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.

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PRELIMINARY STATEMENT

The City misconceives the issue on appeal. That issue is not, as the City suggests, whether earlier or later retirement for police officers, or broader or narrower prior service rights, are desirable. The issue is whether Tier 2 and Tier 3 police officers have the same prior service rights. The answer is yes.

The Legislature has provided in clear terms that Tier 2 officers may retire with full benefits earlier than Tier 3 officers (20 years vs. 22). But it has provided with equal clarity, and without making any distinction between tiers, that prior service in other public employment may sometimes be counted. The Legislature was evidently not persuaded by the argument, made by the City in its brief, that because the work of police officers and firefighters "is particularly hazardous and strenuous" service in other capacities should not count. (Brief of Defendants-Respondents-Appellants ("City Br.") at 1) The report of the Commission that recommended implementation of Tier 3 refers not to hazard and strain, but to chronological age: "the sole justification for a separate service retirement benefit for policemen and firemen is the stated management goal of maintaining a young and vigorous police and fire force." (R645) That goal is furthered by permitting retirement after a fixed period of public service, even if not all of that service is as a police officer or firefighter.

In any event, the work of both Tier 2 and Tier 3 officers is equally hazardous and strenuous, and Tier 3 officers are not younger and more vigorous after 22 years of public service than Tier 2 officers are after 20 years. What really matters is that the statutes governing prior service credit treat Tier 2 and 3 police officers alike. This case is about the City's effort to read into those statutes a distinction that is not there.

ARGUMENT

Plaintiffs argued in their main brief (1) that four specific statutes give Tier 3 police officers the same rights to prior service credit as Tier 2 officers (Brief of Plaintiffs-Appellants-Respondents ("Pl. Br.") at 12-26), and (2) that RSSL §513(c)(2) creates full equivalence between Tier 2 and Tier 3 officers as to prior service credit (*id.* at 26-30). The City chooses to reverse the order of these points, and addresses plaintiffs' second argument first.

The reason is obvious. The City's theory as to the specific statutes plaintiffs primarily rely on finds no support in their text, or anywhere else. As to these statutes, the City makes a largely *ipse dixit* argument – asserting, without citing relevant authority, that a distinction between Tiers 2 and 3 exists, and that statutes

say things they do not say.

I.
THERE IS NO DISTINCTION BETWEEN TIERS IN THE SPECIFIC STATUTES PLAINTIFFS RELY ON

As plaintiffs demonstrated in their main brief, RSSL §§43, 645, 513(b) and New York City Administrative Code ("Code") §§13-143 and 13-218 treat Tier 2 and Tier 3 officers equally, and Supreme Court erred in denying Tier 3 officers the right to transfer, buy back, and purchase prior service credit under those statutes. This is true even assuming that Supreme Court's "frozen in time" interpretation of RSSL §513(c)(2) is correct. The City's brief fails to show any basis, in any statute or anywhere else, for the distinction it tries to make between Tier 2 and Tier 3.

A. The Theory That Benefits Can Be Given to Tier 3 Officers Only Under Article 14 is Baseless

The City begins its argument as to these statutes by asserting that none of them except RSSL §513(b) can give any benefit to Tier 3 members because the other statutes "are found outside Article 14." (City Br. at 23) The City insists that no statute, no matter how clearly it expresses an intent to benefit police officers regardless of tier, can give benefits to Tier 3 officers unless it is in Article 14 of the RSSL. Thus, the City argues that, although RSSL §43 applies by its terms to "[a]ny

member" of NYSLERS, RSSL §645 to "any person" meeting specified criteria (not including tier status), and Code §§13-143 and 13-218 to "any period of allowable service" (without reference to tier status), these statutes cannot mean what they say because they are not in Article 14.

This argument is based on RSSL §519, which, according to the City, "limits the application" of statutes not in Article 14 "to only a narrow category of situations." (City Br. at 23) But section 519 does not do that: the words "limit" and "only" are not found in that section, which is a statute of *inclusion*, not exclusion. Section 519 says:

> Any other provision of this chapter, … 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 section 519 says certain provisions of the RSSL and the Code "shall apply" to Tier 3 officers, including those relating to "transfer of members" – which describes two of the statutes plaintiffs rely on here, RSSL §43 and the Code provisions. The City argues that "transfer" must be narrowly read to refer only to

statutes "governing the procedural means by which members transfer between retirement systems." (City Br. at 24-25) That argument is ill-founded, because section 519 does not limit the words "transfer of members" by the word "procedural." The statute says "transfer of members *and* … procedural matters." (emphasis added) But the argument is also academic, because section 519 says some statutes "shall apply" – it does not say that other statutes, applicable to Tier 3 officers on their face, "shall not apply."

