COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

No. SJC-13468 SUFFOLK COUNTY

ERIC B. MACK,
Plaintiff-Appellee,

vs.

OFFICE OF THE DISTRICT ATTORNEY OF
THE BRISTOL DISTRICT,
Defendant-Appellant.

Appeal from an Order of Summary Judgment
of the Suffolk Superior Court

BRIEF OF AMICI CURIAE LAWYERS FOR CIVIL RIGHTS BOSTON, CITIZENS FOR JUVENILE JUSTICE, NATIONAL LAWYERS GUILD, NEW ENGLAND FIRST AMENDMENT COALITION, AND STRATEGIES FOR YOUTH IN SUPPORT OF APPELLEE AND AFFIRMANCE

ON BEHALF OF AMICI CURIAE,

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Corporate Disclosure Statement

Pursuant to Massachusetts Supreme Judicial Court Rule 1:21, *amici curiae* Lawyers for Civil Rights, Citizens for Juvenile Justice, National Lawyers Guild, New England First Amendment Coalition, and Strategies for Youth make the following disclosure: They are non-profit corporations with no parent corporations, with no stock, and therefore, with no publicly held company owning 10% of more of their stock.

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INTERESTS OF AMICI CURIAE

Lawyers for Civil Rights, Citizens for Juvenile Justice, National Lawyers Guild, New England First Amendment Coalition, and Strategies for Youth as *amici curiae* submit this brief urging the Court to affirm summary judgment in favor of Eric Mack, and specifically, to enforce the Public Records Law, G.L. c. 66, § 10, and require the Office of the District Attorney of the Bristol District ("District Attorney") to disclose certain records concerning the investigation into the police killing of Anthony Harden.

Pursuant to Mass. R. App. P. 17(c)(5), *amici* jointly declare (A) that no party or party's counsel had any part in authoring this brief; (B) that no person other than *amici* contributed any money intended to fund the preparation or submission of this brief; and (C) none of the *amici* represent or has represented any of the parties in this appeal or any similar proceeding involving similar issues or was a party or represented a party in a proceeding or legal transaction that is at issue in this appeal.

Lawyers for Civil Rights Boston (LCR) fosters equal opportunity and fights discrimination on behalf

of people of color and immigrants. It engages in creative and courageous legal action, education, and advocacy in collaboration with law firms and community partners. LCR has a strong interest in ending identity-based disparities in the criminal justice system, and because police-involved shootings disproportionality impact racial minorities, LCR has a specific interest in greater transparency and accountability for police violence.

Citizens for Juvenile Justice (CfJJ) is the only independent, statewide nonprofit organization working exclusively to reform and reimagine the juvenile justice and other youth serving systems in Massachusetts. CfJJ's mission is to advocate for statewide systemic reform that achieves equitable youth justice. Core to this pursuit of equity for youth in the Commonwealth is challenging opacity in systems that interact with youth and emerging adults to ensure that comprehensive, reliable, publicly accessible information is available to ensure accountability and inform effective public policy.

The **National Lawyers Guild** was formed in 1937 and was the first integrated national bar association in the United States. The Massachusetts Chapter of the

National Lawyers Guild works to unite the legal community with organizers and activists to the end that human rights shall be regarded as more sacred than property rights. The Chapter has regularly filed public records requests pursuant to M.G.L. c. 66, section 10, to reveal the workings of government, and in the last few years has litigated in the Superior Courts three separate public records lawsuits against the Boston Police Department and its Boston Regional Intelligence Center to that end. The Chapter has a strong interest in this appeal and working to vindicate the intent and purposes of M.G.L. c. 66, section 10.

The **New England First Amendment Coalition (NEFAC)** is the region's leading advocate for First Amendment freedoms and the public's right to know about government. NEFAC is a non-profit corporation organized and existing under the laws of the Commonwealth of Massachusetts. In collaboration with other like-minded advocacy organizations, NEFAC works to advance understanding of the First Amendment and right-to-know issues throughout the region and across the nation.

Strategies for Youth (SFY) Inc. is a national nonprofit training and advocacy organization dedicated to ensuring the best outcomes for youth interacting with law enforcement. A key part of our policy work focuses on establishing policies and practices that require accountability of law enforcement officers' conduct, including their use of force. Over the last three years, SFY has actively monitored the implementation and policy development of the Massachusetts Peace Officer Standards and Training Commission (POST) to ensure that the newly enacted laws and regulations serve the spirit and letter of the 2020 Act Relative to Justice, Equity and Accountability in Law Enforcement in the Commonwealth.

