To Be Argued By:
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Court of Appeals

STATE OF NEW YORK

In the Matter of the Application of

ROCHESTER POLICE LOCUST CLUB, INC., MICHAEL MAZZEO and KEVIN SIZER,

Petitioners-Respondents,

—against—

CITY OF ROCHESTER and LOVELY A. WARREN, as Mayor of the City of Rochester,

Respondents-Respondents,

—and—

COUNCIL OF THE CITY OF ROCHESTER,

Respondent-Appellant,

—and—

THE MONROE COUNTY BOARD OF ELECTIONS,

Respondent.

REPLY BRIEF FOR RESPONDENT-APPELLANT COUNCIL OF THE CITY OF ROCHESTER

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PRELIMINARY STATEMENT

The question of whether a municipality is prohibited from collectively bargaining over disciplinary issues with a police union turns on the interpretation of two state laws and the policies underlying them: the state law by which the duty and responsibility to control police was delegated to the municipality, and the Taylor Law, which was enacted to address the issue of collective bargaining by public employees at large. Because, in this case, the 1907 Charter of the City Of Rochester and the Taylor Law that succeeded it by 60 years both support a finding that Rochester is prohibited from collectively bargaining discipline with its police union, Respondents the Rochester Police Locust Club and its leadership ("Respondents") distort the meaning of a third state law—the Municipal Home Rule Law ("MHRL")—in their effort to escape dismissal.

Stripped to its essentials, Respondents' argument for affirmance turns on three interrelated propositions, all of which must be correct for them to prevail: *first*, that the MHRL allowed Rochester to overrule both the 1907 Charter, by which the Legislature delegated authority over police discipline to City officials, and the 1967 Legislature's careful balancing of competing state policies on collective bargaining and official control of police as reflected in the Taylor Law's carve-out for preexisting laws; *second*, that, in 1985, Rochester intended to and did use its home-rule powers to upend and reverse *both* the 1907 Charter and the

Taylor Law's dual policy regime; and *third*, that, having acted some 27 years ago—and more than 18 years before this Court's decision in *Patrolmen's Benevolent Association of City of New York, Inc. v. New York State Public Employment Relations Board*, 6 N.Y.3d 563 (2006) ("*NYC PBA*")—Rochester cannot now make a different choice —i.e., that the "grandfathering" that Respondents claim Rochester had enjoyed to control its police force was "waived" or "abandoned," and that a one-way ratchet has been turned, never to go back.

None of these propositions holds water.

To begin, on the question of municipal lawmaking power, the law could hardly be clearer. Far from empowering municipalities to overturn state laws at will, the MHRL, by its terms, expressly *forbids* municipalities from enacting local laws that are "inconsistent" with state law, except under narrow circumstances not implicated by the facts here. The proposition that Rochester could, under the MHRL, nullify the dual-policy regime implicit in the Taylor Law—a "general law" passed in 1967—and the 1907 Charter—a state law specifically designed to grant Rochester officials authority in this particular arena, which a locality has no power to revoke—is flatly contradicted by the plain language of the MHRL and the precedents of this Court. The MHRL allows localities to dictate—and later change—*which* local official within a municipality

exercises power, but forbids *any* municipal legislation that violates state general law or policy. *See* Part I(A), *infra*.

Moreover, and quite apart from the MHRL's textual constraints, there simply is no evidence that, in 1985, Rochester intended to overturn state law, or to "forfeit" local control of its police, or to submit itself to the regime of collective bargaining over police discipline, even if it had had the power to do so. But such intent, clearly articulated, is required under MHRL § 22 in order to supersede state law, as Respondents assert Local Law No. 2-1985 did. Respondents' brief is remarkable for its silence on this point: it contains not a single word about the motivations behind the 1985 Charter amendment—and with good reason. What the Rochester City Council actually said in 1985 was *not* that it was acting to overturn a state law so it could bargain with the police union; saying that would have been nonsensical, as Rochester had been so bargaining for a decade up that point. Rather, it said it was changing its Charter to increase "efficiency and productivity"—the kind of organizational change the MHRL permits and far from a stated desire to overturn state policy. *See* Part I(B), *infra*.

Finally, Respondents' startling assertion that the MHRL can act to bar subsequent governments from undoing the acts of predecessor ones—i.e., that the ratchet of change can only go one way, and that past legislative decisions can never be revisited—is profoundly anti-democratic and a recipe for stasis and dead-hand

control of government policy. It is also contrary to the very purpose of the MHRL itself. The MHRL is designed to facilitate *home rule* at the municipal level. It is not a cul-de-sac into which municipalities can mistakenly wander, only to be trapped forevermore. *See* Part II, *infra*.

