To be Argued by:
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Court of Appeals

of the

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.

BRIEF FOR RESPONDENT-APPELLANT COUNCIL OF THE CITY OF ROCHESTER

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QUESTION PRESENTED

Where a 1907 state law granted local officials in the City of Rochester the power to discipline police officers, thus prohibiting the City from collectively bargaining over the subject under *Patrolmen's Benevolent Association of City of New York, Inc. v. New York State Public Employment Relations Board*, 6 N.Y.3d 563, 573 (2006) ("*NYC PBA*") and its progeny, does a 1985 Rochester local law repealing a section of the City Charter regarding the procedures for disciplining officers "for the reason that this subject matter is covered in the Civil Service Law" have the effect of trumping the state policy expressed in the 1907 act such that a 2019 law establishing an all-civilian police review board with disciplinary powers is invalid?

STATEMENT OF JURISDICTION

This Court has jurisdiction over this appeal pursuant to CPLR § 5602(a)(1)(i), having granted leave to appeal the final determination of the Appellate Division, Fourth Department on November 23, 2021. R424.

PRELIMINARY STATEMENT

In 2019, the people of the City of Rochester—speaking both through their municipal government and directly at the polls—announced their intention to reform Rochester's system for overseeing its police force. At a public referendum, 75% of voters endorsed what Rochester's City Council and its Mayor had enacted into law: Local Law No. 2, which established a new public agency—an all-civilian Police Accountability Board ("PAB") charged with the responsibility to make recommendations to improve the policies and practices of the Rochester Police Department ("RPD"), to hear and determine charges of misconduct levelled at RPD officers, and, in consultation with other stakeholders, to create and maintain a system under which officers found responsible for misconduct would be disciplined.

Local Law No. 2 is the latest in a history of changes, reforms, and modifications to the system of police discipline in Rochester stretching back to the 1920s. And like every one of its predecessors, Local Law No. 2 rests upon an unchanged and unshakeable statement of state public policy: that the disciplining of police officers in Rochester must be carried out exclusively by local officials. That policy is a matter of state law. It is embodied in the Rochester City Charter enacted by the State Legislature in 1907, a Charter that remains in place today.

The 1907 Charter predates New York's Taylor Law, which requires collective bargaining with public employee unions, by six decades.

In September 2019, the Rochester Police Locust Club ("RPLC"), the union representing officers of the RPD, brought suit to block Local Law No. 2. When its initial effort to enjoin the public referendum failed, and the referendum passed by a wide margin, the RPLC argued that the law's substantive provisions (now embodied in Article XVII of the Charter) —which empower the PAB to impose discipline on officers who engage in misconduct—violate the Taylor Law. The RPLC's core assertion is that, by repealing a section of the Charter entitled "charges and trials of policemen" in 1985, Rochester intended to and did surrender, for all time, the power that the Legislature had granted to local officials to control police discipline, choosing instead to submit itself to the Taylor Law's regime of collective bargaining. To date, this position has prevailed in the courts—in the teeth of three decisions issued by this Court in closely-analogous circumstances.

This is a case about power and about intent.

In the decision below, the Appellate Division, Fourth Department, reached two basic conclusions: *first*, that, as a matter of law, the City of Rochester had the power, by unilateral local action, to nullify an act of state law, and defy state policy, in one of the most sensitive areas of municipal governance—the control and discipline of police officers; and *second*, that, as a matter of fact, the

City of Rochester actually intended to and did exercise that power in 1985, when it amended its charter to repeal a section devoted to the procedures by which police officers would be disciplined. Both conclusions are wrong; indeed, both are directly contrary to the settled precedent of this Court.

As to the first issue—the power question—this Court has spoken, and it has spoken clearly and repeatedly. In *Patrolmen's Benevolent Association of City of New York, Inc. v. New York State Public Employment Relations Board*, 6 N.Y.3d 563, 573 (2006), *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, 1068 (2012) ("*Wallkill*"), and *Matter of the City of Schenectady v. New York State Pub. Empl. Relations Bd.,* 30 N.Y.3d 109, 116-17 (2017) ("*Schenectady*")**,** this Court unambiguously held that localities do *not* have the power to nullify state grants of local control over police discipline in favor of collective bargaining, where the Legislature made local officials responsible for police disciplinary issues by way of a state-issued charter or other state law prior to the enactment of the Taylor Law in 1967. On this point, this Court has been emphatic: municipalities in this category are *prohibited* from collective bargaining over police discipline; to do so would be to unlawfully "surrender" responsibility over a sensitive function that the Legislature determined could only safely rest in the hands of local officials. *See* Part I, *infra*.

The Municipal Home Rule Law does not allow localities to trump state law either. By its terms, the savings clauses of the Municipal Home Rule Law, and the doctrine of preemption, forbid municipalities from nullifying the Legislature's policy judgments, including those expressed in the 1907 Charter. Rochester simply does not have the power to abdicate the responsibilities that the Legislature gave to it. *See* Part II(A)(1), *infra*.

As to the second issue—Rochester's intent—the text, the historical record, and the law, are equally clear. There is absolutely no evidence—not one word; not one tidbit of legislative history—that Rochester intended to surrender its authority over police discipline and submit itself to the dictates of the Taylor Law, by the repeal of a section of the Charter entitled "charges and trials of policemen." In the first place, the 1985 charter amendment upon which the RPLC relies occurred 21 years *before* the 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, 573 (2006), where this Court first held that municipalities cannot unilaterally decide to collectively bargain issues of police discipline that the Legislature has entrusted to them prior to 1967. Rochester officials acting in 1985 could not possibly have intended to try to usurp or work around a rule of decision that was, at that time, still two decades in the future. *See* Part II(A)(II), *infra*.

More prosaically, far from having been undertaken to effect a sea-change in municipal power for all time, the 1985 repeal of the "charges and trials" provision was simply a small part of a larger set of charter amendments that restructured Rochester's entire police-fire-emergency services apparatus for the stated purpose of promoting "efficiency and productivity." That the repeal offers as its reasoning that "this subject matter is covered in the Civil Service law;" that it refers to "the Civil Service Law" generally, which includes procedural protections other than collective bargaining, and not to the Taylor Law, which addresses collective bargaining specifically; and that it occurred in a context where the City *already* had been negotiating with the RPLC over discipline for at least a decade, all point to one conclusion: that the repeal was viewed by local officials as a housekeeping measure—cleaning up the Charter to reflect the extant state of affairs—not an intentional surrender or waiver of rights. *See* Part II(A)(II), *infra*.

This Court's settled precedents, the policy of the State of New York as expressed in Rochester's 1907 Charter, and the will of Rochester's voters all point to one necessary outcome: the decision of the Appellate Division, Fourth Department should be reversed, and the underlying Petition should be dismissed.

STATEMENT OF FACTS

I. HISTORY OF POLICE DISCIPLINARY AUTHORITY IN ROCHESTER

In 1907, the State Legislature enacted Chapter 755 of the Laws of 1907, entitled "An Act Constituting the Charter of the City of Rochester" ("Chapter 755" or the "1907 Charter"). *See* R251. Among other things, the 1907 Charter established the City of Rochester's Department of Public Safety, and enumerated the powers of that department's "commissioner," including the power to discipline police officers. *See* R255-56. Section 324 empowered the commissioner of public safety to promulgate rules governing police discipline:

> § 324. **Rules for police and fire force**. — The commissioner must make rules and regulations not inconsistent with the provisions of this act and other laws of the state, or the ordinances of the common council, for the government, direction, management *and discipline* of the police force and of the fire force.

R258 (emphasis added). And, section 330 established the specific procedures by which police officers would be charged, tried, and subject to sanction for any misconduct:

> § 330. **Charges and trials of policemen and firemen**. — If a charge be made by any person against any officer or member of the police or fire force . . . the charge must be put in writing in the form required by the rules of the commissioner of public safety . . . [*i*]*t is then the duty of the commissioner to hear, try and determine the charge according to the rules made by him in relation to such matters.* If the accused person is found guilty of the charge against him, the commissioner may punish him by

> reprimand, by forfeiture of pay for some definite time, by a fine not exceeding fifty dollars, by a reduction in grade, or by dismissal from the force, or *may subject him to any other discipline prescribed in the rules promulgated by the commissioner of public safety*. The commissioner may summarily dismiss from the force any person failing or neglecting to pay within the time or times prescribed by the commissioner, a fine imposed by him. The decision of the commissioner is final and conclusive, and not subject to review by any court.