Pursuant to Mass. R. App. P. 17, *amici curiae* submit this brief in support of Plaintiff-Appellee's position and urge the Court to affirm the judgment of the Suffolk Division of the Superior Court Department.

INTRODUCTION

Less than one year before Michael Harden's tragic and needless death at the hands of a Fall River Police Department officer in November 2021, the Commonwealth enacted emergency reform legislation to increase

police transparency and accountability. This law was passed in the wake of George Floyd's murder by a Minneapolis police officer, which ignited an international movement demanding police reform. Responding to cries for change and a stop to police brutality, the Commonwealth enacted legislation with the express "purpose" of achieving "***justice, equity, and accountability in law enforcement in the Commonwealth***." (An Act Relative to Justice, Equity, and Accountability in Law Enforcement in the Commonwealth, S. 2963 (2020).) A key component of the law, known as the Policing Reform Law, was expanding public access to records concerning police misconduct investigations.

Mr. Harden's brother Eric Mack availed himself of the Public Records Law, G.L. c. 66, § 10, and requested information concerning the District Attorney's investigation into his brother's killing. The District Attorney, however, initially denied the request in its entirety claiming that the report was not final. (A.200-202.) Faced with the District Attorney's flat refusal to comply with the Public Records Law, Mr. Mack initiated suit to obtain these records. Only then did the District Attorney produce

some documents, but he continued to shield others from disclosure, citing Public Records Law exemptions. Of particular concern to *amici curiae* is the District Attorney's attempt to narrow the Policing Reform Law's misconduct-investigation carveout to the Public Record Law's privacy exemption, G.L. c. 4, § 7, cl. 26(c) ("Privacy Exemption"). Mr. Mack ultimately obtained summary judgment mandating disclosure of the withheld investigative records based, in part, on the Policing Reform Law's misconduct-investigation carveout.

The District Attorney appeals the Superior Court's judgment and asks this Court to misconstrue the Policing Reform Law to drastically restrict the misconduct-investigation carveout in direct contravention of the statute's text and purpose. The Legislature explicitly determined that the need for transparency and accountability in policing override privacy concerns when it comes to "records related to a law enforcement misconduct investigation." G.L. c. 4, § 7, cl. 26(c). Should the Court accept the District Attorney's interpretation, it would rewrite the statute and sanction shielding records the Policing Reform Law was designed to bring into public view. Such an interpretation would have dangerous

repercussions in the Commonwealth, particularly for its minority citizens who (like Mr. Harden) are disproportionately victims of unjustified use of force by police.

The Court should therefore decline the District Attorney's attempt to rewrite the misconduct-investigation carveout, uphold the statute as written and intended by the Legislature, and affirm the Superior Court's grant of summary judgment to Mr. Mack.

BACKGROUND

I. The District Attorney Resists Disclosing Public Records Concerning Mr. Harden's Killing by the Police.

On November 22, 2021, the Fall River Police Department dispatched Officers Campellone and Sullivan to follow up on a prior domestic incident complaint. (A.176; A.367.) The Officers were not responding to an active incident, but instead, were performing a routine follow-up investigation. Yet, within just two minutes of entering his home, the officers navigated to his bedroom and Officer Campellone fatally shot him. (A.168; A.205).

The reason for rapid escalation and fatal use of force is contested. At first, Officer Campellone said

Mr. Harden attacked Officer Sullivan with a knife, but she later recanted this testimony and said that Mr. Harden approached with an unknown object—not a knife. (A.407, ¶14; A.364). Neither officer reported seeing a knife (or other weapon) near Mr. Harden's body after he had been shot. (A.407, ¶13; A.404-431.) The same is true of the first back-up officer to arrive, a Fall River Police Department sergeant, who handcuffed Mr. Harden. (A.395-396; A.33.) The next police officer on the scene did not see any weapons near Mr. Harden even when securing the room for the paramedics. (A.395-396; A.33). Similarly, none of the paramedics that attended Mr. Harden in his bedroom and took him to the hospital observed a weapon near his body. (A.385, 390).

A sergeant performing a later "secondary walkthrough" of Mr. Harden's apartment reported seeing a steak knife on a desk in Mr. Harden's bedroom. (A.378.) Another officer who also arrived at the scene after the shooting claimed to have moved the knife from "within close proximity of Mr. Harden" onto the desk for safety reasons. (A.393.) Yet, none of the officers that preceded his arrival on the scene observed the knife, much less "within close proximity of Mr. Harden." (A.378; A.393.) This record raises

significant questions about Officer Campellone's fatal use of force.

