To be Argued by:
ANDREW G. CELLI, JR.
(Time Requested: 15 Minutes)

New York Supreme Court
Appellate Division—Fourth Department

Docket No.: CA 20-00826

In the Matter of the Application of

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

Petitioners-Respondents,

– against –

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

Respondents-Respondents,

COUNCIL OF THE CITY OF ROCHESTER,

Respondent-Appellant,

– and –

THE MONROE COUNTY BOARD OF ELECTIONS,

Respondent.

BRIEF FOR RESPONDENT-APPELLANT

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PRELIMINARY STATEMENT

The voters of the City of Rochester have spoken. By a three-to-one margin in the November 2019 referendum election, they approved an amendment to the Rochester City Charter that empowers a Police Accountability Board ("PAB"), a body created by Local Law No. 2, to exercise civilian oversight of the Rochester Police Department ("RPD"). Among other things, the PAB is empowered to make policy recommendations to the Chief of Police, conduct investigations and adjudicate complaints of police misconduct, and dictate minimum discipline of officers—by way of a "disciplinary matrix"—in cases where misconduct is found. The Rochester Police Locust Club, the union representing officers of the RPD, opposed the establishment of the Police Accountability Board, first politically prior to Local Law No. 2's enactment, and then legally, by suing to block the November 2019 referendum. Both efforts failed. Now, the Locust Club comes before this Court to argue that the Rochester City Council and its citizenry have no power to review and act on findings of officer misconduct. The Locust Club asks this Court to hold instead that police discipline *must* be collectively bargained with the police union, and that the City Council is barred from choosing a different, more responsive disciplinary process for police.

Binding caselaw from the Court of Appeals holds otherwise.

This is that rare circumstance where not one, not two, but *three* cases from this State's highest court squarely resolve a matter such that judgment for Appellant is compelled. In a line of cases beginning with *Patrolmen's Benevolent Association of City of New York, Inc. v. New York State Public Employment Relations Bd.*, 6 N.Y.3d 563, 573 (2006) ("*NYC PBA*"), and continuing through *Matter of Town of Wallkill v. Civil Service Employees Assn., Inc. (Local 1000, AFSCME, AFL-CIO, Town of Wallkill Police Dept. Unit, Orange County Local 836)*, 19 N.Y.3d 1066 (2012) ("*Wallkill*"), and *City of Schenectady v. New York State Public Employment Relations Board*, 30 N.Y.3d 109 (2017)) *(*"*Schenectady*"), police unions challenged the authority of local officials to fashion their own disciplinary processes for police instead of bargaining with a police union over them. In each case, the unions argued that such discipline was mandatorily subject to collective bargaining under the Taylor Law. And, in each case, the Court of Appeals held exactly the opposite, *i.e.*, that, where the State had granted a locality the power to discipline its police officers prior to the 1967 Taylor Law, that locality is *prohibited* from collectively bargaining over issues of police discipline.

As the Supreme Court (Ark, J.) recognized, in 1907, the State Legislature granted the City of Rochester its own charter, and that charter expressly granted the municipality the power to discipline its police officers. That

State act, coming sixty years *before* the Taylor Law, means that discipline is a *prohibited* subject of collective bargaining under the three Court of Appeals cases.

The Supreme Court failed to follow the logic of its own findings—and it ignored the Court of Appeals' precedent. Rather, it held that, by passing a local law in 1985—twenty years *before* the *NYC PBA* ruling from the Court of Appeals—the City of Rochester somehow surrendered the powers that the State had granted it, namely, its state-conferred authority to legislate—and not bargain—police discipline. This holding was error; it fundamentally misunderstands the relationship between the State and a municipality which is organized pursuant to a municipal charter enacted as a state law, as Rochester's charter was. The Supreme Court's analysis violates the Court of Appeals' command that, where there is a pre-Taylor Law state grant to a municipality of power over police discipline, a municipality *cannot choose* to collectively bargain that issue. Because state law is the source of local authority in this area, a locality can no more surrender powers that the state has conferred upon it than it can ignore the dictates of any other state law that affects its operations.

The City of Rochester had no power in 1985 to choose to collectively bargain—but one cannot blame Rochester for the law it passed: the *NYC PBA* line of cases did not come into existence until 2006. In the mid-1980s, Rochester assumed—as other municipalities did—that it was *required* by state law to

collectively bargain police discipline. Rochester did not make a knowing choice in 1985 to give up its state-conferred rights to control police discipline as it saw fit; it made an error that lay, uncorrected, until the line of Court of Appeals cases starting in 2006 with *NYC PBA*.

This case raises important issues of state power over localities—but it involves more than that. Issues of accountability and civilian oversight of police are at the center of an ongoing national debate. Police officers are public employees, whose salaries come from the public fisc, in this case, the tax dollars paid by Rochester's citizens. Consistent with the State's 1907 grant of authority to the locality, and acting through their elected representatives on the City Council—as later approved by the Mayor and ratified through a referendum—the people of Rochester carefully studied and debated the issue of police accountability, consulted with independent researchers, and crafted and enacted a law, Local Law No. 2, to ensure comprehensive civilian oversight over the Rochester Police Department. This, Rochester had the unquestioned right to do. Since 1907, the State Legislature has permitted Rochester to decide for itself how best to oversee and discipline its police officers; the State has never rescinded that grant of authority. Bound by controlling Court of Appeals' precedent, this Court must allow the voters' will to be effectuated.

QUESTIONS PRESENTED

1. Did the Supreme Court err in striking down a Local Law which establishes a board with authority over police discipline, where the Court of Appeals has repeatedly held that, if the State empowered a locality to decide questions of police discipline before the passage of the Civil Service Law and the Taylor Law, police discipline is a *prohibited* subject of collective bargaining? Yes.

2. Did the Supreme Court err—to the extent it made such a finding—in finding that Local Law No. 2 violates, rather than amends, the Rochester City Charter, and in referring Local Law No. 2 back to the City Council despite finding that any conflict between Local Law No. 2 and the Charter did not render either law invalid? Yes.

