To Be Argued By:
MATTHEW C. DALY
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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.

BRIEF FOR RESPONDENT-APPELLANT

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DISCLOSURE STATEMENT

Pursuant to 22 NYCRR §500.1(f), appellant Police Benevolent Association of the City of New York, Inc. states that it has no parent corporation, subsidiaries, or affiliates.

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PRELIMINARY STATEMENT

This appeal asks the Court to reverse the First Department's holding that the repeal of Civil Rights Law ("CRL") §50-a – which for more than 40 years gave police officers privacy rights over their personnel records – was retroactive. This was an issue of first impression in the Appellate Division, and the First Department deviated from the majority of trial courts that held that the repeal was not retroactive. The First Department violated New York's strong presumption against retroactivity, and pulled the rug out from under officers who made binding disciplinary decisions over the last four decades in reliance on the statutory promise of confidentiality.

This is a CPLR Article 78 proceeding brought by the publisher and a reporter for the *New York Post* ("Petitioners") against the New York City Police Department ("NYPD") and its Commissioner, seeking to compel compliance with Freedom of Information Law ("FOIL") requests for all disciplinary records of 144 officers in the NYPD. Appellant Police Benevolent Association of the City of New York, Inc. ("PBA"), the union representing police officers in the NYPD, intervened to protect the rights of its members, including their continuing privacy rights over records created while CRL §50-a was in effect. The First Department held that the repeal was retroactive and ordered the NYPD to disclose responsive records without date limitation. This Court should hold that records created while CRL §50-a was in effect continue to be protected from disclosure.

At issue are four decades of reliance interests by police officers who made binding decisions about how to respond to and resolve disciplinary cases based on §50-a's statutory confidentiality. The statutory promise of confidentiality influenced how officers responded to disciplinary cases and the records created therein. In some cases, innocent officers accepted responsibility and waived their due process rights to a hearing in reliance on the fact that New York law promised them confidentiality, rather than incur the time, burden, and distraction of fighting to clear their names. The results of those cases, and the records created therein, would have been different if CRL §50-a had not granted confidentiality to the subject officers.

Retroactive application of the repeal of §50-a creates the fundamentally unfair result of exposing long-closed, confidential disciplinary records to disclosure only after officers made decisions based on the promise of confidentiality. The officers are clearly prejudiced because they cannot go back and undo those decisions or re-open and fight meritless charges that they acceded to because of §50-a's protections. While the legislature has the power to apply a statutory repeal retroactively, it did not adopt such an unfair result in this case.

It has long been blackletter New York law, and the legislature was well aware at the time of the repeal, that there is a strong presumption against retroactivity, which can only be overcome by a clear expression of legislative intent. With repeal legislation in particular, the presumption against retroactivity has been codified for

more than a century in General Construction Law ("GCL") §93, which creates a mandatory presumption that rights that accrued prior to the repeal "may be enjoyed, asserted, [and] enforced . . . as fully and to the same extent as if such repeal had not been effected."

As the First Department acknowledged, the legislature was silent on retroactivity with the repeal of §50-a, stating only that the repeal would "take effect immediately." That is a common statutory phrase that this Court has held is unhelpful in the retroactivity analysis, because the date a statute takes effect has no bearing on whether the legislature intended to look backwards.

The First Department instead wrote retroactivity into the repeal where the legislature was silent because the Court, without explanation, labeled the repeal as "remedial." The First Department violated this Court's precedents, and contradicted its own recent decisions, in multiple respects. First, recent precedent from this Court and the Appellate Division holds that characterizing a statutory change as remedial is largely irrelevant to the retroactivity analysis since virtually any legislation can be labeled as such. That label does not overcome the requirement of a clear showing of legislative intent for retroactivity, which was utterly lacking here. Second, as this Court recently confirmed, the repeal of legislation after decades of consistent interpretation is not remedial and, in fact, indicates a prospective change. Third, in all events, even under older case law where the remedial nature of legislation was

given some weight, a remedial change does not apply retroactively through silence where to do so would infringe pre-existing rights. The First Department disregarded officers' pre-existing privacy rights and the severe injustice to officers who irreversibly relied on the statutory promise of confidentiality.

Given the legislature's silence and the clear impact on officers' pre-existing rights, pursuant to GCL §93 the First Department should not have gone any further to hold that the repeal of §50-a was not retroactive. Instead, the First Department's Decision creates bad law that waters down the statutory and common law presumption against retroactivity. It allows a court to imply retroactivity into a statutory change even where the legislature is silent, the statutory purpose does not necessarily require retroactive application, and it is undisputed that retroactive application undermines previous reliance interests. The Decision improperly shifts the balance of power from the legislature to the court to engage in lawmaking by writing retroactivity into legislation, and excuses the legislature from its duty to be open and accountable to the public by debating and voting on important issues such as retroactive effects. Separation of powers and the presumption against retroactivity require this important and divisive question to be left to the legislature, which was silent here.

The First Department's Decision should be reversed, and this Court should also reject more recent decisions on this issue from the Second and Fourth

Departments. While those Courts reached the same result as the First Department, their reasoning is inconsistent. They cast aside legislative intent entirely in place of an ill-advised new rule that when a statutory privacy or confidentiality right is repealed, all pre-existing records are presumptively and automatically divested of protection even where the legislature is silent. That holding is 180 degrees the opposite of what the presumption against retroactivity requires.

There is no New York law that supports this extraordinary and troubling holding. But the highest court of a sister state has expressly rejected such a proposition, holding that pre-existing confidentiality rights are protected when a statute is repealed unless the legislature clearly indicates otherwise. That is the correct result because it accords with GCL §93 and properly acknowledges that individuals make important, irreversible decisions based on statutory confidentiality, as officers did here.

The Second and Fourth Department decisions create a dangerous precedent because they jeopardize all actions and statements made in reliance on statutory privacy or confidentiality. There are numerous privacy and confidentiality rights created by statute, protecting records of and communications with grievance bodies, health care providers, lawyers, clergy, and in various other contexts. Such statutes would provide little comfort if, as the Second and Fourth Departments held, privacy

and confidentiality rights are somehow inferior and do not warrant the benefit of the presumption against retroactivity.

