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 PETITIONERS-RESPONDENTS

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DISCLOSURE STATEMENT – 22 NYCRR § 500.1(f)

The Rochester Police Locust Club, Inc. is a not-for-profit corporation organized and existing under the laws of New York State. It has no parent or subsidiary entities, and its only affiliated entity is the Rochester Police Locust Club PAC Fund.

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QUESTION PRESENTED

Can the City of Rochester avail itself of the grandfathering exemption to the Taylor Law's generally applicable mandate of collective bargaining concerning police discipline based upon a pre-1958 statute providing authority for police discipline in the City of Rochester to the Commissioner of Public Safety, under this Court's holding in *Matter of Patrolmen's Benevolent Association of the City of New York, Inc. v. New York State Public Employment Relations Board,* 6 NY3d 563, 573 (2006) (hereinafter "*NYC PBA*" or "*PBA*") and its progeny, where such statute was repealed over thirty-five (35) years ago?

Petitioners-Respondents respectfully submit that this question was correctly answered in the negative by both the Supreme Court, Monroe County and the Appellate Division, Fourth Department.

PRELIMINARY STATEMENT

Since 1967, the Taylor Law (Civil Service Law §§ 200, *et seq*.) has provided public employees in New York with the right, and public employers with the corresponding obligation, to negotiate the terms and conditions of their employment. The Taylor Law applies to police officers, including those employed by the City of Rochester ("City"), and issues relating to discipline are unquestionably included within the ambit of mandatorily negotiable subjects. Pursuant to this requirement for collective bargaining, the City and the Rochester

Police Locust Club, Inc. ("Locust Club"), the recognized employee organization representing most sworn police officers employed by the City, have for many decades negotiated issues relating to the discipline of officers, developing an entire section of the various collective bargaining agreements which have been in place over the decades to address discipline.

In 2019, the Council of the City of Rochester ("City Council") passed Local Law No. 2, which purports to nullify the previously negotiated and agreed upon disciplinary procedures and instead places authority for the discipline of police officers in a newly created civilian Police Accountability Board ("PAB" or "Board"). The new statutory scheme strips the Chief of Police ("Chief") of his/her authority to make the final determination on matters of police discipline, requiring instead that the Chief merely carry out the findings and determinations rendered by the Board. (R134) (Local Law No. 2, Section 1 at § 18-5(J)(4)). The Board was given the authority to investigate potential misconduct by City police officers, with or without an initiating complaint, determine whether disciplinary charges should be brought, conduct a hearing on such charges, determine guilt or innocence and determine the penalty to be imposed. (R1127-135) (Local Law No. 2, Section 1 at §§ 18-3, 18-5). The Board is to be made up of residents of the City, but the legislation excludes from membership on the Board not only current Rochester Police Department ("RPD") employees, but also their immediate family members,

the family members of any elected official in New York, even if the elected official serves in a municipality other than Rochester, attorneys who have ever been involved in a police misconduct lawsuit in Rochester and their immediate families, and most former law enforcement employees, even from other departments, and their family members. (R128) (Local Law No. 2 at § 18-4(E) and (F)).

Because Local Law No. 2 was enacted unilaterally by the City Council and was not the result of collective negotiations between the City and Locust Club, the Locust Club and two of its officers commenced the current action seeking a declaration that those portions of the legislation which provided PAB with disciplinary authority over City police officers were unlawful as violative of State law. The Supreme Court for Monroe County, Justice John J. Ark, followed on appeal by a unanimous Appellate Division, Fourth Department panel, declared the disciplinary components of Local Law No. 2 to be invalid and in violation of the Taylor Law's mandate for collective bargaining.

City Council has again appealed, relying upon provisions of the 1907 City Charter which governed the discipline of police officers and, as will be discussed in detail below, this Court's prior holding in *NYC PBA*. Those City Charter provisions, however, were expressly repealed by City Council in 1985, and for the more than thirty-five (35) years since then the City has fallen under the Taylor Law's collective bargaining mandate relative to police discipline. In an attempt to

resurrect its previously grandfathered, but subsequently abandoned, collective bargaining exemption, City Council now asserts that it did not have the authority, in 1985, to alter the State's 1907 legislative enactment through local legislation. While this argument must, as discussed below, be rejected, even if were to be accepted, and the 1907 legislation somehow retroactively reinstated as if it had not been previously repealed, City Council's position still faces an insurmountable flaw. If the 1985 City Council lacked the authority to alter the State's 1907 legislative enactment, as it argues, then by that same logic and reasoning the 2019 City Council also lacked the authority to alter that legislation through local law. As the Fourth Department put it, "The very rationale that the City Council deploys to invalidate the 1985 repeal would equally doom its own 2019 legislation." (R432).

The Taylor Law's mandate for collective bargaining of all terms and conditions of employment applies to the City of Rochester and the police officers it employs. While there may previously have been an argument to be made that Rochester should be exempted from this obligation to collectively bargaining police discipline based upon a pre-1958 statutory provision, when the relevant Charter provisions were repealed in 1985 the City lost whatever grandfathering argument may have existed. Once the Taylor Law applied to mandate collective bargaining of police discipline, the City no longer had the authority to enact

changes through local legislation because such changes would be contrary to the mandates of a "general law", the Taylor Law, and such local legislation is not authorized under the Municipal Home Rule Law.

ARGUMENT

The Locust Club respectfully submits that the decision of the Appellate Division, Fourth Department should be affirmed. Those portions of Local Law No. 2 which attempt to vest authority for the discipline of police officers in the newly created Police Accountability Board are clearly violative of State law, specifically the Taylor Law's mandate for collective bargaining of terms and conditions of employment.