Section 519 is an incorporation-by-reference statute, in which the Legislature added provisions to Article 14 without bothering to repeat them all. It gives no support to the City's theory that no statute outside of Article 14 can benefit a Tier 3 police officer.

Of course, the Legislature that enacted section 519 could not have disabled future legislatures from enacting benefits for Tier 3 officers outside of Article 14 if it had tried to do so. *See, e.g.*, *Karedes v. Colella*, 100 N.Y.2d 45, 50 (2003) ("[e]lected officials must be free to exercise legislative and governmental powers in accordance with their own discretion and ordinarily may not do so in a manner that limits the same discretionary right of their successors to exercise those powers"); *Brearley School v. Ward*, 201 N.Y. 358, 369 (1911) (the Legislature

"could not limit the power of succeeding legislatures to alter or repeal such legislation"). But it did not try. It might have said, for example: "This article shall be the exclusive source of benefits for members to whom it applies. No provision of law relating to such benefits shall be deemed applicable to such members unless it specifically refers to this article." While even this could not have bound future legislatures, it would have been relevant to the interpretation of future legislation. What is relevant here is that no such language, or language of similar import, exists in any statute.

The theory that it is impossible to give benefits to Tier 3 members outside of Article 14 – the argument that the City calls its "most formidable" (City Br. at 23) – is without foundation.

B. Tier 3 Officers Are Entitled to the Benefit of Transferred NYSLERS Credit Under RSSL §43

As plaintiffs' main brief explained, under RSSL §43 any member of NYSLERS who becomes a New York City police officer may transfer his or her membership to the PPF, and must be given credit for service while he or she was a NYSLERS member. Because section 43 is a pre-1976 statute, RSSL §513(c)(2) makes it applicable to Tier 3 police officers even under Supreme Court's "frozen in

time" interpretation. Despite this, Supreme Court dismissed plaintiffs' claim under section 43, saying that to apply that statute to Tier 3 members would make "myriad" later statutes superfluous. But Supreme Court was mistaken – the "myriad" statutes do not exist. (*See* Pl. Br. at 15)

The City does not defend Supreme Court's assertion that "myriad" enactments would have been unnecessary if section 43 applied to police officers. It does not dispute that, as plaintiffs' main brief said, there are not a myriad of statutes that provide overlapping benefits, but only part of one. (*See* Pl. Br. at 15 n.3; City Br. at 27) The City makes the most of that one, and chides plaintiffs for suggesting that some of the language in it "should be deemed mere surplusage." (City Br. at 28)[1] But under the City's theory, all of RSSL §43 is surplusage as applied to police officers. It makes more sense to infer that one enactment was overinclusive than that the Legislature was wasting its breath when it permitted

[1] The redundancy in the 2005 legislation is minor. That legislation was enacted to correct an inequity between members who had transferred service credit in the past and those more recently permitted to purchase it under the 2002 Settlement. To achieve this, the categories of prior service included in the 2005 legislation – mostly NYCERS service, but including some NYSLERS titles – were lifted verbatim from the Settlement, resulting in the over-inclusiveness on which the City relies. (R239-240, *see also* p. 27 below)

transfers to the PPF under section 43.

Moreover, even the City's meritless argument that Article 14 is the exclusive source of Tier 3 benefits, discussed above, cannot logically be made as to RSSL §43 – because section 513(c)(2), which applies section 43 to Tier 3 police officers, is part of Article 14. The City is therefore reduced to arguing, in substance, that RSSL §43 is inapplicable to *all* police officers – not just those in Tier 3. The City declares, without citing authority:

> [C]ivilian service in NYSLERS would be credited only as non-uniformed civilian service. It would not be credited as allowable uniformed police service in that system. Thus, by the plain language of the statute, civilian service is not credited as allowable police service simply because the member transferred to the PPF.

(City Br. at 27)

In other words, the transferred service can be "credited" to police officers as section 43 commands, but the credit is meaningless because the service will not be "credited as allowable police service" – and that, according to the City's *ipse dixit*, is the only kind that counts. Why the Legislature would provide for a meaningless transfer is a question the City does not address. *See Nat'l Energy Marketers Ass'n v. N.Y. State Pub. Serv. Comm'n*, 33 N.Y.3d 336, 348 (2019), *rearg denied*, 33

N.Y.3d 1130 (2019) (a statutory construction that renders one part of a statute meaningless is to be avoided); *Anonymous v. Molik*, 32 N.Y.3d 30, 37 (2018) (same).