In the end, Respondents' arguments rest upon a faulty premise, namely that preservation of pre-1967 local control of police discipline is a "narrow exception" to the Legislature's command in the Taylor Law, rather than a state policy choice under that law in its own right. This Court has repeatedly held to the contrary. *NYC PBA*, 6 N.Y.3d 563, *Matter of Town of Wallkill v. Civil Serv. Emps. Ass'n., Inc. (Local 1000, AFSCME, AFL-CIO, Town of Wallkill Police Dep't Unit, Orange Cnty. Local 836)*, 19 N.Y.3d 1066 (2012) ("*Wallkill*"), and *Matter of the City of Schenectady v. New York State Pub. Empl. Relations Bd.*, 30 N.Y.3d 109 (2017) ("*Schenectady*") all stand for the proposition that local control of police is itself a vital state policy—so vital, in fact, that it results in a *prohibition* on some municipalities engaging in collective bargaining and thus forfeiting official control. As this Court has long interpreted it, the Taylor Law envisions two categories of municipalities in New York: one where the "the policy favoring control over the police prevails"—i.e., where local officials must exercise, and cannot "surrender," the power and responsibility delegated to them by the State to determine how police are disciplined—and another where the right of public employees to

collectively bargain over conditions of their employment is given priority. *NYC PBA*, 6 N.Y.3d at 572. Neither is an exception; both are the rule.

In the context of the Taylor Law's dual-policy framework, the critical date is 1967. Nineteen sixty-seven is when the Legislature enacted the Taylor Law, thereby preserving "preexisting laws"—those "in force" at the time, *id.* at 572-73—that delegated to some municipalities the power and responsibility to control police discipline. And in 1967, the 1907 Rochester Charter indisputably *was* "in force"—as Respondents acknowledge. Resp. Br. at 12-14. Accordingly, Rochester was, and remains, a municipality in which, under state law, control over the discipline of police rests with local officials and cannot be bargained away. *See* Part II(A), *infra*.

Respondents seek to escape the dispositive impact of 1967 by appealing to concepts like grandfathering, abandonment, and estoppel. These concepts apply in circumstances where: (i) private actors order their affairs according to circumstances or law extant at a particular point in time—*e.g.*, by complying with a certain rule then in place, or by asserting a position in a court case; and, later, (ii) fairness requires that the party be allowed to continue to enjoy (grandfathering) or be required to maintain (estoppel) their position into the future, notwithstanding a change in circumstances or law. These fairness-based notions have no application to a democratic government, which, by definition, cannot be

deemed frozen, or be penalized for being flexible and responsive to changing circumstances and the needs of the community. *See* Part II(B), *infra*. Respondents offer no case that says otherwise.

It would be particularly wrong to hamstring voters and government decision-makers with precepts derived from private-ordering, when the subject matter at issue is policing, perhaps the most important and difficult of government functions. Recognizing the "importan[ce]" of police "to the safety of the community" and "the sensitive nature of the work," this Court has time and again made clear that there is a strong "public interest in preserving" local control over the police, and that, given the "quasi-military nature of a police force," great deference is accorded to those in "charge of [the] police" when it comes to discipline. *NYC PBA*, 6 N.Y.3d at 571, 576. This is not an arena where ancient doctrines of real property law or judicial estoppel should have any truck.

Local Law No. 2's establishment of a Police Accountability Board ("PAB") with authority to discipline police officers is a lawful exercise of Rochester's state-granted powers. In enacting Rochester's 1907 Charter, the State placed the responsibility for disciplining police squarely and solely in the hands of Rochester officials. The 1923 Home Rule amendment to the State Constitution and the MHRL permitted municipalities like Rochester to reorganize their governmental structure and move power within it; they did not and do not allow

localities to abdicate the responsibilities imposed on them by state law. In 1967, the State Legislature chose to protect its 1907 policy choice, placing Rochester in the category of municipalities that must retain official control over, and cannot collectively bargain, police discipline. And, in 2019, the Rochester City Council exercised its home-rule powers to shift responsibility for discipline within its municipal structure, from the Chief of Police to a legislatively-created board made up of appointed City officials—and the voters of Rochester overwhelmingly ratified this choice.

This is our system of government. The Appellate Division's decision should be vacated, and the Petition should be dismissed.

I. ROCHESTER'S HOME RULE POWERS DO NOT PERMIT IT TO FRUSTRATE STATE POLICY REQUIRING OFFICIAL CONTROL OF POLICE DISCIPLINE, BUT DO ALLOW TRANSFER OF THAT CONTROL AMONG ITS OFFICIALS

Respondents assert that, by enacting Local Law No. 2-1985, Rochester "exercised its home rule powers to overturn the Legislature's 1907 policy determination." Resp. Br. at 19. Thereafter, they claim, "City Council no longer had any authority to make unilateral changes to police discipline," because doing so would violate the MHRL's savings clause. *Id.* at 20. Finally, Respondents double down on their theory of home-rule, asserting in the alternative that, if Rochester "lacked the authority, in 1985, to change the State's" 1907

choice, "it also necessarily lacked the authority, in 2019 to create" the PAB. *See id.* at 22. It is a *tour de force* in "heads I win/tails you lose."

