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JEREMY A. CHASE
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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 PETITIONERS-RESPONDENTS

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CORPORATE DISCLOSURE STATEMENT

Pursuant to 22 NYCRR 500.1(f) and 500.22(b)(5), Respondent NYP Holdings, Inc., states that it is a wholly owned subsidiary of News Corporation. News Corporation is a publicly traded corporation. No other publicly traded company owns 10% or more of the stock in NYP Holdings, Inc.

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NYP Holdings, Inc., and Craig McCarthy ("Petitioners" below and "Respondents" here) respectfully submit this Brief in opposition to the Police Benevolent Association of the City of New York, Inc.'s ("PBA" or "Appellant") appeal from a Decision and Order of the Appellate Division, First Department, dated October 12, 2023.

PRELIMINARY STATEMENT

In the summer of 2020, in the immediate aftermath of the killing of George Floyd at the hands of police, calls for changes in policing and the public's relationship to law enforcement abounded. One such change, made just over two weeks after Mr. Floyd's death, on June 12, 2020, was the repeal of Civil Rights Law ("CRL") § 50-a ("Section 50-a"), a law that, prior to its repeal, categorically exempted from disclosure all law enforcement disciplinary records in any forum absent a court order or consent of the officer. The repeal of Section 50-a removed the cloak of confidentiality from law enforcement disciplinary records for good, with the express purpose of helping restore public trust that law enforcement officers and agencies may be held accountable for misconduct. The repeal of Section 50-a reflected the Legislature's realization that the statute too often shielded bad actors and its conclusion that the public interest is better served when law enforcement records are available under FOIL to the same extent as records of other government employees.

Petitioners brought their FOIL lawsuit against the NYPD in October 2021, and shortly thereafter the PBA intervened, arguing, among other things, that the repeal of Section 50-a lacked retroactive application. In other words, the PBA argued that the law, meant to shine light on police disciplinary records in the name of restoring trust with police, only applied to disciplinary records created on or after the June 12, 2020, repeal. Notwithstanding that there is no longer *any* law categorically prohibiting the disclosure of police disciplinary records, the PBA would have all pre-repeal records remain confidential in perpetuity. Or put differently, the PBA argued that the Legislature, by virtue of it not *expressly* stating the repeal of Section 50-a applied retroactively, necessarily only meant to restore a *small modicum* of trust between the public and the police. If accepted, the PBA's cynical and nonsensical argument would eviscerate the entire purpose of the repeal.

As is relevant here, the IAS Court granted the Petition in its entirety without reaching the retroactivity question and, on appeal, the First Department squarely addressed retroactivity, rejected the PBA's argument, and affirmed the IAS Court's decision ordering disclosure of the requested records. In reaching its holding, the First Department correctly determined that the repeal was remedial and, therefore, overcame the presumption against retroactivity. R532.[1] And even after giving careful consideration to the PBA's disappointment that the law no longer guarantees

[1] "R" refers to the Record on Appeal.

police officers confidentiality in perpetuity, the First Department explained that if General Construction Law § 93 were read to override Section 50-a's repeal, this "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.* The PBA then appealed to this Court, Petitioners opposed, and leave was granted. This Court should affirm for the following reasons:

First, this Court need not even reach the issue of retroactivity to affirm Petitioners' entitlement to all police disciplinary records sought in their post-repeal requests. This is because Petitioners do not seek retroactive application of any law; rather, they seek records currently in the NYPD's possession not subject to any existing FOIL exemption. To be clear, a retroactive application of the law would require law enforcement agencies to revisit old requests from before June 12, 2020, and update their responses; but that is not what Petitioners have ever sought. Rather, consistent with multiple recent holdings from the Second and Fourth Departments, this Court need only agree that FOIL requires the NYPD to produce all responsive disciplinary records in its possession that are not exempt from disclosure, which, as of June 12, 2020, includes all law enforcement disciplinary records. The analysis from the Second and Fourth Departments is also in accord with the guidance from the Committee on Open Government, which has explained that the relevant "question is not whether the amendments to FOIL concerning disclosure of law

enforcement disciplinary records have retroactive effect, but rather whether records dating before June 12, 2020, are maintained by the agency at the time of a FOIL request." New York State Committee on Open Government, 2020 REPORT TO THE GOVERNOR AND STATE LEGISLATURE 7-8 (Dec. 2020), https://opengovernment.ny.gov/system/files/documents/2021/01/2020-annual-report.pdf ("COOG 2020 Report"). This position has been consistently adopted in other jurisdictions that have similarly amended their open records laws to make previously confidential police disciplinary records subject to public records requests even if those records were created prior to the date of the amended law. New York should follow suit.

Second, even if the Court felt it necessary to analyze this issue through the lens of retroactivity, the First Department did not err in concluding that Section 50-a's repeal reached pre-June 2020 records. In arriving at its holding, the First Department neither violated New York's presumption against retroactivity nor did it sweep away an alleged "vested right" in confidentiality. PBA Br. at 16-17, 23-24. Instead, the First Department correctly applied this Court's decisions in *Gleason* and *Majewski*, which govern the retroactivity analysis where a statute lacks an express statement of retroactivity. And the *Regina* case, which the PBA points to as a leading authority, actually supports the First Department's holding entirely, *i.e.*, in determining whether a statute has retroactive effect, "[t]here is certainly no

requirement that particular words be used—and, in some instances, retroactive intent can be discerned from the nature of the legislation." *See Regina Metro. Co., LLC v. New York State Div. of Hous. & Cmty. Renewal*, 35 N.Y.3d 332, 370 (2020). This is just such an instance, as the nature of the repeal legislation, passed in the wake of the George Floyd murder and during the nationwide protests that followed, was to remove the cloak of confidentiality from a class of records in service of transparency, accountability, and trust.

In addition, the First, Second, and Fourth Departments[2] have never held that police officers have a vested or continuing right of confidentiality in perpetuity irrespective of Section 50-a's continued viability, and Respondents are unaware of any cases where the Court of Appeals has either. As the First Department correctly held below, the "PBA's position that, given General Construction Law § 93, former Civil Rights Law § 50-a should continue to bar disclosure of police disciplinary records created before June 12, 2020 in response to FOIL requests, would run counter to the clear legislative purpose of providing public access to records that may contain information about actual or alleged police misconduct." R532.

Tellingly, the NYPD has never once raised retroactivity as a basis for withholding records from Petitioners at any stage before or during this litigation. In

[2] The Third Department has not considered retroactivity of Section 50-a's repeal as of the date of this filing.

fact, the only disciplinary record the NYPD has produced to Petitioners so far details disciplinary action against an officer *predating* Section 50-a's repeal. The NYPD's interpretation of the Repeal has aligned with Respondents', as the agency routinely publishes disciplinary information predating the repeal on its own online portals.

Finally, while the PBA trumpets a 30-year-old Utah state court case involving confidential *medical* records as evidence of how other states have handled repeals of confidentiality statutes, this Court should instead be guided by directly analogous case law from other states such as California, Ohio, and Hawaii. Those states have uniformly concluded that it is not a retroactive application to allow prospective requests to reach once-confidential police disciplinary records after the Legislature determines confidentiality should no longer shield those records from public scrutiny.

For all of these reasons, Petitioners respectfully request the Court affirm the First Department's holding insofar as it ordered the disclosure of all disciplinary records, regardless of date created, subject to any redactions permitted by existing FOIL exemptions advanced by the NYPD.

COUNTERSTATEMENT OF QUESTION PRESENTED

1. Whether the First Department correctly held that police disciplinary records created before June 12, 2020, cannot be categorically withheld from

responses to FOIL requests made on or after June 12, 2020, when the only withholding authority—Section 50-a—no longer exists to prohibit their disclosure.

COUNTERSTATEMENT OF THE CASE

A. The Repeal of Section 50-a Makes All Disciplinary Records, Regardless of Date Created, Presumptively Public

In 1976, the New York Legislature passed Section 50-a, which made all law enforcement "personnel records used to evaluate performance toward continued employment or promotion" confidential absent a court order or consent of the officer to disclosure. N.Y. Civ. Rights Law § 50-a (repealed as of June 12, 2020). This law was adopted with a narrow purpose in mind: "to prevent criminal defense lawyers from using such records in cross-examination of police witnesses during criminal prosecutions." *See* Justification, N.Y. Senate Bill S. 8496 Sponsoring Memorandum (June 6, 2020) ("Justification").[3]

Since its passage in 1976, courts interpreted Section 50-a broadly to afford New York law enforcement agencies nearly unfettered ability to shield all police disciplinary records from the public. R259. But in the wake of national protests after the May 25, 2020, murder of George Floyd, the countless deaths of Black men and women at the hands of the police, and the lack of transparency and accountability for those involved in those incidents, on June 12, 2020, New York repealed

[3] https://www.nysenate.gov/legislation/bills/2019/S8496.

Section 50-a, meaning police disciplinary records could no longer be treated any differently than other records sought pursuant to valid FOIL Requests. *Id*.