The City's position that section 43 permits only an illusory "transfer" from NYSLERS to the PPF should, logically, apply to Tier 2 police officers as well as Tier 3 officers. The City offers no reason for any distinction. But, as plaintiffs' main brief demonstrates, the City has for decades allowed Tier 2 officers to have all time transferred under section 43 credited as allowable service for retirement purposes. (Pl. Br. at 14-15) The City's brief ignores the documentary evidence of its own practice. (R145, 875-884, 892) It responds to the authorities plaintiffs cite – a 1963 opinion of the Corporation Counsel and a 2002 court decision – by saying that they pre-dated the application of Tier 3 to police officers, but this misses the point. (City Br. at 28-29) Under RSSL §513(c)(2), Tier 3 officers are entitled to the prior service benefits that were available to Tier 2 members in 1976, including the benefits provided by RSSL §43.

C. RSSL §645 Applies to Tier 3 Police Officers Who Are Not Eligible for Tier Reinstatement

Our main brief demonstrated that Supreme Court's rejection of plaintiffs'

claim under RSSL §645 was based on a misapprehension of both the statute and plaintiffs' claim under it. Supreme Court thought that section 645 was only a "tier reinstatement" statute, i.e., that its sole function was to permit Tier 3 officers to "reinstate" to Tier 2 by buying back credit for service in other public employment before July 1, 2009 (when Tier 3 became applicable to police officers). No one disputes the right of Tier 3 officers to do this. Those who have done so are now Tier 2 officers, and are not involved in this case. Supreme Court thought that plaintiffs here seek the same tier reinstatement rights for Tier 3 officers whose prior service post-dates July 1, 2009, but that is incorrect. Plaintiffs acknowledge that such officers will remain Tier 3 officers, and only seek to buy back time under section 645 so that the time will count towards pension eligibility and increase their pensions. (*See* Pl. Br. at 16-19) That right follows from the words of section 645: "upon rejoining … another public retirement system, [a member] 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."

The City does not defend Supreme Court's rationale. It does not assert that RSSL §645 is purely a tier reinstatement statute, and acknowledges that "the PBA

is not seeking tier reinstatement." (City Br. at 30) Instead, it resorts to a variation on the argument it makes about RSSL §43, discussed above. According to the City, Tier 3 officers whose prior service was after June 30, 2009 can buy back the time – but they are wasting their money if they do, because the time will not count toward their pensions. Once again, the City is arguing for an absurd reading of the statute that is unsupported by the text or by any authority, and is inconsistent with the City's position as to Tier 2 officers, who are permitted to buy back prior service and use it toward their eligibility for retirement – exactly what the City says Tier 3 officers may not do.

The City's only rationale is, again, its *ipse dixit* assertion that time not spent in police or fire service does not count toward a PPF pension, even where the crediting of that time is required by statute. The City says:

> To be sure, a public retirement system member who buys back previous time—even within the same tier—can claim "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." RSSL §645(2). That just doesn't get the PBA very far.
>
> The problem for the PBA's argument is that Tier 3 members have never had the right, benefit, or privilege of

> claiming non-police/fire service as creditable toward the 22 years needed for police/fire retirement with full benefits. RSSL §513(c)(2). …. Regardless of the date they joined the pension system, Tier 3 officers still need to complete 22 years of credited police/fire service before retiring. Time as a pension system member that is not credited police/fire service does not count toward those 22 years for Tier 3 members and it never has. RSSL §513(c)(2).

(City Br. at 30-31)

Thus the City reads "rights or benefits to which he or she would have been entitled" to mean, for Tier 3 officers, "the rights or benefits of an EMT," which are non-existent in the PPF. The City cites no case or statute, and there is none, that supports this self-nullifying interpretation. It cites only RSSL §513(c)(2), the statute enacted in 1976 that, on Supreme Court's reading, gave Tier 3 officers the rights to prior service credit that Tier 2 officers had in that year. But section 513(c)(2) does not say anything about buy-back rights, which did not exist in 1976. And in any event, the 1976 statute could not determine the meaning of section 645, enacted decades later. To the contrary, under well-established rules the prior general statute yields to the later more specific one. *See Dutchess Cnty. Dep't of Soc. Servs. ex rel. Day v. Day*, 96 N.Y.2d 149, 153 (2001). RSSL §645 expressly states this principle: it includes the phrase "[n]otwithstanding any other provision

of law."

