To be Argued by:
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New York Supreme Court
Appellate Division – First Department

Appellate Case No.: 2019-03925

PATRICK J. LYNCH, AS PRESIDENT OF THE PATROLMEN'S BENEVOLENT ASSOCIATION OF THE CITY OF NEW YORK, INC., ON BEHALF OF THE TIERS 3 AND 3 REVISED MEMBER POLICE OFFICERS EMPLOYED BY THE POLICE DEPARTMENT OF THE CITY OF NEW YORK; THE PATROLMEN'S BENEVOLENT ASSOCIATION OF THE CITY OF NEW YORK, INC.,

Plaintiffs-Appellants-Respondents,

– against –

THE CITY OF NEW YORK; BILL DE BLASIO, MAYOR OF THE CITY OF NEW YORK; THE NEW YORK CITY POLICE PENSION FUND; THE BOARD OF TRUSTEES OF THE NEW YORK CITY POLICE PENSION FUND; JAMES P. O'NEILL, AS POLICE COMMISSIONER OF THE NEW YORK CITY POLICE DEPARTMENT AND AS EXECUTIVE CHAIRMAN OF THE BOARD OF TRUSTEES OF THE NEW YORK CITY POLICE PENSION FUND,

Defendants-Respondents-Appellants.

BRIEF FOR PLAINTIFFS-APPELLANTS-RESPONDENTS

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PRELIMINARY STATEMENT

The issues on this appeal are aspects of a single question: whether New York City police officers in Tier 3 – *i.e.*, those who became police officers on or after July 1, 2009 – have the same rights as similarly-situated Tier 2 officers to count the time worked in their previous public-sector jobs for pension purposes. The people affected by this case are Tier 3 officers who, before they joined the police force and became members of the New York City Police Pension Fund ("PPF"), worked for the State or City in other positions, perhaps as correction officers or EMTs, and were members of, or were eligible to be members of, other public pension systems.

A number of statutes control the answer to this question. None of them authorizes any discrimination between Tier 2 and Tier 3 police officers for prior service credit purposes. On the contrary, the statutory scheme requires equal treatment. The New York State retirement system recognizes this, and treats Tier 2 and Tier 3 police members equally as to prior service credit. *See* pp. 29-30 below. However, defendants-respondents-appellants (collectively, "the City") have refused to treat Tier 3 officers equally with their fellow officers in Tier 2.

The City persuaded Supreme Court to uphold, in many respects, the City's unequal treatment of Tier 3 officers. Supreme Court's holdings in the City's favor are flawed in the following ways:

1. The court misinterpreted several statutes that treat Tier 2 and Tier 3

officers equally as to specific prior service rights, and denied Tier 3 officers the benefits they are entitled to under those statutes. Specifically:

a. The court denied Tier 3 officers the benefits available under Retirement and Social Security Law ("RSSL") §43, which permits the transfer to the PPF of service credits earned by officers when they were members of the New York State & Local Employees' Retirement System ("NYSLERS"). Supreme Court believed that this statute could not mean what it plainly says, because that meaning would have rendered many later statutes unnecessary. But the court was mistaken. The later statutes it referred to authorized transfers not from NYSLERS but from the New York City Employees Retirement System ("NYCERS"), to which RSSL § 43 does not apply.

b. The court denied Tier 3 officers the benefit of RSSL §645, which permits former public retirement system members to "buy back" prior service credit by making appropriate contributions to the PPF. The court mistakenly read section 645 as being solely a "tier reinstatement" statute, and held it inapplicable to officers who, because their prior service post-dated July 1, 2009, cannot be "reinstated" to Tier 2 status. But the statute is not only a tier

reinstatement statute. It permits police officers to buy back prior service time whenever it accrued, and to credit that time toward their pensions, though they may remain in Tier 3.

c. The court denied Tier 3 officers the right granted to them by RSSL §513(b) to purchase credit for prior service. The court's original summary judgment opinion does not give any reason for this ruling, or even discuss section 513(b). On reargument, the court defended its omission by saying that the statute does not refer to "police service" – but the statute applies to all Tier 3 employees, including police officers.

d. The court denied Tier 3 officers the rights granted by two New York City Administrative Code provisions, sections 13-143 and 13-218, which allow police officers who previously served in various capacities, including former EMTs, peace officers and sheriffs, to obtain credit for their prior service. Supreme Court held that these code provisions do not apply to Tier 3 officers, but there is no such exclusion in the legislation.

2. The court rightly interpreted RSSL §513(c) as creating an equivalence between the rights of Tier 2 and Tier 3 police officers to prior service credits but wrongly concluded that equivalence was "frozen in time" as of July 1, 1976. In

fact, the plain intent of the Legislature in mentioning the 1976 date was to create an equivalence beginning with the inception of Tier 3. Because no police officers were placed in Tier 3 until 2009, the legislative purpose can be effected only by allowing Tier 3 officers all the prior service rights that Tier 2 officers had until 2009, including the rights to transfer, buy back, and purchase prior service under the statutes described in 1.a-1.d above.

3. The court denied Tier 3 officers the benefit of a 2002 litigation settlement (the "2002 Settlement") that was applicable to "any member" of the police force without regard to tier.

4. The court erroneously converted this declaratory judgment action to a CPLR Article 78 proceeding. It should have remained a declaratory judgment action, because it challenges the City's continuing policy and practice and does not seek review of a specific fact-sensitive determination.

The decision of Supreme Court should be modified to correct these errors.

QUESTIONS INVOLVED

1. Are Tier 3 police officers who were formerly NYSLERS members permitted to transfer prior service pursuant to RSSL §43 as creditable service? Supreme Court answered no.

2. Are Tier 3 police officers permitted to buy back prior service pursuant to RSSL §645 as creditable service? Supreme Court answered no.

3. Are Tier 3 police officers permitted to purchase prior service pursuant to RSSL §513(b) as creditable service? Supreme Court answered no.