In the aftermath of this killing, the District Attorney and the Massachusetts State Police conducted an investigation. On December 21, 2021, the District Attorney issued a report concluding:

> Based on a review of all the facts and circumstances related to this incident, there is no basis to conclude that either Fall River Police Officer committed a crime. The fatal shooting of Mr. Harden by a Fall River Police Officer was justified and was the result of Mr. Harden's violent and armed assault on the male police officer.

(A.36.) Mr. Mack promptly submitted a public records request seeking documents and information concerning his brother's killing. (A.38-40.) The District Attorney refused Mr. Mack's request, citing Public Records Law exemptions and claiming the requested documents were not public records. (A.42-44.) Among other objections, the District Attorney cited the Privacy Exemption claiming that the misconduct-investigation carveout did not apply because "[a]t this time, no misconduct relevant to our criminal investigation has been found." (A.43.) The District Attorney rested on the previously-issued public report

of the incident but provided no other records relating to the investigation of Mr. Harden's fatal shooting. (A.42.).

II. The Lack of Transparency and Accountability for Police Misconduct Have Long Plagued the Criminal Justice System.

The District Attorney's failure to comply with the Public Records Law is consistent with the long history of law enforcement organizations shielding police violence against civilians from public scrutiny. Indeed, lack of transparency and accountability of police misconduct has long plagued the criminal justice system in the United States. Despite the benefits of transparency as an avenue for exposing possible misconduct and promoting accountability, law enforcement has resisted public disclosure of disciplinary and misconduct records.[1] Historically, this lack of disclosure has been codified through police-specific exemptions in public records laws, which hamper attempts to unearth the extent of police misconduct and undermine public confidence in the fairness of the criminal justice

[1] Kate Levine, *Discipline and Policing*, 68 Duke L.J. 839, 870-71 (2019).

system.[2] These legal barriers have been exacerbated by concepts of group loyalty and the "blue wall of silence," which hinder disclosure of even the most egregious cases of police misconduct.[3]

The lack of disclosure perpetuates a status quo in which officers involved in shootings and other forms of excessive—even deadly—force are unlikely to face accountability. Since 2015, nearly 1,000 civilians per year have been shot and killed by police.[4] Data shows that only an infinitesimal share of these cases result in disciplinary action, and even fewer in criminal prosecution of police.[5] One study revealed that between 2005 and 2018, only 97 officers were changed with a crime resulting from a shooting and even fewer, 35, were convicted.[6] Furthermore,

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[2] Christine Koningisor, *Police Secrecy Exceptionalism*, 123 Colum. L. Rev. 615, 637-50 (2023).

[3] Kami Chavis Simmons, *New Governance and the "New Paradigm" of Police Accountability: A Democratic Approach to Police Reform*, 59 Cath. U. L. Rev. 373, 382-86 (2010).

[4] Thomas P. Hogan, *Officer Involved Shooting Investigations Demystified: Slashing Through the Gordian Knot*, 13 Drexel L. Rev. 1, 7 (2021).

[5] Philip M. Stinson, et al., *On-Duty Police Shootings: Officers Charged with Murder or Manslaughter 2005-2018*.

[6] *Id.*

alternative methods of accountability face continued structural barriers.[7]

For instance, police unions and advocacy groups have routinely led resistance to increased oversight and transparency of the criminal justice system. This has undermined public awareness of misconduct, confidence in the fairness of investigations, and opportunities for accountability for police misconduct.[8] Exacerbating the problem is the close relationship between the police and prosecutors, who, even when not stymied by police efforts to prevent disclosure of possible misconduct, may be unwilling to assess police conduct fairly and address the problem transparently.[9]

Without increased transparency, the current status of police misconduct and its disparate impact on racial minorities risks perpetuating the status quo. A 2020 report from the Criminal Justice Policy

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[7] Carol A. Archbold, *Police Accountability in the USA: Gaining Traction or Spinning Wheels?*, 15 *Policing: A Journal of Policy and Practice* 1665, 1669-1677 (2021).

[8] Katherine J. Bies, *Let the Sunshine In: Illuminating the Powerful Role Police Unions Play in Shielding Officer Misconduct*, 28 Stan. L. & Pol'y Rev. 109, 124-25 (2017).