POINT I

POLICE DISCIPLINE IN ROCHESTER IS GOVERNED BY CIVIL SERVICE LAW AND IS A MANDATORY SUBJECT OF COLLECTIVE BARGAINING

The discipline of police officers in the City of Rochester is, and for at least thirty-five (35) years has been, governed by Civil Service Law §§ 75 and 76, as well as by the Taylor Law. Pursuant to this Court's decision in *NYC PBA*, the applicability of Civil Service Law §§ 75 and 76, and the public policy as expressed therein, is the starting point and critical determination to be made in assessing whether police discipline in a particular municipality is a mandatory or prohibited subject of collective bargaining under the Taylor Law. As the Court has

stated, some police officers in New York "have the right to bargain about police discipline, and some do not." *See Matter of City of Schenectady v. New York State Pub. Empl. Relations Bd.*, 30 NY3d 109, 118 (2017). It is clear that police officers in Rochester are in the former category.

A. Discipline Is Presumptively a Mandatory Subject of Bargaining.

The starting point and general rule in New York is that discipline of civil service employees, including police officers, is governed by Civil Service Law §§ 75 and 76 and is a mandatory subject of negotiation under the Taylor Law (Civil Service Law §§ 200, *et seq*.). *See NYC PBA*, 6 NY3d at 573 (discussing holding in *Matter of Auburn Police Local 195 v. Helsby*, 46 NY2d 1034 (1979), which allowed collective bargaining agreements to supplement, modify or replace CSL §§ 75 and 76); *Matter of Town of Wallkill v. Civil Serv. Employees Ass'n, Inc.*, 19 NY3d 1066, 1069 (2012) (noting general applicability of CSL §§ 75 and 76); *City of Schenectady v. New York State Public Employment Relations Bd.*, 30 NY3d 109, 114 (2017) (same).

This follows, first, from the often-declared notion that "the public policy of this State in favor of collective bargaining is 'strong and sweeping.'" *Matter of City of Watertown v. State of New York Pub. Empl. Relations Bd.*, 95 NY2d 73, 78 (2000) (citations omitted). This public policy results in a "presumption in favor of bargaining [which] may be overcome only in 'special circumstances' where the

legislative intent to remove an issue from mandatory bargaining is ‘plain’ and ‘clear’, or where a specific statutory directive leaves ‘no room for negotiation’.” *Id.* at 78-79 (citations omitted). As this Court has previously explained:

> To be sure, where a statute clearly forecloses negotiation of a particular subject, that subject may be deemed a prohibited subject of bargaining. Alternatively, if the Legislature has manifested an intention to commit a matter to the discretion of the public employer, negotiation is permissive but not mandatory. Generally, however, bargaining is mandatory even for a subject treated by statute unless the statute clearly preempts the entire subject matter or the demand to bargain diminishes or merely restates the statutory benefits. Absent clear evidence that the Legislature intended otherwise, the presumption is that all terms and conditions of employment are subject to mandatory bargaining.

Id. at 79 (citations and quotations omitted).

Since the Taylor Law was enacted in 1967, New York courts have consistently held that Civil Service Law §§ 75 and 76 clearly do *not* reflect any intent by the Legislature to remove discipline from the purview of mandatory collective bargaining. *See Matter of Auburn Police Local 195*, 62 AD2d 12, 16-17 (3d Dept 1978), *aff’d by* 46 NY2d 1034 (1979). *See also Matter of New York City Transit Auth. V. New York State Pub. Empl. Relations Bd.*, 8 NY3d 226, 233-234 (2007) (noting general applicability of Section 75 and ability of parties to modify through collective bargaining).

B. This Court Created a Narrow Exception.

This Court has recognized an exception to the general rule requiring mandatory bargaining over discipline, but it is a narrow exception. Beginning with the *NYC PBA* case, and thereafter in *Town of Wallkill* and *City of Schenectady*, the Court of Appeals has cited the language of Civil Service Law § 76(4), which states that Sections 75 and 76 shall not "be construed to repeal or modify" preexisting laws and determined that preexisting laws are "thus grandfathered" out of the otherwise generally applicable statutory framework for discipline. *NYC PBA*, 6 NY3d at 573. However, the Court's decisions have been very clear that the basis for the holdings in this entire line of cases is that Civil Service Law § 76(4) grandfathers in *preexisting* specific or local laws. Nothing in any of these decisions, or in any of the Appellate Division decisions which preceded *NYC PBA*, in any way suggests that the resulting exception from the applicability of the Civil Service Law is broader than the specific preexisting law upon which it is based, that it may be altered or expanded by the municipality or that it can somehow be based upon legislation which was repealed decades ago.

As explained in *NYC PBA*, the exception to mandatorily negotiable discipline for police officers in some municipalities arose out of "a tension between" two State policies – "the strong and sweeping policy of the State to support collective bargaining under the Taylor Law and a competing policy – here,

the policy favoring strong disciplinary authority for those in charge of police forces." *NYC PBA*, 6 NY3d at 571 (citations and quotations omitted). After reaffirming its earlier conclusion that "where Civil Service Law §§ 75 and 76 apply, police discipline may be the subject of collective bargaining", the Court went on to note that

> Civil Service Law § 76(4) says that sections 75 and 76 shall not "be construed to repeal or modify" preexisting laws, and among the laws thus grandfathered are several that, in contrast to sections 75 and 76, provide expressly for the control of police discipline by local officials in certain communities.

Id. at 573.

Under the specific statutes in place in New York City at the time, which had both originated as State statutes, the Police Commissioner was expressly vested with the authority and discretion to discipline police officers. *See id.* at 573-574. Similar statutes, all in effect at that time, also served to place "power and authority" for police discipline with the Orangetown Town Board. *See id.* at 574. These preexisting statutes, and their preservation by Civil Service Law § 76(4), were thus found to embody "a legislative intent and public policy to leave the disciplining of police officers … to the discretion of the Police Commissioner." *Id.* at 575 (*quoting Matter of City of New York v. MacDonald*, 201 AD2d 258, 259 (1st Dept 1994)) (ellipses in original).