The Court should reverse the Decision and hold that disciplinary records created while CRL §50-a was in effect continue to be protected from disclosure.

QUESTION PRESENTED

1. Whether the repeal of Civil Rights Law §50-a applies retroactively to sweep away pre-existing privacy and confidentiality rights over records created prior to the repeal at a time when officers irreversibly relied on the statutory confidentiality when deciding how to respond to and resolve disciplinary matters.

JURISDICTIONAL STATEMENT

On May 16, 2024, this Court granted the PBA's motion for leave to appeal. R529. The Court has jurisdiction pursuant to CPLR 5602(a)(1)(i). Although the Decision remanded to Supreme Court solely to calculate the amount of costs and attorneys' fees owed by the NYPD to Petitioners, the Decision is final as to the PBA, *see We're Assocs. Co. v. Cohen, Stracher & Bloom, P.C.*, 65 N.Y.2d 148, 149 n.1 (1985), and finally adjudicated the principal relief in the case, *see Jones v. Jones*, 28 N.Y.2d 896, 897 (1971); *Rae v. Sutbros Realty Corp.*, 5 N.Y.2d 800, 801 (1958); *Stevens v. Stevens*, 305 N.Y. 926, 927 (1953). Alternatively, the Court has jurisdiction pursuant to CPLR 5602(a)(2). *See Power Auth. of State of N.Y. v.*

Williams, 60 N.Y.2d 315, 323 (1983). The question presented was preserved for the Court's review. *See, e.g.*, R378-81; R393; R523-24; R531-32.

STATEMENT OF THE CASE

A. CRL §50-a Created Privacy Rights On Which Officers Relied

Section 50-a was enacted as a State statute in 1976. R208. It was enacted as part of the Civil Rights Law, and it was set forth in Article 5 thereof entitled "Right of Privacy." Section 50-a created a privacy and confidentiality right for police officers, firefighters, corrections officers, and peace officers across the State, providing that their:

> personnel records used to evaluate performance toward continued employment or promotion . . . shall be considered confidential and not subject to inspection or review without the express written consent of such police officer, firefighter, firefighter/paramedic, correction officer or peace officer within the department of corrections and community supervision or probation department except as may be mandated by lawful court order.

CRL §50-a(1).

The exception for "lawful court order" applied only where a court determined that the records were "relevant and material in the action before it." *N.Y. Civ. Liberties Union v. N.Y. City Police Dep't*, 32 N.Y.3d 556, 566 (2018) (brackets omitted). The statute did not apply to district attorneys, the attorney general, a grand jury, or other government agencies "in the furtherance of their official functions." CRL §50-a(4)

For decades, this Court consistently interpreted CRL §50-a as protecting disciplinary records against disclosure, including in response to FOIL requests. *See, e.g., Prisoners' Legal Servs. of N.Y. v. N.Y. State Dep't of Corr. Servs.*, 73 N.Y.2d 26, 31-33 (1988).

Section 50-a served the important purpose "of preventing the use of personnel records as a device for harassing or embarrassing police and correction officers." *Id.* at 32. The statute sought "to prevent *any* 'abusive exploitation of personally damaging information contained in officers' personnel records.'" *N.Y. Civ. Liberties Union*, 32 N.Y.3d at 564 (emphasis in original) (quoting *Daily Gazette Co. v. City of Schenectady*, 93 N.Y.2d 145, 154 (1999)). The statute "was sponsored and passed as a safeguard against potential harassment of officers through unlimited access to information contained in personnel files." *Daily Gazette Co.*, 93 N.Y.2d at 154-55. "[T]he described abuses of personnel information it was designed to prevent included harassment or reprisals against an officer or his/her family." *Id.* at 155 (internal quotes omitted).

For the more than 40 years that CRL §50-a was in effect, the statutory confidentiality impacted how officers responded to and resolved disciplinary matters. For example, "[r]eliance 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. Thus, officers facing disciplinary proceedings relied on the confidentiality protections of CRL §50-a in deciding to accept responsibility for a disciplinary charge and waive their due process rights to a hearing, knowing that the records would remain confidential. Reliance on §50-a therefore affected the positions taken in disciplinary cases, the statements made in those cases, and how they were ultimately resolved, with some innocent officers settling or otherwise accepting responsibility for disciplinary charges because New York law promised them confidentiality.

Officers acted reasonably and justifiably in making important disciplinary decisions in reliance on §50-a, because that reliance was supported by decisions from this Court that confirmed that the statute "expressly operate[d] to *guarantee confidentiality* notwithstanding FOIL's permissive disclosure regime." *N.Y. Civ. Liberties Union*, 32 N.Y.3d at 567 (emphasis added). This Court further assured officers that "[n]othing in FOIL authorizes a petitioner – or a government agency – to exercise 'absolute discretion' to override these critical statutory protections or their *promise of confidentiality*." *Id.* at 568 (emphasis added).

New York law also clearly provided that the confidentiality rights under §50-a belonged exclusively to the individual officers, not the agencies or anybody else. Thus, officers' reliance interests were further justified by the fact that the agency could not waive the confidentiality protections on their behalf. *See Patrolmen's*

Benevolent Ass'n v. City of N.Y., 171 A.D.3d 636, 636 (1st Dep't 2019) ("the statute creates protected rights (for police officers)"); *Molloy v. N.Y. City Police Dep't*, 50 A.D.3d 98, 100 (1st Dep't 2008) ("[t]he confidentiality of the statute is designed to protect the police officer, not the Department"); *Gallogly v. City of N.Y.*, 51 Misc.3d 296, 300 (Sup. Ct. N.Y. Cty. 2016) ("the confidentiality of the statute is designed to protect individual police officers and not the NYPD").

