Appellate Division; Second Department Docket No. 2019-05674

Court of Appeals

STATE OF NEW YORK

In the Matter of the Application of
THE INNOCENCE PROJECT, INC.,

Petitioner,

For disclosure pursuant to Judiciary Law §90(10),

—against—

GRIEVANCE COMMITTEE FOR THE TENTH JUDICIAL DISTRICT, et al.,

Respondents.

BRIEF OF *AMICI CURIAE* THE ASSOCIATED PRESS, DAILY NEWS, L.P., HEARST CORPORATION, THE NEW YORK TIMES COMPANY, NEWSDAY LLC, AND PRO PUBLICA, INC., IN SUPPORT OF PETITIONER

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Attorneys for Amici Curiae

September 13, 2019

TABLE OF CONTENTS

Page

COURT OF APPEALS
STATE OF NEW YORK

In the Matter of the Application of THE INNOCENCE PROJECT, INC.,	:	
Petitioner,	:	Appellate Division, Second Judicial
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- *against* -	:	
GRIEVANCE COMMITTEE FOR THE TENTH JUDICIAL DISTRICT, and GLENN KURTZROCK,	:	
Respondents.	:	

CORPORATE DISCLOSURE STATEMENT OF
THE ASSOCIATED PRESS

Pursuant to Section 500.1(f) of the Rules of Practice for this Court, the undersigned counsel for *Amicus Curiae* The Associated Press certifies that The Associated Press is a global news agency organized as a mutual news cooperative under the New York Not-For-Profit Corporation Law. It is not publically traded.

Dated: September 13, 2019

Respectfully submitted,

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Respondents.	:	

CORPORATE DISCLOSURE STATEMENT OF DAILY NEWS, L.P.

Pursuant to Section 500.1(f) of the Rules of Practice for this Court, undersigned counsel for *Amicus Curiae* Daily News, L.P. certifies that Daily News, LP is an indirect subsidiary of Tribune Publishing Company, which is publicly held. Merrick Media, LLC, Merrick Venture Management, LLC and Michael W. Ferro, Jr., together own over 10% of Tribune Publishing Company's common stock. Nant Capital LLC, Dr. Patrick Soon-Shiong and California Capital Equity, LLC together own over 10% of Tribune Publishing Company's stock. Daily News, L.P. has one subsidiary: Kearney Property Corp.

A listing of Tribune Publishing Company's other subsidiaries is annexed hereto as Exhibit A.

Dated: September 13, 2019

Respectfully submitted,

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Counsel for Amici Curiae

EXHIBIT A
Subsidiaries of Tribune Publishing Company

Blue Lynx Media, LLC
Builder Media Solutions, LLC
Capital-Gazette Communications, LLC
Chicago Tribune Charities
Chicago Tribune Company, LLC
Chicagoland Publishing Company, LLC
Commonwealth Building Company, LLC
Daily News Charities Inc.
Flagship, LLC
High School Cube, LLC

Hoy Publications, LLC
Inside Business, LLC
Internet Foreclosure Service, LLC
Local Pro Plus Realty, LLC
Orlando Sentinel Communications Company, LLC
Pilot Information Services, LLC
Pilot Military Newspapers of North Carolina, LLC
Port Folio Publishing, LLC
Program Services, LLC
Style, LLC
Pilot Information Services, LLC
Pilot Military Newspapers of North Carolina, LLC
Port Folio Publishing, LLC
Program Services, LLC
Style, LLC
Sun-Sentinel Company, LLC
The Baltimore Sun Company, LLC
The Daily Meal Ventures, Inc.
The Daily Press, LLC
The Hartford Courant Company, LLC
The Morning Call, LLC
Tribune 365, LLC
Tribune Content Agency London, LLC
Tribune Content Agency, LLC
Tribune Direct Marketing, LLC

Tribune DPS, LLC
Tribune Interactive, LLC
Tribune Publishing Business Services, LLC
Tribune Publishing Company, LLC
troncx, Inc.
tronc RE 3, Inc.
tronc RE 2, LLC
tronc RE 1, LLC

TRX Pubco GP, LLC
TRX Pubco, LLC

Virginian-Pilot Media Companies, LLC
BestReviews, LLC

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Respondents.	:	

CORPORATE DISCLOSURE STATEMENT OF
HEARST CORPORATION

Pursuant to Section 500.1(f) of the Rules of Practice for this Court, the undersigned counsel for *Amicus Curiae* Hearst Corporation ("Hearst") certifies that Hearst is privately held and has no other parent. None of Hearst's subsidiaries or affiliates is publicly held.

Dated: September 13, 2019

Respectfully submitted,

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Respondents.	:	

CORPORATE DISCLOSURE STATEMENT OF
THE NEW YORK TIMES COMPANY

Pursuant to Section 500.1(f) of the Rules of Practice for this Court, the undersigned counsel for *Amicus Curiae* The New York Times Company ("The Times") certifies that a listing of The Times' parents, subsidiaries and affiliates are listed on the annexed Exhibit "A."

Dated: September 13, 2019

Respectfully submitted,

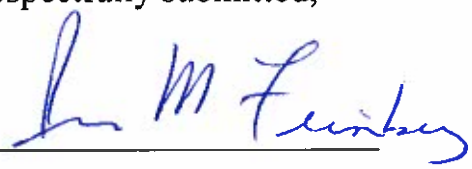

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Exhibit A
The New York Times Company

- The New York Times Company is a publicly traded company with no parent corporation.