[9] Somi Trivedi & Nicole Gonzalez Van Cleve, *To Serve and Protect Each Other: How Police-Prosecutor Codependence Enables Police Misconduct*, 100 B.U. L. Rev. 895, 908-11 (2020).

Program at Harvard Law School to the Supreme Judicial Court commissioned by the late Chief Justice Ralph Gants sets forth the racial and ethnic disparities in the Commonwealth's criminal justice system.[10] The report demonstrates the stark record of how people of color are overrepresented at all stages of the Commonwealth's criminal justice system, and how the Commonwealth exceeds national rates at each stage.[11] It details that racial disparities are in effect at every stage of the criminal justice system, from stops and searches to arrests, charging decisions, conviction rates, and sentencing length.[12] As the 2020 report concludes, the current status of the Commonwealth's criminal justice system has significant racial disparities at every level, intensifying the need for transparency and exposure of the systems that are creating these inequitable results. In the words of Justice Louis Brandeis, "sunlight is … the best of disinfectants,"[13] and the newly-enacted misconduct-investigation carveout is intended to do just that.

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[10] Elizabeth Tsai Bishop, et al., *Racial Disparities in the Massachusetts Criminal Justice System* at 3(2020).
[11] *Id.* at 3-4.
[12] *Id.* at 22-30.
[13] Louis Brandeis, Other People's Money 92 (Frederick A. Stokes Co., 1914).

III. The Commonwealth Enacts the Policing Reform Law of 2020 After Calls for Police Accountability Following George Floyd's Murder.

On May 25, 2020, Minneapolis Police Officer Derek Chauvin killed George Floyd, 46-year-old black man, by kneeling on his neck for over nine minutes during an arrest while fellow officers merely looked on. The murder was captured on video by an onlooker and shared online for all to see.[14] The incontrovertible video of police brutality mobilized tens of thousands across the United States to protest and ultimately, Mr. Floyd's death expanded and intensified interest in Black Lives Matter, the civil rights movement committed to eradicating police brutality and racism.[15]

Responding to intensifying cries for change, Commonwealth lawmakers pressed police reform legislation. (*See* December 10 Letter from Governor Charles Baker Regarding Sen. No. 2963) (the "Baker Letter") ("[T]he calls for justice and reform that followed the killing of … George Floyd this past

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[14] Eric Levenson, *Former Officer Knelt on George Floyd for 9 Minutes and 29 Seconds-Not the Information 8:46*, CNN (Mar. 30, 2021), https://www.cnn.com/2021/03/29/us/george-floyd-timing-929-846/index.html.

[15] *How George Floyd's Death Became a Catalyst for Change*, National Museum of African American History & Culture, https://nmaahc.si.edu/explore/stories/how-george-floyds-death-became-catalyst-change.

Spring [sic]" expedited consideration of the legislation).) On June 17, 2020, Governor Baker filed House Bill No. 4794, entitled "An Act to Improve Police Officer Standards and Accountability and to Improve Training." (H.B. No. 4794.) According to Governor Baker, the bill's primary purpose was to "create[] greater transparency in law enforcement" and "improved police accountability." (*Id.*) Six months later, on December 31, 2020, Governor Baker signed the bill that became the Policing Reform Law into law.[16]

The Policing Reform Law's Prefatory Statement pronounced its explicit "purpose" as achieving "justice, equity, and accountability in law enforcement in the Commonwealth." (Act's Prefatory Statement.) Emphasizing the urgent need for reform, the Act was "declared to be an emergency law, necessary for the immediate preservation of the public safety" because "deferred operation of [the Policing Reform Law] would tend to defeat its purpose." (*Id.*) The Policing Reform Law "makes law enforcement more accountable for their conduct and provides the public

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[16] The Associated Press, *Governor Signs Police Overhaul into Law*, Boston Globe (Dec. 31, 2020), https://www.bostonglobe.com/2020/12/31/metro/governor-baker-signs-landmark-policing-reform-law/

with ***direct insight*** into officers' performance history which ... creates greater transparency in law enforcement..." (*Id* (emphasis added).)

