COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

No. SJC-13468

ERIC MACK,
Appellee,

v.

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

On Appeal from an Order of the Suffolk County Superior Court

BRIEF OF AMICI CURIAE ANDREW QUEMERE, COMMITTEE FOR PUBLIC COUNSEL SERVICES, AND AMERICAN CIVIL LIBERTIES UNION OF MASSACHUSETTS IN SUPPORT OF APPELLEE AND AFFIRMANCE

Mason A. Kortz (BBO #691257)
HARVARD LAW SCHOOL
CYBERLAW CLINIC
1557 Massachusetts Avenue, 4th Floor
Cambridge, MA 02138
(617) 495-2845
mkortz@law.harvard.edu

Rebecca Jacobstein (BBO #651048)
COMMITTEE FOR PUBLIC
COUNSEL SERVICES
75 Federal Street, 6th Floor
Boston, MA 02110
(617) 910-5726
rjacobstein@publiccounsel.net

Jessica J. Lewis (BBO #704229)
Daniel L. McFadden (BBO #676612)
AMERICAN CIVIL LIBERTIES
UNION FOUNDATION OF
MASSACHUSETTS, INC.
One Center Plaza, Suite 850
Boston, MA 02108
(617) 482-3170
jlewis@aclum.org

Counsel for Amici Curiae

November 15, 2023

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Judicial Court Rule 1:21, the American Civil Liberties Union of Massachusetts, Inc. ("ACLUM") represents that it is a nonprofit corporation incorporated under the laws of the Commonwealth of Massachusetts. ACLUM has no parent corporation and has not issued any stock.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Unreported Cases

Statutes

Other Authorities

INTERESTS OF AMICI CURIAE[1]

Andrew Quemere is an independent investigative journalist who lives in Framingham, Massachusetts. He writes *The Mass Dump* newsletter and is cohost of the *Lights Out Mass* podcast. His writing has appeared in *DigBoston* and *The Shoestring*, and he has discussed public records on the GBH program *Talking Politics*. His journalistic work focuses on police transparency and accountability. He has more than a decade of experience using the Public Records Law to obtain information about police misconduct. He has filed hundreds of public records appeals and has two public records lawsuits pending in the Superior Court. See *Quemere v. Northwestern District Attorney's Office*, No. 2384CV01341 (Suffolk Sup. Ct. June 12, 2023); *Quemere v. Bristol County District Attorney's Office*, No. 2384CV01572 (Suffolk Sup. Ct. July 12, 2023). The outcome of this case is relevant to him and other journalists because it will impact their ability to inform the public about newsworthy events.

The Committee for Public Counsel Services ("CPCS") is a statutorily created statewide agency established by G. L. c. 211D, §§ 1 et seq., whose responsibility is

[1] Pursuant to Mass. R. App. P. 17(c)(5), 489 Mass. 1602 (2022), amici and their counsel declare that: (a) no party or a party's counsel authored this brief in whole or in part; (b) no party or a party's counsel contributed money to fund preparing or submitting the brief; (c) no person or entity other than the amici curiae contributed money that was intended to fund preparing or submitting a brief; and (d) counsel has not represented any party in this case or in proceedings involving similar issues, or any party in a case or legal transaction at issue in the present appeal.

"to plan, oversee, and coordinate the delivery" of legal services to certain indigent litigants, including those charged with crimes. G. L. c. 211D, §§ 1, 2, 4. Because an expansive Public Records Law is necessary to permit defendants to obtain the information they need to present a defense and can be critical to wrongly convicted individuals seeking to prove their innocence, the Court's decision in this case will affect the interests of CPCS's present and future clients.

The American Civil Liberties Union of Massachusetts, Inc. ("ACLUM"), an affiliate of the national American Civil Liberties Union, is a statewide nonprofit membership organization dedicated to the principle of liberty and equality embodied in the constitutions and laws of the Commonwealth and the United States. ACLUM has a strong and longstanding interest in advancing open government and police accountability. See, e.g., *Boston Globe Media Partners, LLC v. Dep't of Criminal Justice Info. Servs.*, 484 Mass. 279 (2020) (amicus); *Boston Globe Media Partners, LLC v. Chief Justice of the Trial Court*, 483 Mass. 80 (2019) (amicus).

