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State of New York
Court of Appeals

NYP HOLDINGS, INC. AND CRAIG MCCARTHY,
Petitioners-Respondents,

v.

NEW YORK CITY POLICE DEPARTMENT, DERMOT F. SHEA,
Respondents,

- and -

POLICE BENEVOLENT ASSOCIATION OF THE CITY OF NEW YORK, INC.,
Respondent-Appellant.

BRIEF OF AMICI CURIAE COMMON CAUSE NY, REINVENT ALBANY, AND CITIZENS UNION IN SUPPORT OF PETITIONERS-RESPONDENTS

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 500.1(f) of the Rules of Practice of the Court of Appeals of the State of New York, Amici state as follows:

- Common Cause New York is a not-for-profit corporation with no shareholders, parent corporation, or subsidiaries, and one affiliate, Common Cause Education Fund.
- Reinvent Albany is a not-for-profit corporation with no shareholders, parent corporation, subsidiaries, or affiliates.
- Citizens Union is a not-for-profit corporation with no shareholders, parent corporation, or subsidiaries. It has one affiliate, Citizens Union Foundation.

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STATEMENT OF INTEREST OF *AMICI CURIAE*

Common Cause. Common Cause New York is a nonpartisan grassroots organization dedicated to upholding the core values of American democracy. With more than 75,000 activists and members residing in New York State, including more than 25,000 in New York City, Common Cause New York has been an advocate for government transparency and accountability from its founding in the 1970s and was directly involved in helping advocate for, and draft, the original Freedom of Information Law (FOIL) in 1974 and its major subsequent revisions.

Common Cause New York is a chapter of Common Cause, which has more than 1 million members nationwide and works to create open, honest, and accountable government; to promote equal rights, opportunity, and representation for all; and to empower all people to make their voices heard in the political process. Since its founding in 1970, Common Cause has monitored and advocated for strengthening and protecting the federal Freedom of Information Act (FOIA).

Reinvent Albany. Reinvent Albany is a non-partisan, New York State non-profit group that has advocated for open and accountable government in New York since 2010. Reinvent Albany has been one of

New York's most prominent public voices for government transparency, especially in strengthening FOIL. As a New York representative of the National Freedom of Information Coalition, Reinvent Albany has successfully championed new FOIL practices and has been cited by state and national news media more than 2,000 times in the last decade.

Citizens Union. Citizens Union of the City of New York ("Citizens Union") is a non-partisan civic organization, founded in 1897, dedicated to accountability, ethics, and political reform in New York City and State government. Over the decades, Citizens Union has participated in public advocacy, research, and court proceedings relating to improving police accountability in New York City. Citizens Union is a long-time advocate of open government and has supported strengthening FOIL through legislative and administrative improvements, and by filing amicus curiae briefs to ensure the law is properly implemented.

PRELIMINARY STATEMENT

Amici Common Cause NY, Reinvent Albany, and Citizens Union support Petitioners in this appeal. Amici submit this separate brief, however, to explain the fundamental importance of New York's Freedom of Information Law ("FOIL") to the Court's analysis. Although the PBA focuses almost exclusively on the text and history of *Civil Rights Law § 50-a*, its approach misses the forest for the trees because it fails to account for the text, purpose, and history of *FOIL*, under whose authority the requests at issue were made.

First, this Court can affirm based upon a straightforward application of FOIL and its exemptions. FOIL protects the public's right to access law enforcement disciplinary records, regardless of whether such records were created before June 2020, because such records are no longer "specifically exempt" under any statute currently in effect and thus do not fall within FOIL's exemption for records that "are" exempted with specificity by another statute. *See* Public Officers Law § 87(a)(2).

Second, the PBA's "retroactivity" arguments are meritless. To determine whether a FOIL request was properly denied, this Court need only determine whether Petitioners are entitled to *prospective* FOIL

relief capable of being granted in the future, based on the law existing at the time the FOIL request was made—not whether they are entitled to reopening of prior FOIL requests that were previously denied under preexisting law (a question not at issue here). Applying FOIL today to records created before June 2020 is not a "retroactive" application of FOIL, or of the repeal of Civil Rights Law § 50-a. At one time, Section 50-a merely created the right to assert confidentiality in response to a request for certain records under FOIL, but Petitioners brought *new* FOIL requests at a time when that specific exemption no longer existed.

Third, even if one indulged the fiction that Petitioners seek a "retroactive" application of these statutes—and they do not—the Legislature intended that police disciplinary records be disclosable when it restored the application of FOIL to such records. Holding otherwise would run counter to the very premise of FOIL, which facilitates public access to understand how government decisions are made and hold it accountable—including for misconduct. Dissatisfied with reform, the PBA now asks this Court to create a new FOIL exemption for all disciplinary records that were created before June 2020, but those concerns were more properly directed to the Legislature.

ARGUMENT

I. THE COURT CAN AFFIRM BASED ON A STRAIGHTFORWARD APPLICATION OF FOIL.

The PBA's arguments center around whether the repeal of Civil Rights Law § 50-a was "retroactive." But that is not the relevant question in this appeal. The question is whether Petitioner's FOIL requests were wrongly denied. And as explained below, this Court can affirm based upon a straightforward application of the FOIL statute.