R259-60 (emphasis added).

In the decades between the 1920s and the 1990s, these and related provisions of Rochester's 1907 Charter were amended from time to time by local law, pursuant to the intervening 1923 Home Rule amendment to the State Constitution and the Municipal Home Rule Law. *See infra* at 28-29. Throughout those years, over the course of many amendments, titles and responsibilities within Rochester's governmental structure changed (the "public safety commissioner" became the "police commissioner," who became the "chief of police," for example), but one thing remained the same: the power to discipline police officers remained in the hands of a local official.

Charter Amendments: 1925-1985

In 1925, the City of Rochester, by local law, repealed section 324 of Chapter 755 and replaced it with section 129, which provided that: "the commissioner of public safety . . . shall hear and decide all charges of misconduct and incompetence made against any officer or member of the fire force." R284. In

1957, section 129 was amended, again by local law; the power to discipline police officers remained with the commissioner of public safety. *See* R234. Section 330 was amended by local laws in 1951 and 1963; in both amendments, the commissioner maintained disciplinary authority over police officers. R305 (1951 local law); R307 (1963 local law, reflecting that § 330 was renumbered to § 387).

In 1970, Rochester amended the 1907 Charter to abolish the Department of Public Safety, and to transfer the power over police discipline to the "Commissioner of Police." *See* Comp-1 (Local Law, Int. No. 3 (1970) of City of Rochester). The 1970 amendment created Section 8A-2 of the Charter, titled "Powers and duties of Commissioner of Police," which conferred on the Commissioner of Police "exclusive control of the administration of the Police Department," including the duty and power to "hear and decide all charges of misconduct and incompetency made against any officer or member of the Police Department." Comp-3. The 1970 amendment also created a new Section 8A-7 titled "Charges and trials of policemen," which set forth specific procedures for the disciplining of officers. Comp-3, 4.

In 1974, again by local law, the 1907 Charter was amended to change the title of the office from "Commissioner of Police" to "Chief of Police." *See* R353-54 (amending the charter to "strike therefrom the words 'Commissioner of Police' and insert in their place the words 'Chief of Police'"). The powers

formerly exercised by the Commissioner—including the power to discipline officers of the department—would thereafter be exercised by the Chief.

The 1985 Amendments

In 1985, the City of Rochester again amended the 1907 Charter, via two local laws introduced together—Local Laws No. 1-1985 and No. 2-1985. *See* R330.

Local Law No. 1-1985 established a Public Safety Administration to oversee Rochester's police and fire departments, and its office of emergency communications. R314. A new Section 8-2 was added to the charter; it enumerated the powers of a "Commissioner of Public Safety," whom it described as having "the power of an appointing officer in the agencies under the Commissioner's jurisdiction," including the police department. R323.

Local Law No. 1-1985 also repealed Sections 8A-1, "Chief of Police," and the 8A-2, "Powers and duties of Chief of Police"—the successor of Chapter 755 section 324's conferral of power over police discipline—and replaced those sections with a new Section 8A-1, "Chief of Police; powers and duties," which provided, *inter alia*, that the Chief of Police "shall, subject to the rules of the Commissioner of Public Safety, assign, station and transfer all personnel" and "see to it that the rules and regulations relating to the Police Department are enforced and carried out." R324.

Finally, Local Law No. 2-1985, which was titled "Local Law Amending the City Charter with Respect to Disciplinary Matters Involving Policemen and Firemen," repealed Section 8A-7, "Charges and trials of policemen"—the successor of Chapter 755 section 330's charges and trials section—"for the reason that this subject matter is covered in the Civil Service Law." R317, R328.

The 1995 Amendment

In 1995, Rochester amended the 1907 Charter by local law to repeal Sections 8-1 and 8-2, which related to the Public Safety Administration and the Commissioner of Public Safety, and to delete, in Section 8A-1 ("Chief of Police; Powers and duties") any mention of the Commissioner of Public Safety. This change left the Chief of Police as "the appointing authority for members and employees of the Police Department." R333.

II. THE CITY COUNCIL PASSES LOCAL LAW NO. 2 IN 2019 IN RESPONSE TO CITIZEN CONCERNS

Over the course of its history, Rochester has experienced persistent calls for reform in the wake of deep public concern about police misconduct within the Rochester Police Department.[1] R239-41 ¶¶ 7-8. As this concern has increased

[1] In January 2018, local advocacy groups, churches, and community organizations formed a coalition known as the Police Accountability Board Alliance. The Alliance's goal was to advocate for greater civilian oversight of the RPD and the creation of a "police accountability board." R239-41 ¶ 8.

in recent years, public demonstrations and remonstrances, all calling upon elected officials to move toward greater civilian oversight of policing, have become more urgent. *Id*. A 2017 report issued by independent researchers found significant issues in the RPD's handling of officer misconduct complaints and called for civilian control over the disciplinary process. R240 ¶ 8(2).

Against this backdrop, in 2018 and 2019, the Rochester City Council drafted, debated, and held hearings on legislation to create a new public agency, an all-civilian oversight body called the Police Accountability Board. The basic idea was that the PAB would both review and offer recommendations to improve the policies and practices of the RPD, and hear, try, and determine charges of misconduct against individual officers. R240-41 ¶¶ 8(4)-(5), 9.

The legislative process around the PAB was lengthy and deliberative. The Council debated both its own proposed legislation, which would become Local Law No. 2019-2 ("Local Law No. 2"), and similar legislation introduced around the same time by Rochester's Mayor. The Council bill went through various drafts and amendments. R241 ¶¶ 9-10.

On May 21, 2019, the Council passed Local Law No. 2, which, subject to approval at a referendum, would establish an all-civilian Police Accountability Board. On June 6, 2019, the Mayor approved the legislation. R143. Local Law No. 2 would take effect upon approval by the electors at the

general election on November 5, 2019—i.e., at a public referendum. R140, Local Law No. 2, Section 2. A referendum was required under Municipal Home Rule Law § 23(2)(f) because the new law curtailed the Mayor's Charter-delineated power to appoint and remove all members of boards. Charter of the City of Rochester §§ 3-3(D), 3-3(G).

Local Law No. 2 was approved by 75% of the voters of the City of Rochester at the November 2019 general election.[2] Based on the outcome of the referendum, the 1907 Charter was amended to incorporate Local Law No. 2, formally establishing the Rochester Police Accountability Board. R12.

III. LOCAL LAW NO. 2 CREATES A ROBUST CIVILIAN OVERSIGHT BOARD

Local Law No. 2 amended the 1907 Charter to add a new article to the Charter, Article XVII, entitled "Police Accountability Board." *See* R125, Local Law No. 2, Section 1. The PAB would be constituted with nine members, all of whom would be appointed by the Mayor or the Council and approved by a majority of the Council. R127-28 §§ 18-3(C), 18-4(A), 18-4(H). The PAB is a "public agency," *see* R126 § 18-2 ("The Board"), its employees are paid by the public fisc, *see* R136 § (C)(4); R140 § 18-13, and PAB members are local

[2] Spectrum News Staff, "Police Accountability Board Referendum Passes at the Ballot Box," Spectrum Local News (Nov. 6, 2019), https://spectrumlocalnews.com/nys/rochester/politics/2019/11/06/police-accountability-board-referendum-passes-.

"officers" as defined by the Charter, *see* Charter of the City of Rochester § 2-18(B)(5).

As detailed in Article XVII, the PAB has the power and duty to:

- Review and publicly recommended changes to RPD policies, procedures, and training, including on issues of bias, use of force, de-escalation policies, and accommodation of disabilities. R128, R130, R134-35 §§ 18-3(J), 18-5(C), 18-5(K).

- Conduct community outreach, including giving the public "information about their rights and responsibilities regarding encounters with law enforcement," soliciting input from youth, and publicizing complaint procedures. R137 § 18-7(B).

- Produce reports quarterly and annually. R138 § 18-11(C).

- Perform audits of investigations of civilian complaints and evaluate its own processes and outcomes on an annual basis. R140 § 18-12.

