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Appellate Division–Fourth Department Docket No. CA 20-00826

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.

MEMORANDUM OF LAW IN SUPPORT OF MOTION

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TABLE OF CONTENTS

PAGE NO.

TABLE OF AUTHORITIES

PAGE NO.

Cases

Statutes & Rules

Other Authorities

QUESTION PRESENTED

This case raises the question whether the City of Rochester ("Rochester" or the "City") is permitted to establish a civilian oversight board with the power to discipline police officers who engage in misconduct. Respondent-Appellant Council for the City of Rochester (the "Council") submits this motion seeking leave to appeal the following question of law:

1. Where a 1907 state law granted local officials in Rochester the power to determine police discipline, thus prohibiting the City from collectively bargaining over the subject under this Court's precedents, does a 1985 local law repealing a section of the City Charter regarding the procedures for disciplining officers "for the reason that this subject matter is covered in the Civil Service law" have the effect of lifting the prohibition and forever requiring that the City collectively bargain over such discipline, nullifying a 2019 law establishing an all-civilian police review board with disciplinary powers? The Appellate Division, Fourth Department answered "yes" to this question—and this was error. The Fourth Department erred by ignoring this Court's holding in *Patrolmen's Benevolent Association of City of New York, Inc. v. New York State Public Employment Relations Board*, 6 N.Y.3d 563, 573 (2006) ("*NYC PBA*") and its progeny, that such pre-Taylor Law state enactments fully *prohibit* municipalities from collectively bargaining over these issues. It further

erred by holding that a 1985 Rochester local law—enacted 18 years after the Taylor Law, and more than 20 years before *NYC PBA*—forever surrendered Rochester's exemption from the Taylor Law's requirement of collective bargaining over police discipline. This Court should hear the case to address the conflict between the Fourth Department's ruling in this case and this Court's precedents in *NYC PBA*, 6 N.Y.3d 563, *Matter of Town of Wallkill v. Civil Service Employees Association, 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*"). Leave should also be granted to provide clarity to municipal legislatures and voters on a subject of significant public importance, namely the scope of municipalities' power to act through democratic channels to establish new modalities for police discipline outside the collective bargaining process.

JURISDICTION AND TIMELINESS

The Court has jurisdiction over the motion and proposed appeal under CPLR § 5602(a)(1)(i) because the case originated in Supreme Court, Monroe County; challenges a final determination of the Appellate Division, Fourth Department which resolved the action in its entirety, and is not appealable as of right.

This motion is timely. The Appellate Division's Opinion and Order was issued on June 11, 2021 and the Council was served with written notice of entry on June 17, 2021. *See* Affirmation of Andrew G. Celli, Jr., dated July 19, 2021 ("Celli Aff."), Ex. A. This motion is made within thirty days of service and is therefore timely pursuant to CPLR 5513.

PRELIMINARY STATEMENT

Rochester is the third largest city in New York State, and allegations of police misconduct have been a matter of deep public concern in Rochester for decades. In November 2019, at a referendum election, Rochester voters approved an amendment to the Rochester City Charter that established a Police Accountability Board ("PAB") to investigate and adjudicate allegations of misconduct lodged against members of the Rochester Police Department ("RPD"). The measure carried by a three-to-one margin. Intent on undermining independent civilian oversight of its members, the local police union, the Rochester Police Locust Club ("RPLC"), sued to block this law. In a June 2021 opinion, the Fourth Department sided with the RPLC, misconstruing and narrowing this Court's precedents to find that, by enacting a local law in 1985, the City of Rochester had abandoned its state-conferred power to control police discipline (the "Ruling"). This Court's review is necessary to correct the Fourth Department's erroneous application of this Court's precedents and to provide clarity to municipalities

across the state about their power to address the pressing issue of police misconduct.

In 1907, the State Legislature granted the City of Rochester its own charter—a charter that expressly afforded local officials the power to control the city's police. Rochester, and Rochester alone, bears the responsibility to determine the manner in which its police are disciplined; it cannot abdicate that responsibility to the collective bargaining process. These principles emerge from a trilogy of this Court's cases: *NYC PBA*, 6 N.Y.3d 563, *Wallkill,* 19 N.Y.3d 1066, and *Schenectady*, 30 N.Y.3d 109.