A. FOIL Broadly Protects the Public's Right to Access Law Enforcement Disciplinary Records.

Consistent with its fundamental policy of disclosure, FOIL enables public access to police disciplinary records. The Legislature's repeal of Civil Rights Law § 50-a, and even its amendment to FOIL to facilitate disclosure of police records by allowing redaction of private information, illustrate the Legislature's endorsement of a policy of disclosure of police disciplinary records. The following is a brief overview of these provisions.

1. The Freedom of Information Law (FOIL)

In 1974, New York became "one of the first states" to enact a freedom of information law. Hon. Ralph J. Marino, *The New York Freedom of Information Law*, 43 Fordham L. Rev. 83, 83 (1974). At that time, FOIL "merely listed specific kinds of documents that agencies were

affirmatively required to disclose," including "records made available to the public by any other provision of law." *Westchester Rockland Newspapers, Inc. v. Kimball*, 50 N.Y.2d 575, 580 n.2 (1980); *see* Marino, *supra*, at 86 (FOIL "enumerated" documents subject to inspection).

In 1977, the Legislature restructured FOIL to focus on disclosure, not concealment, by "imposing a broad standard of open disclosure" of government records. *Encore Coll. Bookstores, Inc. v. Auxiliary Serv. Corp. of State Univ. of N.Y.*, 87 N.Y.2d 410, 416 (1995). "FOIL now mandates that [e]ach agency shall . . . make available for public inspection and copying *all records*, unless the records fall within a statutory exemption," making "the vast majority of requested documents presumptively discoverable." *Id.* at 417 (quotation marks omitted); *see, e.g.*, *Citizens for Alts. to Animal Labs, Inc. v. Board of Trs. of State Univ. of N.Y.*, 92 N.Y.2d 357, 361 (1998) (noting the "goal" of "liberal disclosure limited only by narrowly circumscribed specific statutory exemptions").

"The law's premise [is] that the public is vested with an inherent right to know and that official secrecy is anathematic to our form of government." *Matter of Friedman v. Rice*, 30 N.Y.3d 461, 475 (2017) (quotation marks omitted). As this Court has explained, the statute

seeks to "shed light on government decision making, which in turn both permits the electorate to make informed choices regarding governmental activities and facilitates exposure of waste, negligence and abuse." *Encore Coll. Bookstores*, 87 N.Y.2d at 416.

FOIL mandates that every state or municipal entity "make available for public inspection" "all records" (Public Officers Law § 87(2)), meaning information that is "kept, held, filed, produced or reproduced by, with, or for" that entity (*id.* § 86(4)). Within five business days of receiving a request, the entity must make the records available, deny the request in writing, or provide a reasonable estimate when the request will be addressed. *Id.* § 89(3)(a).

Although "FOIL imposes a broad duty on government agencies to make their records available," the Legislature has exempted certain records. *Abdur-Rashid v. New York City Police Dep't*, 31 N.Y.3d 217, 224-25 (2018) (quotation marks omitted). For example, FOIL exempts records that "would constitute an unwarranted invasion of personal privacy"; that "could endanger [] life or safety"; or that "are compiled for law enforcement purposes" and would interfere with an investigation or judicial proceeding. Public Officers Law § 87(2). As particularly relevant

to this appeal, FOIL further exempts records that "are specifically exempted from disclosure by state or federal statute." *Id.*

2. Civil Rights Law § 50-a

Before June 2020, one such "exemption" from FOIL's disclosure requirements granted "specifically" by another statute was Civil Rights Law § 50-a, which "require[d] that police officer personnel records," including "disciplinary decisions" and records relating to "misconduct," be "kept confidential." *New York Civil Liberties Union v. New York City Police Dep't*, 32 N.Y.3d 556, 560, 563-64 (2018).

"Prior to the enactment of section 50-a, the confidentiality of police records was governed by common-law rules governing privileged 'official information,'" which permitted public officials to withhold records under certain circumstances. *Capital Newspapers Div. of Hearst Corp. v. Burns*, 67 N.Y.2d 562, 568 (1986). But those rules were often highly qualified and could be overcome by broad civil litigation disclosure provisions in C.P.L.R. article 31. *Id.* Section 50-a granted police disciplinary records explicit statutory protections, which then became part of FOIL through its cross-reference to specific statutory exemptions from disclosure.

Section 50-a was controversial. It was meant to "prevent time-consuming and perhaps vexatious investigation into irrelevant collateral matters in the context of a civil or criminal action." *Id.* at 569 (quotation marks omitted); *see Daily Gazette Co. v. City of Schenectady*, 93 N.Y.2d 145, 157-58 (1999) (purpose was to prevent potential use of information "in litigation to degrade, embarrass, harass or impeach the integrity of the officer"). Opponents of the bill contended "that the needs to prevent oppressive use of police personnel records 'do not offset the benefits of assuring the availability to the public of the performance evaluation of its servants.'" *New York Civil Liberties Union*, 32 N.Y.3d at 566 (citation omitted). The Legislature nevertheless "made the policy choice to shield the personnel records of these officers from disclosure" in order to prevent their "oppressive use" during cross-examination of police officers in litigation. *Id.* (quotation marks omitted).