4. Are Tier 3 police officers permitted to transfer prior service pursuant to New York City Administrative Code §§ 13-143 and 13-218 as creditable service? Supreme Court answered no.

5. Does RSSL §513(c)(2) grant equivalence between Tier 2 police officers and Tier 3 police officers on the issue of creditable service? Supreme Court answered with a qualified yes: it found that this statute provides equivalence between Tier 2 and Tier 3 "frozen in time" so that Tier 3 police officers receive the same creditable service benefits as Tier 2 police officers did in 1976.

6. Did the 2002 Settlement apply to Tier 3 police officers? Supreme Court answered no.

7. Should this declaratory judgment action be converted to an Article 78 special proceeding pursuant to CPLR §103(c)? Supreme Court answered yes.

THE FACTS

A. The Parties

Plaintiffs-appellants-respondents ("plaintiffs") are Patrick J. Lynch, president of the Police Benevolent Association of the City of New York, Inc. (the "PBA") and the PBA. They bring this action on behalf of Tier 3 New York City

police officers. (R483-510)[1] Defendants-respondents-appellants are the City of New York, Mayor Bill DeBlasio, the PPF, the Board of Trustees of the PPF, and James P. O'Neill, the police commissioner of the New York City Police Department and Executive Chairman of the Board of Trustees of the PPF. The PPF is the pension fund for New York City police officers, including Tier 3 police officers.

B. Pension Tiers

From time to time, the New York Legislature has created separate schemes of pension benefits for employees of the State and its subdivisions. The separate schemes are commonly known as "tiers." (R448, 712) "Tiers" is not a statutory term, but a commonly-used vernacular expression. (R448) The tiers are numbered 1 through 6, with some subdivisions. *See generally Lynch v. City of New York*, 23 N.Y.3d 757, 761-67 (2014). New York City police officers who joined the department before July 1, 1973 (of whom few if any remain active officers) were in Tier 1, and those hired between 1973 and June 30, 2009 are Tier 2 members. *See id*. at 761-64.

Tier 3 was established on July 1, 1976 for all newly hired public employees and is codified in Article 14 of the RSSL. *Lynch*, 23 N.Y.3d at 765. Police officers,

[1] "R" refers to the Record on Appeal.

however, were excluded from Tier 3 by separate legislation. *See* RSSL §500(c); *Lynch*, 23 N.Y.3d at 765. Thus, police officers hired after July 1, 1976 continued to be Tier 2 members. *See Lynch*, 23 N.Y.3d at 765. From 1976 until 2007, the Legislature passed Tier 2 extender laws every two years, so that no police officers were placed in Tier 3, though virtually all other public employees in New York hired after July 26, 1976 became Tier 3 members. *See id*. at 766-67.

In June 2009 another two-year Tier 2 extender bill for police officers was passed by the Legislature. *See id*. at 767. On June 2, 2009, however, because of the financial crisis that began in 2008, Governor Paterson vetoed this extender bill. *See id*. As a result, police officers hired on or after July 1, 2009 became members of Tier 3. *See id*. Those are the officers on whose behalf this suit is brought. (R483-510)

C. Retirement Benefits for Tier 2 and Tier 3 Police Officers

There are significant differences between the benefits available to Tier 2 and Tier 3 police officers. (R449-451, 490-492) The formulas that are used to calculate their pensions are different. (R449-451) There are differences in the time required to be eligible for retirement: Tier 2 officers may retire after twenty years of service, after twenty-five years of service, or at the age of 55 (*see* NYC Admin. Code §13-247), though virtually all of them choose to retire after twenty years (R490, 1140); Tier 3 officers, on the other hand, qualify for "early service retirement" after

twenty years of service, normal retirement at twenty-two years, or retirement with escalated benefits after twenty-five years. *See* RSSL §§ 503(d), 505(a), 510(b). There are other differences between Tier 2 and Tier 3, including, for example, a social security offset that Tier 3 officers are subject to but Tier 2 officers are not. (R1140)

However, the Legislature that enacted the Tier 3 legislation in 1976 chose not to treat Tiers 2 and 3 differently when it came to credit for prior service. (R684) As discussed in more detail below, RSSL §513(c)(2) protects the right of PPF members (and firefighters) to obtain credit for prior service with New York public employers that "if rendered prior to July first, nineteen hundred seventy-six by a [Tier 2] police/fire member, would have been eligible for credit in the police/fire retirement system." July 1, 1976, as mentioned above, was the inception date of Tier 3; the authors of this statutory language did not know, of course, that no police officers would be placed in Tier 3 for more than thirty tears. The thrust of RSSL §513(c)(2) is that, from the moment Tier 3 kicked in, the prior service rights of Tier 2 and Tier 3 officers would be identical.

In addition, as explained below, the Legislature has passed several other, more specific statutes dealing with the rights of police officers to prior service credit. Every one of the statutes involved in this case shows an intention to treat Tier 2 and Tier 3 officers identically – but the City has not honored that intention.

Not only the statutes, but also the 2002 Settlement, are relevant to the issues in this case. In 2002, the City and the PBA settled three lawsuits involving various issues, including prior service disputes. The 2002 Settlement, as explained more fully below, says among other things that "any person who is a member of the PPF" may buy back or purchase certain prior service time. The settlement makes no distinction between tiers, but the City has refused to allow Tier 3 police officers to avail themselves of its benefits.

THE PROCEEDINGS BELOW

Plaintiffs began this action on November 4, 2016. (R483-510) Their complaint contains five claims for declaratory relief, four relating to statutory buy back, purchase and transfer rights of Tier 3 police officers for their prior service, and one for breach of the 2002 Settlement.

Both sides moved for summary judgment. They took opposite positions on many issues, one of which was the meaning of the above-quoted language in RSSL §513(c)(2), referring to the 1976 inception date of Tier 3. Plaintiffs interpret this language, as explained in Point II below, to create full equivalence, as to prior service credits, between Tier 2 and Tier 3 police officers. The City interprets it to create no equivalence at all.