Subsidiaries and Affiliates: Fake Love LLC; Hello Society, LLC; New York Times Canada Ltd.; New York Times Digital LLC; Northern SC Paper Corporation; NYT Administradora de Bens e Servicos Ltda.; NYT Building Leasing Company LLC; NYT Capital, LLC; Midtown Insurance Company; NYT Shared Service Center, Inc.; International Media Concepts, Inc.; The New York Times Distribution Corporation; The New York Times Sales Company; The New York Times Syndication Sales Corporation; NYT College Point, LLC; NYT Group Services, LLC; NYT International LLC; New York Times Limited; New York Times (Zürich) GmbH; NYT B.V.; NYT France S.A.S.; International Herald Tribune U.S. Inc.; NYT Germany GmbH; NYT Hong Kong Limited; Beijing Shixun Zhihua Consulting Co. LTD.; NYT Japan GK; NYT Singapore PTE LTD; NYT News Bureau (India) Private Limited; NYT Real Estate Company LLC; The New York Times Building LLC; Rome Bureau S.r.l.; The New York Times Company Pty Limited; Wirecutter, Inc.

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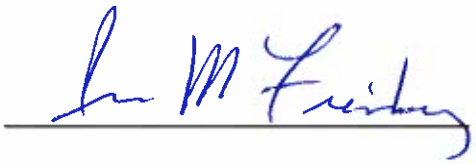
GRIEVANCE COMMITTEE FOR THE TENTH JUDICIAL DISTRICT, and GLENN KURTZROCK,	:	
Respondents.	:	

CORPORATE DISCLOSURE STATEMENT OF NEWSDAY LLC

Pursuant to Section 500.1(f) of the Rules of Practice for this Court, the undersigned counsel for *Amicus Curiae* Newsday LLC ("Newsday") certifies that it is a Delaware limited liability company whose members are Tillandsia Media Holdings LLC and Newsday Holdings LLC. Newsday Holdings LLC is an indirect subsidiary of Cablevision Systems Corporation. Cablevision Systems Corporation is (a) directly owned by Altice USA, Inc., a Delaware corporation which is publicly traded on the New York Stock Exchange and (b) indirectly owned by Altice N.V., a Netherlands public company.

Dated: September 13, 2019

Respectfully submitted,



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CORPORATE DISCLOSURE STATEMENT OF PRO PUBLICA, INC.

Pursuant to Section 500.1(f) of the Rules of Practice for this Court, the undersigned counsel for *Amicus Curiae* Pro Publica, Inc. ("ProPublica") certifies that ProPublica is a non-profit corporation and has no parent corporation, has no affiliates or subsidiaries, and has no stock.

Dated: September 13, 2019

Respectfully submitted,

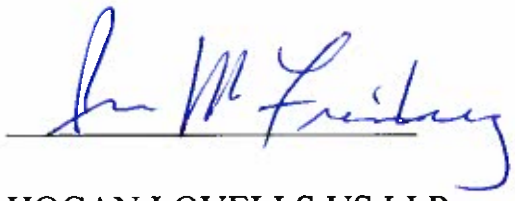

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TABLE OF AUTHORITIES

Page(s)

Cases

TABLE OF AUTHORITIES
(continued)

Page(s)

Statutes

Other Authorities

TABLE OF AUTHORITIES
(continued)

Page(s)

INTEREST OF AMICI CURIAE[1]

Amici are all news organizations that publish information or represent the interests of those that do. *Amici* regularly report on criminal proceedings in New York at the state and federal level, including prosecutorial misconduct in connection with such proceedings. In gathering information about the functioning of the criminal justice system, *amici* rely on the presumption of public access to criminal proceedings guaranteed by the First Amendment, *see Press-Enter. Co. v. Super. Ct. of Calif. for Riverside Cty.*, 478 U.S. 1, 10 (1986); *Associated Press v. Bell*, 70 N.Y.2d 32, 39 (1987), and statutory sources of access like New York's Freedom of Information Law ("FOIL") and its federal counterpart, 5 U.S.C. § 552 *et seq*. ("FOIA"), among other things. When misconduct by New York-licensed prosecutors becomes the subject of professional disciplinary proceedings, *amici* have a strong interest in ensuring that the laws governing those proceedings are interpreted by courts in a manner that facilitates public access and promotes transparency and accountability.

This case squarely implicates *amici*'s concerns. Under Judiciary Law § 90(10), justices of the appellate division are permitted to open the record of a pending disciplinary proceeding in their discretion "for good cause." Here,

[1] No party's counsel contributed content to the brief or participated in the preparation of the brief. On September 11, 2019, amici's counsel contacted counsel for Respondents via email and asked for their position on this motion. As of September 13, 2019, counsel for Respondents had not responded to those emails.

petitioner presented a compelling case to unseal the records of the Grievance Committee for the Tenth Judicial District's investigation of former Suffolk County District Attorney Glenn Kurtzrock. The subject matter of the inquiry—Kurtzrock's blatant prosecutorial misconduct in a series of murder cases, which resulted in his sudden, mid-trial resignation from the DA's office in May 2017—had already been widely reported, by *amici* and others, as had the identity of Kurtzrock's victims. The public interest in the progress of the Grievance Committee's inquiry is significant. But the Second Department denied the petition in a terse, conclusory ruling that addressed none of petitioner's arguments.

The Appellate Division's decision is troubling. Section 90(10) plainly permits the appellate divisions to open attorney disciplinary proceedings to the public in appropriate circumstances. The situation here—a confirmed, high-profile case of prosecutorial misconduct, already widely reported in the press—points squarely toward disclosure. Yet the court below left no hint how it interpreted or applied the "good cause" standard, much less why it was not met on this record. If this decision is allowed to stand, *amici* and the public will be left in the dark on at least two fronts: (1) why an investigation into the professional consequences of Kurtzrock's betrayal of the public trust, paid for by the public fisc, does not merit public scrutiny, and (2) whether and to what extent "good cause" might exist to unseal future disciplinary proceedings involving prosecutorial misconduct.

Because there is no valid reason to let that uncertainty linger, and ample reason to make the disciplinary proceeding here public, *amici* write separately to urge the Court to review the ruling below.