- Conduct independent investigations of complaints of misconduct, including by issuing subpoenas and reviewing investigatory materials gathered by the RPD. R127, R130, R131 §§ 18-3(E), 18-5(A), 18-5(G).

- Establish, in conjunction with the Chief of the RPD and the Locust Club President (and before holding any disciplinary hearings), a "disciplinary matrix" setting penalty levels based on the gravity of the misconduct and prior sustained complaints. R130, R134 §§ 18-5(B), 18-5(J).

- Conduct disciplinary hearings and decide whether the officer committed misconduct and, if so, the *minimum* disciplinary action to be taken pursuant to the disciplinary matrix. The Chief may impose "any additional discipline beyond that recommended by the Board." R132, R134 §§ 18-5(H), 18-5(J).

Article XVII (Local Law No. 2, as incorporated into the 1907 Charter) also expressly accords RPD officers procedural rights during the PAB's disciplinary process, borrowing from the New York State Civil Service Law. Among those rights are:

- The right to counsel and the right to call witnesses at disciplinary hearings, as well as the protections set forth in Civil Service Law § 75, which the statute borrows and imports. R133 § 18-5(I)(7).

- The right to appeal any final determination of the PAB as a whole; the statute borrows and imports the appeal rights embodied in Civil Service Law § 76. R134 § 18-5(I)(10)(e).

PROCEDURAL HISTORY

On September 9, 2019—after Local Law No. 2 was enacted by the Council and signed by the Mayor, but before the referendum—the Rochester Police Locust Club (the police union) and its president filed this hybrid Article 78 and Declaratory Judgment action and moved for a preliminary injunction to block the referendum. The Supreme Court, Monroe County (Ark, J.) enjoined the referendum, but the Appellate Division reversed, and permitted the referendum to proceed. R50-51; *Rochester Police Locust Club, Inc. v. City of Rochester*, 176 A.D.3d 1646, 1647 (4th Dep't 2019). Rochester voters passed the referendum approving Local Law No. 2 by a three-to-one margin. Nine PAB members were

appointed and the PAB held its first meeting on January 28, 2020. *See* City of Rochester, "Past Board Meetings," https://www.cityofrochester.gov/PAB/.[3]

The Merits Ruling of the Supreme Court, Monroe County

The Supreme Court heard the case on its merits and invalidated that portion of Local Law No. 2 that empowers the PAB to "conduct[] hearings and disciplin[e] officers of the City of Rochester Police Department." R35. The Supreme Court held that, "[u]ntil 1985, the City of Rochester unquestionably possessed unfettered, exclusive authority to regulate matters of police discipline," R25, citing this Court's *NYC PBA* line of cases and the "'grandfathering' exception" to the Civil Service Law, R21-25. But the Supreme Court further held that Rochester's passage of Local Law No. 2-1985 "ended the City's 'grandfather' exemption," such that, after 1985, Rochester was required to collectively bargain police discipline under the Taylor Law. *Id.*[4] The Council appealed.

[3] On January 28, 2020, the Supreme Court entered a Stipulated Injunction between the parties to maintain the pre-Local Law No. 2 status quo as to any investigations and discipline of police officers to "avoid the expenditure of time and resources which would be associated with" a further preliminary injunction motion and without waiver of any party's arguments. R45.

[4] The Supreme Court also held that Local Law No. 2's disciplinary regime "facially conflicts" with Civil Service Law § 75 and Unconsolidated Law § 891's command that "'[h]earings upon charges [against police officers] . . . shall be held by the officer or body having the power to remove the person charged'" or a designee, R18 (emphasis omitted), because "[a]lthough the PAB shall make 'the final decision of discipline,' the PAB has no inherent authority to punish or remove the officer." R19. On appeal, the Appellate Division rejected this conclusion, holding that, because Local Law No. 2 designated the PAB as the body with power to "remove" a police officer for misconduct, Local Law No. 2 did not violate Civil Service Law § 75(2) and Unconsolidated Laws § 891. R434.

The Ruling of the Appellate Division, Fourth Department

On June 11, 2021, the Appellate Division issued an Opinion and Order affirming the lower court's decision in part, but vacating that portion of the Supreme Court judgment referring Local Law No. 2 back to the Council. *See* R425-35 ("Opinion"); *supra*, note 4.

Consistent with this Court's precedents in *NYC PBA* and its progeny, the Appellate Division held that, where a pre-1967 state law expressly provides for control of police discipline by local officials, "the subject of police discipline is exempt from the presumption of collective bargaining that would otherwise prevail by virtue of Civil Service Law § 204(2)." R429. The panel found that the 1907 Charter provision was just such a preexisting law and, therefore, that, "at the time of its adoption [in 1967], the Taylor Law neither displaced Rochester's then-existing practices for disciplining police officers nor required collective bargaining of that topic going forward." R430.

But the Appellate Division further held that, in 1985, the City "explicitly surrendered" its "exempt[ion]" from the Taylor Law by passing Local

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The Supreme Court's order also referred Local Law No. 2 "back to the Rochester City Council to be reconciled and made compliant with New York State law and the Rochester City Charter." R35. The Appellate Division vacated that portion of the order, finding that the "court had no power to 'refer' the challenged law back to the legislative body that enacted it for amendment or correction." R434. The Supreme Court's erroneous determination regarding Civil Service Law § 75(2) and Unconsolidated Laws § 891, and its referral back to the Council are not at issue in this appeal.

Law No. 2-1985, which repealed Charter Section 8A-7, titled "Charges and trials of policemen," "for the reason that this subject matter is covered in the Civil Service Law." R430-31; *see also* R317. The Appellate Division found that as of 1985, the 1907 Charter was no longer "in force" and, as a result, Rochester was thereafter "statutorily mandated" to collectively bargain police discipline under the Taylor Law. R431. On this basis, the Appellate Division invalidated Local Law No. 2's grant of disciplinary powers to the PAB. *Id.*

The Council sought leave to appeal the Appellate Division Opinion and on November 23, 2021, this Court granted the Council's motion. R424.

ARGUMENT

I. UNDER THE *NYC PBA* LINE OF CASES, THE 1907 CHARTER PROHIBITS ROCHESTER FROM COLLECTIVELY BARGAINING OVER POLICE DISCIPLINE

This Court's precedents in *Patrolmen's Benevolent Association of City of New York, Inc. v. New York State Public Employment Relations Board*, 6 N.Y.3d 563, 573 (2006), *Matter of the Town of Wallkill v. Civil Serv. Empls. Assn, Inc.,* 19 N.Y.3d 1066 (2012), and *Matter of the City of Schenectady v. New York State Pub. Empl. Relations Bd.*, 30 N.Y.3d 109 (2017), make one conclusion indisputably clear: where, prior to the passage of the Taylor Law in 1967, the State Legislature granted local officials the power to discipline police officers, those local authorities are not merely "exempted" from the Taylor Law's requirement of

collective bargaining over police disciplinary matters; they are *prohibited* from collectively bargaining over such matters. *See Schenectady*, 30 N.Y.3d at 113 (explaining that *NYC PBA* and *Wallkill* "held that the statutory grants of local control over police discipline . . . rendered discipline a prohibited subject for collective bargaining"); *id.* at 116 ("[P]olice discipline is a prohibited subject of bargaining in Schenectady."); *NYC PBA*, 6 N.Y.3d at 571-72 ("where such legislation is in force, the policy favoring control over the police prevails, and collective bargaining over disciplinary matters is prohibited"); *Wallkill*, 19 N.Y.3d at 1069 ("the subject of police discipline resides with the Town Board and is a prohibited subject of collective bargaining between the Town and Wallkill PBA").

Here, the State Legislature granted Rochester officials the power to discipline police officers in 1907—fully 60 years before the passage of the Taylor Law. That grant of authority, embodied in the 1907 Charter of the City of Rochester that remains in effect today, means that Rochester is not just "exempt" from the Taylor Law's collective bargaining requirement; it is *prohibited* from surrendering its power to control police discipline in favor of collective bargaining.

The distinction between an exemption and a prohibition is critical. The Appellate Division correctly held that, when the Legislature passed the Taylor Law in 1967, it intended to exclude Rochester from the Law's reach, because the State had earlier—in 1907—granted Rochester local control over police discipline.