INTRODUCTION

This Court has long recognized the public interest "in knowing whether public servants are carrying out their duties in an efficient and law-abiding manner." *Globe Newspaper Co. v. Police Comm'r of Boston*, 419 Mass. 852, 858 (1995), quoting *Att'y Gen. v. Collector of Lynn*, 377 Mass. 151, 158 (1979). This interest is particularly strong with regard to the conduct of law enforcement officials, who hold a position of special public trust. See *Boston Globe Media Partners, LLC v. Dep't of Criminal Justice Info. Servs.*, 484 Mass. 279, 292 (2020). As such, records of investigations of police officers' conduct, including the names of involved officers, have generally been construed as public records. See, e.g., *Boston Globe Media Partners, LLC v. Chief Justice of the Trial Court*, 483 Mass. 80, 102 (2019); *Worcester Telegram & Gazette Corp. v. Chief of Police of Worcester*, 436 Mass. 378, 386 (2002).

Prior to 2020, one limitation on access to records of police misconduct was the extent to which those records constituted "personnel . . . files" under G. L. c. 4, § 7, cl. 26(c) ("Exemption (c)"). This meant that "the actual order and notice of disciplinary action issued as a personnel matter from the [supervisor] to the target" was exempt from disclosure, but the materials collected or generated during the investigation were not. *Worcester Telegram & Gazette Corp. v. Chief of Police of Worcester*, 58 Mass. App. Ct. 1, 10 (2003).

In 2020, the Legislature passed a series of reforms to "provide justice, equity and accountability in law enforcement." St. 2020, c. 253, *An Act Relative to Justice, Equity and Accountability in Law Enforcement in the Commonwealth* [hereinafter "Accountability in Law Enforcement Act" or "2020 Act"]. In so doing, the Legislature amended Exemption (c) in two ways. *Id.* First, it removed a semicolon in Exemption (c) that this Court previously interpreted to render personnel records absolutely exempt from disclosure. See *Globe Newspaper Co. v. Boston Ret. Bd.*, 388 Mass. 427, 433-434 (1983). With the removal of that semicolon, such records are now public, except to the extent that their disclosure "may constitute an unwarranted invasion of privacy." G. L. c. 4, § 7, cl. 26(c). Second, the Legislature added a second clause stating that Exemption (c) "shall not apply to records related to a law enforcement misconduct investigation." *Id.*[2]

In the same Act in which the Legislature granted greater access to records previously exempt under Exemption (c), it also established the Massachusetts Peace Officer Standards and Training Commission ("POST" or "the Commission"). See G. L. c. 6E, § 2. The law charged POST with, *inter alia*, creating a central, publicly available repository of certain information regarding law enforcement officers,

[2] Exemption (c) states in full: "personnel and medical files 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; provided, however, that this subclause shall not apply to records related to a law enforcement misconduct investigation."

including information derived from misconduct investigations (though not necessarily the investigation records themselves). See *id.* at §§ 4, 8, 13.

On November 22, 2021, a Fall River police officer shot and killed Anthony Harden, a 30-year-old Black man. Mack Br. at 12-13. The Bristol County District Attorney's Office ("BDAO") investigated Mr. Harden's death and issued a final report concluding that the officer was justified in fatally shooting Mr. Harden. See Mack Br. at 16; BDAO Br. at 14. See also BDAO Add. at 81 (lower court finding that these facts were not in dispute). Mr. Harden's brother, appellee Eric Mack, requested records related to the investigation from the BDAO. BDAO Br. at 12-13. However, the BDAO redacted and withheld many responsive records. See Mack Br. at 17-24; BDAO Br. at 14-15.

Amici address two of the BDAO's arguments[3] for redacting and withholding records: (1) that the records at issue here are not "records related to a law

[3] The BDAO also argues that home surveillance videos, provided to the police by the homeowner, are exempt under Exemption (c) by virtue of a line of constitutional cases that have nothing to do with the Public Records Law. See BDAO Br. at 34-36, citing *Commonwealth v. Mora*, 485 Mass. 360, 371 (2020); *Commonwealth v. Augustine*, 467 Mass. 230, 252 (2014); *Commonwealth v. Rousseau*, 465 Mass. 372, 382 (2013); *Commonwealth v. Balicki*, 436 Mass. 1, 12-13 (2002); *Commonwealth v. Yusuf*, 488 Mass. 379, 391 (2021). These cases address limits placed on the government's authority to conduct a search under the Fourth Amendment to the U.S. Constitution and article 14 of the Massachusetts Declaration of Rights; none of them concern the release of records to the public about what the government is already doing. Indeed, the purpose of the Public Records Law is to permit "the public to shine a light on the daily workings and operations of public offices and their

enforcement misconduct investigation," BDAO Br. at 37-48, and (2) that the establishment of the POST Commission relieves other agencies of their duties under the Public Records Law. *Id.* at 54-56. The Court should not endorse these arguments, as they seek to clip the wings of the 2020 Act before it ever takes flight. The Court should reject the BDAO's arguments and affirm the decision below.

