decide contested policy issues and improperly circumvent ongoing legislative processes where a retroactivity bill was introduced last year, but not enacted.

The Court should reverse and hold that pre-repeal records continue to be protected.

ARGUMENT

I. THE NEW YORK CIVIL RIGHTS LAW GRANTED OFFICERS PRIVACY AND CONFIDENTIALITY RIGHTS THAT CONTINUE TO BE ENFORCEABLE FOR RECORDS THAT PREDATE THE STATUTE'S REPEAL

A. The Court Should Reject Petitioners' Argument That No Retroactivity Analysis Is Required Because It Disregards GCL §93 And Officer's Pre-Existing Rights

Contravening the First Department's Decision on appeal, Petitioners now argue that no retroactivity analysis is required at all, relying on the subsequently issued decisions from the Second and Fourth Departments: *Newsday, LLC v. Nassau Cty. Police Dep't*, 222 A.D.3d 85 (2d Dep't 2023), and *Abbatoy v. Baxter*, 227 A.D.3d 1376 (4th Dep't 2024). But those decisions are erroneous for the reasons set forth in the PBA's opening brief, including because they did not address, and are

inconsistent with, GCL §93's presumption that pre-existing rights continue following a statutory repeal. And they create bad law by sweeping away pre-existing rights and reliance interests without any legislative instruction to do so. PBA Br. 29-36. Petitioners' attempt to bolster their argument with non-binding policy statements from the Committee on Open Government and out-of-state cases is unhelpful, as those sources did not address the issues raised by this appeal.

1. Petitioners' Argument That No Retroactivity Analysis Is Required Conflicts With GCL §93

Petitioners' argument that no retroactivity analysis is required cannot be reconciled with GCL §93, which requires a presumption that: "The repeal of a statute . . . shall not affect or impair any . . . right accruing, accrued or acquired . . . prior to the time such repeal takes effect, but the same may be enjoyed, asserted, [or] enforced . . . as fully and to the same extent as if such repeal had not been effected."[2]

GCL §93 is clearly applicable (PBA Br. 31), as there is no question this case involves the repeal in full of CRL §50-a. R209. Moreover, Petitioners do not and cannot dispute any of the following facts confirming that officers had pre-existing, affirmative rights under CRL §50-a: the statute was a "Right of Privacy" granted by the Civil Rights Law; the Sponsor's Memorandum for the repeal acknowledged that

[2] The common law rule requiring a retroactivity analysis is equally applicable, providing that where a statutory change "would impair rights a party possessed when he acted," the "traditional presumption teaches that [the change] does not govern absent clear [legislative] intent favoring such result." *Landgraf v. USI Film Prods.*, 511 U.S. 244, 280 (1994); *accord Regina Metro.*, 35 N.Y.3d at 365.

§50-a "creates a special right of privacy" (R208); §50-a created a right enforceable by officers; and this Court held that §50-a was a "critical statutory protection," "guarantee [of] confidentiality," and "promise of confidentiality," *N.Y. Civ. Liberties Union v. N.Y. City Police Dep't*, 32 N.Y.3d 556, 567-68 (2018). PBA Br. 31. Further, CRL §50-a was for the specific protection of officers and their families against harassment, retaliation, and exploitation. PBA Br. 8.

Thus, this case is not about a mere "expectation" that existing law will remain unchanged. NYP Br. 41. It is about a statutory right affirmatively granted to officers, enforceable by them, for the protection of their privacy, safety, and well-being. In *Frontier Ins. Co. v. State*, 160 Misc.2d 437 (Ct. Cl. 1993), *aff'd as modified on other grounds*, 216 A.D.2d 975 (3d Dep't 1995), the Court rejected an argument similar to that made by Petitioners here that pre-existing rights should not be protected. The Court distinguished a right that merely "existed because no law prohibited it," which may not be entitled to continuing protection following a statutory change. *Id.* at 449. In contrast, where the individuals "entitled to the benefits of [the statute] received an affirmative grant of protection," the statute provided a "vested right" that cannot be infringed following a statutory change, absent a clear expression of legislative intent to do so. *Id.*

Petitioners' argument that GCL §93 somehow does not protect a statutory grant of privacy and confidentiality rights has no basis in the text of GCL §93 or the

caselaw. As discussed in the PBA's opening brief and Part A.4 below, courts in other states have protected pre-existing confidentiality rights following a statutory change, holding they are substantive, vested rights (PBA Br. 35-36), along with the majority of New York trial courts that addressed this issue with the repeal of CRL §50-a (*id.* at 24-25). Moreover, the text of GCL §93 uses broad language: "shall not affect or impair *any* . . . right accruing, accrued or acquired." (Emphasis added). The use of the phrase "any right" is broad and does not support carving out privacy or confidentiality rights granted by the Civil Rights Law.

