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Court of Appeals

of the

State of New York

In the Matter of the Application of

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

Petitioners-Respondents,

– against –

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

Respondents-Respondents,

(For Continuation of Caption See Inside Cover)

BRIEF FOR *AMICUS CURIAE* ALBANY COMMUNITY POLICE REVIEW BOARD IN SUPPORT OF APPELLANT

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– and –

COUNCIL OF THE CITY OF ROCHESTER,

Respondent-Appellant,

– and –

THE MONROE COUNTY BOARD OF ELECTIONS,

Respondent.

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PRELIMINARY STATEMENT AND STATEMENT OF INTEREST OF THE *AMICUS CURIAE*[1]

The Albany Community Police Review Board (the "Review Board") respectfully submits this *amicus curiae* brief in support of reversal of the opinion and order issued in this case by the Appellate Division, Fourth Department on June 11, 2021. Specifically, the Review Board calls this Court's attention to the long-standing New York State policy favoring local control over police discipline and urges the Court to reaffirm the importance of that policy and ensure that municipalities can continue to exercise their discretion in how police discipline is implemented at the local level.

The job of the police is to protect the safety and security of the community they serve. But the police cannot do that job unilaterally. To work effectively, the police need the community's support. Social science research shows that a community will provide that support when—and

[1] No party's counsel contributed content to this brief or participated in the preparation of the brief in any manner. No party or party's counsel contributed money that was intended to fund preparation or submission of the brief. Additionally, no person or entity other than *amicus curiae* and its counsel contributed money that was intended to fund preparation or submission of the brief (*see* 22 NYCRR 500.23 [a] [4] [iii]).

only when—the community regards its officers as "legitimate": deserving of, and rightfully entitled to use, the law-enforcement authority they possess. This means that the police must interact with members of the community appropriately, performing their duties in accordance with applicable laws and procedures. And when officers fail to live up to those professional responsibilities, the community must have a voice in the disciplinary process.

Consistent with these fundamental precepts, this Court has long recognized the strong New York State policy favoring local control over police discipline: entrusting the process to persons who represent the community and can be expected to bring the community's conscience to bear, such as mayors of cities, other local elected officials, and high-ranking police personnel whom they appoint. The policy derives largely from state-level legislation enacted prior to 1963, the year the Municipal Home Rule Law was enacted and enabled municipalities to address a variety of governmental matters, including law enforcement, without the need for state-level involvement.

This Court has found the state policy favoring local control over police discipline strong enough to justify excluding the subject of police

discipline from collective bargaining negotiations between municipalities and police unions. State-level legislation enacted in the late 1960s expressed a general preference that the terms and conditions of public employment be collectively bargained, but the Court has repeatedly held that, when it comes to the specific issue of police discipline, the policy of local control prevails.

In this case, however, the Fourth Department improperly deviated from this Court's steady jurisprudential path. The Fourth Department held that the City of Rochester is *prohibited* from legislatively creating a "Police Accountability Board" of civilian residents empowered to discipline Rochester officers. Instead, the court held that Rochester is *required* to collectively bargain the issue and to accept whatever result the collective bargaining may produce, no matter how detached from community norms it may be. The court opined that the state policy favoring local control over police discipline is a grant of permission that a municipality irrevocably forfeits should it ever submit the issue of police discipline to collective bargaining, which the court found Rochester had done in the 1980s. In other words, as the Fourth Department saw it,

the policy contains a trap for the unwary: If and when a municipality opts into collectively-bargained police discipline, it can never later opt out.

Created by City of Albany law in 2000, the Albany Community Police Review Board is an independent police oversight agency comprised of nine civilian members appointed by elected city officials. As of 2022, the Review Board reviews the Albany Police Department's handling of complaints alleging misconduct on the part of Albany police officers and conducts independent investigations into potential misconduct. Where appropriate, the Review Board recommends to Albany's Chief of Police appropriate discipline to impose. The Chief must either impose the Review Board's recommended discipline or, where requested, provide a written explanation for why he or she will not do so (*see* Albany City Code § 42-345). In performing its duties, the Review Board gives the community a direct voice in the police discipline process—a voice critical to ensuring that officers are regarded as legitimate by the people they are assigned to police.

The Review Board is a living manifestation of the state policy favoring local control over police discipline. The Review Board is participating as *amicus curiae* here to ensure that the policy receives its

proper due, and that Rochester, Albany, and other municipalities are *always* entitled to establish police disciplinary mechanisms that bring the conscience of the community to bear.