But the panel erred in treating this exclusion as an "exempt[ion]" from the Taylor Law that could then be lost by subsequent local legislative action, like an exemption from a new zoning rule afforded to a preexisting, non-conforming land use, which can be lost by subsequent changes to the property. This Court's precedents make clear that pre-1967 grants of local control over police discipline are not "exceptions to a new rule" arising under the Taylor Law; they are themselves important statements of state policy. Unless and until these expressions of state policy are reversed or modified by an action of the State Legislature, local officials are prohibited from acting contrary to that state policy choice—including by attempting to "abdicate" authority that the State has conferred upon them, and subjecting matters related to that authority to collective bargaining.

A. This Court has Repeatedly Held That a Pre-Taylor Law Grant of Power Over Police Discipline to a Locality Prohibits Bargaining Over Discipline

In *NYC PBA,* this Court found that, by enacting New York City's charter in 1897, the State Legislature had expressly committed authority over police discipline to local officials in New York City. In considering whether the Taylor Law required New York City to negotiate police discipline with the police union, the Court held that "some subjects are excluded from collective bargaining as a matter of policy, even where no statute explicitly says so." 6 N.Y.3d at 572.

This Court found language in New York City's 1897 charter dispositive of local control: "'The [police] commissioner shall have cognizance and control of the government, administration, disposition and discipline of the department, and of the police force of the department.'" *Id.* at 573-74 (quoting New York City Charter) (emphasis omitted). On that basis, this Court held that the Taylor Law's requirement of collective bargaining must give way to the state-enacted charter that predated it. "[W]here . . . legislation [committing police discipline to local authority] is in force, the policy favoring control over the police prevails, and collective bargaining over disciplinary matters is prohibited." *Id.* at 571-72.

Twice more, in *Wallkill*, 19 N.Y.3d at 1069, and *Schenectady*, 30 N.Y.3d at 115-16, this Court reaffirmed the core principle of *NYC PBA*, holding that specific state laws that pre-dated the Taylor Law and accorded local officials control over police discipline (the Town Law and the Second-Class Cities Law, respectively) trump the Taylor Law's general policy favoring collective bargaining. In both cases, this Court has held, the Taylor Law "must give way" to preexisting state grants of local control.

Indeed, this Court has gone further, holding that in such cases localities are "prohibited" from engaging in collective bargaining; they cannot "surrender" or "abdicate" (i.e., bargain away) their state-delegated duty and responsibility to exercise disciplinary authority over their police. This language of

“prohibition” was not, we submit, a careless word choice; it reflected this Court’s careful balancing of important state policies. Although the right of public employees to collectively bargain reflects a strong state policy, there exists a “competing policy” to which it must sometimes yield—namely, the “policy favoring strong disciplinary authority for those in charge of police forces.” *NYC PBA*, 6 N.Y.3d at 571. Where the Legislature, prior to enacting the Taylor Law, had specifically empowered a locality with “official authority over the police,” the Taylor Law’s general command of collective bargaining gives way, because it is “not sufficient to displace the more specific authority” requiring local control. *Schenectady*, 30 N.Y.3d at 115.

The prohibition on collective bargaining over police discipline first enunciated in *NYC PBA* is in line with jurisprudence from this Court going back to the 1970s holding that municipalities cannot relinquish control over certain terms of teacher and police officer employment through collective bargaining. As a matter of state policy, localities must exercise, and cannot abdicate, state-granted powers to collective bargaining. Just as municipalities to which the State has granted specified powers over police discipline, like Rochester, “may not surrender, in collective bargaining agreements, their ultimate responsibility” for those issues, *NYC PBA*, 6 N.Y.3d at 572, other, similarly-situated municipalities cannot “surrender, in collective bargaining,” the “right to choose among police

officers seeking promotion," the "ultimate responsibility for deciding on teacher tenure," or the "right to inspect teachers' personnel files." *Id.* (citing cases). The Legislature expressly delegated these responsibilities to the relevant localities, implicitly excluding them from collective bargaining. *See Cohoes City Sch. Dist. v. Cohoes Tchrs. Ass'n*, 40 N.Y.2d 774 (1976); *Bd. of Ed., Great Neck Union Free Sch. Dist. v. Areman*, 41 N.Y.2d 527 (1977); *Schenectady Police Benevolent Ass'n v. New York State Pub. Emp. Rels. Bd*., 85 N.Y.2d 480 (1995); *In re Buffalo Police Benevolent Ass'n (City of Buffalo)*, 4 N.Y.3d 660 (2005).

The Legislature made a policy determination that these responsibilities should not be abandoned to the collective bargaining process, which is outside democratic channels and beyond the reach of democratic accountability. In the teacher tenure context, this Court held that because the "responsibility, with the accompanying grant of enabling authority, to select and screen the teaching personnel in the school must be exercised by the board for the benefit of the pupils and the school district . . . it is beyond the power of the board to surrender this responsibility as part of any agreement reached in consequence of collective bargaining." *Cohoes City Sch. Dist.,* 40 N.Y.2d at 777-78.

Likewise, by providing for "control of police discipline by local officials in certain communities," the State made a policy choice to place the important responsibility for discipline at the local level. *NYC PBA*, 6 N.Y.3d at

573. As in the teacher tenure context, that responsibility cannot be "surrender[ed] . . . as part of any agreement reached in consequence of collective bargaining." *Cohoes City Sch. Dist.*, 40 N.Y.2d at 778.

When a city is required to *bargain* over discipline, it loses its power to unilaterally *decide* how employees should be disciplined. *See NYC PBA*, 6 N.Y.3d at 572. Instead, it must sit at the bargaining table with unions and agree to a discipline system that the union finds acceptable—or risk that an arbitration panel will unilaterally decide the contractual terms of discipline. N.Y. Civ. Serv. Law § 209(4).

And while the state policy favoring local control may be set forth in explicit statutory language, it need not be. The scope of what "may be the subject of collective bargaining is limited 'by plain and clear, rather than express, prohibitions in the statute or decisional law' as well as in some instances by '[p]ublic policy, whether derived from, and whether explicit or implicit in statute or decisional law, or in neither.'" *Cohoes City Sch. Dist.*, 40 N.Y.2d at 778 (quoting *Syracuse Teachers Ass'n v Board of Ed.*, 35 N.Y.2d 743, 744 (1974) and *Susquehanna Valley Cent. Sch. Dist. At Conklin v. Susquehanna Valley Teachers' Ass'n*, 37 N.Y.2d 614, 616–17 (1975)).

B. The State Granted Rochester Power Over Police Discipline Long Before Enacting the Taylor Law

In 1907, in "An Act Constituting the Charter of the City of Rochester," the State Legislature expressly granted Rochester officials the power to control and discipline their municipal police force. This grant of authority is reflected in section 324 (which provided that the public safety commissioner "must make rules and regulations . . . for the . . . discipline of the police force"), and section 330 ("it is . . . the duty of the commissioner to hear, try and determine [charges alleged against police officers] according to the rules made by him in relation to such matters" and "may subject him to any other discipline prescribed in the rules promulgated by the commissioner of public safety"). R258, R259-60 §§ 324, 330. Local control was maintained throughout every iteration of the 1907 Charter's provisions governing police services since that time. *See supra* at 8-11.

Like the state laws analyzed in the trio of cases from this Court, the above provisions of the 1907 Charter were "enacted prior to Civil Service Law §§ 75 and 76, [and] specific[ally] commit[] police discipline to the commissioner and detail[] the relevant procedures." *Schenectady*, 30 N.Y.3d at 115. As a result, the Taylor Law's "general command regarding collective bargaining is not sufficient to displace the more specific authority granted" to Rochester by the 1907 Charter. *Id.* The power and responsibility to discipline police officers was delegated to

Rochester by the State in 1907. R430 (Opinion at 6). In the last 115 years, the State has neither retracted that power, nor relieved Rochester of that responsibility.

All of this is undisputed. The Appellate Division recognized that the 1907 Charter is a state law enacted prior to the Taylor Law; that the Charter granted City officials the power to discipline police; and that the Taylor Law's requirement of collective bargaining in this area did not apply to Rochester prior to 1985. R430 (Opinion at 6). This ends the matter—or at least it should.