Indeed, courts have applied GCL §93 to a wide variety of statutory rights. *See, e.g.*, *850 Co. v. Schwartz*, 15 N.Y.2d 899, 901 (1965) (right to charge emergency rental rate); *Whitehead v. Pine Haven Operating LLC*, 222 A.D.3d 104, 107 (3d Dep't 2023) (immunity for liability from COVID treatment); *Kurtis v. Wyman*, 67 Misc.2d 938, 941 (Sup. Ct. Albany Cty. 1971), *aff'd*, 41 A.D.2d 884 (3d Dep't 1973) (right to pay increase); *Heos v. McCloskey*, 277 A.D. 1129, 1130 (2d Dep't 1950) (right to execute on judgment); *Vandeweghe v. City of N.Y.*, 150 Misc. 815, 820 (Sup. Ct. Bronx Cty. 1934), *aff'd*, 242 A.D. 762 (1st Dep't 1934) (exemption from assessment). On the other hand, Petitioners do not cite any case where a court held that a statutory right was excluded from GCL §93's presumption against retroactivity. There is no basis to create new law writing an exception into GCL §93 for the privacy and confidentiality rights of officers under the repealed Civil Rights

Law. To do so would ignore that individuals make important decisions in reliance on statutory privacy and confidentiality rights and jeopardize the ability to rely on other confidentiality statutes that exist in numerous contexts under New York law. PBA Br. 33-34.[3]

Unable to refute that CRL §50-a granted officers protected rights, Petitioners attempt to muddy the issues by repeatedly stating that this case is about amendments to FOIL. NYP Br. 4, 19, 21, 24-25. It is not. At issue is the *repeal* of a provision of the Civil Rights Law – an independent statute – that granted affirmative rights for the protection of officers, thereby triggering GCL §93.

Thus, Petitioners cannot avoid a retroactivity analysis by arguing that a record must be disclosed unless it falls within one of FOIL's exemptions. NYP Br. 21. Petitioners argue that CRL §50-a is no longer an applicable exemption because it has been repealed, but this argument ignores the effects of GCL §93: the pre-existing privacy rights continue "as fully and to the same extent *as if such repeal had not been effected*." (Emphasis added).[4]

---

[3] Petitioners' argument that some of the other confidentiality statutes involve medical records that would be protected by HIPAA or the privacy exemption (NYP Br. 41 n.8) is speculative, and the PBA cited other confidentiality statutes that are outside the medical context.

[4] Similarly, Petitioners' argument that "it has long been understood" that "FOIL renders records maintained by an agency, regardless of creation date, subject to disclosure" (NYP Br. 24) is unhelpful because no New York case has previously addressed the issue here where an independent statute granted affirmative privacy and confidentiality rights belonging to the subject employees, and then was repealed. GCL §93 governs this situation.

Petitioners' argument that the FOIL statute (POL §87) "has been amended more than thirty times since FOIL was passed," and therefore that a ruling in the PBA's favor would purportedly force agencies "to engage in an impossible task of applying various outdated versions of the law" (NYP Br. 21-22), is inaccurate fearmongering. Those FOIL amendments did not involve the issue here – the *repeal* of an *independent statute* granting officers affirmative rights, triggering GCL §93's presumption against retroactivity.

And, in all events, Petitioners' hypothetical does not identify a single example of a FOIL amendment that involved pre-existing privacy rights analogous to the facts here. Nor does it attempt to distinguish minor amendments from substantive ones. And it is important to keep in mind that the presumption against retroactivity is only that – a presumption. If the legislature intends to open pre-repeal records to disclosure, it needs to provide a clear expression of intent for retroactivity. That is not too much to ask. The legislature did not do so here.[5]

As set forth in the PBA's opening brief, to bypass a retroactivity analysis would also sweep away four decades of reliance interests by officers without any legislative directive for this fundamentally unfair result. PBA Br. 8-9, 24-25.