In repealing Section 50-a, the Legislature intended that the repeal would cover all disciplinary records regardless of the date created. The Sponsoring Memorandum for the repeal made clear that "[r]epeal of § 50-a will help the public regain trust that law enforcement officers and agencies may be held accountable for misconduct," and that, under the status quo, "FOIL's public policy goals, which are to make government agencies and their employees accountable to the public, are . . . undermined by the statute." Justification to S. 8496. It is hard to imagine how the repeal of Section 50-a would help the public regain trust that law enforcement officers and agencies may be held accountable for misconduct if all records previously shielded from disclosure would remain as such. The same is true of the repeal's stated efforts to remedy Section 50-a's effect of undermining FOIL's public policy goals. The very nature and purpose of the repeal was to remove the shroud of secrecy covering historical and forward-looking disciplinary records.

The Floor Debates only confirm this fact. During the Floor Debates Senator Julia Salazar explained that the repeal would give the family of Ramarley Graham, killed by police in 2012, access to records relating to his death "eight years later." N.Y. Senate, Floor Debate, 243rd N.Y. Leg., Reg. Sess. 1821-22 (June 9, 2020), https://www.nysenate.gov/transcripts/2020-06-09t1153. She explained further that

the repeal would allow New Yorkers to learn "whether police departments have taken these misconduct complaints seriously in the past or whether they have ignored or dismissed them." *Id.* at 1823. And, as soon as the repeal was to go into effect, New Yorkers would "finally find out whether an officer who's currently policing in our communities has racked up complaints for using excessive force or for making illegal stops or for any other type of misconduct." *Id.* She continued that "[b]y repealing Section 50-a, we will make it possible to find out whether police departments have ignored repeated patterns and complaints about officers' behavior. Police departments will no longer be able to conceal whether or not they knew about previous excessive-force complaints in their too-frequent attempts to avoid responsibility." *Id.*

But Senator Salazar was not alone. The bill's sponsor, Senator Jamaal Bailey, made clear that while Section 50-a would be repealed, the legislation "add[s] necessary privacy protections to protect the records of the members that were *previously* protected under the—that are *currently* protected under Statute 50-a *until the time that it is repealed from law*." *Id.* at 1770 (emphasis added). Senator Michael Gianaris exclaimed during the Floor Debates, "*let us know who the people with a history of problems are*, so that we can work to improve the system and instill more confidence and faith in it on behalf of the public," (*id.* at 1818 (emphasis added)), while Senator Kevin Parker pointed out that the repeal was "about shining light on

the records of some bad individuals who should be protecting our communities but oftentimes are not." *Id.* at 1819-20. Likewise, Senator Jessica Ramos expressed her "fear" that with the repeal of Section 50-a, "we'll see now that . . . the NYPD as an institution, as a bureaucracy, has not been keeping us safe." *Id.* at 1832. Senator Zellnor Myrie, perhaps summing it up best, stated on the floor, "That is what this bill is about. *It is about the history*. We have seen brutality go unanswered. This isn't an attack; this is accountability. This isn't targeting; this is transparency. This isn't anti-police; this is pro-people." *Id.* at 1880 (emphasis added). Simply put, the Legislature and the public knew exactly what the repeal of Section 50-a was intended to do—and that was to make *all* police disciplinary records open to public view like any other public documents.

B. Petitioners Submit FOIL Requests and Appeals Both Actual and Constructive Denials

On the same day Section 50-a was repealed, Petitioners NYP Holdings, Inc., the publisher of the *New York Post* (the "Post"), and one of its crime reporters, Craig McCarthy, submitted 140 FOIL Requests to the NYPD seeking disclosure of "all disciplinary records" for each of 140 high-ranking or otherwise notable officers. R262. On June 18, 2020, Mr. McCarthy submitted three more identical requests for three other officers. R41; R50-53. Finally, on June 25, 2020, Mr. McCarthy submitted one more identical request for one last officer. R41. After a variety of delays, the NYPD denied or constructively denied all FOIL Requests without ever

invoking retroactivity. And the lone request the NYPD produced responsive records for included disciplinary action predating the repeal. Specifically, on June 18, 2021, the NYPD produced the one heavily-redacted disciplinary record produced in this entire action, a document detailing the disciplinary history of Officer David Afanador for a series of violent incidents between 2014 and 2021—importantly, a period six years prior to the repeal of Section 50-a—and his turning a blind eye to other officers' excessive force. R43-44; R130-175; R449 at n.10.

C. The NYPD Routinely Publishes Disciplinary Records Pre-Dating June 12, 2020

After Section 50-a's repeal, and during the pendency of Mr. McCarthy's appeals and throughout this litigation, the NYPD began publishing disciplinary records and data existing prior to June 12, 2020. As the NYPD admitted in its cross-motion before the IAS Court, "[s]ince the repeal of 50-a the Department has launched an Officer Profile section on its public facing website that shows disciplinary information about active uniform officers and posted several of the most recent disciplinary trial decisions approved by the Police Commissioner for cases from 2012-2021 for active, terminated, and retired MOS after a redaction project launched by the NYPD." R401-402 at n.5. The NYPD now routinely publishes disciplinary information predating the repeal on other online portals as well. For example, since 2021, the NYPD has maintained an online portal where it publishes trial decisions for internal misconduct investigations dating back to January 2008.

See, *e.g.*, https://nypdonline.org/link/1016. Also since 2021, the NYPD has maintained an online dashboard containing profiles and partial disciplinary histories of all 35,000 active police officers dating back to 2014. *See*, *e.g.*, https://nypdonline.org/link/2. Other news organizations have also obtained and published police disciplinary records predating the repeal of Section 50-a, and some of these records are more than 30 years old. *See*, *e.g.*, Policing and Public Trust: New York Police Disciplinary Records, NYDATABASES.COM, *available at* https://data.democratandchronicle.com/new-york-police-disciplinary-records/ (compiling and publishing police disciplinary records from as early as 1986).

D. Petitioners File Article 78 Petition and Prevail Before IAS Court

On October 6, 2021, Petitioners initiated the instant Article 78 proceeding to compel disclosure of the unlawfully withheld disciplinary records. After 10 months, on August 12, 2022, the NYPD filed its answering affirmation and cross-motion where it asserted only that complying with its FOIL obligations would be too burdensome.

Prior to the NYPD's filing of its cross-motion, on November 16, 2021, the PBA intervened to oppose disclosure of all requested records. The PBA raised multiple arguments that the NYPD never asserted, including its lone asserted basis for this Court's review—that the repeal of Section 50-a lacked retroactive

application and therefore permanently prohibits the release of *any* disciplinary record predating June 12, 2020.

On December 6, 2022, the IAS Court issued its Decision and Order granting the Petition in full. The IAS Court ordered the NYPD to "disclose all substantiated and unsubstantiated disciplinary records for the 144 officers (in accordance with petitioners' narrowed request) on a schedule to be worked out by the parties." R10. The IAS Court also held that while the PBA was entitled to intervene in the proceeding, "[i]t would be wholly inappropriate" for it "to permit an intervenor to raise arguments not asserted by the agency" because while the PBA was "entitled to amplify the arguments raised by the NYPD," it could not "force petitioners to respond to arguments about issues that the NYPD waived or failed to assert altogether." R8. As such, the IAS Court did not rule on the PBA's retroactivity argument.

The PBA appealed with respect to the retroactivity question, while Petitioners cross-appealed on the denial of attorneys' fees and costs, an issue not before this Court.[4]

[4] The First Department ultimately held Petitioners were entitled to their reasonable attorneys' fees and remanded to the IAS court to determine the appropriate amount of fees.

E. The First Department Holds the Repeal of Section 50-a Applies Retroactively

On October 12, 2023, the First Department issued a unanimous Decision and Order holding that "the repeal of Civil Rights Law § 50-a applies retroactively to records created prior to June 12, 2020." R532 (Decision and Order) (citing *Schenectady Police Benevolent Ass'n v. City of Schenectady*, 2020 WL 7978093, at *6 (Sup. Ct. Schenectady Cnty. 2020)) ("*Schenectady PBA*"). In reaching its holding, the First Department correctly applied the retroactivity analysis long-endorsed by this Court for statutes lacking an *express* statement of retroactivity, citing to both *In re Gleason (Michael Vee Ltd.)*, 96 N.Y.2d 117 (2001), and *Majewski v. Broadalbin-Perth Cent. Sch. Dist.*, 91 N.Y.2d 577 (1998). R532. The First Department explained that "the repeal 'went into effect immediately and, by its plain reading and intent, applies to records then existing and not simply to records created at a time subsequent to the enactment of the legislation.'" *Id.* (quoting *Cooper ex rel. Cooper v. New York*, 2021 N.Y. Misc. LEXIS 5169, at *10 (N.Y. Ct. Cl. Jan. 26, 2021)). The First Department also correctly found that "[t]he legislative history clarifies that the legislature 'conveyed a sense of urgency' and intended for the legislation to be remedial" (*id.*) and also cited to case law holding that the repeal "reflected a strong legislative policy promoting transparency of police disciplinary records and eliminated any claim of confidentiality in them." *Id.* at 531 (quoting *People v. Castellanos*, 72 Misc. 3d 371, 376 (Sup. Ct. Bronx Cnty. 2021)).