3. Repeal of Civil Rights Law § 50-a.

"Section 50-a was first enacted into law (L. 1976, ch. 413) some two years after passage of the original FOIL legislation (L. 1974 ch. 578)." *Daily Gazette*, 93 N.Y.2d at 154. But despite the subsequent legislative expansion of FOIL to promote disclosure of records, courts construed § 50-a's *exemption* expansively. For example, courts held that mere "grievances" against police officers and related decisions were "personnel records, used to evaluate performance" under § 50-a and therefore exempt. *Prisoners' Legal Servs. of N.Y. v. New York State Dep't of Corr. Servs.*, 73 N.Y.2d 26, 29 (1988). Courts further held that § 50-a applied even to requests by newspapers for records that were not involved in litigation. *See Daily Gazette*, 93 N.Y.2d at 153. And courts concluded that § 50-a exempted law enforcement personnel records even when officers' identifying information was "adequately redacted." *New York Civil Liberties Union*, 32 N.Y.3d at 560.

In response to concerns that judicial statutory constructions were insulating law enforcement from public scrutiny, this Court noted that policy reforms were most appropriately directed to the Legislature. *See, e.g.*, *id.* at 570-71. As a result, advocates for government accountability

and FOIL disclosure (including these Amici) sought § 50-a's repeal. *See* Mem. of Supp., https://reinventalbany.org/wp-content/uploads/2020/06/Support-Civil-Rights-Law-50-a-Group-Memo.pdf; Committee on Open Gov't, *Annual Report* (2014), https://opengovernment.ny.gov/system/files/documents/2021/12/2014-annual-report.pdf (§ 50-a "undermine[d] the public policy goals of FOIL").

In June 2020, following national protests in the wake of the death of George Floyd, the Legislature repealed Civil Rights Law § 50-a, making clear that such records could no longer claim a statutory exemption from disclosure under FOIL. *See* 2020 N.Y. Laws 780, 780. Simultaneously, the Legislature amended FOIL itself to ensure that such disclosures included appropriate safeguards. The Legislature made clear that an agency responding to a FOIL request shall redact any portion of such records containing sensitive information like medical history, contact information, social security number, and use of mental assistance services. *See* Public Officers Law § 87(4-a), (4-b); *id.* § 89 (2-b), (2-c). And the Legislature broadly defined the "law enforcement disciplinary records" that required such redactions to mean "*any* record" created in furtherance of a law enforcement investigation, hearing, or disciplinary

action. *See id.* § 86(6)-(9) (emphasis added).

B. Police Disciplinary Records *Are Not* Specifically Exempt from Disclosure Under Civil Rights Law § 50-a.

To support its argument that records created before June 2020 are not subject to disclosure, the PBA appears to invoke the FOIL exemption in Public Officers Law § 87(2)(a) for records that are "specifically exempt" under a state statute, and points to the now-repealed Civil Rights Law § 50-a as the source for such statutory exemption. But as in prior FOIL cases, "[t]his case presents a straightforward application" of these two provisions. *New York Civil Liberties Union*, 32 N.Y.3d at 570.

"First, the literal language" of FOIL is inconsistent with the PBA's contention that access to police disciplinary records *today* turns on whether they were previously considered confidential under Civil Rights Law § 50-a *before June 2020*. *Daily Gazette*, 93 N.Y.2d at 153; *see Matter of Empire Ctr. for N.Y. State Policy v. New York State Teachers' Ret. Sys.*, 23 N.Y.3d 438, 444 (2014) (applicability of FOIL exemption was "plain from the face of the statute"); *Matter of Town of Waterford v. New York State Dep't of Envt'l Conservation*, 18 N.Y.3d 652, 657 (2012) (applicability of FOIL was clear "[b]y its plain terms").

FOIL provides that public entities must disclose "all records" that do not fall within one of the statute's narrow exemptions. *See* Public Officers Law § 87(2). As relevant here, FOIL exempts records that "*are* specifically exempted from disclosure by state . . . statute." *Id.* § 87(2)(a) (emphasis added). Currently, no state statute specifically exempts police disciplinary records. The Appellate Division was thus correct in holding that "respondents had no reasonable basis for denying access to most of the records sought." *NYP Holdings, Inc. v. New York City Police Dept.*, 220 A.D.3d 487, 489 (1st Dep't 2023) (quotation marks omitted).

The PBA argues that the records in question *were* specifically exempted under Civil Rights Law § 50-a before that statute was repealed. PBA Br. at 31. But FOIL is written in the present tense; it does not include an exemption for documents that at one time *were* exempted under another statute. "It is fundamental that in interpreting a statute, a court should look first to the particular words in question, being guided by the accepted rule that statutory language is generally given its natural and most obvious meaning." *Matter of Capital Newspapers, Div. of Hearst Corp. v. Whalen*, 69 N.Y.2d 246, 251 (1987). "Where, as here, the

literal language of a statute is precise and unambiguous, that language is determinative." *Encore Coll. Bookstores*, 87 N.Y.2d at 417-18.

Nor does the plain language of § 50-a support the PBA's claim that police disciplinary records created before June 2020 *continue to be* protected after June 2020. Although § 50-a previously provided that all such records "shall be considered confidential and not subject to inspection or review" without consent or a court order, the Legislature has since modified that statute by making clear that § 50-a "is REPEALED." *See* 2020 N.Y. Laws 780, 780.