[5] The case Petitioners cite, *Kellog v. Travis*, 100 N.Y.2d 407 (2003), is inapposite for this reason. In *Kellog*, the Court held that GCL §93's presumption against retroactivity was overcome because the statutory amendment at issue – requiring offenders to submit a sample to the DNA identification index – expressly stated that it applied to offenders whose crimes were committed before the effective date of the amendment. *Id.* at 408.

Petitioners disingenuously attempt to manufacture a factual issue regarding officers' reliance, arguing that "nothing in the record supports" that §50-a impacted officers' decision-making (NYP Br. 42), but this argument is easily rejected. Petitioners ignore the sworn statement that: "Reliance on the right to confidentiality certainly impacted police officer decision-making in responding to complaints, such as a decision to compromise a meritless claim to avoid burden and distraction rather than vigorously contesting it to protect one's reputation." R322. Moreover, numerous lower courts have recognized the important reliance interests of officers on §50-a's privacy rights and that such reliance interests are subject to protection following the repeal. PBA Br. 24-25. On the other hand, no court has disagreed that such reliance occurred. The Appellate Division cases ignored this issue.[6]

Accordingly, GCL §93 requires a presumption that officers' pre-existing privacy and confidentiality rights under §50-a continue "as if such repeal had not been effected." As such, pre-repeal records are presumptively exempt from FOIL. That presumption cannot be overcome unless there was a clear expression of legislative intent for retroactivity, which there was not for reasons set forth in the PBA's opening brief and Part B below.

[6] Petitioners also argue for the first time that the PBA needs to prove that the specific 144 officers who are the subject of the FOIL Requests relied on CRL §50-a. NYP Br. 42. But the question of the retroactivity of a State statute affecting tens of thousands of police officers, firefighters, and corrections officers is not based on the particular circumstances of any one individual, and Petitioners do not cite any case saying otherwise.

2. The "Future Transactions" Doctrine Is Inapplicable

Petitioners also rely on the "future transactions" doctrine to argue that no retroactivity analysis is required (NYP Br. 23-24), but that doctrine is inapplicable. PBA Br. 31-33.

First, the future transactions doctrine is a common law doctrine that has no applicability to, and cannot override, the statutory mandate of GCL §93 that where, as here, a statute is repealed, the pre-existing rights presumptively continue with the same force and effect as if there had been no repeal. Petitioners do not cite any case applying the future transactions doctrine where GCL §93 is applicable.

Second, a FOIL request or other discovery request seeking records created while CRL §50-a was in effect does not involve only future transactions, and such an argument ignores the last four decades of reliance interests by officers on the statutory promise of confidentiality. PBA Br. 32. Petitioners focus only on the burden on agencies responding to FOIL requests, arguing that the repeal does not require agencies to re-open old requests, and therefore purportedly has no retroactive effect. NYP Br. 3, 26. But this case does not involve merely an amendment to FOIL impacting only agency disclosure obligations. The affected right at issue is that of *police officers* who were the beneficiaries of CRL §50-a, were granted a civil right of privacy to protect them against harassment, retaliation, and exploitation (PBA Br. 8), and made binding disciplinary decisions in reliance on that statutory right.

Petitioners' argument that "the repeal of Section 50-a does not change any of the outcomes of binding disciplinary decisions" (NYP Br. 23) only underscores the unfairness of reaching backwards to publicize disciplinary records that were created under a promise of confidentiality. Innocent officers acceded to responsibility in response to meritless disciplinary charges in reliance on the statutory guarantee of confidentiality. R322. If they had known the records would become public – exposing their reputations, safety, and well-being – they would have fought the charges. They cannot go back now and undo those decisions. *See People v. Francis*, 74 Misc.3d 808, 820 (Sup. Ct. Monroe Cty. 2022) ("To now reach back and lay bare matters, where that officer believed such would not be subject to public view at the time disciplinary action was meted out, is, in the Court's opinion, patently unfair.").

This Court has never applied the future transactions doctrine to any remotely analogous case. Rather, this Court's precedents show that the doctrine has been limited to the inapposite context where a party is applying for a future privilege such as a license or job, and there are antecedent events that impact the entitlement to that privilege. For example, the case Petitioners cite, *Acevedo v. N.Y. State Dep't of Motor Vehicles*, 29 N.Y.3d 202 (2017), involved drivers whose licenses were revoked for drunk driving. *Id.* at 212. The Commissioner of the DMV had discretion to grant them new licenses. *Id.* at 214. At issue were amended regulations of the DMV allowing the Commissioner to conduct a lifetime review of the applicant's

driving record. *Id.* at 215. The petitioners argued that their prior offenses could not be considered because they occurred before the regulations were adopted. *Id.* at 228. The Court rejected that argument, holding that "[t]he Commissioner's consideration of 'antecedent events' – petitioners' driving records – does not, by itself, render the Regulations 'retroactive' in nature." *Id.* at 229. Significantly, there was no prior statute that granted confidentiality over the prior offense records.