But, instead of viewing the 1907 Charter as a century-plus-old reflection of state policy favoring local control of police for Rochester, the Appellate Division held the 1907 Charter should be treated as an "exemption" or "exception" to the Taylor Law's requirement of collective bargaining, and concluded that "exemption" was lost or "surrendered" by a 1985 amendment to the Charter. This conclusion contravenes this Court's command in the *NYC PBA* line of cases that such a pre-1967 state law represents a state policy choice affirmatively favoring local control over police discipline, and thus gives rise to a *prohibition* on collective bargaining. And it is contrary to this Court's repeated holdings that localities cannot lawfully "surrender" their pre-1967 powers to the vicissitudes of collective bargaining.

II. LOCAL LAW NO. 2-1985 DID NOT ALTER THE 1907 STATE GRANT OF POWER

At the root of the Appellate Division's ruling in this case is the following proposition: that Rochester's action in 1985 repealing Section 8A-7 ("Charges and trials of policemen") "for the reason that this subject matter is covered in the Civil Service Law" effectively nullified the Legislature's 1907 grant of authority to Rochester officials. R430-31 (Opinion at 6-7); *see also* R317.

This proposition was incorrect for three fundamental reasons:

First, because the City of Rochester lacked the power to displace the State's delegation to Rochester of authority over, and responsibility for, police discipline;

Second, because the record, read on its own terms, makes clear that, in 1985, Rochester did not intend to waive its state-granted right of local control—and that it *couldn't have* intended to, because that right was not identified by this Court until 2006; and,

Third, because, contrary to the Appellate Division's reading of *NYC PBA* and its progeny, the relevant point in time when "preexisting laws" had to have been "in force" to render the Taylor Law inapplicable was 1967, when the Taylor Law was passed, not some other date "when the municipality refuses to collectively bargain over police discipline." R430 (Opinion at 6).

A. Rochester Lacked Both the Power and the Intent to Nullify the 1907 Policy of the State by Local Law

1. Municipal Home Rule Law Does Not Extend to Overriding State Policy in This Context

The 1907 charter "reflect[ed] the policy of the State that police discipline in [Rochester] is subject to the Commissioner's authority." *NYC PBA*, 6 N.Y.3d at 574. A municipality has no power to alter that state determination. As of 1967, when the State passed the Taylor Law (and indeed, through today), the State's last legislative word was its 1907 statement that discipline of Rochester officers was committed to local control, not collective bargaining. *See Schenectady*, 30 N.Y.3d at 113. The State never revoked the 1907 Charter. And it never enacted *any* legislation that permits Rochester to collectively bargain police discipline. The City of Rochester, as a creature of the State, does not have the power to override, by mere local legislation, the State's determination that Rochester is carved out of the Taylor Law and cannot bargain police discipline. Only the State itself could do that—and it never has.

The Municipal Home Rule Law is not to the contrary. Via the 1923 Home Rule amendment to the State Constitution and the Municipal Home Rule Law, the State Legislature afforded municipalities the power to amend their charters within certain limits. *See* N.Y. Mun. Home Rule Law §§ 10(1)(ii)(c)(1) (Rochester can revise its charter "by local law adopted by its legislative body").

The Municipal Home Rule Law permits Rochester to shift the locus of disciplinary power *within* the municipal government structure. Moving that power from the "commissioner of public safety"—the term used in sections 324 and 330 of the 1907 Charter—to some different and newly-created municipal official or body ("Police Commissioner," "Chief of Police," for example), with somewhat different authority, is something Rochester has done repeatedly, and lawfully, both before and after 1967.[5] Local Law No. 2 of 2019 is the most recent example of this kind of change; it moves police disciplinary power, in part, to the PAB, a "public agency," *see* R126 § 18-2 ("The Board"), consisting of local "officers" as defined in the Charter, *see* Charter of the City of Rochester § 2-18(B)(5).

Creating new roles, offices, and mechanisms for disciplining police officers is one thing; surrendering the municipality's state-afforded power altogether to the process of collective bargaining is something else again—and it is forbidden by this Court's jurisprudence. Under both the New York State Constitution and the Municipal Home Rule Law, localities like Rochester may not

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[5] *See, e.g.*, Charter of the City of Rochester §§ 17-4–17-31 (describing history of amendments to charter since 1907); R234 (replacing section 324 with section 129); R307 (1963 local law, reflecting that § 330 was renumbered to § 387); *see* Comp-2, 3 (1970 amendment abolishing Commissioner of Public Safety and creating Commissioner of Police with control over charges of misconduct); R353-54 (1974 amendment replacing Commissioner of Police with Chief of Police); R314, R323 (1985 amendment creating Public Safety Administration and Public Safety Commissioner with power to appoint and remove police officers); R333 (deleting mention of the Commissioner of Public Safety and making the Chief of Police "the appointing authority for members and employees of the Police Department").

adopt local laws inconsistent with any general law or "to the extent that the legislature shall restrict the adoption of such a local law." N.Y. Const, art. IX, § 2(c)(i), (ii); Municipal Home Rule Law § 10(1)(i), (ii). In addition, "[t]he 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). In areas that are "partly state and partly local . . . [t]he power of the city is subordinate at such times to the power of the state." *Adler v. Deegan*, 251 N.Y. 467, 491 (1929), *amended*, 252 N.Y. 615 (1930) (Cardozo, J.).

Thus, while Rochester may adopt local laws that are "in harmony" with the Legislature's stated policy, it cannot use the Municipal Home Rule Law to nullify or deviate from state law (except under very circumscribed conditions not applicable here), or to frustrate state policy. *Id.* Here, that policy—that police discipline remains in the control of Rochester city officials—is embodied in two state laws: the 1907 Charter, which remains in effect today; and the Civil Service Law's carve out for preexisting state laws.[6]

[6] Civil Service Law § 76(4) 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. N.Y. Civ. Serv. Law § 76(4). Unlike Civil Service Law § 76(4), the Taylor Law does not contain explicit language referencing or "grandfathering" preexisting laws. But, as the Appellate Division explained, "section 76 (4) was the juridical muse for the section 204 (2) exception created by the Court of Appeals in *PBA*." R430 (Opinion at 6). *See also NYC PBA*, 6

Quite unlike the pre-existing, non-conforming property use to which it has been analogized, local control over police discipline in specific municipalities like Rochester is neither archaic nor disfavored—much less conduct that the Legislature sought to have fade away in favor of collective bargaining. To the contrary, when it enacted the Taylor Law, the Legislature chose to *favor and protect* the right and obligation of certain cities to exercise "strong disciplinary authority for those in charge of police forces" going forward—*without* the restrictions born of collective bargaining. *NYC PBA*, 6 N.Y.3d at 571. As this Court has explained, a policy of local control over police discipline is responsive to the unique "quasi-military nature of a police force," the "importan[ce]" of the police officers "to the safety of the community," and "the sensitive nature of the work." *Id.* at 576 (cleaned up). The "public interest in preserving official authority over the police," *id.,* rather than a negotiated regime, furthers the "importance of maintaining both discipline and morale within the city's chosen mode of organization for its police force," *Silverman v. McGuire*, 51 N.Y.2d 228, 231–32 (1980) (cleaned up). For cities—like Rochester—where the Legislature had specifically provided that those in "charge of [the] police" should control police

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N.Y.3d at 572 (holding inapplicable all of the Taylor Law's provisions where there is a preexisting grant of disciplinary authority to the locality: "some subjects are excluded from collective bargaining as a matter of policy, even where *no statute explicitly says so*.") (emphasis added)).

discipline, that decision to prohibit collective bargaining was "a matter of policy" set by the State, which no locality has power to trump. *NYC PBA*, 6 N.Y.3d at 571, 572.

In the decision below, the Appellate Division held that the "1985 [Charter Amendment] repeal actually aligned Rochester with the modern-day Legislature's policy favoring collective bargaining of police discipline." R431-32 (Opinion at 7-8). This was error. This Court has repeatedly held that the State has *two* state policies in this area that are *both* important, even as they are in tension: one in favor of collective bargaining, reflected in the Taylor Law; and a different one—one that predated the Taylor Law, but remained an important state policy at the time of its 1967 passage—that favors local authority over police discipline in localities where the Legislature had so placed that responsibility. *See NYC PBA*, 6 N.Y.3d at 575–76 ("While the Taylor Law policy favoring collective bargaining is a strong one, so is the policy favoring the authority of public officials over the police."). The Appellate Division panel dismissed the second policy as anachronistic (i.e., something other than "modern-day"), all but erasing it from the analysis.

