Appellate Division, First Department Case No. 2023-00242
New York County Clerk's Index No. 159132/21

Court of Appeals

STATE OF NEW YORK

NYP HOLDINGS, INC. and CRAIG MCCARTHY,

Petitioners-Respondents-Appellants,

—against—

NEW YORK CITY POLICE DEPARTMENT, DERMOT F. SHEA, in his official capacity as Commissioner of the New York City Police Department, and POLICE BENEVOLENT ASSOCIATION OF THE CITY OF NEW YORK, INC.,

Respondents-Appellants-Respondents.

OPPOSITION TO MOTION FOR LEAVE TO APPEAL AND FOR A STAY PENDING APPEAL

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CORPORATE DISCLOSURE STATEMENT

Pursuant to 22 NYCRR 500.1(f) and 500.22(b)(5), Petitioner 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") respectfully submit this Memorandum of Law in opposition to the Police Benevolent Association of the City of New York, Inc.'s ("PBA" or "Appellant") motion for leave to appeal from a Decision and Order of the Appellate Division, First Department, dated October 12, 2023 and in Opposition to a stay pending appeal.

PRELIMINARY STATEMENT

Petitioners filed this Freedom of Information Law ("FOIL") action against the New York City Police Department ("NYPD") to obtain the disciplinary records of 144 high ranking or otherwise notable officers in the wake of the New York State Legislature's 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 the consent of the officer. 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 two weeks after Mr. Floyd's death, on June 12, 2020, was the repeal of Section 50-a. With Justice Brandeis' oft quoted aphorism, "sunlight is said to be the best of disinfectants"[1] at its heart, the repeal of Section 50-a removed the cloak of confidentiality from law enforcement disciplinary

[1] Louis Brandeis, "What Publicity Can Do," HARPER'S WEEKLY (Dec. 20, 1913).

records for good with the express purpose of helping the public regain trust that law enforcement officers and agencies may be held accountable for misconduct.

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, actually only applied to disciplinary records created on or after the June 12, 2020 repeal. Notwithstanding that there is no longer *any* law 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 that 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, its cynical argument would eviscerate the entire purpose and effect of the repeal.

The IAS Court ultimately 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.

Now, the PBA seeks leave to appeal the First Department's well-reasoned Decision to the Court of Appeals. However, the PBA has wholly failed to meet the

threshold requirements for further appellate review. In a motion for leave to appeal, the movant must identify legal questions that merit review by this Court because (a) the legal question is novel or of public importance; (b) the challenged decision conflicts with prior decisions of the Court of Appeals; or (c) there is a conflict at the Appellate Division level. 22 NYCRR 500.22(b)(4). The PBA fails on all accounts.

First, the PBA fails to raise a genuinely novel issue of public importance with its appeal. At bottom, the answer to whether Section 50-a applies retroactively to pre-repeal records is plain with the most rudimentary understanding of the statutory purpose and nature of the legislation. In reality, the PBA's argument is nothing more than a pretext for seeking a *de facto* judicial invalidation of a duly-passed act of the New York State Legislature.

Second, while the PBA attempts to manufacture conflict between the First Department decision and Court of Appeals precedent, its efforts fall flat. In reaching its holding, the First Department applied *Gleason* and *Majewski*, cases from this Court, which have been binding precedent for decades, governing proper retroactivity analysis where the statute does not have an express statement of retroactivity. And the *Regina* case, which the PBA points to as the primary point of conflict, in fact, *supports* the First Department holding entirely, *i.e.*, 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." *See Regina*

Metro. Co., LLC v. New York State Div. of Hous. & Cmty. Renewal, 35 N.Y.3d 332, 370 (2020).

Third, the PBA acknowledges, as it must, that there is no conflict at the Appellate Division level, and instead points only to a handful of trial court decisions that came out differently elsewhere in the state. That does not warrant this Court's review. In the end, the PBA may not like the repeal or the First Department's holding, but that is not a legitimate reason for Court of Appeals' review, and the PBA's motion should be denied.

Likewise, because leave to appeal should be denied, the PBA's motion for a stay pending appeal should also be denied as the continued delays and efforts to undo Section 50-a's repeal have only continued to further prejudice Petitioners' newsgathering on an issue of utmost public concern and continues to prevent the public from gaining access to the very records that necessitated the law's repeal more than three years ago. The time has come for this case to end once and for all.

