To be Argued by:
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APL-2022-00016
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Court of Appeals

of the

State of New York

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-Respondents-Appellants,

– 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-Appellants-Respondents.

BRIEF FOR PLAINTIFFS-RESPONDENTS-APPELLANTS

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CORPORATE DISCLOSURE STATEMENT

Pursuant to 22 N.Y.C.R.R. § 500.1(f), counsel for Plaintiff-Respondent-Appellant the Patrolmen's Benevolent Association of the City of New York (now known as the Police Benevolent Association of the City of New York) certifies that it has no corporate parents, subsidiaries, or affiliates.

STATEMENT OF RELATED CASES

Pursuant to 22 N.Y.C.R.R. § 500.13(a), there are no related cases.

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PRELIMINARY STATEMENT

The central issue in this case is whether Tier 3 police officers have the same rights as Tier 2 police officers to receive various forms of pension credit for prior public employment. The answer, as the Appellate Division correctly held, is yes. The statutes are clear on their face, and make no distinction between Tier 2 and Tier 3 officers. Any doubt on this score is removed by this Court's recent decision on a similar issue in *Lynch v. City of New York,* 35 N.Y.3d 517 (Oct. 20, 2020) ("*Lynch II*"*).*

In *Lynch II*, defendants-appellants-respondents (collectively "the City") argued, as they do here, that certain pension-related benefits were not available to Tier 3 officers. The City relied principally on the argument that "the pension rights of tier 3 police officers are exclusively governed by article 14" of the Retirement and Social Security Law ("RSSL"). Therefore, the City argued in *Lynch II*, any statute outside Article 14 that confers pension rights on police officers must be read as inapplicable to Tier 3 officers. *Lynch II*, 35 N.Y.3d at 522. That was also the City's primary argument in this case – but, while this case was pending in the Appellate Division, this Court rejected the argument, holding in *Lynch II* that Article 14 "creates no such exclusivity." *Id.* at 527. The Appellate Division cited *Lynch II* in deciding the main issues here in favor of plaintiffs-respondents-appellants ("Plaintiffs"): "Article 14 of the Retirement and Social Security Law

(RSSL) … does not exclusively govern every right and benefit enjoyed by all tier 3 members." *Lynch v. City of New York*, 194 A.D.3d 416, 417 (1st Dep't 2021).

Undeterred, the City now comes back to this Court with a repackaged version of the same argument. The City argues, in substance, that RSSL § 513(c)(2) creates, for prior service credits, the same sort of exclusivity that the Court rejected in *Lynch II*. The City relies on language in section 513(c)(2) saying that Tier 3 police officers can receive credit "only" for service that was creditable for Tier 2 officers in 1976. According to the City, this language is a universal and perpetual exclusion of Tier 3 officers from all statutes enacted after 1976 that grant prior service credits to police officers. All such statutes, to the extent they apply to Tier 3 officers are, the City says, "inconsistent" with RSSL § 513(c)(2) and must be disregarded – so that, as to prior service credits, Article 14 is the exclusive source of benefits for Tier 3 officers after all.

The idea that the 1976 Legislature intended to, or even could, bar future Legislatures from ever conferring any new benefits on Tier 3 police officers is absurd. Nor is it supported by the statute the City relies on. As the Appellate Division explained, the City misreads RSSL § 513(c)(2), by ignoring its context. It should be read with the simultaneously-enacted preceding subsection of the same statute, RSSL § 513(c)(1). So read, as the Appellate Division correctly held, section 513(c)(2) merely excludes Tier 3 police and fire members from the

"broader eligibility requirements" of section 513(c)(1) and "does not conflict" with the statutes on which Plaintiffs rely. *Id.* at 417-18.

The City's brief does not point out any flaw in the Appellate Division's reasoning. It does not even try to do so. It merely declares that the City's reading of the statute is right and the Appellate Division's is wrong. As this brief will show, the reverse is true.

The order of the Appellate Division, to the extent appealed from by the City should be affirmed. As to the issues raised on Plaintiffs' cross-appeal, the order should be reversed, for the reasons explained in Point II of the Argument.