By failing to acknowledge the vitality and importance of the *earlier* (pre-1967) state policy favoring local control, the Appellate Division also failed to acknowledge that the *NYC PBA* jurisprudence created two—and only two—

categories of municipalities for purposes of Taylor Law application: those that are *required* by the Taylor Law to collectively bargain over police discipline (because there was no pre-1967 state statute that specifically empowered local officials), and those that are *prohibited* from negotiating discipline (because the State, by pre-1967 statute, had committed the "ultimate responsibility" of discipline to local officials). *NYC PBA*, 6 N.Y.3d at 572. As this Court put it in *Schenectady*, "some local counterparts have the right to bargain about police discipline, and some do not." 30 N.Y.3d at 118. The Appellate Division's ruling posits the existence of a third category—a locality that was *once* exempted by prior state law from the Taylor Law, but then *later* somehow submitted itself to the Taylor Law by unilateral local action. This cannot be reconciled with the framework created by *NYC PBA* and its progeny.

Whatever the Rochester City Council may have believed when it suggested in 1985 that police discipline was a subject already "covered by the Civil Service Law"—and it is difficult to tell from the scant record, as detailed below—the City lacked the power to submit itself to the Taylor Law or forfeit the State-granted control over discipline. *NYC PBA*, 6 N.Y.3d at 570.

Reading Local Law No. 2-1985 as subjecting Rochester to the Taylor Law's command of collective bargaining is inconsistent with the Legislature's intent that the Taylor Law *not* apply to cities like Rochester and would therefore

violate the Constitution and Municipal Home Rule Law's savings clauses. *See* N.Y. Const, art. IX, § 2(c)(i), (ii); Municipal Home Rule Law § 10(1)(i), (ii).

Put another way, the 1985 charter amendment does not mandate collective bargaining over police discipline in Rochester because it cannot. The power to discipline police officers was given by the State to the locality in the 1907 Charter and has never been repealed. Consistent with its home-rule power, the City of Rochester has a free hand to restructure the police disciplinary process *within* municipal government, including via Local Law No. 2 and the referendum process. But it cannot abdicate that responsibility or surrender its state-delegated power to discipline police officers by voluntarily subjecting itself to the Taylor Law's collective bargaining regime. That option is simply not available to it.

2. Local Law No. 2-1985 Does Not Surrender Official Authority Over Police Discipline

Quite apart from the issue of whether, as a matter of state law, the City of Rochester was *empowered* to surrender its state-delegated control over police discipline is the separate question of whether the City of Rochester *intended* to surrender that power in 1985. It didn't. The text of these 1985 amendments and their history express no such intent. Local Law No. 2-1985—the provision upon which the Appellate Division relied in finding that Rochester had "explicitly surrendered" its "exempt[ion]" from the Taylor Law—does not state that Rochester intends to abdicate local control to collective bargaining. It never

mentions collective bargaining or the Taylor Law at all. It never expresses an intent to surrender municipal authority. And the legislative history evinces no such intent. The 1985 law was part of an internal restructuring that placed the police department under a new public safety administration and in doing so preserved local officials' control over police officers. And Rochester's actions in 1985 were necessarily uninformed by this Court's rulings in *NYC PBA* and its progeny, cases that would be decided more than two decades after this amendment.

Local Law No. 2-1985, which is entitled "Local Law Amending the City Charter with Respect to Disciplinary Matters Involving Policemen and Firemen," is not a substantive provision of law. It simply repeals as unnecessary Section 8A-7, "Charges and trials of policemen," as part of a broader restructuring of the City of Rochester's public safety apparatus. *See* R330. What the Appellate Division found significant in Local Law No. 2-1985 is the basis for repeal: "for the reason that this subject matter is covered in the Civil Service Law." R317, R328. It is this statement of *reasoning* that the Appellate Division held constituted the "explicit surrender" of local control. R431 (Opinion at 7).

This is a bridge too far. Nowhere does the 1985 amendment state that Rochester intended or wished to surrender the power accorded it by the State in the 1907 Charter. At worst, it reflects the City's view, at that time, of what was duplicative—what "the Civil Service law" already "covered." The "Civil Service

Law" is a very broad subject—it includes many provisions that relate to "charges and trials of policemen," including those that guarantee due-process-type procedural rights to "policeman" and other public employees. *See, e.g.*, N. Y. Civ. Serv. Law § 75(2) (detailing procedure for disciplinary actions, including right to representation and to summon witnesses, requirement of written notice of charges, and requirement that hearing officer make a record of the hearing). Indeed, this is not unlike Local Law No. 2 (2019), which itself imports the "due process rights delineated in NYS Civil Service Law Section 75" and the appeal rights embodied in Civil Service Law § 76. R133 § 18-5(I)(7); R134 § 18-5(I)(10)(e). There is nothing in Local Law No. 2-1985 that says its reference to "the Civil Service law" is specifically a reference to the *Taylor Law*—which is but one Article in the Civil Service Law—or that it was intended to require collective bargaining over the terms of police discipline. To suggest otherwise is to assign to the Rochester City Council an intent that it did not express.

The legislative history of the 1985 Charter amendments contains no support for the proposition that Rochester intended a sea-change in the legal landscape around police discipline when it repealed the "charges and trials" provision. Three pages of introductory text submitted by the City Manager in support of Local Law No 2-1985 (and its companion law) say nothing about collective bargaining. *Id.* There simply is no evidence that these amendments

were intended as momentous or meaningful changes at the time—much less that they reflected a knowing, voluntary, and intentional waiver of the municipality's then nearly-80-year right to discipline its police officers. Putting this legislative action in historical context, the very notion of such a waiver is nonsensical: as of 1985, municipalities that had been granted local control of their police forces prior to 1967 could not have known the nature of that right vis the Taylor Law, because this Court would not enunciate the rule for another 21 years.

What, then, were the 1985 Charter amendments in Rochester seeking to achieve? The answer is found in Local Law No. 1-1985—the companion law that was introduced along with the repeal of the "charges and trials" provisions. Local Law No. 1-1985's purpose, as stated in the legislative record, was to reorganize the City's police and fire departments and the office of emergency communications under a new Public Safety Administration to promote "efficiency and productivity" in the area of public safety. R312-14. In short, the 1985 amendments were yet another in a long line of municipal restructuring of the fire-police-emergency services in Rochester.

And, as was the case in prior reorganization efforts, far from evincing an intent to abdicate local control over police discipline, the text of the 1985 amendments expressly *retains* "official authority over the police," albeit in the hands of a newly-designated municipal official. *PBA NYC*, 6 N.Y.3d 576.

Section 5 of Local Law No. 1-1985 added Section 8-2 "Commissioner of Public Safety" to the Charter, which, among other things, provided that the newly created "Commissioner shall have the power of an appointing officer in the agencies under the Commissioner's jurisdiction, and shall have the power to issue subpoenas, administer oaths and take affidavits with respect to matters pertaining to the Public Safety Administration." R323. Section 6 of Local Law No. 1-1985 replaced Sections 8A-1 and 8A-2, which had conferred on the Chief of Police "exclusive control of the administration of the Police Department" (including the duty and power to "hear and decide all charges of misconduct and incompetency made against any officer or member of the Police Department" and to "appoint" personnel). In its stead, the amendment inserted a new Section 8A-1 "Chief of Police; powers and duties." R324; Comp-2; R353-54. The new Section 8A-1 *also* provided that the Chief of Police "shall have control of [the Police Department's] administration," "subject to the rules of the Commissioner of Public Safety," and conferred on the Chief the "power and . . . duty to see that all rules and regulations relating to the Police Department are enforced and carried out; to issue subpoenas, administer oaths and take affidavits with respect to all matters pertaining to the Police Department; and perform such other duties as may be prescribed by law or ordinance or assigned by the Commissioner of Public Safety." R324.