Thus, while the First Department cautioned that "characterization of a statute as remedial is not dispositive," it correctly held that "as a general matter 'remedial legislation should be given retroactive effect in order to effectuate its beneficial purpose.'" *Id.* at 532 (quoting *Gleason*, 96 N.Y.2d at 122; *Majewski*, 91 N.Y.2d at 585). The First Department then explained that the PBA's position "that, given General Construction Law § 93, former Civil Rights Law § 50-a should continue to bar disclosure of police disciplinary records created before June 12, 2020 in response to FOIL requests, 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.*

These considerations alone satisfy the retroactivity analysis, but the First Department went considerably further. At oral argument, the panel rightly reminded the PBA's counsel that records are presumptively available to the public under FOIL unless a specific exemption applies. Prior to its repeal, Section 50-a applied to withhold records under FOIL via Public Officers Law § 87(2)(a) "which provides that an agency may deny access to records that *are* specifically exempt from disclosure by state or federal statute, *not were* specifically exempt." September 21, 2023 Appellate Division, First Department Live Stream, *available at* https://www.youtube.com/watch?v=Z4g-3jT6-Dg&list=PLSfH-NopovE-cDXoBKtCYMVp4ctK6Wn_k&index=17 at 2:46:31-2:46:45 (emphasis by panel).

As the First Department panel pointed out at argument, Section 50-a "is gone," and the "legislature went through these policy considerations and after 40 years decided the time has come to change 50-a." *Id.* at 2:45:29-2:46:25. As such, since there is no statute that specifically exempts pre- or post-repeal disciplinary records from disclosure, Section 87(2)(a) is inapplicable, and the ghost of Section 50-a cannot be applied to withhold disciplinary records under FOIL. Yet, still, counsel for the PBA continued to insist that "we have to act, for purposes of records that predate the repeal, as if Section 50-a had never been repealed." *Id.* at 2:47:15-2:47:24. That is not the law.

F. The Second and Fourth Departments and the Committee on Open Government Agree That all Disciplinary Records, Regardless of Date Created, Are Now Presumptively Available to the Public

Before the First Department issued its Decision, only one other Appellate Department had addressed the production of pre-June 12, 2020, disciplinary records. *See New York Civ. Liberties Union v. City of Rochester*, 210 A.D.3d 1400, 1401 (4th Dep't 2022), *leave for appeal granted on other grounds*, 39 N.Y.3d 915 (2023) ("*City of Rochester*"). In *City of Rochester*, the Fourth Department modified a judgment from the trial court and granted "those parts of the petition seeking law enforcement records *dated on or before June 12, 2020*." *Id.* (emphasis added). While the court's decision rested on waiver grounds, the parties fully briefed the retroactivity question for the court, and it still ordered disclosure of the disciplinary records irrespective of

the date created. Perhaps recognizing the futility of the retroactivity argument, the City of Rochester sought and was granted leave to appeal from this Court solely on the issue of whether unsubstantiated disciplinary records need be disclosed following the repeal—not the retroactivity question.

Approximately one month after the First Department issued its Decision, the Second Department likewise held that the Legislature did not intend to exclude from disclosure police disciplinary records that were created prior to June 12, 2020. *See e.g.*, *Newsday, LLC v. Nassau Cnty. Police Dep't*, 222 A.D.3d 85, 92-93, 95 (2d Dep't 2023). Preliminarily, the Second Department correctly noted that because "[t]he petitioner made the subject FOIL requests in July 2020, after the legislative amendments were enacted," that "the petitioner is not seeking retroactive application of the statutory amendments to a pending FOIL request." *Id.* (citing *Majewski*, 91 N.Y.2d 577 (discussing retroactivity)). The Second Department then held:

> To the extent that the NCPD contends that the Legislature intended to exclude from disclosure any law enforcement disciplinary records that were created prior to June 12, 2020, it has offered no support for this proposition. By their nature, FOIL requests seek records that were generated prior to the request date. In amending the Public Officers Law to provide for the disclosure of records relating to law enforcement disciplinary proceedings, the Legislature did not limit disclosure under FOIL to records generated after June 12, 2020, and we will not impose such a limitation ourselves.

Id. And after the PBA submitted its brief to this Court, the Second Department reaffirmed the *Newsday* ruling, holding that because "the petitioner made the subject

FOIL requests after the legislative amendments were enacted, the petitioner was not seeking retroactive application of the statutory amendments to a pending FOIL request," and the court also "reject[ed] the respondents' contention that . . . the Legislature intended to exclude from disclosure any law enforcement disciplinary records that were created prior to June 12, 2020." *Gannett Co. v. Town of Greenburgh Police Dep't*, 229 A.D.3d 789, 793 (2d Dep't 2024).

The Fourth Department also recently reached the same holding as the Second Department, explaining:

> it is not a retroactive application of the repeal of section 50-a to conclude that past police disciplinary records are no longer subject to that exception and are now subject to FOIL; it is merely a recognition that police departments faced with FOIL requests cannot rely on an exception that no longer exists to evade their prospective duty of disclosure.

Abbatoy v. Baxter, 227 A.D.3d 1376, 1377-78 (4th Dep't 2024). This is because "[w]hen section 50-a was repealed on June 12, 2020, that exception was removed. 'A statute is not retroactive . . . when made to apply to future transactions merely because such transactions relate to and are founded upon antecedent events.'" *Id.* (quoting *Forti v. New York State Ethics Comm'n*, 75 N.Y.2d 596, 609 (1990)).

Likewise, when presented with the same issue posed by this appeal, the New York State agency tasked with furnishing "advisory guidelines" and "advisory opinions" regarding FOIL, (*see* POL § 89(1)(b)), agreed with Respondents here, adopting the same reasoning above. Specifically, in its December 2020 *Report to*

the Governor & Legislature by the Committee on Open Government, the agency considered the effect of repeal on "records created before June 12, 2020," and it confirmed that the relevant "question is not whether the amendments to FOIL concerning the disclosure of law enforcement disciplinary records have retroactive effect, but rather whether records dating before June 12, 2020, are maintained by the agency at the time of a FOIL request." COOG 2020 Report at 7-8. If they are, they must be disclosed, subject only to the current list of "exemptions appearing in §§ 87[2][a]- [q] of the Law." *Id.* at 8. This is because "it has long been understood by courts . . . that FOIL renders records 'maintained by an agency,' regardless of creation date, subject to disclosure." *Id.* at 7.

In subsequent Annual Reports from 2022 and 2023, and in response to the trial court decisions referenced in the PBA's brief (Br. at 12-13), the Committee on Open Government has reiterated that even if retroactivity were the correct analysis, "[t]he Committee believes that the repeal must be applied retroactively to fulfill the expressed intent of the Legislature to promote transparency and accountability for law enforcement agencies." New York State Committee on Open Government, 2022 REPORT TO THE GOVERNOR AND STATE LEGISLATURE 6 (Dec. 2022), https://opengovernment.ny.gov/system/files/documents/2022/12/2022-coog-annual-report-final.pdf ("COOG 2022 Report"); *see also* New York State Committee on Open Government, 2023 REPORT TO THE GOVERNOR AND STATE LEGISLATURE 7

(Dec. 2023), https://opengovernment.ny.gov/system/files/documents/2023/12/2023-coog-annual-report_final.pdf ("COOG 2023 Report"). This follows because "all law enforcement personnel records – whenever created – are subject to disclosure under FOIL unless they come within one of its statutory exemptions." *Id.*

ARGUMENT

The Court reviews questions of law, like the question of whether records created prior to the repeal of Section 50-a may be categorically withheld in response to a post-repeal FOIL request, de novo. *Weingarten v. Bd. of Trs.*, 98 N.Y.2d 575, 580 (2002). "It is fundamental that a court, in interpreting a statute, should attempt to effectuate the intent of the Legislature." *Majewski*, 91 N.Y.2d at 583 (citation omitted). Here, the intent of the Legislature is clear: records created prior to the repeal of Section 50-a are subject to disclosure under FOIL.

I. THE COURT SHOULD AFFIRM THE DECISION OF THE APPELLATE DIVISION AND REQUIRE PRODUCTION OF ALL NON-EXEMPT DISCIPLINARY RECORDS IN ITS POSSESSION REGARDLESS OF DATE CREATED

A. Petitioners Do Not Seek Retroactive Application of Any Law; Rather, They Seek Records Currently in the NYPD's Possession Not Subject to Any Existing FOIL Exemption

The question presented by this appeal is not whether the repeal of Section 50-a "applies retroactively" (PBA Br. at 6) but, instead, whether as of the date of Petitioners' FOIL Requests (*i.e.*, June 12, 18, and 25, 2020), the PBA could compel the NYPD to invoke a repealed statute to justify the withholding of records currently

in the agency's possession. It could not. As Section 50-a no longer exists, disclosure of police disciplinary records is no longer exempt pursuant to POL § 87(2)(a), the provision that authorizes denial of access to records that "are specifically exempted from disclosure by state or federal statute." Retroactivity has nothing to do with this analysis.