As the Fourth Department explained in this case, "[w]ith this compromise, the Court of Appeals gave force to the default-preference for collective bargaining enshrined in the Taylor Law without displacing any preexisting law concerning police discipline that remained in force." (R430) (citation omitted).

C. The Exception Requires Such Legislation Be "In Force".

It is clear from this Court's prior holdings, as well as the holdings in numerous Appellate Division decisions, that the prohibition on negotiating police discipline applies only where preexisting legislation is in force. As discussed above, in the absence of a specific preexisting statute governing police discipline in a particular municipality, "the policy of the Taylor Law prevails, and collective bargaining is required …." *NYC PBA*, 6 NY3d at 571 (citations omitted). It is only "*where such legislation is in force*, [that] the policy favoring control over the police prevails, and collective bargaining over disciplinary matters is prohibited." *Id.* (citations omitted) (emphasis added). *See also City of Schenectady*, 30 NY3d at 115 (quoting *NYC PBA*).

This Court expressly stated in *NYC PBA* that such preexisting legislation must be "in force", and that language was reaffirmed, and quoted, in its most recent decision addressing the issue, *City of Schenectady*. *See* 30 NY3d at 115 (quoting *NYC PBA*). The preexisting legislation at issue in *Town of Wallkill*, Town Law § 155, was also inarguably still in effect. *See* 19 NY3d at 1069.

Additionally, as will be discussed in Point II(C), *infra*, while *NYC PBA* was this Court's first decision on this precise issue, it was preceded by multiple Appellate Division decisions, all of which involved legislation which was in effect at the time the legal challenge arose. *See Matter of City of Mount Vernon v. Cuevas*, 289 AD2d 674, 675-676 (3d Dept 2001); *MacDonald*, 201 AD2d at 259; *Matter of Rockland County Patrolman's Benevolent Ass'n v. Town of Clarkstown*, 149 AD2d 516, 517 (2d Dept 1989); *Matter of Town of Greenburgh v. Police Ass'n of Town of Greenburgh*, 94 AD2d 771, 771-772 (2d Dept 1983). The Fourth Department correctly noted this requirement, stating:

> … there is an important caveat to the preexisting-law exception created by *PBA*: the preexisting law in question must be " 'in force' " when the municipality refuses to collectively bargaining over police discipline (*Schenectady*, 30 NY3d at 115, quoting *PBA*, 6 NY3d at 571-572; *see Wallkill*, 19 NY3d at 1069). The "in force" requirement was satisfied in *Schenectady*, *PBA*, and *Wallkill*, but it is not satisfied here.

(R430).

D. There Is No Preexisting Law In Effect in Rochester.

As the lower courts in this case correctly recognized, although the City of Rochester previously had legislation, in the form of a 1907 City Charter provision, which would have constituted a preexisting law removing police discipline from collective bargaining, that prior legislation cannot serve to authorize Local Law

No. 2 because the relevant provisions were expressly repealed in 1985. (R25-27, 430).

The 1907 Charter established a Department of Public Safety, led by a Commissioner who was expressly empowered to make rules relating to the discipline of the police and fire forces and to hear, try and determine disciplinary charges and penalties against police officers and firemen. (R258-260). A determination made by the Commissioner was “final and conclusive, and not subject to review by any court.” (R260).

Over the years, the City, through local legislation, amended these Charter provisions in various ways, most of which involved minor language changes or the renumbering of charter sections. (R250-307). In 1970, the City split the Department of Public Safety into separate police and fire departments, each led by a separate Commissioner, and enacted a new Charter provision setting forth detailed procedures for “Charges and trials of policemen”. (Comp-1-4). A few years later, the title of Commissioner of Police was changed to Chief of Police. (R353-354).

Although an argument might be made that the 1970 changes were sufficiently substantive to forfeit any grandfathering rights available under Civil Service Law §§ 75 and 76, and correspondingly trigger an obligation for the City

to negotiate police discipline, it is unnecessary to address that issue due to the action taken by the City Council in 1985.

In 1985 the City Council enacted two related local laws. Local Law No. 1-1985, in somewhat of a return to the pre-1970 structure, established a Public Safety Administration to oversee both the police and fire departments. (R314). It also replaced provisions detailing the powers and duties of the Chief of Police in a manner which preserved the Chief's responsibility for the operation of the police department and to "assign, station and transfer all personnel", but which did not specifically refer to discipline. (R324). The discipline issue was specifically addressed by Local Law No. 2-1985, which stated:

> Chapter 755 of the Laws of 1907, entitled "An Act Constituting the Charter of the City of Rochester" is hereby amended by repealing Section 8A-7, Charges and trials of policemen, for the reason that *the subject matter is covered in the Civil Service Law*.

(R328) (emphasis added).

Thus, while it perhaps could previously have been argued that police discipline in the City of Rochester was governed by a statutory provision which predated Civil Service Law §§ 75 and 76 and the Taylor Law, once Local Law No. 2-1985 was enacted that earlier provision was eliminated, police discipline in the City of Rochester was no longer governed by a preexisting statute and, as a result, the City forfeited any ability to be "grandfathered" into the exception to mandatory collective bargaining. City Council cannot justify a 2019 legislative action by

attempting to rely, as the source of authority, upon a charter provision which was repealed decades ago. This is particularly true where City Council expressly recognized that, at the latest, as of 1985 the subject of police discipline in Rochester was governed by Civil Service Law. Unlike *Schenectady*, which involved an analysis of whether the Taylor Law *implicitly* superseded a pre-existing law, the Second Class Cities Law, in the City of Rochester the pre-existing statute was *expressly* repealed.

Both lower courts in this case correctly recognized that the 1985 repeal of the Charter provisions governing police discipline ended any exemption the City may previously have had to the Taylor Law's mandate for collective bargaining of police discipline. As Justice Ark stated:

> The State Legislature gave the City this power in 1907 through the City Charter, and the City's authority was "grandfathered" in by operation of CSL Section 76(4). However, in 1985, the City Council explicitly submitted RPD discipline matters to state law when it repealed the police discipline portion of the City Charter expressly "*for the reason that this subject matter is covered in the Civil Service Law*." That was a valid exercise of the power vested in it by the 1907 Charter, and the City opted to submit itself to the governance of state law. This ended the City's "grandfather" exemption. Thus, after 1985, state law governed RPD discipline.