SUMMARY OF THE ARGUMENT

I. The BDAO argues that the investigation at issue is not a police misconduct investigation, both because it was statutorily required and because it ended in a finding of no misconduct. BDAO Br. at 43-47. In fact, it argues that *any* investigation that ends with an agency reporting "no misconduct" is not, and never was, a misconduct investigation. BDAO Br. at 47-48. Beyond offending logic, this argument would read the changes made by the Legislature to Exemption (c) as restricting, rather than expanding, public access to records about potential law enforcement misconduct, defeating the purpose of the 2020 Act. Neither the mandatory nature nor the outcome of an investigation of police misconduct alter the character of that investigation. The Court should follow the plain meaning of the law and its prior precedent and require these records to be released without redactions of the names of involved officers. (Pp. 14-22)

---

employees thorough access to public records and data." *Healey v. Cruz*, No. 1684CV03619, 2018 WL 6722424, at *5 (Suffolk Sup. Ct. Nov. 27, 2018). As such, these cases are inapposite.

II. The BDAO argues that the Legislature's creation of POST vested the Commission with "an exclusive grant of authority" to release records related to police misconduct. BDAO Br. at 55. That argument, again, seeks to turn the purpose of the 2020 Act on its head. The establishment of POST did not provide an exemption to or repeal any part of the Public Records Law, nor did it give the Commission exclusive authority to determine the release of officers' names in the context of misconduct investigations. (Pp. 22-30)

ARGUMENT

I. Exemption (c) does not apply to records related to police misconduct investigations, including the names of officers involved, regardless of the outcome of the investigation.

Access to information about the conduct of government employees, generally, is governed by two laws designed to promote disclosure and transparency: G. L. c. 66, § 10, which provides for access to public records ("Public Records Law"), and G. L. c. 4, § 7, cl. 26, which defines "public records" and enumerates specific exemptions to that definition. The Public Records Law creates a presumption that each sought record is public. G. L. c. 66, § 10A(d)(1)(iv). As such, any "'statutory exemptions must be strictly and narrowly construed,'" *Att'y Gen. v. Dist. Att'y for Plymouth Dist.*, 484 Mass. 260, 267 (2020), quoting *Globe Newspaper Co. v. Dist. Att'y for the Middle Dist.*, 439 Mass. 374, 380 (2003), and a state agency must prove by a preponderance of the evidence that any records are exempt from disclosure.

G. L. c. 66, § 10A(d)(1)(iv). As such, a state agency wishing to shield such records from the public faces significant hurdles.

Prior to 2020, records related to investigations of police officers' conduct were governed, in part, by Exemption (c) to the Public Records Law. Some such records, like specific disciplinary actions, were exempt as "personnel file[s]." *Worcester Telegram & Gazette*, 58 Mass. App. Ct. at 9-10. Other records, including "the interviews, the reports, [and] the conclusions and recommendations" that formed the investigation, were not. *Id.* at 10. With the Accountability in Law Enforcement Act, however, the Legislature amended Exemption (c) so that it "shall not apply to records related to a law enforcement misconduct investigation." G. L. c. 4, § 7, cl. 26(c).

The BDAO tries to sidestep this clear statutory language by arguing that death investigations are not law enforcement misconduct investigations—a distinction that runs counter to the purpose of investigating fatal shootings by police. The BDAO does not stop there. It also argues that *any* investigation ending with a finding of no misconduct is not a law enforcement misconduct investigation. This interpretation offends common sense as well as the purpose and language of the 2020 Act.

A. An investigation of a fatal shooting by a police officer is a "law enforcement misconduct investigation" under Exemption (c), regardless of the outcome.

The language of Exemption (c), as amended, prevents its application to records related to a law enforcement misconduct investigation. The BDAO makes two arguments to dodge this clear mandate: (1) that an investigation of a death caused by a police officer in the course of their official duties is not a misconduct investigation, because it is required by law under G. L. c. 38, § 4, BDAO Br. at 43-44, and (2) that if an investigation of police conduct finds no misconduct, then it was never a misconduct investigation in the first place. BDAO Br. at 44-47. The BDAO is wrong on both counts. A statutorily mandated investigation can be a police misconduct investigation for the purposes of Exemption (c); an investigation of whether a person's death was caused by an officer's illegal conduct is one such circumstance. As explained below, any investigation with the goal of determining whether a police officer acted improperly in the course of their duties is a law enforcement misconduct investigation under the statute.