It is axiomatic that if an agency has responsive records in its possession at the time a FOIL request is made, those records are presumptively open to the public and must be produced unless a specific exemption applies. *Gould v. N.Y. City Police Dep't*, 89 N.Y.2d 267, 274-75 (1996) (all government records are "presumptively open for public inspection . . . unless they fall within one of the enumerated exemptions"). The date of record creation is not, and has never been, relevant to the FOIL analysis. *See* POL § 87(2) (requiring agencies to produce "all records, except those records or portions thereof that may be withheld pursuant to the exceptions"); POL § 86(4) (defining "record" to include "any information kept, held, filed, produced or reproduced by, with or for an agency"); POL § 87(3) (requiring agencies to maintain a "current list by subject matter of all records in the possession of the agency").

Indeed this is the only reasonable and practicable way to interpret FOIL's mandate given that Section 87 of the Public Officers Law has been amended more than thirty times since FOIL was passed. *See* POL § 87 (McKinney's 2021)

(providing history of amendments). Under the PBA's proposed analysis, agencies would be forced to engage in an impossible task of applying various outdated versions of the law to records based on the exact date of their creation and the specific exemptions available on that date. Moreover, FOIL officers should not be expected to be familiar with the legislative history of every amendment to FOIL before responding to a request. FOIL simply does not work that way.

The Second Department relied on this reasoning in holding that the "petitioner made the subject FOIL requests in July 2020, after the legislative amendments were enacted, and, thus, [was] not seeking retroactive application of the statutory amendments to a pending FOIL request." *Newsday*, 222 A.D.3d at 92-93; *see also Gannett Co.*, 229 A.D.3d at 793 (same). This is because, "[b]y their nature, FOIL requests seek records that were generated prior to the request date," and since "the Legislature did not limit disclosure under FOIL to records generated after June 12, 2020," the court would "not impose such a limitation." *Newsday*, 222 A.D.3d at 93. Likewise, the Fourth Department recently used the same reasoning to reach the same conclusion, explaining that "it is not a retroactive application of the repeal of section 50-a to conclude that past police disciplinary records are no longer subject to that exception and are now subject to FOIL; it is merely a recognition that police departments faced with FOIL requests cannot rely on an exception that no longer

exists to evade their prospective duty of disclosure." *Abbatoy*, 227 A.D.3d at 1377.[5] This is because "[w]hen section 50-a was repealed on June 12, 2020, that exception was removed. 'A statute is not retroactive . . . when made to apply to future transactions merely because such transactions relate to and are founded upon antecedent events.'" *Id.* (quoting *Forti*, 75 N.Y.2d at 609).

In its Brief, the PBA attempts to argue that the Fourth Department's application of *Forti* is misguided because "the 'transactions' at issue are officers' binding disciplinary decisions, and the creation of associated records and statements," and it "is a fiction to say that the requests for historic records pertains only to 'future transactions.'" PBA Br. at 32. But this analysis is flatly wrong. Here, the repeal of Section 50-a does not change any of the outcomes of binding disciplinary decisions, and as discussed *infra*, the record is devoid of any evidence that any of the 144 officers here settled their lawsuits in reliance on Section 50-a. Rather, the repealed law means that Section 50-a no longer applies to the NYPD's prospective consideration of Petitioners' pending FOIL requests—a "future

[5] The PBA's brief erroneously claims that "[t]he 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." PBA Br. at 35. But that argument misunderstands those holdings. Neither court has held the change in law was "automatically retroactive;" rather, both courts held that they need not engage in retroactivity analysis at all because they first determined that disclosure of disciplinary records via a valid FOIL request was simply not a retroactive application of any law. *See*, *e.g.*, *Newsday*, 222 A.D.3d at 93 (considering *Majewski* retroactivity analysis but finding it was not applicable); *Abbatoy*, 227 A.D.3d at 1377 (finding that the repeal did not necessitate a retroactivity analysis); *Gannett Co.*, 229 A.D.3d at 793 (same).

transaction." That the pending FOIL requests may touch upon "antecedent events"—police officers' prior disciplinary actions—does not render the repeal retroactive in nature. *See*, *e.g.*, *Acevedo v. N.Y. State Dep't of Motor Vehicles*, 29 N.Y.3d 202, 228-29 (2017) (explaining that "the Regulations were not impermissibly applied retroactively to petitioners' applications simply because the Commissioner considered prior conduct—namely petitioners' drunk driving offenses—that predated the Regulations" because, although an "antecedent event," the Regulations "applied only to the Commissioner's prospective consideration of petitioners' pending re-licensing applications—a 'future transaction'").

And when presented with this same question, the Committee on Open Government confirmed that the relevant "question is not whether the amendments to FOIL concerning the disclosure of law enforcement disciplinary records have retroactive effect, but rather whether records dating before June 12, 2020, are maintained by the agency at the time of a FOIL request." COOG 2020 Report at 7-8. If pre-June 12, 2020, records are maintained by the agency, they must be disclosed, subject only to the current list of "exemptions appearing in §§ 87(2)(a)-(q) of the Law." *Id.* at 8. This is because "it has long been understood by courts and the Committee that FOIL renders records 'maintained by an agency,' regardless of creation date, subject to disclosure." *Id.* at 7.

When faced with similar issues arising from amendments to open records laws to make police disciplinary records available, courts in other jurisdictions, including a leading case in California, have held that "[t]he question of retroactive application . . . is of no consequence" where the amended law "merely prescribes a law enforcement agency's prospective duty" as of the date of enactment. *See L.A. Police Protective League v. City of L.A.*, 2019 WL 1449721, at *3 (Cal. Super. Ct. Feb. 19, 2019) ("*LAPPL*"). Indeed, in *LAPPL*, the California court held that, "[g]iven the prospective nature of the duty created by the [amended law]," the amended law applied to all requests for disciplinary records "maintained" in the agency's possession as of the date of the amendment, and had "nothing to do with the date on which a personnel record was created." *Id.* at 3-4. This analysis is logically sound given that the change in open records laws "does not impose an obligation or burden on a law enforcement agency to revisit responses it may have made to [FOIL] requests prior to [the enactment date]." *Id.* at 3. Other jurisdictions with strikingly similar changes in their Freedom of Information laws to make police disciplinary records available have also adopted the same approach. *See*, *e.g.*, *State of Hawaii Org. of Police Officers (SHOPO) v. Soc'y of Pro. Journalists-Univ. of Hawaii Chapter*, 927 P.2d 386, 397 (Haw. 1996) (same); *Beacon Journal Publ'g v. Univ. of Akron*, 415 N.E.2d 310, 313 (Ohio 1980) (same).

The same analysis applies here: under FOIL, the agency always has a "prospective duty" to produce all records in its possession that are not exempt from disclosure regardless of the date the record was created. Therefore, there should be no unique treatment of police disciplinary records created before June 12, 2020. This is not akin to requiring law enforcement agencies to go back and revisit old requests from before June 12, 2020, and updating their responses, which is what a "retroactive application" of the law would actually require. *See LAPPL*, 2019 WL 1449721, at *3. Petitioners merely seek the application of the extant law on the date of its June 12, 18, and 25, 2020, FOIL Requests.

Other language from the Justification of Section 50-a's repeal supports this view. The unambiguous language demonstrates the repeal has nothing to do with the date on which a personnel record was created—it applies to all records and specifically references that one of many problems with Section 50-a includes the need for disclosure concerning past instances of misconduct, explaining that Section 50-a previously "create[d] a legal shield that prohibits disclosure, even when it is known that *misconduct occurred*." Justification to S. 8496 (emphasis added). It logically follows that the Legislature contemplated that FOIL Requests would cover disciplinary records concerning misconduct that had already occurred before June 12, 2020, since, by their nature, FOIL requests necessarily include conduct that occurred before the date a request is made.

For these reasons, no retroactivity analysis is required for this Court to conclude that all police disciplinary records sought by valid FOIL request, regardless of date created, must be produced unless another FOIL exemption applies.

B. The Decision Should Be Affirmed Because Even if Considered a Retroactive Application of the Repeal of Section 50-a, the Legislature Clearly Intended Such Retroactive Application

Even if the Court chooses to analyze through the lens of retroactivity whether pre-repeal records must be disclosed in response to post-repeal requests, the Legislature clearly intended such requests to reach pre-repeal records. The correct interpretation and effect of Section 50-a's repeal should be evident to anyone who paid the slightest attention in the immediate aftermath of the George Floyd killing in May 2020. In less than three weeks, both chambers of the Legislature passed the repeal, and the Governor signed the repeal into law. In doing so, the State government pronounced that the repeal of Section 50-a would provide immediate access to disciplinary records in the name of transparency and accountability to restore trust between law enforcement and the public. The very nature of the repeal was to shine a light on those policing the streets and enable the public to scrutinize and understand whether police departments have lived up to their mandates to punish misconduct within their ranks.

Ignoring the societal context and the events of the day that precipitated the repeal, the PBA argues that the First Department's Decision is "fundamentally

unfair" and should be reversed because it (1) "violated New York's strong presumption against retroactivity by writing retroactivity into the repeal of CRL § 50-a where the legislature was silent" and (2) swept "away decades of reliance interests by [police] officers without a clear expression of legislative intent." PBA Br. at 16-17. The PBA is wrong on both accounts.