The Policing Reform Law achieved these aims by, *inter alia*, requiring disclosure of records relating to law enforcement misconduct investigations.[17] The Commonwealth has mandated the disclosure of government records since 1851.[18] The law's current version presumes that nearly every government record is public. G.L. c. 4, § 7, cl. 26. This presumption can be overcome only if there is an express statutory exemption and places the burden on the government office resisting disclosure to show that the exemption applies. G.L. c. 4, § 7, cl. 26(a)-(v). The exemption at issue here is the Privacy Exemption, which prohibits disclosure of "personnel and medical files

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[17] In addition to expanding the Public Records Law, the bill increased accountability and transparency by creating a certification process for police officers and curtailing the use of force.

[18] *Hastings & Sons Pub. Co. v. City Treasurer of Lynn*, 374 Mass. 812, 815 (1978) (citing to St.1851, c. 161, and St.1897, c. 439 as the earliest statutes in the Commonwealth requiring public acccess to records and documents); Sec. William F. Galvin, *A Guide to the Massachusetts Public Records Law*, Secretary of the Commonwealth Division of Public Records (Jan. 2017), https://www.mass.gov/files/2017-06/Public%20Records%20Law.pdf.

or information and any other materials or data relating to a specifically named individual, the disclosure of which may constitute an unwarranted invasion of personal privacy." G.L. c. 4, § 7, cl. 26(c).

The Policing Reform Law explicitly created a carveout from the Privacy Exemption to grant the public access to any records relating to police misconduct investigations. Specifically, the Policing Reform Law amended the Privacy Exemption by adding the proviso that the exemption "***shall not apply to records related to a law enforcement misconduct investigation***." G.L. c. 4, § 7, cl. 26(c) (emphasis added). The misconduct-investigation carveout made accessible to the public police records that were previously shielded. In so amending the Public Records Law, the Legislature determined that accountability and transparency in policing trump any police privacy concerns that may exist in the context of police misconduct investigations. This position is in line with the Policing Reform Law as a whole, and its broader context within the Black Lives Matter civil rights movement.

ARGUMENT

I. The Misconduct-Investigation Carveout Mandates Disclosure of Records Relating to the District Attorney's Investigation of Mr. Harden's Killing.

The District Attorney tries to severely narrow the carveout to avoid disclosure of records relating to the investigation into Mr. Harden's killing. The interpretation the District Attorney proposes simply cannot be squared with the carveout's plain text or the Policing Reform Law's purpose. The District Attorney's proffered reading is therefore impermissible.

A. The Privacy Exemption Does Not Shield from Disclosure Records Relating to Police Misconduct Investigations.

The Commonwealth's public records law grants anyone the right to timely access and inspect public records upon request. G.L. c. 66, 10(a). The statute establishes a presumption that a record will be disclosed unless it falls into one of twenty-one statutorily created exemptions. G.L. c. 4, § 7, cl.(26(a)-(v). At issue here is the Policing Reform Law's amendment to the Privacy Exemption requiring disclosure of "records related to a law enforcement misconduct investigation." *Id.* at (c).

While the term "law enforcement misconduct investigation" is not statutorily defined, its meaning is clear and unambiguous. *See Com. v. Scott*, 464 Mass. 355, 358 (2013) ("We interpret statutory language to give 'effect consistent with its plain meaning and in light of the aim of the Legislature' unless to do so would achieve an 'absurd' or 'illogical' result.") (citation omitted). The plain meaning of "law enforcement misconduct investigation" certainly encompasses the investigation into whether Officer Campellone's fatal use of force was legally justified or whether it constituted misconduct.

Indeed, the District Attorney's December 21, 2021 report concerning the incident characterized his inquiry as one to determine whether "either Fall River Police Officer committed a crime." (A. 36.) Moreover, counsel for the District Attorney was asked at oral argument for summary judgment if the investigation into Mr. Harden's death included "whether there's misconduct done in the performance of one's duty." (A.609.) Counsel candidly admitted that "[o]f course" it did. (*Id.*) "Of course" the investigation into Mr. Harden's death was a misconduct investigation, and

thus, subject to disclosure under the Public Records Law.

B. The District Attorney's Interpretation of the Misconduct-Investigation Carveout Lacks Textual Support.

Ignoring its plain language, the District Attorney argues that the misconduct-investigation carveout is limited only to investigations that ***result in a finding of misconduct.*** (App. Br. at 19; *id.* at 42, 44-48 (contending "no accusation or finding of misconduct has been leveled against an officer" and thus, the misconduct-investigation carveout does not apply). Nowhere does the statute limit application of the carveout to investigations resulting in a **finding** of misconduct. *See* G.L. c. 4, § 6 ("Words and phrases shall be construed according to the common and approved usage of the language[.]").