"A fundamental tenet of statutory interpretation is that statutory language should be given effect consistent with its plain meaning and in light of the aim of the Legislature unless to do so would achieve an illogical result." *Sullivan v. Brookline*, 435 Mass. 353, 360 (2001). Here, the default rule under the Public Records Law is public disclosure. Exemption (c) creates an exception to that rule, and the 2020 Act

created an exception to that exception, *i.e.*, that Exemption (c) "shall not apply to records related to a law enforcement misconduct investigation." Therefore, as a matter of statutory construction, Exemption (c)'s general exception to the presumption of public access "must be construed narrowly," and the "exception to the exception" for records related to a law enforcement misconduct investigation "must be construed broadly in favor of disclosure." *See Dist. Att'y for the Middle Dist.*, 439 Mass. at 383.

The import of this approach is clear. The Legislature did not limit the "exception to the exception" to merely records *of* law enforcement misconduct or records *finding* law enforcement misconduct. Rather, the Legislature restored public access to the broad category of "records *related* to a law enforcement misconduct *investigation*." G. L. c. 4, § 7, cl. 26(c) (emphasis added). An "investigation" is, obviously, not a final conclusion, but rather "the activity of trying to find out the truth about something, such as a crime." Black's Law Dictionary (11th ed. 2019). And "related" is a term that broadens the operation of the text to all records "connected in some way" with that process. *See id.* Thus, the plain meaning of "records related to a law enforcement misconduct investigation" covers at least the records "connected in some way" to "the activity of trying to find out the truth about" possible law enforcement misconduct, such as criminal conduct or unjustified uses of force. By its plain language, Exemption (c) certainly cannot apply to an inquiry,

statutorily authorized or not, into whether a fatal shooting by an officer constituted a crime or was otherwise improper.

And that is exactly what was being investigated here. G. L. c. 38, § 4 authorizes a district attorney's office to investigate cases of "unnatural or suspicious death." In this case, the death arose when a police officer shot Mr. Harden. Then, pursuant to G. L. c. 38, § 4 and in accordance with its duties, the BDAO investigated to determine whether a crime or other improper conduct occurred. See G. L. c. 12, § 27 (providing duties of district attorneys); *LeBlanc v. Commonwealth*, 457 Mass. 94, 99 (2010) (motivating purpose behind this type of investigation is the "public interest in obtaining the truth as to the manner and cause of death"). This sort of investigation—whether a law enforcement officer committed misconduct when they used deadly force—is exactly what Exemption (c)'s "exception to the exception" must be construed to cover. See *Dist. Att'y for the Middle Dist.*, 439 Mass. at 383. Because there is no dispute that the records at issue are "related" to that investigation, Exemption (c) does not shield them from disclosure.

The BDAO's second argument is even less supportable. The BDAO argues that the phrase "misconduct investigation" is outcome-dependent and implicitly requires an ultimate finding of misconduct. BDAO Br. at 47 ("If there was no misconduct . . . the records do not fall within the umbrella of the amended language."). Starting with the "plain meaning," *Sullivan*, 435 Mass. at 360, the

language of the 2020 amendment makes no mention of a prerequisite finding of misconduct and in no way refers to the outcome of an investigation. As for the "aim of the Legislature," *id.*, the 2020 amendment was intended to substantially increase access to records of police misconduct investigations.[4] It would be contrary to the principles of statutory construction—and the presumption in favor of disclosure—to adopt a restrictive reading of the 2020 amendment. Thus, the BDAO's novel theory of "Schrödinger's Investigation" must fail. Unlike the proverbial feline, the nature of an investigation is known and defined by the investigator's mandate, actions, and objectives long before the outcome is known.

Finally, given the public interest in obtaining information concerning police officers' use of deadly force, it would be perplexing for records related to such an investigation to be exempt from the amended Public Records Law. Cf. *Worcester Telegram & Gazette* 58 Mass. App. Ct. at 8–9 ("It would be odd, indeed, to shield from the light of public scrutiny . . . the workings and determinations of a process

[4] An earlier version of the 2020 Act would have amended Exemption (c) to exclude from its definition only information in the POST database and "the disposition of a law enforcement misconduct investigation." See Senate Bill No. 2820, *An Act to Reform Police Standards and Shift Resources to Build a More Equitable, Fair and Just Commonwealth That Values Black Lives and Communities of Color*. However, the version that was enacted contains the broader carve-out for "records related to a law enforcement misconduct investigation." G. L. c. 4, § 7(26)(c). The Legislature had the opportunity to adopt a narrow amendment; instead, it passed a law preventing the withholding of all records related to law enforcement misconduct investigations under Exemption (c). Thus, it would be contrary to the legislative aim of the 2020 Act to adopt a restrictive reading of the 2020 amendment.

whose quintessential purpose is to inspire public confidence."). The public has a right to examine investigations that did not find wrongdoing for inconsistencies, incompetence, and corruption. See *Dep't of Crim. Just. Info. Servs.*, 484 Mass. at 293 (noting that "where police officers . . . allegedly engage in criminal conduct that does not result in an arraignment . . . the public has a substantial interest in ascertaining whether the case was not prosecuted because it lacked merit or because these public officials received favorable treatment."). Disclosing investigations that exonerate police officers also "protect[s]" those officers and their departments "from unwarranted criticism." *Worcester Telegram & Gazette*, 58 Mass. App. Ct. at 8. The BDAO's view of the 2020 amendment would undermine these interests—an ironic outcome for an Act with "Accountability" in its title.