RESTATEMENT OF QUESTIONS PRESENTED ON THE CITY'S APPEAL

1. Does RSSL § 513(c)(2), enacted in 1976, prevent Tier 3 police officers from receiving prior service benefits granted to police officers generally in statutes enacted after 1976? The Appellate Division answered no.

2. Are the rights granted by RSSL § 43 to transfer prior service credits available to Tier 3 police officers? The Appellate Division answered yes.

3. Are the rights granted by RSSL § 645 to "buy back" prior service credits available to Tier 3 police officers? The Appellate Division answered yes.

3. Are the rights granted by RSSL § 513(b) to purchase prior service credits available to Tier 3 police officers? The Appellate Division answered yes.

4. Are the rights granted by New York City Administrative Code §§ 13-143(b)(1) and 13-218(2)(a)[1] available to Tier 3 police officers? The Appellate Division answered yes.

QUESTIONS PRESENTED ON PLAINTIFFS' CROSS-APPEAL

1. Does a 2002 settlement agreement between the Police Benevolent Association (the "PBA") and the City apply to Tier 3 police officers? The Appellate Division answered no.

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

JURISDICTION OVER THE CROSS-APPEAL

The Appellate Division's decision finally determined the action, and this Court has granted leave to appeal. This Court has jurisdiction over Plaintiffs' cross-appeal pursuant to CPLR § 5602(a)(1)(i).

BACKGROUND

From time to time, the New York Legislature has created separate schemes of pension benefits for employees of the State and its subdivisions, commonly

[1] These are substantially identical statutes, and are treated as a single statute in this brief.

known as "tiers." 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) ("*Lynch I*").

Tier 3 was established on July 1, 1976 for all newly hired public employees and is codified in Article 14 of the RSSL. *Lynch I*, 23 N.Y.3d at 765. Police officers, however, were excluded from Tier 3 by separate legislation, and those hired after July 1, 1976 continued to be Tier 2 members until 2009. *See* RSSL § 500(c); *Lynch I*, 23 N.Y.3d at 765. In that year, Governor Patterson vetoed a bill to extend Tier 2 for police officers, and police officers hired on or after July 1, 2009 became members of Tier 3. *See id*. at 767.

There are significant differences between the benefits available to Tier 2 and Tier 3 members, including, for example, the formulas used to calculate pensions, whether the pensions are subject to a social security offset, and the number of years of service required before an officer is eligible for retirement. *Compare* NYC Admin. Code § 13-247 with RSSL §§ 503(d), 505(a), 510(b). However, in the statutes at issue on this appeal, relating to prior service credits, the Legislature chose to treat all police officers equally, regardless of tier.

THE STATUTES INVOLVED

A. The Statutes Plaintiffs Rely On

Plaintiffs' claims in this case, to the extent they were upheld by the Appellate Division, are based on four statutes: (1) RSSL § 43, which allows

members of the New York State and Local Employees Retirement System ("NYSLERS") to transfer their membership to the Police Pension Fund ("PPF"); (2) RSSL § 645, which allows the "buy-back" of certain prior service credit; (3) RSSL § 513(b), which allows the purchase of certain prior service credit; and (4) New York City Administrative Code §§ 13-143(b)(1)/13-218(2)(a), which allows the transfer of prior service in certain enumerated categories, such as service as an EMT or peace officer, and deems such service to be police service. (The statutes are quoted in the applicable sections of the argument below.)

These statutes make no distinction between tiers, and the City's brief does not dispute that they are applicable on their face to all police officers. The City's main argument is that these statutes are inapplicable to Tier 3 members because they "directly conflict with" RSSL § 513(c)(2).

B. RSSL § 513(c)

Section 513(c) was enacted in 1976 as part of RSSL Article 14, by which Tier 3 was created. While the City would like the Court to read only § 513(c)(2), it is important to read the first two subsections of § 513 together. They say, in relevant part, the following:

> 1. A [Tier 3] member shall not be eligible to obtain credit for service with a public employer other than the state of New York, a political subdivision thereof, a public benefit corporation, or a participating employer …

> 2. A [Tier 3] 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 [Tier 2] 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.