Respondents have it all exactly backward. The MHRL is a statute that allows localities to reorganize their governmental processes, while forbidding them from frustrating general state law or policy. If Local Law No. 2-1985 had the capacious purpose that the Respondents assign to it—i.e., to abdicate its state-assigned responsibility for police discipline and instead submit the matter to collective bargaining—it would clearly violate the MHRL's prohibition on "inconsistent" local laws. On the other side of the ledger, Local Law No. 2's establishment of a local board of City officials is precisely the kind of municipal reorganization that the MHRL was enacted to encourage and facilitate.

A. Rochester Cannot Use its Home Rule Powers To Abdicate Its Responsibility to Control Police Discipline

In 1907, by enacting the Charter of the City of Rochester, the Legislature granted local officials the power and duty to control the discipline of its police officers.[1] The relevant charter provisions "reflect the policy of the State" that disciplinary authority over police should be committed to "local officials." *NYC PBA*, 6 N.Y.3d at 570, 574. This was a state grant of power; only the State can revoke it. *See Schenectady*, 30 N.Y.3d at 116-17 (collective bargaining

[1] See Opening Br. at 7-8, 25 (describing the grant under Sections 324, 330 of the 1907 Charter).

prohibited where state statute "has not been expressly repealed or superseded *by the legislature* nor was it implicitly repealed by the enactment of the Taylor Law in 1967") (emphasis added). To date, the State has neither repealed nor diminished this power; that much is undisputed. And because Rochester's legislators "may not so exercise their powers as to limit the same discretionary right of their successors to exercise that power and must transmit that power to their successors unimpaired," Rochester itself also could not diminish or destroy this power. *Morin v. Foster*, 45 N.Y.2d 287, 293 (1978). As such, Rochester retains the 1907 state-granted power to control discipline of its police force.

Respondents posit a universe where, in 1985, acting pursuant to the MHRL, Rochester surrendered the powers afforded it in the 1907 Charter, and subjected itself to collective bargaining under the Taylor Law—and that it did so using Local Law No. 2-1985. This is all wrong, both legally and factually.

Legally, the New York State Constitution and the MHRL afford localities like Rochester the power to enact local laws concerning the "powers, duties, qualifications, number, mode of selection and removal, [and] terms of office . . . of [a municipality's] officers and employees." N.Y. Const., art. IX, § 2(c)(1); MHRL § 10(1)(ii)(a). But they explicitly forbid municipalities from enacting local laws that are "inconsistent with . . . any general [State] law" or "to the extent that the [State] legislature shall restrict the adoption of such a local law."

N.Y. Const, art. IX, § 2(c)(i), (ii); MHRL § 10(1)(i), (ii). "Inconsistency is not limited to cases of express conflict between State and local laws. It has been found where local laws prohibit what would be permissible under State law, or impose prerequisite additional restrictions on rights under State law, so as to inhibit the operation of the State's general laws." *Consol. Edison Co. of New York v. Town of Red Hook*, 60 N.Y.2d 99, 108 (1983) (cleaned up). *See also Chambers v. Old Stone Hill Rd. Assocs.*, 1 N.Y.3d 424, 433, (2004) (explaining that this Court has "extended [a] statute's explicit preemption" to local laws that "posed the same deterrent to effective implementation of the state policy . . . as the [explicitly] preempted local laws and ordinances").

The 1967 Legislature's dual-policy regime is implicit in the Taylor Law, which is a "general law," and "restricts the adoption of" certain local laws through its prohibition on collective bargaining in certain localities. N.Y. Const, art. IX, § 2(c)(i), (ii); MHRL § 10(1)(i), (ii); *see also NYC PBA*, 6 N.Y.3d at 572 ("some subjects are excluded from collective bargaining as a matter of policy, even where no statute explicitly says so"). And the 1907 Charter is a state law that specifically accords power and responsibility to local officials in Rochester, and thus prevents local officials from "impair[ing]" their successors from exercising that power. *Morin*, 45 N.Y.2d at 293. It would be flatly "inconsistent" with the 1967 Legislature's policy of preserving preexisting grants of authority to officials

in some municipalities (and thus prohibiting collective bargaining on some issues in some localities, while requiring it in others)—which is reflected in its implicit carve-out of pre-1967 laws, *see NYC PBA* 6 N.Y.3d at 572; *Wallkill*, 19 N.Y.3d at 1069; *Schenectady*, 30 N.Y.3d at 115-16—for Rochester to try to use its MHRL charter-amendment powers to subject itself to collective bargaining. Rochester cannot lawfully frustrate one state legislative policy (preservation of preexisting laws affording local control) and submit itself to the other (collective bargaining). The 1907 Charter, like each specific state law granting authority over police discipline to a locality, is a "state[ment of] the policy favoring management authority over police disciplinary matters." *NYC PBA,* 6 N.Y.3d at 576. In 1907, the State Legislature decided this issue and, in 1967, it reaffirmed its decision: Rochester is a municipality where local officials must control the police. It cannot enact a local law that frustrates or defies that decision.