This Court should not expand the future transactions doctrine to this case because it would violate GCL §93 and vitiate affirmative statutory rights on which officers relied.

3. The Committee On Open Government Confirms That There Has Been No Clear Statement Of Retroactive Intent

The annual reports from the Committee on Open Government from 2020-2023 that Petitioners cite (NYP Br. 18-20, 24) do not help, and actually undermine, Petitioners' argument.

Initially, Committee on Open Government's opinions are not binding on the courts. *Digital Forensics Unit, Legal Aid Society v. Records Access Officer, N.Y. City Police Dep't*, 214 A.D.3d 532, 534 (1st Dep't 2023). The Committee's annual reports that Petitioners cite are particularly unhelpful because they are not even advisory opinions.

Indeed, the Committee statements misconstrue the issue, just as Petitioners do, framing it as "'whether the amendments to FOIL concerning the disclosure of

law enforcement disciplinary records have retroactive effect.'" NYP Br. 24 (quoting COOG 2020 Report at 7-8). As discussed above, this case is not about "amendments to FOIL," but the *repeal* of a provision of the *Civil Rights Law*. The Committee is not an expert on the Civil Rights Law, the legal effect of a statutory repeal, or the law of retroactivity. Its statements are not entitled to any weight in this case.

In all events, the Committee's statements only underscore the ambiguity of the legislative record. They acknowledge that there is an "important need for the Legislature to act to clarify its intent." COOG 2022 Report at 6; *see also* COOG 2023 Report at 7. In fact, the Committee notes that a bill was introduced last year to, among other things, make the repeal of §50-a retroactive. COOG 2023 Report at 8-9. But that bill has *not* been enacted. This Court should not bypass the legislative process by holding that pre-repeal records are subject to disclosure where the legislature itself has tried, but been unable, to reach consensus on this issue.

4. The Relevant Out-Of-State Cases Support The PBA Not Petitioners

As set forth in the PBA's opening brief, *Salt Lake Child & Fam. Therapy Clinic, Inc. v. Frederick*, 890 P.2d 1017 (Utah 1995), is on point because it involved the repeal of a statutory privilege against disclosure. PBA Br. 35-36. Its holding withstands any procedural distinction that Petitioners attempt to muster: statutory confidentiality is a "substantive right" and "vested right," and confidentiality rights should be determined as of the date the record was created, not the date a disclosure

request is made. *Id.* at 1019-20. Other courts are consistent with that holding. *See Coventry First, LLC v. Florida Office of Ins. Regulation*, 30 So.3d 552, 559-60 (Fla. Dist. Ct. of App. 2010) (the "substantive rights" to confidentiality "already had vested"); *Venosh v. Henzes*, No. 1498 MDA 2013, 2014 WL 10896822, at *8 n.3 (Pa. Super. Ct. July 11, 2014) ("[t]he application of evidentiary privileges is considered to be a matter of substantive law," and thus applying the law as it existed when the record was created, not when the disclosure request is made).

The three out-of-state cases cited by Petitioners, on the other hand, are inapposite because they did not involve a repeal of an affirmative statutory right or any equivalent of GCL §93. If applied here, they would violate New York law and create bad policy by sweeping away pre-existing, decades-long reliance interests without any analysis of whether that was the legislature's intent.

Petitioners primarily rely on a California trial court case, *L.A. Police Protective League v. City of L.A.*, No. 18STCP03495, 2019 WL 1449721 (Cal. Super. Ct. Feb. 19, 2019). That case involved a narrow amendment to the California Penal Code to provide only that a limited subset of officer personnel records were subject to disclosure – namely, only those involving discharge of a firearm; death or great bodily injury; a substantive finding of sexual assault; or a substantive finding of dishonesty. *Id.* at *1. Thus, the statutory amendment at issue was much narrower than the outright repeal of CRL §50-a at issue here, and California never deemed the

privacy and confidentiality protections as a civil right as they were under New York law. Significantly, the Court in *L.A. Police* stated that the petitioner seeking to avoid disclosure never raised a vested rights argument until reply, and the argument was "undeveloped." *Id.* at *2 n.1. Moreover, the Court relied on California law, inapplicable here, that there is a presumption that rights created by statute are not vested rights. *Id.* at *6. That holding directly conflicts with GCL §93.