ARGUMENT

THE NEW YORK STATE POLICY FAVORING LOCAL CONTROL OVER POLICE DISCIPLINE ENTITLES MUNICIPALITIES TO ESTABLISH CIVILIAN REVIEW BOARDS

A. Effective Policing Requires That The Community Have A Voice In Police Discipline—The Hallmark Of Civilian Review Boards

The job of the police is to protect the safety and security of the community they serve. However, police cannot effectively protect a community without the community's trust and support.

As a threshold matter, in order to be able to protect their community, police need an overwhelming majority of the community to obey the law an overwhelming majority of the time. No police agency has the resources to deal with a community comprised entirely, or even significantly, of lawbreakers (Tom R. Tyler & Jeffrey Fagan, *Legitimacy and Cooperation: Why Do People Help the Police Fight Crime in Their Communities*, 232 Ohio St J Crim L 231, 262 [2008]; Tom R. Tyler, *Enhancing Police Legitimacy*, 593 Annals of the Am Academy of Political

& Soc Scis 84, 85 [2004]; National Research Council of the National Academy of Scis., *Fairness and Effectiveness in Policing: The Evidence*, at 294 [2004], https://nap.nationalacademies.org/read/10419/). Further, when crime does occur, police need members of the community to report it, because police cannot monitor all locations at all times (Tyler, *supra*, at 85; *see* Tyler & Fagan, *supra*, at 233, 262). Additionally, in order to properly investigate crime, police need members of the community to assist, or at least cooperate with, law enforcement's efforts to identify evidence, witnesses, and, eventually, the perpetrators (Tyler & Fagan, *supra*, at 233, 238–239; Tyler, *supra*, at 85). Brendan Cox, a former Chief of the Albany Police Department, recently summed up the necessary police-community alliance this way: "If we don't build relationships and have the community ready to stand up when something happens, violence is going to continue because it's going to be that much harder to get someone off the street that is committing violence" (Marisa Jacques, *How Civilian Police Review Boards Can Build Community Trust*, Spectrum News 1 [May 20, 2022], https://spectrumlocalnews.com/nys/capital-region/news/2022/05/20/police-review-boards-can-build-community-trust-).

Social science research has consistently shown that members of the community are significantly more likely to lend this type of support if they view the police as "legitimate": deserving of, and rightfully entitled to use, the law-enforcement authority they possess (*e.g.* President's Task Force on 21st Century Policing, *Final Report*, at 9–18 [May 2015], https://cops.usdoj.gov/pdf/taskforce/taskforce_finalreport.pdf; Tyler & Fagan, *supra*, at 250–252, 266–267; Andrew Goldsmith, *Police Reform and the Problem of Trust*, 9 Theoretical Criminology 443, 444–445 [2005]; *see also* Tracey L. Meares, *The Good Cop: Knowing the Difference Between Lawful or Effective Policing and Rightful Policing—And Why It Matters*, 54 Wm & Mary L Rev 1865, 1875–1880 [2013]). Indeed, legitimacy is not merely helpful; it is a key component of an effective police force (*see* Maria Ponomarenko & Barry Friedman, *Democratic Accountability and Policing*, *in* 2 *Reforming Criminal Justice: Policing* 5, 13 [2017]). Evidence indicates that people will not comply with the law simply out of fear that they might be apprehended and punished otherwise (Tyler, *supra*, at 85; *see* Tyler & Fagan, *supra*, at 233–235).

As has been widely observed—including by police executives—legitimacy "requires meaningful inclusion of and partnership with

community members in conducting the business of the police department" (International Assn. of Chiefs of Police, *IACP National Policy Summit on Community-Police Relations: Advancing a Culture of Cohesion and Community Trust*, at 16 [Jan. 2015], https://www.theiacp.org/sites/default/files/2018-09/CommunityPoliceRelationsSummitReport_web.pdf; *see also United States v Weaver*, 9 F4th 129, 161 [2d Cir 2021 en banc, Lohier, J., concurring] ["[G]iving communities and their elected representatives greater input on police activities * * * promotes police legitimacy and trust"]). Partnership with the community means partnership with the *whole* community: "No social, economic, racial, ethnic, religious, or other groups can be excluded" (Debra Livingston, *Police Discretion and the Quality of Life in Public Places: Courts, Communities, and the New Policing*, 97 Colum L Rev 551, 657 [1997], quoting George L. Kelling & Catherine M. Coles, *Fixing Broken Windows* 168 [1996]). Only this type of broad-based community involvement can "keep policy decisions by political officials roughly in line with and responsive to the policy preferences of the public" (Scott M. Sullivan, *Private Force/Public Goods*, 42 Conn L Rev 853, 877 [2010]).