Nowhere in § 50-a—or FOIL itself—did the Legislature "specifically" provide that documents created before June 2020 shall remain confidential even after § 50-a's repeal. If the Legislature had "wanted to achieve that result, it could have said so," but it did not. *Newsday*, 5 N.Y.3d at 89; *see, e.g.*, *M. Farbman & Sons, Inc. v. New York City Health & Hosps. Corp.*, 62 N.Y.2d 75, 81 (1984) ("If the Legislature had intended" the purported exemption from FOIL, "it certainly could have so provided"); *Short v. Board of Mgrs. of Nassau Cnty. Med. Ctr.*, 57 N.Y.2d 399, 405 (1982) (rejecting interpretation of FOIL because "verbiage to achieve that result was readily available" to the Legislature).

In fact, the Legislature has expressed intent for police disciplinary records *to be disclosed under FOIL* following June 2020, not exempt under that statute. *See Capital Newspapers*, 67 N.Y.2d at 567 (requiring a "showing of clear legislative intent to establish and preserve that confidentiality which one resisting a FOIL disclosure claims as protection"). In 2018, this Court held that such records were categorically barred from disclosure under Civil Rights Law § 50-a, even if they were appropriately redacted. *See New York Civil Liberties Union*, 32 N.Y.3d at 570. In repealing § 50-a, however, the Legislature simultaneously *amended FOIL* to require a law enforcement agency to make appropriate redactions before disclosing such records—in other words, it made clear in both statutes that it expected disclosure of police disciplinary records under FOIL with reasonable safeguards. *See* 2020 N.Y. Laws 780, 781 (amending Public Officers Law §§ 87, 89).

In construing these amendments, the Court must "give effect to both statutes." *Xerox Corp. v. Town of Webster*, 65 N.Y.2d 131, 132 (1985); *see Regina Metro. Co., LLC v. New York State Div. of Hous. & Cmty. Renewal*, 35 N.Y.3d 332, 352 (2020) ("When a statute is part of a broader legislative scheme, we construe its language in context and in a

manner that harmonizes the related provisions and renders them compatible[.]" (quotation marks omitted)). No provision in either statute limits the disclosure of police records by date. Holding that records created before June 2020 remain exempt wholesale and in perpetuity, regardless of the redactions now required by FOIL, would render these FOIL amendments not only inconsistent with their plain text, but superfluous for the vast majority of records implicated by both statutes. *See Ivey v. State*, 80 N.Y.2d 474, 480 (1992) ("[E]very part of a statute is to be given effect and meaning, and no word may be excised by the courts in such a way as to deprive it of meaning and effect.").

II. THE PBA'S RETROACTIVITY ARGUMENTS ARE MERITLESS.

Rather than engage in a straightforward application of FOIL, the PBA focuses its appeal on the repeal of Civil Rights Law § 50-a, arguing that there can be no retroactive application of *that statute*. *See* PBA Br. 16-29; PBA Reply at 8. But focusing narrowly on "rights" that once existed under § 50-a would let the tail wag the dog: section 50-a was merely an exemption to disclosure duties *under FOIL*; it created the right to assert confidentiality if a *particular FOIL request* happened to issue at a time when such a cross-referenced exemption existed. *See, e.g.*, Civil

Rights Law § 50-a(1)-(3) (stating that such records shall be "not subject to inspection or review" without consent or a court order). With that exemption now rescinded, any right to claim such an exemption from FOIL in response to a request has been extinguished. And by making the instant request for non-exempt records *after* the repeal, Petitioners seek *prospective* relief that is capable of being granted in the future under the current FOIL statute. *See* Public Officers Law § 87(2). That raises no retroactivity concerns, even if the request covers antecedent records.

In any event, retroactive application would be appropriate here. Holding that police disciplinary records created before June 2020 continue to be exempt from FOIL would, at minimum, leave the content of every police disciplinary record up to June 2020 forever shrouded in secrecy, despite the Legislature's intent for historical records to be considered when enacting police reforms and curbing abuse. That result would be contrary to the plain text, history, and purpose of FOIL.

A. The FOIL Request Does Not Implicate a "Retroactive" Application of Any Statute.

Contrary to the PBA's claims, applying the current statutory requirements to FOIL requests for law enforcement disciplinary records submitted after June 2020 does not require "retroactive application" of

any statute. PBA Br. at 25; *see Matter of Newsday, LLC v. Nassau Cnty. Police Dep't*, 222 A.D.3d 85, 92-93 (2d Dep't 2023); *Matter of Abbatoy v. Baxter*, 227 A.D.3d 1376, 1377 (4th Dep't 2024).

As Petitioners make clear, their FOIL request for non-exempt records under current law does not seek to reopen FOIL requests that were previously denied prior to § 50-a's repeal. *See* Pet. Br. at 3, 26. Rather, Petitioners seek *prospective relief* under the current FOIL and its in-effect exemptions moving forward (see *supra* at 5-6 (explaining that FOIL requires an agency to disclose all records absent an applicable exemption)), and "a statute that affects only 'the propriety of prospective relief'" has "no potentially problematic retroactive effect even when the liability arises from past conduct." *Regina Metro. Co.*, 35 N.Y.3d at 365 (quoting *Landgraf v. USI Film Prods.*, 511 U.S. 244, 273 (1994)).

As the Committee on Open Government has explained, "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." Committee on Open Gov., *2020 Rep. to Gov. & State Legis*, 7 (Dec. 2020), https://opengovernment.ny.gov/system/files/documents/2021/01/2020-annual-report.pdf. "If such records exist," FOIL directs "that

for a request for those records, the agency is required to analyze whether each such records must be disclosed pursuant to FOIL or may be withheld pursuant to one of the exemptions appearing in" FOIL. *Id.* at 8. The question is therefore not one of "retroactivity," but of "consistent FOIL application to records maintained by an agency." *Id.* at 7-8.