These cases are on all fours with the instant action. In each case, police unions challenged the authority of local officials to fashion their own disciplinary processes for police, instead of bargaining over them with a police union. In each, the unions argued that such discipline was mandatorily subject to collective bargaining under the Taylor Law. In each, this Court granted leave to appeal. And, in each, this Court rejected the claims of the police unions and held 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.

Under the *NYC PBA* line of case, localities fall into two distinct categories based on whether, prior to 1967, the State did or did not grant the locality the

power to discipline police officers. Those localities that were granted that power prior to 1967 are forbidden from collectively bargaining over the issue, and the precise mechanism for determining such discipline can be established via normal democratic means such as local law or charter amendment. Those localities that were *not* granted such power by the State prior to 1967 *must* and can *only* address the means, mechanism, and substance of police discipline via collectively bargaining with the relevant police union. The Fourth Department has now conjured a third category: municipalities who were granted authority to discipline police prior to 1967 by state law, but who somehow lost that authority by way of a post-1967 local law such that collective bargaining over police discipline is now required. Such a construct is directly contrary to this Court's holding that a municipality empowered by state law to control police discipline cannot simply abdicate its responsibility or "surrender" its power to control its police. *See NYC PBA*, 6 N.Y.3d at 575. In this case, the Fourth Department held that a local law Rochester passed in 1985—eighteen years after enactment of the Taylor Law and twenty years before this Court's ruling in *NYC PBA* establishing that municipalities in the first category cannot bargain police discipline—somehow reflects an intent on the part of Rochester to abandon its state-created right and obligation to control police discipline. The proposition is both historically incorrect and logically

incoherent—and it threatens to overturn this Court's careful development of the law in this important area.

The Fourth Department fundamentally erred in ignoring this Court's clear command that, where, prior to the enactment of the Taylor Law, the state put the responsibility for police discipline in the hands of local officials, those local officials have *no* power to legislate or bargain such responsibility away. This Court has held that, in such circumstances, police discipline is a *prohibited* subject of collective bargaining. *See Schenectady*, 30 N.Y.3d 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"). The trilogy of cases "prohibited" such abdication because the pre-1967 state law reflected a state policy judgment that it was the municipality's "ultimate responsibility" to determine police discipline—a responsibility that it cannot "surrender, in collective bargaining." *NYC PBA*, 6 N.Y.3d at 572. The Ruling omits *any mention* of this clear prohibition, or even this language; in doing so, it defies this Court's precedents and undermines the democratic processes by which a municipality alters how it oversees its police force.

If upheld, the Ruling would mean that any municipality that was empowered by state law before 1967 to control police discipline could nullify that state law, and thereby undermine the strong state policy that underlies it, by passing a local law—an outcome that, in and of itself, would be extraordinary and, in all events, is directly contrary to the entire *NYC PBA* framework. In the case of Rochester, the local law at issue was enacted decades before *NYC PBA*, at a time when the balancing of competing state policies—one favoring local control over police, another in favor of collective bargaining—had not yet been explored and decided by this Court. Permitting the Ruling to stand would fatally undermine this Court's well-developed jurisprudence in this extremely sensitive area of state policy, and create broad confusion about the power of localities to address issues of police discipline outside the collective bargaining process.

This Court should grant this motion in order to correct the Fourth Department's error and to address a subject of great public import: the scope of municipal authority to address issues of police misconduct, a question that has only become more pressing in the wake of the murder of George Floyd in May 2020, and New Yorkers' public protests and debates over police misconduct that ensued.

STATEMENT OF FACTS

LOCAL LAW NO. 2 RESULTS FROM CITIZEN CONCERNS

Alleged misconduct by members of the RPD has been a decades-long concern in Rochester that has intensified in recent years. Rochesterians—through public demonstrations, remonstrances, and other actions—have long called upon their elected officials, including members of the Council, to address these concerns, including by creating greater civilian oversight of the department.[1] R239-41 ¶¶ 7-8. In 2017, independent researchers issued a report on the handling of civilian complaints by the RPD and found a need for civilian 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 Rochester's Mayor. The Council bill went through various drafts and

[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.