B. Even if Exemption (c) did apply, the Public Records Law would require the release of police officers' names.

As explained above, Exemption (c) does not apply in this case, because the records at issue are related to a law enforcement misconduct investigation. Even if this were not the case, though, the BDAO could not withhold information about the names of the officers involved in Mr. Harden's death. When weighing public employees' privacy interests against the public interest in disclosure protected by the Public Records Law, courts have consistently required the disclosure of public employees' names in matters relating to their official conduct. See, e.g., *Brogan v. Sch. Comm. of Westport*, 401 Mass. 306, 308 (1987) (requiring disclosure of

absentee school employees' names); *Pottle v. Sch. Comm. of Braintree*, 395 Mass. 861, 865 (1985) (names and addresses of municipal school committee's employees).

In reaching this conclusion under Exemption (c), the Court reasoned that public employees' names "are not 'intimate details' of a 'highly personal' nature" such that their release may constitute an unwarranted invasion of privacy. *Pottle*, 395 Mass. at 865. "Public employees, by virtue of their public employment, have diminished expectations of privacy." *Id.* at 866. Thus, the Court has required the disclosure of names in the context of wages and disbursements for off-duty work, *Hastings & Sons Publ'g. Co. v. City Treasurer of Lynn*, 374 Mass. 812, 817-818 (1978), employee rosters, *Cape Cod Times v. Sheriff of Barnstable Cnty.*, 443 Mass. 587, 594-596 (2005), and driving under the influence arrests, *Dep't of Crim. Just. Info. Servs.*, 484 Mass. at 294.

Further, a brief examination of the history of the Public Records Law verifies that the Legislature intended the names of public employees, including police officers, to be part of the public record. After the Court held in *Pottle* that the names and home addresses of public employees were not exempt under Exemption (c), 395 Mass. at 865, the Legislature amended the Public Records Law to explicitly protect, *inter alia*, public employees' home addresses, *Cape Cod*, 443 Mass. at 595 n.18. The Legislature, by omission, chose not to protect public employees' names, thus leaving that aspect of the Court's decisions intact. See *Commonwealth v. Vega*, 449 Mass.

227, 231 (2007) ("The Legislature is presumed to be aware of the prior state of the law as explicated by the decisions of this court."). Though the Public Records Law has been amended several times since its enactment, the Legislature has not taken action to exempt public employees' names, see G. L. c. 4, § 7, cl. 26(o), (p), and the Court has not interpreted the law to bar their release. It should not do so now.

II. POST is not the exclusive vehicle by which to obtain police records, including the names of officers accused of misconduct.

The BDAO argues that the creation of the POST Commission granted the Commission exclusive authority to "determine the public release of police officers' names in connection with investigations," BDAO Br. at 55, relieving the BDAO of its responsibility under the Public Records Law. However, amici can only identify two ways in which a statute may exempt records from the Public Records Law: (1) where records are "specifically or by necessary implication exempted from disclosure by statute" as defined in G. L. c. 4, § 7, cl. 26(a), or (2) by repeal as a matter of statutory interpretation. Neither theory supports the BDAO's argument.

A. The establishment of the POST Commission does not constitute a statutory exemption to disclosure under Exemption (a).

The Public Records Law recognizes a limited number of exemptions that are enumerated under G. L. c. 4, § 7, cl. 26. As relevant here, G. L. c. 4, § 7, cl. 26(a) ("Exemption (a)") exempts records that are "specifically or by necessary implication exempted from disclosure by statute." To invoke Exemption (a), it is necessary to

show either that (1) "another statute—the 'exempting statute'—expressly prohibits disclosure," or (2) that "the exempting statute protects the record from disclosure by 'necessary implication,' such as where the exempting statute prohibits disclosure as a practical matter." *Dist. Att'y for Plymouth Dist.*, 484 Mass. at 263. "In determining whether records are 'specifically or by necessary implication' exempted from disclosure, [courts] must exercise considerable caution." *Id.* at 267.