(R25) (emphasis in original).

Similarly, the Appellate Division held that "the 1985 City Council explicitly surrendered its grandfathered prerogative to exempt police discipline from collective bargaining." (R431).

These holdings were entirely consistent with this Court's prior decisions in *NYC PBA, Town of Wallkill* and *City of Schenectady*, and the numerous decisions on the same issue from the Appellate Division, none of which have even remotely suggested that the "grandfathering" exception to mandatory collective bargaining can continue to exist in the absence of a specific statutory provision, or be resurrected after it is abandoned.

It should also be noted that this conclusion, which seems self-evident and inarguable, that a municipality may forfeit a previously enjoyed grandfathered status by repealing the prior locally applicable statute, was also recently reached by both the Supreme Court, Onondaga County and the Appellate Division, Fourth Department in a pair of related cases involving the City of Syracuse.

Although *City of Syracuse v. Syracuse PBA, Inc.*, 124 NYS3d 523 (Sup Ct, Onondaga County, 2020) *aff'd by* 198 AD3d 1322 (4th Dept 2021)[1] did not involve newly enacted legislation, the central issue in the case was exactly the same as presented in this case – whether or not the City fell within the "grandfathering" exemption created in the *NYC PBA, Town of Wallkill* and *City of Schenectady* cases. Just as in Rochester, the City of Syracuse had initially operated under a City Charter which placed authority for police discipline in a Commissioner of Public

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[1] *Motondo v. City of Syracuse*, 68 Misc3d 398 (Sup Ct, Onondaga County, 2020) *aff'd by* 198 AD3d 1321 (4th Dept 2021) is the companion case involving the union representing City of Syracuse firefighters. It raised identical issues and was decided in the same manner.

Safety, later transferred to the Chief of Police. *See id.* at 527. In 1960, Syracuse adopted a new Charter which kept authority for police discipline with the Chief of Police, but which added language stating: "Disciplinary proceedings against any member of the department shall be conducted in accordance with the rules and regulations of the department and the provision of law applicable thereto, *including the Civil Service Law*." *Id.* (emphasis added).

Following essentially the same reasoning as the lower courts in this case, the Hon. Deborah H. Karalunas found that by amending its Charter after the passage of Civil Service Law § 75 and stating that discipline of police officers would be conducted in accordance with the Civil Service Law, which it had the authority to do under the Municipal Home Rule Law, the City had given up its grandfathered status under Civil Service Law § 76(4), thus rendering police discipline a mandatory subject of bargaining once the Taylor Law was enacted. *See id* at 531.

While decisions of the lower courts are obviously not binding on the Court of Appeals, the fact that two (2) separate Supreme Court Justices and a total of eight (8) Appellate Division Justices[2] have analyzed this issue and unanimously arrived at the same conclusion increases the persuasive value of these lower court decisions.

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[2] The companion cases involving the City of Syracuse were heard before the same Fourth Department panel, which consisted of four (4) Justices, one of whom was also on the panel which heard and decided this matter.

Syracuse and Rochester followed a similar course with respect to police discipline. Both initially had authority for police discipline vested, by the State Legislature, in a police commissioner and were therefore grandfathered out of the Civil Service Law framework generally applicable to police discipline; both subsequently exercised their authority under the Municipal Home Rule Law to abandon that system of police discipline and instead to utilize the Civil Service Law; both later regretted that action and attempted to abandon the Civil Service Law requirements and void agreements that had been negotiated with the police union; and both have had those efforts correctly declared unlawful and improper by the lower courts.

POINT II

CITY COUNCIL'S 1985 LEGISLATION WAS LAWFUL AND VALID

City Council, now regretting the decision it made decades ago to amend the City Charter, attempts to argue that it did not actually have the authority to submit to State law governing police discipline. This position, however, is both directly contradicted by the Municipal Home Rule Law and by City Council's own argument on its ability to amend the Charter.

A. The 1985 Amendments Were Authorized By the Municipal Home Rule Law.

The Municipal Home Rule Law specifically grants a municipality the right to revise its Charter through the passage of local laws, including changes

concerning the "removal … of its officers and employees." Mun. Home Rule Law § 10(1)(ii)(a)(1). As the Fourth Department explained, along with amendments to the State Constitution, the Municipal Home Rule Law relaxed, and eventually repudiated entirely, the former "Dillon's Rule", which had previously prevented municipalities from altering their own structure or powers without State approval. (R428). Thus, by the express terms of a statute enacted by the State Legislature, the City of Rochester had the authority to amend its Charter through local law and alter the procedure and source of authority for the discipline of police officers. City Council exercised this authority in 1985 and provided that the discipline of police officers was governed by Civil Service Law. (R431) ("That is precisely what the City Council did in 1985: it exercised its home rule powers to overturn the Legislature's 1907 policy determination.").

City Council's argument that it did not have any power to alter the State's 1907 determination to vest power for police discipline in Rochester in the Commissioner of Public Safety, *see* Respondent-Appellant's Brief at pp. 18-19 and 28-34, is simply wrong and unsupported by any authority or logic. The 1907 Charter was not, as City Council claims, the State's last word on the subject. Rather, the State subsequently enacted the Municipal Home Rule Law and provided the City with the express authority to make its own determinations on the matter of disciplining or removing its officers and to change the Charter by local

law, as long as such change did not conflict with any general law. The provisions of the City Charter vesting authority for police discipline in a Commissioner of Public Safety and providing a procedure for disciplinary actions were expressly repealed by City Council in 1985, pursuant to that authority granted by the State in the Municipal Home Rule Law.