STATEMENT OF FACTS

HISTORY OF CIVILIAN OVERSIGHT OF THE RPD

The Rochester Police Department ("RPD") is managed by the Chief of Police, a sworn officer who, in turn, is appointed and may be removed by the Mayor. How to strike the balance between professional police leadership and civilian oversight has been a topic of public debate for decades in Rochester—with, not surprisingly, the Locust Club, the police union, playing an active and important role in the discussion. In the early 1960s, after a street encounter between police and a civilian led to civil unrest in the City, a civilian complaint review process was created by local law; the Locust Club challenged that law in court and lost. *See Locust Club of Rochester v. City of Rochester*, 29 A.D.2d 134, 135, *aff'd*, 22 N.Y.2d 802 (1968).

Three decades later, in 1992, the City created the Civilian Review Board ("CRB"), a volunteer board, to provide an additional level of civilian review

of police practices. While the CRB was empowered to review allegations of misconduct and issue reports, it lacks the power to conduct independent investigations or to impose discipline. Scott Affidavit (Sept. 19, 2019), R238-39 ¶¶ 4-6.

Concerns about alleged misuse of force by members of the RPD have intensified over the last few years. Many Rochesterians—through public demonstrations, remonstrances, and other actions—called upon their elected officials, including members of the Council, to address these concerns.[1] R239-41 ¶¶ 7-8. In February 2017, a lengthy report on the handling of civilian complaints by the RPD, and of the effectiveness of the CRB, was issued by independent researchers. The report found "a lack of accountability and transparency within the RPD, resulting in continued occurrences of police officer misconduct[;] . . . no independent review of police misconduct that calls officers to account for their actions or enacts appropriate discipline that would deter the misconduct[;] . . . [and] no real opportunity for civilians to have their complaints heard in a just and fair process outside of the control of the RPD."[2] The report called for civilian

[1] In January 2018, local advocacy groups, churches, and community organizations formed a coalition known as the Police Accountability Board Alliance (the "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.

[2] Barbara Lacker-Ware and Theodore Forsyth, The Case for an Independent Police Accountability System: Transforming the Civilian Review Process in Rochester, New York (2017), http://enoughisenough.rocus.org/wp-content/uploads/2017/02/The-Case-for-an-Independent-Police-Accountability-System-2.1.17-FINAL.pdf.

control over the disciplinary process at the RPD. R240 ¶ 8(2). In response, in 2018-19, the Council considered legislation to create a new all-civilian oversight body called the Police Accountability Board—or PAB—to handle complaints of police misconduct. R240-41 ¶¶ 8(4)-(5), 9.

The legislative process was lengthy and deliberative. The Council publicly 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 Mayor Lovely Warren. The Council bill went through various drafts and amendments. R241 ¶¶ 9-10. The Council passed Local Law No. 2 on May 21, 2019, and the Mayor approved it on June 6, 2019. R143.

By its terms, Local Law No. 2 was to be submitted to the electors at the general election on November 5, 2019 and would only take effect upon approval. R140, Local Law No. 2, Section 2. A referendum was required pursuant to Municipal Home Rule Law § 23(2)(f) because the law curtailed the Mayor's Charter-delineated power to appoint and remove all board members. Rochester City Charter §§ 3-3(D), 3-3(G). The referendum asked voters if they wished to approve an amendment to the Rochester City Charter to incorporate the terms of Local Law No. 2 and establish a PAB empowered to conduct civil oversight of the Police Department, as discussed below. R12-13 n.11.

On November 5, 2019, Rochester voters overwhelmingly passed the referendum approving Local Law No. 2 and amending the Charter. R12.[3] Over 75% of the voters in the November 2019 election voted to approve the law and create the PAB.[4]

WHAT THE LAW DOES

Local Law No. 2 amended the City Charter to add a new article to the Charter, Article XVII, entitled "Police Accountability Board." *See* R125, Local Law No. 2, Section 1. The nine-member PAB was designed to be independent of the Rochester Police Department (no current or former RPD employees can be PAB members). R127-28 §§ 18-3(C), 18-4(A), 18-4(C). Article XVII provides that members of the PAB are to be appointed as follows: the Mayor appoints one member, the Council appoints a member from each council district (for a total of four), and the Council also appoints four additional members drawn from nominations from a slate of community organizations. R128 § 18-4(H). Each member of the PAB must be approved by a majority of the City Council. R128

[3] The Supreme Court decision erroneously states that the referendum took place on November 4, 2019. The general election, which the referendum was part of, took place on November 5, 2019. *See* https://www.elections.ny.gov/NYSBOE/law/2019PoliticalCalendar.pdf.

[4] "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-.

§ 18-4(H)(3).[5] The new charter section also specifies that members of the PAB (as well as its Executive Director and staff) are required to participate in a broad range of training relevant to the PAB's work. R136-37 § 18-7(A).

As detailed in Article XVII, once established, 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

[5] Because the City Council ultimately approves appointment of all members of the PAB via legislation, the City Council is the appointing authority with power to remove these members for violation of Rochester's Code of Ethics or otherwise for cause. *See* Rochester City Charter §§ 2-18(E); 2-19. While Local Law No. 2 also provides a process by which a majority of the PAB may request that the City Council remove a member of the PAB for good cause, it does not confer any power on the PAB itself to remove a member of the board. R129 § 18-4(I). Members of the PAB are thus accountable to the Rochester City Council, who, in turn, as elected officials, are accountable to the voters of Rochester. While the Supreme Court drew incorrect conclusions about how a member of the PAB may be removed, as it correctly noted, the structure and mechanisms of the PAB's appointments, removals, and term limits are not challenged in the Petition. *See* R14, Decision at 6 n.24, 6 n.32.

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 has no power to impose less than the discipline determined by the PAB using the matrix, but may impose "any additional discipline beyond that recommended by the Board" R132, R134 §§ 18-5(H), 18-5(J).

