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

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.

Case No. 2019-03925

SUPPLEMENTAL BRIEF FOR DEFENDANTS-RESPONDENTS-APPELLANTS

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

PRELIMINARY STATEMENT

The PBA dramatically overstates the significance of the recent Court of Appeals decision in *Lynch v. City of New York*, 2020 NY Slip Op. 05841 (the "Childcare Credit decision"). That decision, involving the ability of Tier 3 police members to purchase service credit for time spent on unpaid childcare leave, does not address, let alone decide, any of the dispositive issues in this case. At most, it helps the PBA to overcome threshold challenges to its claims without boosting the merits of those claims in any way. The fundamental flaws in the PBA's arguments persist.

In the Childcare Credit decision, the Court of Appeals held that legal provisions from outside Article 14 that do not conflict with the terms of Article 14 can apply to Tier 3 members. The PBA won in that case, in part, because Article 14 was silent on the benefit it sought to claim. But that is not true here, where Article 14 explicitly sets forth how prior service is to be credited for Tier 3 police/fire members. The decision offers no support for the PBA's claim that provisions outside of Article 14 have supplanted the plain terms governing Tier 3 members' pension benefits.

ARGUMENT

In *Lynch v. City of New York*, 2020 NY Slip Op. 05841, the Court of Appeals held that an Administrative Code provision granting a benefit to "any member" of the Police Pension Fund applied to Tier 3 members in the absence of a conflict with the terms of Article 14. The provision at issue permitted members to purchase service credit for time spent on unpaid childcare leave. Admin. Code § 13-218(h). Article 14 granted the same benefit to certain correction members, but was silent as to whether police members could claim the credit. RSSL § 513(h).

The Court's primary reasoning proceeded in two steps. First, it held that the phrase "any member" in the Administrative Code was to be given a broad reading, unconstrained by reference to a particular pension tier. *Lynch*, 2020 NY Slip Op. 05841, at 6-7. Second, the Court found that the application of the benefit from the Administrative Code to Tier 3 members was not inconsistent with the provisions of Article 14. *Id.* at 7-10. The Court wrote that the Legislature's silence on the question of police members' ability to purchase childcare service credit in Article 14 was

"acquiescence" to the benefit granted in the Administrative Code. *Id.* at 8. The Court underscored the absence of a direct conflict multiple times in its decision. *Id.* at 2, 7-10, 15.

The Court returned to its focus on the lack of statutory conflict once again when rejecting of the City's arguments. As the PBA points out (Supplemental Br. 5), the Court held that RSSL § 519 does not exclude the application of provisions of law from outside Article 14, even those that do not relate to "the reemployment of retired members, transfer of members and reserves between systems and procedural matters." *Lynch*, 2020 NY Slip Op. 05841, at 10. Instead, the Court held, § 519 "incorporates by reference relevant parts of, among other things, the Administrative Code *that do not conflict* with the guidelines of the RSSL." *Id.* (emphasis added). The Court also found that its own precedent did not require concluding that Article 14 provided the exclusive source of Tier 3 members' substantive benefits. *Id.* at 10-12. The Court did not address the question of how direct conflicts between the provisions of Article 14 and provisions from other bodies of law should be resolved.

A. The Court of Appeals' decision says little about any of the key issues in this appeal.

1. The decision does not address the dispositive statutory issues in this case.

The Court of Appeals' decision in the Childcare Credit case says nothing at all about the interpretation of RSSL § 513(c)(2), which states in plain terms that Tier 3 police/fire members are eligible to receive service credit for previous employment only if, in 1976, such service would have been credited as police or fire service in the member's previous retirement system. Unlike the points the PBA highlights, this is actually a dispositive issue in the case and nothing in the Court of Appeals' reasoning casts any doubt on the arguments the City has raised (*see* City Br. 15-22). Tellingly, the PBA never mentions § 513(c)(2) in its supplemental brief, further highlighting that the Court of Appeals' decision does not have anything to do with the key statute at issue here.

If anything, the Childcare Credit decision strengthens the City's position, given the Court's strong emphasis on interpreting the statute's plain language. *Lynch*, 2020 NY Slip Op. 05841, at 5-7. That is exactly the approach the City urges here (*see* City Br.

15-16). In contrast, the PBA seeks to judicially amend the statute to reflect what they imagine the Legislature really meant to say but didn't (*see* City Br. 20-22).

The Childcare Credit decision also does not speak to the question of what happens where, as here, the provision that a party urges be applied to Tier 3 members is contrary to the clear terms in Article 14. At issue in the Court of Appeals' decision were, on the one hand, an Administrative Code provision granting a benefit to police members and, on the other hand, an RSSL provision that was silent on the question. Considering the latter's silence, the Court held there was no tension at all and, thus, the Administrative Code could grant a benefit to Tier 3 members. *Lynch*, 2020 NY Slip Op. 05841, at 7-10. Here, in contrast, Article 14 contains a provision that clearly and directly sets forth what prior service may be credited toward a Tier 3 police/fire member's retirement date. RSSL § 513(c)(2). The PBA argues that other provisions from outside Article 14 require a different rule. But even the broadest possible reading of the Court of Appeals' recent decision does not support that theory. Instead, the Court

repeatedly highlighted the lack of anything in Article 14 that could be seen to conflict with its reading of the Administrative Code. *Lynch*, 2020 NY Slip Op. 05841, at 2, 7-10, 15. There is a world of difference between supplanting plain legislative terms, as the PBA attempts to do here, and interpreting legislative silence, as the Court of Appeals did in the Childcare Credit decision.