In a decision dated July 5, 2019, Supreme Court converted the action to an Article 78 proceeding and granted partial summary judgment to each side. As to

the meaning of section 513(c)(2), the court rejected both sides' positions, concluding that the statute should be read to "create equivalence between Tier 2 and Tier 3, but frozen in time so that Tier 3 members receive the same creditable service benefits as Tier 2 members in 1976." We argue in Point II below that Supreme Court erred in this and should have accepted plaintiffs' broader reading of section 513(c)(2). But this issue does not affect any of the other arguments in this brief. As to those issues, we accept for the sake of argument Supreme Court's "frozen in time" analysis.

Having adopted the "frozen in time" approach, the court resolved several other issues under narrower statutes, and under the 2002 Settlement. We describe the court's analysis of each of those issues in Points I and II of the Argument section below.

Both sides moved for reargument as to certain issues. (R1254-1431) Supreme Court denied both reargument motions on March 30, 2020. (R68)

SUMMARY OF ARGUMENT

Point I of the argument below demonstrates that Supreme Court misinterpreted several specific, targeted statutory provisions. These provisions, collectively, create substantial parity between Tier 2 and Tier 3 officers for purposes of prior service credit. Point II demonstrates that a broader statute, RSSL § 513(c)(2), was intended by the Legislature to do essentially the same thing – to

create equivalence between Tiers 2 and 3, not "frozen in time" as of 1976, as Supreme Court held, but across the board from the inception of Tier 3. Points I and II thus provide alternative routes to the same result.

Point III demonstrates that the 2002 Settlement also affords to Tier 3 police officers rights under the statutes discussed in subsections B and C of Point I. Point IV demonstrates that this action, as a whole, should have remained a declaratory judgment action, and should not have been converted to a CPLR article 78 proceeding.

ARGUMENT

A motion for summary judgment should be granted where "the cause of action or defense [is] 'established sufficiently to warrant the court as a matter of law in directing judgment' in the movant's favor." *Santoni v. Bertelsmann Prop., Inc.*, 21 A.D.3d 712, 713 (1st Dep't 2005) (quoting CPLR 3212 (b)). Once the movant "tender[s] sufficient evidence in admissible form to demonstrate the absence of any material issues of fact … the burden of production shifts to the party opposing the motion to produce sufficient evidence, also in admissible form, of the existence of a material issue of fact." *Sheehan v. Gong*, 2 A.D.3d 166, 168 (1st Dep't 2003) (internal citations omitted).

Nearly all of the questions here are purely questions of statutory interpretation. Accordingly, as Supreme Court recognized: "The court's primary

consideration 'is to ascertain and give effect to the intention of the Legislature.'" (R40) And "[w]hile the text of the statute 'is the clearest indicator of legislative intent and courts should construe unambiguous language to give effect to its plain meaning' … the legislative history may also be relevant." (R40) Also, "where the issue presented to the court is one of purely statutory interpretation, 'there is little basis to rely on any special competence or expertise of the administrative agency,' and the court 'need not accord any deference to the agency's determination.'" (R40) Though it stated these principles, Supreme Court erred in the application of them to this case.

The one question presented here that does not turn on statutory interpretation – the claim under the 2002 Settlement – can also be decided as a matter of law. Neither side presented extrinsic evidence as to the meaning of the settlement or suggested that it was ambiguous. *See Koren Rogers Assoc. Inc. v. Standard Microsystems Corp.*, 79 A.D.3d 607, 608 (1st Dep't 2010) ("On a motion for summary judgment, the construction of an unambiguous contract is a question of law for the court to pass on.") (internal citation and quotations omitted)

I.
SUPREME COURT MISINTERPRETED SEVERAL SPECIFIC STATUTES THAT TREAT TIER 2 AND TIER 3 OFFICERS EQUALLY

Supreme Court misinterpreted several statutes that treat Tier 2 and Tier 3 officers equally and denied Tier 3 officers the benefits they are entitled to under

those statutes. Therefore, even assuming that Supreme Court's "frozen in time" interpretation of RSSL §513(c)(2) is correct (which it is not, as we show in Point II below), Supreme Court nevertheless erred in denying Tier 3 officers the right to transfer, buy back, and purchase prior service pursuant to RSSL §§ 43, 645, 513(b) and New York City Administrative Code §§ 13-143 and 13-218.

A. Supreme Court Erred in Holding That Tier 3 Police Officers Are Not Entitled to Transfer Prior NYSLERS Credit Pursuant to RSSL §43

RSSL §43 provides, in relevant part:

> (a) …. Any member of [NYSLERS] may transfer his membership to any retirement system… which is operating on a sound basis and is subject to the supervision of the department of financial services of this state. …
>
> (b) …. A person so transferring from one retirement system to another shall be deemed to have been a member of the system to which he or she has transferred during the entire period of membership service credited to him or her in the system from which he or she has transferred….
>
> ….
>
> (d) … Such member … shall be given such status and credited with such service in the second retirement system as he was allowed in the first retirement system.

It is undisputed that the PPF is a proper transferee system under section 43(a). Thus, under this statute any member of NYSLERS who becomes a New York City police officer may transfer his or her membership to the PPF, and under

RSSL §43(b) and (d) the transferring member must be given credit for service while he or she was a NYSLERS member. There is no exception for Tier 3 police officers. On the contrary, because the relevant parts of section 43 were in effect in 1976,[2] RSSL §513(c)(2), as interpreted by Supreme Court to mean "that Tier 3 members receive the same creditable service benefits as Tier 2 members in 1976," (R41) requires that Tier 3 officers get the benefit of section 43.