B. The Legislature Repealed CRL §50-a After More Than 40 Years Without Saying Anything About Retroactivity

More than 40 years after the passage of CRL §50-a, on June 12, 2020, the legislature repealed the statute. R302. The repeal of §50-a was not a prompt reaction to a judicial interpretation of the statute. As set forth above, courts consistently interpreted the statute for decades as providing broad confidentiality protections for officers. Moreover, proposed legislation to repeal §50-a was introduced at least four years before the statute was repealed.[1]

There is nothing in the repeal legislation indicating that the repeal was intended to apply retroactively. The text pertaining to the repeal stated only: "Section 50-a of the civil rights law is REPEALED."[2] The only language relating to timing

[1] Assem. B. A09332, 2015-2016 Gen. Assem. (2016) (https://assembly.state.ny.us/leg/?default_fld=&leg_video=&bn=A09332&term=2015&Summary=Y) (bill introduced in 2016 to repeal CRL §50-a).

[2] Sen. B. S8496, 243rd Legislative Session, (2020), at §1 (https://www.nysenate.gov/legislation/bills/2019/s8496).

was that "[t]his act shall take effect immediately."[3]

The Sponsor Memo also did not indicate that the repeal was intended to apply retroactively. It stated the bill's Purpose as: "To repeal Civil Rights Law §50-a." R207. And its Justification acknowledged that §50-a created a "*special right of privacy*." R208 (emphasis added). It said nothing about any intent to sweep away that pre-existing "special right" over records created prior to the repeal.

The Justification explained as the reason for the repeal that §50-a's protections against disclosure "undermined" FOIL's public policy goals "to make government agencies and their employees accountable to the public." *Id.* The Justification stated that, in light of FOIL provisions such as the privacy exemption, and a court's ability to protect against improper cross-examination and determine issues of admissibility at trial, "[t]he broad prohibition on disclosure created by §50-a is therefore unnecessary, and can be repealed as contrary to public policy." *Id.* The Justification stated that the "[r]epeal of §50-a will help the public regain trust that law enforcement officers and agencies may be held accountable for misconduct." *Id.* Those statements are easily read to indicate that the repeal was prospective. *See infra* at 26-27.

[3] *Id.* at §5. The bill also made certain amendments to FOIL (Pub. Officers Law §86), including, *inter alia*: providing definitions of "law enforcement disciplinary records" and "law enforcement disciplinary proceeding"; mandating redactions of certain personal information; and permitting redaction of technical infractions. Those portions of the bill were also silent as to whether the legislature intended the repeal of CRL §50-a to apply retroactively.

C. Petitioners' FOIL Requests

Upon the repeal of CRL §50-a, in June 2020, Petitioners served the NYPD with FOIL requests for all disciplinary records of 144 officers, without date limitation (the "FOIL Requests"). R40-41. The NYPD took no position on the non-retroactivity of the repeal. It denied certain of the FOIL Requests, without responding to others, on grounds not relevant here, and produced redacted records in response to one request. R43-R44.

D. Procedural History

On October 6, 2021, Petitioners commenced this proceeding in Supreme Court, New York County, pursuant to CPLR Article 78, to compel the NYPD to comply with the FOIL Requests. R36-49. On November 16, 2021, the PBA moved to intervene, asserting, among other defenses, that records that predate the repeal of CRL §50-a are protected from disclosure because the repeal was not retroactive. R320-23. On December 8, 2021, Supreme Court granted the PBA's motion to intervene. R390-91.

On July 14, 2022, the PBA filed a Notice of Supplemental Authorities, citing additional Supreme Court cases issued after the PBA intervened holding that the repeal of CRL §50-a was not retroactive. R392-93. At that time, no Appellate Division case had addressed the issue on the merits, but at least five trial court cases held that the repeal was not retroactive. *See Gannett Co. v. Herkimer Police Dep't,*

76 Misc.3d 557 (Sup. Ct. Oneida Cty. 2022); *Khasira v. Cty. of Nassau*, No. 607202/2018, 2022 WL 1048505 (Sup. Ct. Nassau Cty. Feb. 23, 2022); *People v. Francis*, 74 Misc.3d 808 (Sup. Ct. Monroe Cty. 2022); *Brighton Police Patrolman Ass'n v. Catholdi*, No. l2020002814, 2021 WL 7287668 (Sup. Ct. Monroe Cty. Apr. 16, 2021); *Abbatoy v. Baxter*, 77 Misc.3d 711 (Sup. Ct. Monroe Cty. 2022), *rev'd*, 227 A.D.3d 1376 (4th Dep't 2024). Three trial court cases went the other way. *See Puig v. City of Middletown*, 71 Misc.3d 1098 (Sup. Ct. Orange Cty. 2021); *Schenectady Police Benevolent Ass'n v. City of Schenectady*, No. 2020-1411, 2020 WL 7978093 (Sup. Ct. Schenectady Cty. Dec. 29, 2020); *Cooper v. N.Y.*, No. 131452, 2021 WL 11961151 (Ct. Cl. Jan. 26, 2021).

On August 12, 2022, the NYPD filed a cross-motion to dismiss the Petition, limited to arguing that the FOIL Requests were unduly burdensome. R395-417. The NYPD stated that it was "taking no position on the issues of retroactivity of 50-a." R403. On September 12, 2022, the PBA filed a response to the NYPD's cross-motion to clarify that the PBA's non-retroactivity defense was not, and could not be, waived by the NYPD. R520-26.

E. The Lower Court Decisions

On December 6, 2022, Supreme Court issued a Decision and Order denying the NYPD's cross-motion to dismiss and ordering the NYPD to comply with the FOIL Requests. R4-13. Supreme Court did not rule on the merits of the PBA's non-

retroactivity defense, holding that the PBA could not raise this argument because it had not been asserted by the NYPD. R10.

The PBA appealed with respect to the non-retroactivity issue. On June 20, 2023, the First Department granted the PBA's motion to stay Supreme Court's order pending appeal.[4]

On October 12, 2023, the First Department issued the Decision. R530-33. The Court held that Supreme Court erred by failing to address the merits of the PBA's non-retroactivity argument. It held:

> section 50-a, prior to its repeal, 'create[d] protected rights (for police officers)' (*Matter of Patrolmen's Benevolent Assn. of the City of N.Y. v. de Blasio*, 171 AD3d 636, 636 [1st Dept 2019], *lv dismissed* 35 NY3d 979 [2020]), which 'should not be deemed automatically waived by the inaction of [respondents]' (*Matter of Molloy v. New York City Police Dept.*, 50 AD3d 98, 100 [1st Dept 2008]).