The doctrine of preemption similarly prevents Rochester from using its home rule powers to overturn the 1967 Legislature's dual-policy regime and the 1907 Charter. "The preemption doctrine represents a fundamental limitation on home rule powers," embodying "the untrammeled primacy of the Legislature to act with respect to matters of State concern." *Albany Area Builders Ass'n v. Town of Guilderland*, 74 N.Y.2d 372, 377 (1989) (cleaned up). "'Preemption,' in the Taylor Law context, means that collective bargaining of terms and conditions of

employment is prohibited because a plain and clear bar in statute or policy involving an important constitutional or statutory duty or responsibility leaves . . . no discretion as to how an issue may be resolved." *Newark Valley Cent. Sch. Dist. v. Pub. Emp. Rels. Bd.*, 83 N.Y.2d 315, 320 (1994). In short, if Rochester had attempted to use its home rule powers to submit police discipline to collective bargaining, in contradiction to the commands of the 1907 Charter and the 1967 Legislature's dual-policy regime (which it did not, see *infra*), the doctrine of preemption would render that effort a nullity. *Id.* Rochester had no power to abdicate official control over police discipline and submit that subject to mandatory collective bargaining—in 1985 or ever—because to do so would "impose[] additional restrictions on rights granted by State law," and therefore be "inconsistent with the State's overriding interests." *Jancyn Mfg. Corp. v. Suffolk Cnty.*, 71 N.Y.2d 91, 97 (1987).

The Fourth Department's conclusion that City Council could—and did, in 1985—"exercise[] its home rule powers to overturn the Legislature's 1907 policy determination" was erroneous. R431. Rochester may only adopt local laws that are "in harmony" with state laws and policies; it cannot use the MHRL to nullify state law (except under very circumscribed conditions not applicable here), or to frustrate state policy. *Adler v. Deegan*, 251 N.Y. 467, 491 (1929), *amended*, 252 N.Y. 615 (1930) (Cardozo, J.).

B. Rochester's Home Rule Powers Allow Transfer of Control of Police Discipline to a Public Agency

While the MHRL forbids municipalities from enacting local laws that contravene state law and policy, it permits municipalities to *restructure* the powers and duties of officers *within* municipal government. Indeed, restructuring of that kind is the whole point of the MHRL. And it is precisely that kind of restructuring that Rochester undertook in 2019 by creating and empowering, through Local Law No. 2, a new public agency whose appointed members are "officers" of the City of Rochester under the Charter. Respondents' brief ignores all of this. It suggests that Rochester had no flexibility to reallocate roles and responsibilities within City government, and that only the precise official identified in the 1907 Charter as having disciplinary authority over police may exercise that authority, MHRL notwithstanding. Resp. Br at 25-29. This is wrong, as the case law makes clear.

The MHRL and State Constitution allow municipalities to pass local laws concerning the "powers [and] duties . . . of its officers and employees." MHRL 10 §§ (1)(ii)(a)(1) and 1(ii)(c)(1). Through these provisions, the State gave "the local governing body the right to make changes in the structure and form of the present organization" of the City. *Bareham v. City of Rochester*, 246 N.Y. 140, 145–46 (1927); *see also Osborn v. Cohen*, 272 N.Y. 55, 60 (1936) ("agencies of municipal governments, and their organization, operation, and administrative control have been deemed matters of local concern").

While the strong state policy enunciated in *NYC PBA* and its progeny, and embodied in the 1907 Charter and Taylor Law, requires preservation of "official authority" over police discipline, it does not, as Respondents suggest, limit that authority to the specific official—"commissioner," "chief," or otherwise—named in the original legislation or charter. In *Schenectady*, this Court made the point explicitly, when it found that it was "irrelevant" that "subsequent changes to Schenectady's form of government have eliminated the office of the commissioner" to whom the State Legislature, through the Second Class Cities Law, originally granted authority over police discipline, and that those changes "transferred that office's powers and responsibilities to others." *Schenectady*, 30 N.Y.3d at 115 n.1. This is also clear from *NYC PBA* itself, which repeatedly describes in broad terms the Legislature "commit[ting] disciplinary authority over a police department to *local officials*," *NYC PBA*, 6 N.Y.3d at 570, "commit[ting] police discipline to the discretion of *local officials*," *id.* at 571, "provid[ing] expressly for the control of police discipline by *local officials* in certain communities," *id.* at 573, "the policy favoring the authority of *public officials* over the police," *id.* at 575-76, "the public interest in preserving *official authority* over the police," *id.* at 576, and "the policy favoring *management authority* over police disciplinary matters, *id.* (emphasis added).

Finally, as this Court made clear in *Wallkill* when it endorsed the Town's enactment of a local law providing for police disciplinary proceedings before the all-civilian Town Board, such "management authority" need not be exercised by a chief of police. *Wallkill*, 19 N.Y.3d at 1068 Like Schenectady, Rochester may transfer or reallocate the power it was endowed by the State over police discipline from the "commissioner of public safety"—the term used in the 1907 Charter—to some other municipal official or body because doing so maintains "the policy favoring the authority of public officials over the police." *NYC PBA*, 6 N.Y.3d at 575-76.