It is important to note that Local Law No. 2—now incorporated into the City Charter—also expressly accords RPD officers substantial procedural rights during the PAB's disciplinary process, including:

- 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).

The law also includes a severability provision: "The invalidity of any provision or provisions of this chapter shall not affect the validity of the remaining provisions thereof, but such remaining provisions shall continue in full force and effect." R140 § 18-14.

The law states that it will only take effect if approved by the voters at a referendum; the law curtailed the Mayor's power to appoint board members, thus fitting within the Municipal Home Rule Law's requirement for mandatory referendum for laws curtailing the "power of an elective officer." Mun. H. R. L. § 23(2)(f); *see* R140, Local Law No. 2, Section 2.

PROCEDURAL HISTORY

On September 9, 2019—after Local Law No. 2 was passed by the City Council and signed by the Mayor, but before the referendum—the Rochester Police Locust Club and its president filed this action and moved for a preliminary injunction seeking to block the referendum on Local Law No. 2. The Supreme Court set a compressed briefing schedule and heard argument on September 25, 2019. Without finding that the Petitioners were likely to prevail on the merits—instead concluding that the law "may be legally permissible as written"—and without finding that Petitioners would suffer irreparable harm, the Supreme Court granted Petitioners' motion for a preliminary injunction and enjoined the referendum that same day. R53-54, R109-111

The Council, the City of Rochester, and Mayor Warren appealed. R51. On October 17, 2019, the Fourth Department vacated the preliminary injunction 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).

On November 5, 2019, Rochester voters overwhelmingly passed the referendum approving Local Law No. 2, with 75% of voters in favor. *See* R12. Nine PAB members were appointed in accordance with Local Law No. 2 and the PAB held its first meeting on January 28, 2020. *See* https://www.cityofrochester.gov/PAB/.[6]

At this point, the Supreme Court took up the case on its merits. On December 11, 2019, the Supreme Court requested supplemental information from the parties in the form of fourteen questions. R364-66. The parties submitted answers to these questions on January 10, 2020. R367-420. On May 7, 2020, the Supreme Court issued a Decision and on May 19, 2020, issued a Letter Order and Judgment. R3-37. The Council timely appealed. R1.

Justice Ark's May 7 Decision granted Petitioners' application insofar as it found unlawful that portion of Local Law No. 2 that empowers the PAB to "conduct[] hearings and discipline[e] officers of the City of Rochester Police Department." R35. The Decision found 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

[6] On January 28, 2020, the 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.

final decision of discipline,' the PAB has no inherent authority to punish or remove the officer." R19.

The Decision recognized that the State, in passing the 1907 Rochester City Charter, had given Rochester exclusive authority to regulate police discipline under the Court of Appeals line of cases beginning with *NYC PBA*, 6 N.Y.3d 563, 573 (2006), and continuing through *Wallkill*, 19 N.Y.3d 1066 (2012), and *Schenectady*, 30 N.Y.3d 109 (2017). R22-25. It thus held that Rochester fell within a "'grandfathering' exception" to the Civil Service Law's requirement that police discipline be a subject of collective bargaining. R21-25. The Supreme Court found that "[u]ntil 1985, the City of Rochester unquestionably possessed unfettered, exclusive authority to regulate matters of police discipline." R25. The Supreme Court then held that the Rochester City Council's passage, in 1985—*before* the *NYC PBA* line of cases—of a law that "repealed the police discipline portion of the City Charter expressly 'for the reason that this subject matter is covered in the Civil Service Law' . . . ended the City's 'grandfather' exemption." *Id.*

The Supreme Court also found that Local Law No. 2's severability clause was valid and, therefore, while it struck parts of Local Law No. 2 relating to the discipline of RPD officers, the remaining parts of the law remained in force. R34.

In addition to these findings, the Supreme Court made a series of observations that have nothing to do with legal analysis of the challenge before it, but that reflect the Supreme Court's policy concerns about Local Law No. 2. For example, while noting that "Petitioners did not challenge the phrasing of the referendum," the Supreme Court dedicated a paragraph in a footnote to what it saw as important effects of Local Law No. 2 that were not listed on the ballot. R13 n.11. In another footnote attached to a description of the nomination of some PAB members by the Alliance, the Supreme Court raised "[t]he question" —while noting candidly that the question was "not before the Court" —of "whether a branch of government may divest itself of the duty of governing and transfer its power and responsibilities to a private organization that intentionally excludes membership solely on the basis of occupation." R14 n.23. In a third footnote regarding removal of PAB members, the Supreme Court stated that "[t]hough not germane to the Court's decision, the wisdom of this particular provision is questionable." R30 n.113. The Supreme Court also discussed "the reasons it is important to maintain commander control of a police force," even though such policy arguments had no bearing on the legal analysis. R20.

The Supreme Court also delivered a substantive critique of Local Law No. 2—one that was both legally immaterial to the challenge before it, and, worse yet, incorrect as a matter of fact. The Decision described the PAB's powers as

"unprecedented among civilian police review boards." R16. Respectfully, that is simply untrue. While the PAB represents a bold and innovative response to community concerns about police misconduct, in truth, Milwaukee, Detroit, Connecticut, Newark, Chicago, San Francisco, Oakland, and Washington, D.C. *all* have similar laws that provide civilian oversight bodies with the power to determine police discipline. Some of these jurisdictions, including Milwaukee, Detroit, Connecticut, and Newark, provide that the civilian board has final say over police discipline, while others, including Chicago, San Francisco, Oakland, and Washington, D.C., provide that, where the oversight board and police chief disagree about the discipline to be imposed, an independent—often civilian—body will make the final determination. Connecticut state law provides that any municipality in the state may create a civilian oversight commission with the power to discipline police officers. *See* R401-06 (citing city and state statutes governing other civilian oversight bodies).

Finally, despite finding that any "conflict with the Rochester City Charter does not render either law wholly invalid," the Supreme Court 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. It is not clear from the Decision whether this command is premised on a finding that Local Law No. 2 violates the Rochester City Charter despite expressly amending

it, or is merely based on the Supreme Court's expressed view that it "would have been preferable for the City Council to explicitly state its intention to affect City government." R31.