To that end, history has shown that a breakdown in the police-community partnership can have disastrous consequences. In the 1960s, hundreds of riots erupted in urban areas nationwide stemming from incidents involving police (*see* Samuel Walker & Charles M. Katz, *The Police in America: An Introduction* 43 [5th ed 2005]). After an unusually destructive riot in Detroit in 1967, the National Advisory Commission on Civil Disorders, popularly known as the Kerner Commission in reference to its chairperson, then-Governor of Illinois Otto Kerner, was formed to examine the cause of the unrest and disturbances (*id.* at 44). In its final report, the Kerner Commission found "deep hostility between police and ghetto communities" to be a primary cause (*id.*, quoting National Advisory Commn. on Civil Disorders, *Report*, at 157 [1968]). This hostility stemmed from perceptions that police were operating in a starkly *illegitimate* fashion: allowing harmful illegal activities to fester in poor neighborhoods while aggressively interdicting them in affluent ones, and responding to complaints from residents of poor neighborhoods with comparatively less urgency (*see* National Advisory Commn. on Civil Disorders, *supra*, at 161; *see also* Walter Katz, *Beyond Transparency:*

Police Union Collective Bargaining and Participatory Democracy, 74 SMU L Rev 419, 424–425 [2021]).

The requisite “meaningful inclusion of and partnership with community members in conducting the business of the police department” (International Assn. of Chiefs of Police, *supra*, at 16) demands that police behave appropriately in the first instance. That is, they must interact with members of the community appropriately, performing their duties in accordance with applicable laws and procedures. Policing is, after all, the principal “business of [any] police department” (*id.*).

It is likewise essential for police departments to include and partner with the community in the specific police business of administering discipline to officers who run afoul of their obligations and misuse their law-enforcement authority. Among policing scholars, “there is nearly uniform agreement that the development of police policies and officer oversight should not be divorced from community input” as far as the particular issue of discipline is concerned (Stephen Rushin, *Police Disciplinary Appeals*, 167 U Penn L Rev 545, 589 [2019]; *see also* Goldsmith, *supra*, at 445). The disciplinary process must be a process in

which the community has a voice, because a community voice is "an essential component of legitimacy" (Ponomarenko & Friedman, *supra*, at 13).

There are a variety of popular disciplinary mechanisms that facilitate community involvement of this nature. That list includes the traditional mechanism of entrusting police discipline to the community's elected officials, who are accountable to the community via the ballot box. The list also includes the time-honored means of entrusting discipline to elected officials' appointees—a category that encompasses most municipal chiefs of police—who generally are given a mandate to take the community's interests into account in their decisionmaking, and who are answerable to the community in the sense that the community can vote the elected officials who appointed them out of office in favor of new officials who may be expected to make new appointments.

But there is good reason to think that the best way to ensure the conscience of the community is brought to bear is with discipline determined by civilian review boards like the Rochester Police Accountability Board and *amicus curiae* the Albany Community Police Review Board. "In large urban [areas] where police attend to the concerns

of many distinct communities, [the more traditional] mechanisms of political accountability may be too far removed from the concerns of local neighborhoods to [e]nsure responsiveness to these concerns" in the disciplinary process (Livingston, *supra*, at 655). Civilian review boards, if properly constituted and equipped with sufficient authority, can make responsiveness a reality. Indeed, according to Debra Livingston, formerly a professor, scholar of police practices, and commissioner of the New York City Civilian Complaint Review Board, and currently the Chief Judge of the United States Court of Appeals for the Second Circuit, "[t]he principle that citizens should participate in reviewing complaints brought against police officers * * * is widely accepted today and is viewed by many as a means by which citizens can have input into 'the acceptable limits of police practices in enforcing laws and maintaining order'" (Livingston, *supra*, at 665, quoting Werner E. Petterson, *Police Accountability and Civilian Oversight of Policing: An American Perspective*, *in* Andrew J. Goldsmith, *Complaints Against the Police* 259, 273 [1991]).

B. State Policy Entitles Municipalities To Entrust Police Discipline To Institutions, Like Civilian Review Boards, That Bring The Conscience Of The Community To Bear

This Court has repeatedly recognized the existence of a powerful state policy favoring "local control over police discipline": entrusting the disciplinary process to persons who represent the community and thus can be expected to act in the community's best interest and bring the community's conscience to bear (*Matter of City of Schenectady v New York State Pub. Empl. Relations Bd.*, 30 NY3d 109, 114–115, 117 [2017]; *accord e.g. Matter of Town of Walkill v Civil Serv. Empl. Assn., Inc.*, 19 NY3d 1066, 1069 [2012]; *Matter of Patrolmen's Benevolent Assn. of the City of New York, Inc. v New York State Pub. Empl. Relations Bd.*, 6 NY3d 563, 573–576 [2006]). To be sure, that is not the *only* state policy relevant to police discipline. The Public Employees' Fair Employment Act, commonly called the "Taylor Law," expresses a general preference that the terms and conditions of public employment (of which the process for administering discipline is one) be established via collective bargaining (*see* Civil Service Law § 204 [2]). But, as this Court has noted, the police-specific policy favoring local control over police discipline is "strong enough to justify excluding police discipline from collective

bargaining," the Taylor Law notwithstanding (*Matter of City of Schenectady*, 30 NY3d at 115, quoting *Matter of Patrolmen's Benevolent Assn. of the City of New York*, 6 NY3d at 573).