R531 (brackets in original).

The Court addressed the merits of the non-retroactivity issue as a matter of first impression in the Appellate Division. It held "that the repeal of Civil Rights Law §50-a applies retroactively to records created prior to June 12, 2020." R532.

The Court acknowledged that "the legislature made no express statement in the repeal itself, or in the limited legislative history concerning the same, as to

[4] The NYPD also appealed on the ground that Supreme Court granted the Petition before the NYPD had an opportunity to file an answer, but it withdrew that appeal. Petitioners cross-appealed from the aspect of Supreme Court's order denying their request for costs and attorneys' fees. Those issues are not relevant to this appeal.

whether the repeal was to be applied retroactively." *Id.* (internal quotes omitted). Nevertheless, the Court implied retroactivity where the legislature was silent. The Court relied on the fact that the repeal "went into effect immediately." *Id.* The Court also concluded that the legislature "conveyed a sense of urgency" and "intended for the legislation to be remedial." *Id.* The Court held that enforcing officers' pre-existing privacy rights over records created prior to the repeal "would run counter to the clear legislative purpose of providing public access to records that may contain information about actual or alleged police misconduct." *Id.*

On October 27, 2023, the PBA moved in this Court for leave to appeal and for a stay of the lower court decisions to the extent they require the disclosure of records predating the repeal of §50-a. On May 16, 2024, this Court granted leave to appeal and the stay. R529.

ARGUMENT

This Court reviews questions of law – such as the question of statutory interpretation presented here – *de novo*. *See Weingarten v. Bd. of Trs. of N.Y. City Teachers' Ret. Sys.*, 98 N.Y.2d 575, 580 (2002).

I. THE DECISION SHOULD BE REVERSED BECAUSE OFFICERS HAVE CONTINUING PRIVACY RIGHTS OVER RECORDS THAT PREDATE THE REPEAL OF CRL §50-a

A. The Decision Violates New York's Strong Presumption Against Retroactivity

The First Department violated New York's strong presumption against retroactivity by writing retroactivity into the repeal of CRL §50-a where the legislature was silent. In doing so, the First Department erroneously swept away decades of reliance interests by officers without a clear expression of legislative intent for that fundamentally unfair result.

It is blackletter New York law that there is a "presumption against retroactivity" of a statute. *Regina Metro. Co. v. N.Y. State Div. of Hous. & Cmty. Renewal*, 35 N.Y.3d 332, 370 (2020); *see also Majewski v. Broadalbin-Perth Cent. Sch. Dist.*, 91 N.Y.2d 577, 584 (1998) (recognizing "fundamental canon of statutory construction that retroactive operation is not favored by courts").

The presumption against retroactivity protects important reliance interests and expectations of the public:

> This "deeply rooted" presumption against retroactivity is based on "[e]lementary considerations of fairness [that] dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly." As the Supreme Court has cautioned, careful consideration of retroactive statutes is warranted because "[t]he Legislature's unmatched powers allow it to sweep away settled expectations suddenly and without individualized consideration" and "[i]ts responsivity to political pressure poses a risk that it may be

> tempted to use retroactive legislation as a means of retribution against unpopular groups or individuals."

Regina Metro., 35 N.Y.3d at 370 (quoting *Landgraf v. USI Film Prods.*, 511 U.S. 244, 265-66 (1994)).

Thus, "it takes a clear expression of the legislative purpose to justify a retroactive application of a statute." *Id.* (internal quotes and alterations omitted). While "in some instances retroactive intent can be discerned from the nature of the legislation," this Court set a high bar for such implied retroactivity: "[T]he expression of intent must be sufficient to show that the Legislature contemplated the retroactive impact on substantive rights and intended that extraordinary result." *Id.* at 370-71. Thus, a statute will not be given retroactive operation "unless the language expressly or by *necessary* implication *requires it*." *Majewski*, 91 N.Y.2d at 584 (emphasis added.)

With respect to repeal legislation in particular, the presumption against retroactivity is codified in GCL §93, which provides:

> The repeal of a statute or part thereof shall not affect or impair any act done, offense committed or right accruing, accrued or acquired, or liability, penalty, forfeiture or punishment incurred prior to the time such repeal takes effect, but the same may be enjoyed, asserted, enforced, prosecuted or inflicted, as fully and to the same extent as if such repeal had not been effected.

The GCL imposes rules of statutory interpretation that "should be read into every statute subsequently enacted, unless the wording of such later statute plainly

expresses a contrary intent." *O'Keeffe v. Dugan*, 185 A.D. 53, 54 (2d Dep't 1918); *see also Southbridge Finishing Co. v. Golding*, 2 A.D.2d 430, 434 (1st Dep't 1956) ("the necessity for" for deviating from the GCL "must clearly appear"). This Court recently reenforced that the GCL should guide a court's analysis in determining the effect of a statutory repeal. *See Rochester Police Locust Club, Inc. v. City of Rochester*, 41 N.Y.3d 156, 165 (2023).

Thus, pursuant to GCL §93, "[i]n the absence of evidence of contrary intent, such legislation [repealing a statute] is not to be given retroactive effect." *People v. Roper*, 259 N.Y. 635, 635 (1932). This statutory rule of construction applies "with special force to statutes which otherwise would be *ex post facto* or would deprive persons of substantial rights." *Id.*

As set forth below, there is no clear expression of legislative intent for retroactivity in the repeal of CRL §50-a. On the other hand, retroactive application would sweep away four decades of reliance interests by officers on the statutory promise of confidentiality. As such, retroactive application is not permissible even if the repeal were properly labeled "remedial," which it is not. The Court does not need to go any further to reverse. But even if the purpose behind the repeal were considered under a remedial analysis, the purpose does not "by necessary implication require" retroactivity. *Majewski*, 91 N.Y.2d at 584. Indeed, the statutory

purpose speaks in prospective terms. Thus, the First Department erred in holding that the presumption against retroactivity was overcome.