This appeal followed.

ARGUMENT

I. ROCHESTER IS NOT PERMITTED TO COLLECTIVELY BARGAIN POLICE DISCIPLINE

Controlling Court of Appeals precedent makes clear that police discipline is *not* a proper subject for collective bargaining in Rochester. As the Supreme Court correctly held, for decades after the passage of the Taylor Law, "the City of Rochester unquestionably possessed unfettered, exclusive authority to regulate matters of police discipline." R25.

A. Under Controlling Court of Appeals Precedent, Police Discipline *Cannot* Be Collectively Bargained, Because a State Statute Places the Disciplinary Power in the Hands of Local Officials

1. Discipline of Rochester Police Officers is Not a Permitted Subject of Collective Bargaining

a. A Trio of Court of Appeals Cases Holds that Discipline Cannot be Collectively Bargained Where there is a Prior State Statute Granting the Locality the Power to Discipline

If there is one fixed principle in the law governing police, local control, and collective bargaining, it is this: the subject of "discipline may *not* be a subject of collective bargaining under the Taylor Law when the Legislature has

expressly committed disciplinary authority over a police department to local officials." *NYC PBA*, 6 N.Y.3d at 570 (emphasis added). The Court of Appeals has so held not once but three times, including as recently as 2017. *NYC PBA*, 6 N.Y.3d 563 (2006); *Wallkill*, 19 N.Y.3d 1066 (2012); *Schenectady*, 30 N.Y.3d 109 (2017). Rochester presents a fourth such case.

The Court of Appeals has thrice rendered the Taylor Law inapplicable in cases where, prior to 1967, the State had delegated authority for police discipline to localities. *NYC PBA* is the leading and seminal case. In *NYC PBA,* the Court of Appeals found that, by enacting New York City's charter in 1897, the State Legislature had expressly committed authority over police discipline to a local official in New York City.

In considering whether the Taylor Law required New York City to negotiate police discipline, the Court of Appeals held that "some subjects are excluded from collective bargaining as a matter of policy, even where no statute explicitly says so." *NYC PBA*, 6 N.Y.3d at 572. Although the right of public employees to collectively bargain has strong policy support in state law, there exists a "competing policy" to which it must yield—namely, the "policy favoring strong disciplinary authority for those in charge of police forces." *Id.* at 571. Where the Legislature, prior to enacting the Taylor Act, had specifically empowered a locality with "official authority over the police," the Taylor Law's

general command of collective bargaining for public employees gives way, because it is "not sufficient to displace the more specific authority" of local control over police. *Schenectady*, 30 N.Y.3d at 115.

The Court of Appeals first faced this issue in the context of New York City, its charter, and claims by the local police union that the Taylor Law trumps local control. Finding the following language in New York City's 1897 charter dispositive—"'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,'" *NYC PBA*, 6 N.Y.3d at 573-74 (quoting New York City Charter) (emphasis omitted)—the Court in *NYC PBA* held that the Taylor Law 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. In case anyone misunderstood the holding of *NYC PBA*, the Court of Appeals reaffirmed it twice—once in 2012 and again in 2017. In *Wallkill*, 19 N.Y.3d at 1069, and *Schenectady*, 30 N.Y.3d at 115-16, the Court of Appeals pointed to preexisting state laws (the Town Law and the Second-Class Cities Law, respectively) that accorded local officials control

over police discipline and held that the policy of the Taylor Law could not displace those grants of authority.[7]

b. A 1907 State Statute Granted Rochester the Power to Discipline its Officers, Precluding It from Bargaining Over that Issue

Here, as in each of the Court of Appeals' trio of cases, there is a state law that grants Rochester "local control over police discipline," namely, Chapter 755 of the State's laws of 1907, which created the Charter of the City of Rochester. *Schenectady*, 30 N.Y.3d at 113; *see* R250-73 (relevant section of Ch. 755 of L. 1907). As the Supreme Court appropriately found, R25, in Rochester's 1907 charter, the State Legislature expressly granted Rochester officials the power to discipline police officers, just as the 1897 state law relied upon in *NYC PBA* enacted the New York City Charter and granted New York City local control over police discipline. 6 N.Y.3d at 574.

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[7] Unsurprisingly, Appellate Division panels faced with similar questions have uniformly followed and adopted the principle that municipalities cannot collectively bargain police discipline where there is a pre-Taylor Law grant of state authority over police discipline to the locality. *See Town of Goshen v. Town of Goshen Police Benevolent Ass'n*, 142 A.D.3d 1092, 1093 (2d Dep't 2016) (collective bargaining agreement is void because "by enacting L.L. No. 1, the Town Board affirmed that the subject of police discipline resides with it and is a prohibited subject of collective bargaining between the appellant and the PBA"); *Town of Harrison Police Benevolent Ass'n, Inc. v. Town of Harrison Police Dep't*, 69 A.D.3d 639, 642 (2d Dep't 2010) ("Since disciplinary matters are not a proper subject of collective bargaining as per the Westchester County Police Act, the Supreme Court erred in granting the petition . . . "); *Gizzo v. Town of Mamaroneck*, 36 A.D.3d 162, 163 (2d Dep't 2006) (holding that Mamaroneck, by local law, can alter who determines police discipline); and *Carver v. Cty. of Nassau*, 135 A.D.3d 888, 889-890 (2d Dep't 2016) (where "the County Charter [a state law] vested the power to discipline members of the Nassau County Police Department exclusively with the Commissioner of Police," "collective bargaining over disciplinary matters was prohibited" and Nassau's agreement to submit to "binding arbitration" is void).

Specifically, sections 324 and 330 of Chapter 755 of the Law of 1907, entitled "An Act Constituting the Charter of the City of Rochester," provided as follows:

> § 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.
>
> § 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 . . . *it 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.

R258, R259 §§ 324, 330 (emphasis added).

This language is virtually identical to the New York City Charter language found dispositive in *NYC PBA*. *See NYC PBA*, 6 N.Y.3d at 573-74 (quoting New York City Charter).