The 1985 amendments ensured that Rochester officials maintained broad control over the City's police, including: (1) the powers of an appointing officer over the police department (i.e., the ability to fire and hire officers); (2) the power to control the administration of the police department, including through making and enforcing rules; and (3) the power to use investigative tools, including subpoenas and affidavits, "with respect to *all* matters pertaining to the Police Department." R324 (emphasis added). Accordingly, the 1985 changes to the Charter reflect a continuation of the long state policy and tradition of local control over police going back to 1907, albeit exercised, over the years, by different local officials interacting in new ways. *See* R258 ("commissioner must make rules and regulations . . . for the government, direction, management and discipline of the police force"). The changes made in 1985 were neither an abdication nor an abandonment of the regime of local control; they were innovations and tweaks to that regime designed to increase "efficiency and productivity." R313. The language, structure, and, as shown below, history, cannot support or imply repeal of the 1907 grant of state power over police discipline. *See also Schenectady*, 30 N.Y.3d at 117 ("'Generally, a statute is deemed impliedly repealed by another statute only if the two are in such conflict that it is impossible to give some effect to both. If a reasonable field of operation can be found for each statute, that

construction should be adopted.'") (quoting *Alweis v. Evans,* 69 N.Y.2d 199, 204 (1987)).

The Appellate Division also held that Rochester "exercised its home rule powers to overturn the Legislature's 1907 policy determination." R431 (Opinion at 7). This too was error. Even where a municipality has the power to displace a state law, under Section 22 of the Municipal Home Rule Law, "evidence [of] a legislative intent to amend or supersede those provisions of a state law sought to be amended or superseded" is required to do so. *Tpk. Woods, Inc. v. Town of Stony Point*, 70 N.Y.2d 735, 737 (1987). "[D]efiniteness and explicitness" is required "to avoid the confusion that would result if one could not discern whether the local legislature intended to supersede an entire state statute, or only part of one—and, if only a part, which part." *Id.* No such evidence exists in this record.

Kamhi v. Town of Yorktown, 74 N.Y.2d 423 (1989), is instructive here. There, the Town of Yorktown passed a local law imposing a recreation fee as a condition of a site plan approval for a local development. The developer contested the fee, arguing that it violated a provision of the New York State Town Law; in response, the town argued that it was empowered by the Municipal Home Rule Law to "supersede" state law in this circumstance. *Id.* at 426-27. In *Kamhi,* this Court held that the locality may only "supersede" a state law when its states

"its intention [to do so] with definiteness and explicitness." *Id.* at 434. That condition is woefully absent from the 1985 Charter amendments. Whatever else one might think of Local Law No. 2-1985's reasoning-for-repeal language, it is not a "definite" or "explicit" statement of intent to "supersede" the 1907 Charter.

Moreover, Rochester could not have intended Local Law No. 2-1985 to overturn the Legislature's policy choice so that it could commence bargaining over police discipline in 1985—because Rochester already had been collectively bargaining on this issue with the local police union since the mid-1970s. As early as 1976, the collective bargaining agreement between the City and the Locust Club included a provision, Article 20, that stated that "disciplinary procedures involving members of the Bargaining Unit covered in this agreement shall be in accordance with Articles 75 and 76 of the New York State Civil Service Law."[7] Local Law No. 2-1985 thus changed nothing in Rochester. The most logical explanation for Local Law No. 2-1985 is that it was a housekeeping amendment reflecting what

[7] *See* Agreement Between the City of Rochester, NY and the Rochester Police Locust Club, Inc., July 1, 1976 to June 30, 1978, *available at* https://www.cityofrochester.gov/WorkArea/DownloadAsset.aspx?id=21474846017. Articles governing police discipline were likely present in even earlier collective bargaining agreements between Rochester and the RPLC. According to a newspaper article, the 1974 collective bargaining agreement with the RPLC contained a section governing discipline of officer misconduct. *See* Gino Fanelli, "From social club to obstacle to police reform. How the Locust Club came to be," *Rochester City Newspaper*, (March 1, 2021), https://www.rochestercitynewspaper.com/rochester/from-social-club-to-obstacle-to-police-reform-how-the-locust-club-came-to-be/Content?oid=12890026.

had been in the collective bargaining agreement, by that point, for nearly a decade. R328.

Finally, in 1985, Rochester had no way of suspecting that its obligations under the 1907 Charter were superior to any claims under the Taylor Law (which is but one part of the Civil Service Law). That's because this Court's decisional law would not identify such rights for another two decades. Any misunderstanding on Rochester's part of the import of the interplay between pre-1967 state laws giving localities the power to discipline police on the one hand, and the Taylor Law on the other, is understandable and was widespread throughout the state, as evidenced by *NYC PBA* itself and the numerous municipalities that have been the subject of post-*NYC PBA* challenges.

As a matter of simple logic, Rochester could not, in 1985, surrender a right that was not identified by this Court until 2006, in this Court's decision in *NYC PBA*. R431 (Opinion at 7). Significantly, in *Schenectady* this Court expressly rejected the argument that prior conduct by a municipality was relevant to, or constituted a waiver of, state-endowed rights of a locality to control its police. *Schenectady* held that the city's pre-2006 "course of dealing" suggesting that it believed itself bound to collectively bargain police discipline did not imply a "waiver" of the locality's State-granted rights. 30 N.Y.3d at 117. And in *Wallkill*, this Court found a 2007 local law providing for police disciplinary proceedings

before the Town Board was a valid exercise of Town Law § 155's grant of authority over police discipline, notwithstanding that the Town had bargained with the local police union over discipline since 1995. 19 N.Y.3d at 1068. So too here. There can be no dispute that the 1985 law "took place prior to 2006," *id.*,—i.e., before *NYC PBA*—and that Rochester's conduct in enacting it was based upon—at worst—a mistaken belief about the reach of the Taylor Law.

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The City of Rochester never "explicitly surrender[ed]" its known right to discipline police, because it could not. R431 (Opinion at 7). And this Court has never held that a municipality could "surrender" that right even if it wanted to. To do so would fundamentally undermine this Court's *NYC PBA* jurisprudence, creating a third category of municipalities and untold confusion about what local legislatures did and did not intend in the past. The 1985 Charter amendments in Rochester—which plainly keep in local hands the broad powers of police control granted by the Legislature in 1907 and, at worst, are ambiguous as to which aspects of the "Civil Service Law" they recognized as controlling—are a poor vehicle for a wholesale rewrite of this area of the law. They are not remotely impactful or clear enough to lawfully displace the power that the Legislature placed in Rochester's hands in 1907 and cannot overcome "the public interest in

preserving official authority over the police," which, as this Court recognized, "remains powerful." *NYC PBA*, 6 N.Y.3d at 576.

B. Legislation "In Force" in 1967, Not 1985 or 2019, Governs Rochester's Authority Over Police Discipline

Integral to the Appellate Division's analysis was its view that, for the *NYC PBA* "exemption" from the Taylor Law to apply, the "preexisting law in question must be 'in force' when the municipality refuses to collectively bargain over police discipline." R430 (Opinion at 6) (quoting *Schenectady*, 30 N.Y.3d at 115). Under the Appellate Division's view, the 1907 Charter (the "preexisting law") was not "in force" in 2019 when Local Law 2 passed, because the 1985 amendment reflected a decision on the part of Rochester to subject itself to "the Civil Service Law." R431 (Opinion at 7). As detailed above, however, the 1985 amendment could not overturn the Legislature's 1907 grant of authority to Rochester and the highly ambiguous and indirect amendment did not do so. But the Appellate Division *also* misread this Court's "in force" language, and reversal is required on that basis as well.