COUNTERSTATEMENT OF QUESTION PRESENTED

1. Whether the First Department correctly relied on precedent from this Court in applying the repeal of Section 50-a retroactively to disciplinary records created before the repeal, where that Decision was consistent with the clear legislative purpose "of providing access to records that may contain information about actual or alleged police misconduct" in accordance with the "strong legislative

policy promoting transparency of police disciplinary records and eliminating any claim of confidentiality in them" and with the clear language that the repeal was to go "into effect immediately," evincing its urgency and its intended remedial nature to effectuate its beneficial purpose of transparency and accountability between law enforcement and the public.

COUNTERSTATEMENT OF THE CASE

As the facts of this case have been set forth in detail in multiple rounds of briefing in the courts below, Respondents will provide only a brief statement of the facts relevant to this motion.

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 to enable law enforcement officers to refuse disclosure of "personnel records used to evaluate performance toward continued employment or promotion." 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).

Since its passage in 1976, courts interpreted Section 50-a broadly to afford New York police departments nearly unfettered ability to shield all police disciplinary records from the public unless the officer consented to their disclosure

or a court order was obtained. R291.[2] But in the wake of national protests after the May 2020 murder of George Floyd and 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 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 when 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 "FOIL's public policy goals, which are to make government agencies and their employees accountable to the public, are thus undermined by the statute." Sponsor Mem., S. 8496, 243rd Leg. Sess. (N.Y. 2020). 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.

[2] "R" refers to the joint record on appeal.

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). 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 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 1820. Likewise, Senator Jessica Ramos expressed his "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. Petitioner Submits 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.

R294. The NYPD acknowledged receipt of each of those requests on June 17, 2020 and stated that it expected to fulfill those requests by October 28, 2020. R47-48; R62-63. On June 18, 2020, Mr. McCarthy submitted three more identical requests for three other officers. R48; R57-61. The NYPD acknowledged receipt of those requests on June 24, 2020 and stated that it expected to fulfill those requests by November 4, 2020. *Id.* Finally, on June 25, 2020, Mr. McCarthy submitted one more identical request for one last officer. *Id.* The NYPD acknowledged receipt of that request on June 29, 2020 and stated that it expected to fulfill that request by November 12, 2020. *Id.*

Having received no response to any of his requests or further communication from the NYPD, on January 21, 2021, Mr. McCarthy filed an appeal of the constructive denial of his first 48 FOIL requests on the ground that the NYPD had failed to respond by the estimated date of completion. R48; R64-67. That same day, the NYPD denied his appeal claiming that (1) no constructive denial had occurred, and (2) the U.S. Court of Appeals for the Second Circuit issued a stay on September 17, 2020 in *Uniformed Fire Officers Ass'n v. de Blasio*, No. 2020-cv-2789 (2d Cir.), which prohibited the release of any disciplinary records. R49; R68-70. On March 3, 2021, the Second Circuit vacated the stay referenced in the NYPD's appeal denial. R49; R71-72.

By August 26, 2021, nearly six months since the stay was vacated and over 14 months since Mr. McCarthy first filed the requests, the NYPD had issued determinations for only 16 of the 144 requests, simply ignoring the other 128 requests.[3] R57-61. Thus, on August 26, 2021, Petitioners appealed the constructive denial of the then-outstanding 128 FOIL requests. R49; R73-92. On August 31, 2021, the NYPD denied the appeal. R49; R93-95. As of the filing of the Petition on October 6, 2021, the NYPD had failed to make a determination on the 116 outstanding FOIL requests, and after more than 15 months, each outstanding request had been constructively denied. R50.

The NYPD *did* respond to 16 of the 144 requests on June 3, 2021, denying each request in full on the grounds that "such information, if disclosed, would constitute an unwarranted invasion of personal privacy" under POL § 87(2)(b). Mr. McCarthy promptly appealed each of the denials on June 4, 2021. R50; R96-99. On June 8, 2021 and June 18, 2021, he received 16 appeal denial letters from the NYPD containing nearly identical meritless justifications. R50; R100-145. Also, 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—

[3] As acknowledged in Exhibit 12, R198-201, FOIL Requests Nos. FOIL-2021-056-08486 and FOIL-2021-056-08507 are duplicative in that they both seek disciplinary records of "Jonathan Taveras." Therefore, while Mr. McCarthy submitted 145 FOIL requests, only 144 were at issue.

importantly, a period six years prior to the repeal of Section 50-a—and his turning a blind eye to other officers' excessive force. R50-51; R146-193; R503 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 at 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." R450-51 at n.5. The NYPD now 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. 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 in which it abandoned nearly *all* bases for withholding except for a dubious and unsupported argument 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 in this action 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." R12.