No Retroactivity In Statutory Text – "As the clearest indicator of legislative intent is the statutory text, the starting point in any case of interpretation must always be the language itself, giving effect to the plain meaning thereof." *Id.* at 583. Here, the legislature did not say anything about retroactivity in the repeal legislation, which the First Department acknowledged. R532; *see also Francis*, 74 Misc.3d at 815-16 ("Further, the Legislature made no express statement in the repeal itself, or in the limited legislative history concerning the same, as to whether the repeal was to be applied retroactively.").

The First Department attempted to bolster its retroactivity holding with the fact that the repeal took effect "immediately." R532. But this Court has held that such language "is equivocal" on retroactivity, *Gottwald v. Sebert*, 40 N.Y.3d 240, 259 (2023), because "the date that legislation is to take effect is a separate question from whether the statute should apply to claims and rights then in existence," *Majewski*, 91 N.Y.2d at 583; *see also Landgraf*, 511 U.S. at 257 ("A statement that a statute will become effective on a certain date does not even arguably suggest that it has any application to conduct that occurred at an earlier date."). The Decision's reliance on the "take effect immediately" language to support retroactivity is also inconsistent with the First Department's own decisions. *See State v. Daicel Chem.*

Indus., 42 A.D.3d 301, 302 (1st Dep't 2007) ("Language in the statute that it shall 'take effect immediately' does not support retroactive application."); *Aguaiza v. Vantage Props., LLC*, 69 A.D.3d 422, 423 (1st Dep't 2010) (even though statute stated that it was to take effect "immediately," "[n]o provision was made in the statute for retroactive application of its terms").

"Take effect immediately" language is common in legislation, and the First Department erred by concluding that this ordinary language provides legislative intent for retroactivity. Indeed, the legislature should be presumed to have been familiar with the well-settled case law discussed above when it repealed §50-a. If it wanted the repeal to apply retroactively, the legislature knew it needed to say more than that the repeal took effect immediately. But it did not say more, strongly implying that there was no legislative consensus on retroactivity.[5]

Infringement Of Pre-Existing Rights – The First Department's choice to apply the repeal of CRL §50-a retroactively also failed to credit the decades-long privacy rights and reliance interests of officers. Instead, the Court held that the repeal should be applied retroactively because it is purportedly "remedial." R532. But the Court

[5] In the proceedings below, the only statements Petitioners could muster for their retroactivity argument were ambiguous comments by legislators during floor debates, which did not even directly address retroactivity. Even the First Department does not appear to have relied on those comments. Nothing prevents individual legislators from making partisan statements during floor debates. As the U.S. Supreme Court has held, statements by individual legislators during floor debates are not particularly helpful to determine legislative intent because "[t]hose who did not speak may not have agreed with those who did, and those who spoke might differ from each other." *U.S. v. Trans-Mo. Freight Ass'n*, 166 U.S. 290, 318 (1897).

overlooked the fact that even remedial legislation does not apply retroactively where, as here, to do so would infringe pre-existing rights. The First Department's Decision constitutes judicial lawmaking and diminishes the presumption against retroactivity by allowing a court to sweep away pre-existing rights by characterizing a statutory change as "remedial" – a label that can be invoked for virtually any statutory change.

It is well-settled under recent precedent that simply characterizing legislation as "remedial" is not sufficient to imply retroactivity, because courts recognize that virtually any legislation can be labeled as such. This Court recently acknowledged that the U.S. Supreme Court has "limit[ed] the continued utility of the tenet that new 'remedial' statutes apply presumptively to pending cases." *Regina Metro.*, 35 N.Y.3d at 365 (citing *Landgraf*, 511 U.S. at 285 n.37 (1994)). Even earlier, this Court held that "[c]lassifying a statute as 'remedial' does not automatically overcome the strong presumption of prospectivity since the term may broadly encompass any attempt to supply some defect or abridge some superfluity in the former law." *Majewski*, 91 N.Y.2d at 584 (internal quotes omitted). Thus, "even assuming the repeal of [a statute] is properly classified as remedial, that classification is largely immaterial." *Ruth v. Elderwood at Amherst*, 209 A.D.3d 1281, 1287 (4th Dep't 2022).

Indeed, the repeal of CRL §50-a is no more remedial than most other legislation. This is not a situation where the legislature acted quickly to clarify a

statute in response to a judicial decision, where one could argue that the clarification reflects what the legislature always intended. Section 50-a was in place from 1976 to 2020, and for decades the courts interpreted it as protecting disciplinary records from disclosure. Moreover, repeal legislation was introduced in 2016, more than four years before it was adopted. *Supra* at 10. Repealing a statute after decades of consistent application, and even then only after several more years of consideration, is not "remedial"; it is simply a gradual determination to change the law. This Court recently held that a statutory change was not retroactive under similar circumstances. *See People v. Galindo*, 38 N.Y.3d 199, 207 (2022) (fact that "legislature waited over 40 years after lower courts first declared that traffic infractions are not offenses within the meaning of CPL 30.30(1) before expressly abrogating that line of cases" weighed against retroactivity).[6] Thus, the trial court in *Abbatoy*, 77 Misc.3d at 719, correctly held that "the repeal of §50-a was not a 'remedial' statute requiring retroactive application."

The First Department's holding is again irreconcilable with its own decisions. In *Raparthi v. Clark*, 214 A.D.3d 613, 614 (1st Dep't 2023), the legislative history expressly stated that the statutory amendment at issue was a "remedial amendment."

[6] The First Department ignored *Galindo* and instead cited *In re Gleason*, 96 N.Y.2d 117 (2001), which is inapposite. In *Gleason*, this Court had issued a decision interpreting a provision of the CPLR relating to the enforcement of arbitration awards, and "[t]he Legislative reaction was swift. At the next session, the Assembly introduced a bill to amend CPLR 7502(a) to require that all applications relating to an arbitration be brought within a single action or proceeding." *Id.* at 121. The legislature cannot be said to have acted "swiftly" in repealing CRL §50-a.