Under the first prong of the Exemption (a) analysis, a statute "specifically" exempts records only where it expressly limits disclosure to a specific group, see *Dist. Att'y for Middle Dist.*, 439 Mass. at 380-381, or "expressly state[s] that such a record either 'shall not be a public record,' 'shall be kept confidential' or 'shall not be subject to the disclosure provision of the Public Records Law.'" Secretary of the Commonwealth, Public Records Division, *A Guide to the Massachusetts Public Records Law* 15 (Dec. 2022) [hereinafter "Public Records Guide"]. There is no language in G. L. c. 6E resembling these statements relevant to the records at issue, so it does not "specifically" exempt the records from public disclosure.[5] As such, the BDAO's claim could only fall under the second prong.

[5] G. L. c. 6E, § 8(c)(2) requires POST to keep "[a]ll proceedings and records relating to a preliminary inquiry or initial staff review used to determine whether to initiate an inquiry . . . confidential, except that the executive director may turn over . . . evidence which may be used in a criminal proceeding." However, this only applies to inquiries initiated by POST in response to a complaint. G. L. c. 6E, § 8(c)(1). No such inquiry is at issue here.

Under the second prong, the agency bears the initial burden "to prove, by a preponderance of the evidence, that such record or portion of the record may be withheld in accordance with state or federal law." G. L. c. 66, § 10A(d)(1)(iv). But the BDAO's brief does not cite to a single section of G. L. c. 6E in support of its argument or any case from which the Court could infer a need to withhold records related to misconduct investigations and involved officers' names by "necessary implication." The BDAO has not met its preliminary burden—nor could it. The BDAO's arguments are without support as a matter of fact and as a matter of law.

A statute excludes records from the Public Records Law by necessary implication where release of the records would subvert the statute. See *Dep't of Crim. Just. Info. Servs.*, 484 Mass. at 290. This includes situations in which release of the records would provide an end run around another statute. For example, in *Champa v. Weston Public School*, 473 Mass. 86 (2015), the Court held that federal law, which "condition[ed] receipt of Federal funds on the nondisclosure of education records," necessarily implied that such records were exempt from disclosure under the Public Records Law. *Id*. at 91 n.8. The Court has further found an exemption by "necessary implication" where release of the records would undermine clear legislative intent. See *Dep't of Crim. Just. Info. Servs.*, 484 Mass. at 290.

Nothing in G. L. c. 6E can be understood as limiting public access to records related to law enforcement misconduct investigations. That G. L. c. 6E establishes a

process by which POST collects and releases certain information about officers' disciplinary records does not in itself exempt those records by necessary implication from the Public Records Law.[6] See *Att'y Gen. v. Collector of Lynn*, 377 Mass. 151, 154-155 (1979) (law setting forth process for public officials to access certain records did not exempt, by necessary implication, same records from public records law). See also Public Records Guide at 15 ("A statute is not a basis for exemption if it merely lists individuals or entities to whom the records are to be provided; the statute must expressly limit access to the listed individuals or entities."). And as a practical matter, while POST is obligated to include certain information in its public database, see G. L. c. 6E, §§ 4, 8, 13, it is not obligated to include records of external investigations, to the extent it even has those records.

Further, nothing in the legislative history of the POST statute evinces an intent to shield records of investigations of potential misconduct; in fact, it shows the opposite. In her testimony, Representative Tami L. Gouveia specifically explained that the 2020 Act would "ensure that police misconduct investigations and their

[6] While POST has authority to conduct an investigation of a police officers' use of deadly force, G. L. c. 6E, § 8(c)(1)(i), the statute does not give the Commission the exclusive authority to conduct such investigations. See, e.g., 555 Code Mass. Regs. 6.09 (requiring law enforcement agencies to investigate an officer's use of deadly force). Unlike an investigation undertaken by a district attorney, which may result in criminal charges, an investigation by POST determines whether an officer's certification should be revoked or suspended. See G. L. c. 6E, § 10. In apparent recognition of their concurrent jurisdiction, the BDAO does not argue that the 2020 Act repealed G. L. c. 38, § 4.

outcomes are *public records*."[7] Likewise, Representative Maria D. Robinson recommended that transgressions by law enforcement officers become public records specifically to remedy "concealment reduc[ing] transparency."[8] Interpreting the creation of POST as establishing an exemption for records of police misconduct would subvert a key purpose of G. L. c. 6E and the 2020 Act.

B. The establishment of POST did not repeal the Public Records Law.

The BDAO's brief can also be read to argue that the establishment of POST invalidated *any* application of the Public Records Law to the general category of information the Commission collects. See BDAO Br. at 55, citing *Skawski v. Greenfield Investors Property Development LLC*, 473 Mass. 580, 591 (2016). To the extent the BDAO argues this, it is wrong. The standard for repeal is exceedingly high: "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." *Skawski*, 473 Mass. at 586, citing *Commonwealth v. Palmer*, 464 Mass. 773, 777 (2013). As explained above, POST's enabling statute does not expressly repeal any section of the Public Records Law. In order for the BDAO to succeed under this

[7] Testimony of Representative Tami Gouveia to the Chairs of the House Ways and Means Committee and of the Joint Committee on the Judiciary (July 17, 2020) (emphasis added).