The following news organizations join in this *amicus* brief:

The Associated Press. The Associated Press ("AP") is a global news agency organized as a mutual news cooperative under the New York Not-for-Profit Corporation Law. AP's members include approximately 1,500 daily newspapers and 5,000 broadcast news outlets throughout the United States. AP has its headquarters and main news operations in New York City and has staff in more than 300 locations worldwide.

Daily News, L.P. Daily News, L.P. publishes the New York Daily News, a daily newspaper that serves primarily the New York City metropolitan area and is one of the largest papers in the country by circulation. The Daily News' website, NYDailyNews.com, receives approximately 100 million page views each month.

Hearst Corporation. Hearst Corporation ("Hearst") is one of the nation's largest diversified media companies. Its major interests include ownership of numerous television stations across the country; newspapers such as the Houston Chronicle, San Francisco Chronicle, and Times Union (Albany, N.Y.); and approximately 300 magazines across the world.

The New York Times Company. The New York Times Company is the publisher of The New York Times and The New York Times International Edition, and operates the leading news website nytimes.com.

Newsday LLC. Newsday LLC ("Newsday") is the publisher of the daily newspaper, Newsday, and related news websites. Newsday is one of the nation's largest daily newspapers, serving Long Island through its portfolio of print and digital products. Newsday regularly reports on the activities of the Suffolk County District Attorney's Office, and extensively covered the prosecutorial misconduct by Kurtzrock at issue in this petition.

ProPublica. ProPublica is an independent, nonprofit newsroom that produces investigative journalism in the public interest. It publishes its work on its own Web site, propublica.org, and also often in partnership with leading news organizations.

SUMMARY OF ARGUMENT

The Court should grant Petitioner's motion and review the decision below because of the substantial public interest at stake and the numerous flaws in the Appellate Division's decision. The Second Department's threadbare ruling gives the public no hint, much less an edifying explanation, why a disciplinary proceeding into serious, confirmed instances of prosecutorial misconduct should not be opened to the public. Ensuring the public is fully informed about the actions of unethical prosecutors is an issue of paramount public importance, because prosecutors possess the awesome "power to employ the full machinery of the state," and the public "must have assurance that those who would wield this power will be guided solely by their sense of public responsibility for the attainment of justice." *Young v. U.S. ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 814 (1987). For that reason, *amici* regularly gather news and public reports regarding prosecutorial overreach and misconduct; they have a substantial interest in vindicating the public's need to know when, how, and why the prosecutors of this State fail to faithfully fulfill their vital function.[2]

While this Court has previously identified two interests served by maintaining confidentiality in professional disciplinary proceedings generally—to

[2] As used in this brief, "Motion" refers to Petitioner's Memorandum of Law in support of its motion for leave to appeal, dated August 19, 2019; "Grievance Committee Opp." refers to the Grievance Committee's opposition to Petitioner's motion for leave to appeal, dated August 28, 2019; and "Kurtzrock Opp." refers to Kurtzrock's opposition, dated August 30, 2019.

protect complainants' privacy, and to safeguard the reputation of the accused, *see Johnson Newspaper Corp. v. Melino,* 77 N.Y.2d 1, 10-11 (1990)—it is doubtful whether those interests apply with the same force to the Judiciary Law, particularly with respect to disciplinary proceedings involving prosecutors. Indeed, when the confidentiality provision now embodied in Judiciary Law § 90(10) was first enacted, commentators were in accord that the new law was designed to conceal only attorneys' confidential personal files, and not matters of a public nature. As Frederick P. Close, then-presiding justice of the Appellate Division, Second Department, put it, the provision was intended to "give attorneys the protection of the court against unwarranted scrutiny of their personal history and at the same time empower the court to divulge all records whenever it is in the public interest to do so." *See infra* at § I(A)(i).

Johnson Newspaper also does not grapple with the substantial public interest in monitoring the actions (and misdeeds) of prosecutors, one of the primary reasons that the United States Supreme Court and this Court have repeatedly held that the First Amendment requires criminal trials and ancillary criminal proceedings to be open to the public. While no constitutional issue was raised below, the circumstances presented here—a post-trial disciplinary proceeding regarding prosecutorial misconduct that was revealed, in court, during a public criminal trial—potentially trigger a First Amendment right of public access.

At a minimum, Petitioner is correct that "good cause" exists on this record to unseal Kurtzrock's disciplinary proceeding. The policy rationales for confidentiality described in *Johnson Newspaper*—privacy and reputational issues—are simply not implicated by Petitioner's request. The substantial public interest in monitoring prosecutorial misconduct generally, and Kurtzrock's actions specifically, confirms the presence of good cause. Kurtzrock's underlying *Brady* violations and the ensuing professional consequences have already been extensively covered in the press, including by *amici;* the public has ample reason to be deeply concerned about whether and to what extent a former prosecutor with Kurtzrock's track record should be practicing law before the bar of this state.

Amici respectfully submit that if the Second Department had properly balanced the private and public interests at play, and considered the context and history of Section 90(10), it could not reasonably have concluded that Kurtzrock's disciplinary proceeding should remain sealed. This Court should thus reverse. But at the very least, the Court should grant review and offer the lower courts guidance on what "good cause" means in this context, including how the Appellate Divisions should consider the public interest in attorney disciplinary records when entertaining requests to unseal.

ARGUMENT

I. THE COURT SHOULD GRANT REVIEW BECAUSE KURTZROCK'S DISCIPLINARY PROCEEDING SHOULD BE OPENED TO THE PUBLIC.

The Second Department's terse refusal to make the records of the disciplinary proceedings against Kurtzrock public reflects a stark failure to properly understand the statutory provision that governs the confidentiality of these proceedings and the significant public interests at stake. Under Judiciary Law § 90(10), "all papers, records and documents" regarding "any complaint, inquiry, investigation or proceeding relating to the conduct or discipline of an attorney or attorneys" may be revealed, in whole or in part, "upon good cause being shown" in the discretion of the appellate division. The statute does not define "good cause," and this Court has never had occasion to interpret it.