The other two out-of-state cases Petitioners cite did not involve any impairment of pre-existing rights. *State of Hawai'i Org. of Police Officers v. Soc'y of Professional Journalists-Univ. of Hawai'i Chapter*, 927 P.2d 386, 389 n.7 (Haw. 1996), involved a statutory amendment that *reduced* the scope of records that could be disclosed. And *Beacon Journal Publ'g v. Univ. of Akron*, 415 N.E.2d 310, 398 (Ohio 1980), did not involve officer personnel files, but rather an amendment that allowed the disclosure of investigatory records (specifically, two "routine incident reports").

Thus, the cases Petitioners cite only underscore that the repeal of CRL §50-a was a far more dramatic change affecting broader rights of officers, which is all the more reason why it should not be applied retroactively without a clear expression of legislative intent to do so.

For all of the foregoing reasons, Petitioners' argument that no retroactivity analysis is required should be rejected, and the Second and Fourth Department

decisions should not be followed. The First Department correctly concluded that a retroactivity analysis is required but, as discussed below, erred in concluding that the presumption against retroactivity is overcome.

B. Petitioners Do Not And Cannot Identify A Basis To Overcome The Strong Presumption Against Retroactivity

Petitioners concede that there is no express statement of retroactivity with the repeal of CRL §50-a. NYP Br. 14. They instead argue that the repeal was purportedly "remedial," and therefore that this Court should imply retroactivity. This argument is meritless for at least three independent reasons. PBA Br. 20-29.

1. The Court Cannot Imply Retroactivity Where the Legislature Was Silent Because This Would Infringe Officers' Vested Rights

First, Petitioners do not dispute the authority cited by the PBA that even a remedial statute cannot be implied to be retroactive where it would infringe vested rights to do so. PBA Br. 23-24. As set forth in the PBA's opening brief and Part A above, implying retroactivity here would vitiate the vested privacy and confidentiality rights of officers granted by the Civil Rights Law. Petitioners do not cite any case where a statute was deemed remedial and implied to be retroactive where, as here, an affirmative statutory right was repealed. Rather, *Ruth v. Elderwood at Amherst*, 209 A.D.3d 1281, 1287 (4th Dep't 2022), addressed a statutory repeal and held that the repeal was *not* retroactive and that any attempt to classify the repeal as remedial was "largely immaterial." PBA Br. 21.

Petitioners resort to mischaracterizing the PBA's argument by claiming that it is a "rehash" of the Second Circuit's decision in *Uniformed Fire Officers Ass'n v. de Blasio*, 846 F. App'x 25 (2d Cir. 2021). NYP Br. 42. But that case had nothing to do with the issues of retroactivity or vested rights. It involved a preliminary injunction application where the plaintiffs argued that certain disciplinary records could not be disclosed following the repeal of CRL §50-a because officers' plea agreements incorporated the terms of §50-a. *Uniformed Fire Officers*, 846 F. App'x at 32. Thus, the argument was purely contractual. The Court's holding at issue was limited to the narrow finding that there was insufficient evidence that the terms of §50-a were actually made part of the contracts, and that the contracts should not be implied to incorporate the terms of §50-a because that would forever prevent the legislature from changing the law. *Id.*

In addition to the fact that there are no contract theories at issue here, the Second Circuit's policy concern is not implicated either. The PBA is not arguing that the legislature would be forever barred from opening pre-repeal records to disclosure if it chose to do so. Rather, because retroactivity would infringe the vested rights of officers, that policy judgment cannot be implied by a court, but rather requires a clear expression of retroactive intent by the legislature, which is lacking here.

Petitioners also attempt to downplay the significance of the repeal, arguing that "there is no legal consequence whatsoever to disclosing the disciplinary records sought here." NYP Br. 38. Petitioners ignore, however, that at issue is a civil rights law designed to protect officers and their families against harassment, retaliation, and exploitation. PBA Br. 8. While Petitioners, in their own interests as a private litigant, seek to downplay and disregard the rights of officers, there are serious competing safety, privacy, and law enforcement concerns why the repeal should not be made retroactive. The balancing of these types of competing policies is a matter for the legislature, which did not make any decision on retroactivity.

Accordingly, since applying the repeal of CRL §50-a retroactively would infringe the vested rights of officers, and the legislature did not state that it intended this result, the Court cannot imply retroactivity. The Court does not need to go any further to reverse the Decision.