Nevertheless, the Court held that the amendment was not retroactive because "classifying a statute as remedial does not automatically overcome the strong presumption of prospectivity." *Id.* (internal quotes and brackets omitted). And in *Gottwald v. Sebert*, 203 A.D.3d 488, 489 (1st Dep't 2022), *aff'd in relevant part*, 40 N.Y.3d 240 (2023), the Court held that amendments to New York's anti-SLAPP statute were not retroactive even though they were remedial. The Court held:

> The legislature acted to broaden the scope of the law almost 30 years after the law was originally enacted, purportedly to advance an underlying remedial purpose that was not adequately addressed in the original legislative language. The legislature did not specify that the new legislation was to be applied retroactively. The fact that the amended statute is remedial, and that the legislature provided that the amendments shall take effect immediately, does not support the conclusion that the legislature intended retroactive application of the amendments.

Id. There is no basis for a different result here.

In all events, even under older cases where the remedial nature of legislation was given some weight in the retroactivity analysis, a remedial statute cannot be implied to be retroactive if it would infringe vested rights to do so. *See Ruffolo v. Garbarini & Scher, P.C.*, 239 A.D.2d 8, 12 (1st Dep't 1998) (statutory amendment did not apply retroactively because "[s]uch a result would impair vested rights" (citing *Frontier Ins. Co. v. State*, 160 Misc.2d 437 (Ct. Claims 1993)); *Aguaiza v. Vantage Props., LLC*, 69 A.D.3d 422, 423 (1st Dep't 2010) (retroactive application of remedial statute "must not impair vested rights"). As this Court has held, "people

guide their affairs in the light of existing laws" and "it would be unfair to defeat expectations, rights and liabilities arising under those laws by subsequent retroactive changes." *People v. Oliver*, 1 N.Y.2d 152, 158 (1956). As discussed herein, implying retroactivity into the repeal of §50-a would vitiate four decades of reliance interests by officers in the privacy and confidentiality of their personnel records.

Courts that have considered officers' reliance interests have correctly held that implying retroactivity into the repeal of §50-a would improperly infringe those pre-existing rights, and this Court should follow those decisions. *See Francis*, 74 Misc.3d at 820 ("[T]he Court can take judicial notice that police officers and the other protected persons have relied upon the sealed nature of personnel records in resolving disciplinary matters . . . . 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."); *Gannett*, 76 Misc.3d at 566 (the Court was "particularly moved by the equitable argument" that "from the date on which [CRL] §50-a was enacted until the date of its repeal, police officers relied upon the protections afforded by that statute in making decisions with regard to disciplinary actions and that it would be patently unfair to now reach back and lay bare the records that those officers justifiably believed would remain shielded from public disclosure"); *Abbatoy*, 77 Misc.3d at 715-16 ("police officers facing disciplinary proceedings would rely upon the confidentiality provisions

contained in [CRL] §50-a in determining whether to accept a lesser punishment and waive their due process rights to a hearing . . . It cannot be said that these rights to confidentiality were anything less than substantial, vested rights"); *Brighton Police Patrolman Ass'n*, 2021 WL 7287668, at *2 ("to now allow for retroactive disclosure of the details of these same settlements would be to deprive these officers of their contractual or accrued rights").

Since retroactive application of the repeal of §50-a would clearly prejudice officers who relied on the statute, and the legislature was silent on whether it intended this patently unfair result, a "remedial" finding cannot overcome the presumption against retroactivity required by GCL §93. The Court does not need to go any further to reverse the Decision.

Legislative Purpose Is Inconclusive – Based on its erroneous "remedial" finding, the First Department went on to engage in improper judicial lawmaking by holding that retroactive application is warranted by the "clear legislative purpose of providing public access to records that may contain information about actual or alleged police misconduct." R532. As discussed above, the First Department overlooked the fact that even remedial legislation cannot be applied retroactively through silence where, as here, it would infringe pre-existing rights. But the Decision also violates well-settled precedent holding that where, as here, the legislative

purpose would be achieved by prospective application, the presumption against retroactivity is not overcome.

The legislative purpose is set forth in the Sponsor Memo, which speaks in prospective terms. It uses the future tense: "Repeal of §50-a *will* help . . . ." R208 (emphasis added). And it appears to refer to the ability to obtain records relating to alleged misconduct that may occur in the future. The reference to "may be held accountable" implies future conduct. *Id.* Indeed, the 18-month statute of limitations applicable to civil service discipline would have already expired on the overwhelming majority of pre-repeal allegations. *See* Civil Service Law §75(4). The legislature did not say or indicate that it intended the repeal to apply to disciplinary cases that were resolved years or decades ago.

Even if the First Department believed that the statutory purpose of accountability is better served by opening all records to disclosure regardless of date, such a policy argument is insufficient to overcome the presumption against retroactivity. As the U.S. Supreme Court has held, "It will frequently be true . . . that retroactive application of a new statute would vindicate its purpose more fully. That consideration, however, is not sufficient to rebut the presumption against retroactivity." *Landgraf*, 511 U.S. at 285-86.

Indeed, in *Ruth*, 209 A.D.3d at 1288, the sponsors' memoranda similarly stated that the repeal of a statute – which granted healthcare providers immunity

against negligence claims for COVID treatment – was intended to promote "accountability." The Court correctly held that the purpose of accountability was "at best, inconclusive on the issue of retroactivity" because it would also be accomplished on a prospective basis. *Id.* (internal quotes omitted). The Court held, "[T]he absence of temporal language renders the memoranda equally susceptible to the interpretation that the legislature, recognizing the consequences of its enactment of [the immunity statute], intended to reverse course on policy and hold nursing home facilities accountable for any harm and damages 'incurred' by their residents going forward." *Id.* at 1289.

Similarly, the legislation repealing §50-a "is plainly not the sort of provision that *must* be understood to operate retroactively because a contrary reading would render it ineffective." *Landgraf*, 511 U.S. at 286 (emphasis in original); *see also Galindo*, 38 N.Y.3d at 207 ("Nothing in the text expressly or by necessary implication requires retroactive application of the statute as amended." (internal quotes omitted)); *Gottwald*, 40 N.Y.3d at 259 ("Nor is there anything in the amended statute requiring retroactive application by necessary implication." (internal quotes omitted)). The legislature's conclusion that disclosure promotes accountability is served on a going-forward basis to personnel matters arising after the repeal. Thus, "the discernible legislative purpose does not mandate a particular result." *Majewski*, 91 N.Y.2d at 589.