1. The Decision Below Correctly Gave Retroactive Effect to the Repeal of Section 50-a, a Remedial Change in Law

The First Department did not depart from this Court's precedent in holding that the repeal of Section 50-a applies retroactively to records created prior to June 12, 2020. R532. The PBA continues to mistake this Court's precedent that establishes a *presumption* against retroactive application where a statute lacks an express statement of retroactivity with a *prohibition*.[6] PBA Br. at 18. That is not the law.

Retroactive effect is given to remedial statutes, which are statutes "designed to correct imperfections in prior law, by generally giving relief to the aggrieved party." *Nelson v. HSBC Bank USA*, 87 A.D.3d 995, 998 (2d Dep't 2011) (citation

[6] The PBA also insists that the Second and Fourth Department holdings are erroneous because they "turn New York's strong presumption against retroactivity on its head," since those decisions would require that the Legislature affirmatively state "that the repeal is *not* intended to be retroactive and that pre-existing statutory rights continue." PBA Br. at 34 (emphasis in original). But not only is this not actually what either case says, for the reasons already discussed *supra*, the Second and Fourth Departments never had to address the presumption against retroactivity or legislative intent because they held prospective disclosure is not a retroactive application. *Abbatoy*, 227 A.D.3d at 1377; *Newsday*, 222 A.D.3d at 93; *Gannett Co.*, 229 A.D.3d at 793.

omitted). Such laws are "given retroactive effect in order to effectuate [their] beneficial purpose," *In re Gleason* (*Michael Vee, Ltd.*), 96 N.Y.2d 117, 122 (2001). In reaching its well-reasoned Decision, the First Department correctly followed this Court's guidance that "[t]here is certainly no requirement that particular words be used—and, in some instances ***retroactive intent can be discerned from the nature of the legislation***." *Regina Metro.*, 35 N.Y.3d at 370 (emphasis added). This is just such an instance, as the nature of the repeal legislation, passed in the wake of the George Floyd murder and during nationwide protests that followed, was to remove the cloak of confidentiality from a class of records in service of transparency, accountability, and trust.

Contrary to the PBA's claim, the First Department did not merely "bolster its retroactivity holding with the fact that the repeal took effect 'immediately.'" PBA Br. at 19. Rather, the First Department's Decision correctly and carefully took into consideration a number of factors laid out by this Court in *Gleason*, including the legislative history, the legislation's remedial and beneficial purpose, and both the plain reading and intent to apply the repeal "to records then existing and not simply to records created at a time subsequent to the enactment of the legislation," just as the *Gleason* analysis requires.[7] R532 (quoting *Cooper ex rel. Cooper*, 2021 N.Y.

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[7] The PBA argues that the First Department erred in relying on *In re Gleason*, 96 N.Y.2d 117 (2001). PBA Br. at 22 n.6. It did not. For over two decades, *Gleason* has stood for the proposition that "remedial legislation should be given retroactive effect in order to effectuate its beneficial

Misc. LEXIS 5169, at *10 (N.Y. Ct. Cl. Jan. 26, 2021)). And in any event, whether or not the repeal "took effect immediately," and therefore evinces urgency, is one of many of the considerations properly considered by the First Department as just one part of the analysis. *See* S. 8496, 243rd Leg. Sess., § 5 (N.Y. June 6, 2020) ("This act shall take effect immediately."); *see also Majewski*, 91 N.Y.2d at 583 ("[T]o take effect immediately evinces a sense of urgency.") (citations omitted). Multiple New York courts have held that the phrase "take effect immediately" is indicative of the Legislature's urgency in repealing Section 50-a. *See*, *e.g.*, *Schenectady PBA*, 2020 WL 7978093, at *1 (repeal took "effect immediately, removed the blanket of secrecy with which law enforcement records, statewide, were previously cloaked in their entirety"); *Cooper ex rel. Cooper*, 2021 N.Y. Misc. LEXIS 5169, at *10 (retroactive effect where Section 50-a takes "effect immediately"); *Puig v. City of Middletown*,

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purpose" and provides multiple factors to guide courts in the retroactivity analysis, including: "whether the Legislature has made a specific pronouncement about retroactive effect or conveyed a sense of urgency; whether the statute was designed to rewrite an unintended judicial interpretation; and whether the enactment itself reaffirms a legislative judgment about what the law in question should be." *Id.* at 122. The PBA's reliance on *People v. Galindo* is also misplaced. There, this Court held—after consideration of the text "expressly or by necessary implication" and legislative history that there was no indication of legislative urgency where (1) "the legislature *delayed* the amendment's effective date for eight months"; and (2) "the legislature waited over 40 years . . . before expressly abrogating that line of cases." 38 N.Y.3d 199, 207 (2022) (emphasis in original). The nature of the legislation in *Galindo* was the classification of traffic infractions. Here, by contrast, the very nature of the repeal of Section 50-a requires retroactive application for it to have any meaning (*i.e.*, undo decades of public distrust and eroding accountability between law enforcement and the public, especially in light of past misconduct at the hands of police officers). Nor did the legislature in *Galindo* evince any sense of urgency, given the timelapse, whereas here, by contrast, the repeal of Section 50-a took effect immediately and conveyed a sense of urgency by enacting the repeal less than three weeks after nationwide protests over police misconduct began.

71 Misc. 3d 1098, 1106 (Sup. Ct. Orange Cnty. 2021) ("to take effect immediately evinces a sense of urgency"), *aff'd*, 2024 WL 3959162 (2d Dep't Aug. 28, 2024).

The legislative history establishes that the repeal was "designed to correct imperfections in prior law" that allowed police departments to block public disclosure of any record considered as bearing on the performance evaluation of a police officer, no matter how remote or attenuated the connection—the hallmark of a remedial legislative act. *Town of Cortlandt v. New York State Bd. of Real Prop. Servs.*, 36 A.D.3d 823, 826 (2d Dep't 2007) (quoting *Asman v. Ambach*, 64 N.Y.2d 989, 990-91 (1985)); *see also Nelson*, 87 A.D.3d at 997-98 ("[R]emedial legislation should be given retroactive effect in order to effectuate its beneficial purpose. . . . Remedial statutes are those designed to correct imperfections in prior law[.]") (internal quotation marks and citations omitted).

The repeal was also designed to rewrite an unintended judicial interpretation. Specifically, for more than 40 years, New York courts misinterpreted the narrow exception for 50-a: "to prevent criminal defense attorneys from using [disciplinary] records during cross-examinations of police witnesses." *Puig*, 71 Misc. 3d at 1108 (quoting Justification to S. 8496). Indeed, what was a narrow confidentiality provision designed simply to "limit access to [law enforcement] personnel records by criminal defense counsel, who used the contents of the records . . . against officers[] to embarrass officers during cross-examination," *Carpenter v. City of*

Plattsburgh, 105 A.D.2d 295, 298 (3d Dep't 1985) (citing *People v. Morales*, 97 Misc. 2d 733, 738 (Crim. Ct. N.Y. Cnty. 1979)), *aff'd*, 66 N.Y.2d 791 (1985), was afforded an unnecessarily expansive judicial interpretation over the years. The statute, which was enacted a year before FOIL, was never intended to "withhold from the public virtually any record that contains any information that could conceivably be used to evaluate the performance of a police officer." *Puig*, 71 Misc. 3d at 1103. Thus, this overbroad interpretation "created a 'legal shield' that prohibited disclosure even when it [was] known that misconduct ha[d] occurred." *Id.* at 1104. As observed in *Schenectady PBA*, "despite litigation to repudiate or, at least, scale back [Section] 50-a's blanket safeguard against disclosure, its protections, prior to 2020, continued to receive expansive interpretation." 2020 WL 7978093, at *3. In response to this broad judicial construction, New York lawmakers, "responding to public demand, dramatically changed the landscape on June 12, 2020. On this date, a package of sweeping statutory reforms was enacted in combination with the complete repeal of [Section] 50-a." *Id.* at *4.

The text accompanying Senate Bill S. 8496 confirms the repeal of Section 50-a was intended to remedy 50-a's broad interpretation when applied to FOIL. As the Legislature explained: "FOIL's public policy goals . . . to make government agencies and their employees accountable to the public, [had been] undermined" and the "evolution of Section 50-a ha[d] defeated [the FOIL] goal of

accountability and transparency." Justification to S. 8496. The repeal sought to undo that unintended "legal shield," to remedy flaws in police accountability, to "help the public regain trust that law enforcement officers and agencies may be held accountable for misconduct," and to "positively affect public trust in law enforcement and serve to hold police and other uniformed law enforcement officials to the same level of accountability applied to all other public employees." *Id.* Post-enactment statements from the Committee on Open Government have reiterated the same conclusion, noting "that the repeal must be applied retroactively to fulfill the express intent of the Legislature to promote transparency and accountability for law enforcement agencies" because "all law enforcement personnel records – whenever created – are subject to disclosure under FOIL unless they come within one of its statutory exemptions." COOG 2022 Report at 6; *see also* COOG 2023 Report at 7.