In addressing analogous confidentiality provisions found in other laws regarding professional discipline, this Court has found that confidentiality furthers "the dual purpose of encouraging complainants to come forward and safeguarding a professional's reputation." *In re Aretakis*, 16 A.D.3d 899, 900 (3d Dep't 2005) (citing *Johnson Newspaper*, 77 N.Y.2d at 10-11). The Third Department has concluded that the presumption of confidentiality in active attorney disciplinary proceedings may yield when the "dual purposes" identified in *Johnson Newspaper* would not be furthered. *Artekis*, 16 A.D.3d at 900.

Following *Artekis*, Petitioner argues that its request to unseal should be granted because the pro-confidentiality "purposes" identified by this Court in *Johnson Newspaper* would not be disserved by unsealing Kurtzrock's proceeding. Motion at 32-33. For their part, Respondents posit that *Johnson Newspaper* supports their position because it purportedly suggests that the public has no First Amendment interest in the proceedings of *any* professional disciplinary proceedings, including the workings of the Grievance Committee. *See* Grievance Committee Opp. at 13-14; Kurtzrock Opp. at 2-3.

Amici agree with Petitioner that making public the records of Kurtzrock's disciplinary proceeding would be completely consistent with the policy rationales for confidentiality in professional disciplinary proceedings articulated in *Johnson Newspaper*. And *amici* most certainly agree with Petitioner that the degree of public interest in an attorney disciplinary proceeding *is* relevant to whether "good cause" exists to unseal within the meaning of Section 90(10)—indeed, according to the legislative history, it is the central consideration in whether disclosure is proper—and that the strong public interest in Kurtzrock's proceeding more than justifies its opening. But for the reasons explained below, *amici* respectfully submit that, properly construed, *Johnson Newspaper* has little to say about the meaning of "good cause" as used in Section 90(10). *Johnson Newspaper* did not examine the language or legislative history of Section 90(10, and none of the other

confidentiality provisions addressed in that case *have* any "good cause" exception to confidentiality. Nor would *Johnson Newspaper* bar, in a proper case, a claim that the First Amendment right of access to criminal trials mandates the opening of post-trial disciplinary proceedings involving prosecutors.

A. *Johnson Newspaper* Does Not Apply to Disciplinary Proceedings Involving Prosecutorial Misconduct.

In *Johnson Newspaper*, this Court affirmed the lower courts' rejection of a newspaper's attempts to gain access to a professional disciplinary hearing involving a dentist, a procedure governed by Education Law § 6510(8).[3] *See* 77 N.Y.2d at 4, 9. In so holding, the Court rejected the newspaper's contention that there was a "constitutionally based public right of access" to the dental disciplinary hearing under the First Amendment to the United States Constitution or article 1 of the State constitution, because there was no history and tradition of public access to such hearings. *Id.* at 5-8. The Court also distinguished its ruling in *Matter of Herald Co. v. Weisenberg*, 59 N.Y.2d 378 (1983), where the Court held that unemployment compensation hearings should be presumptively open to the public,

[3] That provision provides, in relevant part: "The files of the department relating to the investigation of possible instances of professional misconduct, or the unlawful practice of any profession licensed by the board of regents, or the unlawful use of a professional title or the moral fitness of an applicant for a professional license or permit, shall be confidential and not subject to disclosure at the request of any person, except upon the order of a court in a pending action or proceeding. The provisions of this subdivision shall not apply to documents introduced in evidence at a hearing held pursuant to this chapter and shall not prevent the department from sharing information concerning investigations with other duly authorized public agencies responsible for professional regulation or criminal prosecution." N.Y. Educ. L. § 6510(8).

on the basis that there was "nothing in the statute or regulations" governing unemployment compensation hearings "indicative of a policy of confidentiality," 77 N.Y.2d at 8-9, whereas the Education Law's confidentiality provision "manifests a governmental policy of preserving the confidentiality of information pertaining to disciplinary proceedings until a determination has been reached." *Id.*

The Court then observed that:

> The same policy is reflected in analogous statutes pertaining to disciplinary proceedings in the legal profession (*see*, Judiciary Law § 90 [10]), the medical profession (*see*, Public Health Law § 230 [10], [11] [a]; Education Law § 6510-a), and to disciplinary hearings conducted by the State Commission on Judicial Conduct (*see*, Judiciary Law § 44 [4]).

77 N.Y.2d at 9.

The Court thus concluded that state law "reflect[ed] a policy of keeping disciplinary proceedings involving licensed professionals confidential until they are finally determined," and that this policy served two purposes: (1) safeguarding information that a potential complainant may regard as private or confidential and thereby remov[ing] a possible disincentive to the filing of complaints of professional misconduct; and (2) "the possibility of irreparable harm to a professional's reputation resulting from unfounded accusations." *Id.* at 10-11.

i. *Johnson Newspaper* Addressed an Entirely Different Confidentiality Regime Involving Different Statutory Language and Legislative History.

The Third Department's *Aretakis* decision effectively construed *Johnson Newspaper* as providing the test for when the "good cause" standard in Section 90(10) might be met. That was understandable, given *Johnson Newspaper*'s description of Section 90(10) as an "analogous statute" and other broad language from the decision.