Via the 1923 Home rule amendment to the State Constitution, and the passage of the Municipal Home Rule Law, the State Legislature afforded Rochester and other municipalities like it the power to amend their charters, within certain limits and by certain means. *See* N.Y. Mun. Home Rule Law 10 §§ 1(ii)(a)(1) and 1(ii)(d) (Rochester can revise its charter "by local law adopted by its legislative body" and can pass local laws concerning the "removal . . . of its officers and employees"). Thus, by the time of the Taylor Law's passage, the concept of "local control of police" included the right of voters to change the locus of discipline from the "commissioner of public safety"—the term used in Section 330 of the Charter—to some other municipal official or body. And indeed, it has. *See, e.g.*, Charter of the City of Rochester §§ 17-4–17-31 (describing history of amendments to charter since 1907).[8] The 2019 referendum establishing the PAB, and empowering it to impose discipline, is a transfer of authority within the municipal structure consistent with Rochester's Home Rule power.

[8] Although §§ 324 and 330 were subsequently amended, by local law, control over police discipline has always resided in local Rochester officials. Specifically, in 1925, the city of Rochester, by local law, replaced § 324 (which it repealed) with § 129, which used nearly identical language: "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." R246 Celli Aff. ¶ 3, Ex. 2 (1925 local law); *see also id*. ¶ 4, Ex. 3 (1957 local law: amending § 129 but retaining relevant language concerning disciplining officers). Section 330 was altered by local laws in 1951 and 1963 to tinker with *how* the commissioner imposed discipline, but continued to have the Rochester commissioner impose police discipline. *Id*. ¶ 5, Ex. 4 (1951 local law); *id*. ¶ 6, Ex. 5 (1963 local law, reflecting that § 330 was renumbered to § 387). Crucially, however, at no point prior to 1967 did the State Legislature amend the Rochester charter to remove the power to discipline police from local control. *See id.*; *see also* Charter of the City of Rochester Article VIII (Public Safety Administration) and VIIIA (Police Department) (listing history of amendments which includes only amendment by local laws, not state laws).

Most importantly, the 1907 state statute chartering Rochester—like the 1897 New York City Charter at issue in *NYC PBA*—was "passed decades before the Taylor Law existed" and "express[ed] a policy so important that the policy favoring collective bargaining should give way." *NYC PBA*, 6 N.Y.3d at 576. Like the state statutes analyzed in the trio of Court of Appeals cases, the governing provision of the 1907 Rochester charter "has not been expressly repealed or superseded by the legislature nor was it implicitly repealed by the enactment of the Taylor Law in 1967." *Schenectady*, 30 N.Y.3d at 116-17. As a result, the Taylor Law's "general command regarding collective bargaining is not sufficient to displace the more specific authority" granted by the 1907 Rochester charter. *Id.* at 115.

Put another way: the Taylor Law does not mandate collective bargaining over police discipline in Rochester, in the face of the 1907 Charter, 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. Within the confines of its ability to amend its Charter, 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 that power.

The 1907 Charter remains in place to this day; Local Law No. 2—once it was approved by the voters—amended it to establish the powers of the PAB.

2. CSL § 75 Similarly Does Not Apply

In each of the three Court of Appeals cases finding that police discipline is not subject to collective bargaining, the Court also found inapplicable the procedural protections of Civil Service Law ("CSL") §§ 75 and 76. *NYC PBA*, 6 N.Y.3d at 573-575; *Wallkill*, 19 N.Y.3d at 1069; *Schenectady*, 30 N.Y.3d at 114-15. CSL § 76(4), which the Court of Appeals repeatedly referenced, specifically "grandfathers" prior-enacted legislation. It 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). Accordingly, if the power to discipline was delegated to the locality *prior* to the passage of CSL sections 75 and 76 in 1958, those sections of the CSL do not apply.[9] *See NYC PBA*, 6 N.Y.3d at 573-575 (citing CSL § 76(4) to find CSL § 75 inapplicable); *Wallkill*, 19 N.Y.3d at 1069 (same); *Schenectady*, 30 N.Y.3d at 114-15 (same). Section 76(4) thus "grandfathered" state laws passed prior to the enactment of CSL §§ 75 and 76—including the 1907 Rochester charter, which predated those statutes by 50-plus years. *NYC PBA*, 6 N.Y.3d at 573.

[9] *See Meringolo on Behalf of Members of the Corr. Captains Ass'n v. Jacobson*, 173 Misc. 2d 650, 651 (Sup. Ct., N.Y. Cty. 1997), *aff'd sub nom. Meringolo v. Jacobson*, 256 A.D.2d 20 (1st Dep't 1998) (recognizing that CSL § 75 passed in 1958).

In any event, there is no substantive conflict between Local Law No. 2 and CSL § 75. The former borrows and incorporates the procedural protections of the latter. *See* R133 § 18-5 (I)(7) (requiring PAB to grant procedural protections as embodied in CSL § 75). In their wisdom, the voters of the City of Rochester accorded police officers the exact same procedural protections in disciplinary cases as they would have had under the Civil Service Law. This is far from being an admission that these statutes apply—indeed, if they did apply it would be surplusage for Local Law No. 2 to so state. Rather, it reflects a policy decision by the City of Rochester to borrow those protections and import them into local law. Accordingly, as a matter of *substance*, officers charged with misconduct have no fewer rights to present and challenge evidence now, before the PAB, than they had previously, before the Police Commissioner (or than they would have if Sections 75 and 76 applied). In the end, the Locust Club's complaint is not and cannot be that its members are prejudiced in their procedural rights. It is simply that they do not wish to be judged by civilians.