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 would only take effect upon approval by the electors at the general election on November 5, 2019. 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. Charter of the City of Rochester §§ 3-3(D), 3-3(G).

Over 75% of the voters in the November 2019 election supported the referendum approving Local Law No. 2 and amending the Charter. R12.[2]

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, with members appointed by the Mayor and the Council (and approved by a majority vote of the Council) who may not be current or former RPD employees. R127-28 §§ 18-3(C), 18-4(A), 18-4(H).

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

As detailed in Article XVII, once established, the nine-member PAB has the power and duty to:

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

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

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

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

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

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

- Conduct disciplinary hearings and decide whether the officer committed misconduct and, if so, the *minimum* disciplinary action to be taken pursuant to the disciplinary matrix. The Chief 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).

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, a union, and its president filed this hybrid Article 78 and Declaratory Judgment action and moved for a preliminary injunction seeking to block the referendum. The Supreme Court enjoined the referendum, but the Fourth Department reversed, and permitted the referendum to proceed. R50-51; *Rochester Police Locust Club, Inc. v. City of Rochester*, 176 A.D.3d 1646, 1647 (4th Dep't 2019). Rochester voters passed the referendum approving Local Law No. 2 by a three-to-one margin, and nine PAB members were appointed in accordance with Local Law No. 2. The PAB held its first meeting on January 28,

2020. *See* City of Rochester, "Past Board Meetings," https://www.cityofrochester.gov/PAB/.[3]

The Supreme Court then took up the case on its merits and invalidated 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 Council appealed.

On June 11, 2021, the Fourth Department issued an Opinion and Order upholding the lower court's decision but vacating that portion of the Supreme Court judgment referring Local Law No. 2 back to the Council. *See* Celli Aff., Ex. A ("Opinion").

In the Ruling, the Fourth Department held—consistent with this Court's precedents in *NYC PBA* and its progeny—that, where a pre-1967 state law expressly provides for control of police discipline by local officials, "the subject of police discipline is exempt from the presumption of collective bargaining that would otherwise prevail by virtue of Civil Service Law § 204(2)." Opinion at 5. The panel found that the 1907 Rochester City Charter provision entrusting police discipline to the police commissioner was just such a preexisting law and therefore

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

that, "at the time of its adoption [in 1967], the Taylor Law neither displaced Rochester's then-existing practices for disciplining police officers nor required collective bargaining of that topic going forward." *Id.* at 6.

But the Fourth Department went on to hold that, in 1985, the City "explicitly surrendered" its "exempt[ion]" from the Taylor Law by passing an amended to the City Charter (the "1985 Charter Amendment"). *Id.* at 7. The 1985 Charter Amendment—a local law—states only that it repeals Charter Section 8A-7, titled "Charges and trials of policemen," "for the reason that this subject matter is covered in the Civil Service Law." *Id.* at 6-7; *see also* R317. The Fourth Department found that the 1907 (pre-Taylor Law) state statute was no longer "in force" and, as a result, Rochester was thereafter required to collectively bargain police discipline under the Taylor Law. Opinion at 7. On this basis, the Fourth Department invalidated Local Law No. 2's grant of disciplinary powers to the PAB. *Id.*

Finally, the Appellate Division rejected the Supreme Court's subsidiary finding that Local Law No. 2's designation of the PAB as the disciplinary hearing body violated a police officer's right under Civil Service Law § 75(2) and Unconsolidated Laws § 891 to a hearing before the officer or body with power to remove the police officer. *Id.* at 9-10.

ARGUMENT

This Court could hardly have been clearer: municipalities upon whom the State has conferred broad power over police discipline cannot "surrender" that power, or abdicate their responsibility to exercise it, in favor of collective bargaining. That is the holding of *NYC PBA*, 6 N.Y.3d 563, *Wallkill*, 19 N.Y.3d 1066, and *Schenectady*, 30 N.Y.3d 109. The Court should grant the Council's motion for leave to appeal because the Fourth Department's Ruling directly contradicts this important principle.