Weak as the City's argument is, it should apply equally to Tier 2 and Tier 3 officers – but the City applies it to Tier 3 officers only. The inconsistency may be illustrated by two hypothetical officers, John and Mary. Both were previously in other public service jobs, say as EMTs. John became a member of his previous retirement system in 2008, Mary of hers in 2010. Both joined the police force in 2012 as Tier 3 officers.

John wants to buy back his prior service time for three reasons: to become a Tier 2 officer (thanks to his 2008 membership date), to count his EMT time towards his retirement and to increase his pension. Mary knows she will remain in Tier 3, but she also wants to buy back her time, to count it towards her retirement and to increase her pension. The City says that, if both buy back their time, John achieves all of his goals (*see* Pl. Br. at 18-19), but Mary has only thrown money away. The City's brief does not try to explain why.

D. Tier 3 Police Officers Can Purchase Prior Time Under RSSL §513(b)

As plaintiffs' main brief explains, RSSL §513(b) – contained in Article 14 of the RSSL, applicable to Tier 3 members specifically – allows such members to

purchase the credit that they earned or could have earned in previous public employment. Supreme Court apparently overlooked this statute in its original opinion. On reargument, Supreme Court adopted a rationale similar to the theory that the City applies to RSSL §§43 and 645, discussed above: that service other than police or fire service can be "credited," but does the member to whom it is credited no good. Supreme Court said: "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 … allowable 'police service', the type of credit plaintiffs seek." (R61) This analysis is unsound, for the reasons explained in plaintiffs' main brief (Pl. Br. 22-23) and in Points IB and IC above.

The City does not defend Supreme Court's rationale on this issue. Instead, it argues that the purchase right granted by RSSL §513(b) is nullified, as to police officers, by RSSL §513(c)(2). This argument is without merit. It is based on confusion between two statutes enacted to address different issues, almost a quarter of a century apart.

As relevant here, the first enacted of the two sections was section 513(c)(2),

which was part of Article 14 from its inception in 1976.[2] Section 513(c)(2) says that "police/fire members" of Tier 3 may receive credit for prior service with state, municipal and certain other employers "only if such service, 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 or plan involved." Supreme Court held that this statute was designed to create "equivalence" between Tier 2 and Tier 3 police/fire members. (R71) Plaintiffs agree, though we argue below that the equivalence was not "frozen in time" as Supreme Court held. The City takes an even narrower view of the statute than Supreme Court. (*See* pp. 22-25 below) But no one can argue that the 1976 Legislature intended to create an exception to the purchase right created by RSSL §513(b), for the simple reason that that purchase right did not then exist.

The purchase right now at issue was created 24 years later, in 2000, by an amendment to RSSL §513(b). (L. 2000, ch. 552) The question here is whether that

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[2] There was a section 513(b) in the 1976 version of the statute, but it was narrower than the present section 513(b) and is irrelevant to the present case. *See* L. 1976, ch. 890.

purchase right extends to Tier 3 police officers, and the answer is clearly yes.

The relevant intention is that of the 2000 Legislature that created the purchase right. The City says that the 2000 legislation is applicable only to "general members" – i.e., not to police and fire members. (City Br. at 37) But the statute plainly says the opposite: "a *member* shall be eligible to obtain retirement credit." (emphasis added) "General member" is a defined term in the RSSL (*see* RSSL §501(12)); if the Legislature wanted to limit section 513(b) to general members it could have said so, as it did in other sections of the RSSL. *See*, *e.g.*, RSSL §§501(17) (distinguishing normal retirement age for "general members" and "police/fire members"); 503(a) (retirement eligibility requirements for "general members"); 504 (service retirement benefits for "general members"); 516(b) (vesting for "general members").

The term "members" as used in RSSL §513(b) is unambiguous, and there is no need to consult the legislative history. But the legislative history confirms that it is intended to apply to all Tier 3 members, not just "general members." It says that section 513(b) allows "members of a public retirement system to receive pension service credit for prior service with any public employer in New York State …" There is no support for the idea that the 2000 Legislature intended to benefit only

general members.