But *Johnson Newspaper* was considering an entirely different statute (or set of statues), and any comment it made about Judiciary Law § 90(10) was pure dicta. Unlike all the other confidentiality statues cited in *Johnson Newspaper*, only Section 90(10) contains a flexible "good cause" standard for disclosure. The remainder allow disclosure, if at all, in far more limited scenarios. *See, e.g.*, *supra* at n.3. Thus, this Court's discussion in *Johnson Newspaper* about a different set of confidentiality laws which do not have a "good cause" disclosure standard necessarily says very little about what "good cause" means in the context of Judiciary Law § 90(10) and attorney discipline.

Moreover, the legislative history of Section 90(10) explains why the "good cause" standard was included in that law, and not in the other confidentiality provisions discussed in *Johnson Newspaper*—because the proponents of imposing confidentiality restrictions on attorney disciplinary proceedings understood that the

public interest would *inevitably* require disclosure of certain attorney disciplinary matters.

It is important to understand that the 1945 bill that inserted a confidentiality provision into the Judiciary Law was controversial at the time it was proposed, and was disapproved by numerous commenters. Among those opposed was the Association of the Bar of the City of New York, which observed that "disciplinary records are compiled at the public expense within the metropolitan area," and therefore could "see no reason why there should any secrecy about the records of the conduct of the discipline of attorneys." The City Bar concluded that such records "should be made available to any person having an interest therein without the necessity of applying for an obtaining an order from the Appellate Division." Bill Jacket, L.1909, c. 35, The Association of the Bar of the City of New York Report No. 33 at 2.[4] [5]

In response to this criticism, the proponents of the bill explained that that confidentiality was needed because of the private and confidential nature of many attorney disciplinary records. Thus, in a March 2, 1945 letter to the then-Counsel

[4] A copy of L.1909's bill jacket, as retrieved from the New York Public Library in August 2019, is attached to the Affirmation of Ira M. Feinberg, dated September 13, 2019, in support of *amici*'s motion for leave to appeal.

[5] The City Bar continued to oppose the bill even after the last sentence of the new confidentiality provision, allowing for the automatic exposure of records in the event of a sustained finding of discipline, was added via amendment. In relevant part, the City Bar reiterated that it saw "no reason why there should be any secrecy about records of the conduct or discipline of attorneys." *Id.,* Report No. 143 at 2-3.

to the Governor (and future Chief Judge) Charles D. Breitel, Presiding Justice Close wrote that "[t]he purpose of the bill is to seal from *indiscriminate public view* the confidential records in this court relating to attorneys and counselors at law." Bill Jacket, L.1909, c. 35, Letter from Frederick P. Close to Charles D. Breitel at 1 (1945) (emphasis added). According to Justice Close, "from time to time, some members of the public, without restraint, have violated [the] confidential relationship [between the court and its officers] in order to further a personal, malicious or ulterior motive." *Id.* Justice Close concluded that the proposed confidentiality provision struck a proper balance because it would "give attorneys the protection of the court against unwarranted scrutiny of their personal history and at the same time empower the court to divulge all records whenever it is in the public interest to do so." *Id.*

Others defended the bill as a means of protecting the "intimate details of professional conduct in an essentially private relationship" between attorney and client. Bill Jacket, L.1909, c. 35, Memorandum (May 7, 1945) at 2 (recognizing that disciplinary records "usually involve the personal and the private professional conduct of a lawyer" and "are most frequently instituted by a client, whose personal feeling toward the lawyer is extremely bitter"). That memorandum, apparently written by future Chief Judge Breitel, further recognized that "[t]he bill

is perfectly clear that in a proper case the court can permit the disclosure of the contents of such papers." *Id.* at 1.

The salient point from the legislative history is that there is *no suggestion* that attorney disciplinary records of significant public interest were ever meant to remain sealed, and every reason to think that genuine public interest in such materials was precisely the type of "good cause" the drafters of Section 90(10) had in mind. Nothing in *Johnson Newspaper* is to the contrary.[6]

ii. *Johnson Newspaper* Did Not Address Whether the First Amendment Right of Access to Criminal Proceedings Applies to Attorney Disciplinary Proceedings That Are Ancillary to In-Court Professional Misconduct.

Both below and in opposing the instant motion, respondent Kurtzrock has suggested that *Johnson Newspaper* forecloses a claim that the First Amendment right of public access to criminal proceedings applies to disciplinary proceedings involving prosecutors. *See, e.g.*, Kurtzrock Opp. at 3. But *Johnson Newspaper* did not address whether a First Amendment right of access applied to attorney disciplinary proceedings generally, much less proceedings involving prosecutorial misconduct specifically. And there is every reason to believe that if the latter issue were presented to this Court, the result would be different.

[6] Both respondents rely on this Court's statement in *Matter of Capoccia*, 59 N.Y.2d 549 (1983) that "[t]he provisions for confidentiality set forth in subdivision 10 of section 90 . . . were enacted primarily, if not only, for the benefit of the attorney under investigation." *Id.* at 555. But that statement, and *Capoccia* more broadly, do not answer the question of when confidentiality must yield to the public interest.

In its seminal ruling that the First Amendment required public access to criminal trials, the Supreme Court concluded that openness "has long been recognized as an indispensable attribute of an Anglo-American trial," not least because openness discouraged "the misconduct of participants." *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 569 (1980). Put simply, "[t]he First Amendment right of access 'serves an important function of monitoring prosecutorial or judicial misconduct." *In re Special Proceedings*, 842 F. Supp. 2d 232, 242 (D.D.C. 2012) (quoting *Washington Post v. Robinson*, 935 F.2d 282, 288 (D.C. Cir. 1991)). Nor is the public's interest in monitoring prosecutorial misconduct limited to a criminal trial itself—particularly where the trial revealed misconduct. "Plainly the First Amendment right of access is not limited to the criminal trial itself." *Associated Press v. Bell*, 70 N.Y.2d 32, 37 (1987) (extending the public's right of access to pretrial suppression hearing).