The Ruling also undermines the foundation upon which the *NYC PBA* jurisprudence rests. This Court has *never* held that the 1967 Taylor Act requires collective bargaining of police discipline where, as here, a pre-Taylor Act state law specifically granted the locality the power to control such discipline. Where the Legislature previously committed specific disciplinary authority to a locality, the Taylor Law simply does not apply—period.

There is no dispute that, between 1967 (when the Taylor Law was enacted) and 1985 (when the Rochester City Charter was amended), Rochester city officials had the clear legal authority to control police-officer discipline, and were not required to bargain over that subject with the police union. The Fourth Department itself so held: in that period, "the Taylor Law neither displaced Rochester's then-existing practices for disciplining police officers nor required collective bargaining

of that topic going forward." Opinion at 6. But the panel then departed from its own conclusion by holding that the 1985 Charter Amendment—enacted decades *after* the Taylor Law (as well as decades *before NYC PBA*)—somehow repealed the State's grant of authority over police discipline and now forever prevents Rochester from exercising the power granted to it by the State in 1907. If the Ruling stands, local legislatures of the distant past will be deemed to have "surrendered" powers expressly afforded them, and responsibilities imposed upon them, by the State Legislature, even before this Court had an opportunity to first articulate how the relevant state policies and laws interact with one another. In effect, the Ruling allows local action that occurred in 1985—18 years after the Taylor Act was passed—to override the State's determination that Rochester should control the discipline of its officers and not collectively bargain over discipline. Not only is this outcome directly contrary to this Court's *NYC PBA* line of cases; it results in dead-hand control over both current local legislative bodies—who are "stuck" with the decisions of past local legislatures, no matter how circumstances change—and this very Court—whose contemporary rulings are rendered meaningless by a decades-old charter amendment that was administrative in nature, and based on an understanding of the law that we now know was fatally incomplete.

Where a case "present[s] a conflict with prior decisions of this Court" and raises issues of "public importance," leave to appeal is warranted. 22 N.Y.C.R.R. § 500.22. Here, both considerations strongly militate in favor of a grant of leave. The Ruling conflicts with not one, but three decisions of this Court; its holding, left undisturbed, will create confusion for municipalities across the state seeking to effectuate state-mandated local control over police discipline and to modernize their disciplinary mechanisms in light of contemporary needs.

On three separate occasions since 2006, this Court has considered whether these same issues are worthy of review; each time it has answered the question "yes." Since granting leave in and ultimately deciding *NYC PBA*, *Wallkill*, and *Schenectady*, public concern over the conduct of police, and the public's interest in effective oversight of police, has only grown. Faced with the community's desire to ensure that police officers protect, rather than mistreat, the people they are charged to serve, local officials and voters throughout the state need this Court's guidance on their power to control and reform the disciplinary process for police.

I. LEAVE SHOULD BE GRANTED BECAUSE THE FOURTH DEPARTMENT RULING CONFLICTS WITH THIS COURT'S HOLDING IN THE *NYC PBA* LINE OF CASES

The Council seeks leave to appeal on the question of whether a municipality can, by local law, legislate away a state-law mandate to exercise control over police discipline, and forever subject itself to the Taylor Law's requirement of

collective bargaining. In three cases, this Court has already answered that question in the negative. The Fourth Department boldly—and erroneously—went the other way, holding that the 1985 Charter Amendment was an effective surrender of the powers that the State granted to Rochester in 1907, and an appropriate abdication of the state-imposed responsibility to control the police. Opinion at 7.

The Fourth Department's surrender/abdication framework flatly contravenes this Court's command that "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). This Court has so held not once but three times, including as recently as 2017. *NYC PBA*, 6 N.Y.3d at 571-72; *Wallkill*, 19 N.Y.3d at 1069; *Schenectady*, 30 N.Y.3d at 113, 116. The Fourth Department misapplied and improperly narrowed this line of cases. Leave should be granted to clarify that a post-1967 local law cannot override a pre-Taylor Law state statute that grants a municipality plenary authority over police discipline. Rochester could not have "surrendered" or "abdicated" its power and the duty to discipline police even if it had wanted to.