The Review Board urges this Court to expressly hold that the state policy favoring local control over police discipline is strong enough such that municipalities are *always* entitled to entrust disciplinary determinations to decisionmakers that represent the community. In particular, municipalities should always be able to entrust police discipline to civilian review boards.

This Court has traced the state policy favoring local control over police discipline to the 1880s (*see Matter of Patrolmen's Benevolent Assn. of the City of New York*, 6 NY3d at 576, citing *People ex rel. Masterson v French*, 110 NY 494, 499 [1888]). But the roots of the policy are, in fact, much deeper, stretching all the way back to colonial times. Police misbehavior has been a recurrent problem in the State of New York ever since Dutch colonists organized the first precursor to the modern police forces in operation today. Accordingly, the issue of police discipline has often been a matter of the Legislature's acute concern, especially before the adoption of the Municipal Home Rule Law in 1963 allowing

municipalities to more readily govern their own affairs without state-level input. The Legislature has weighed in on the issue of police discipline repeatedly, enacting detailed disciplinary regimes at the municipal level. And in those regimes, the Legislature has overwhelmingly allocated disciplinary authority to persons and institutions that represent the community. In other words, whenever the Legislature has had reason to pay especially close attention to the important issue of police discipline, the Legislature has consistently sided in favor of local control.

1. The History And Tradition Of Local Control Over Police Discipline In New York City

Start with policing in New York City. In the 1600s, Dutch colonists on the island of Manhattan created the first organized form of law enforcement in the geographic region that is now the State of New York: the New York City night watch (Larry K. Gaines & Victor E. Kappeler, *Policing in America* 76–77 [4th ed 2002]). Continuing in one form or another until the 1800s, the night watch was a group of individuals who patrolled their assigned areas during the evening and early morning hours with a mandate to arrest persons they personally observed engage in wrongdoing and to generally keep the peace (*see* Douglas Greenberg,

The Effectiveness of Law Enforcement in Eighteenth-Century New York, 19 Am J of Legal Hist 173, 174–175 [1975]; Gloria G. Dralla et al., *Who's Watching the Watchman? The Regulation, or Non-Regulation, of America's Largest Law Enforcement Institution, the Private Police*, 5 Golden Gate L Rev 433, 443 [1975]). Night watches were supervised by "constables," in the relatively populous areas, and "sheriffs," in the relatively sparse ones (*see* Greenberg, *supra*, at 175–177). Those supervisory persons had more expansive law-enforcement powers than the watchmembers themselves, such as the authority to execute arrest warrants issued by magistrates (Dralla et al., *supra*, at 442). However, they also were tasked with additional responsibilities, including some having nothing to do with law enforcement, like surveying land (Gaines & Kappeler, *supra*, at 75; *see* Greenberg, *supra*, at 175). Generally, service as a watchperson or a supervisor was by municipal selection akin to jury duty (*see* Greenberg, *supra*, at 175; Dralla et al., *supra*, at 443).

Though its aims were laudable, the New York City night watch suffered from defects that made it a breeding ground for incompetence, misbehavior, and even corruption. Persons who served on the night watch often did so after completing a full day of work at their primary

occupation, and thus were prone to sleeping while on patrol (Dralla et al., *supra*, at 443). There was, to put it mildly, no character-and-fitness requirement. Indeed, some persons serving on the night watch were assigned to do so as punishment for having committed a crime (Gaines & Kappeler, *supra*, at 76–77). Additionally, wealthy persons selected to serve often paid others to serve in their stead—and then to look the other way as they engaged in criminal activity (*cf.* Dralla et al., *supra*, at 444). An opinion piece that ran in the *New York City Gazette* in 1757 called night watch members a "[p]arcel of idle, drunken, vigilant Snorers, who never quelled any nocturnal Tumult in their lives; but would, perhaps, be as ready to join in a Burglary as any Thief in Christendom" (Eric H. Monkkonen, *Crime, Justice, History* 174 [2002], quoting *New York Gazette*, Feb. 21, 1757).