While the PBA posits that the use of present tense in the text of the repeal implies it should only apply to future conduct (PBA Br. at 26), the PBA fails to cite any cases for this argument, and both misunderstands how FOIL requests work and what the Justification section actually says. FOIL requests seek records maintained by an agency and invariably reach records created prior to the date of the request. *See supra I.A*. And as the Justification accompanying Senate Bill S8496 makes clear, the express purpose of the repeal included accountability, transparency, and to ensure that police disciplinary records are treated like *any other* public employees'

records, which necessarily requires the production of all responsive records regardless of date created unless a FOIL exemption applies.

The Legislature also made clear its "legislative judgment" that *histories* of complaints (not just future complaints) must see the light of day. *See*, *e.g.*, N.Y. Senate, Floor Debate, 243rd N.Y. Leg., Reg. Sess. (June 9, 2020) at 1821-23 (Sen. Salazar remarking that repeal would give the family of Ramarley Graham, who died eight years earlier in a confrontation with police, access to records relating to his death); *id.* at 1823 (Sen. Salazar noting that repeal will allow New Yorkers to find out "whether police departments have taken these misconduct complaints seriously *in the past* or whether they have ignored or dismissed them" (emphasis added)); *id.* at 1818 (Sen. Gianaris: repeal intended to inform public about the "people with a history of problems"); Assembly Debate at 106-09 (Member Epstein noting that "the history" of certain officer caught on tape assaulting a citizen would "remain[] unknown" absent repeal); *id.* at 145-46 (Member Richardson: release of historical records will allow public to "track the patterns" of misconduct); *id.* at 152 (Member Mosley: "As soon as this law goes into effect, . . . New Yorkers . . . will be able to demand and get from their police departments [information about] officers [with] a history of misconduct").

Contrary to the PBA's insistence that statements by legislators supporting a change in law are "unhelpful" and are merely "ambiguous comments . . . which [do]

not even address retroactivity," (PBA Br. at 20 n.5), these statements clearly express the Legislature's understanding that the repeal would reach past discipline and historical records allowing the public to track patterns of behavior. And while Respondents here have never claimed that declarations of legislators during floor debates are dispositive, they should be used as indicators of legislative intent and "may be accorded some weight in the absence of more definitive manifestations of legislative purpose." *See Majewski*, 91 N.Y.2d at 586; *In re OnBank & Tr. Co.*, 90 N.Y.2d 725, 731 (1997) (in the absence of express statements of retroactivity, relying on comments made by amendment's sponsor and chair to hold that "[t]he history of the amendment also indicates a legislative intent that it be retroactive").

The PBA's claim that the repeal is not remedial because it occurred many years after passage of the original law or because proposed legislation to repeal Section 50-a was first introduced in 2016 misses the point. PBA Br. at 21-22. Just because the law was repealed years after its enactment does not make its import any less remedial. This is especially true given the broader context of the George Floyd murder just three weeks earlier, the Justification to S. 8496, the legislative history, and the very nature of the legislation make clear the repeal was not simply a "gradual determination to change the law." PBA Br. at 22. Rather the repeal was designed to overhaul the relationship between law enforcement and the public via transparency

and accountability which requires a historical lookback to hold any meaningful purpose to the public.

The PBA then focuses its brief on two recent First Department cases, *Gottwald v. Sebert* and *Raparthi v. Clark*—claiming that both are irreconcilable with the Decision below because the statutes in each case were deemed "remedial" yet were not applied retroactively. PBA Br. at 22-23. The PBA is wrong that these decisions are irreconcilable.

In *Gottwald*, the First Department held that amendments to New York's anti-SLAPP law were not intended to apply retroactively to libel cases filed prior to the amendments even though the amended statute was "remedial" and "the legislature provided that the amendments shall take effect immediately." 203 A.D.3d 488, 489 (1st Dep't 2022), *rev'd on other grounds*, 40 N.Y.3d 240 (2023). But the anti-SLAPP law is a much different statutory scheme than the repeal of Section 50-a. Unlike here, the anti-SLAPP amendments at issue in *Gottwald* "broaden[ed] the scope of the law" extending significant rights and protections to defendants in frivolous lawsuits based on the exercise of free speech rights, including the right to file a lawsuit for attorneys' fees and damages. Retroactive application of the anti-SLAPP law could have potentially opened up long-resolved libel lawsuits to previously uncontemplated litigation against the initial plaintiffs for damages.

Just as in *Gottwald*, in *Raparthi*, the defendant argued that an amendment to the No Wage Theft Loophole Act applied retroactively and therefore "require[d] reinstatement of his Labor Law claim," *i.e.*, an argument that would have given the defendant the ability to bring a new claim under the broadened scope of the law. 214 A.D.3d 613, 614 (1st Dep't 2023). The First Department held it was not retroactive, notwithstanding the Legislature stating it was "a remedial amendment," because the court had "continued to hold that the wholesale withholding of commissions is not a specific deduction from wages as required under [the statute]." *Id.* Thus, clearly the First Department does not simply write retroactivity into legislation whenever it feels like it; rather, it considers multi-factor tests for retroactivity, including considering whether retroactive application would create new liabilities for prior conduct just as it did in *Gottwald* and *Raparthi*.

Here, unlike in *Gottwald* and *Raparthi*, no additional rights or protections are being granted retroactively, there is no concern that old claims will be revived, and no one faces the prospect of new liabilities on account of actions under the pre-repeal regime. At bottom, nothing in the First Department's Decision suggests that it reached an irreconcilable result with either *Gottwald* or *Raparthi*; it simply reached a different result based on the facts in this specific case.

For the same reasons, it is of no moment that the Fourth Department found that the repeal of a statute, which previously conferred immunity to healthcare

providers for negligence claims arising from COVID treatments, should not be applied retroactively, even where the Justification made clear that it was also designed to promote "accountability." *Ruth v. Elderwood at Amherst*, 209 A.D.3d 1281, 1286 (4th Dep't 2022). The *Ruth* holding is sound because if the repeal was applied retroactively, healthcare providers would "face entirely separate liability in state civil actions for conduct that was inoculated by EDTPA," *i.e.*, retroactive application in *Ruth* would punish prior misconduct that was previously immune. *Id.* That is nothing like the facts here, where the repeal of Section 50-a does not impose new punishment for prior misconduct but, instead, simply makes previously resolved claims publicly viewable. And as discussed *supra*, while the repeal may upset prior expectations for some unspecified number of officers, applying the repeal retroactively does not attach any new legal consequence to any discipline imposed on any police officers. Nor does a retroactive application subject police officers to further or different discipline for prior conduct; there is no legal consequence whatsoever to disclosing the disciplinary records sought here. As the PBA concedes, the "18-month statute of limitations applicable to civil service discipline would have already expired." PBA Br. at 26. That the information may be disclosed to the public is not a new legal consequence to events completed before Section 50-a's repeal—it simply makes those public disciplinary records previously immune from FOIL now disclosable subject to valid FOIL requests, treating police officers the same as any

other public employees. *See*, *e.g.*, *N.Y. Civ. Liberties Union v. N.Y. State Police*, 228 A.D.3d 1162, 1166 (3d Dep't 2024) (finding that "the legislative materials clearly indicate a desire that disclosure of these records be treated like any other public record"); *LAPPL*, 2019 WL 1449721, at *5 (accord under California law).

The PBA also claims, without support, that "even if the purpose behind the repeal were considered under a remedial analysis, the purpose does not 'by necessary implication require' retroactivity," (PBA Br. at 18 (quoting *Majewski*, 91 N.Y.2d at 584)), because, the PBA claims, the Legislature's "conclusion that disclosure promotes accountability is served on a going-forward basis to personnel matters arising after the repeal." PBA Br. at 27. But the repeal necessarily requires retroactive application to reach all disciplinary records because any other holding would render the repeal meaningless. This is so for the very obvious reason that to provide accountability and transparency and to restore trust between the public and law enforcement, FOIL requests must reach all disciplinary records, otherwise the very conduct referenced on the debate floor would remain shrouded in secrecy in perpetuity. At the same time, in order to treat law enforcement records like any other government employees' records, law enforcement records predating June 12, 2020, can no longer be treated any differently.

2. Statutory Confidentiality Is Not a Vested Right, and Police Officers Do Not Retain a Continuing Expectation of Confidentiality in Perpetuity

The PBA continues to argue that the First Department "failed to credit the decades-long privacy rights and reliance interests of officers" because "a remedial statute cannot be implied to be retroactive if it would infringe vested rights to do so," speculates, without any record support, that officers "made decisions in reliance on those privacy and confidentiality rights," and claims "it is indisputable that officers . . . had an accrued right to privacy and confidentiality over personnel records" which can never be taken away. PBA Br. at 20, 23, 31. In sum, the PBA continues to assert that police officers' "pre-existing rights continue as if the statute remains in effect." *Id.* at 30. In other words, the PBA argues that the NYPD must act as though Section 50-a was never repealed and is, therefore, forbidden from ever producing disciplinary records pre-dating the repeal. This is simply not the law.