II. THE SUPREME COURT'S ATTEMPT TO DISTINGUISH CONTROLLING COURT OF APPEALS PRECEDENT FAILS

A. Rochester's 1985 Law, Passed Long Before the *NYC PBA* Line of Cases, Does Not Alter the State's Prohibition on Rochester Collectively Bargaining Discipline

Notwithstanding its determination that the State Legislature granted the City of Rochester the "exclusive authority to regulate matters of police discipline," R25,

the Supreme Court held, citing no case, that Rochester no longer had that authority by virtue of a law that Rochester passed in 1985 —*twenty-one years before* the *NYC PBA* line of cases. In this way, Supreme Court held, Rochester is differently situated from New York City, Wallkill, and Schenectady; thus, it asserts, the three Court of Appeals cases are inapposite.

The Supreme Court's distinction is novel, and its conclusion is unsupported and incorrect, for three reasons.

1. Rochester Was Prohibited From Binding Itself to the Taylor Law in 1985

First, Rochester did not have the *power* in 1985, or subsequently, to deem the inapplicable Taylor Law binding on the municipality. It may have thought it did, but *NYC PBA*, in 2006, held otherwise. The holding of *NYC PBA* is clear: a city like Rochester—empowered by the State to control police discipline—cannot *contravene* State law by submitting itself to the Taylor Law from which it was carved out. Nor can it somehow adopt the Taylor Law simply by collectively bargaining on the topic of police discipline, now that the Court of Appeals has held that such bargaining is legally *prohibited*.

NYC PBA and its progeny makes clear that, for municipalities where the State had previously committed "police discipline to the discretion of local officials," *Schenectady*, 30 N.Y.3d at 115, discipline cannot be addressed in a collective bargaining agreement, period. In such situations, collective bargaining

is not merely "not mandatory" or "permissible but not required"—it is *prohibited,* as the Court of Appeals has reiterated.[10] This is consistent with the longstanding state "policy favoring the authority of public officials over the police"—a policy so important that it trumps the general state policy supporting collective bargaining. *See NYC PBA*, 6 N.Y.3d at 575-76.

The Court of Appeals' trio did not only ground these rulings in the "grandfathering" language of CSL § 76(4),[11] but also relied on the State Legislature's *implicit* policy justification underlying its grant of discipline authority to localities. The Taylor Law's collective bargaining precepts in Article 14, CSL § 200 *et seq.* were enacted nearly a decade after the procedural protections outlined in CSL §§ 75 and 76. Decision at 16. And, unlike CSL § 76(4), the Taylor Law does not contain explicit language referencing or "grandfathering" preexisting laws. Despite the lack of explicit language, the Court of Appeals did not hesitate to hold inapplicable all of the Taylor Law's provisions where there is a preexisting grant of disciplinary authority to the locality: "some subjects are

[10] *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").

[11] CSL § 76(4) states "[n]othing [contained] in sections seventy-five or seventy-six [of the Civil Service Law] 'shall be construed to repeal or modify any general, special or local'" preexisting laws. N.Y. Civ. Serv. Law § 76(4). Such language says nothing about Rochester's power to overrule, through local law, the state's prohibition on collective bargaining.

excluded from collective bargaining as a matter of policy, even where *no statute explicitly says so*." *NYC PBA*, 6 N.Y.3d at 572 (emphasis added). Where the State made a policy decision that the locality should control discipline—e.g., the 1907 State grant of authority to Rochester—that policy decision controls.

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. *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.

Accordingly, even had Rochester intended in 1985 to "surrender" its authority to regulate police disciplinary—a dubious proposition for which there is absolutely no support anywhere in the case law—it was clear by 2006 that it did not and does not have the power to do so: the State's determination that Rochester was prohibited from collectively bargaining discipline was fixed by the enactment of the 1907 Charter. As of 1967, when it 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. *Schenectady*, 30 N.Y.3d at 113.

The Supreme Court distinguished numerous Appellate Division cases holding that collective bargaining was impermissible by stating that, in those cases, the local legislation was "continuously in effect" from before the enactment of the Taylor Law to the recent adoption of the "new, contested local law." R25-26. But none of those cases relied on the Supreme Court's novel concept of "continuous effect" or even that it was relevant to the analysis. The concept itself finds no support anywhere in the jurisprudence of this area. And the Supreme Court cited no case for its novel proposition that a municipality can "los[e] its 'grandfathered' status," let alone that it could do so through passage of local legislation before the *NYC PBA* line of cases. R26.

2. The 1985 Rochester Legislature Did Not Relinquish a Known Right—It Wrongly Believed it was Bound by the Civil Service Law

Second, when Rochester passed the 1985 local law, it was without benefit of the *NYC PBA* line of cases which emerged twenty-one years later. As a matter of simple logic, Rochester could not, in 1985, "surrender" a right that was not established until 2006. R25. The 1985 local law was pithy indeed: It states only that Rochester was repealing its own code provisions governing police discipline,

"for the reason that the subject matter is covered in the Civil Service Law." R317. The 1985 act does *not* say that Rochester had made a policy judgment to bargain discipline—much less that it wished to surrender its state-given right to discipline its police officers. It does not say anything of the sort. What seems perfectly clear is that, in 1985, Rochester believed itself *bound* by the Civil Service Law. That misunderstanding has been widespread throughout the state, as evidenced by *NYC PBA* itself and the numerous municipalities that have been the subject of post-*NYC PBA* challenges.

Significantly, the Court of Appeals 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. In *Schenectady*, the Court of Appeals held that even if the city's "course of dealing" evidenced that it believed itself bound to collectively bargain police discipline, the "'course of dealing' referenced all took place prior to 2006, when we decided *Matter of Patrolmen's Benevolent Assn.*" *Schenectady*, 30 N.Y.3d at 117. So too here. There can be no dispute that the 1985 law "took place prior to 2006," *id.,* and that Rochester's conduct in enacting it was based upon a mistaken belief about the reach of the Taylor Law.

The City of Rochester never "explicitly surrender[ed]" its known right to discipline police, because it could not. And the Supreme Court's statement otherwise is simply wrong. R25.