A. Leave to Appeal Should be Granted to Correct the Fourth Department's Failure to Recognize that the 1907 State Statute Granting Rochester the Power to Discipline its Officers Prohibited It from Bargaining Over that Issue

NYC PBA, *Wallkill*, and *Schenectady* make clear that, where the State granted local officials the power to discipline police before the Taylor Law was enacted, those local authorities are not merely "exempted" from the Taylor Law's collective bargaining requirement, they are *prohibited* from collectively bargaining over police discipline. *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"). Significantly, the word "prohibit" appears nowhere in the Ruling's description or application of the *NYC PBA* line of cases, despite this being a centerpiece of the Council's briefing below. *See* Opinion at 5-6. Instead, the Ruling construes the *NYC PBA* line of cases as creating an "exempt[ion]" from the Taylor Law that then can be lost or discarded by subsequent action—much like an exemption from a new zoning rule

that is afforded to a preexisting, non-conforming use. That is emphatically not this Court's vision or approach to pre-1967 state delegations of power to localities to control their police. Far from being "exceptions to a new rule," such delegations are important statements of ongoing state policy, unless and until they are changed by state action. This Court should grant leave to appeal to correct the Fourth Department's failure to recognize this critical distinction.

In *NYC PBA*, this Court found that, by enacting New York City's charter in 1897, the State Legislature had expressly committed authority over police discipline to a local official in New York City. In considering whether the Taylor Law required New York City to negotiate police discipline, the Court 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. 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,'" *Id.* 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.

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

These cases' pronouncement of a "prohibition" on collective bargaining was hardly a careless word choice; it reflected this Court's careful balancing of important state policies. 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." *NYC PBA*, 6 N.Y.3d 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.

NYC PBA explained that the prohibition on collective bargaining over discipline is consistent with a long line of case law holding, as a matter of state policy, that certain decisions cannot be surrendered to collective bargaining but instead remain the "ultimate responsibility" of the municipality. 6 N.Y.3d at 572. A municipality "may not surrender, in collective bargaining agreements, [its] ultimate responsibility for deciding" police discipline, just as this Court has held that municipalities cannot "surrender, in collective bargaining," the "right to choose among police officers seeking promotion," the "ultimate responsibility for deciding on teacher tenure," or the "right to inspect teachers' personnel files." *Id.* (citing cases).[4]

The Fourth Department recognized that Rochester's 1907 Charter is a state law enacted prior to the Taylor Law; that the Charter granted the City officials the power to discipline police; and that the Taylor Law's requirement of collective bargaining in this area did not apply to Rochester prior to 1985. Opinion at 6. All of this was correct. The court went astray, however, when it characterized Rochester's 1907 charter as merely creating an "exemption" or "exception" to the Taylor Law's requirement of collective bargaining over police discipline, and

[4] *See Cohoes City Sch. Dist. v. Cohoes Tchrs. Ass'n*, 40 N.Y.2d 774 (1976); *Bd. of Ed., Great Neck Union Free Sch. Dist. v. Areman*, 41 N.Y.2d 527 (1977); *Schenectady Police Benevolent Ass'n v. New York State Pub. Emp. Rels. Bd.*, 85 N.Y.2d 480 (1995); *In re Buffalo Police Benevolent Ass'n (City of Buffalo)*, 4 N.Y.3d 660 (2005).

wholly ignoring this Court's command in the *NYC PBA* line of cases that such a state law creates a *prohibition* on collective bargaining.

1. The State Granted Rochester Authority Over Police Discipline in 1907

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. 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).

Like the state statutes analyzed in the trio of Court of Appeals cases, the above provisions of the 1907 Rochester charter were "enacted prior to Civil Service Law §§ 75 and 76, [and] specifically commit[] police discipline to the commissioner and detail[] the relevant procedures." *Schenectady*, 30 N.Y.3d at 115. As a result, the Taylor Law's "general command regarding collective bargaining is not sufficient to displace the more specific authority" granted by the 1907 Rochester Charter. *Id.* at 115. The power to discipline police officers was given by the State to Rochester in 1907. Opinion at 6. The State has never retracted that grant. Thus, while 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—it cannot *abandon* its power in favor of a regime of collective bargaining.