2. The Repeal Of CRL §50-a After Forty Years Is Not Remedial

Petitioners' implied retroactivity argument also fails because they cannot show that this case falls within the remedial doctrine. PBA Br. 21-22.

The remedial doctrine has been applied where the legislature acted quickly in response to a misinterpretation or misapplication of a statute "to clarify what the law was always meant to do and say." *In re Gleason*, 96 N.Y.2d 117, 122 (2001); *see also Majewski*, 91 N.Y.2d at 585 (same). That was the situation in *Gleason*, where

the Court interpreted a CPLR provision, expressly invited the legislature to amend the provision if it intended a different result, and "[t]he Legislature responded promptly with" a clarifying amendment. 96 N.Y.2d at 119-20; PBA Br. 22 n.6. Thus, the "sense of urgency" that this Court referred to was the legislature's "swift" action in response to the judicial interpretation. *Gleason*, 96 N.Y.2d at 122. Petitioners do not cite any case that has applied the remedial doctrine under remotely analogous facts.[7]

First, this case does not involve a clarifying amendment. The legislature *repealed* CRL §50-a in its entirety. One cannot claim that a complete repeal is a change "to clarify what the law was always meant to do and say." *Gleason*, 96 N.Y.2d at 122.[8]

Second, this case does not involve the type of "urgency" this Court referred to in *Gleason – i.e.*, a prompt reaction to a misinterpretation or misapplication of the

[7] The cases Petitioners cite are inapposite because they involved clarifying amendments. *See Nelson v. HSBC Bank USA*, 87 A.D.3d 995, 996 (2d Dep't 2011) (New York City Council amended the Human Rights Law in response to judicial decisions); *Town of Cortlandt v. N.Y. State Bd. of Real Prop. Servs.*, 36 A.D.3d 823, 825 (2d Dep't 2007) (tax statute was amended to correct a specific interpretation by the Board of Real Property Services).

[8] The question of the original intent behind CRL §50-a in 1976 is highly debatable, which only adds to the ambiguity of the legislative record. Petitioners argue that the statute was intended to be limited to preventing criminal defense attorneys from using police disciplinary records during cross-examination. NYP Br. 31-32. Petitioners do not cite any of the legislative record from 1976 to support that position. In fact, the legislature drafted CRL §50-a broadly, and this Court cited material from the 1976 record to hold that "[u]ndeniably from the legislative record, however, the legislative objective went beyond precluding disclosure on behalf of defendants in pending criminal cases." *Daily Gazette Co. v. City of Schenectady*, 93 N.Y.2d 145, 154-55 (1999).

statute. The legislature adopted CRL §50-a in 1976 and, as Petitioners concede, for decades the courts interpreted it broadly. NYP Br. 7, 31. The legislature accepted the broad interpretation for decades, and thus one cannot say that the repeal is what the legislature always intended from the beginning. Cases directly on point hold that where the legislature waited many years after a statute was interpreted to change it, retroactivity should not be implied. PBA Br. 22-23.

While the legislature unquestionably acted with speed (less than a week) to pass the version of the repeal bill that ultimately became law – after a prior version had been sitting for four years – that was not a response to a particular interpretation where one could say that the legislature clarified what it always meant. Rather, the legislative history shows that the legislature rushed the passage of the repeal because it had support to do so. The rushed action does not demonstrate, and has nothing to do with, retroactive intent. Quite the opposite, the record shows that in rushing to pass the bill, there are issues the legislature did not consider, let alone reach a consensus on. Indeed, the legislature acknowledged that it may need to revisit the repeal in the future. *See* Assembly Fl. Debate[9] at 66-67 ("I don't think enough stakeholders have been involved in this to make this – get this done right. . . . We need to slow down . . . .); 81 ("[W]e didn't even have Committee agendas 'til, you

[9] N.Y. State Assembly, Floor Debate (June 9, 2020) (https://www2.assembly.state.ny.us/write/upload/transcripts/2019/6-9-20.html)

know, Sunday, so I don't think we even gave the public, you know, a chance to fully understand what we're working on.");104-05 (noting that stakeholders such as police unions were not adequately consulted; "there are stakeholders in this, and when you rush a bill through bill drafting and it's out in two days, you can make some mistakes"; "So I'm hopeful that we will get everybody to the table to be able to talk about what we talk down here as chapter amendments. . . . And I think maybe in this particular piece of legislation we should add some stuff to make it better."); 116 (explaining that the repeal legislation may need "to be revisited"). There is no basis to conclude that the legislature reached a consensus on retroactivity – an issue that was not even discussed.