The language of section 43 is plain on its face: "any" NYSLERS member may transfer to "any" qualified retirement system, and upon such transfer "shall be credited with such service in the second retirement system as he was allowed in the first retirement system." The plain meaning of the section is confirmed in an opinion rendered by the Corporation Counsel of the City of New York in 1963. Under section 43, the Corporation Counsel said: "a member of the [PPF] who transferred to such fund from [NYSLERS] is deemed to have been a member of the [PPF] during the entire period of membership service credited to him in [NYSLERS]." (R892) *See also Lynch v. Giuliani*, Index No. 112959/2001 (N.Y. Sup. Ct. 2002) (reproduced at R875-884) (recognizing that time transferred directly from NYSLERS to PPF would be "counted toward the 20-year service period required for retirement under the PPF") (R876, 882); Tier 2 Summary Plan

[2] The parts of section 43 that are relevant here were enacted by Chapter 687 of the 1955 Session Laws and Chapter 903 of the 1957 Session Laws. (R1333-1428, 1429-1431)

Description at 8 (noting that "[a]ll properly transferred state time" is deemed eligible to satisfy minimum retirement eligibility requirement) (R145); Affidavit of Joseph F. Maccone, dated October 2, 2017 at ¶5 (stating that Tier 2 police officers have been able to transfer time from NYSLERS to the PPF as creditable service pursuant to section 43 since prior to 1976) (R1140).

Despite the statute's plain language, Supreme Court concluded that section 43 does not apply to Tier 3 officers. This conclusion was based on a misapprehension. The court believed that many statutes enacted after section 43 would have been unnecessary if section 43 meant what it said: "there would have been no need for the Legislature to create the myriad amendments that expanded creditable service to Tier 2 members if RSSL §43 properly allowed them to transfer service." (R45) But those "myriad amendments" do not exist. All of the statutes cited by the City in its briefing on the summary judgment motion involved transfer of *NYCERS* time, not NYSLERS time – and section 43 does not apply to NYCERS time.[3]

In short, Supreme Court misread section 43, which permits transfer of

[3] There is in fact a single example (not, ironically, mentioned by the City until the reargument motions) of a statute that may be partially redundant of section 43: Chapter 498 of the Laws of 2005 allows certain transfers of time from both NYCERS and NYSLERS although, because of RSSL §43, the reference to time also covered by NYSLERS was probably unnecessary. That the Legislature may once have erred on the side of caution is not a reason for a court to disregard the plain meaning of RSSL §43.

NYSLERS time to PPF by police officers, without regard to tier. Since Tier 2 officers could have transferred time under section 43 in 1976 (and still can), the court's ruling is inconsistent with its own holding that "Tier 3 members receive the same creditable service as Tier 2 members in 1976." (R41)

B. Supreme Court Erred in Holding That RSSL §645 Does Not Apply to Tier 3 Police Officers

RSSL §645 says, in relevant part:

> [A]ny person other than a retiree of a public retirement system, who previously was a member of a public retirement system and whose membership in such public retirement system ceased by reason of (i) insufficient service credit, (ii) withdrawal of accumulated contributions, or (iii) withdrawal of membership, upon rejoining such public retirement system or another public retirement system, shall be deemed to have been a member of his or her current retirement system during the entire period of time commencing with and subsequent to the original date of such previous ceased membership, provided that such person… repays the amount refunded, if any, at the time such previous membership ceased, together with interest …. Upon such reinstatement of date of membership, such member shall be entitled to all the rights, benefits and privileges to which he or she would have been entitled had his or her current membership begun on such original date of membership except that … such previously credited service shall be deemed to be prior service, not subsequent service.

This statute, in substance, permits someone who was, but is no longer, a

member of a "public retirement system"[4] to "buy back" the credit for service that he or she lost on departure from the system, by repaying any refund that resulted from that departure. And when a public employee leaves one public retirement system to join another, and buys back prior service credit, section 645 affords to that employee all of the rights, benefits, and privileges to which he or she would have been entitled to had his or her current membership (*i.e.*, membership in the second retirement system) begun on the date of membership in the first retirement system.

Supreme Court held that section 645 does not provide a benefit to most Tier 3 police officers, stating that "plaintiffs' interpretation of RSSL §645 is far broader than the actual language of the statute." (R45) But the court's holding is untenable – it contradicts the clear language of the statute and misstates the relief that plaintiffs are seeking. Section 645 appears in RSSL Article 15-D, which is not limited to any particular tier. There is simply no reason to think the statute is inapplicable to Tier 3 police officers. To the contrary, Supreme Court itself acknowledged that the statute "permits members *in any tier* to reinstate their

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[4] Public retirement system is defined here to be "the New York state and local employees' retirement system, the New York state teachers' retirement system, the New York state and local police and fire retirement system, the New York city employees' retirement system, the New York city teachers' retirement system, the New York city board of education retirement system, the New York city police pension fund, or the New York city fire department pension fund." RSSL §645(a).

original date of public retirement system membership." (R45 (emphasis added))

One implication of the statute is that, as Supreme Court also recognized, when the member in question is a police officer and the "original date of public employment" is before July 1, 2009, the member is "reinstated" from Tier 3 to Tier 2. (R45) Police officers who first became public employees before July 2009 and who buy back their time under section 645 are Tier 2 members and, as Supreme Court pointed out, are "not aggrieved" by the City's refusal to apply section 645 to officers who, because they became public employees after the 2009 cut-off date, remain in Tier 3. (*Id.*) All this is undisputed.

But it is illogical not to allow the remaining Tier 3 members to buy back their time under section 645 and so count that time towards pension eligibility. That is all the relief plaintiffs in this case are seeking under section 645. (R492-493, 501-502) Supreme Court failed to recognize this. It mistakenly believed that employees with post-July 2009 public employment dates were seeking "to reinstate to Tier 2 under RSSL §645," and held that they could not do so because that would lead to "the destruction of the tier system." (R45-46)

In other words, Supreme Court thought that section 645 was only "a statute on tier reinstatement." (R46) But it is not only that. It is a statute on the reinstatement of original date of public employee membership, whether or not that reinstatement affects tier status. The City has recognized this in the case of Tier 2

members, who have been permitted to avail themselves of section 645 regardless of whether they were eligible to reinstate to Tier 1. *See*, *e.g.*, 2002 Settlement at ¶¶ 9-10 (providing for buy back of prior service time pursuant to section 645 with no requirement, or even mention, of reinstatement to an earlier tier) (R222-223); NYPD Application for Purchase of Prior Service Credit Pursuant to Chapter 646 of the Laws of 1999 (attached as Appendix B to the NYPD Operations Order dated December 11, 2002 relating to Purchased Service Credit Under RSSL §645) (providing for an option – but not requirement – to apply for a "change of tier for service previously transferred" in connection with an application to purchase prior service credit pursuant to section 645) (R1082).