In the teeth of the statutory text and legislative history, the City argues that the 1976 enactment of section 513(c)(2) precludes the application of section 513(b) to police officers. The City says: "The more specific provision of §513(c)(2) controls over the general provision in §513(b)." (City Br. at 36) The City is wrong in saying that RSSL §513(c)(2) is more specific: section 513(c)(2) creates a general equivalence between the prior service rights of Tier 2 and Tier 3 police officers, while section 513(b) creates a specific right to purchase prior service credit. But more to the point, section 513(b), as relevant here, was enacted 24 years *later* than section 513(c)(2) – and it is a basic maxim that, where there is conflict, the later statute is controlling. N.Y. Statutes §398 (McKinney's 2019). (The City misleadingly refers to section 513(c)(2) as "a later provision of the same statute," apparently on the theory that, although section 513(c) was enacted earlier, c comes after b in the alphabet. (City Br. at 37))

The City's argument about RSSL §513(b) fails to justify discrimination between Tier 2 and Tier 3. At the same time that it enacted the section 513(b) purchase right, the Legislature enacted the present version of RSSL §446, which provides a similar purchase right to Tier 2 members. L. 2000, ch. 552, reproduced

at R1085-1125. The City has acknowledged that Tier 2 officers may exercise the section 446 purchase right and use the time toward their eligibility for retirement. *See* Tier 2 SPD at 10 (R147) There is no good reason why Tier 3 officers cannot do the same thing.

E. Tier 3 Police Officers Are Entitled to the Benefits Provided for NYCERS Members in the Code

Supreme Court held that under its "frozen in time" interpretation of RSSL §513(c)(2) only the 1976 predecessor of Code §13-143(b)(1) (formerly §B3-30.1) is applicable to Tier 3 police officers. (R42-43, 49) Plaintiffs' main brief demonstrated that, even assuming that the "frozen in time" interpretation is correct as an interpretation of section 513(c)(2), passed in 1976, it does not follow that Tier 3 members could not acquire rights under the post-1976 Code. Section 513(c)(2) does not purport to, and could not, disable a later legislature from granting additional rights, as later legislatures did, by amendments to the Code resulting in the current versions of Code §§13-143(b)(1) and 13-218(2)(a). (Pl. Br. at 23-26)

The City's principal response is an argument this brief has already answered. The City reiterates its theory that no statute that is not in RSSL Article 14, even

though it says it applies to "any period of allowable service" as sections 13-143(b)(1) and 13-218(2)(a) do, can affect the pension rights of Tier 3 members. (City Br. at 33-34)

Plaintiffs have demonstrated that the City's Article 14 exclusivity theory is without basis. (*See* pp. 3-6 above) No more need be said, except to call attention to the City's astonishing claim that a legislature *can* bind a future legislature to its will, as to procedure if not substance. The City says:

> The PBA … claims that the Legislature did not 'disable a later legislature from granting more' benefits (*id.*). That's undoubtedly true, *but the avenue available to the Legislature* for granting those substantive benefits to Tier 3 members is to amend Article 14, not the Administrative Code.

(City Br. at 34)

Thus the City claims that only one "avenue" is "available" to a legislature that wants to change the prior service rights available to Tier 3 members. This, we submit, is self-evidently wrong. Absent some constitutional limitation, a legislature may travel on any "avenue" it chooses in passing legislation, even if a previous legislature has tried to block the path – and here, there is no indication that any previous legislature has ever tried. That the City would reach for such a far-fetched

argument reflects the basic flaw in its case: under the plain language of the statutes Tier 3 police officers have rights that the City refuses to recognize.

The City also argues that the Code provisions cannot apply to Tier 3 members because they have a fixed contribution rate rather than the variable rate used for Tier 1 and 2 members and that this results in an "inconsistency." (City Br. at 35) The Code sections do provide a mechanism for the members' rate of contribution to be adjusted – but only "*as may be necessary*." Code §§13-143(b)(2)(a) and 13-218(d)(2)(b) (emphasis added). Because Tier 3 members' contribution rate is fixed, no adjustment is necessary. The inconsistency the City relies on does not exist.

Accordingly, Tier 3 members are entitled to avail themselves of the benefits provided by Code §§13-143 and 13-218.

II.
RSSL §513(C)(2) PROVIDES FULL EQUIVALENCE IN PRIOR SERVICE RIGHTS BETWEEN TIERS 2 AND 3

In addressing the second point in plaintiffs' brief, the City argues that that Supreme Court's "frozen in time" interpretation of RSSL §513(c)(2) is correct – that the "equivalence" between Tiers 2 and 3 by that statute is limited to benefits

existing in 1976. (City Br. at 20-22) The City also argues, however, that the effect of section 513(c)(2) is even more limited than Supreme Court held: that it permits credit only for prior police and fire service, a position that was rejected by Supreme Court. (City Br. at 15-19; R41) Both of the City's arguments are flawed.