The constables and sheriffs who supervised the night watch drew similar criticism. They were known to take bribes to release prisoners who should have been maintained in custody, extort money from prisoners who remained in custody in exchange for preferential treatment, and otherwise act under color of authority to further their own pecuniary interests (Greenberg, *supra*, at 179). In 1765, the incidence of

sheriffs personally pocketing fines they had been ordered to collect on behalf of the colonial authorities had become so frequent that the Supreme Court issued an order requiring that sheriffs throughout the colony of New York "account for the fines received by them" (*id.*, quoting Order Requiring Sheriffs to Account for Fines [Sup Ct, Albany County, Apr. 18, 1765]). And in 1773, the colonial government passed a law declaring that "many of the Inhabitants of the [various] Counties have sustained Losses by the Misconduct and Insolvency of the Constables of the said Counties" and requiring "for Remedy whereof" that "every Constable hereafter to be chosen," upon beginning a new term of service, personally "enter into Bond or Obligation with sufficient Security" against which aggrieved persons could levy in the event of financial impropriety (L 1773, ch 1606).

Concerns of corruption in the night watch system persisted well into statehood, and indeed well into the 1800s. These included concerns about malfeasance stemming from the peculiar fee-for-service manner in which constables were compensated (Dralla et al., *supra*, at 444). In 1813, the New York City Council remarked: "There is reason to believe that great impositions are practiced on the poor the ignorant and unwary

(particularly destitute females) under the garb of office; and that numbers have been frequently taken to prison, for the sole purpose of obtaining fees" (City of New York, 7 *Minutes of the Common Council of the City of New York 1784–1831*, at 845–846 [1917]). Notably, in or around that time period, "one female was committed as a vagrant four times in little more than two Months; and some are returned under fictitious names" (*id.*, at 845). In the early 1840s, New York City newspapers reported instances in which constables were returning stolen property but failing to bring the thieves to justice, prompting at least one newspaper editor to publicly attribute the pattern to conspiracies in which a constable arranged for a crook to steal property, give the property to the constable, receive a portion of the constable's fee award as a kickback, and escape prosecution entirely (*see e.g.* Bruce Chadwick, *Law & Disorder: The Chaotic Birth of the NYPD* 122 & n 11 [2017]).

Against this backdrop, in 1844 the Legislature passed the Municipal Police Act, abolishing the night watch system in New York City and creating the New York City Police Department: the State's first modern, around-the-clock police force (L 1844, ch 315). The Legislature undertook a top-to-bottom overhaul of the concept of law enforcement in

New York City. It instituted a multi-level command structure, led by a chief of police nominated by the mayor and confirmed by the City Council (*id.*, art II, §§ 1–2; *see id.*, art I, § 12). The Legislature also eliminated the problematic fee-for-service system of compensation, and in its place adopted a system of yearly salaries, removing the perverse incentives that formerly held sway (*id.*, art IV, §§ 1–2).

And among other aspects of the Municipal Police Act, the Legislature additionally instituted a mechanism for disciplining officers for inappropriate behavior (L 1844, ch 315, art III, § 4). In light of the regrettably rich history of impropriety that had plagued the night watch, the issue of discipline was no doubt top of mind for state lawmakers as they formulated, and ultimately passed, the Municipal Police Act. And on that subject, the Legislature delegated ultimate disciplinary authority to a person whose job it was to represent the city: the mayor. Supervisory officers had the power to suspend their subordinates in the first instance, but the mayor had final say. Namely, "the officer making the suspension shall, within twenty-four hours thereafter, notify the mayor of such suspension, in writing, which notice shall specify the grounds for such suspension, and contain the names of the witnesses to establish the

charge," the statute provided (*id.*). Thereafter, the mayor "shall cause notice to the accused to be given" and "afford him an opportunity to be heard in his defence" (*id.*) "The mayor shall examine witnesses upon the charges, and in defence, and may for cause remove the accused from office, or restore him to duty" (*id.*)

In 1857, the Legislature passed the Metropolitan Police Act, merging into the New York City Police Department a handful of smaller police forces that had sprung up in neighboring areas (L 1857, ch 569). Overall control of this expanded force was given not to a single chief of police but to a seven-member police board consisting of five members appointed by the Governor, the Mayor of New York City, and the Mayor of Brooklyn (which, at the time, was not formally part of New York City) (*id.*, § 1). And in the Metropolitan Police Act, the Legislature continued representative control over police discipline, entrusting the police board with the responsibility of "discipline of [the force's] subordinate officers" (*id.*, § 6). Likewise, the Legislature empowered the police board to prescribe and enforce rules and regulations governing "[t]he qualifications, enumeration and distribution of duties, mode of trial, and removal from office of each officer of the said police force" (*id.*, § 7).