Indeed, such internal restructuring is the very essence of municipal home rule. In this case, by establishing the PAB under Local Law No. 2, Rochester both complied with the state's policy command by keeping the power over police discipline in the hands of local officials, and changed the situs of that power from one "local official" (the Chief of Police) to another (the PAB, a public agency comprised of Rochester "officers" under its Charter). *See* R126 § 18-2 ("The Board"); R136 § (C)(4); R140 § 18-13; Charter of the City of Rochester § 2-18(B)(5).

II. EVEN IF ROCHESTER HAD THE POWER TO CHOOSE COLLECTIVE BARGAINING, IT IS NOT A ONE-WAY RATCHET

Even if Rochester had the power to submit its police disciplinary process to collective bargaining through local legislation in 1985—which it did

not—Rochester would also be fully empowered to reverse course and reinstate official control over discipline through local legislation, including through Local Law No. 2. As a matter of logic and basic democratic principles, a local law repealing a state-enacted Charter provision cannot forever forfeit a state-granted right. Respondents' insistence on this one-way ratchet relies on a misreading of the *NYC PBA* line of cases and finds no support in the law.

A. *NYC PBA* Describes a Two-Policy Disciplinary Regime, Not a Grandfathered Exemption under Civil Service Law § 76(4)

Respondents' position that the 1985 Charter amendment "forfeited [Rochester's] ability to be 'grandfathered' into the exception to mandatory collective bargaining" relies upon the flawed premise that local control of police discipline is a narrow "exception" created by Civil Service Law § 76(4). In fact, local control is not an exception at all—it is one of two "competing" state policies, both of which are reflected in the Taylor Law. *NYC PBA*, 6 N.Y.3d at 571, 575*; see also Schenectady*, 30 N.Y.3d at 117 ("this Court has already resolved that policy conflict in favor of local control over police discipline"). And § 76(4)—the premise of Respondents' insistence on a grandfathered exception that can be lost—is not the source of the 1967 Legislature's preservation of local control in any event; it is not even part of the Taylor Law.

Respondents incorrectly assert that the "basis for the holdings in this entire [*NYC PBA*] line of cases is that Civil Service Law § 76(4) grandfathers in

preexisting specific or local laws," creating a "narrow exception" no "broader than the specific preexisting law" and which may not be altered. Resp. Br. at 9. Put plainly, the state policy prohibiting collective bargaining in municipalities where the State had previously vested local officials with control over police discipline does *not*, as Respondents would have it, derive from the "grandfather clause" of Civil Service Law § 76(4). Unlike Civil Service Law § 76(4), the Taylor Law—Section 204—does not contain explicit language referencing or "grandfathering" preexisting laws, *see* Civil Service Law § 204. Rather, as this Court has consistently stressed in cases dating back to the 1970s, the "grandfathering" is implied. *NYC PBA*, 6 N.Y.3d at 572 ("some subjects are excluded from collective bargaining as a matter of policy, even where no statute explicitly says so"). As the Fourth Department found, while Civil Service Law § 76(4) may have been "the juridical muse for the section 204 (2) exception created by the Court of Appeals in *PBA*," it is not its source. R430. Rochester is excluded from the Taylor Law's bargaining mandate when it comes to police discipline because the State made the *policy choice* in 1907 to confer authority over that subject to local officials and the *policy choice* in 1967 to protect that conferral and others like it, *not* because of the

grandfathering language in Civil Service Law § 76(4). Respondents' repeated references to 1958 are a sleight of hand.[2]

The state policy choices at the heart of the *NYC PBA* line of cases also explain why the state-grant of authority must be "in force" in 1967—not, as the Respondents assert, "at the time the legal challenge arose." *See* Resp. Br. at 12. It was the Legislature's intent in 1967 when it passed the Taylor Law to create a dual regime where "some local counterparts have the right to bargain about police discipline, and some do not." *Schenectady*, 30 N.Y.3d at 118. In *Schenectady*, this Court made clear that in determining which municipalities the Legislature intended to fall into each category, post-1967 laws have "no bearing." *Id. See also id.* at 115, n.1 (examining "the Second Class Cities Law, enacted *prior* to Civil Service Law §§ 75 and 76" and stating that "[s]ubsequent changes to Schenectady's form of government" are "irrelevant") (emphasis added).[3]

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[2] Respondents' reliance on *Meringolo v. Jacobson*, 173 Misc. 2d 650 (Sup. Ct. N.Y. Cnty. 1997), *aff'd*, 256 A.D.2d 20 (1st Dep't 1998), is misplaced. There, the court found a 1976 New York City law that conflicted with Civil Service Law § 75's prohibition on unpaid leave over 30 days could not be saved by Civil Service Law § 76(4)'s exemption of preexisting laws. The statutory analysis of the *Meringolo* court is inapplicable here because it involved conflict between Civil Service Law § 75 and a local law passed after the Civil Service Law, whereas this case concerns a state grant of authority that predated the Taylor Law by decades. As explained above, the Taylor Law's implied policy favoring local control of police discipline in municipalities like Rochester does not derive from Civil Service Law § 76(4), whose language is analyzed in *Meringolo*. And unlike Rochester, *Meringolo* involved no pre-Civil Service Law state grant of authority to control the subject matter of its post-Civil Service Law local legislation.