The First Department's Decision creates a troubling precedent by seriously watering down this Court's "by necessary implication" standard. The Decision opens the door for courts to write retroactivity into legislation whenever the court believes the statutory purpose would be better served by retroactivity. Based on the Decision, the legislature would never have to grapple over the important issue of retroactivity and be held accountable to their constitutes for deciding that issue. The legislature could simply leave it to the courts to decide whether retroactive application is, in the court's view, in the public interest, which violates democratic principles of government and separation of powers.

Indeed, in this case it appears likely that the legislature chose *not* to address retroactivity in the repeal of §50-a either because such legislation would not have received sufficient support given the patent unfairness to officers or because it would have required further debate and delay the passage of the repeal. "[C]ompromises necessary to [statutory] enactment may require adopting means other than those that would most effectively pursue the main goal. A legislator who supported a prospective statute might reasonably oppose retroactive application of the same statute." *Landgraf*, 511 U.S. at 286. The weighty policy questions surrounding whether the repeal of §50-a should apply to historic records should be left to debate in the legislature and require a clear expression of legislative intent, which was lacking here. *See id.* at 273 (requirement of clear intent of retroactivity "allocates to

[legislature] responsibility for fundamental policy judgments concerning the proper temporal reach of statutes").

Accordingly, for all of the reasons discussed above, there is an insufficient basis to overcome the strong presumption against retroactivity with the repeal of CRL §50-a. Instead, GCL §93 requires that the repeal be deemed prospective only and that officers' pre-existing privacy rights over records created prior to the repeal continue to be enforced. As such, the First Department's Decision should be reversed.

B. Decisions From The Second And Fourth Departments Are Also Erroneous By Disregarding Pre-Existing Privacy Rights

While leave to appeal to this Court was pending, the Second and Fourth Departments also held that historic records can be disclosed after the repeal of CRL §50-a, but they are inconsistent with the First Department by holding that retroactivity concerns are not implicated when a confidentiality statute is repealed.[7] This Court should not follow those decisions because they create bad law in conflict with GCL §93 and ignore the fact that individuals make important and irreversible decisions in reliance on privacy and confidentiality rights.

In *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), the Courts held

[7] The Third Department has not addressed this issue.

that they need not analyze retroactivity because the FOIL requests were made after the repeal of §50-a. The Fourth Department reasoned that when an agency receives a FOIL request, it has a "prospective duty of disclosure" and "cannot rely on an exception" – *i.e.* CRL §50-a – "that no longer exists." *Abbatoy*, 227 A.D.3d at 1377. The Court held that "it is not a retroactive application of the repeal of Section 50-a to conclude that police disciplinary records are no longer subject to that exception and are now subject to FOIL." *Id.*; *accord Newsday,* 222 A.D.3d at 92-93 ("The petitioner made the subject FOIL requests in July 2020, after the legislative amendments were enacted, and, thus, the petitioner is not seeking retroactive application of the statutory amendments to a pending FOIL request.").[8]

The Second and Fourth Department decisions failed to address, and are irreconcilable with, GCL §93. As discussed in Part A above, that statute creates a mandatory presumption that where a statute is repealed, rights that accrued prior to the repeal "may be enjoyed, asserted, [and] enforced . . . as fully and to the same extent as if such repeal had not been effected." Thus, it is not enough to simply say that CRL §50-a "no longer exists." *Abbatoy*, 227 A.D.3d. at 1377. One could say the same in every case where a statute is repealed. Under GCL §93, pre-existing rights continue as if the statute remains in effect unless the legislature says otherwise.

[8] The Second Department adhered to its *Newsday* decision in *N.Y. Civ. Liberties Union v. Nassau Cty.*, -- N.Y.S.3d --, 2024 WL 3058153 (2d Dep't June 20, 2024),

Thus, under GCL §93, the relevant inquiry is not when the FOIL request was made – either pre- or post-repeal of CRL §50-a. The relevant inquiry is when the *right* of the affected individual *accrued*. As the U.S. Supreme Court has held, a court must determine whether application of a new law "would impair rights a party possessed *when he acted*." *Landgraf*, 511 U.S. at 280 (emphasis added)." If so, the "traditional presumption teaches that it does not govern absent clear congressional intent favoring such result." *Id.*; *accord Regina Metro.*, 35 N.Y.3d at 365.

It is indisputable that officers and other covered employees had an accrued right to privacy and confidentiality over personnel records created while §50-a was in effect, and that they made decisions in reliance on those privacy and confidentiality rights. Section 50-a created a right belonging exclusively to the officers, which could not be waived by the agency. *See Molloy*, 50 A.D.3d at 100; *Patrolmen's Benevolent Ass'n*, 171 A.D.3d at 636. Section 50-a was adopted in the Civil Rights Law as a "Right of Privacy." Even the Justification for the repeal acknowledged that §50-a "creates a *special right of privacy*." R208 (emphasis added). This Court similarly recognized that §50-a was a "guarantee [of] confidentiality" and a "promise of confidentiality." *N.Y. Civ. Liberties Union*, 32 N.Y.3d at 567-68. Eliminating a guarantee of privacy and confidentiality only after officers made decisions in reliance that the information would be protected from disclosure is patently unfair and quintessential retroactivity.