Following the 1985 amendments, police discipline in Rochester was expressly governed by Civil Service Law §§ 75 and 76, was a mandatory subject of negotiation under the Taylor Law, and any subsequent attempt by City Council to unilaterally alter the disciplinary process, such as Local Law No. 2, would violate those general State laws. City Council's authority to amend the Charter by local law is expressly limited to enactments which are "not inconsistent with the provisions of the constitution or not inconsistent with any general law …." Mun. Home Rule Law § 10(1)(i). Once these general laws applied, City Council no longer had any authority to make unilateral changes to police discipline.

City Council's argument that it did not have the power in 1985 to submit police discipline to the mandates of Civil Service Law § 75 because, pursuant to a case which would not be decided for another twenty-one (21) years, police discipline in Rochester was a prohibited subject of negotiations, is misplaced because it misconstrues both the Court of Appeals' holding in *NYC PBA* and the nature of the action taken by the 1985 City Council. The Court of Appeals'

decision in *NYC PBA*, which found police discipline in New York City and the Town of Orangetown to be a prohibited subject of negotiations, was expressly based upon the framework created by the New York City Charter and Rockland County Police Act and the grandfathering provision of Civil Service Law § 76(4). City Council's legislative actions in 1985 were not negotiations and Rochester did not abdicate or forfeit any power given to it by the State through collective bargaining. Rather, pursuant to the express authority conveyed by the Municipal Home Rule Law, City Council permissibly altered the statutory framework governing police discipline. Rochester gave up its grandfathered rights regarding police discipline not through collective bargaining, but through legislative action.

This change in 1985 was permissible pursuant to the Municipal Home Rule Law because it did not conflict with any general law. However, the subsequent attempt to enact Local Law No. 2, nearly thirty-five (35) years later, was not within City Council's authority because, once general State law applied, such a change was inconsistent with a general law (both the Taylor Law and Civil Service Law § 75) and, therefore, not permitted under the Municipal Home Rule Law.

As the Fourth Department correctly noted:

> Nothing in the *Schenectady*, *Wallkill*, or *PBA* decisions even remotely suggests that a grandfathered law concerning police discipline must be forever fossilized in the municipal codebooks, never to be abrogated by the municipality in the valid exercise of its home rule powers. To the contrary, the *Schenectady* decision specifically emphasized that the qualifying preexisting law in that case had *not* been repealed, and

> it even 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 (*see* 30 NY3d at 116-118, citing L2001, ch 587). *Schenectady* thus clearly contemplates the potential repeal of a preexisting law concerning police discipline that would have otherwise qualified for the *PBA*-created exception to mandatory collective bargaining. Indeed, by insisting on the eternal sanctity of the policy choices of the 1907 Legislature, the City Council embraces the very specter of dead-hand control that its brief repeatedly decries.

(R432) (footnote omitted).

B. City Council's Argument Would Be Self-Defeating.

Furthermore, City Council's argument, even if it were not incorrect, would be self-defeating. If it lacked the authority, in 1985, to change the State's 1907 legislation placing authority for police discipline in the City of Rochester with the Commissioner of Public Safety and to instead utilize the Civil Service Law, then it also necessarily lacked the authority, in 2019, to create a new Police Accountability Board and vest it with authority for police discipline.

The Appellate Division recognized this, stating:

> The City Council's reasoning on this point suffers from an additional flaw. If, as the current City Council insists, the Legislature's 1907 policy determination to commit police discipline to the exclusive discretion of the executive branch was so important and fundamental that it barred the 1985 City Council from subjecting police discipline to collective bargaining, then the paramount import of that 1907 policy would also logically bar the current City Council from transferring the executive's latent disciplinary authority to an unelected body like PAB. Simply stated, 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. The very rationale that the City Council deploys to invalidate the 1985 repeal would equally doom its own 2009 legislation. Thus, by winning the battle over the validity of the 1985 repeal, the City Council would ineluctably lose the war over the validity of the 2019 local law.

(R432).

C. The Intent of the 1985 City Council Is Speculative and Irrelevant.

Another component of City Council's argument which is entirely unsupported by any existing case law is the unprecedented proposition that an otherwise valid legislative act can somehow, decades later, be ignored or retroactively undone because the legislature at the time did not foresee all possible consequences of the legislation or was operating under a mistaken belief about the law.

First, any attempt to discern the motivation of City Council in 1985, or to gauge individual legislators' understanding of the law, is purely speculative. "[T]here is absolutely no record support for the current City Council's speculation that its 1985 predecessor unwittingly repealed the 1907 City Charter provision while laboring under a comprehensive misapprehension of the Taylor Law and its workings." (R432). While City Council appears to presume that the 1985 Council was operating under a mistaken belief that Civil Service Law §§ 75 and 76, along with the Taylor Law, required the City to negotiate police discipline, there is absolutely no evidence to support such a conclusion. The mere fact that today's

City Council might see collective bargaining of discipline only as a negative which would never be undertaken voluntarily does not in any way mean that the 1985 City Council had the same view.

Additionally, although City Council points exclusively to the *NYC PBA* decision in 2006 as the first indication of a potential exception to the requirement for municipalities to negotiate police discipline, that is not accurate. While the *NYC PBA* case was the first decision from the Court of Appeals, that decision did not break new legal ground or reverse established law, but rather was the culmination of, and affirmed, a series of lower court decisions that started in the early 1980's. In fact, in *Matter of Town of Greenburgh (Police Ass'n of Town of Greenburgh)*, 94 AD2d 771 (2d Dept 1983), the Second Department expressly held that a special or local law governing police discipline which pre-dated Civil Service Law §§ 75 and 76 operated to remove police discipline from collective bargaining under the Taylor Law. Thus, at least two years before City Council passed the 1985 amendments, the appellate division had already recognized that preexisting statutes could remove police discipline from collective bargaining.