B. Leave to Appeal Should Be Granted to Clarify that Rochester's 1985 Charter Amendment Does Not Alter the State's Prohibition on Rochester Collectively Bargaining Police Discipline

The Fourth Department also erred in holding that Rochester's 1985 Charter Amendment somehow eliminated the prohibition identified by this Court, and

thereby required Rochester to collectively bargain over police discipline for all time to come. Leave to appeal should be granted to clarify whether local legislation can reverse the State's prohibition on collectively bargaining police discipline in cases of this sort.

The Fourth Department held that the grant of authority to Rochester officials set forth in the 1907 Charter—indisputably, a *state* law—was a nullity because, in 1985, the Council passed a *local* law that repealed Section 8A-7, titled "Charges and trials of policemen, for the reason that this subject matter is covered in the Civil Service Law." Opinion at 6-7; *see also* R317. The panel reasoned that, for the *NYC PBA* "exemption" from the Taylor Law to apply, the "preexisting law in question must be 'in force' when the municipality refuses to collectively bargain over police discipline." Opinion at 6 (quoting *Schenectady*, 30 N.Y.3d at 115).

The Fourth Department analysis is straightforwardly wrong. In the first place, as this Court has explained, in order to effectively preempt the Taylor Law, the state law had to have been "in force" in *1967*, when the Legislature passed the Taylor Law, not on some floating date such as "when the municipality refuses to collectively bargain," as the Fourth Department asserted. This Court's focus on 1967 derives from its effort to ascertain the Legislature's *intent* when it passed the Taylor Law. *See Schenectady*, 30 N.Y.3d at 116-17 (state statute "has not been expressly repealed or superseded by the legislature nor was it implicitly

repealed by the enactment of the Taylor Law in 1967"). Here, the 1907 Charter was clearly "in force" in 1967 (and it still is today), and the Legislature's intent was for it to remain so. Under the logic of *NYC PBA* and its progeny, the 1967 Legislature intended to preserve that state grant of authority, along with all other, similar legislation "in force" when the Taylor Law was enacted. Indeed, the 1907 Charter was and remains the last word from the State Legislature about police discipline in Rochester, period full stop.[5] As a result, the Taylor Law's "general command" about collective bargaining could not and did not displace the "specific authority" the Legislature granted Rochester in 1907 to discipline its own officers. *Schenectady*, 30 N.Y.3d at 115.

The Fourth Department not only failed to apply this Court's "in force" principle—that would be bad enough. It then went on to assert that the "1985 [Charter Amendment] repeal actually aligned Rochester with the modern-day

[5] Although §§ 324 and 330 of Chapter 755 of the 1907 law 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).

Legislature's policy favoring collective bargaining of police discipline." Opinion at 7-8. This too is error: this Court has repeatedly held that the State has *two* state policies in this area that both are critical, even as they are in tension: one in favor of collective bargaining for municipal employees, which is reflected in the Taylor Law, and a different one—one that predated the Taylor Law, but that remained an important state policy at the time of its passage—that favors local control over police discipline in localities where the State Legislature had so decreed prior to 1967. *See NYC PBA*, 6 N.Y.3d at 575–76 ("While the Taylor Law policy favoring collective bargaining is a strong one, so is the policy favoring the authority of public officials over the police."). The Fourth Department panel dismissed the second policy as anachronistic (i.e., something other than "modern-day"), all but erasing it from the analysis.