3. The Current City Council Has the Power to Modify Any Determination Made by the 1985 Council

Third, the Supreme Court made no effort to address the idea that perhaps the City of Rochester should be deemed to have "changed its mind" since 1985—and that's what Local Law No. 2 represents. There is no case law of which we are aware that holds that a municipality, having passed a law through the normal democratic channels, is without power to change that law later in time. The very concept is contrary to democratic principles and imposes a dead-hand power on past legislative bodies that defies the need to change laws as times change. Accordingly, even if it were true that somehow the 1985 law were an intentional relinquishing of Rochester's right not to collectively bargain discipline—though Rochester was "prohibited" from so bargaining and it had no understanding it had such right at the time—the 2019 City Council and the voters of 2019 have the authority to disagree with the 1985 Council predecessor and change the law.[12] *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"

[12] 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 is was before the Court, because Local Law 2 does repeal the 1985 Legislature's decision (uninformed though it was) to collectively bargain discipline.

(internal citations omitted)). The current 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.

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No appellate court has *ever* held that police discipline is a proper subject of collective bargaining where, as here, a pre-Taylor Law state law granted the municipality the power to discipline police officers. The Supreme Court's reliance on Rochester's 1985 law to subvert its finding that the Legislature granted Rochester the authority to regulate matters of police disciplines has no support. It should be rejected.

B. Unconsolidated Law § 891 Does Not Change the Analysis, Nor is There any Conflict with that Provision

Unconsolidated Law § 891 has never been invoked in any of the *NYC PBA* line of cases, because it is simply an *officer-specific version* of the civil service rights codified in CSL § 75. *See* R116, Petition ¶ 22 (admitting that Unconsolidated Law § 891 "mirrors" CSL § 75). Just as CSL § 75 is inapplicable because of the state's 1907 grant of authority over police discipline to Rochester, Unconsolidated Law § 891 is inapplicable for the same reason.

Unconsolidated Law § 891 is limited to removal proceedings and, like CSL § 75, provides that a disciplinary hearing for a police officer shall be held "by the officer or body having the power to remove the person." N.Y. Unconsol. Law

§ 891. The Supreme Court asserts that this language conflicts with Local Law No. 2 because, in its view, while "the PAB shall make 'the final decision of discipline,' the PAB has no inherent authority to punish or remove the officer." R19.

Supreme Court misreads Local Law No. 2. Local Law No. 2 specifically states that the PAB has "the power to discipline RPD Officers if a complaint of misconduct is sustained" and further states the PAB's "determination of discipline shall be binding on the Chief." R134 § 18-5(J)(4). Put another way, where the PAB decides removal is appropriate, the Chief has no power *not* to remove the officer; the Chief must, as a ministerial matter, remove the officer. Indeed, the whole basis for the Locust Club's lawsuit is its complaint that Local Law No. 2 "remov[es] the authority of the Police Chief to discipline police officers." R115, Petition ¶ 18. Given the explicit authority Local Law No. 2 vests in the PAB, the Supreme Court erred in stating that PAB has "no inherent authority to punish or remove" police officers. By virtue of Local Law No. 2, the PAB *is* the "body having the power to remove" an officer and there is no inconsistency with Unconsolidated Law § 891.[13]

Nor is there any conflict between Local Law No. 2 and Unconsolidated Law § 891 as a matter of substance. Unconsolidated Law § 891, like CSL § 75,

[13] *Lynch v. Giuliani*, 301 A.D.2d 351 (1st Dep't 2003), cited by the Supreme Court, is thus inapplicable, because under the terms of the City charter in *Lynch,* the "police commissioner [had] absolute authority in matters of police discipline." 301 A.D.2d at 352. The hearing held by the civilian board resulted only in "a recommended decision to the Police Commissioner," which the Commissioner was free to rejected. *Id.* at 355.

provides certain due process protections for officers accused of wrongdoing, including notice, a right to a hearing, a right to be furnished with the charges against him, and an opportunity to be represented by counsel. All of these protections are incorporated into Local Law No. 2 and now into the Charter. *See* R133 § 18-5(I)(7) (incorporating "[a]ll due process rights" in CSL § 75); CSL § 75 (civil servant has right to be furnished with "a copy of the charges preferred against him").

C. There is no State Requirement of Command Control

While not a legal basis for the Supreme Court's ruling, the Supreme Court repeatedly stated that only the police commissioner—and not a Police Accountability Board—should have the power to decide whether police officers engaged in misconduct. If the Court was expressing its personal policy preferences for "commander control of a police force," R20, 75% of Rochester voters see it precisely the other way. Policy preferences are not the province of the judiciary. They are the province of the legislature and the voters acting through referenda. To the extent the Court was indicating that *who* has the power to discipline affects the Taylor Law analysis, it erred both as a matter of fact and a matter of law.

As matter of historical fact, in this State, civilian leaders regularly are empowered to determine police discipline in this state. In *Wallkill*, the Court of Appeals upheld a local law which vested the Town Board, a civilian body—not the

police commissioner—with "the authority to review the individual hearing officer's recommendations, render a final determination of the charges and impose a penalty." *Wallkill*, 19 N.Y.3d at 1068; *see also Town of Goshen v. Town of Goshen Police Benevolent Ass'n*, 142 A.D.3d 1092 (2d Dep't 2016) (upholding local law entrusting civilian legislature with police discipline).[14]

And the Court of Appeals never limited the *NYC PBA* line of cases to state grants of disciplinary authority to police commissioners. The Court of Appeals has instead only considered whether the pre-Taylor Law state law granted disciplinary control to *any* "local officials," be it a police commissioner *or* a Town Board, as in *Wallkill*. 19 N.Y.3d at 1069. If it did, then the precise local official to whom the power fell, by whatever lawful means, was irrelevant.

The *NYC PBA* line of cases does not speak to *who,* within a municipality, can discipline police. That question is answered by the municipality itself, under their powers afforded them by the 1923 Home Rule Amendment to the New York State Constitution and the subsequent Municipal Home Rule Law, which grants to municipalities the power to determine *how* to exercise the powers granted by the state. Rochester has the power to pass local laws concerning the "removal . . . of its officers and employees." N.Y. Mun. Home Rule Law 10 §

[14] The Supreme Court's opinion in *Town of Goshen* provides more detail on the challenged law: the "Town Board . . . shall make all final determinations concerning the investigation of complaints and imposition of disciplinary penalties with respect to members of the Town of Goshen Police Department." 42 Misc. 3d 236, 238 (Sup. Ct. Orange Cty. 2013).