The PBA also overstates the significance of the Court's interpretation of RSSL § 519. The Court found that the application of other bodies of law to Tier 3 members was not limited to "the reemployment of retired members, transfer of members and reserves between systems and procedural matters," RSSL § 519(1), finding instead that the statute "incorporates by reference relevant parts of" the Administrative Code and other laws provided that those parts "do not conflict with the guidelines of the RSSL." *Lynch*, 2020 NY Slip Op. 05841, at 10. But, as argued in our prior brief, what the PBA seeks to do here is apply provisions of law found outside of Article 14 that conflict with the provisions found within Article 14 (City Br. 24-25). Indeed, if Article 14 provided the benefit the PBA seeks, there would be no

need for its attempted reliance on the other statutes it seeks to import for Tier 3 members (App. Br. 12-26). The PBA's claim that the Court of Appeals has blessed its attempt to override the provisions of Article 14 is contrary both to § 519 and the Court of Appeals' interpretation of that statute.

Even if legal provisions from outside of Article 14 can grant pension benefits to Tier 3 members, there can be no doubt that Article 14 is the primary source of such benefits. Nor can there be doubt that, in the event of a conflict, Article 14 controls. *See* RSSL §§ 500(a), 519(1). The Court of Appeals' decision does not undermine that conclusion in the slightest.

Assuming for the sake of argument that the Childcare Credit decision says everything the PBA claims (and it does not), the PBA is still not entitled to the relief it seeks. The problem is that, at most, the decision finds that certain laws outside of Article 14 *can* apply to Tier 3 members. It does not, however, offer any guidance on *how* those laws are to apply. And as the City explained at length in our previous briefing, the PBA's arguments fail even if the various provisions they cite applied to Tier 3

members (City Br. 26-38). Thus, at most, the Court of Appeals' recent decision allows the PBA to overcome a threshold consideration for arguments that nonetheless fail. The PBA never explains how anything in the Court's decision aids them on these grounds, which are the actual dispositive issues in this case.

2. The Childcare Credit decision does not entitle the PBA to any relief based on the 2002 settlement agreement.

The PBA's argument that the Court of Appeals' decision aids its breach of contract argument is totally misplaced. In its decision, the Court considered a particular phrase used by the Legislature in a specific statute. What the Legislature may have meant in drafting this statute at one point in time says nothing about what the PBA, the City, and the PPF meant using a different—albeit, similar—phrase in a settlement agreement at a different point in time. There is simply no basis to apply the Legislature's intent, as divined by the Court, to different parties acting in a different context.

The PBA offers only its conclusions, with no analysis for why the result it urges should be so. And indeed, it bears repeating,

the demonstrated understanding of the agreement, as evidenced by contemporaneous documentation from the various parties to the agreements, was that it did not actually apply to all police members (City Br. 49-50). This is contrary to the position the PBA adopts now and claims the Court of Appeals, somehow, mandates.

Moreover, nothing in the Court's decision speaks to the situation here, where applying the terms as the PBA urges would result in a plainly nonsensical application of the agreement's terms. The agreement specifies that prior service is to be calculated in accord with a series of Administrative Code provisions that no one argues actually apply to Tier 3 members (City Br. 47-49). The Court's decision on statutory interpretation cannot be read to require that out-of-context phrases in a contract be given their broadest possible reading regardless of countervailing indicators in the contract's terms.

3. The Childcare Credit decision does not speak at all to the issues raised on cross-appeal.

Finally, despite claiming that the Court of Appeals' decision resolves the most significant issues before the Court in this case, even the PBA does not argue that the decision has anything to say about the City's cross-appeal. That's because there is no basis in the statutes governing the transfer of service credit that grants Tier 3 members additional monetary benefits for non-credited service, or affects the age at which such members may claim full benefits upon retirement (City Br. 39-45; City Reply 3-11). The PBA never sought these benefits and it is unlikely Supreme Court intended to grant them. Nothing in the Childcare Credit decision alters the conclusion that this Court should modify Supreme Court's order to make clear that police members may transfer allowable police/fire service credit to the PPF *for the purpose of determining the minimum eligibility requirements for retirement*, as set forth in Administrative Code § B3-30.1 in 1976.

CONCLUSION

This Court should affirm Supreme Court's rejection of the PBA's attempt to expand the prior service benefits available to Tier 3 officers and modify Supreme Court's order to make clear that Tier 3 police members may not obtain additional monetary benefits for certain types of non-allowable service or alter the number of years of allowable police service such a member must complete before retiring with full benefits.

Dated: New York, NY
January 4, 2021

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