Police officers hired on or after July 1, 2009 accept that they will remain Tier 3 members, and are only asking for the right section 645 gives them – the right to buy back their prior service time and count that time in calculating their pension rights, as Tier 2 officers are allowed to do. Supreme Court erred in denying them that right.

C. Supreme Court Erred in Holding That Tier 3 Police Officers Cannot Purchase Prior Time Pursuant to RSSL §513(b)

RSSL §513(b) says, in relevant part:

> A member shall be eligible to obtain retirement credit hereunder for previous service with a public employer if retirement credit had previously been granted for such service or if such service which [*sic*] would have been

> creditable in one of the public retirement systems of the state … at the time such service was rendered, if the individual had been a member of such retirement system and the member has rendered a minimum of two years of credited service after July first, nineteen hundred seventy-six or after last rejoining a public retirement system, if later; provided, however, retirement credit may be granted for service which predates the date of entry into the retirement system if such service is otherwise creditable and was rendered by an employee of a public employer during which employment he was ineligible to join a public retirement system provided that such public employer was participating in a public retirement system of the state at the time of such employment, or is so participating at the time that credit for such previous service is being sought.

This statute is part of Article 14 of the RSSL, an article that applies only to Tier 3 members. It allows such members to "obtain retirement credit" by purchasing the credit that they earned or could have earned in previous public employment. Though the word "purchase" does not appear in RSSL §513(b), there is no dispute that it is a purchase statute. *See* RSSL §513(b-1) (referring to "any member eligible to purchase credit for previous service … pursuant to subdivision b").

The benefits of section 513(b) are available to any public employee who is "a member" of Tier 3. There is no exclusion for police officers. The legislative history confirms the statute's plain meaning, saying that it allows "members of a public retirement system to receive pension service credit for prior service with any public employer in New York State, as long as the prior service would

otherwise be credited" and that "[p]ublic employees should have the opportunity to receive pension service credit for all of their time in public service regardless of their original date of membership in a retirement system." (R1094-1095) The Legislature's intent not to discriminate between tiers is also shown by simultaneously-enacted legislation: in the same chapter of the Laws of 2000 the Legislature made similar amendments to the prior service provisions for Tier 2 members (contained in RSSL §446) and for Tier 3 members (contained in RSSL §513(b)). *See* L. 2000, ch. 552, reproduced at R1085-1125.

Supreme Court's original opinion on summary judgment dismissed plaintiffs' claim under section 513(b) without citing or discussing that statute. Rather, the court focused on the similar provision applicable to Tier 2 officers, RSSL §446(b), saying: "RSSL §446(b) cannot possibly apply to Tier 3 members as it is a component of RSSL Article 11, not Article 14 which governs Tier 3 members." (R46) It seems that the court overlooked the similar provision in Article 14, RSSL §513(b).

When its failure to address section 513(b) was called to Supreme Court's attention on a motion for reargument, the court declined to alter its decision, stating:

> [T]here is no merit as to plaintiffs' claim that this court overlooked RSSL §513(b) as an avenue to obtain relief. RSSL §513(b) does not speak to allowable police service

> on the basis of prior NYCERS or NYSLERS service. All RSSL §513(b) speaks to is "Previous service", which allows a Tier 3 member to receive pension credit for previous service. It does not speak to the crediting of such service as allowable "police service", the type of credit plaintiffs seek. As such, there was no need to address it in the July 2019 Order.

(R72)

Thus the court, in its reargument decision, appeared to hold that, even though a police member is entitled to "receive credit" for prior service the credit will do him or her no good unless it is for "police service." This theory lacks merit. It does not make sense to say that an officer can "receive credit" for time if the credit is worthless. Such a reading runs afoul of basic statutory rule that the statutes should be read to give effect to all their parts. *See Avella v. City of New York*, 29 N.Y.3d 425, 434 (2017) ("all parts of a statute are intended to be given effect"); *United States v. Jozeny*, 541 F.3d 166, 171 (2d Cir. 2008) (statutes should be read "to give effect, if possible, to every clause and word of a statute") (citations omitted).

No statute says or implies that only service labeled as "police service" or "uniformed police service" may count towards a Tier 3 officer's pension under RSSL §513(b). On the contrary, the Court of Appeals has pointed out that RSSL §513 "generally provides in subdivision (b) for credit for most public service rendered in the state or City." *Kaslow v. City of New York*, 23 N.Y.3d 78, 85

(2014); *see also id.* at 86 ("NYCERS has … always interpreted 'credited service' for Tier 3 correction officers, as directed in [RSSL] §§ 501(3) and 513, to include both uniformed and non-uniformed service"). Indeed, Supreme Court itself said in interpreting another subsection of RSSL §513 (section 513(c)(2), discussed in Point II below): "Acceptable prior service is not cabined to only uniformed police or fire service by the plain language of RSSL §513." (R41)

No authority of any kind supports the theory that Supreme Court accepted in its belated consideration of section 513(b). Its ruling on the section 513(b) issue should be reversed.