The PBA argues that FOIL cannot compel disclosure of records created in June 2020, before *§ 50-a's repeal*. PBA Br. at 29. But a statute like § 50-a "'does not operate retrospectively merely because it is applied in a case arising from conduct antedating the statute's enactment.'" *American Econ. Ins. Co. v. New York*, 30 N.Y.3d 136, 147 (2017) (quoting *Landgraf*, 511 U.S. at 269-70); *see, e.g.*, *Forti v. New York State Ethics Comm'n*, 75 N.Y.2d 596, 609-10 (1990) ("'A statute is not retroactive . . . when made to apply to future transactions merely because such transactions relate to and are founded upon antecedent events'" (quoting Statutes § 51); *see also Gottwald v. Sebert*, 40 N.Y.3d 240, 258-59 (2023).

"'Rather, the court must ask whether the new provision attaches *new legal consequences* to events completed before its enactment.'" *American Econ. Ins.*, 30 N.Y.3d at 147 (emphasis added) (quoting *Landgraf*, 511 U.S. at 269-70). The statute is deemed to have retroactive

effect only if "'it would *impair rights* a party possessed when he acted, *increase a party's liability* for past conduct, or *impose new duties* with respect to transactions already completed.'" *Regina Metro. Co.*, 35 N.Y.3d at 365 (emphases added) (quoting *Landgraf*, 511 U.S. at 278-80).

Applying the repeal of Civil Rights Law § 50-a (i.e., removal of confidentiality for records once protected by § 50-a) to these FOIL requests would not attach any new legal consequences or liabilities to events that were "completed" by June 2020 because creating or maintaining records when § 50-a was in effect (PBA Br. at 32) did not themselves impose legal consequences or liabilities upon any agency; it was only possession of *non-exempt records* when *faced with a pending FOIL request* that could lead to such consequences, and in this case, Petitioners' FOIL requests came *after* § 50-a's repeal. The "prospective relief" of disclosure that Petitioners seek has "no potentially problematic retroactive effect even when the liability arises from past conduct." *Regina Metro. Co.*, 35 N.Y.3d at 365 (quoting *Landgraf*, 511 U.S. at 273).

Nor would applying the repeal of Civil Rights Law § 50-a in this case impair *rights* or impose new *duties* for events "completed" by June 2020. Before § 50-a's repeal, that statute provided a *right to assert*

confidentiality over records *in response to a FOIL request*, not a right to shield forever from public view such records if statutory confidentiality were ever waived by the Legislature. *See* Civil Rights Law § 50-a(1)-(3) (providing that records shall not be "subject to inspection or review" absent consent or an order making them "available to the persons so requesting"). Here, the events imposing "duties"—the FOIL requests for possession of records that were not exempt under FOIL—came *after* the Legislature chose to extinguish the narrow grant of the right to assert confidentiality through § 50-a's repeal, which triggered duties under statutory provisions that no longer implicate any right to assert confidentiality and instead seek to "shed light on government decision making" in records on a going forward basis. *Encore Coll. Bookstores*, 87 N.Y.2d at 416. Applying those prospective obligations to records created before repeal is not a "retroactive" application of the statute.

This Court has repeatedly held similarly in similar cases. In *Forti v. New York State Ethics Commission*, for example, state officers challenged a statute that imposed "new and expanded restrictions" on activities of former government employees after their separation from state service. 75 N.Y.2d 596, 604 (1990). The Court concluded that

applying the statute to employees "regardless of whether they left State service before or after the Act's effective date" did not render it "'retroactive' in any true sense of that term" because it "merely prohibits a class of individuals from engaging in certain specified business and professional activities *after* the statute's effective date," and new restrictions on employment were "future transactions" that related to and were founded upon "antecedent" state employment. *Id.* at 607, 609.

Likewise, in *Matter of Miller v. DeBuono*, a nurse aid was fired and prohibited from future employment pursuant to a state regulation that was enacted after a prohibited incident of abuse had taken place. 90 N.Y.2d 783, 786-87 (1997). The Court concluded that the regulation applied prospectively, not retroactively, because "where the requirements for engaging in specified professional activity are changed to govern future professional eligibility, a statute does not operate retroactively in any true sense even though its application may be triggered by an event which occurred prior to its effective date." *Id.* at 790 (quotation marks omitted). The Court explained that the provision was a measure designed to regulate *future employment*, even though the

nurse's disqualifying conduct had occurred before the regulation's promulgation. *Id.*

Similarly, in *St. Clair Nation v. City of New York*, the Department of Buildings refused to accept documents from "any person" found to have knowingly submitted false materials in violation of a newly enacted code provision. 14 N.Y.3d 452, 455 (2010). The Court concluded that the provision had no retroactive effect when applied to an engineer who engaged in misconduct before it was enacted, because the new provision "aim[ed] to regulate *future* professional eligibility," and its purpose was "to promote public safety" *moving forward*. *Id.* at 457 (emphasis added). "The fact that petitioner's inability to file papers with DOB for a future period of time [was] predicated on prior false filings d[id] not render … application of the provision retroactive." *Id.* at 457-58.