These facts do not fit within this Court's remedial precedent, and it would be improper to imply retroactivity where the legislature did not consider or decide this issue.

3. The Repeal Of CRL §50-a Does Not Require Retroactivity By Necessary Implication Because The Repeal Accomplishes A Substantial Policy Change On A Prospective Basis

Even if Petitioners could establish that the repeal was remedial, that label is not sufficient to overcome the presumption against retroactivity. PBA Br. 21-23. Petitioners effectively concede this point by attempting to cobble together evidence of retroactive intent, but their evidence is ambiguous at best and does not come close to meeting the requisite standard of showing that "necessary implication requires"

retroactivity. *Majewski*, 91 N.Y.2d at 584; *People v. King*, -- N.E.3d --, 2024 WL 3029969, at *2 (June 18, 2024); *Gottwald v. Sebert*, 40 N.Y.3d 240, 258 (2023); *People v. Galindo*, 38 N.Y.3d 199, 207 (2022).

In a futile attempt to meet the necessary implication standard, Petitioners argue that "[a]t bottom, the repeal would be rendered meaningless if the release of police disciplinary records created before June 12, 2020, were not subject to disclosure" (NYP Br. 49), but that argument is demonstrably false. Under prospective application of the repeal, there are reams of records that have been generated over the last four years and counting since the repeal, with more records being generated every day in agencies across the State, that are now subject to disclosure. The repeal of CRL §50-a allows for access to those records (subject to other applicable exemptions). If CRL §50-a had not been repealed, those records post-dating June 12, 2020, would still be subject to protection. Thus, the repeal is not "meaningless" when applied on a prospective basis. Similarly, Petitioners' argument that "FOIL requests seek records maintained by an agency and invariably reach records created prior to the date of the request" (NYP Br. 33) does not require

the repeal to be retroactive. Records generated between the date of the repeal and the FOIL request are no longer subject to §50-a's protection.[10]

Thus, there is no need to debate, or for the Court to make a policy judgment, about whether the legislature's policies of transparency and accountability would be better served by allowing disclosure of pre-repeal records – which in turn would infringe the vested rights of officers and prejudice their privacy, safety, and well-being – because such generalized policy considerations are insufficient to overcome the presumption against retroactivity. Petitioners do not dispute that even to the extent "retroactive application of a new statute would vindicate its purpose more fully," such a "consideration, however, is not sufficient to rebut the presumption against retroactivity." *Landgraf*, 511 U.S. at 285-86.

Petitioners argue that the repeal of CRL §50-a was purportedly "'to hold police and other uniformed law enforcement officials to the same level of accountability applied to all other public employees'" (NYP Br. 33), and they attribute this language to the Justification for Senate Bill S. 8496 – *i.e.*, the 2020 repeal legislation. However, no such language is found in the Justification for Senate Bill S. 8496 or elsewhere in its text. *See* R205-10. Rather, Petitioners apparently

[10] The case Petitioners cite, *In re OnBank & Trust Co.*, 90 N.Y.2d 725 (1997), is inapposite. The Court implied retroactivity because otherwise, portions of the amended statute would have been superfluous. *Id.* at 731. Petitioners do not identify any aspect of the legislation here that would be superfluous when applied prospectively.

lifted this language from a prior version of the proposed bill, *which was never enacted*.[11] Thus, the language is irrelevant.

Even if the language were considered, however, it is easily interpreted on a prospective basis, meaning officer records created after the repeal are no longer subject to CRL §50-a's protection. Petitioners' reliance on that language is also misguided because, in fact, there is no uniformity in this State on the confidentiality of personnel records of public employees. *See* Assembly Fl. Debate at 62-63 (pointing out that teachers and legislators still have statutory confidentiality protections); *see also, e.g.*, N.Y. Jud. Law §45 (confidentiality over disciplinary records of judges). Thus, the reference to "all other public employees," in addition to being outside the relevant legislative record, is confusing and ambiguous.

Petitioners' remaining arguments rely on other ambiguous matter that does not show a clear expression of legislative intent for retroactivity, let alone that retroactivity is required by necessary implication.

Petitioners rely on the "take effect immediately" language in the repeal legislation, but the PBA cited numerous cases holding that such language "is equivocal" on retroactivity. *Gottwald*, 40 N.Y.3d at 259; *see* PBA Br. 19-20.