In 1892, police misconduct in New York City became a hot-button issue once again following a high-profile sermon delivered by Reverend Charles Parkhurst of the Madison Square Presbyterian Church in Manhattan (Kevin E. McCarthy, *Cops in Court: Assessing the Criminal Prosecutions of Police in Six Major Scandals in the New York City Police Department from 1894 to 1994*, at 57 [2016] [City University of New York John Jay College of Criminal Justice Ph.D. Dissertation], https://academicworks.cuny.edu/cgi/viewcontent.cgi?article=1715&context=gc_etds). In that sermon, Reverend Parkhurst accused police of taking bribes in return for looking the other way regarding illegal gambling and prostitution (*id.* at 57–58). In response to Reverend Parkhurst's allegations, the Legislature formed a committee chaired by Senator Clarence Lexow to investigate the New York City Police Department (*id.* at 58). The investigation turned up ample evidence of precisely the type of corruption Reverend Parkhurst had alleged (*id.*). In 1895, the committee issued a report finding "an extraordinary disinclination on the part of the police, so efficient in other respects, to display any desire or activity in the suppression of certain descriptions of vice and crime" (*id.* at 61, quoting New York State Senate, *Report and Proceedings of the*

Senate Committee Appointed to Investigate the Police Dept. of the City of New York, at 21 [Jan. 18, 1895]).

In 1897, on the heels of the Lexow report, the Legislature enacted the Greater New York City Charter, redefining the city to consist of the five boroughs that have comprised it ever since (L 1897, ch 398). With the redefinition of the city came a reconfiguration, to some extent, of the New York City Police Department. The police board was modified to consist of four members (rather than seven), all of whom were appointed by the City's mayor (*id.*, § 270). But the police board remained the body tasked with prescribing and enforcing disciplinary rules and procedures, including rules and procedures relating to removal of officers from the force (*id.*, § 271). In other words, when the issue of police discipline once again returned to the forefront, the Legislature once again designated an organ of local government—a body that could be expected to bring the community's perspective to bear—as the final disciplinarian.

The ensuing years leading up to the passage of the Taylor Law in 1967 saw more New York City Police Department misconduct scandals and corresponding governmental investigations. In 1912, a committee of the City Council examined allegations of police involvement with

gambling and prostitution (McCarthy, *supra*, at 90–129). In the 1930s, a state legislative committee inquired into similar issues (*id.* at 130–167). In the 1950s, a Brooklyn newspaper report that police were protecting racketeers sparked an investigation by the borough's district attorney that led to numerous prosecutions and internal disciplinary proceedings against officers (*id.* at 168–210). Through it all, despite having every reason to scrutinize the issue of police discipline and implement any adjustments it saw fit, the Legislature steadfastly kept New York City police discipline a matter committed to decisionmakers accountable to city residents.

As the foregoing discussion shows, at the state level, there has been a remarkably constant course of legislative conduct repeatedly reaffirming that discipline of New York City police officers is a matter properly entrusted to persons who represent the city and have the city's interests at heart. This consistency reinforces this Court's conclusion that the state policy favoring local control over police discipline prevails over the Taylor Law's preference for collective bargaining with respect to the terms and conditions of public employment generally. The Legislature's consistency undercuts the Fourth Department's conclusion (Record on

Appeal ["R"] 430–433) that a municipality's one-time choice to use collective bargaining irrevocably commits that municipality to collective bargaining going forward.

2. The History And Tradition Of Local Control Over Police Discipline In Other New York Municipalities

The legislative record regarding police discipline in New York City is not unique. The approach the Legislature has taken with respect to police discipline in the State's most populous city is also the approach the Legislature has taken with respect to a group of some of the next most populous cities: cities designated "cities of the second class" as of December 31, 1923 based on populations of between 50,000 and 175,000 according to the 1920 federal census (*see* Second Class Cities Law § 4; 1894 NY Const, art XII, § 2). This group of cities consists of Albany, Binghamton, Niagara Falls, Schenectady, Syracuse, Troy, Utica, and Yonkers (United States Dept. of Commerce, Bureau of the Census, *Bulletin: Fourteenth Census of the United States: 1920 – Population: New York*, at 2).

The Second Class Cities Law, enacted in 1906 (L 1906, ch 473) and amended in relevant part in 1925 (L 1925, ch 392), establishes a model charter for these cities. The charter includes a provision creating the

position of commissioner of public safety (Second Class Cities Law § 130). Appointed by the mayor (*id.* § 12), the public safety commissioner is entrusted with control of police affairs, including discipline (*id.* § 130). The public safety commissioner "is authorized and empowered to make, adopt, promulgate and enforce reasonable rules, orders and regulations for the discipline of police officers, and for the hearing, examination, investigation, trial and determination of charges made or prepared against any officer" as well as to "in his discretion, punish any such officer or member found guilty thereof" (*id.* § 133; *see also id.* § 137 [setting forth rules and regulations governing the public safety commissioner's disciplinary power]; *Matter of City of Schenectady*, 30 NY3d at 114–115).