Second, the notion that a legislative enactment could subsequently be treated as invalid or ignored after decades merely because a consequence or impact becomes apparent that might not have been contemplated by the legislature that passed the statute is not only absurd, but would wreak havoc and potentially be

applicable, at one time or another, to virtually every statute ever passed by any legislative body. There is absolutely no legal support, in statute or in case law, for the concept of retroactively nullifying or ignoring a valid legislative enactment based upon a legislative body's misunderstanding of applicable law or a failure to foresee certain future impacts, even if that were assumed to be the case with the 1985 City Council.

In fact, even if the intent of the 1985 City Council could be definitively determined, it is entirely irrelevant because there was no ambiguity in the 1985 legislation, which expressly and unequivocally repealed the prior City Charter provisions governing police discipline. *See Triple A Intl., Inc. v. Democratic Republic of Congo*, 721 F3d 415, 418 (6th Cir 2013), *cert denied* 571 US 1024 (2013) ("no amount of legislative history can rescue an interpretation that does as much damage to the enacted text as [the plaintiff's] interpretation does here").

POINT III

THE P.A.B. LEGISLATION WOULD STILL BE UNLAWFUL AND INVALID EVEN IF ROCHESTER HAD RETAINED ITS PREVIOUS GRANDFATHERED STATUS

In addition to all of the foregoing, even if the City had not eliminated the position of Commissioner of Public Safety and transferred the power to run the police department to a Chief of Police and shifted to operating under the Civil Service Law for police discipline, Local Law No. 2 would still not fall under the

holdings in the *NYC PBA, Town of Wallkill* and *City of Schenectady* cases because the City is not, as those municipalities were, simply exercising the authority granted by those preexisting statutes. Rather, City Council is attempting to enact entirely new legislation which completely changes the framework and authority for police discipline. No pre-Civil Service or pre-Taylor Law legislation even arguably provides authority for police discipline in the City of Rochester to the City Council, nor to any unelected advisory board. City Council is attempting to argue that legislation passed in 2019 (Local Law No. 2) is somehow grandfathered in the same manner as pre-existing statutes which were passed over fifty (50) years ago. That argument makes no sense, is completely antithetical to the entire legal notion of grandfathering, is not supported by any portion of this Court's prior decisions and should be flatly rejected.

A. The 1907 Charter Itself Did Not Authorize New Legislation and Civil Service Law § 76(4) Does Not Grandfather Subsequent Legislation.

Nothing in the *NYC PBA* line of cases even remotely suggests that a municipality operating under a pre-1958 legislative grant of authority may then, forever going forward, do whatever it wishes with respect to police discipline. Rather, the Court merely grandfathered such municipalities to continue operating under those pre-1958 legal provisions. Even if the pre-1985 Rochester City Charter provisions had remained in effect, the consequence would be that the City

would be entitled to utilize those Charter provisions and to refuse to negotiate discipline – not that the City could unilaterally enact an entirely new disciplinary structure in a manner contrary to State law. Once the City departs from the pre-1958 statutes, it loses its grandfathered status.

Although none of the prior cases from this Court, or from the lower courts, dealing with the negotiability of police discipline under the Taylor Law involved attempts by a municipality to pass new local legislation, such attempts to pass new legislation have been analyzed in the context of Civil Service Law § 76(4)'s grandfathering provision, which as discussed at length above was central to the analysis of public policy contained in *NYC PBA* and its progeny – as the Fourth Department put it, serving as "the juridical muse" (R430) – has specifically been found applicable only to statutes enacted prior to 1958. *See Meringolo v. Jacobson*, 173 Misc2d 650 (Sup Ct, New York County, 1997) *aff'd* 256 AD2d 20 (1st Dept 1998).

In rejecting an argument that a provision of the New York City Administrative Code enacted in 1976 could be exempted under Section 76(4), the *Meringolo* Court held:

> The language of § 76(4) on its face does not support [the Commissioner's] position. When § 76(4) says that it shall not be construed "to repeal or modify" any contrary special or local law or charter provision, the language clearly refers to laws then in existence.
>
> …

> As noted, the language of § 76(4) is clear as it stands, that the exemption applies to laws in existence when § 76(4) was passed. Where the statute is clear and unambiguous on its face, the legislation must be interpreted as it exists.
>
> …
>
> Had the legislature wished to exempt future local laws from the application of Section 75, it would have said so.

Id. at 653.

Thus, even had some version of the pre-1985 City Charter provisions governing police discipline still been in effect in 2019, that would in no way authorize the passage of Local Law No. 2. The only way new legislation can be authorized under the *NYC PBA* line of cases is where the statutory provision which was enacted prior to Civil Service Law §§ 75 and 76 itself provides an explicit grant of "power and authority to adopt and make rules and regulations" governing police discipline. *NYC PBA*, 6 NY3d at 574 (quoting Town Law § 155 and Village Law § 8-804). In that very narrow situation, the grandfathered legislation itself authorizes new legislation or regulations. However, in contrast to the specific statutory grants of authority "to adopt and make rules and regulations" present in the Town and Village Laws, preexisting legislation which merely vests authority or discretion for police discipline in a specific local official – typically a Commissioner or Chief – does not include any authorization or authority for new legislation.

The version of the Rochester City Charter which was in place at the time Civil Service Law §§ 75 and 76 were enacted did not provide any authority for City Council to enact laws relating to police discipline. Rather, the relevant Charter provision – Section 330, Charges and trials of policemen and firemen – laid out a procedure to be followed, culminating in a hearing before the Commissioner of Public Safety who was charged with rendering a determination and imposing a penalty, and only the Commissioner was given authority to make rules or regulations relating to such proceedings. (R305). Similarly, even if the adjustments to the Charter following the enactment of Civil Service Law §§ 75 and 76 were overlooked, or considered merely non-substantive changes, the relevant provision in place just before repeal in 1985, now numbered Section 8A-7, Charges and trials of policemen, also set forth a detailed procedure to be followed in order to impose discipline on a police officer, with such authority at this time resting in the Chief of Police. (R353-354; Comp-3-4).