Third, the Fourth Department refused to accept that the *NYC PBA* jurisprudence created two—and only two —categories of municipalities for purposes of Taylor Law application: those that are *required* to negotiate discipline under the Taylor Law (because there was no pre-1967 state statute that specifically empowered local officials to determine discipline), and those that are *prohibited* from negotiating discipline (because the State, by pre-1967 statute, had committed the "ultimate responsibility" of discipline to the local officials). *NYC PBA*, 6 N.Y.3d at 572. The Fourth Department's third category—a locality that was *once*

exempted by prior state law from the Taylor Law, but then *later* somehow submitted itself to the Taylor Law by unilateral action—cannot be reconciled with the framework created by *NYC PBA* and its progeny. Whatever the Rochester City Council may have believed when it suggested in 1985 that police discipline was a subject already "covered by the Civil Service Law"—and it is difficult to tell from the scant record—the City certainly lacked the power to submit itself to the state Civil Service Law, or to forfeit the control over such discipline that the State had given it in 1907. *NYC PBA*, 6 N.Y.3d at 570.

The 1907 Charter is a state law—and one that the State never repealed or amended. The State never enacted *any* legislation that permits Rochester to collectively bargain police discipline. And 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 officials must control police discipline, free of the constraints of collective bargaining. Only the State itself could do that—and it never has.

1. It Is Doubtful that the Council Intended to Surrender Power Over Police Discipline by Passing the 1985 Charter Amendment

Even if Rochester had the power to override the State's prohibition on collective bargaining notwithstanding this Court's precedent—a power heretofore not contemplated by the caselaw—it is far from clear that the 1985 Charter

Amendment actually intended to do so. The 1985 Charter Amendment does *not* say that Rochester had made a policy judgment to bargain discipline—much less that it wished to surrender its state-given right (and obligation) to discipline its police. It says only that the Charter provision on charges and trials of policeman is repealed "for the reason that this subject matter is covered in the Civil Service Law." R317. When Rochester passed the 1985 Charter Amendment, it was without the benefit of the *NYC PBA* line of cases that emerged twenty-one years later.

What seems most likely from the record is not that the City of Rochester wished to be bound by the Taylor Law, but that it (mistakenly) *believed* that it already was, and undertook to bring its Charter into line with that belief. 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. Moreover, as a matter of simple logic, Rochester could not, in 1985, "surrender" a right that was not established until 2006, in this Court's decision in *NYC PBA*. Opinion at 7.

C. Leave Should be Granted to Clarify That the Police Accountability Board is A Lawful Mechanism for the Exercise of Rochester's State-Granted Authority to Control Police

Lastly, the Ruling suggests that, by its terms, the City of Rochester's 1907 Charter bars the City from placing police disciplinary authority in an all-civilian

Police Accountability Board of the sort established by Local Law No. 2. Opinion at 8. This too was error. This Court should grant leave to appeal to clarify that civilian oversight boards are simply another mechanism for local authority over police discipline, fully within the power of the locality to create under the Municipal Home Rule Law.

NYC PBA and its progeny describe the State's strong policy in favor of "official authority" over police discipline in general terms, not as being limited to a particular official, institution, or format. *NYC PBA*, 6 N.Y.3d at 576. In some localities, "official authority" takes the form of the police commissioner, *see NYC PBA*, 6 N.Y.3d at 573-74, or "commissioner of public safety," R259 § 330 (1907 Rochester Charter); in others, it is a town board, *see Wallkill*, 19 N.Y.3d at 1068. This Court has never opined that the exercise of local control over police discipline must take a specific form; who the relevant official or body is, and how they exercise their powers, are questions entirely separate from whether or not the Taylor Law does or does not require collective bargaining in a particular locality.

Indeed, under the Municipal Home Rule Law, a municipality like Rochester is granted flexibility about *how to exercise* its power over discipline—i.e., by *which* local officials. But the question of *whether it has the power* to discipline depends on whether there was, or was not, a pre-1967 state law requiring local control. 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). Whether the Commissioner of Public Safety imposes police discipline (under the 1907 Charter) or, instead, whether a municipal board imposes that discipline (under Local Law No. 2), in either event, it is the City, through its employees and boards, that is exercising the power to discipline its police officers originally granted to it by the State in 1907.