The Legislature certainly could have so limited the carveout, but it did not. By reading into the statute words that are omitted, the District Attorney invites the Court to violate a foundational rule of statutory construction. *See Dartt v. Browning-Ferris Indus., Inc.*, 427 Mass. 1, 9 (1988) ("[W]e will not add to a statute a word that the Legislature had the option to, but chose not to, include.") (citation

omitted). The Court should decline the District Attorney's invitation to insert this limitation now.

C. The District Attorney's Reading of the Carveout Undermines the Policing Reform Law's Purpose of Increasing Law Enforcement Accountability and Transparency.

The District Attorney's reading of the misconduct-investigation carveout is also divorced from the Policing Reform Law's purpose and legislative history.[19] It is axiomatic that laws must be interpreted consistent with their legislative intent. *See e.g., Bd. of Appeals of Hanover v. Hous. Appeals Comm. in Dept. of Cmty. Affs.*, 363 Mass. 339, 355 (1973) ("[A] construction of a statute which would completely negate legislative intent should be avoided.") (citation omitted). The Policing Reform Law created the misconduct-investigation carveout to further its goals of transparency and accountability

[19] See Christian M. Wade, Advocates want more public access to police records, Gloucester Daily Times (Aug. 23, 2020), https://www.gloucestertimes.com/news/local_news/advocates-want-more-public-access-to-police-records/article_8237569a-11da-5a9c-abf7-b125599dc5bd.html (describing police reform advocates' desire for a "requirement that all records related to a law enforcement misconduct investigation be made available to the public detailing the allegations and what actions, if any, police departments took in response" and "a publicly accessible database of police misconduct allegations, investigations and outcomes.") (internal quotations omitted).

by expanding access to records relating to police misconduct investigations.

The Commonwealth's century-old public records law reflects a deeply engrained commitment to an open government. *Worcester Telegram & Gazette Corp. v. Chief of Police of Worcester*, 436 Mass. 378 at 382-83 ("The primary purpose of G.L. c. 66, § 10, is to give the public broad access to governmental records[.]"). That is why the law defines public records broadly[20] and creates a presumption of disclosure for branches of government subject to the statute. The law creates transparency which empowers the public to hold the government accountable. *Boston Globe Media Partners, LLC v. Dept. of Crim. Just. Info. Servs.*, 484 Mass. 279, 293 (2020) (describing transparency as a public

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[20] The law defines "public records" broadly to include:

> [A]ll books, papers, maps, photographs, recorded tapes, financial statements, statistical tabulations, or other documentary materials or data, regardless of physical form or characteristics, made or received by any officer or employee of any agency, executive office, department, board, commission, bureau, division or authority of the commonwealth, or of any political subdivision thereof, or of any authority established by the general court to serve a public purpose, or any person, corporation, association, partnership or other legal entity which receives or expends public funds for the payment or administration of pensions for any current or former employees of the commonwealth or any political subdivision. G.L. c. 4, § 7.

interest furthered by the Public Records Law); *Att'y Gen. v. Dist. Att'y Plymouth Dist.*, 484 Mass. 260, 262-63 (2020) ("In enacting the public records law, the Legislature recognized that . . . greater access to information about the actions of public officers and institutions is increasingly ... an essential ingredient of public confidence in government[.]") (citations omitted).

The Policing Reform Law furthered these century-long aims to specifically increase transparency in policing.[21] By its own terms, the Policing Reform Law defined its "purpose" as improving "justice, equity, and accountability in law enforcement in the Commonwealth." (S. 2963 (2020).) It did so by strategically limiting the scope of the Privacy Exemption as a way of providing "direct insight" into misconduct investigations, which "creates greater transparency in law enforcement." (Baker Letter). The Legislature made a policy decision that privacy concerns must cede to the need for transparency in

[21] Even before the Policing Reform Law amended the Privacy Exemption, it was well established that public emeployees, like Officers Campellone and Sullivan, have a diminished expectation of privacy in matters relating to their public employment. *Brogan v. Sch. Comm. of Westport*, 401 Mass. 306, 308 (1987).

police misconduct investigations to subject them to public scrutiny and, if necessary, hold law enforcement accountable. G.L. c. 4, § 7, cl. 26(c).

The District Attorney's reading of the misconduct-investigation carveout would do the exact opposite. Far from creating direct insight into policing, the District Attorney is fighting to maintain the shroud of secrecy that existed prior to enactment of the Policing Reform Law. Such an interpretation cannot be squared with the law's express purpose.