The same "rationale controls the question of retroactivity in this case." *Id.* at 457. Disclosure is required under FOIL because that statute—and the repeal of Civil Rights Law § 50-a—mandate *future* disclosure of all law enforcement disciplinary records to promote the policies underlying FOIL *moving forward*. Applying the revised statutory scheme to all current requests for police disciplinary records,

regardless of whether the records they cover were created before or after a statute's enactment, does "not render that statute 'retroactive' in any true sense of that term." *Forti*, 75 N.Y.2d at 609. And the repeal of § 50-a itself did not impair any substantive rights to assert confidentiality because it did not mandate reopening any FOIL requests that were denied before § 50-a's repeal. *See Matter of Acevedo v. New York State Dep't of Motor Vehs.*, 29 N.Y.3d 202, 228-29 (2017) (Regulations requiring DMV to consider past driving records "did not rescind petitioners' existing licenses" and applied only to "prospective consideration of petitioners' pending relicensing applications—a 'future transaction[]'").

"[F]amiliar considerations of fair notice, reasonable reliance, and settled expectations offer sound guidance" on the analysis. *Landgraf*, 511 U.S. at 270. The PBA argues that police officers settled disciplinary proceedings expecting that related documents would be considered confidential. *See, e.g.*, PBA Br. at 8-9. But "'a statute does not operate retrospectively merely because it . . . upsets expectations based in prior law.'" *American Econ. Ins.*, 30 N.Y.3d at 147 (cleaned up) (quoting *Landgraf*, 511 U.S. at 269-70). "'[E]ven uncontroversially prospective statutes may unsettle expectations and impose burdens on past

conduct,'" but that is a feature of any significant change in the law and does not prevent the Legislature from addressing policy concerns moving forward. *Id.* (quoting *Landgraf*, 511 U.S. at 269-70).

The PBA also claims that police officers had a "vested right" in confidentiality under § 50-a because they reasonably relied on that statute in the past. PBA Br. 24-25. But the public has no "vested right" in the law remaining unchanged in perpetuity and cannot reasonably rely on its elected Legislature's never amending or reforming the state's statutes. *See, e.g.*, *Aaron Manor Rehab. & Nursing Ctr., LLC v. Zucker*, 42 N.Y.3d 46, 56-57 (2024) ("[E]ven petitioners do not argue that the legislature or the Department can never adjust rates already set, thus minimizing any unfairness to petitioners or reliance on rates for services provided prior to the passage of the elimination clause.").

Any such reliance would be particularly unreasonable in regard to FOIL, which "has been amended more than thirty times since FOIL was passed." Pet. Br. at 21. The right to confidentiality was newly created in 1976 by the Legislature against a backdrop of court-ordered disclosures (*Capital Newspapers*, 67 N.Y.2d at 568), and that statutorily created right was subsequently extinguished by the repeal of Section 50-a in June

2020, such that any FOIL request issuing thereafter would be judged under the current law without any extant exemption.

Holding otherwise would impermissibly ossify New York law, including FOIL, and bind the Legislature by preventing it from addressing changed conditions and legitimate policy concerns. *See, e.g.*, *Regina Metro. Co.*, 35 N.Y.3d at 348 ("[T]he legislature determines the public policy of this State, recalibrating rights and changing course when it deems such alteration appropriate . . . ."); Public Officers Law § 84 (finding it incumbent to "extend public accountability wherever and whenever feasible" as "government services increase and public problems become more sophisticated and complex and therefore harder to solve").

Having lost before the Legislature the right to assert continuing confidentiality for old records in response to FOIL requests, the PBA now asks this Court to create a new FOIL exemption for all disciplinary records that were created before June 2020. But although the PBA's concerns are "perhaps a predicate on which to ground an argument . . . that [FOIL] should be amended," those concerns are (and previously were) more "properly directed" to the Legislature. *New York Civil Liberties Union*, 32 N.Y.3d at 570-71 (quotation marks omitted).

For the same reasons, the PBA misplaces its reliance on General Construction Law § 93, which provides that the repeal of a statute shall not be construed as impairing accrued "rights." PBA Br. at 29-31. That law merely enshrines into statute the presumption against retroactivity that, as explained above, does not apply here. *See People v. Roper*, 259 N.Y. 635, 635 (1932); *see also Kellogg v. Travis*, 100 N.Y.2d 407, 411 (2003) (Legislature can "enact laws that have retroactive application" when it intends to do so); PBA Br. at 2-3, 17, 25 ("[T]he presumption against retroactivity is codified in GCL § 93 . . . ."); *id.* at 31; PBA Reply at 5 (applying *Landgraf* retroactivity analysis to GCL § 93).

General Construction Law § 93 has no application because the repeal of Civil Rights Law § 50-a applies prospectively to FOIL requests following the repeal, like the request at issue in this case, not FOIL requests that were fully resolved under now-rescinded versions of that law. Regardless of whether police may have had an "accrued right" to *assert confidentiality in response to records requests that were made under FOIL before 2020* (PBA Br. at 32-33; *see* PBA Reply at 5-6 (arguing that § 50-a created a "right enforceable by officers" for their protection "against harassment, retaliation, and exploitation"), they have no such

rights with respect to these FOIL requests, which were made under a statutory framework that contains no such exemption. And regardless of the generic background rule of construction provided in General Construction Law § 93, no state statute "*specifically* exempts" police disciplinary records from FOIL disclosure any longer. Holding as much does not impair rights provided in any statute.