Under neither of these potential preexisting statutes, or in fact any of the versions of the Charter going back to the original 1907 Charter from the State, was City Council given any authority to enact laws, rules or regulations governing police discipline and, as such, even if one of these versions had somehow survived, and not been expressly repealed decades ago, none would authorize the passage of Local Law No. 2.

B. Local Law No. 2 Is Inconsistent With the Public Policy Recognized In *NYC PBA*.

Local Law No. 2, which creates a new citizen-staffed review board and attempts to vest that board with exclusive authority for the discipline of police officers in the City of Rochester, is also not consistent with the nature of the public policy declared by the Court in *NYC PBA*. This inconsistency provides yet another basis upon which to reject the City's attempt to claim an exception from mandatory collective bargaining.

As previously discussed, the *NYC PBA* decision reflected a resolution of two important, but competing, policies – the policy of support for collective bargaining under the Taylor Law and "the policy favoring strong disciplinary authority *for those in charge of police forces*." *NYC PBA*, 6 NY3d at 571 (emphasis added). Specifically addressing the New York City code provisions at issue, which were initially enacted by the State and gave the Police Commissioner the power and discretion to discipline police officers, the Court found the provisions to "reflect the policy of the State that police discipline in New York City is subject *to the Commissioner's authority*." *Id.* at 574 (emphasis added).

The New York City code provisions at issue in *NYC PBA* were extremely similar to the 1907 City Charter provisions initially put in place by the State for the City of Rochester and which serve as the basis for City Council's arguments in this case. Similar to the New York City code provisions, the 1907 Charter provisions

in Rochester placed authority for police discipline with the Commissioner of Public Safety. Thus, following the holding of *NYC PBA*, the 1907 Charter provisions would be deemed to "reflect the policy of the State that police discipline in [the City of Rochester] is subject to the Commissioner's authority." *Id.* The expression of policy by the State relating to the discipline of police officers in a particular municipality is determined by the contents of the specific statute applicable to that municipality. The 1907 legislature did not express a policy, as City Council attempts to characterize it, of authority for police discipline in Rochester resting in unidentified, or changing, "local officials", but rather specifically with the Commissioner of Public Safety.

In evaluating the public policy concerning authority for police discipline, the *NYC PBA* Court also noted: "As long ago as 1888, we emphasized the quasi-military nature of a police force, and said that a question pertaining solely to the general government and discipline of the force … must, from the nature of things, rest wholly in the discretion of the commissioners. *Id.* at 576 (quotations and citation omitted). The quasi-military nature of a police force and the importance of control over discipline "for those in charge of police forces", *id.* at 571, formed the basis for the finding of a public policy sufficiently strong to compete with the Taylor Law's "strong and sweeping policy", *id.*, in favor of collective bargaining and must therefore also define the parameters of that public policy. It was not,

either at the time the various underlying statutes were initially enacted, nor a century later when this Court issued the first decision in this line of cases, a general public policy, but rather a policy specific to each locality based upon the contents of the applicable statute. Indeed, in many localities there is no such specific legislation and, as a result, the generally applicable Civil Service Law provisions, both Section 75 and 76 as well as the Taylor Law, apply and control, which could not possibly be the case if there were a single, general, public policy concerning police discipline.

While Local Law No. 2 provides PAB with the authority to review departmental policies, procedures and training, and to recommend changes (R128-135), the Board clearly cannot be considered "in charge of" the police department. The Chief of Police remains, pursuant to the City Charter, "responsible for the operation of the Police Department." Rochester City Charter § 8A-1(A). *See also* Rochester City Charter § 8A-D ("The Chief of Police shall be the head of the Police Department and shall have control of its administration.").

Thus, as PAB is not in charge of the police force in the City of Rochester, Local Law No. 2 is not at all consistent with the public policy recognized by the Court in *NYC PBA*, which was "the policy favoring strong disciplinary authority *for those in charge of police forces*." *NYC PBA*, 6 NY3d at 571 (emphasis added).

POINT IV

CITY COUNCIL SHOULD BE ESTOPPED FROM TAKING THE POSITION THAT POLICE DISCIPLINE IS A PROHIBITED SUBJECT OF BARGAINING

Although the discussion above demonstrates that City Council's argument must fail on its own merits, it is also clear that City Council, as a branch of the City of Rochester, 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.

As set forth in the record, for decades the discipline of police officers in Rochester has expressly been implemented under the authority and procedures found in Civil Service Law §§ 75 and 76 and Article 20 of the CBA. (R335-347). The subject of discipline, including rights of officers and procedures for the investigation and hearing process, have also repeatedly been the subject of negotiations between the City and the Locust Club, and the Locust Club has made concessions to obtain the negotiated contractual provisions, including concessions based expressly on the position of the City that Civil Service Law § 75 provides the authority for the discipline of police officers.

This Court has previously addressed the potential for a municipality to be estopped from abandoning the Civil Service Law and negotiated agreements as the basis for police discipline and instead claiming a grandfathered right to rely upon a

century-old statute. In *City of Schenectady* the police union made this exact argument. *See* 30 NY3d at 117. Although the Court declined to apply judicial estoppel to the City of Schenectady in that case, its discussion of the issue is important. In fact, equally as important is what the Court did *not* hold. It did not hold that a municipality in such circumstances could not, as a matter of law, be estopped from reverting to the "old" statute or from disavowing the negotiated collective bargaining agreement. Instead, it evaluated the specific conduct by the City of Schenectady and found estoppel to be inappropriate under those particular facts.

Specifically, the Court excused the City of Schenectady's pre-2006 use of the Civil Service Law and negotiated disciplinary procedures on the basis that it predated the Court's decision in *NYC PBA*. *See id.* (noting the referenced course of dealing "all took place prior to 2006, when we decided *Matter of Patrolmen's Benevolent Assn.*"). Because the City acted promptly following that decision to announce it would no longer utilize the Civil Service Law and the negotiated procedures for police discipline, the Court refused to apply estoppel to bar the City from changing positions. *See id.* Similarly, the Town of Wallkill had acted promptly after the *NYC PBA* decision. *See Town of Wallkill*, 19 NY3d at 1068.