The District Attorney's interpretation would also create a perverse incentive for investigators to conclude that no misconduct had been committed to avoid disclosure. The close relationship between the police officers whose conduct is being scrutinized and the District Attorney making a charging decision renders the public interest in transparency particularly acute. A lack of transparency in these investigations threatens justice and public confidence in the conclusions reached by law enforcement and the District Attorney. It is no coincidence that the vast

majority of investigations into the police's use of force do not result in a finding of misconduct.[22]

Mr. Floyd's death demonstrates the power of transparency. Publication of the onlooker's video left no doubt that Officer Chauvin and the officers who stood by while Mr. Floyd was asphyxiated should be charged with his killing. There, the police's actions (and inactions) and prosecutor's charging decision were accountable to the public who could see the circumstances of Mr. Floyd's killing for themselves. Here, in contrast, the lack of transparency undermines public confidence in the District Attorney's conclusion that no misconduct occurred and gives rise to concerns that racial bias may have played in role in Mr. Harden's treatment by the police. Within just two minutes of initiating a routine follow-up investigation, Officer Campellone fatally shot Mr. Harden. Officer Campellone recanted her testimony that Mr. Harden was holding a knife, and most responding officers stated that Mr. Harden was unarmed and they

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[22] Stinson et al., *On-Duty Police Shootings: Officers Charged with Murder or Manslaughter 2005-2018* (finding that although 900-1,000 individuals were killed by police during the report's time period, 97 police officers were arrested for murder or manslaughter in connection with these deaths, and 35 were convicted).

did not see a weapon near him. Only one officer later claimed that a knife had been found near Mr. Harden and—in violation of accepted protocol—he picked it up and placed it on a nearby desk. Whether impropriety or misconduct occurred, the Policing Reform Law required disclosure of the investigative records into Mr. Harden's killing. The Legislature weighed the competing policy concerns and determined that the inherent value of public disclosure outweighed the District Attorney's desire for secrecy regardless of whether Officer Campellone's use of fatal force was justified.

II. The District Attorney's Remaining Arguments to Avoid Application the Misconduct-Investigation Carveout Are Unfounded.

Faced with the unambiguous language of the misconduct-investigation carveout, the District Attorney attempts to sidestep his disclosure obligations by asserting two baseless arguments. First, the District Attorney relies on semantics, contending that the records were part of a "statutorily required investigation into a death," and thus, cannot constitute a misconduct investigation under the Public Records Law. (App. Br. at 43.) Second, the District Attorney argues that the POST

Commission provides the sole avenue for the release of the names of officers involved in misconduct investigations. (App. Br. at 54-56.) Neither argument is availing.

A. The District Attorney's Invocation of G.L. c. 38, § 4 Is Not Relevant to the Misconduct-Investigation Carveout.

The District Attorney attempts to sidestep the misconduct-investigation carveout by arguing that there is no disclosure obligation because "[t]he investigation in this matter was a statutorily required investigation into a death" pursuant to G.L. c. 38, § 4, and not a misconduct investigation. (App. Br. at 43.)

Not only does this argument presume incorrectly that "death" and "misconduct" investigations are mutually exclusive, but also overlooks the fact that the District Attorney has conceded the investigation into Mr. Harden's killing was a misconduct investigation. The investigation examined whether Officers Campellone and Sullivan had "committed a crime." (A. 36.) In addition, at oral argument on summary judgment counsel for the District Attorney admitted that the investigation assessed "whether there's misconduct done in the performance of one's

duty." (A.609.) *Anzalone v. Admin. Office of Tr. Ct.*, 457 Mass. 647, 653 (2010) (finding that although the issue was discussed in briefing, it had been "conceded" by counsel at oral argument). The District Attorney cannot now hide behind semantics to argue otherwise and avoid its disclosure responsibilities under the misconduct-investigation carveout.

The District Attorney also lacks a legal basis for his claim that a death investigation under G.L. c. 38, § 4 bars it from also being a "law enforcement misconduct investigation." G.L. c. 38, § 4 provides, in relevant part, that "[t]he district attorney or his law enforcement representative shall direct and control the investigation of the death and shall coordinate the investigation with the office of the chief medical examiner and the police department within whose jurisdiction the death occurred." G.L. c. 38, § 4. The statute sets forth the protocol following a death, including reporting of the death to the chief medical examiner, transportation of the body, documentation of the body and surrounding environment, and assignment of the "investigation of the death" to the relevant district attorney's office. *Id.* Crucially, however, there is no language precluding a

death investigation from also constituting a "misconduct investigation" under the Public Records Law.