D. Supreme Court Erred in Holding That Tier 3 Police Officers Cannot Avail Themselves of the Benefits Provided for NYCERS Members in the New York City Administrative Code

New York City Administrative Code §13-143(b)(1) (formerly §B3-30.1) says in relevant part:

> [A]ny period of allowable service rendered as an "EMT member" … which immediately precedes service in the police force, and any period of allowable service rendered (i) as a peace officer, as defined in section 2.10 of the criminal procedure law, (ii) in the title of sheriff, deputy sheriff, marshal or district attorney investigator, or (iii) in any position specified in appendix A of operations order 2-25 of the police department of the city of New York dated December eleventh, two thousand two, which immediately precedes service in the police force, and any period of allowable service in the uniformed transit police force, uniformed correction force, housing police service and the uniformed force of

> the department of sanitation immediately preceding service in the police force, credit for which period of immediately preceding allowable service was or is transferred pursuant to subdivision a of this section, shall be deemed to be service in the police force for purposes of eligibility for benefits and to determine the amount of benefits under the police pension fund.

New York City Administrative Code §13-218(2)(a) (formerly §B18-15.0) is substantially identical.

These two Administrative Code sections allow a public employee to transfer his or her prior service in one of the named capacities – EMT, peace officer, etc. – from another retirement system to the PPF. These code provisions were amended several times over the years to add categories of transferable service. (R904-907, 934-940, 968-970, 989-992) Supreme Court held that Tier 3 police officers could not avail themselves of the Code provisions in their current form, though it held that the 1976 predecessors of these provisions are applicable to Tier 3 police officers. (R40-43)

Supreme Court reasoned that its conclusion followed from its view that RSSL §513(c)(2) provides Tier 3 police officers with "equivalence … frozen in time" as of 1976 and "requires application of 1976 era creditable service rules to Tier 3 police members." (R41-42) But, even assuming for present purposes that the court's interpretation of section 513(c)(2) was correct, it does not follow that Tier 3 members could not acquire rights under post-1976 legislation.

Section 513(c)(2) grants rights ("A police/fire member shall be eligible…."); it does not take them away. Even if it granted only "frozen in time" equivalence in 1976, it did not – indeed, it could not – disable a later legislature from granting more. And later legislatures did grant more when they amended the code provisions in issue. *See, e.g.*, Chapter 640 of the 1980 Session Laws §3 (amending section 13-218 (then section B18-15.0) to expand prior service to include service in the uniformed transit police force, corrections force, housing police, and department of sanitation) (R904-907); Chapter 941 of the 1981 Session Laws §§ 1, 4 (amending sections 13-218 and 13-143 (then sections B18-15.0 and B3-30.1) to make clear that pension credit be available for transfer of certain uniformed services into the PPF) (R934-940, 941-967); Chapter 728 of the 2004 Session Laws §§ 1-2 (amending sections 13-218 and 13-143 to expand prior service to include service as an EMT) (R968-970, 971-988); Chapter 498 of the Laws of 2005 §§ 1-2 (amending sections 13-218 and 13-143 to expand prior service to include service as a peace officer, sheriff, marshal, and certain other enumerated positions) (R989-992, 993-1007). The post-1976 legislation incorporated into what are now sections 13-143(b)(1) and 13-218(2)(a) was not limited to Tier 2 officers.

The code provisions, as they now stand, say that "*any* period of allowable service" in specified positions "shall be deemed to be service in the police force"

(emphasis added). These words should be read to mean what they say.

That conclusion is reinforced by RSSL §§ 500(a) and 519(1), contained in Article 14 of the RSSL (the article which governs the rights of Tier 3 members). Section 500(a) provides that code provisions apply to Tier 3 members. And RSSL §519(1) is even more explicit, referring specifically to "transfer" provisions like those involved here:

> Any other provision of this chapter, of the state education law or of *the administrative code of the city of New York*, or rules and regulations thereunder, relating to the reemployment of retired members, *transfer of members* and reserves between systems and procedural matters *shall apply to members covered under this article* during the duration thereof unless inconsistent herewith.

(emphasis added.) Thus, RSSL §519(1) removes any doubt that that NYC Administrative Code §§ 13-218 and 13-143, "provisions…of the administrative code…relating to…transfer of members," apply to "members covered by this article" – *i.e.*, Tier 3 police officers.

II.
SUPREME COURT ERRED IN HOLDING THAT RSSL §513(C)(2) DOES NOT PROVIDE EQUIVALENCE BETWEEN TIER 2 AND TIER 3

At several points in its summary judgment opinion, Supreme Court relied on its interpretation of RSSL §513(c)(2) as creating "equivalence" between Tier 2 and Tier 3 police officers, where prior service credits are concerned, but equivalence "frozen in time so that Tier 3 members receive the same creditable service benefits

as Tier 2 members in 1976." (R41) The arguments in Point I above proceed on the assumption that this interpretation is correct. As we have demonstrated, on that assumption Supreme Court nevertheless erred in several ways. In this point, we will demonstrate that Supreme Court's interpretation is too narrow. Section 513(c)(2) creates full equivalence between Tiers 2 and 3 that is not "frozen in time."

Section 513(c)(2) says:

> A police/fire member shall be eligible to obtain credit for service with a public employer described in [RSSL §513(c)(1)] only if such service, if rendered prior to July first, nineteen hundred seventy-six, by a police/fire member who was subject to article eleven of this chapter [*i.e.*, a Tier 2 officer], would have been eligible for credit in the police/fire retirement system or plan involved.

Supreme Court referred to the statute's text, which contains the July 1, 1976 date. But the court should also have focused on the statute's purpose, as reflected by its text. The court should have considered *why* the 1976 date is in the statute.