As an initial matter, the First Department gave full and fair consideration to the PBA's claim that police officers' confidentiality interests in their own disciplinary records continue in perpetuity but did not find it compelling enough to override clear legislative intent. As the Decision stated: "PBA's position that, given General Construction Law § 93, former Civil Rights Law § 50-a should continue to bar disclosure of police disciplinary records created before June 12, 2020 in response to FOIL requests, would run counter to the clear legislative purpose of providing

public access to records that may contain information about actual or alleged police misconduct." R532. Thus, the First Department was faithful in its application of this Court's precedent concerning overcoming the presumption against retroactivity and did not ignore or "sweep away" the police officers' reliance interests.[8]

In addition, imposing confidentiality over a class of otherwise public records is a matter of legislative prerogative; not vested rights. The confidentiality afforded by Section 50-a was nothing more than an expectation based on the anticipated continuation of a benefit bestowed by then-present general law. Sweeping aged disciplinary records under the rug of confidentiality is not necessary for police officers to perform their job duties and is not a vested right. And what the Legislature

[8] The PBA also extrapolates that the Second and Fourth Department decisions somehow "create a dangerous precedent" because "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." PBA Br. at 33. The question is not whether police officers' privacy rights are "worthy of protection" but, rather, whether by repealing a statute which once guaranteed confidentiality, the repealed law continues to provide a continuing confidentiality right. As other courts have held that reached the retroactivity analysis, the answer is clearly no. In the FOIL context, where there is a presumption of openness, and where, as here, the Legislature expressly stated that law enforcement records will be treated like any other public employees' records, there is no support for the argument that police officers' former confidentiality rights continue in perpetuity. R532; *N.Y. Civ. Liberties Union*, 228 A.D.3d at 1163; *see also LAPPL*, 2019 WL 1449721, at *5. The PBA offers nothing to rebut these decisions; instead it tries to analogize police disciplinary records, which are no longer subject to a prohibition against disclosure, with confidential records created in healthcare and litigation contexts which are not applicable here. *See*, *e.g.*, PBA Br. at 33 (citing N.Y. Jud. Law § 45 (judicial conduct privilege); N.Y. Admin. Code § 20-817 (pregnancy services privilege); N.Y. Mental Hygiene Law § 33.13(c) (mental health complaints); CPLR 4503 (attorney-client privilege)); CPLR 4504 (clergy privilege); CPLR 4507 (psychologist privilege); CPLR 4508 (social worker privilege). But the vast majority of these other types of confidential records would be covered by the privacy exemption anyway, which permits an agency to withhold sensitive medical information or information that would constitute an unwarranted invasion of personal privacy, and is separately covered by HIPAA privacy rules.

gives, the Legislature may see fit to take away. In *Uniformed Fire Officers Ass'n v. de Blasio*, the court rejected the notion that the repealed law could prevent disclosure because "the only right to confidentiality plaintiffs [could] claim, prior to the repeal of 50-a, was 50-a itself," and the plaintiffs failed to "adequately allege[] or adequately demonstrate [] deprivation of some other liberty or property right aside from the repeal of 50-a itself." R502 (Case No. 1:20-cv-05441-KPF, Dkt. No. 216, Tr. of Decision at 26:21-25 (S.D.N.Y. Aug. 21, 2020)). The same is true here.

The PBA makes much of individual officers' purported "reliance on the statutory promise of confidentiality," repeatedly claiming that innumerable police officers "made binding decisions about how to respond to and resolve disciplinary cases based on §50-a's statutory confidentiality" and that "[t]he 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." PBA Br. at 1-2, 4-5, 9, 18, 20-22, 24, 31-32. But nothing in the record supports that any police officer, let alone any of the 144 police officers' referenced in the FOIL Requests here, entered a plea agreement in any disciplinary proceeding, much less that a promise of statutory confidentiality factored into that decision to plea. Indeed, the PBA's argument is merely a rehashing of its argument from *Uniformed Fire Officers Ass'n v. de Blasio*, where it claimed that when officers entered plea agreements in disciplinary proceedings, those agreements implicitly incorporated Section 50-a. 846 F. App'x

25, 32 (2d Cir. 2021). The Second Circuit explicitly rejected that argument observing that "[t]he New York Court of Appeals has cautioned that a contract 'does not transform all statutory requirements that may otherwise be imposed under [the governing] law into <u>contractual</u> obligations,' and it has 'decline[d] to interpret [a contract] as impliedly stating something which [the signatories] have neglected to specifically include.'" *Id.* (quoting *Skanska USA Bldg. Inc. v. Atl. Yards B2 Owner, LLC*, 31 N.Y.3d 1002, 1007 (2018)) (alterations and emphasis in original). It continued that "[R]ead[ing] into . . . contracts terms that do not exist based on then-existing statutory language, . . . would protect against all changes in legislation, . . . [and] severely limit the ability of state legislatures to amend their regulatory legislation." *Id.* (quoting *Am. Econ. Ins. Co. v. New York*, 30 N.Y.3d 136, 154 (2017) (alterations in original)). Here, an officer's reliance on then-existing statutory language in deciding how to respond to disciplinary complaints is no different than in *Uniformed Fire Officers*, where the Court found such reliance was not warranted when entering plea agreements in those disciplinary proceedings.

The PBA also drastically overstates the import of Section 93 in the calculus of whether the repeal of Section 50-a requires disclosure of pre-repeal records. As the Court of Appeals has made clear, Section 93's presumption against retroactive application merely provides a principle of construction that governs only in the absence of contrary legislative intent. *People v. Roper*, 259 N.Y. 635, 635 (1932)

(per curiam). Indeed, Section 93, like all provisions of the General Construction Law, is not to be applied when the "general object" of the legislative act indicates that a different meaning or application is intended—even if the retroactive application of such legislative act could arguably impact accrued or substantial rights. *See* N.Y. Gen. Constr. Law § 110; *see also People v. Oliver*, 1 N.Y.2d 152, 159 (1956). And as this Court has "long recognized," when applying the General Construction Law, "the Legislature is free to enact laws that have retroactive application," and here, as described above, there is overwhelming evidence of the Legislature's clear intent to do so. *Kellogg v. Travis*, 100 N.Y.2d 407, 411 (2003).

Further clarifying this point, this Court has held: "state statutory law, including the General Construction Law, provides no ground for invalidating another, later-enacted state statute." *Id.* Since the repeal, none of the Appellate Divisions have held that Section 93 must be read to prohibit the release of any disciplinary records dated prior to June 12, 2020, and for good reason. Section 93 and the substantial rights theory on which it is based are inoperative here because the legislative history of Section 50-a's repeal includes powerful evidence that its intended effect was to remove blanket confidentiality for all disciplinary records; not just post-repeal records. If that were not the case, decades of relevant data would be removed from public examination, preventing the restoration of public trust in the conduct and practices of police departments throughout New York State—the core

purpose animating the repeal of Section 50-a. Sponsor Mem., S. 8496, 243rd Leg. Sess. (N.Y. 2020) ("Repeal of § 50-a will help the public regain trust that law enforcement officers and agencies may be held accountable for misconduct."). Rendering disciplinary records wholly inaccessible unless created on or after June 12, 2020, would clearly undermine the transparency and accountability sought by the Legislature.

The cases the PBA relies on in support of its perpetual confidentiality argument are not FOIL cases, let alone Section 50-a cases, and do not stand for the proposition that statutory confidentiality is a vested right. Indeed, two of those cases concerned a change in the law that *increased* the legal liability for a party based on prior events. *See Ruffolo v. Garbarini & Scher, P.C.*, 239 A.D.2d 8, 12 (1st Dep't 1998) (explaining that recent amendment reducing the statute of limitations for malpractice claims should not be applied retroactively because doing so "would impair vested rights"); *Aguaiza v. Vantage Props., LLC*, 69 A.D.3d 422, 424 (1st Dep't 2010) (holding that because enactment of new local law "created a new right of action that did not exist prior to its enactment, it should be applied prospectively only"). In another dissimilar case cited by the PBA, the Fourth Department did not apply an amended statute retroactively because doing so would have exempted a building owner from liability for a construction worker's injuries when the law (as it existed at the time of the injury) would have imposed absolute liability. *Franz v.*

Dregalla, 94 A.D.2d 963, 64 (4th Dep't 1983). None of these cases support the PBA's arguments here, given that, even if considered a retroactive application, the repeal would only require production of disciplinary records currently in existence and not actually reopen disciplinary hearings to increase an officer's liability for prior actions when Section 50-a was in effect.

While the PBA also cites a number of out-of-county, non-binding trial court decisions finding that Section 50-a's repeal would "improperly infringe pre-existing rights," the Fourth Department has since overturned *Abbatoy*, while the other cases cited in its Brief are all from counties within the Fourth Department's reach and, therefore, are no longer good law. *See*, *e.g.*, *Abbatoy v. Baxter*, 77 Misc. 3d 711 (Sup. Ct. Monroe Cnty. 2022), *reversed*, 227 A.D.3d 1376 (4th Dep't 2024); *People v. Francis*, 74 Misc. 3d 808 (Sup. Ct. Monroe Cnty. 2022); *Gannett Co. v. Herkimer Police Dep't*, 76 Misc. 3d 557 (Sup. Ct. Oneida Cnty. 2022); *Brighton Police Patrolman Ass'n v. Catholdi*, 2021 WL 7287668 (Sup. Ct. Monroe Cnty. 2021). In addition, none of the vested rights arguments have been adopted by any of the other Appellate Divisions to have considered the issue, and, therefore, should not be followed here. In any event, numerous other trial courts have reached the same conclusion as the First Department did below, that the "repeal of Civil Rights Law § 50-a . . . reflected a strong legislative policy promoting transparency of police disciplinary records and eliminated any claim of confidentiality in them." R531

(citing *People v. Castellanos*, 72 Misc. 3d 371, 376 (Sup. Ct. Bronx Cnty. 2021); *see also N.Y. Civ. Liberties Union*, 228 A.D.3d at 1165-66 (same)).