A. The City Does Not Successfully Defend the "Frozen in Time" Theory

Plaintiffs' main brief argued that, in interpreting RSSL §513(c)(2), the Court should consider not only its literal language, which contains the date July 1, 1976, but also ask why that date was chosen. The answer is clear: July 1, 1976 was the date Tier 3 came into existence, and the Legislature wanted to give Tier 3 police officers the same prior service rights as Tier 2 officers as of that date. Because (as the authors of section 513(c)(2) did not foresee) the inception date of Tier 3 for police officers was delayed until July 1, 2009, the intention of the Legislature is best effected by allowing full equivalence to Tier 3 officers as of that date. (Pl. Br. at 26-30)

The City offers an unconvincing alternative explanation for the Legislature's choice of July 1, 1976: the 1976 Legislature, the City says, knew what the benefits of Tier 2 officers were in 1976, and decided that those benefits were good enough

for Tier 3 officers. (City Br. at 21) It was, the City implies, a mere coincidence that July 1, 1976 happened to be the expected starting date of Tier 3. In other words, the City assumes that the 1976 Legislature *intended* 1976 benefits to be "frozen in time" regardless of the date when police officers would become subject to Tier 3. This is a wildly implausible speculation – and one that ignores the legislative history described in plaintiffs' main brief. (*See* Pl. Br. at 28)

The City suggests that, if the Legislature did not intend to freeze benefits as of 1976, regardless of any delay in the inception date of Tier 3 for police officers, it would have written the statute differently, and offers a proposed rewrite of the statute. (City Br. at 20) But the rewrite reflects a misunderstanding of plaintiffs' argument. The City's rewritten statute contains *no* reference date, but plaintiffs say that the reference date should be July 1, 2009, the date when police officers were first placed in Tier 3. Plaintiffs suggest an interpretation of the language of the statute that effectuates what the Legislature intended to do: the reference to July 1, 1976 should be read as meaning "the date when Tier 3 is first applied to police/fire members."

B. Supreme Court Correctly Rejected the City's Reading of RSSL §513(c)(2)

The City argues that RSSL §513(c)(2) not only freezes the rights of Tier 3 officers as of 1976, but also effectively gives them no rights in any event, because it applies only to prior police/fire service. Supreme Court expressly rejected this argument, saying: "Defendants' interpretation is incorrect. Acceptable prior service is not cabined to only uniformed police or fire service by the plain language of RSSL §513." (R41) In this holding – which goes unmentioned in the City's brief – Supreme Court was correct.

The City's interpretation is based, as so many of its arguments are, on an *ipse dixit*. The City asserts that the statute says something it does not say. The City first quotes RSSL §513(c)(2):

> A police/fire member shall be eligible to obtain credit for service with a public employer described in paragraph one 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, would have been eligible for credit in the police/fire retirement system or plan involved.

(Quoted in City Br. at 16)

The City then purports to paraphrase the statute:

> Thus, the plain language of the statute makes clear that Tier 3 police members may receive credit for prior service for the purpose of satisfying minimum uniformed service requirements only if, in 1976, such service would have been credited *as police or fire service* in the member's previous retirement system for that purpose.

(*Id.*; emphasis added)

But the paraphrase does not match the text. The words "as police or fire service" are not in the statute. The statute, at worst for plaintiffs, treats Tier 2 and Tier 3 officers identically as of 1976.

Thus the City can prevail on this issue only if, as the City claims, "[i]t was not until *after* June 30, 1976 that any non-police or fire prior service became creditable as allowable police service for Tier 2 members." (City Br. at 17) If that were true, the Court might wonder why the 1976 Legislature bothered to enact RSSL §513(c)(2). But it is not true. Provisions granting prior service rights to Tier 2 officers for non-police or fire service did exist in 1976.

First, RSSL §43 existed in 1976, and allowed NYSLERS members to transfer their time to other pension systems, including the PPF. As Point IA above explains, the City reads section 43, absurdly, as self-nullifying in its application to police officers, permitting only a transfer of time that can never do the transferring

employee any good. Point IA demonstrates that this reading should be rejected, as should the alternative theory on which the Supreme Court dismissed plaintiffs' RSSL §43 claim.