With respect to intervenor, the PBA, the IAS Court 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." R10. 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.

E. The First Department Holds the Repeal of Section 50-a Applies Retroactively and Remands for Petitioners' Attorneys' Fees and Costs

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." Decision at 3 (citing *Schenectady Police Benevolent Ass'n v. City of Schenectady*, 2020 WL 7978093, at *6 (Sup. Ct. Schenectady Cty. 2020)) ("*Schenectady PBA*"). In arriving at this holding, the First Department correctly applied the retroactivity analysis long-endorsed by this Court, citing in its Decision 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). *Id.* at 3. In correctly applying these long-standing precedents which address the standard for finding retroactive application in the face of a statute lacking an *express* statement of retroactivity, 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 (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 2 (quoting *People v. Castellanos*, 72 Misc. 3d 371, 376 (Sup. Ct. Bronx Cty. 2021)).

Thus, while the First Department caveated its Decision, explaining 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.'" Decision at 3 (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

continues 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.

ARGUMENT

No genuine basis exists to grant the PBA's motion for leave to appeal. A party seeking leave to appeal must present a question of law important enough to merit this Court's review. A legal question merits review when it: (a) is novel or of public importance; (b) presents a conflict with prior decisions of this Court; or (c) involves a conflict among departments of the Appellate Divisions. 22 NYCRR 500.22(b)(4); *In re Estate of Hart*, 24 N.Y.2d 158 (1969) (per curiam). This Court has explained that its role is not "to correct errors in individual cases, but to decide matters of larger import." *People v. Grimes*, 32 N.Y.3d 302, 315 (2018) (citation omitted).

While the issue of the retroactivity of Section 50-a's repeal is superficially novel, in truth it is a manufactured issue not worthy of this Court's time. The retroactive intent of the repeal is self-evident, as the very purpose of the statute was to shine light on police disciplinary records that had long been kept in the shadows. The issue presents no conflict between the Appellate Departments, and in no way conflicts with this Court's case law. Unless or until another Appellate Department holds differently, *i.e.*, that Section 50-a *does not* apply to records created on or before June 12, 2020, this Court need not disturb the First Department's well-reasoned

Decision which applied this Court's own settled retroactivity analysis. The PBA has failed to identify an issue warranting review of this Court, and as such, the Court should deny its motion in its entirety.

I. THE COURT SHOULD DENY APPELLANT'S MOTION SEEKING LEAVE TO APPEAL

A. This Case Does Not Present a Genuine Issue of Public Importance

The PBA's motion fails to explain in any meaningful way why this case implicates a genuine issue of public importance that warrants this Court's review. Instead it states, in wholly conclusory terms, that the retroactivity question is one of "unquestionable" public importance because (1) it "involv[es] the interpretation and effect of recent State legislation," and (2) when Section 50-a was in effect, it "was subject to numerous decisions by this Court." PBA's Motion for Leave ("Mot.") at 15. Neither of the PBA's conclusory bases for finding the question of the retroactivity of Section 50-a's repeal to be one of public importance holds any water, and the Court should decline to take this case as a result.

Questions of public importance are those whose resolution would "advance the law in an area in which advancement is needed." *Seawright v. Bd. of Elections, City of N.Y.*, 35 N.Y. 3d 227, 252 (2020) (Wilson, J., dissenting). The PBA's conclusory reasons for finding the question of the retroactivity of Section 50-a's repeal to be one of public importance do not in any way advance the law in an area

in which advancement is needed. Instead, they are nothing more than pretexts for rolling the law backward.