B. The Legislature Intended for the Repeal of Civil Rights Law § 50-a to Apply to Police Disciplinary Records Created Before June 2020.

Even if the repeal of Civil Rights Law § 50-a had a retroactive effect on substantive rights—and it did not—retroactive application under these circumstances would be permissible because the Legislature intended for law enforcement disciplinary records to be subject to FOIL disclosure regardless of when those documents were created.

"It is fundamental that a court, in interpreting a statute, should attempt to effectuate the intent of the Legislature." *Majewski v. Broadalbin-Perth Cent. Sch. Dist.*, 91 N.Y.2d 577, 583 (1998) (citation omitted). Thus, while statutes will not be given retroactive application "unless the language expressly or by necessary implication requires it," that is a "navigational tool[] to discern legislative intent." *Id.* at 584. And

"[g]enerally, the plain meaning of the statutory text is the best evidence of legislative intent." *People v. Galindo*, 38 N.Y.3d 199, 203 (2022) (quotation marks omitted).

The plain language of these statutes makes clear that the Legislature intended to lift the cloak of confidentiality from police disciplinary records regardless of whether they were previously considered exempt under FOIL. *See supra* Pt. I.B. Moreover, the "legislative history" makes clear that the Legislature did not intend for records created before June 2020 to continue to be exempt indefinitely. *Capital Newspapers*, 67 N.Y.2d at 567; *see, e.g.*, *Daily Gazette*, 93 N.Y.2d at 154 (examining the "legislative history of Civil Rights Law § 50-a, as originally adopted and later amended"); Pet. Br. at 8-10 (discussing legislative debate). The "legislative history reveals that the purpose of [the] new legislation is to clarify what the law was always meant to say and do" because the repeal of § 50-a was intended to restore the purpose of the statutory scheme by requiring broad disclosure, not concealment, of police records. *Majewski*, 91 N.Y.2d at 585; *see, e.g.*, *In re Gleason (Michael Vee, Ltd.)*, 96 N.Y.2d 117, 122-23 (2001) (retroactive application permissible where statute "was designed to rewrite an unintended

judicial interpretation" or "reaffirm[] a legislative judgment about what the law in question should be"); Pet. Br. at 32-33.

Finally, the PBA's proposed construction "should be rejected" because it would be "inimical to the very statutory purpose" of these provisions. *Prisoners' Legal Servs. of N.Y.*, 73 N.Y.2d at 32. The fundamental premise of FOIL "[is] that the public is vested with an inherent right to know and that official secrecy is anathematic to our form of government." *Friedman*, 30 N.Y.3d at 475 (quotation marks omitted). The statute thus seeks to "shed light on government decision making, which in turn both permits the electorate to make informed choices regarding governmental activities and facilitates exposure of waste, negligence and abuse." *Encore Coll. Bookstores*, 87 N.Y.2d at 416.

Police disciplinary records are quintessential government records that ought to be subject to public scrutiny. Police officers wield enormous power over the public, including the ability to determine a person's life or death in an instant. *See, e.g.*, Amanda Hernández, *After George Floyd's Murder, More States Require Release of Police Disciplinary Records* (Aug. 2, 2023), https://thebrunswicknews.com/news/national_news/after-george-floyd-s-murder-more-states-require-release-of-police-disciplinary

-records/article_4813c8af-91a7-5357-8108-7348189459fb.html. Holding them accountable can be difficult: obstacles abound in legal proceedings, and internal reviews can be shrouded in secrecy. *See, e.g.*, Joanna Schwartz, *Shielded: How the Police Became Untouchable* (2023) (barriers to recovery for police misconduct).

Of the more than 750,000 law enforcement officers across the country, "[a]t least 85,000" were "investigated or disciplined for misconduct over the past decade," including for "tens of thousands" of cases of serious misconduct. John Kelly & Mark Nichols, *We Found 85,000 Cops Who've Been Investigated for Misconduct. Now You Can Read Their Records*, USA Today (April 24, 2019, 9:15 PM), https://www.usatoday.com/in-depth/news/investigations/2019/04/24/usa-today-revealing-misconduct-records-police-cops/3223984002/. Officers "have beaten members of the public, planted evidence and used their badges to harass women. They have lied, stolen, dealt drugs, driven drunk and abused their spouses." *Id.*

Many law enforcement officers, such as Derek Chavin (the officer who killed George Floyd in events leading up to § 50-a's repeal), are alleged repeat offenders—"[n]early 2,500 have been investigated on 10 or

more charges. Twenty faced 100 or more allegations yet kept their badge for years." *Id.* Recent years have seen numerous deaths by individuals—from Tamir Rice to Laquan McDonald to Anton Black—under troubling circumstances at the hands of officers with extensive histories of alleged misconduct that were fully disclosed, if at all, only to police and addressed after the deaths occurred. Disclosure of disciplinary records helps deter future misconduct by empowering the public, including the press, to advocate for the firing of bad actors or refusal to hire them in the first instance. *See* Ash Gautam, *Balancing Interests in Public Access to Police Disciplinary Records*, 100 Tex. L. Rev. 1405, 1407-08 (2022); *see also Friedman*, 30 N.Y.3d at 475 ("One of FOIL's salient features is its capacity to expose abuses on the part of government; in short, to hold the governors accountable to the governed" (quotation marks omitted)).