[8] Testimony of Representative Maria Robinson, to the Chairs of the House Ways and Means Committee and of the Joint Committee on the Judiciary (July 17, 2020).

theory, therefore, the 2020 Act would need to repeal the Public Records Law by "clear implication."

"Implied repeal is clear where 'the earlier statute is so repugnant to and inconsistent with the later enactment covering the subject matter that both cannot stand.'" *Swaski*, 473 Mass. at 586, citing *Dartmouth v. Greater New Bedford Reg'l Vocational Tech. High Sch. Dist.*, 461 Mass. 366, 374-375 (2012). The "touchstone" of the inquiry is the Legislature's intent in "all its words" and in connection with the cause or objective of the statutes. See *id.* , citing *Weems v. Citigroup Inc.*, 453 Mass. 147, 153 (2009). In evaluating the Legislature's words, the Court may look at the title of acts and statements by legislators. See *id.*

This case is thus unlike *Skawski*, the sole case the BDAO cites in support of its argument. In *Skawski*, the Court examined two statutes that provided conflicting rules on the same matter—jurisdiction over disputes regarding land permits. 473 Mass. at 580-81. Prior to *Skawski*, parties could appeal permit decisions to any of the Land Court, the Superior Court, the Housing Court, or the District Court. *Id.* at 581. In a later-enacted law, the Legislature established a new permit session of the Land Court and specified that permits appeals could be made to the Land Court and the Superior Court. *Id.* at 587-88. As the Court pointed out, the new law's specific grant of jurisdiction to the Land Court would be ineffective if it was not read to strip jurisdiction from the Housing Court. *Id*.

There is no irreconcilable conflict between the Public Records Law and the 2020 Act. Indeed, there is barely any overlap between the records POST is required to publicly report and those a district attorney's office might maintain as part of a law enforcement misconduct investigation. POST is required only to report the final disposition of misconduct investigations, G. L. c. 6E, § 4(h), whereas the Public Records Law reaches "[e]very record that is made or received by a government entity or employee," Public Records Guide at 39, including investigative and police reports, surveillance videos, photographs, and other documents.

Further, it would be incoherent for the Legislature to implicitly repeal the portion of the Public Records Law granting public access to police misconduct records in the same Act that expanded that access. See *Brookline v. Alston*, 487 Mass. 278, 294 (2021) (internal citations and quotation marks omitted) ("[I]n the absence of explicit legislative commands to the contrary, [courts] construe statutes to harmonize and not to undercut each other."). Cf. *DiFiore v. American Airlines, Inc*., 454 Mass. 486, 491 (2009) ("Where possible, [courts] construe the various provisions of a statute in harmony with one another, recognizing that the Legislature did not intend internal contradiction.") Accordingly, the Court should reject the BDAO's argument that the creation of the POST Commission displaces the Public Records Law.

C. Limiting the public disclosure of police misconduct records would have negative consequences for criminal defendants.

Giving POST the exclusive authority to disclose records of police misconduct investigations would not only undermine the purpose of the 2020 Act, it would also have deleterious consequences on the administration of justice for people charged with and convicted of crimes. The Public Records Law is an important mechanism for defendants and defense attorneys to obtain information relevant to criminal cases.

In order to gain access to the information necessary to zealously represent their clients, defense counsel turn to the Public Records Law. For example, in *Committee for Public Counsel Services v. Massachusetts State Police*, CPCS sued to enforce compliance with a public records request seeking access to, *inter alia*, *Brady* material such as civil lawsuits and criminal complaints against troopers, as well as information regarding the State Police's use of technology. See Complaint at ¶ 10, 12-16, 37-62, 67-83, No. 2384CV02324 (Suffolk Sup. Ct. Oct. 13, 2023). This is necessary, in part, because this Court has held that police internal affairs documents are not in the prosecution's possession, custody, or control. See *Commonwealth v. Wanis*, 426 Mass. 639, 643 (1998). As a result, criminal defendants frequently need to use the Public Records Law to obtain documents regarding the police witnesses involved in their cases.