Initially, while there is no question that Section 50-a was the subject of multiple decisions by this Court when it was extant, it has since been repealed, and those earlier decisions are of limited relevance to the issues raised here. But more importantly, 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. A national uproar ensued following Mr. Floyd's murder, and over the ensuing two weeks, a fierce debate over policing in New York led the Legislature to repeal Section 50-a, which, by virtue of removing Section 50-a's shroud of secrecy from police disciplinary records, was intended to "positively affect [sic] 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." Sponsor Mem., S. 8496, 243rd Leg. Sess. (N.Y. 2020). The sponsoring memorandum makes clear that the courts' interpretation of Section 50-a since its enactment in 1976 has "defeated The Freedom of Information Law's (FOIL) goal of accountability and transparency." *Id.* The repeal sought to remedy this erroneous and overbroad interpretation to ensure that the public could scrutinize who is policing its streets, and understand both how and whether police departments hold officers accountable for misconduct. Restoring trust in this

manner necessarily requires both forward and backward looking action. The very nature of the repeal revealed the retroactive intent of the Legislature. *See Regina*, 35 N.Y.3d at 370. Put differently, the retroactivity question that the PBA has raised here is neither novel nor of public importance; it is nothing more than an attempt to negate the obvious intent of the legislature and the will of the People of New York.

Even if this Court were to read the question the PBA presents for appeal generously, as whether the First Department correctly applied this Court's retroactivity analysis in the context of a statute without an express statement of retroactivity, it is simply not a novel question or one that presents any issues of greater public importance than in any other retroactivity analysis. If the retroactivity of every new statute were to require this Court's attention, it would open the floodgates for appellate review in every instance. In any event, the First Department *did* engage in and correctly apply this Court's retroactivity analysis, relying on a number of factors approved by this Court including that the repeal was to take "effect immediately," that the legislature discussed its remedial purpose to promote transparency of police discipline, and the stated intent that repeal of the law would develop accountability and trust between law enforcement and the public. Decision at 3 (quoting *Gleason*, 96 N.Y.2d 117 (2001), and *Majewski*, 91 N.Y.2d 577 (1998)).

In the end, the PBA simply does not like the result reached by the First Department. That is not a basis for this Court to exercise its discretionary review.

B. The First Department's Decision Does Not Conflict with Any Decision of This Court

The First Department's Decision does not run afoul of this Court's precedent in any respect. The PBA argues that the First Department's Decision conflicts with this Court's precedent and the General Construction Law by (1) "failing to properly enforce New York's strong presumption against retroactivity" and (2) sweeping "away decades of reliance interests by police officers . . . by judicial decision instead of clear legislative expression." Mot. at 16-17. Appellant is wrong on both accounts.

First, 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." The PBA seems 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*. That is not the law.

In reaching its Decision, the First Department followed this Court's guidance from *Regina* 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." 35 N.Y.3d at 370. 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 Black Lives Matter protests, was to remove the cloak of confidentiality from a class of records in service of transparency, accountability, and trust. In other words, the nature of the repeal was to make police disciplinary records public so that the public

can scrutinize who is policing their streets and understand whether police departments have lived up to their mandates to punish misconduct within their ranks.

Contrary to the PBA's claim, the First Department did not merely "prop up its retroactivity holding on the fact that the repeal took effect immediately." Mot. at 20. 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.[4] Decision at 3 (quoting *Cooper ex rel. Cooper*, 2021 N.Y. Misc. LEXIS 5169, at *10). And in any event, whether or not the repeal "took

[4] The PBA suggests that the First Department erred in relying on *In re Gleason*, 96 N.Y.2d 117 (2001). Mot. at 24, n.5. 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 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). In addition, the nature of the legislation in *Galindo* was classifying 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 a month after nationwide protests over police misconduct began.

effect immediately," and therefore evinces urgency, is one of the considerations properly considered by the First Department. *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); *Puig v. City of Middletown*, 71 Misc. 3d 1098, 1106-07 (Sup. Ct. Orange Cty. 2021) (same); *Schenectady PBA*, 2020 WL 7978093, at *1 (repeal "took effect immediately [and] removed the blanket of secrecy with which law enforcement records, statewide, were previously cloaked in their entirety").

Furthermore, as discussed above, the legislative justification and intent of the repeal was plainly remedial. *Compare* Mot. at 22, *with* Decision at 3. 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 v. HSBC Bank USA*, 87 A.D.3d 995, 997-98 (2d Dep't 2011) ("[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).

Relatedly, 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 Committee Report of 2019 New York Senate Bill No. 8496). This overbroad interpretation "created a 'legal shield' that prohibited disclosure even when it [was] known that misconduct ha[d] occurred." *Puig*, 71 Misc. 3d at 1104, 1108. 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 by the New York State Court of Appeals." 2020 WL 7978093, at *3. In response to this overbroad 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 *8.