[3] The Fourth Department and Respondents erroneously read *Schenectady* as indicating that a preexisting state grant must be "in force" when the locality refuses to bargain because, according

From this vantage point, *City of Syracuse v. Syracuse Police Benevolent Ass'n, Inc*., 68 Misc. 3d 412, 424 (Sup. Ct. Onondaga Cnty. 2020), *aff'd*, 198 A.D.3d 1322 (4th Dep't 2021), relied on by Respondents, is either readily distinguishable, or, more properly, wrongly decided. There, the City of Syracuse amended its Charter in 1960, eliminating the provisions concerning disciplinary power over police that originated in state law and replacing them with a requirement that "disciplinary proceedings . . . be conducted in accordance with . . . the Civil Service Law." *City of Syracuse,* 68 Misc. 3d at 420 (cleaned up). Under the *NYC PBA* framework, the State made a policy choice in 1906, when it passed the Second Class Cities Law, that Syracuse (like Rochester in 1907) should have local control of police discipline. But, unlike Rochester, by the time the State made its second policy choice concerning the locus of police discipline when it passed the Taylor Law in 1967, Syracuse had *already* exercised its Home Rule powers to opt-in to the state-wide Civil Service regime and no pre-existing law

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to the Fourth Department, the Court "contrasted the continued effectiveness of Schenectady's local law with the Legislature's repeal of a similar preexisting statute that had limited collective bargaining for State Police officers." R432. This reads too much into the Court's discussion in *Schenectady* of a 2001 amendment to the Civil Service Law that "delete[d] the exclusion for collective bargaining of disciplinary procedures regarding state troopers." *Schenectady*, 30 N.Y.3d at 118. This Court did not compare this repealed provision with the Second Cities Law at issue in *Schenectady*. Rather, it rejected the PERB's reliance on the repeal's supporting memorandum, which explained that the repeal of this provision prohibiting State Police officers from collectively bargaining discipline "would simply grant all State Police officers equal treatment with respect to their local counterparts," as having little import, because "some local counterparts have the right to bargain about police discipline, and some do not." *Id.*

conferring police discipline to local officials was "in force." And, unlike Rochester, Syracuse's 1960 Charter Amendment "evinced its intent to supersede the Second Class Cities Law provisions regarding police discipline, and to require compliance with the Civil Service Law's collective bargaining provisions." *Id.* at 425. Clear language in the Charter amendment stated how "disciplinary proceedings" were to be conducted and legislative history described Syracuse's goal of adopting a "uniform disciplinary" policy "in accordance with the procedures prescribed by the State Civil Service Law." *Id.* at 424. In contrast, the history of Rochester's Local Law No. 2-1985 does not manifest any intent to make such a sweeping change to disciplinary practice. But, more fundamentally, *Syracuse* misstates the central question in these disputes, finding that "[t]he answer turns on the expressed intent of the *local* body." *Id.* at 423 (emphasis added). This is wrong. As this Court has made clear, what matters is the intent of the State Legislature in granting localities power and preserving that policy choice, not the intent of local officials. *See NYC PBA*, 6 N.Y.3d at 574 (citing pre-Taylor Law state statutes which "reflect the policy *of the State* that police discipline in New York City is subject to the Commissioner's authority" (emphasis added)).

B. There is No Basis In Law For Permanent Municipal Forfeiture of State-Granted Rights

Respondents' vision of Rochester as forever forfeiting its "grandfathered" right to control police discipline through the 1985 amendments to

the Charter is also fundamentally at odds with both democracy at large, and established principles of abandonment of pre-existing non-conforming uses.

Respondents can point to no basis for their contention "that a municipality may forfeit a previously enjoyed grandfathered status by repealing the prior locally applicable statute," other than to say, without citation, that this conclusion "seems self-evident and inarguable." Resp. Br. at 16. But the law is clear that even in the context of private land-use—where forfeiture of a right to a non-conforming use is most commonly invoked—*intent* to abandon the grandfathered use is still required. *Toys R Us v. Silva*, 89 N.Y.2d 411, 421 (1996) ("abandonment of a nonconforming use requires both an intent to relinquish and some overt act or failure to act, indicating that the owner neither claims nor retains any interest in the subject matter of the abandonment").

And here, there simply is no evidence that Local Law No. 2-1985 reflected an intentional relinquishment of the municipality's then nearly-80-year right to discipline its police officers. Nowhere in the 1985 amendment does it state that Rochester intended or wished to surrender the power accorded it by the State in the 1907 Charter. And, contrary to Respondents' contention that there is "no record support," and "absolutely no evidence" that the 1985 City Council "unwittingly repealed the 1907 Charter provision," *see* Resp. Br. at 23, the only legislative history of the 1985 Charter amendments—three pages of introductory

text submitted by the City Manager in support of Local Law No 2-1985 (and its companion law)—say absolutely nothing about collective bargaining. Instead, this history indicates the purpose of the amendments was to reorganize under a new Public Safety Administration to promote "efficiency and productivity" in the area of public safety. R312-14. Far from showing a desire to relinquish municipal control, the plain language of the 1985 amendments indicates an intent to maintain broad official control over the police. *See* Opening Br. at 37-39.