[11] For example, the language is found in the *2016* bill. N.Y. State Assembly, Bill No. A09332 (https://nyassembly.gov/leg/?default_fld=&leg_video=&bn=A09332&term=2015&Summary=Y&Memo=Y).

Petitioners' reliance on a few cherry-picked statements from individual legislators during the one day of debates also does not overcome the presumption against retroactivity. Out of the more than 200 members of the Assembly and Senate, Petitioners muster ambiguous statements from a handful of them. But none of those statements address retroactivity, vested rights, or officers who already made disciplinary decisions in reliance on the statutory promise of confidentiality. Petitioners' attempt to contort them into a statement on retroactivity ignores the fact that application of the repeal on a prospective basis opens to disclosure post-repeal records that otherwise would have been confidential absent the repeal, making it impossible to know whether the legislators were referring to policy changes on a prospective basis or intended retroactive effect.

Petitioners' citation to *Majewski* undermines their argument. In that case, the legislators expressly discussed the retroactivity issue, and even then the Court held that such statements "must be cautiously used," quoting the U.S. Supreme Court's holding that: "'it is impossible to determine with certainty what construction was put upon an act by the members of a legislative body that passed it by resorting to the speeches of individual members thereof.'" *Majewski*, 91 N.Y.2d at 586 (quoting *U.S. v. Trans-Missouri Freight Ass'n*, 166 U.S. 290, 318 (1897)). Ultimately, the Court held that the legislation at issue "would not be rendered meaningless in the absence of retroactive application." *Id.* at 589. Given this Court's caution in considering even

express statements about retroactivity, the cursory and ambiguous record here does not overcome the strong presumption against retroactivity.

C. Petitioners' Reliance On Post-Repeal, Non-Legislative Matters Is An Irrelevant Distraction

Petitioners do not even attempt to explain how their argument that the NYPD has disclosed certain historic records is relevant to the retroactivity analysis. It is not. Petitioners' speculative argument made up for the first time in this Court about *Brady* disclosures is equally irrelevant.

The NYPD, as a party to this case, expressly said it is "taking no position on the issues of retroactivity of 50-a." R403; R407 (same). And it submitted a letter to this Court, dated September 19, 2024, stating that it is not filing a brief on this appeal. There is no basis to draw any conclusions from the NYPD's neutral position. Moreover, simply because an agency violated the non-retroactivity of the repeal by impermissibly making certain disclosures does not excuse future violations. Agencies do not control the retroactivity or non-retroactivity of a State statute. *See Frontier Ins.*, 160 Misc.2d at 444. Indeed, Petitioners ignore the fact that CRL §50-a was not unique to the NYPD. Other law enforcement departments across the State concluded that the repeal was *not* retroactive and withheld records that predate the repeal. *See* PBA Br. 12-13. The NYPD's actions cannot waive the non-retroactivity of a State statute.

Petitioners' reference to *Brady* disclosure cases to argue that a finding that the repeal of CRL §50-a is not retroactive would create a "legal impracticality" (NYP Br. 49) is also meritless, in addition to being unpreserved. Petitioners are not an expert on what disclosure obligations are or are not practical for prosecutors. And none of the cases Petitioners cite involved the non-retroactivity issue. Rather, the only case that addressed this issue in the context of criminal disclosure obligations held that the repeal was *not* retroactive. *Francis*, 74 Misc.3d at 814-20.

CONCLUSION

The Court should: hold that a retroactivity analysis is required; reverse the Decision's holding that the repeal of CRL §50-a was retroactive; and hold that records predating the repeal continue to be protected from disclosure.

Dated: New York, New York
October 17, 2024

Respectfully submitted,

FREDERICK W. VASSELMAN
Office of the General Counsel of the Police Benevolent Association of the City of New York, Inc.
125 Broad Street
New York, New York 10004

Of Counsel:
Dave Morris

GOLENBOCK EISEMAN ASSOR BELL & PESKOE LLP

By: _____
Matthew C. Daly

711 Third Avenue
New York, New York 10017
(212) 907-7300

Attorneys for Appellant Police Benevolent Association of the City of New York, Inc.

CERTIFICATION OF COMPLIANCE

I certify pursuant to Rule 500.13(c)(1) that the total word count for all printed text in the body of this brief, excluding the portions exempted by Rule 500.13(c)(3), is 6,899 words.