The answer is clear and indisputable: July 1, 1976 is the date when Tier 3 came into being. Saying "prior to July first, nineteen hundred seventy-six" was a way of saying "prior to the date on which Tier 3 first existed." Indeed, since "tier" is not a statutory term, the Legislature customarily designates tiers by referring to dates. Thus, Article 11 of the RSSL, which governs the rights of Tier 2 police officers, defines the members of that tier as those "who join or rejoin a public

retirement system of the state or a municipality thereof … on or after July first, nineteen hundred seventy-three, but prior to July first, nineteen hundred seventy-six." RSSL §440. And Article 14 of the RSSL – which governs the rights of Tier 3 members – defines the members subject to that article as those "who join or rejoin a public retirement system of the state on or after July first, nineteen hundred seventy-six." RSSL §500(a). *See also* RSSL §501 (defining a "police/fire member" subject to Article 14 as one who "if employed in the same capacity on June thirtieth, nineteen hundred seventy-six, would have been eligible for membership in the New York state and local police and fire retirement system, the New York city police pension fund or the New York city fire department pension fund, or for participation in the uniformed transit police force plan or housing police force plan in [NYCERS]." (emphasis added)

Thus section 513(c)(2) may be paraphrased as saying that, upon the inception of Tier 3, its members shall have the same rights to prior service credit as members of earlier tiers. That this is what the Legislature meant is confirmed by the report of the Commission that recommended implementation of Tier 3, which says: "Credit for service shall be governed by provisions similar to those currently contained in Section 446 of the Retirement and Social Security Law [applicable to Tier 2 members]." (R684) In using the July 1, 1976 date to express this thought, the Legislature obviously did not foresee that, as to police officers, the beginning

date of Tier 3 would in effect be postponed for thirty-three years. To effectuate the Legislature's intention, Supreme Court should have held that Tier 3 police offices are entitled to credit for prior service if that service would have been creditable before July 1, 2009.

To hold otherwise would be unfair to Tier 3 officers. The 1976 Legislature, in creating a tier of public employees who are treated less favorably in many ways than those hired earlier, made a considered decision *not* to treat the new hires less favorably where prior service credits were concerned. Supreme Court's "frozen in time" interpretation deprives Tier 3 police officers of the benefit of that legislative choice. It is not reasonable to think that the Legislature intended that a *de facto* postponement, for police officers, of Tier 3's effective date should prevent future Tier 3 officers from obtaining what the Legislature intended to give them – equivalence in treatment where prior service credit is concerned.

In contrast to the City, New York State's police retirement system has carried out this legislative intent. As reflected in their plan booklets, the State system does not discriminate in how it credits prior service between Tier 2 and 3 police members. *See, e.g.*, Article 14 Benefits for PFRS Tier 3 Members at 7 (R716); Service Credit for Tier 2 through 6, New York State and Local Retirement System at 8-9 (R747-748); New York State & Local Retirement System, Your Retirement Benefits: Police and Fire Retirement System at 9, 12, 14, 25-41 (R771,

774, 776, 787-803). The City has no good excuse for refusing to implement, as the State does, what the Legislature intended when it created Tier 3.

When interpreting a statute, courts are to "ascertain and give effect to the intention of the Legislature." *People v. Jones*, 26 N.Y.3d 730, 733 (2016). "Generally, inquiry must be made of the spirit and purpose of the legislation, which requires examination of the statutory context of the provision as well as its legislative history." *Matter of Sutka v. Conners*, 73 N.Y.2d 395, 403 (1989). Here, the language of the RSSL §513(c)(2) and its statutory context make the intent of the Legislature clear: to grant true equivalence between Tier 2 and Tier 3 in terms of creditable service. (R684)

III.
SUPREME COURT ERRED IN HOLDING THAT TIER 3 POLICE OFFICERS CANNOT AVAIL THEMSELVES OF THE BENEFITS OF THE 2002 SETTLEMENT

The 2002 Settlement (R512-531) resolved, in favor of the PBA and its members, two of the issues discussed above: those under RSSL §§ 645 (buy-back of prior service credit, *see* Point I.B above) and 513(b) (purchase of prior service credit, *see* Point I.C above). If there were any doubt that all police officers – including Tier 3 members – are entitled to avail themselves of those two RSSL sections, the 2002 Settlement removes it.

As to section 645, the 2002 Settlement confers rights on "*any person who is*

a member of the PPF and a member of the uniformed service of the NYPD" whose service was acquired pursuant to RSSL §645 and performed in certain enumerated titles. (R517 (emphasis added)) It permits any such person to have the time counted as "city service" and creditable to satisfy the minimum years required for retirement. (R518) Likewise, as to chapter 552 of the Laws of 2000, which enacted the language in section 513(b) that is in issue here, the 2002 Settlement provides that where "any person who is a member of the PPF and a uniformed member of the NYPD" acquires service pursuant to Chapter 552 that service shall be deemed "city service." (R519-520) The words "any person" are not ambiguous. They do not mean "Tier 2 members only."

Supreme Court nevertheless ruled that "Tier 3 members cannot avail themselves of the benefits of the 2002 Settlement Agreement" because "Tier 3 members were not contemplated in the agreement as no Tier 3 police members existed until 2009." (R47) This reasoning is unsound. It is true that, in 2002, no police officers had been placed in Tier 3, but the possibility that they could be was certainly "contemplated." The Legislature had been passing extender bills every two years since 1976 to forestall precisely that possibility – as the negotiators for the PBA and the City undoubtedly knew. If the parties to the 2002 Settlement Agreement wanted to limit its benefits by tier, they could easily have done so.

A fundamental principle of contract interpretation is that agreements should

be construed in accord with the parties' intent, and the best evidence of the parties' intent is what is reduced to writing. *Greenfield v. Philles Records, Inc.*, 98 N.Y.2d 562, 569 (2002). "Where the terms of a contract are clear and unambiguous, the intent of the parties must be found within the four corners of the contract, giving a practical interpretation to the language employed and reading the contract as a whole." *Tomhannock, LLC v. Roustabout Res., LLC*, 33 N.Y.3d 1080, 1082 (2019) (internal citations and quotations omitted). A contract is unambiguous if "on its face it is reasonably susceptible of only one meaning." *Banco Espírito Santo, S.A. v. Concessionária Do Rodoanel Oeste S.A.*, 100 A.D.3d 100, 106-07 (1st Dept 2012) (finding that use of the term "Close Out Amount" in agreement was unambiguous and applying its "ordinary and natural meaning") (internal quotations omitted). And if a contract could be "more reasonably read to convey one meaning, the party benefitted by that reading [here, Tier 3 police officers] should be able to rely on it; the party seeking exception or deviation from the meaning reasonably conveyed by the words of the contract [here, Defendants] should bear the burden of negotiating for language that would express the limitation or deviation." *Greenfield*, 98 N.Y.2d at 571 (quotations and citation omitted). Under these principles, the 2002 Settlement should be read to apply to those it says it applies to: "any person who is a member of the PPF and a member of the uniformed service of the NYPD."