This absence of intent is fatal to Respondents' positions both that the 1985 amendments abandoned a grandfathered right and that they superseded state law prohibiting Rochester from collectively bargaining discipline. In arguing that the 1985 City Council's intent is "irrelevant," *see* Resp. Br. at 23, Respondents ignore the requirements of MHRL Section 22, upon which they themselves purport to rely. In those narrow circumstances (not applicable here) where a municipality has the power to supersede a specific state law, Section 22 of the MHRL requires clear "evidence [of] a legislative intent to amend or supersede those provisions of a state law sought to be amended or superseded." *Tpk. Woods, Inc. v. Town of Stony Point*, 70 N.Y.2d 735, 737 (1987). Here, no such intent exists.

And even if Rochester had manifested an intent to abandon its right to control police discipline, the principles of abandonment urged by Respondents cannot apply to municipal governments as if they are private actors. There is no

case that says otherwise—and the implications of this Court so holding would be profoundly undermining of democracy. Cities are not akin to property owners afforded an exemption from a new zoning rule for preexisting, non-conforming land use, or mid-career professionals exempted from new licensing examination requirements. It is axiomatic that local elected officials must retain the capacity to lawfully legislate, unencumbered by their predecessors' acts or lapses. When it comes to a government's powers, such as the power to control police discipline, a legislature "may not so exercise their powers as to limit the same discretionary right of their successors to exercise that power and must transmit that power to their successors unimpaired." *Morin*, 45 N.Y.2d at 293; *see also Farrington v. Pinckney*, 1 N.Y.2d 74, 82 (1956) (where "one Legislature violently disagrees with its predecessor" it may "modify or abolish its predecessor's acts" (internal citations omitted)).

To find otherwise would in essence be to apply estoppel against Rochester's City Council. The 2019 Council would be prevented from enacting the will of their constituents to create a robust civilian oversight board—and from complying with the state policy favoring protection of local control of police discipline—simply because their 1985 counterpart got it wrong. But "policy reasons . . . foreclose estoppel against a governmental entity in all but the rarest cases." *Parkview Assocs. v. City of New York*, 71 N.Y.2d 274, 282 (1988).

III. RESPONDENTS' RESURRECTED ALTERNATE BASES FOR INVALIDATING LOCAL LAW NO. 2 FAIL

Unable to advance a coherent argument for their position, Respondents resort to a kitchen-sink approach, appending alternate arguments for invalidating Local Law No. 2 already passed over or rejected by the courts below. None are availing.

A. Estoppel Does Not Apply

Without citing any legal standard, Respondents baldly assert that the City Council should be estopped from "attempting to deny the applicability of the Civil Service Law and the validity of Article 20 of the collective bargaining agreement and asserting that police discipline is a prohibited subject of negotiation." Resp. Br. at 33. In doing so, Respondents invite this Court to ignore the long-standing principle, discussed *supra*, that estoppel against municipal governments is heavily disfavored. *See Parkview Assocs.*, 71 N.Y.2d at 282. Especially given the sensitive and important function at issue here—oversight of police—the Court should decline this invitation.

The fact that the City Council passed a law in 1985—*19 years before the Court of Appeals first announced the legal principle that governs this case*—repealing a section of the Charter titled "Charges and trials of policemen," "for the reason that this subject matter is covered in the Civil Service Law," R317, R328, cannot now preclude Rochester from exercising its state-granted responsibility to

control discipline. This is black-letter law. "[E]stoppel may not be applied to preclude a State or municipal agency from discharging its statutory responsibility. . . . This is particularly true where, as here, the estoppel is sought to be applied to perpetuate . . . a misreading of constitutional and statutory requirements." *City of N. Y. v. City Civil Serv. Comm'n*, 60 N.Y.2d 436, 449 (1983).

Underscoring the absurdity of their estoppel argument, Respondents rely on this Court's decision *not* to estop a municipality in a similar circumstance. *Schenectady*, 30 N.Y.3d at 117. In *Schenectady*, the Court quickly dismissed the argument that Schenectady's position in judicial proceedings that pre-dated *NYC PBA* could judicially estop the city from later following the holding of *NYC PBA*. *Id.* Respondents can point to no position taken by the City Council since *NYC PBA* concerning the applicability of Civil Service Law § 75 or Article 20 of the CBA and so, as in *Schenectady*, their estoppel argument lacks any factual basis, much less a legal one. Indeed, in each of the *NYC PBA* line of cases, a collective bargaining agreement had already been negotiated by the municipality—yet in *none* of these cases did the Court of Appeals find that the mere existence of a collective bargaining agreement estopped the municipality from arguing that police discipline could not be collectively bargained. *See id.*; *NYC PBA*, 6 N.Y.3d at 570-71; *Wallkill,* 19 N.Y.3d at 1068. While the *Schenectady* Court noted that Schenectady announced changes to its disciplinary process soon after *NYC PBA*

came down, the Court did not indicate (contrary to Respondents' suggestion) that estoppel could apply if Schenectady had not quickly announced a change in position. *Schenectady*, 30 N.Y.3d at 117.