In focusing only on the date the FOIL request was made and ignoring these pre-existing rights and reliance interests, the Fourth Department misapplied the rule that "'[a] statute is not retroactive when made to apply to future transactions merely because such transactions relate to and are founded upon antecedent events.'" *Abbatoy*, 227 A.D.3d at 1377 (ellipses omitted) (quoting *Forti v. N.Y. State Ethics Comm'n*, 75 N.Y.2d 596, 609 (1990)). Here, the "transactions" at issue are officers' binding disciplinary decisions, and the creation of associated records and statements, made in reliance on the statutory promise of confidentiality while §50-a was in effect. It is a fiction to say that the request for historic records pertains only to "future transactions." Rather, the request seeks to reach backwards to transactions (disciplinary decisions and the creation of related records and statements) that occurred years and decades in the past in reliance on §50-a, and that in some cases would have been different if §50-a had not been in effect. This is a retroactive application of the repeal that requires a clear expression of legislative intent. *See Franz v. Dregalla*, 94 A.D.2d 963, 964 (1st Dep't 1983) ("plaintiff had a vested right to the protection provided by the statute"); *Lipkis v. Gilmour*, 160 Misc.2d 50, 52

(Sup. Ct. App. Term 1994) ("[r]etroactive application would violate the extensive reliance placed on the law as it previously stood").[9]

The Second and Fourth Department decisions create a dangerous precedent whereby nobody can comfortably rely on statutory confidentiality or privacy, because the Second and Fourth Departments do not view reliance on those rights as worthy of protection or deserving of the presumption against retroactivity. There are numerous other examples of statutory privacy and confidentiality that individuals rely on in creating records and making statements and decisions. *See, e.g.*, N.Y. Jud. Law §45 (confidentiality over complaints, proceedings, and other records of the State Commission on Judicial Conduct); N.Y.C. Admin. Code §20-817 (confidentiality over health and personal information provided in the course of seeking pregnancy services); N.Y. Mental Hygiene Law §33.13(c) (confidentiality over records pertaining to patients of mental health office); CPLR 4503 (attorney-client privilege); CPLR 4505 (prohibiting clergy from disclosing confessions or confidences); CPRL 4507 (psychologist privilege); CPLR 4508 (confidentiality over

[9] *Forti*, 75 N.Y.2d at 606, relied on by the Fourth Department, is inapposite. In that case, the legislature passed a new law that increased the restrictions on former State employees from practicing before their former agencies. The Court held that application of the new restrictions to individuals who left State employment prior to the adoption of the new law did not render the statute retroactive. Unlike here, *Forti* did not involve the repeal of a statute that granted individuals explicit rights (the right to privacy and confidentiality) on which those individuals relied for decades while the statute was in place. Since no statutory repeal was involved, the Court also did not address GCL §93. And in *Forti*, the Court held that the express language of the new law showed the legislature's intent that it apply to former employees who had already left State service. *Id.* at 610. There is no such language in the legislation repealing §50-a.

communications to social worker). A statutory right to confidentiality is of course subject to being changed prospectively. But those who relied on the promise of confidentiality while the statute was in effect are justified in expecting that pre-existing records would remain confidential unless the legislature says otherwise. The Second and Fourth Department decisions seriously diminish the ability to rely on statutory confidentiality protections by holding that pre-existing documents or communications are presumptively and automatically opened to disclosure if the legislature changes the law – even without any indication of retroactive intent.

The Second and Fourth Department decisions also turn New York's strong presumption against retroactivity on its head. Under those decisions, to protect pre-existing privacy or confidentiality rights, the legislature would have to expressly say that the repeal is *not* intended to be retroactive and that pre-existing statutory rights continue. That is the opposite of New York law.

Indeed, the Second Department expressly applied this backwards analysis. It faulted the party resisting disclosure for failing to offer proof that "the Legislature intended to exclude from disclosure any law enforcement disciplinary records that were created prior to June 12, 2020." *Newsday*, 222 A.D.3d at 93. Under New York's presumption against retroactivity, however, the burden should have been on the party seeking disclosure to identify a clear expression of legislative intent to sweep away the pre-existing privacy and confidentiality rights that accrued while §50-a

was in effect. The Second and Fourth Departments improperly created a new rule that where the pre-existing right involves privacy or confidentiality, the law change is automatically retroactive and pre-existing rights are disregarded.

While there do not appear to be any other New York cases that have addressed the effect on pre-existing records of a repeal of a statute pertaining to privacy/confidentiality, the Supreme Court of Utah has addressed this precise issue, and should be followed by this Court. In *Salt Lake Child & Fam. Therapy Clinic, Inc. v. Frederick*, 890 P.2d 1017 (Utah 1995), discovery was sought from a medical clinic relating to a patient's counseling records. The clinic refused to produce the records pursuant to a Utah statute providing that communications with a therapist were confidential and privileged absent certain exceptions. *Id.* at 1018. That statute was repealed while litigation to compel disclosure was pending. The Court held that the records, which were created while the statutory confidentiality was in effect, continued to be protected against disclosure following the repeal.

In *Salt Lake*, the party seeking disclosure argued – similar to the reasoning of the Second and Fourth Departments here – that "while the communications in question occurred under the old statute, the relevant point in time for the application of the [new law] is not the point in time at which the communication took place, but rather the point at which the communication is to be disclosed." *Id.* at 1019. The Court properly rejected that argument. It held that the law must be applied as it

existed when the communications were made because the issue involved a "substantive right to have communications which had been conducted under an expectation of confidentiality kept private." *Id.* at 1019-20. The Court further held that even if the right against disclosure were deemed procedural, it could not be applied retroactively because, as under New York law, "only procedural statutes which do not enlarge, eliminate, or destroy vested or contractual rights may be applied retroactively." *Id.* at 1020 (internal quotes omitted). The Court held: "Because [the repeal legislation] affects [the patient's] vested right to have her communications with the Clinic, conducted under an expectation of confidentiality, kept private, it cannot be applied retroactively." *Id.*

Salt Lake is the fair and appropriate result by recognizing that individuals make important decisions in reliance on statutory confidentiality, as officers did here. The inherently unfair result of reaching backwards to sweep away confidentiality rights only after officers made binding decisions in reliance on those rights should not be imposed without a clear expression of legislative intent. The Second and Fourth Departments erred by disregarding the pre-existing statutory rights altogether.

CONCLUSION

The Court should reverse the Decision insofar as it held that the repeal of CRL §50-a was retroactive, and should hold that records created while §50-a was in effect continue to be protected from disclosure.

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Respectfully submitted,

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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 8,658 words.