Nor has the District Attorney cited any case law to support his G.L. c. 38, § 4 argument. The opening brief cites two cases but neither is apposite. *LeBlanc v. Commonwealth*, for example, concerns the section of the death investigation statute requiring the medical examiner to "inquire into the cause and circumstance of the death." 457 Mass. 94, 96 (2010) (explaining that, if the chief medical examiner concludes "the death was due to violence or other unnatural means or to natural causes that require further investigation, he shall take jurisdiction," and setting forth the medical examiner's responsibilities thereafter). Similarly, *Com. v. Nardi* again concerns the responsibilities of a medical examiner in the context of an evidentiary dispute relating to the autopsy report. 452 Mass. 379, 393 (2008) (describing investigation following death and authority of office to retain DNA samples collected during investigation). Neither *LeBlanc* nor *Nardi* supports the District Attorney's argument that death and misconduct investigations are mutually exclusive. They are not.

Moreover, if adopted, the District Attorney's interpretation would create a dangerous and absurd result. It would allow law enforcement to circumvent the Public Records Law in situations where police misconduct results in deaths because of a statute that merely sets the protocol for the public officials charged with investigating deaths. Such a result is antithetical to both the text of the misconduct-investigation carveout and the purpose of the Policing Reform law as it would conceal from the public the most extreme cases of potential misconduct—when police kill civilians.

B. The District Attorney's Argument that the POST Commission Provides the Exclusive Method for the Release of Information Is Unfounded.

The District Attorney further attempts to abdicate his disclosure obligations under the misconduct-investigation carveout by arguing that the POST Commission is the sole avenue for the release of the names of officers involved in misconduct investigations, not the Public Records Law.

The District Attorney does not, however, provide any valid basis for his argument. Indeed, the District Attorney's argument rests solely on the fact that the Post Commission is authorized to disclose officers'

names. The lone case the District Attorney cites to support his argument, *Skawski v. Greenfield Invs. Prop. Dev. LLC*, is irrelevant. It addressed whether a later statute superseded an earlier one governing jurisdiction over certain appeals Housing Court decisions. 473 Mass. 580, 591 (2016). This Court held "[i]t is well established that '[a] statute is not to be deemed to repeal or supersede a prior statute in whole or in part in the absence of express words to that effect or of clear implication.'" *Id.* at 586 (quoting *Com. v. Palmer*, 464 Mass. 773, 777 (2013)). Here, we are dealing with provisions of the Policing Reform Law that were enacted contemporaneously. The District Attorney's interpretation would require this Court to view language of the Police Reform Law as either inoperative or superfluous, in clear violation of the axiom that "none of the words of a statute is to be regarded as superfluous, but each is to be given its ordinary meaning without overemphasizing its effect upon the other terms appearing in the statute, so that the enactment considered as a whole shall constitute a consistent and harmonious statutory provision[.]" *HSBC Bank USA, N.A. v. Morris*, 490 Mass. 322, 334-335 (2022) (quoting *Com. v. Woods Hole,*

Martha's Vineyard & Nantucket S.S. Auth., 352 Mass. 617, 618 (1967). *Skawski* is thus inapposite.

CONCLUSION

For these reasons, *amici curiae* respectfully urge the Court to affirm the grant of summary judgment.

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CERTIFICATION OF COMPLIANCE WITH RULES OF APPELLATE PROCEDURE PURSUANT TO RULES 16(K) AND 17(C)(9)

I, Ana Francisco, attorney for *amici*, certify that the foregoing brief of *amici curiae* complies with Massachusetts Rules of Appellate Procedure regarding the form and submission of appellate briefs. Pursuant to Rules 17(c)(9) and 20(a)(3)(E), I further certify that this brief contains 28 non-excluded pages. The brief was written in Courier New Font 12-point font, with 10 characters per inch. The brief was prepared using Microsoft Word. I have caused 7 copies and one original of the brief to be filed with the Court.

s/ Ana M. Francisco
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CERTIFICATE OF SERVICE

Pursuant to Massachusetts Rules of Appellate Procedure 13(d), I hereby certify, under the penalties of perjury, that on November 15, 2023, I have made service of this Brief upon the below counsel of record for Defendant-Appellant, via the Electronic Filing System:

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