For these reasons, a federal judge has twice held that the First Amendment right of access applies to investigations of prosecutorial misconduct ancillary to a criminal trial. Both instances involved the criminal case of former Senator Ted Stevens of Alaska, in which a jury verdict convicting Stevens was eventually overturned due to "uncontroverted evidence that [prosecutors] had committed *Brady* violations." *See In re Special Proceedings*, 842 F. Supp. 2d 232, 235 (D.D.C. 2012). In 2008, during the period immediately after the jury verdict,

Judge Emmet Sullivan found that the First Amendment right of access applied to a "self-styled whistleblower complaint" that alleged misconduct by the Stevens prosecutors. *See United States v. Stevens*. No. 08-231 (EGS), 2008 WL 8743218, at *8 (D.D.C. Dec. 19, 2008). Judge Sullivan reasoned that the public "certainly had access to defendant's trial," and that "access to the complaint and any resulting proceedings are likely to serve the important function of monitoring prosecutorial misconduct," especially where that issue was raised at trial. *Id.* Because the public right of access applied, the whistleblower's complaint that he had not intended his report to be public was deemed insufficient to warrant sealing. *Id.*

Judge Sullivan's second relevant ruling in the *Stevens* case followed a flurry of post-trial activity, in which: (1) following confirmed *Brady* violations, the government eventually moved to dismiss the indictment against Stevens, vacating the conviction, and "assur[ed] the Court that it would investigate the prosecutors internally through its confidential Office of Professional Responsibility Process," *In re Special Proceedings*, 842 F. Supp. 2d at 235; (2) before dismissing the indictment, the court appointed an attorney, Henry Schuelke, to investigate and bring criminal contempt proceedings as needed against the prosecutors, *see id.*; and (3) Schulke eventually produced a lengthy investigative report. Several of the prosecutors under investigation objected to disclosure of Schulke's report because of, *inter alia*, the potential harm to their professional reputations, but in a

comprehensive opinion, Judge Sullivan explained that the First Amendment mandated disclosure of the report because, among other reasons, it would "certainly play a positive role in informing the public of the flaws in the criminal trial of Senator Stevens," and would "safeguard against future prosecutorial misconduct." *Id.* at 243-45. The court also rejected the contention that the prosecution's unilateral decision to dismiss the indictment terminated the public's right of access to ancillary proceedings, holding that "[t]he public . . . enjoyed a First Amendment right of access" to ancillary proceedings after dismissal of the indictment. *Id.* at 241. In other words, the prosecutors' misconduct was part and parcel of a public criminal trial, and the public therefore had a right to access the disciplinary consequences of those putative public servants. *Id.*

The facts here share numerous similarities to *Stevens*—demonstrated *Brady* violations, resulting in voluntary dismissal of the indictment and ultimately a post-disciplinary investigation. *See* Motion at 10-12. Judge Sullivan's reasoning, including his comprehensive analysis of post-trial matters in which the First Amendment right of access was found to attach, *In re Special Proceedings*, 842 F. Supp. 2d at 235, is also highly instructive. While the question of whether the First Amendment right of access applies to the Grievance Committee's investigation here was not raised below, the *Stevens* case shows that such a claim may well be meritorious, and the Court, in construing Judiciary Law § 90(10), should take the

First Amendment right of access into account. Equally important, *Johnson Newspaper* understandably did not grapple with any of the weighty issues surrounding the public's right to monitor prosecutorial misconduct, and would not bar such a claim, here or in a future case.[7] Kurtzrock's suggestion to the contrary is simply wrong.

B. "Good Cause" Exists to Unseal Kurtzrock's Proceeding.

Petitioner argues that the public interest in unsealing Kurtzrock's proceeding is substantial, and that there are no countervailing confidentiality considerations—such as the ones identified in *Johnson Newspaper*—that would warrant continued closure. *Amici* agree completely.

i. There Are No Cognizable Privacy or Reputational Interests at Stake in Kurtzrock's Proceeding.

Amici agree that "[t]here is no concern that unsealing the disciplinary proceeding against Kurtzrock will frustrate either purpose" for confidentiality identified in *Johnson Newspaper*. Motion at 27. There is no concern here about the risk of deterring complainants: publicly available court documents and

[7] Indeed, because *Johnson Newspaper* was not a case about the Judiciary Law, this Court had no occasion to consider the substantial extent to which attorney disciplinary records were considered public before confidentiality was imposed by statute (absent good cause) in 1945. For example, when the current Section 90 of the Judiciary Code was first codified into a single section in 1909 (then as Section 88), it contained no reference to treating attorney disciplinary records as confidential. That reflected the generally public nature of the attorney disciplinary process, even for ultimately unsuccessful proceedings. *See, e.g.*, *In re Kelly*, 59 N.Y. 595, 596 (1875) (affirming an award of costs in "an application to disbar the respondent, made by Henry H. Morange," one that was "instituted by [Morange] in bad faith," the records of which were nevertheless public because "the proceeding is of a public nature").

widespread press coverage have already disclosed personal identifying information of the victims of Kurtzrock's misconduct and the families of those murdered. Motion at 28-29; infra at §(B)(ii). As in *Aretakis*, therefore, "the matters referred to in [the] complaints . . . [are] already part of the public domain," so there is no risk of deterring anyone from lodging complaints against Kurtrzrock. *See Aretakis*, 16 A.D. 35 at 900-01. To the contrary, the evidence shows that the reverse is more likely, and public disclosure could lead to more victims of Kurtzrock's misconduct coming forward. *See, e.g.*, Andrew Smith, "Was Conviction Tainted? Attorney: ADA withheld evidence in '13 murder case," *Newsday*, July 17, 2019, at 14 ("Another murder case tried by a disgraced former Suffolk homicide prosecutor will soon be the subject of legal proceedings that could result in the reversal of a conviction because of claims of legal and ethical misconduct.").