Disclosure also helps restore public trust in the legitimacy of law enforcement, not only by helping bring about justice for individuals, but also by helping the public identify trends and enact reforms to repair broken relationships with police. *See* Gautam, *supra*, at 1415 (noting that police have a "continuing public trust problem," especially with Black Americans); PBA Br. at 11. "Fueled by public outrage over the

2020 murder of George Floyd by a Minneapolis police officer and other high-profile incidents of police violence," state policymakers in nearly every state have offered hundreds of police oversight and transparency bills, with at least seven (including New York) passing laws providing for the disclosure of police disciplinary records after the death of George Floyd. Hernández, *supra.*

Increased transparency has led to essential police reforms, such as community policing and training for dealing with individuals with mental illnesses. *See, e.g.*, *How Policing Has—and Hasn't—Changed Since George Floyd*, The Marshall Project (Aug. 6, 2022), https://www.themarshallproject.org/2022/08/06/how-policing-has-and-hasn-t-changed-since-george-floyd?gad_source=1&gclid=EAIaIQobChMIkJmoirDciQMVqBKtBh1exRyNEAAYASAAEgJd2vD_BwE ("At the local level, many departments have begun experimenting with new approaches, like alternative response programs that send unarmed counselors or social workers to certain calls. . . . Other local police departments have attempted cultural change at the hands of new charismatic leaders."); Cheyanne M. Daniels, *Here's What's Changed Since George Floyd's Murder Three Years Ago*, The Hill (May 25, 2023),

https://thehill.com/homenews/race-politics/4020985-heres-whats-changed-since-george-floyds-murder-three-years-ago/ (listing cities that fund mental health crisis response teams and community programs such as trauma and counseling services).

Preventing disclosure of disciplinary records created before June 2020 would be contrary to the Legislature's purpose. In restoring the application of FOIL to disciplinary records, the Legislature anticipated broad disclosure of *historical* alleged misconduct, so vital lessons from the past could be used in crafting and implementing reforms and prevent future abuse. *See* Public Officers Law § 84; Pet. Br. at 34. Turning a blind eye to every record created before June 2020 would have rendered § 50-a's repeal effectively meaningless when it was enacted and would continue to inhibit the critical policies underlying FOIL for years to come.

The Legislature did not eliminate all of FOIL's safeguards for police disciplinary records. FOIL continues to exempt records that "would constitute an unwarranted invasion of personal privacy"; that "could endanger the life or safety" of any person; or that "are compiled for law enforcement purposes" and would interfere with an investigation or judicial proceeding. *See id.* § 87(2). These exemptions are not invoked in

this appeal. Moreover, the Legislature specifically amended FOIL to safeguard against disclosure of private information in disciplinary records by requiring redactions of certain information such as medical and financial history, mental health treatment, and electronic contact information. *See id.* § 89(2).

To be sure, exposure of records to the public eye can raise concerns about reputation, state of mind, or one's safety. But the PBA's desire that such records remain exempt from FOIL disclosure indefinitely "does not warrant going beyond the clear words" of the statute. *Newsday, Inc. v. State Dep't of Transp.*, 5 N.Y.3d 84, 88 (2005); *see, e.g.*, *Newsday, Inc. v. Empire State Dev. Corp.*, 98 N.Y.2d 359, 364 (2002) (Court required to apply the "literal language of the statute"). The Legislature has found that "[t]he potential for abuse through FOIL is in a sense a price of open government," and such potential for abuse "should not be invoked to undermine the statute." *M. Farbman & Sons, Inc. v. New York City Health & Hosps. Corp.*, 62 N.Y.2d 75, 82 (1984).

In any event, incidents that implicate these concerns are few and far between. Rachel Moran & Jessica Hodge, *Law Enforcement Perspectives on Public Access to Misconduct Records*, 42 Cardozo L. Rev.

1237, 1279-78 (2021). Hackers and other individuals already can find the names of officers in affidavits, testimony, and online databases and can film police interacting with the public on the job. *See Right to Record Government Officials in Public*, Reporters Committee for Freedom of the Press, www.rcfp.org/reporters-recording-sections/right-to-record.

The solution to concerns about disclosure is better training, including to protect information from being leaked or accessed online. Dave Bryant, *Privacy and Public Records Concerns*, American Police Beat (Nov. 25, 2023), https://apbweb.com/2023/11/privacy-and-public-records-concerns/. It is not a permanent grant of secrecy to historical records, in contravention of the Legislature's repeal of § 50-a and restored application of the FOIL statute, which would prevent the citizenry from holding public servants accountable. *See, e.g.*, *New York Civil Liberties Union*, 32 N.Y.3d at 571. For these reasons, the policy judgment made by the Legislature in June 2020 to repeal Section 50-a must be respected and outweighs the largely non-legal concerns the PBA raises here.

CONCLUSION

The Court should affirm.

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Respectfully submitted,

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CERTIFICATION OF COMPLIANCE

Pursuant to 22 N.Y.C.R.R. § 500.13(c)(1), Amer S. Ahmed, a partner at Gibson, Dunn & Crutcher LLP, hereby certifies that according to the word count feature of the word processing program used to prepare this brief, the brief contains 6,990 words, which complies with the limitations stated in § 500.13(c).