As we demonstrate below, and as the Appellate Division held, the second of the above paragraphs is simply a limitation on the first. It does not, and could not, require that Tier 3 officers must be forever excluded from whatever prior service the Legislature chooses to provide to police officers generally.

THE PROCEEDINGS BELOW

Plaintiffs began this declaratory judgment and breach of contract action on November 4, 2016, seeking relief from the City's failure to honor the prior service pension rights and benefits that Tier 3 police officers are entitled to by law and contract. (R513-531)[2] The City moved to convert Plaintiffs' action into a CPLR Article 78 proceeding, and, upon conversion, to dismiss Plaintiffs' claims. (R74-75) Plaintiffs cross-moved for summary judgment. (R436-438)

On July 5, 2019, Supreme Court, New York County (Margaret A. Chan, J.) granted nearly all of the City's motion. (R10-24) Supreme Court also converted

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

this matter to an Article 78 proceeding, and denied nearly all of Plaintiffs' cross-motion. (R10-24) On May 4, 2021, the Appellate Division reversed in part and granted summary judgment to Plaintiffs on all their statutory claims, specifically finding that the legislative enactments Plaintiffs rely on do not conflict with Article 14 of the RSSL. (R1437-1439) The Appellate Division, however, affirmed Supreme Court's decision with respect to Plaintiffs' breach of contract claim and its decision to convert this matter to an Article 78 proceeding. (R1437-1439)[3]

The City moved in the Appellate Division for reargument or leave to appeal to this Court. Plaintiffs opposed that motion, and cross-moved for leave to appeal in the event that the City's motion for leave to appeal was granted. The Appellate Division denied the motion and cross-motion, but this Court granted the parties' motion and cross-motion for leave to appeal on February 10, 2022. (R1435)

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[3] The City took a cross-appeal to the Appellate Division, asking that court to modify certain language in Supreme Court's opinion that the City did not like. *See* Brief for Defendants-Respondents-Appellants filed in the Appellate Division, First Department, dated August 21, 2020 ("City App. Div. Br."), attached in Plaintiffs' Compendium ("C") at C-48 – C-54. The Appellate Division rejected the cross-appeal, modifying Supreme Court's order only in Plaintiffs' favor, and saying that it was "otherwise affirmed." (R1437) The City, however, seems to be under the impression that it won its cross-appeal below. Its brief says that the Appellate Division "scuttled" the supposedly "problematic language." City Br. at 13 n.6. The Appellate Division did nothing of the kind, and the City's claim that it did is baseless – indeed, incomprehensible.

ARGUMENT

I.
THE COURT SHOULD AFFIRM THE APPELLATE DIVISION'S DECISION WITH RESPECT TO THE STATUTORY CLAIMS

A. The Appellate Division's Decision is in Accord with this Court's Decision in *Lynch II*

1. *Lynch II* Rejected the "Exclusivity" Argument on Which the City Principally Relied

What was originally the central issue in this case was decided by this Court in Plaintiffs' favor less than two years ago. In *Lynch II*, the Court rejected the City's argument that "the pension rights of tier 3 police officers are exclusively governed by article 14 of the [RSSL]," holding instead that the RSSL "creates no such exclusivity." *Lynch II*, 35 N.Y.3d at 522, 527.

Until *Lynch II* was decided, this "exclusivity" argument was the mainstay of the City's defense of the present case. In its brief to the Appellate Division, the City insisted that Tier 3 members are limited to the benefits set forth in Article 14, saying that the Plaintiffs' "most formidable" challenge is that the statutes they rely on are "found outside of Article 14." To support this conclusion the City relied on RSSL § 519(1) and on *Lynch I*, a 2014 decision of this Court in another litigation between the same parties. (*See* City App. Div. Br. at C-16, C-28-C-29, C-32-C-34, C-42, C-50-C-51.) These arguments echoed those the City made in *Lynch II*. *See Lynch II* at 522, 527.