The Fourth Department muddies the analysis—and ultimately gets it wrong—by injecting it with its own apparent bias against the PAB. It begins the Ruling with a discussion of the PAB, its make-up, its powers, and its appeals process, all of which displays the panel's clear disdain for the all-civilian body. *See* Opinion at 2. Then, later on in the Ruling, it suggests that Local Law No. 2 is

invalid because it takes power away from the appointed police chief and places it in the hands of an independent board. *Id.* at 8. None of this has anything to do with this Court's jurisprudence under *NYC PBA*, of course, and it ignores the Municipal Home Rule Law implications of the matter altogether. This Court should grant leave to identify these passages for what they are: judicial *dicta* that have no place in the analysis, and to clarify that a municipality's power to control police discipline under the *NYC PBA* line of cases may be vested in a duly created civilian board like the PAB.

II. LEAVE SHOULD BE GRANTED TO PROVIDE CLARITY TO MUNICIPALITIES ON WHETHER AND HOW THEY CAN ADDRESS PUBLIC APPETITE FOR POLICE REFORM

The Court should grant leave in order to provide clarity to municipalities across the state as to the scope of their power to address public calls for police reform. When the Council passed Local Law No. 2 in 2019, police reform had long been important to the Rochester community. *See* R239-41. Since that time, the country has been roiled by high-profile instances of police misconduct, including the killing of George Floyd by a Minneapolis police officer in May 2020. The death of Daniel Prude in RPD custody in March 2020, and the debate about how and why it occurred, was also a flashpoint for demonstrations and calls for reform. Efforts to reform policing, including through accountability mechanisms that include civilian oversight, is at or near the top of the national agenda.

The question at the heart of this case—whether a city has the power to respond to the will of its voters by creating a robust mechanism for civilian oversight of police—is of great significance to municipalities in New York. The *NYC PBA* line of cases makes clear that a broad swath of New York municipalities—including those governed by the Second Class Cities Law, *see Schenectady*, and by Town Law § 155, *see Wallkill*—are empowered to control police discipline and thus are prohibited from engaging in collective bargaining over it. Any number of those municipalities could find themselves in Rochester's position of having, at some point after the Taylor Law was enacted, passed a local law recognizing the existence of the Civil Service Law, repealing or amending a State-created charter provision governing police discipline, or even simply complying with the Civil Service Law because it believed, incorrectly, that it was required to. All such municipalities would face a harsh reality if they learned that, having done any one of these things in the distant past, they were now forever barred from addressing police discipline outside the collective bargaining process. The issue of local responses to allegations of systemic police misconduct is a statewide priority: On June 12, 2020, Governor Cuomo issued Executive Order 203, which directs local governments to "perform a comprehensive review of current police force deployments, strategies, policies, procedures, and practices, and develop a plan to improve such deployments, strategies, policies, procedures,

and practices." The question of what local mechanisms work best to address police misconduct is at the top of the agenda in localities across the state. Executive Order (A. Cuomo) No. 203 (9 NYCRR 8.203). As municipalities attempt to grapple with public debate over policing and respond to Executive Order 203's command, clarity as to their powers to control and change police discipline is crucial.

This case provides the Court with an opportunity to provide much needed clarity to local officials in an area of central public importance. As a New York State Bar report recently recognized, citing the confusion wrought by, *inter alia*, this case,

> State and local laws provide a confusing patchwork of provisions related to police disciplinary authority, collective bargaining, and the degree to which localities can implement new systems. Public employee discipline is generally governed by the Taylor Law and subject to collective bargaining, but that law notably did not displace pre-existing statutory provisions that vested police disciplinary decision-making power in local officials. If a locality had such a law in place, it ostensibly retains much greater control over police discipline, but questions remain as to whether the locality can substantially alter those disciplinary systems without upsetting this balance. . . . [S]tate law offers little practical guidance to communities and policymakers hoping to create or expand truly empowered oversight agencies.[6]

[6] New York State Bar Association, Report and Recommendations of the Task Force on Racial Injustice and Police Reform 68 (June 2021), https://nysba.org/app/uploads/2021/06/Report-by-

The Court should grant leave to appeal so that Rochester's attempts to navigate this "confusing patchwork" of police disciplinary authority can provide clarity to other New York municipalities.

CONCLUSION

For these reasons, the Court should grant the Council's motion for leave to appeal the Appellate Division's decision and order.

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New York, New York

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