As this Court has explained, in order to effectively preempt the Taylor Law, the state law had to have been "in force" *in 1967*, when the Legislature passed the Taylor Law, not on some floating date such as "when the municipality refuses to collectively bargain," as the Appellate Division asserted. This Court's focus on 1967 as the key date reflects its effort to ascertain the Legislature's intent

when it passed the Taylor Law. *See Schenectady*, 30 N.Y.3d at 116-17 (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"). Where the State "policy favoring management authority over police disciplinary matters" is set forth in a state law enacted *before* 1967, the Legislature intended "that the policy favoring collective bargaining should give way." *NYC PBA*, 6 N.Y.3d at 576. It is for this reason that this Court in *Schenectady* found that a *2001* state statute had "no bearing on what the legislative intent was in 1906 (when the legislature passed the Second Class Cities Law) or 1967 (when the legislature adopted the Taylor Law)." *Schenectady*, 30 N.Y.3d at 118.[8]

Here, the 1907 Charter was clearly "in force" in 1967 (and it still is today), and the Legislature's intent was for it to remain so. Under the logic of *NYC PBA* and its progeny, the 1967 Legislature intended to preserve that state grant of authority, along with all other, similar legislation "in force" when the Taylor Law was enacted. The 1907 Charter was and remains the last word from the State Legislature about police discipline in Rochester, period full stop. As a result, the

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[8] This Court has also cited the so-called "grandfathering" language of Civil Service Law § 76(4), *see supra* note 6, in describing the need to focus on "preexisting laws" "that were passed decades before the Taylor Law existed," in *NYC PBA*, *Schenectady* and *Wallkill*. *NYC PBA*, 6 N.Y.3d at 573, 576. *See also Schenectady*, 30 N.Y.3d 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); *Wallkill*, 19 N.Y.3d 1069 (finding prohibition on collective bargaining based on "Town Law § 155, a general law enacted *prior* to Civil Service Law §§ 75 and 76")(emphasis added).

Taylor Law's "general command" about collective bargaining could not and did not displace the "specific authority" the Legislature granted Rochester in 1907 to determine police discipline of its own officers. *Schenectady*, 30 N.Y.3d at 115.

III. ROCHESTER'S STATE-GRANTED POWER OVER POLICE DISCIPLINE MAY BE VESTED IN A CIVILIAN BOARD

A. Rochester May Vest a New Public Agency, Like the PAB, With Its State-Granted Power Over Police Discipline

Having never abdicated its state-delegated right to control police discipline (in any event, it cannot lawfully do so), Rochester is free, subject to the Municipal Home Rule Law, to determine *which* municipal officers or bodies within the city structure should exercise that power and how. The Council's choice, through Local Law No. 2, was to place this power in the hands of a public agency with an all-civilian board. This is entirely permissible, and the Appellate Division's conclusion to the contrary is error. *See* R432 (Opinion at 8).

NYC PBA and its progeny describe the State's strong policy in favor of "official authority" over police discipline in general terms, not as being limited to a particular official, institution, or format. 6 N.Y.3d at 576. In some localities, "official authority" takes the form of the police commissioner, *see id.* at 573-74, or "commissioner of public safety," R259 § 330 (1907 Rochester Charter). In other localities, a town board controls police discipline—and there is no requirement that board members have policing experience. *See Wallkill*, 19 N.Y.3d at 1068. This

Court has never opined that the exercise of local control over police discipline must take a specific form; who the relevant official or body is, and how they exercise their powers, are questions entirely separate from whether or not the Taylor Law does or does not require collective bargaining in a particular locality.

The question of *whether* a municipality was granted the *power* to discipline depends on whether there was a pre-1967 state law. By contrast, *how* municipalities who were granted that power may wish to exercise it—i.e., by *which* local officials—is a matter for each municipality to decide for itself, and implement under the Municipal Home Rule Law. The Municipal Home Rule Law and State Constitution allow Rochester to revise its charter "by local law adopted by its legislative body" and to pass local laws concerning the "powers [and] duties. . . of its officers and employees." N.Y. Mun. Home Rule Law 10 §§ (1)(ii)(a)(1) and 1(ii)(c)(1). This permits Rochester to move 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. Whether it is the Commissioner of Public Safety (1907), the Commissioner of Police (1970), the Chief of Police (1974), or, instead, a municipal board (under Local Law No. 2), that imposes discipline, in all events, it is the City of Rochester—the locality—through its employees, officers, and boards, that is exercising this state-granted power.

Rochester's enactment of Local Law No. 2 and creation of the PAB is merely the latest iteration and exercise of Rochester's long-established authority to organize its own governmental affairs (within constitutional limits) and control police discipline at the local level. As this Court explained in 1927,

> [A]rticle 12, § 1, of the Constitution . . . casts a duty upon the Legislature to provide for the organization of cities. The Legislature has fulfilled that obligation. First, it enacted the charter of the city of Rochester (Laws of 1907, c. 755), and later, by the passage of the city Home Rule Law (Laws of 1924, c. 363), it provided further for a different organization of that city and of all other cities by giving the local governing body the right to make changes in the structure and form of the present organization.

Bareham v. City of Rochester, 246 N.Y. 140, 145–46 (1927). It is this right that allows Rochester to place the City's power over police discipline in the "structure and form" set forth in Local Law No. 2.

In contrast, when a city is required to collectively bargain discipline, it is *deprived* of the power to unilaterally decide how police officers should be disciplined. *See NYC PBA*, 6 N.Y.3d at 572. Instead, it must sit at the bargaining table with police unions and agree to a discipline system that the union finds acceptable—or risk that an arbitration panel will unilaterally decide the contractual terms of discipline. N.Y. Civ. Serv. Law § 209(4). In this scenario, the unions are empowered, and the elected local officials (or any municipal board they create) are disempowered. That is the very purpose of collective bargaining, but it also

explains why bargaining over discipline for police officers—public employees who are entrusted with the power to arrest and use state-sanctioned violence—is so fraught.

The Appellate Division fails to acknowledge this important distinction, erroneously concluding that "the 1907 City Charter provision cannot logically preclude collective bargaining of police discipline yet simultaneously permit an independent board to fire police officers over the objection of the executive's appointed police chief." R432 (Opinion at 8). By fixating on the difference between an all-civilian PAB and the police chief, it misses the crucial point that *the PAB is a creature of the City*, not some independent group, and that the voters of Rochester specifically and overwhelmingly decided to vest power in this particular body. The PAB's structure, powers, and limitations were all determined by the Council and approved by voters in a referendum; the PAB is a public agency; PAB employees are employed by the City of Rochester. *See* R126 § 18-2 ("The Board"); R136 § (C)(4); R140 § 18-13. The PAB's members are all appointed by elected officials (the Mayor and the Council), albeit some are nominated by local organizations, and are local "officers" under the Charter. *See* Charter of the City of Rochester § 2-18(B)(5). The structure and powers of the PAB can equally by changed by the elected branches, should they decide to do so at some future date. Once established, the PAB is empowered to act, but only

within the confines of Local Law No. 2. Thus, the PAB is an example of "control of police discipline by local officials," *NYC PBA*, 6 N.Y.3d at 573, no different than the town board in *Walkill*, 19 N.Y.3d at 1068.

B. The 1985 Rochester Council Cannot Stop its 2019 Counterpart from Enacting a PAB

Local Law No. 2-1985 could no more prevent the Council, and Rochester's voters, from establishing the PAB than legislation passed by Congress when Ronald Reagan was President could bind the Congress and President that sit today. Even if it were true that somehow the 1985 law were an intentional relinquishing of Rochester's right to dictate police discipline in favor of a collective bargaining regime, in 2019, the voters exercised their power to reverse prior Charter amendments, including those enacted by 1985 local law, and move forward under a different scheme.[9] This kind of innovation is a core feature of democracy. To hold otherwise would be to cede dead-hand control over all matters in the future to legislators of the past. That is not the rule, as a matter of logic, law, or democracy. As this Court has long held, one "legislature may not bind the hands of its successors in areas relating to governmental matters." *Morin v. Foster*, 45 N.Y.2d 287, 293 (1978).

[9] Indeed, the Supreme Court recognized this tension, stating that it is "not before the Court" whether the City Council could "simply repeal[] the 1985 law." R25. Except that that issue very much *is* before the Court, because Local Law 2 does repeal the 1985 Legislature's decision (to the extent that is what it even decided) to collectively bargain discipline.

In this respect, the Appellate Division erred in its suggestion that the 1985 Council "deprive[d] its successors of the ability to revive or reclaim [the right to control police discipline] at some future point." R433 (Opinion at 9). The law is to the contrary: 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)). The 2019 Council followed Rochester's Charter by passing Local Law No. 2 and then having a referendum for voter approval. The proper process was followed; the result must be respected.

CONCLUSION

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

Dated: February 18, 2022
New York, New York

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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 12,381 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: February 18, 2022

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I, Tyrone Heath, 2179 Washington Avenue, Apt. 19, Bronx, New York 10457, being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age and resides at the address shown above or at

On February 22, 2022

deponent served the within: **BRIEF FOR RESPONDENT-APPELLANT COUNCIL OF THE CITY OF ROCHESTER**

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