In rejecting the City's theory in *Lynch II*, this Court destroyed the main basis for the City's defense of this case. The *Lynch II* Court said that RSSL § 519(1) "creates no such exclusivity" as the City claimed. *Lynch II* at 527. It also said that the City's "exclusivity theory lacks support in our case law." *Id*. This Court distinguished the 2014 *Lynch I* decision that the City heavily relied on, saying:

> Defendants' reliance upon *Lynch v City of New York* (23 NY3d 757 [2014]) is misplaced. … [In the 2014 *Lynch I* case] *we did not so much as hint* that the [RSSL] might be the sole instrument for determining retirement benefits of Tier 3 members.

Lynch II at 527. (emphasis added)

In short, what the City once called its "most formidable" argument in this case has already been rejected by this Court. Now, out of necessity, the City has switched gears and claims with a straight face *Lynch II* actually *supports* its position. The City says that the Appellate Division here "essentially … nullified" *Lynch II*. Brief for Defendants-Appellants-Respondents ("City Br.") at 15. But the Appellate Division did not nullify this Court's decision; it followed it. *See* 194 A.D.3d at 417, citing *Lynch II* for the proposition that "Article 14 … does not exclusively govern every right and benefit enjoyed by all tier 3 members." The Appellate Division was correct. *Lynch II* controls this case.

2. The City's Repackaged "Exclusivity" Theory is No Better Than the One *Lynch II* Rejected

Now, the City claims to have discovered in RSSL § 513(c)(2) a new basis for its exclusivity theory. It says that section 513(c)(2) overrides the plain language of later-enacted statutes granting prior service benefits to police officers without distinction as to tier, leaving Article 14 as the exclusive source of prior service benefits. Echoing its failed *Lynch II* argument, the City says that the Appellate Division "wrongly looked to laws outside of Article 14 that were enacted after 1976." City Br. at 22.

The City's new theory is refuted by reading together the two subsections of RSSL § 513(c), which were enacted in 1976 as part of the same legislation. We again quote the relevant language of both subsections:

> 1. A [Tier 3] member shall not be eligible to obtain credit for service with a public employer other than the state of New York, a political subdivision thereof, a public benefit corporation, or a participating employer …
>
> 2. A [Tier 3] 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 [Tier 2] 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.

The meaning of these statutes read together is not obscure, and was correctly understood by the Appellate Division. Section 513(c)(1), though worded as a

negative subject to an exception, makes clear that, in general, Tier 3 members of the pension system may receive credit for prior service with most public employers, including the State and its political subdivisions. RSSL § 513(c)(2) limits that right, in the case of police and fire members, to service that would have been creditable to a Tier 2 police or fire member when the statute was enacted.

The City, however, separates subsection 2 from subsection 1, and elevates subsection 2 to a universal rule, applicable to statutes enacted *after* 1976. The City says that no statute can ever be read to give Tier 3 police officers more rights than Tier 2 police officers had in 1976. That reading does not make sense. There is no apparent reason why the 1976 Legislature would have wanted to exclude Tier 3 officers perpetually from every benefit future statutes might provide.

Indeed, the 1976 Legislature could not have done that if it wanted to. An earlier legislature cannot disable a later legislature from giving additional benefits. *Dutchess Cnty. Dep't of Soc. Servs. ex rel. Day v. Day*, 96 N.Y.2d 149, 153 (2001). *See also 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, Ltd. v. Ward*, 201 N.Y. 358, 369 (1911) (the Legislature "could not limit the power of succeeding legislatures to alter or repeal such legislation").

On the contrary, if a later statute did conflict with RSSL § 513(c)(2), the later statute would prevail. N.Y. Statutes § 398 (McKinney's 2019) ("Where two statutes are in irreconcilable conflict with each other the later constitutional enactment will prevail"). This is true whether or not there is an express "notwithstanding" clause in the later statute – although, as to one of the statutes at issue here, the City is incorrect in saying there is no such clause. *Compare* City Br. at 24 ("Nor did the Legislature insert a 'notwithstanding' clause or any similar language in the subsequent enactments") *with* RSSL § 645 ("Notwithstanding any other provision of law…").