The text accompanying Senate Bill S8496 confirms the repeal of Section 50-a was intended to remedy this interpretation. 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 Section to Senate Bill S. 8496. The repeal sought to undo that unintended "legal shield," to remedy flaws in police accountability, and to "help the public regain trust that law enforcement officers and agencies may be held accountable for misconduct." *Id*.

The legislative history is also replete with references showing that the understanding was that, by repealing Section 50-a, all records would be available. For example, the Legislature was clear that it intended the repeal of Section 50-a to be a remedial law because it (i) pronounced that the repeal of Section 50-a was justified due to the need to access records concerning law enforcement officers' past disciplinary histories to right prior wrongs and identify patterns of bad behavior (*i.e.*, records created prior to repeal); (ii) conveyed a sense of urgency by enacting the repeal less than a month after nationwide protests over police misconduct began; and (iii) made clear its "legislative judgment" about the reasons that past complaints must be disclosed. *See*, *e.g.*, N.Y. Senate, Floor Debate, 243rd N.Y. Leg., Reg. Sess. 1821-22 (June 9, 2020), discussed *supra* at 7-8.

The PBA's claim that the repeal is not remedial because it occurred many years after the passage of the original law misses the point. Mot. at 23. 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 weeks earlier, the Justification Section to Senate Bill S. 8496, the

legislative history, and the very nature of the legislation make clear the repeal was not simply a change in law, but rather was designed to overhaul the relationship between law enforcement and the public via transparency and accountability.

Second, just as the PBA did below, it drastically overstates the import of General Construction Law § 93 in the calculus of whether the repeal of Section 50-a requires disclosure of pre-repeal records. Mot. at 20-21. As the Court of Appeals has made clear, Section 93's presumption against retroactive application provides merely 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).

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 the repeal did not apply retroactively, 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."). And as addressed at length in the proceedings below, confidentiality of past disciplinary records is not necessary for police officers to carry out their employment. R506.

The PBA argues that the First Department's Decision "ignored the impact on the decades-long rights and reliance interests of police officers and other covered employees" (Mot. at 20), and openly speculates that "reliance on the right to confidentiality certainly impacted police officer decision-making in responding to complaints, such as a decision to compromise a meritless claim to avoid burden and distraction rather than vigorously contesting it to protect one's reputation." *Id.* at 7 (citing R357 ¶ 134). But the PBA points to nothing in the record other than a single conclusory allegation in its answer for this purported reliance interest, and nothing in the record establishes how many, if any, officers in fact settled their disciplinary claims with the consideration of confidentiality in mind.

The First Department did not err or cause "severe injustice" as the PBA put it, by not addressing the PBA's speculative harm in its Decision. Mot. at 3. To be clear, Petitioners asked for disciplinary records of 144 high-ranking or otherwise notable police officers, and the PBA could have (but did not) submit anything in the record

to demonstrate that any of those specific officers actually *did rely* on confidentiality in settling any of their cases. That some officers may have hypothetically pled out to avoid a full hearing on their conduct or misconduct is reason in itself that this practice, to the extent it exists, should not be honored.

Moreover, at oral argument, the First Department gave full and fair consideration to the PBA's speculative claim that police officers' confidentiality interests in their own records continue in perpetuity but did not find it compelling enough to override the clear legislative intent. As the Decision states: "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." Decision at 3.

Thus, the First Department was faithful in its application of this Court's leading precedent concerning overcoming the presumption against retroactivity and did not ignore or "sweep away" the police officers' reliance interests. Clearly, the PBA's grievance is with the repeal of the legislation and not the First Department's application of the present law. This is not grounds for this Court to grant leave.

C. The First Department Decision Does Not Create or Contribute to a Conflict Among the Appellate Departments

In a last-ditch effort, the PBA attempts to manufacture a conflict between the First Department's Decision and other New York courts generally, claiming that "[t]he First Department deviated from the majority of courts that have addressed the issue." Mot. at 16. But the PBA is grasping at straws with this argument as there is no conflict among the Appellate Departments on this issue.

The one other Appellate Department that addressed this question was entirely consistent with the First Department Decision here. *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). There, the Fourth Department modified a judgment from the trial court that denied access to disciplinary records on the ground that Section 50-a lacked retroactive application, and instead 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.