Similarly, there is no need here to protect the attorney's reputational interests: Kurtzrock's egregious conduct is already well documented, including by *amici* in contemporaneous news reports. Two justices of the Supreme Court and the Suffolk County DA's Office have all concluded that Kurzrock committed clear *Brady* and *Rosario* violations. See Motion at 30. The Suffolk County DA's office, in particular, called Kurtzrock's conduct "inexcusable." *Id.* Simply put, "[a]ny interest [Kurtzrock] might have had in keeping his name in the free-and-clear has already largely evaporated." *Bartko v. D.O.J.*, 898 F.3d 51, 69 (D.C. Cir. 2018)

(finding accused attorney's privacy interest in maintaining secrecy over disciplinary proceeding was minimal where "the allegations of misconduct during the . . . trial are already a matter of public record").

ii. The Public Interest in Kurtzrock's Disciplinary Proceeding Is Substantial.

As explained above, the original understanding of the "good cause" exception in Section 90(10) was that unsealing would be appropriate "whenever it is in the public interest to do so." *Supra* at §B(1). Here, every aspect of the public interest points in favor of disclosure, and this Court should grant review to make that clear.

First, the public has a substantial interest in monitoring the actions of prosecutors generally, and prosecutorial misconduct specifically. *See supra* at §1(A)(ii); *see also* Motion at 5-6.

Second, the public has a substantial interest in ensuring that the attorney disciplinary system is functioning properly. The disciplinary system's purpose, after all, is to "protect the public in its reliance upon the presumed integrity and responsibility of lawyers." *In re Kahn*, 38 A.D.2d 115, 124 (1st Dep't), *aff'd sub nom. Kahn v. Ass'n of Bar of City of New York*, 31 N.Y.2d 752 (1972). Because of the importance of ensuring and maintaining the bar's high ethical standards, *amici*

frequently report on attorney disciplinary matters with public implications.[8] And Petitioner's observations about the shortcomings of New York's attorney disciplinary system in timely resolving disciplinary issues with public implications are well-taken: this is an area that needs more public scrutiny, not less.

Third, the public—and *amici*—have a substantial interest in Kurtzrock's disciplinary proceeding specifically, both because of the existing public interest in his misdeeds and what his disciplinary proceeding represents. Kurtzrock's "inexcusable" actions have been widely covered by the press, including by *amicus* Newsday, which has published more than 25 pieces about Kurtzrock, which have ranged from articles in early May 2017 covering the stunning revelations about Kurtzrock's misconduct during the trial of Messiah Booker and his immediate resignation,[9] to articles about his misconduct in the Lawrence case,[10] announced

[8] *See, e.g.*, Madeline Singas, "Bill to oversee DAs misses the point," *Newsday*, Aug. 16, 2018; Benjamin Mueller, "New York State Standardizes Its Oversight of Lawyers," *N.Y. Times*, Dec. 29, 2015; Joaquin Sapien & Sergio Hernandez, "Who Polices Prosecutors Who Abuse Their Authority? Usually Nobody," *ProPublica*, April 3, 2013; Rich Schapiro, "Ex-Brooklyn District Attorney Charles Hynes evades charges in federal corruption probe," *The Daily News*, Dec. 16, 2016.

[9] *See* Joye Brown, "Prosecutor Glenn Kurtzrock steps down in Suffolk," *Newsday*, May 11, 2017, at 12; *see also* Emily Saul, "DA bungle aids 'killer,'" *New York Post*, May 11, 2017, at 6; "Long Island prosecutor fired during murder trial," *Associated Press*, May 10, 2017 ("A murder charge was dismissed against a Long Island man mid-trial after the prosecuting attorney was fired for misconduct.").

[10] *See* Andrew Smith, "Judge dismisses Shawn Lawrence's murder case over misconduct," *Newsday*, Feb. 16, 2018, at 13.

reforms in the Suffolk County District Attorney's Office,[11] and many other related topics. *Amici* have also published editorial pieces discussing Kurtzrock's misconduct and its implications for legal reform efforts.[12]

Kurtzrock's disciplinary proceeding involves all these interests. Kurtzrock's misdeeds, committed in the name of the people of Suffolk County, are well known and resulted in his swift resignation from the DA's office. Yet Kurtzrock is still practicing law, *see* Motion at 5, 9, 25, without comment or update from the Grievance Committee. There will be no other reckoning for Kurtzrock for his misconduct. *See Schnitter v. City of Rochester*, 556 F. App'x 5, 7 (2d Cir. 2014) ("a prosecutor enjoys absolute immunity for failure to disclose exculpatory evidence, because deciding what disclosure to make is part of a prosecutor's role as advocate, and constitutes a core prosecutorial function"). The public thus has a paramount interest in learning how and why the Grievance Committee has not yet seen fit to take action. Put another way, there is no reason why an inquiry into

[11] *See* Andrew Smith, "Suffolk DA Timothy Sini to issue new protocols to avoid ethical failures; Sini said there will be 'constant, repetitive training' on discovery rules, and he will run the first session himself," *Newsday*, March 8, 2018, at 4.

[12] *See, e.g.*, Nick Encalada-Malinowski and Roger Clark, "Prosecutors need oversight now," *Daily News*, July 2, 2018, at 18.

very public misconduct by a public servant, paid for by the public, should be conducted in private.[13]

II. AT THE VERY LEAST, THE COURT SHOULD GRANT REVIEW TO CLARIFY HOW THE "GOOD CAUSE" STANDARD IN SECTION 90(10) SHOULD BE INTERPRETED AND APPLIED.