But in any event, there is no conflict between RSSL § 513(c)(2) and later statutes. The Appellate Division explained why. Section 513(c)(2) merely excludes certain police/fire members from the "broader eligibility requirements" of RSSL § 513(c)(1). 194 A.D.3d at 17. "So read," the Appellate Division concluded, "RSSL 513(c)(2) does not conflict" with the statutes on which Plaintiffs rely. *Id.* at 417-418. The court went on to say:

> Our interpretation is foremost supported by the statutory language of RSSL article 14, and furthermore accords with the fundamental principles of statutory interpretation that statutes should be read as a whole and that provisions should be read harmoniously so that each and every part of a statute can be given effect.

Id. at 418 (internal citations omitted).

The City offers no refutation of the Appellate Division's reasoning. Its brief does not so much as cite RSSL § 513(c)(1), much less try to explain why the Appellate Division was wrong in saying that § 513(c)(2) is no more than an exclusion from the broader language of the previous subsection. The City says in conclusory terms that the Appellate Division "paid lip service" to *Lynch II* and "misread Article 14 itself and ignored clear statutory conflicts." (City Br. at 14.) But the Appellate Division faithfully followed *Lynch II*, and the "statutory conflicts" are non-existent.

B. The Statutes Plaintiffs Rely on Apply to Police Officers Generally, Without Distinction as to Tier

The City clearly believes that the Legislature *should* have excluded Tier 3 police officers from the prior service benefits at issue here. Indeed, the City evidently does not think that *any* police officers should get credit for non-police service. The City finds various aspects of the police pension system unduly "generous" (City Br. at 3, 6, 15, 21, 31), and favors what it calls "[t]he historic requirement that an officer perform police duty for at least 20 years to retire with full benefits." City Br. at 3. The City is so committed to this "historic requirement" that it misrepresents history. It says: "In 1976, the only service that counted [toward retirement eligibility] was uniformed service as a police officer or firefighter." *Id.* at 2. This is simply not true. As we show below, RSSL § 43,

enacted long before 1976, allows time transferred from prior service by former members of NYSLERS to count towards retirement. The City has always afforded that right to Tier 2 police officers who qualify for it, and still does so today. *See* pp. 18-19 below.

The City does not dispute that the statutes at issue give credit for non-police service to Tier 2 officers. The City struggles unsuccessfully to find a legal basis for denying the same benefits to officers in Tier 3. There is no such basis, as the New York State police system, interpreting the same statutes, has recognized. The record shows that the State does not discriminate in the crediting of prior service between Tier 2 and 3 police members. (R716, R747-748, R771)

Every one of the four statutes Plaintiffs rely on here is applicable, by its terms, to police officers generally, or to public employees including police officers. None of the statutes makes any distinction between Tier 2 and Tier 3. The City's brief does not dispute this. Apart from the argument based on RSSL § 513(c)(2), discussed above, it offers only flimsy – in some cases no – statutory interpretation arguments.

1. RSSL § 43

RSSL § 43 provides "transfer" rights to former members of NYSLERS. It says, 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 New York City Police Pension Fund ("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. The statute says that "any member" of NYSLERS 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."

This Court in *Lynch II* made clear that, in these kinds of statutes, "'any member' can mean only what is says." 35 N.Y.3d at 524. As with the statute at issue in *Lynch II*, so too in RSSL § 43, "the reference to 'any member' is unbounded and unfixed to employees of a particular tier, and the absence of an exception applicable to tier 3 employees cannot reasonably be attributed to carelessness or mistake." *Id.* The City does not argue here that the words "any member" do not include Tier 3 police officers.

Indeed, though the City's brief does not acknowledge it, as to this statute the City cannot resort even to its faulty argument that the statute is overridden by RSSL § 513(c)(2). The City claims that, under section 513(c)(2), "Tier 3 police members may obtain credit toward retirement eligibility only to the extent that Tier 2 members got such credit in 1976" (City Br. at 23) This argument by its own terms is inapplicable to section 43, because the relevant provisions of RSSL § 43 were enacted before 1976.[4]

Thus, the City is reduced to arguing, in substance, that section 43(d) cannot mean what it very plainly says: that a transferring member "shall be given such

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[4] 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)

status and credited with such service in the second retirement system as he was allowed in the first retirement system." The City's theory is that this conflicts with earlier legislation saying that police officers are eligible for retirement after a minimum period of service "in the police force." City Br. at 29. But if there were a conflict, the later-enacted statute would prevail.