The Legislature included similar provisions in laws it enacted that establish the default government structures of the State's many towns and villages, likewise placing disciplinary authority in the hands of persons appointed by elected officials—and thereby accountable to the community in that manner. The Town Law provides that each town shall have a town board: a body composed of the supervisor and the members of the town council, all of whom are elected officials (Town Law §§ 20, 60). The law authorizes the town board to "adopt and make rules and

regulations for the examination, hearing, investigation and determination of charges, made or preferred against any member or members of such police department" (*id.* § 155). Substantiated charges shall result in "conviction by the town board," and penalties meted out shall take the form of "punish[ment] by the town board" (*id.*; *see Matter of Town of Walkill*, 19 NY3d at 1069). From time to time, the Legislature has enacted laws specifically prescribing the same framework—discipline via "conviction by the town board" and "punishment by the town board"—for certain categories of towns in particular counties (*see e.g.* Rockland County Police Act, L 1936, ch 526, § 7; Westchester County Police Act, L 1936, ch 104, § 7). And the Village Law provides a similar framework for the discipline of police officers in New York's villages (*see* Village Law § 8-804 [1]).

* * * * *

The bottom-line: The state policy favoring local control over police discipline is far broader and more deeply-rooted than the Fourth Department below appreciated. The long-standing policy is unquestionably that municipalities are entitled to establish disciplinary mechanisms, like civilian police review boards, that bring the conscience

of the community to bear. And that policy is clearly strong and important enough that a one-time municipal decision to address police discipline via collective bargaining does not constitute an irrevocable surrender of police discipline to collective bargaining for all time (*contra* R 430–433).

C. State Policy Does Not Contain A Trap For Unwary Municipalities To Irrevocably Surrender Police Discipline To Collective Bargaining And To The Potential Pitfalls Of Disciplinary Arbitration That Often Come With It

Particularly in large cities, civilian police review boards offer a means of importing community values into the disciplinary process that may be superior to the more traditional mechanisms of local control, in which discipline is imposed by elected officials and the police superiors they appoint. But virtually *any* means of local control over police discipline—including traditional review by politically appointed police superiors—generally fosters more community support and trust for law enforcement than the sorts of disciplinary mechanisms often produced by collective bargaining between municipalities and police unions. Embracing the Fourth Department's view, under which a municipality's one-time preference for collective bargaining prohibits the municipality from changing course thereafter (R 430–433), therefore has the potential to seriously impair the ability of police to do their jobs effectively.

The reason stems from certain aspects of the disciplinary arbitration processes that collective bargaining often yields (Rushin, *Police Disciplinary Appeals*, *supra*, at 571).[2] In arbitration, the determination of "guilt" and "punishment" is made by a third party who is ostensibly independent of both the police department and police union (*id.*). Sometimes, the disciplinary process consists entirely of one or more arbitration proceedings. Usually, though, arbitration is the last stage in the process, serving as a final, binding appeal from earlier decisions reached by police department personnel (*id.*).

Police unions have substantial leverage in today's political landscape, including with respect to collectively bargaining the details of disciplinary arbitration (*see* Zoe Robinson & Stephen Rushin, *The Law Enforcement Lobby*, 107 Minn L Rev 1965, 1988–1990 [2023]). Often, in collective bargaining agreements, police unions are able to exert significant authority over arbitrator selection—even requiring that the

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[2] Additionally, collective bargaining *itself* runs counter to community involvement in certain respects. "While the expressed ethos of American democracy is grounded in the twin pillars of 'transparency' and 'accountability,' the police union collective bargaining process undermines both" insofar as the process entails negotiations occurring behind closed doors (Katz, *supra*, at 422 [internal citations omitted]).

universe of potential arbitrators be restricted to a particular slate largely of their choosing (*see* Rushin, *Police Disciplinary Appeals*, *supra*, at 574–575). To be sure, in any given arbitration proceeding, the police department generally retains the ability to exercise at least a limited number of "strikes" (*id.*). But in all events, the arbitrator who ultimately is selected may not be a member of the community at issue and is not tasked with bringing the conscience of the community to bear.