The other courts that have addressed the retroactivity of the repeal consist entirely of out-of-county, *trial court* cases—not Appellate Division cases. *See* Mot. at 15-16. Such decisions do not bind the First Department, and disagreement between an Appellate Department and certain trial courts is not among the grounds warranting leave to appeal. 22 NYCRR 500.22(b)(4). In any event, there were just as many cases holding that Section 50-a *does* apply retroactively as there are those that hold it does not. *See*, *e.g.*, *Cooper ex rel. Cooper*, 2021 N.Y. Misc. LEXIS 5169, at *10 ("The legislation 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 on June 12, 2020"); *Schenectady PBA*, 2020 WL 7978093, at *6 (finding "there is *strong evidence* that retroactive effect was intended by the legislature"); *Puig*, 71 Misc. 3d at 1108 ("[T]he limited legislative history indicates . . . that the repeal was remedial in nature, and should be applied retroactively.").[5]

[5] 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 would also hamstring criminal defendants' rights to a fair trial which is the entire purpose of *Brady* disclosures. *See*, *e.g.*, *People v. Porter*, 71 Misc. 3d 187, 190 (Bronx Cty. 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 Cty. 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 Cty. 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). Particularly in the context of criminal cases, the relevant police disciplinary records will necessarily be backward-looking.

The PBA then focuses its motion on two recent First Department cases, *Gottwald v. Sebert* and *Raparathi v. Clark*—claiming that both are irreconcilable with the Decision here because the statutes in each case were deemed "remedial" yet were not applied retroactively. Mot. at 24. The PBA is wrong that these decisions are irreconcilable.[6]

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* "broadened 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.

[6] Even if it were correct, a conflict in decisions *within a single Appellate Division* is not a basis for this Court to grant leave to appeal. 22 NYCRR 500.22(b)(4) (requiring a "conflict among the departments of the Appellate Division").

Just as in *Gottwald*, in *Raparathi*, the defendant argued that a recent amendment to the No Wage Theft Loophole Act applied retroactively and therefore "required 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).

Here, unlike in *Gottwald* and *Raparathi*, 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. Rather, the repeal of Section 50-a merely charges law enforcement agencies with a "prospective duty," as of June 12, 2020, to produce responsive records in its possession that are not exempt from disclosure. This is not akin to requiring law enforcement agencies to go back and revisit old FOIL requests from pre-June 12, 2020 and update their responses. At bottom, nothing in the First Department's Decision suggests that it reached an irreconcilable result with either *Gottwald* or *Raparathi*; it simply reached a different result based on the facts in this specific case.

In the end, the PBA's argument is simply another variation in its "error correction" theme, which is not a ground for discretionary review in this Court.

II. A STAY CONTINUES TO PREJUDICE PETITIONERS AND THE PUBLIC

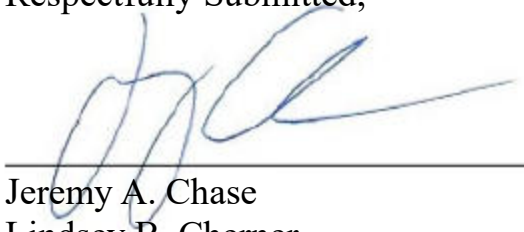
A stay precluding disclosure of all disciplinary records pre-dating June 12, 2020, even after Petitioners substantially prevailed twice below, is prejudicial to Petitioners. If anything, it is the Petitioners and the public at-large, not the PBA, who stand to face irreparable harm. It is the Petitioners who have been seeking disclosure of these disciplinary records for three-and-a-half years to keep the public abreast of pressing newsworthy issues involving law enforcement discipline, and the PBA has repeatedly prolonged this litigation at every juncture in the hope that Petitioners, and the public, will never receive these records. That harm has been ongoing for decades, before Section 50-a was repealed. While Petitioners cannot undo three-and-a-half years of delays, if the PBA's motion for leave to appeal is denied, Petitioners can finally begin to receive the very records which necessitated the repeal.

CONCLUSION

As this Court has recognized, "there must be an end to lawsuits." *In re Huie*, 20 N.Y.2d 568, 572 (1967). This lawsuit concluded when the First Department correctly held that Section 50-a applies retroactively. The PBA offers no good reason to disturb that conclusion. For the foregoing reasons, Respondents respectfully request that the Court deny the PBA's motion for leave to appeal for a stay.

Dated: November 3, 2023
New York, New York

Respectfully Submitted,



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