1(ii)(a)(1). It also has the power to revise its charter "by local law adopted by its legislative body." *Id.* § 1(ii)(d). *See generally Mitchell v. Borakove*, 225 A.D.2d 435, 439 (1st Dep't 1996) ("a city's power to adopt a new charter, or amend an existing one, has been codified by the Legislature") (Tom, J., concurring). To the extent that Rochester seeks to amend its charter to "curtail any power of an elective official," the amendment must be ratified by the voters, via a referendum election. Municipal Home Rule Law § 23(2)(f). In this case, the City enacted Local Law No. 2 to set forth the methods for disciplining and removing police officers in cases of misconduct under a newly-established PAB, and, for the reasons described below, it required that this new method take the form of a charter amendment that required ratification at a referendum by the voters of Rochester.

The City of Rochester's decision to vest disciplinary authority in a locally appointed PAB is no different in kind from its prior decisions to vest that authority in the Chief; both are lawful choices of the City of Rochester.

III. LOCAL LAW NO. 2 LAWFULLY AMENDED THE CITY CHARTER AND NO FURTHER AMENDMENT OR REPEAL IS REQUIRED

Under the Rochester City Charter, the Mayor has the power, "[s]ubject to confirmation by the Council, to appoint . . . the members of all boards," Rochester City Charter § 3-3(D), and to "remove all . . . members of boards," *id*. § 3-3(G). Local Law No. 2 curtails this power in the case of the PAB; under it, all but one PAB member would *not* be appointed by the Mayor. *See* R128

§ 18-4(H). On this, the parties and the Supreme Court all agree. *See* R373, R418; R29.[15] The same principle applies to removal of PAB members: because the City Council is the appointing authority for the members of the PAB, it—not the Mayor—has the power to remove those members. *See* Rochester City Charter §§ 2-18(E); 2-19.

Under the well-established rule of statutory construction that "what is special or particular in the later of two statutes supersedes as any exception whatever in the earlier statue is unlimited or general," these changes to the Mayor's powers as to the PAB are clear and non-controversial. *Francois v. Dolan*, 95 N.Y.2d 33, 39 (2000) (*quoting East End Trust Co. v. Otten*, 255 N.Y. 283, 286 (1931) (Cardozo, Ch. J.)). Recognizing that this rule of statutory construction applies to Local Law No. 2, *see* R29, the Supreme Court found that any "conflict with the Rochester City Charter does not render either law wholly invalid," R35.

Nevertheless, Justice Ark 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. Although Local Law No. 2 explicitly "amended" the Charter "by adding the following new Article XVIII," R23, and was put to a referendum, as required for laws that "curtail any power of an elective

[15] Consistent with Municipal Home Rule Law, Local Law No. 2's curtailment of the Mayor's power was approved by voters in a referendum. Municipal Home Rule Law § 23(2)(f); *see also* R21.

official," Municipal Home Rule Law§ 23(2)(f), the Supreme Court concluded that it "would have been preferable for the City Council to explicitly state its intention to affect City government," R31.

The Supreme Court's belief as to what would or would not be "preferable" is not a valid reason for a court to direct a legislative body to alter an otherwise valid law. Indeed, such an instruction runs afoul of the longstanding precept that Courts must "not [] blur the line of demarcation between the legislative and judicial functions of the government." *Bareham v. Bd. of Supervisors of Monroe Cty.*, 247 A.D. 534, 537 (4th Dep't 1936); *see also People v. Boothe*, 16 N.Y.3d 195, 198 (2011) ("It is well settled that courts are not to legislate under the guise of interpretation.") (internal quotations marks and citation omitted).[16]

Supreme Court's improper intervention in and commentary on aspects of Local Law No. 2 whose legality is not in question and which were not challenged by Petitioners is a troubling theme in the Justice Ark's Decisions. *See e.g.*, R30 n.113 ("Though not germane to the Court's decision, the wisdom of this

[16] The Supreme Court also suggests that Local Law No. 2 conflicts with the City Charter's grant of power to the Mayor "to be the chief executive officer and administrative head of City Government" and that Local Law No. 2 conflicts with the City Charter "by creating a body whose powers conflict with those of the Police Chief." R29, R30. While Respondent City Council maintains that Local Law No. 2 does not modify the Mayor's power to "be the chief executive officer and administrative head of City Government," nor entirely strip the Police Chief of his or her enumerated powers, *see* 398-401, such conflicts would not alter the conclusion that Local Law No. 2's amendment of the City Charter is proper.

particular provision is questionable . . . ."); R54 (enjoining voters from voting on referendum that "may be legally permissible as written" because "any legislation submitted for a referendum on a matter of this importance should be a well-crafted, possibly judicially-honed law"). Such superfluous judicial commentary ignores that the

> [p]ower to legislate is vested in the Legislature, and not in the courts. If ill-advised statutes are enacted, the Legislature, and not the courts, is responsible to the people. [Courts] have no right to pass upon the wisdom, expediency, or necessity of the particular statute under review. [Courts] had nothing to do with its enactment, and, except as individuals forming a part of the great body politic, we have nothing to say as to the fitness or propriety of the legislation. That responsibility rests entirely upon the Legislature which passed the statute, and the Governor who gave it his approval. [Courts] are given no revisionary powers of legislation.

Bareham, 247 A.D. at 536-37. Local Law No. 2, approved in a referendum by the vast majority of Rochester voters, expresses the will of the people of Rochester to take decisive action to address the pressing need for police accountability. The Supreme Court's opinions about how Rochester should have legislated cannot stand in the way.

CONCLUSION

For the foregoing reasons, the Court should reverse the Supreme Court's May 19 Order and Judgment.

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