Further, disciplinary arbitration may sow community distrust because of the frequency with which arbitrators have been reported to reach so-called "compromise" decisions, according to research on the topic (*see* Stephen Rushin, *Police Arbitration*, 74 Vanderbilt L Rev 1023, 1065–1069 [2021]). For any given arbitral engagement, in order to stand a chance at being selected, an arbitrator must present at least some level of attractiveness to both sides: police departments seeking to impose discipline *and* unions representing officers seeking to resist discipline (*see id.* at 1065–1066). An arbitrator who overwhelmingly rules in favor of police officers facing potential discipline is likely to be stricken by police departments, and an arbitrator who overwhelmingly rules in favor of police departments is likely to be stricken by police officers (and the

unions representing them) (*see id.*). It has long been hypothesized that, as a matter of natural self-interest, arbitrators competing for disciplinary engagements may seek to render decisions reflecting a middle-ground that both sides of the dispute can portray as favorable, even if the evidence points more strongly toward a different outcome (*see id.*).

The available statistics tend to substantiate that view. For example, frequently, when police departments determine that an officer has committed misbehavior sufficient to warrant termination, on appeal to an arbitrator the penalty is reduced to a suspension, allowing the officer to eventually return to his or her job (*see* Rushin, *Police Arbitration*, *supra*, at 1066–1068; Rushin, *Police Disciplinary Appeals*, *supra*, at 576). Professor Stephen Rushin, a leading academic authority on law-enforcement disciplinary issues, summarizes the potential problems with compromise rulings in the context of police discipline:

> "In other fields, an arbitrator's tendency towards compromise may not be a problem, particularly when it allows for the resolution of matters like financial or contractual disputes between sophisticated parties. But in the world of police accountability, compromise can have serious public policy implications. Compromise can result in unfit or dangerous officers terminated for acts of violence or dishonesty being forced back onto a police force where they are prone to commit future acts of wrongdoing" (Rushin, *Police Arbitration*, *supra*, at 1066 [internal citations omitted]).

This problem is compounded by the breadth of arbitral review. Usually, as part of the arbitral review incorporated into collectively-bargained police disciplinary processes, the arbitrator is empowered to review the prior decisions in the matter *de novo* (Rushin, *Police Disciplinary Appeals*, *supra*, at 576). The typical framework involves an initial decision by police department personnel, followed by one or more internal appeals to department leadership, and culminating in a final review by an arbitrator in which the arbitrator need not give any deference to departmental factfinding or judgment calls (*id.* at 577). Thus, the arbitrator's power is not meaningfully restricted in any way, relegating prior departmental disciplinary decisions to what Professor Rushin calls "somewhat symbolic" status (*id.* at 578).

Moreover, arbitral compromises of the sort described above are difficult to reverse, because the standard of judicial review of arbitration awards is the polar opposite of a *de novo* reexamination (*see* Stephen Rushin, *Police Union Contracts*, 66 Duke L J 1191, 1239 [2017]). New York law allows only "a limited role for the judiciary in arbitration" (*American Intl. Specialty Lines Ins. Co. v Allied Capital Corp.*, 35 NY3d 64, 70 [2020] [discussing CPLR art 75]). "An arbitration award may be

vacated on three narrow grounds: 'it violates a strong public policy, is irrational, or clearly exceeds a specifically enumerated limitation on the arbitrator's power'" (*Matter of United Federation of Teachers, Local 2 v Board of Educ. of the City of New York*, 1 NY3d 72, 79 [2003], quoting *Matter of Board of Educ. of Arlington Cent. Sch. Dist. v Arlington Teachers Assn.*, 78 NY2d 33, 37 [1991]). Thus, if a compromise result is reached in arbitration, it may be nearly impossible to overturn.

For all the above reasons, the arbitral disciplinary procedures that regularly result from collective bargaining can pose serious obstacles to police reform and accountability (*see* Catherine L. Fisk & L. Song Richardson, *Police Unions*, 85 Geo Wash L Rev 712, 754–755 [2017]). The concerns are not merely theoretical. "[T]here is a growing body of evidence to suggest that the disciplinary appeals process described [above] may frequently impede police accountability" to the surrounding community (Rushin, *Police Disciplinary Appeals*, *supra*, at 579). Those sorts of outcomes are completely at odds with the trust and support that a community must repose in its police force in order to facilitate effective policing. The need to avoid those objectionable results counsels strongly

in favor of rejecting the Fourth Department's crabbed view of the state policy favoring local control over police discipline.

CONCLUSION

The Fourth Department's decision should be reversed.

September 1, 2023

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CERTIFICATE OF COMPLIANCE

The foregoing brief was prepared on a computer using double-spaced, 14-point Century Schoolbook font. It consists of 6,630 words, excluding the table of contents, table of authorities, and this certificate, thereby complying with the specifications prescribed by 22 NYCRR 500.13 (c) (1).

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

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