In fact, the supposed conflict exists only in the City's imagination. The provision of section 43(d) that a transferring employee "shall be … credited with such service in the second retirement system as he was allowed in the first retirement system" can only mean, in the case of a police officer, that a member transferring from NYSLERS must be credited with such service in PPF – "the second retirement system" – as he or she was allowed in NYSLERS. In other words, the transferred service must be treated as though it were service in the police force. If the words "shall be credited" in section 43(d) do not mean that, they mean nothing at all.

And in any event, the City's interpretation of section 43(d) is contradicted by its own treatment of Tier 2 officers. The idea that the "shall be credited" language of section 43(d) has no real meaning logically applies to Tier 2 police officers as well as Tier 3 officers. The City offers no reason for any distinction. But the City has for decades allowed Tier 2 officers to have all time transferred under section 43 credited as allowable service for retirement purposes. Indeed, an opinion

rendered by the Corporation Counsel of the City in 1963 says, in reference to section 43, "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); R145 (Tier 2 Summary Plan Description saying that "[a]ll properly transferred state time" is deemed eligible to satisfy minimum retirement eligibility requirement); R1140 (affidavit testimony 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). The City's brief makes no attempt to explain away this evidence of its own practice.

Section 43 unquestionably permits the crediting of transferred NYSLERS service to police officers without regard to tier.

2. RSSL § 645

RSSL § 645 says, in relevant part:

> Notwithstanding any other provision of law, any 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"[5] 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

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[5] 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).

second retirement system) begun on the date of membership in the first retirement system.

Because section 645 was enacted in 1998, the City relies here on its position, refuted above, that section 513(c)(2) nullifies any post-1976 legislation granting prior service benefits, to the extent that legislation applies to Tier 3 officers. City Br. at 30-31. The City also offers another argument: that section 645 only permits tier reinstatement; "[t]hat is all it does." *Id.* at 30. But that is not what the statute says. It permits "any person" to buy back prior service credit, making no mention of whether such a buy-back would result in reinstatement to an earlier tier.

Again, the City's argument contradicts its own practice with respect to Tier 2 police officers, who have been permitted to buy back credit under section 645 regardless of whether they were eligible to reinstate to Tier 1. *See* R222-223 (settlement provision for buy back of prior service time pursuant to section 645 with no mention of reinstatement to an earlier tier); R1082 (NYPD application for purchase of prior service credit providing for an option – but not requirement – to apply for a "change of tier for service previously transferred").

The buy-back rights described in RSSL § 645 are available to Tier 3 police officers.

3. RSSL § 513(b)

RSSL § 513(b), enacted in its present form in 2000, 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, and thus 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 § 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 (R1094-1095), and 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). *See* L. 2000, ch. 552, reproduced at R1085-1125. Indeed, 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* R147 (Tier 2 Summary Plan Description).

As to section 513(b), the City's only argument is that the statute, enacted in 2000, is nullified as to Tier 3 police officers by RSSL § 513(c)(2), enacted almost a quarter of a century earlier.[6] City Br. at 20-21. The argument is without merit for the reasons explained above.

4. Administrative Code §§ 13-143(b)(1)/13-218(2)(a)

New York City Administrative Code §13-143(b)(1) (formerly §B3-30.1)

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[6] There was a section 513(b) in the 1976 version of Article 14, but it was narrower than the present section and is irrelevant to the present case. *See* L. 1976, ch. 890.

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. The code provisions were amended several times over the years to add categories of transferable service. (R904-907, 934-940, 968-970, 989-992) As they now stand, they 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. They do not say or suggest that Tier 2 and Tier 3 officers should be treated differently.

The City barely mentions these code provisions in its brief. City Br. at 11, 23. As to them, again its only argument is that RSSL § 513(c)(2) nullifies them as applied to Tier 3 officers, an argument we have already refuted. *See* City Br. at 23-24.