Helpfully, the *LAPPL* court addressed this very issue when the petitioner in that case argued that its "privacy rights [were] vested rights." 2019 WL 1449721, at *6. There, the *LAPPL* court explained that "it is 'presumed' rights created by statute are not 'vested rights' and a party arguing otherwise must overcome this presumption." *Id.* And "[e]ven assuming the rights were vested, the state, exercising its police power, may impair such rights when considered reasonably necessary to protect the health, safety, morals and general welfare of the people." *Id.* (citation and internal quotation marks omitted). Here, statutory confidentiality of police disciplinary records was simply not a vested right, but even if it was, the PBA does nothing to rebut the Legislature's clear intent to overhaul the statutory scheme in favor of accountability and transparency between law enforcement and the public.

Thus, just like the *LAPPL* court, the First Department was faithful in its application of this Court's leading precedent to overcome the presumption against retroactivity and did not ignore or "sweep away" the police officers' reliance interests.

C. The NYPD's Consistent Production of Pre-Repeal Disciplinary Records Post-Repeal and the Need for *Brady* Material Undercut the PBA's Arguments Against Retroactive Application

Tellingly, the NYPD seemingly shares the same understanding as Petitioners here—that the change in law requires production of all police disciplinary records regardless of dated created—as the NYPD has never raised retroactivity as a basis for withholding *any* of the disciplinary records sought by Petitioners throughout the entirety of this four-year litigation. Indeed, the one record the NYPD has produced in four years in response to the 144 FOIL requests was a single, heavily redacted disciplinary record for Officer Afanador, which included discipline from as far back as 2014, six years prior to the repeal of Section 50-a. R43-44; R130-175; R449 at n.10.

Likewise, post-repeal, outside of this litigation, the NYPD routinely publishes disciplinary records and data existing prior to June 12, 2020. As the NYPD admitted in its cross-motion:

> Since the repeal of 50-a, the Department has launched an Officer Profile section on its public facing website that shows disciplinary information about active uniform officers and posted several of the most recent disciplinary trial decisions approved by the Police Commissioner for cases from 2012-2021 for active, terminated, and retired MOS after a redaction project launched by the NYPD.

R401-402 at n.5. The NYPD routinely publishes disciplinary information pre-dating the repeal on other online portals as well. For example, since 2021, the NYPD has maintained an online portal where it publishes trial decisions for internal misconduct

investigations dating back to January 2008. *See*, *e.g.*, https://nypdonline.org/link/1016. Also since 2021, the NYPD has maintained an online dashboard containing profiles and partial disciplinary histories of all 35,000 active police officers dating back to 2014. *See, e.g.*, https://nypdonline.org/link/2.

Under the PBA's misguided analysis, the production of Officer Afanador's record, the NYPD's own admissions that it routinely publishes information from at least 2012, and the online portals published by the NYPD would violate the law. That the PBA does not bother explaining why its position should be adopted when the agency routinely makes these disclosures only further weakens the PBA's arguments. At bottom, the repeal would be rendered meaningless if the release of police disciplinary records created before June 12, 2020, were not subject to disclosure. This was certainly not the Legislature's intention.

Finally, the legal impracticality of a finding that Section 50-a lacks retroactive application is only underscored when considered in the context of criminal cases. Since the repeal, numerous courts have required disclosure of the *complete* disciplinary records of testifying police witnesses as *Brady* material, meaning the People now have an affirmative obligation to disclose these records to defendants under the Criminal Procedure Law with no court order. *See*, *e.g.*, *People v. Porter*, 71 Misc. 3d 187, 190 (Bronx Cnty. Crim. Ct. 2020) ("Reinforcing the presumption of complete disclosure of police misconduct files is the June 2020 repeal of Civil

Rights Law § 50-a."); *People v. Cooper*, 71 Misc. 3d 559, 567 (Erie Cnty. Crim. Ct. 2021) ("The legislative intent in repealing 50-a was to make law enforcement disciplinary records fully available."); *People v. Goggins*, 76 Misc. 3d 898, 901 (Bronx Cnty. Crim. Ct. 2022) ("The scope of the People's impeachment disclosure obligations must also be viewed in light of the June 2020 repeal of Civil Rights Law § 50-a, resulting in public access to police misconduct files."); *People v. Arroyo*, 2022 N.Y. Misc. LEXIS 2400, at *8 (N.Y. Crim. Ct. Mar. 21, 2022); *People v. Chung*, 81 Misc. 3d 1219(A), at *4 (N.Y. Crim. Ct. 2023) ("[T]he prosecution must ascertain the existence of, and review all police witness disciplinary records for discoverable material as part of its due diligence and fundamental discovery obligation."); *People v. Holmes*, 82 Misc. 3d 1222(A), at *2 (Cohoes City Ct. 2024) ("§ 50-a, however, is gone, and in its place is a discovery scheme that does not just encourage openness but compels it."). If Section 50-a's repeal were not interpreted to reach disciplinary records pre-dating the repeal, it would not only hamstring restoring trust in the police—the express aim of the repeal—but it would create a bizarre situation where a criminal defendant will have access to post-repeal disciplinary records only but not pre-repeal records. This would hamstring criminal defendants' rights to a fair trial which is the entire purpose of *Brady* disclosures. This cannot be the law.

D. The Utah Case the PBA Cited Does Not Compel a Different Outcome

Finally, instead of relying on other states' open records cases that also require disclosure of law enforcement records that pre-date the amendment to those similar laws, *see supra* I.A, the PBA claims this Court should instead follow a nearly 30-year-old Utah state court case not involving open records requests or even police disciplinary records and which was expressly cabined to the facts of that case. On this basis alone, this Court should not consider it. But even if it does, the circumstances and analysis relied upon by that Utah court to prohibit disclosure of records between a patient and their mental health provider have no bearing on the facts here.

In *Salt Lake Child & Family Therapy Clinic, Inc. v. Frederick*, the clinic, a non-party, filed a petition for extraordinary relief challenging the trial court's denial of the clinic's motion for protective order in a personal injury case brought by a patient against an automobile company in which the company sought discovery into the patient's prior health conditions. 890 P.2d 1017, 1019-20 (Utah 1995). At the time the patient filed her personal injury lawsuit, the Utah law barred disclosure of records between patient and mental health providers as privileged. *Id.* But, only after the litigation commenced, that law was repealed. *Id.* In holding that the repealed law should not apply retroactively, the Utah court held that:

> In the instant case [] the action had been commenced, discovery begun, the protective order applied for, and the denial of that order appealed, all under the previous statute. Clearly, to apply section 58–60–114 to the action at this point would be to do so retroactively.

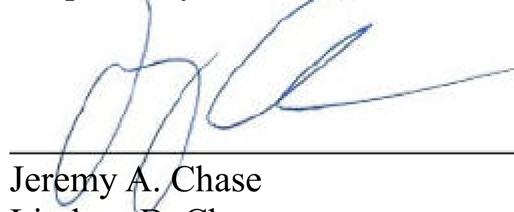
Id. at 1020. The court there also held that "[b]ecause [the repeal] affects [the patient's] vested right to have her communications with the Clinic, conducted under an expectation of confidentiality, kept private, it [therefore] cannot be applied retroactively." *Id.* By contrast, here, no Appellate Division court has found Section 50-a provided a "vested right" to maintain all disciplinary records confidential in perpetuity. And unlike the factual distinctions and procedural posture in *Salt Lake Child*, the injured plaintiff seemingly only filed her personal injury case because of her expectation that her private medical records would continue to be exempt from disclosure, even in discovery and with her health at issue. But here, under FOIL, government employees assume their positions with the understanding that, by default, their records are presumptively available to the public unless they are statutorily exempted by POL § 87(2), because FOIL embodies this state's "strong commitment to open government and public accountability." *Capital Newspapers v. Burns*, 67 N.Y.2d 562, 565 (1986). No Appellate Department has diverged from FOIL's presumption of openness, and this Court should follow suit here.

CONCLUSION

For the foregoing reasons, this Court should affirm the Decision insofar as it held that after Section 50-a's repeal, FOIL requests reach all disciplinary records regardless of creation date. Alternatively, consistent with the Second and Fourth Departments' reasoning, because Petitioners-Respondents do not seek retroactive application of the repeal of Section 50-a, the NYPD must produce all disciplinary records in its possession unless another FOIL exemption applies.

Dated: September 19, 2024
New York, New York

Respectfully Submitted,



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CERTIFICATION OF COMPLIANCE

I hereby certify that 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 13,036 words.