Moreover, while Respondents never specify what *type* of estoppel they assert should be imposed, in *Schenectady*, the police union had cited *judicial* estoppel. *Schenectady*, 30 N.Y.3d at 117 (emphasis added). Judicial estoppel clearly does not apply here. Judicial estoppel provides that "[w]here a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position." *Zedner v. United* States, 547 U.S. 489, 504 (2006) (cleaned up). The City Council has not previously taken any position regarding the applicability of the Civil Service Law and the CBA "in a legal proceeding," let alone "succeeded" on that position.

Simply put, the City Council is not estopped from following this Court's precedent and the State's policy command.

B. Civil Service Law § 75 and Unconsolidated Law § 891 Do Not Invalidate Local Law No. 2

Undeterred by the Fourth Department's rejection of these arguments as "unduly pedantic," R434, Respondents again assert that Local Law No. 2 is also invalid under Civil Service Law § 75 and Unconsolidated Law § 891, claiming it

violates an officer's right under these laws to a hearing before the officer or body having the power to remove him, *see* Resp. Br. at 36-38.

As an initial matter, under Civil Service Law § 76(4), which provides that "[n]othing contained in section[s] seventy-five or seventy-six of this chapter shall be construed to repeal or modify any general, special or local" preexisting laws, Rochester is exempted from the requirements of Civil Service Law § 75. N.Y. Civ. Serv. Law § 76(4). As this Court repeatedly found, where police discipline is not subject to collective bargaining, the procedural requirements of Civil Service Law §§ 75 and 76 are also inapplicable. *See NYC PBA*, 6 N.Y.3d at 573-75 (citing § 76(4) to find § 75 inapplicable); *Wallkill*, 19 N.Y.3d at 1069 (same); *Schenectady*, 30 N.Y.3d at 114-15 (same). Unconsolidated Law § 891 has never been invoked in any of the *NYC PBA* line of cases, because it is simply an *officer-specific version* of the civil service rights codified in Civil Service Law § 75. *See* R116, Petition ¶ 22 (admitting that Unconsolidated Law § 891 "mirrors" Civil Service Law § 75). Just as Civil Service Law § 75 is inapplicable because of the state's 1907 grant of authority over police discipline to Rochester, Unconsolidated Law § 891 is inapplicable for the same reason.

In any event, there is no *substantive* conflict between Local Law No. 2 and Civil Service Law § 75 or Unconsolidated Law § 891.[4] As the Fourth Department concluded, "because Local Law No. 2 makes PAB the primary body 'having the power to remove the [officer],' PAB's designation as the disciplinary hearing panel does not violate sections 75(2) and 891." R434. Respondents' insistence that Section 75 forecloses the possibility of multiple officers or bodies having the authority to remove an officer and that Unconsolidated Law § 891 requires a hearing before an employee of the police department, in addition to relying on an "unduly pedantic" parsing of the PAB and Chief of Police's powers, is also undermined by Rochester's own Charter. Rochester's Charter already creates an "additional method of removal" outside the Chief of Police, by empowering the City Council with jurisdiction to vote to remove any City officer or employee following a hearing. *See* Rochester City Charter § 2-19.[5]

[4] Moreover, because Local Law No. 2 incorporates and imports the procedural protections of Civil Service Law §§ 75 and 76, there is no substantive conflict and no prejudice could arise. *See* R133 § 18-5(I)(7) (incorporating "[a]ll due process rights" in Civil Service Law § 75); N.Y. Civ. Serv. Law § 75 (civil servant has right to be furnished with "a copy of the charges preferred against him").

[5] *Lynch v. Giuliani*, 301 A.D.2d 351 (1st Dep't 2003), cited by Respondents, is also inapplicable, because under the terms of the city charter in *Lynch,* the "[p]olice [c]ommissioner [had] absolute authority in matters of police discipline." 301 A.D.2d at 352. The hearing held by the civilian board resulted only in "a recommended decision to the Police Commissioner," which the Commissioner was free to reject. *Id.* at 355. In contrast, under Local Law No. 2, the Police Chief is obligated to impose the PAB's determination.

CONCLUSION

For the foregoing reasons, the Court should reverse the Appellate Division, Fourth Department's June 11, 2021 Opinion and Order.

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PRINTING SPECIFICATIONS STATEMENT

I, Andrew G. Celli, Jr., attorney for Council of the City of Rochester, hereby certify, pursuant to 22 NYCRR 500.13(c)(1), that this brief was prepared using Microsoft Word; the typeface is Times New Roman; the main body of the brief is in 14-point font and footnotes are in 12-point font; and the line spacing is double. I further certify that this brief contains 6,960 words as counted by the word-processing program, inclusive of point headings and footnotes and exclusive of the table of contents, table of authorities, signature block, and this certification.

Dated: April 19, 2022