In addition, Code §§B3-30.1 and B18-15.0 existed in 1976. These sections permitted the transfer of NYCERS time to the PPF. (*See* R42-43) Supreme Court, consistent with its rejection of the City's theory that transfer of time under section 513(c)(2) is "cabined to only uniformed police or fire service," granted summary judgment in plaintiffs' favor on their claim under section B3-30.1 and declared that "defendants … have violated and continued to violate RSSL §513(c)(2) and 1976 Administrative Code §§B3-30.1 and B18-15.0 by refusing to permit all police officers, including those … in Tier 3 from availing themselves of the benefit provided by that statute." (R42-43, 48-49)

Though the City cross-appealed from Supreme Court's order (R32), its brief does not argue that the grant of summary judgment against it as to Code §B3-30.1 was in error. Code sections B3-30.1 and B18-15.0, however, are relevant to plaintiffs' appeal because they contradict the City's claim that, as of 1976, no statutes allowing police officers to claim prior service credit for non-police and fire service were in existence. That is a likely reason why the City has not disputed the

grant of partial summary judgment against it in its cross-appeal: it would be awkward for the City to have to explain away these sections of the Code.

III.
TIER 3 POLICE OFFICERS ARE ENTITLED TO THE BENEFITS OF THE SETTLEMENT

As plaintiffs' main brief shows, the relevant sections of the Settlement (R512-531) – an agreement that was drafted by the City – apply to "any person who is a member of the PPF and a member of the uniformed service of the NYPD." (R517, 519) These words are not ambiguous, and it is undisputed that Tier 3 police officers are "member[s] of the PPF and … of the uniformed service of the NYPD." The City's brief tries unsuccessfully to avoid the effect of this plain language.

First, the City echoes Supreme Court's view that the Settlement cannot apply to Tier 3 police officers, because there were no Tier 3 police officers at the time of the Settlement in 2002. (City Br. at 46-47) Plaintiffs' main brief responds to this argument, pointing out, among other things, that the existence of Tier 3 police officers was wholly foreseeable. (Pl. Br. at 31-32) The City nevertheless speculates that the parties did not really think Tier 3 officers were covered by the

Settlement – but the City forgets that the best evidence of what the parties thought is what their agreement said. *See Tomhannock, LLC v. Roustabout Res., LLC*, 33 N.Y.3d 1080, 1082 (2019). Whether or not the parties had Tier 3 police officers specifically in mind, they chose to use broad, inclusive language: "member[s] of the PPF and … the uniformed service of the NYPD." There is no evidence that they intended to restrict the meaning of those words by tier.

The City claims to find such evidence in references to sections of the Code that, the City says, do not apply to Tier 3 police officers. (City Br. at 48-49) But this proves, at most, that the parties to the Settlement focused on the particular Code provisions then in use. It does not imply an intent to exclude Tier 3 members, or justify disregarding the broadly inclusive language the parties chose to describe who would benefit from their agreement. At most, these references would create an ambiguity in the Settlement – one that should be resolved, under familiar principles, against the party that drafted it, the City. *See 327 Realty, LLC v. Nextel of N.Y., Inc.*, 150 A.D.3d 581, 582 (1st Dep't 2017).

Finally, the 2005 letters the City relies on, submitted in support of legislation that codified the Settlement in part, are completely irrelevant. (City Br. at 49-50) They say nothing about tiers, and do not suggest that the words "any person who is

a member" in the Settlement mean anything other than what they say. The language quoted by the City (City Br. at 49) refers to police officers who were covered by the Settlement, but who could not purchase prior service and have it counted toward their retirement because they had already transferred that same service. Nothing in the letters suggests that any police officer was not covered by the Settlement. (*See* R517-521; R241, 244) The letters have no bearing on any issue in this case.

IV.
THIS ACTION SHOULD NOT HAVE BEEN CONVERTED TO AN ARTICLE 78 PROCEEDING

The City contends that the Supreme Court correctly converted this case from a declaratory judgment action into an Article 78 special proceeding because the PBA is challenging "a single determination" (City Br. at 53), rather than a "policy and practice." The City is wrong. This is not a case of a single police officer challenging a determination to deny his or her pension, but an across-the-board challenge to a misreading of a series of statutes that, the City admits, "may have an effect on many members over many years." (City Br. at 54)

The cases cited by the City on this issue are inapposite. (City Br. at 51) Each

was a challenge to a single determination by a governmental body. Where, as here, a plaintiff seeks "review of a continuing policy" the Court of Appeals "has consistently held that conversion to a declaratory judgment action is appropriate." *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) (citations omitted).