As noted above, *amici* believe that the Third Department's interpretation of Section 90(10) in *Aretakis* was incomplete; in particular, by relying on *Johnson Newspaper*, the Third Department did not independently assess the statute's good cause requirement, as needed. But given the dearth of precedent, Petitioner's reliance on *Aretakis* here is completely understandable. Unless and until this Court interprets the "good cause" standard in Section 90(10), litigants like Petitioner and *amici* will be left to try to cobble together a cognizable standard from a series of inapposite cases. The Court can and should fill the void by granting review and clarifying what "good cause" means in this context.

The ruling below shows why that guidance is needed. The Second Department's conclusory decision does not indicate what factors the court considered pertinent to the good cause analysis, much less how it balanced them. It does not indicate whether the court evaluated the public interest or how it would

[13] Respondent Kurtzrock claims that "there is no support for the premise that the confidentiality provisions of [Section 90(10)] should apply differently to prosecutors," Kurtzrock Opp. at 3, but that is not true—the inherent public interest in the work of prosecutors demands that different considerations apply. *Matter of Rodeman*, 65 A.D.3d 350 (4th Dep't 2009), cited by Kurtzrock, does not address the "good cause" standard at all, and is thus inapposite.

be served or disserved by continued closure. This opaque ruling leaves the public with no standard to aim at, much less a workable one. The Court should not countenance that result; "'I know it when I see it' is an unacceptable response." *Pataki v. N.Y. State Assembly*, 4 N.Y.3d 75, 101 (2004) (Rosenblatt, J., concurring); *see also id.* ("A proper resolution . . . requires a test, consisting of a number of factors, no single one of which is conclusive, to determine when" action is appropriate.).

It is true that Section 90(10) entrusts the unsealing of attorney disciplinary records to the discretion of the Appellate Division, and the Second Department stated that its decision to deny unsealing here was "[u]pon the exercise of that discretion." But the Second Department did not offer any explanation for its discretionary decision, leaving Petitioner, the public, and this Court utterly in the dark. That alone has warranted reversal by this Court in other contexts. *See Kobylack v. Kobylack*, 62 N.Y.2d 399, 402 (1984) (reversing Appellate Division's ruling when it was "not possible to discern from the memorandum why defendant's pension rights were disregarded," and, even if the decision to do so was discretionary, why the lower court had not "set forth the factors it considered and the reasons for its decision"). Review here will allow this Court to articulate for the first time the factors relevant to the Appellate Division's exercise of

discretion, a ruling that would help resolve not only this matter, but also future applications for unsealing of disciplinary records.

III. THE APPELLATE DIVISION'S STATEMENT THAT IT RETAINED AUTHORITY TO SUA SPONTE RECONSIDER ITS DECISION DOES NOT INSULATE THAT DECISION FROM APPELLATE REVIEW.

Respondent Grievance Committee argues that this Court lacks jurisdiction to review the decision below because it is non-final, purportedly because the Second Department did not "dismiss" the application, but "explicitly retained authority to 'revisit its determination with respect to the application, on its own motion,' in the event of a change in circumstances." Grievance Committee Opp. at 6. *Amici* disagree that the ruling below is non-final; after all, the Second Department unambiguously "denied" Petitioner's application, leaving nothing more to resolve, and expressly stated that any further action would be "on its own motion," *i.e.*, not on the now-final application of Petitioner. There are no further proceedings before the Second Department; its ruling is final in every sense.

Amici write separately to note that the Grievance Committee's argument also raises constitutional concerns, given that it would effectively preclude appellate review in an area laden with First Amendment considerations and the public interest, and indefinitely delay potential disclosure of records that ought to be public. *Cf. Westchester Rockland Newspapers, Inc. v. Leggett*, 48 N.Y.2d 430, 442 (1979) (noting that any "motion to exclude the public from [a criminal] pretrial

proceeding must be made on the record, in open court," and "[i]n any event, all proceedings on the motion, whether in open court or in camera, should be recorded for appellate review"). And, as the Second Circuit has held, where the public right of access to records applies, delay in disclosure of those records causes constitutional injury. *See, e.g.*, *Lugosch v. Pyramid Co. of Onondaga,* 435 F.3d 110, 126 (2d Cir. 2006) ("Our public access cases and those in other circuits emphasize the importance of immediate access where a right to access is found.").

Indeed, the Second Department's gratuitous suggestion that it might revisit its decision down the road only highlights that further clarity regarding the "good cause" standard is desperately needed. The Second Department's suggestion that it might change its conclusion "upon the existence of a change in circumstances" is entirely unhelpful in the absence of any indication of what circumstances the court deems relevant to the unsealing issues. And the upshot of the Grievance Committee's position is disturbing; it amounts to an argument that a lower court can insulate from appellate review a decision addressing the release of public records simply by gesturing to a potential future *sua sponte* re-visitation based on an unstated, unexplained set of standards.

That cannot be the law. As set forth above, at the very least, the public needs to know what "circumstances" properly are considered by the Appellate

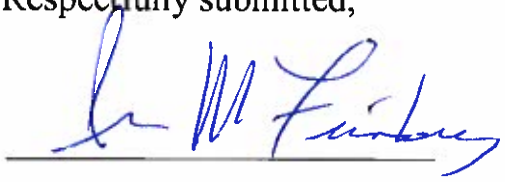
Divisions in entertaining requests for unsealing like the one here. The Court should grant review so that it can explain this important issue to the public.

CONCLUSION

For the foregoing reasons, the Court should grant the motion for leave to appeal.

September 13, 2019

Respectfully submitted,



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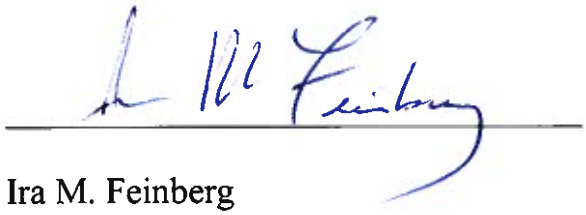

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