The code provisions, like the other statutes Plaintiffs rely on, are applicable to Tier 3 police officers.

II.
THE COURT SHOULD REVERSE THE APPELLATE DIVISION'S DECISION WITH RESPECT TO THE 2002 SETTLEMENT AND THE CONVERSION OF PLAINTIFFS' ACTION TO AN ARTICLE 78 PROCEEDING

The Appellate Division erred in holding that Plaintiffs are not entitled to avail themselves of the benefits of a 2002 settlement between the parties, and that this matter was properly converted to an Article 78 proceeding.

A. Tier 3 Police Officers are Entitled to the Benefits Provided in the 2002 Settlement

The 2002 settlement (R512-531) resolved, in favor of the PBA and its members, two of the statutory issues in this case: those under RSSL §§ 645 (buy-back of prior service credit, *see* pp. 19-21 above) and 513(b) (purchase of prior

service credit, *see* pp. 22-23 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 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 section 513(b) in its present form, 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."

The Appellate Division affirmed Supreme Court's ruling on this claim, finding that "nothing in the 2002 settlement agreement between the parties evinces the intention of the parties at the time they entered into the contract to apply the agreement to tier 3 members, of whom there were none until July 1, 2009." 194 A.D.3d at 418 (internal quotations and citations omitted). But this finding runs afoul of this Court's ruling in *Lynch II*.

The settlement says that the benefits provided by RSSL §§ 645 and 513(b) shall be available to "any person" who is a member of the PPF and a member of the uniformed service of the NYPD (R517, 519). The Court in *Lynch II* made clear that language such as this "can mean only what is says" – and is "unbounded and unfixed to employees of a particular tier." 35 N.Y.3d at 524. In finding for the City on this claim, the Appellate Division adopted the same argument that was rejected in *Lynch II* – that because there were no Tier 3 members in existence at the time of the 2002 settlement, it cannot apply to them. *Lynch II* dictates the reversal of this finding. *See id*. ("Although there were no tier 3 police officers when this part of the Administrative Code was passed, *that fact is irrelevant*.") (emphasis added)

Moreover, the Appellate Division's holding is contrary to well-established principles of contract interpretation. One such principle is that agreements should be construed in accord with the parties' intent, and the best evidence of that 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 Dep't 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, the City] 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). Finally, to the extent that the references to "any person" create an ambiguity in the settlement, it 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).

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." If the parties to the 2002 settlement wanted to limit its benefits by tier, they could easily have done so. But they did not. Rather, they chose to use language that is, in the words of *Lynch II*, "unbounded and unfixed to employees of a particular tier." 35 N.Y.3d at 524. The decision of the Appellate Division with respect to the settlement should be reversed.

B. Article 78 is Not the Proper Vehicle for this Dispute

This matter should not have been converted from a declaratory judgment action into a CPLR Article 78 special proceeding. 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 Appellate Division found that the action was properly converted because "the 'critical issue in the administration' of the retirement plans at issue 'is the interpretation of statute[s] governing transfers, purchase, and buy-backs, and 'when that issue is resolved it remains for the [City] to perform ministerial acts, the making of arithmetic reckonings.'" 194 A.D.3d at 417. The Appellate Division added that Plaintiffs "essentially seek[] review based on errors of law." *Id.* But this is not a case of a single police officer challenging a determination to deny his or her pension. It is an across-the-board challenge to a misreading of a series of statutes over a period of years, resulting in the denial of a variety of benefits to an entire group of police officers.

The Court 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 344. 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) (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"); *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, 656-58 (1988) (declaratory judgment action determining tier status of certain public employees).

Accordingly, a declaratory judgment action is the correct vehicle for Plaintiffs' claims.

CONCLUSION

For the foregoing reasons, the order of the Appellate Division should be affirmed insofar as it is appealed from by the City, and reversed insofar as it is the subject of Plaintiffs' cross-appeal.

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NEW YORK STATE COURT OF APPEALS
CERTIFICATE OF COMPLIANCE

I hereby certify pursuant to 22 NYCRR PART 500.1(j) that the foregoing brief was prepared on a computer using Microsoft Word.

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