The City argues that *Matter of Zuckerman v. Board of Educ. of City School Dist. of City of N.Y.*, 44 N.Y.2d 336, 343-44 (1978) and *Allen v. Blum*, 58 N.Y.2d 954, 956 (1983) are distinguishable from the present situation, but the argument fails. These cases closely align with the facts here; they both involve challenges to "continuing polic[ies]" – in *Zuckerman*, a policy relating to the termination and hiring of employees, and in *Blum*, a policy relating to the suspension or revocation of home relief. Similarly, here, plaintiffs allege that the City has maintained a policy of denying Tier 3 police officers certain prior service rights and benefits. *See McKechnie v. Ortiz*, 132 A.D.2d 472, 475 (1st Dep't 1987) (declaratory judgment action regarding interpretation of statute relating to retirement and pension benefits); *Civil Serv. Emps. Ass'n Inc., Local 1000, AFSCME, AFL-CIO v. Regan*, 71 N.Y.2d 653, 657-58 (1988) (declaratory judgment action determining tier status of certain public employees).

Lacking precedent that supports its position, the City refers to two previous cases bearing the same name as this case, *Lynch v. City of New York*, 23 N.Y.3d 757 (2014) and *Lynch v. City of New York*, 162 A.D.3d 589 (1st Dep't 2018), *leave to appeal granted* 32 N.Y.3d 915 (2019), and says that they were decided as Article 78 proceedings. (City Br. at 51-52) But neither of the previous *Lynch* opinions is a relevant precedent, because the issue was not briefed in either appeal and neither decision says a word about it. Here, the issue is presented, was decided below, and is briefed on the appeal. This Court should hold, in accordance with the cases cited above, that plaintiffs' choice of a declaratory judgment action was correct and should not have been overturned.

V. THE CITY'S CROSS-APPEAL LACKS MERIT

Though the City filed a notice of cross-appeal, its brief does not argue that Supreme Court's decision granting summary judgment for plaintiffs as to the 1976 versions of Code §§B3-30.1 and B18-15.0 – the only statutes under which Supreme Court held Tier 3 officers entitled to benefits – was in error or should be reversed. The City asks this Court only to "modify" some of the language in Supreme Court's opinion to "clarify" it. (City Br. at 39-45)

The Court should reject the request. The City made the same two requests below, in the form of a motion for reargument. As the Supreme Court pointed out in denying that request, the Court did not "misapprehend" anything. (R60-61)

First, the City discusses Supreme Court's holding that PPF must "transfer service credit pursuant to RSSL §513(c)(2) and 1976 Admin Code §B3-30.1" (R23, quoted in City Br. at 39) The City admits this holding is "correct in terms of determining what service can be credited for satisfying the retirement eligibility requirements," but says it "could be read to suggest that Tier 3 police members may obtain additional monetary benefits." (*Id.*) It could indeed be so read, and quite correctly. The City points to nothing in section B3-30.1 that would bar Tier 3 officers from monetary benefits. Its only argument on the point is its familiar *ipse dixit*: the only source of benefits for Tier 3 officers is RSSL Article 14, and anyway non-police/fire service does not count. (City Br. at 40-41) But Supreme Court held otherwise, in a ruling the City admits is "correct."

The City says that Supreme Court could not have meant to award monetary benefits because the complaint "does not claim" such a right. (City Br. at 42) The City is wrong. The complaint does demand such relief (R110-112) and the issue was squarely litigated below (R458-459, 1216-1217). The City does not like the

outcome, but has chosen not to argue that Supreme Court erred, doubtless because the City thinks it will lose. The decision is clear, and should be allowed to stand.

The City's second request for clarification (City Br. at 43-44) is also needless. Supreme Court's opinion clearly says that the Code's requirements as to service time must be complied with (R23) and there is nothing to clarify. And this proposed correction is also erroneous. The City's statement that Tier 3 officers may not retire "after completing only 20 years of credited service" is simply untrue. (City Br. at 43; *see* RSSL §503(d)) The City perhaps means that Tier 3 workers cannot retire *with full benefits* after 20 years, but that is not what its brief says.

CONCLUSION

On plaintiffs' appeal, the order of Supreme Court should be reversed, and declarations issued in plaintiffs' favor. On the City's cross-appeal, so much of Supreme Court's order as is favorable to plaintiffs should be affirmed.

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