IV.
SUPREME COURT ERRED IN CONVERTING PLAINTIFFS' DECLARATORY JUDGMENT ACTION TO A CPLR ARTICLE 78 PROCEEDING

Supreme Court erred in converting this matter from a declaratory judgment action into a CPLR Article 78 special proceeding pursuant to CPLR 103(c). (R38-39) Plaintiffs are not seeking review of a single, fact-intensive determination of a governmental body; rather, plaintiffs are challenging the City's continuing policy and practice of refusing to allow Tier 3 police officers to credit prior service to the PPF as the applicable statutes (and the 2002 Settlement) require. (R486-510) A declaratory judgment action is the appropriate vehicle for resolving such a dispute.

The Court of Appeals has repeatedly held that a declaratory judgment action, not an Article 78 proceeding, is appropriate where, as here, a plaintiff challenges a continuing policy or practice of a state agency. *See Matter of Zuckerman v. Board of Educ. of City School Dist. of City of New York*, 44 N.Y.2d 336, 343-44 (1978). In *Zuckerman*, the Court of Appeals converted the case into a declaratory judgment action, noting that "article 78 relief could well be inadequate and thus inappropriate" because "[p]etitioners seek more than just a review of a single determination of the respondents; they seek review of the continuing policy of discharging personnel selected from eligible lists and replacing them with holders of certificates of competence, and they seek review of the legality of the issuance of these certificates of competence." 44 N.Y.2d at 343-44. Similarly, in *Allen v.*

Blum, 58 N.Y.2d 954, 956 (1983), the Court of Appeals found that "because the action seeks review of a continuing policy, a declaratory judgment class action rather than individual article 78 proceedings is proper." *See also Matter of Dorst v. Pataki*, 167 Misc. 2d 329, 332-33 (Sup. Ct. 1995), *aff'd*, 228 A.D.2d 4 (3d Dep't 1997), *aff'd*, 90 N.Y.2d 696 (1997) (noting that the Court of Appeals "has consistently held that conversion to a declaratory judgment action is appropriate … where the petitioners seek review of a continuing policy").

Plaintiffs here are plainly seeking review of a "continuing policy." They are not seeking review of isolated determinations about the pensions of particular police officers. The City has, over a period of years, adhered to a policy of denying a variety of benefits to an entire group of police officers, relying on a misinterpretation of the applicable statutes. Accordingly, a declaratory judgment action is the correct vehicle for plaintiffs' claims.

CONCLUSION

Supreme Court erred in ruling that Tier 3 police officers cannot avail themselves of the prior service benefits provided by RSSL §§ 43, 645, 513(b) and New York City Administrative Code §§ 13-218 and 13-143 and in finding that RSSL §513(c)(2) does not provide full equivalence between Tier 2 and Tier 3 police officers with respect to prior service credit. Supreme Court also erred in finding that Tier 3 police officers may not benefit from the 2002 Settlement and in converting this action to an Article 78 special proceeding. Supreme Court's judgment should be modified to correct these errors.

Dated: New York, New York
July 2, 2020

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STATEMENT PURSUANT TO CPLR 5531

NEW YORK SUPREME COURT
APPELLATE DIVISION: FIRST DEPARTMENT

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PATRICK J. LYNCH, AS PRESIDENT OF THE PATROLMEN'S BENEVOLENT ASSOCIATION OF THE CITY OF NEW YORK, INC., ON BEHALF OF THE TIERS 3 AND 3 REVISED MEMBER POLICE OFFICERS EMPLOYED BY THE POLICE DEPARTMENT OF THE CITY OF NEW YORK; THE PATROLMEN'S BENEVOLENT ASSOCIATION OF THE CITY OF NEW YORK, INC.,

Plaintiffs-Appellants-Respondents,

against

THE CITY OF NEW YORK; BILL DE BLASIO, MAYOR OF THE CITY OF NEW YORK; THE NEW YORK CITY POLICE PENSION FUND; THE BOARD OF TRUSTEES OF THE NEW YORK CITY POLICE PENSION FUND; JAMES P. O'NEILL, AS POLICE COMMISSIONER OF THE NEW YORK CITY POLICE DEPARTMENT AND AS EXECUTIVE CHAIRMAN OF THE BOARD OF TRUSTEES OF THE NEW YORK CITY POLICE PENSION FUND,

Defendants-Respondents-Appellants.

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Case No. 2019-03925

1. The index number in the Court below is 655831/2016.
2. The full names of the original parties appear in the caption above. There have been no changes in the parties.
3. This action was commenced in the Supreme Court, New York County.
4. This proceeding was commenced by service and filing of a Summons and Verified Complaint, dated November 4, 2016. Issue was joined by the service of a Defendants' Verified Answer, dated January 11, 2017.
5. This is a declaratory judgment action to determine the rights and benefits under the buy back, purchase, and transfer provisions of the RSSL and the New York City Administrative Code available to those police officers hired on or after July 1, 2009 for their prior service in New York State or New York City retirement systems. This is also an action for breach of contract.
6. These appeals are from the order of Hon. Margaret A. Chan, Supreme Court, New York County, entered on July 9, 2019 and the order of Hon. Margaret A. Chan, Supreme Court, New York County, entered on April 27, 2020.
7. This appeal is being taken on a fully reproduced record.