Indeed, the Public Records Law may be a defendant's best—or only—chance to prove their innocence. For example, in *Commonwealth v. Ellis*, 475 Mass. 459

(2016), this Court upheld the allowance of a new trial motion that was supported by "documentary evidence obtained through public records requests" that demonstrated that the "detectives had been engaged *with the victim* in criminal acts of police misconduct." *Id*. at 465, 475 . See Paper #232 - Order on Third New Trial Motion, *Commonwealth v. Weichel*, No. 8182CR77144 (Norfolk Sup. Ct. Apr. 10, 2017) (allowing new trial motion, in part, based on evidence obtained through public records);[9] Complaint at ¶¶ 8-12, 19, 40, *Jellison v. Arthur*, No. 2384CV00385 (Suffolk Sup. Ct. Feb. 12, 2023) (relying on public records law to obtain documents on police conduct in investigations). POST does not collect all investigatory materials, and despite its statutory mandate, it currently only publicly lists those investigations in which the complaint against the officer was sustained.[10] Accepting the argument that the creation of POST, by mere implication, cuts off public access to vast amounts of investigatory records that have long been considered public would result in immeasurable harm to defendants—and it is an illogical interpretation of an act intended to foster "justice, equity and accountability in law enforcement."

[9] See also *Man Who Spent 36 Years in Prison Awarded $33 Million After Proving Innocence In Braintree Murder*, The Patriot Ledger (Oct. 19, 2022), https://www.patriotledger.com/story/news/2022/10/19/wrongly-accused-braintree-murder-suspect-fred-weichel-awarded-millions/10540620002/.

[10] See *POST Commission Releases Database of Law Enforcement Agency Disciplinary Records*, Mass.gov (Aug. 22, 2023), https://www.mass.gov/news/post-commission-releases-database-of-law-enforcement-agency-disciplinary-records.

CONCLUSION

For the foregoing reasons, *amici* respectfully urge the Court to affirm the lower court ruling and keep records related to law enforcement misconduct investigations, including involved officers' names, accessible to the public.

Dated: November 15, 2023

Respectfully Submitted,

/s/ Mason A. Kortz

Mason A. Kortz (BBO #691257)
HARVARD LAW SCHOOL
CYBERLAW CLINIC
1557 Massachusetts Avenue, 4th Floor
Cambridge, MA 02138
(617) 495-2845
mkortz@law.harvard.edu

Rebecca Jacobstein (BBO #651048)
COMMITTEE FOR PUBLIC
COUNSEL SERVICES
75 Federal Street, 6th Floor
Boston, MA 02110
(617) 910-5726
rjacobstein@publiccounsel.net

Jessica J. Lewis (BBO #704229)
Daniel L. McFadden (BBO #676612)
AMERICAN CIVIL LIBERTIES
UNION FOUNDATION OF
MASSACHUSETTS, INC.
One Center Plaza, Suite 850
Boston, MA 02108
(617) 482-3170
jlewis@aclum.org

Counsel for Amici Curiae[11]

[11] *Amici curiae* thank Fall 2023 Harvard Cyberlaw Clinic students Angela Li, Pedro R. M. Silva, and Ellen Teuscher for their invaluable contributions to this brief.

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 17(c)(9) of the Massachusetts Rules of Civil Procedure, I, Mason A. Kortz, hereby certify that the foregoing **Brief of Amici Curiae Andrew Quemere, Committee for Public Counsel Services, and American Civil Liberties Union of Massachusetts in Support of Appellee and Affirmance** complies with the rules of court that pertain to the filing of amicus briefs, including, but not limited to:

Mass. R. A. P. 16(e) (references to the record);
Mass. R. A. P. 17(c) (cover, length, and content);
Mass. R. A. P. 20 (form and length of brief); and
Mass. R. A. P. 21 (redaction).

I further certify that the foregoing brief complies with the applicable length limitation in Mass. R. A. P. 20 because it is produced in the proportional font Times New Roman at size 14 points and contains 5,937 total non-excluded words as counted using the word count feature of Microsoft Word 365.

Dated: November 15, 2023

Respectfully Submitted,

/s/ Mason A. Kortz

Mason A. Kortz, BBO #691257

COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT

No. SJC-13468

ERIC MACK,
Appellee,

v.

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

CERTIFICATE OF SERVICE

Pursuant to Mass. R. A. P. 13(e), I hereby certify, under the penalties of perjury, that on this date of November 15, 2023, I have made service of a copy of the foregoing **Brief of Amici Curiae Andrew Quemere, Committee for Public Counsel Services, and American Civil Liberties Union of Massachusetts in Support of Appellee and Affirmance** in the above captioned case upon all attorneys of record by electronic service through eFileMA.

Dated: November 15, 2023

Respectfully Submitted,

/s/ Mason A. Kortz

Mason A. Kortz (BBO #691257)
HARVARD LAW SCHOOL
CYBERLAW CLINIC
1557 Massachusetts Avenue, 4th Floor
Cambridge, MA 02138
(617) 495-2845
mkortz@law.harvard.edu