In contrast, the City of Rochester continued to utilize the Civil Service Law for more than thirteen (13) years after the Court's decision in *NYC PBA.* The City

has negotiated multiple CBAs with the Locust Club since that time, all of which included Article 20, and during the negotiations for each agreement the subject of discipline was negotiated. (R335-337). In fact, the City and the Locust Club entered into a Memorandum of Agreement which altered a portion of the disciplinary process under Article 20 as recently as October 2018. (R340-341).

Thus, not only has the City of Rochester maintained the position that Civil Service Law § 75 applies and governs police discipline for more than a decade after the *NYC PBA* decision, in contrast to the City of Schenectady and Town of Wallkill, which each acted promptly to alter its position, but in fact the City of Rochester has continued to maintain its position relative to the Civil Service Law and Article 20 of the CBA well after the Court of Appeals issued the *City of Schenectady* decision, with numerous disciplinary matters being commenced in 2017 and 2018 under the express auspices of Civil Service Law § 75. (R337-338).

City of Schenectady did not hold that a municipality could not be estopped from disputing the applicability of the Civil Service Law to police discipline. In fact, *City of Schenectady* actually shows what a municipality was required to do following the *NYC PBA* case in order to avoid the application of estoppel. While the City of Schenectady avoided the application of estoppel due to its prompt action, the City of Rochester did exactly the opposite, maintaining its position that Civil Service Law and Article 20 of the CBA apply and govern police discipline,

using them as the basis for imposing discipline and continuing to negotiate discipline for well over a decade, and therefore the opposite result should occur. Respondent-Appellant should be estopped from any attempt to deny the applicability of the Civil Service Law and Article 20 of the CBA or to assert that police discipline in the City of Rochester is a prohibited subject of negotiation.

POINT V

LOCAL LAW NO. 2 VIOLATES CIVIL SERVICE LAW § 75 AND UNCONSOLIDATED LAW § 891

In addition to violating the Taylor Law, Local Law No. 2 also violates both Civil Service Law § 75 and Unconsolidated Law § 891.

Civil Service Law § 75 requires a disciplinary hearing to be held "by the officer or body having the power to remove the person against whom such charges are preferred, or by a deputy or other person designated by such officer or body in writing for that purpose." *Civ. Serv. Law* § 75(2). Under the City Charter, even after the enactment of Local Law No. 2, it is clear that the Chief of Police remains the appointing authority under Section 8A-1 of the City Charter and that it is the Chief who has the power of removal. The Board makes a determination as to the discipline to be imposed, but that determination is then carried out by the Chief. If the PAB itself had the authority to remove a police officer, there would be no need for this process of binding the Chief to carry out the PAB's determinations, the Board itself would simply carry out the removal of the officer. Because PAB does

not itself have that authority, and it is not a designee of the Chief of Police, a disciplinary hearing held before the PAB would violate Section 75.

Although the Appellate Division rejected this argument as "unduly pedantic" (R434), in doing so it failed to recognize that its conclusion that PAB became, in essence, the body with the power to remove an officer would result in a situation where both a body (PAB) and an officer (the Chief of Police) would have the authority to remove an officer, since Local Law No. 2 preserves the Chief's right to impose discipline more severe than that dictated by PAB. Such a situation violates Section 75's mandate for a single "officer *or* body" (emphasis added) having removal authority. The entirely of Section 75 speaks to "*the* officer or body having the power to remove" (emphasis added) the employee, clearly suggesting that such authority cannot rest in more than one place.

Local Law No. 2 also violates Unconsolidated Law § 891 because that statute, which is specific to instances in which removal is sought, requires that the hearing must be held before an employee of the police department. *See Matter of Lynch v. Giuliani*, 301 AD2d 351, 359-360 (1st Dept 2003). Unlike Civil Service Law § 75, which broadly permits the officer or body with the authority to remove an employee to delegate the task of conducting the disciplinary hearing, Unconsolidated Law § 891 contains additional language limiting any delegation to "a deputy or other employee of such officer …." *Uncon Law* § 891. Thus, the

statute "requires that a police officer be removed from his or her position only after a hearing conducted by an individual actually employed by the [head of the police department]." *Matter of Lynch*, 301 AD2d at 359. As members of PAB are not employees of the police department, a hearing before the Board which sought an officer's removal would violate Unconsolidated Law § 891.

CONCLUSION

The Locust Club respectfully submits that, for the reasons discussed at length above, the decision of the Appellate Division, Fourth Department should be affirmed.

Dated: March 31, 2022

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CERTIFICATE OF COMPLIANCE

I, Daniel P. DeBolt, Esq., attorney for Petitioners-Respondents, 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 8,920 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: March 31, 2022

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COUNTY OF MONROE)

AFFIDAVIT OF SERVICE BY OVERNIGHT FEDERAL EXPRESS DELIVERY

I, **Jeremy Slyck**, of Rochester, New York, 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.

On March 31, 2022

deponent served the within: **BRIEF FOR PETITIONERS-RESPONDENTS**

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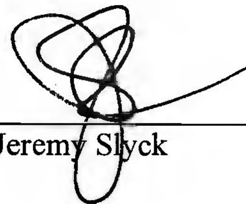
the address(es) designated by said attorney(s) for that purpose by depositing **three (3)** true copy of same, enclosed in a properly addressed wrapper in an Overnight Next Day Air Federal Express Official Depository, under the exclusive custody and care of Federal Express, within the State of New York.

Sworn to before me on March 31, 2022

Andrea P. Chamberlain
Notary Public, State of New York
No. 01CH6346502
Qualified in Monroe County
Commission Expires August 15, 2024



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