To be Argued by:
ROBERT S. SMITH
(Time Requested: 30 Minutes)

APL-2022-00016
Appellate Division–First Department Case No. 2019-03925
New York County Clerk's Index No. 655831/16

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.

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PRELIMINARY STATEMENT

Plaintiffs' opening brief showed that the Appellate Division erred on two issues: (1) the scope of the 2002 settlement agreement and (2) the conversion of this declaratory judgment action to a CPLR Article 78 proceeding. As to the first issue, the City's Reply/Responsive Brief ("City Reply Br.") does not even try to answer Plaintiffs' main argument; as to the second, it relies on inapposite authorities. As to both issues, the Appellate Division's order should be reversed.

ARGUMENT

I. TIER 3 POLICE OFFICERS ARE ENTITLED TO THE BENEFITS PROVIDED IN THE 2002 SETTLEMENT

The 2002 settlement (R512-531) expressly confers rights on "*any person* who is a member of the PPF" and a "uniformed member" of the NYPD. (R517-520) (emphasis added). As Plaintiffs' opening brief shows, this Court held in *Lynch v. City of New York*, 35 N.Y.3d 517, 524 (Oct. 20, 2020) ("*Lynch II*"), in a closely analogous context, that the words "any member" are not ambiguous, and do not mean "Tier 2 members only." The City's brief on this issue, amazingly, does not even cite *Lynch II*, much less try to distinguish it. It could hardly be clearer that the Appellate Division's holding on this issue is inconsistent with *Lynch II*.

The City relies on the PBA's 2005 lobbying efforts in favor of proposed pension reform legislation, quoting a statement in a PBA letter saying that "not all

members … were able to receive the benefit of these settlements." (City Reply Br. at 16). The City's argument is misleading: the quoted sentence had nothing to do with the meaning of "any member" in the 2002 settlement, as the next sentence of the letter, which the City fails to quote, demonstrates: "Those officers who, upon appointment to the New York City Police Department, properly transferred certain pension time, had it credited as a monetary benefit only." (R241) The PBA letter 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. For that reason, those officers were not "able to receive the benefits" of the settlement. Nothing in the letter suggests that any police officer was not *covered* by the settlement.

The decision of the Appellate Division with respect to the settlement agreement should be reversed.

II. ARTICLE 78 IS NOT THE PROPER VEHICLE FOR THIS DISPUTE

The authorities cited in Plaintiffs' opening brief (pp. 29-30) show 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. The cases cited by the City are not to the contrary.

None of the City's cases involves, as this one does, a continuing policy or practice contrary to multiple statutes; on the contrary, each relates to an isolated

decision. *See Solnick v. Whalen*, 49 N.Y.2d 224, 227 (1980) (City Reply Br. at 18) (single nursing home facility's challenge to adjustment of its Medicaid reimbursement rates); *NYC Health and Hosps. Corp. v. McBarnette*, 84 N.Y.2d 194, 198-99 (1994) (City Reply Br. at 19) (single hospital operator's challenge to its Medicaid reimbursement rates and demand for reimbursement); *Advanced Refractory Tech., Inc. v. Power Auth. of State of N.Y.*, 81 N.Y.2d 670, 678-79 (1993) (City Reply Br. at 19) (issue was whether claims relating to purchase of electrical power from state agency could be brought as breach of contract claim; Article 78 was appropriate route because the "focus of the controversy" was on the "agency's alleged violation of a Federal statute, not on a breach of an express contractual right"); *Save Pine Bush, Inc. v. Albany*, 70 N.Y.2d 193, 202-03 (1987) (City Reply Br. at 19) (environmental group's challenge to city's enactment of zoning ordinances); *Matter of Kaslow v. City of New York,* 23 N.Y.3d 78 (2014) (City Reply Br. at 19) (pension suit brought by one retired corrections officer); *Keane v. Leary*, 29 N.Y.2d 713 (1971) (City Reply Br. at 19) (action brought by three widows of police officers to determine their individual eligibility for "death gamble benefits"); *Greystone Mgt. Corp. v. Conciliation and Appeals Bd. of City of New York*, 62 N.Y.2d 763, 764 (1984) (City Reply Br. at 19-20) (action brought by landlords challenging newly adopted rent-setting procedure as "arbitrary, capricious and unduly burdensome").

The City says that Plaintiffs are "disguis[ing]" their claims as a declaratory judgment action "to extend the statute of limitations." (City Reply Br. at 18) Plaintiffs are not disguising anything. They sued for a declaratory judgment action because that is the right remedy in this sort of case. The monetary consequences of that choice will not be large, because the statute of limitations is of no moment to the vast majority of Tier 3 members, who had been members of the NYPD for, at most, 7 years when the action was commenced, and have until their retirement dates to seek prior service credit. (R191) But if there are a few Tier 3 officers who would benefit from the longer statute of limitations, they are entitled to that benefit.

The City also claims that Plaintiffs cannot obtain the relief they seek through a declaratory judgment action because one of their prayers for relief is for "a coercive order" to "nullify" the City's past decisions. (City Reply Br. at 20) But the principal relief Plaintiffs seek is declaratory; a coercive order would be necessary only in the highly unlikely event that the City would disregard a declaration in Plaintiffs' favor. As this Court said in *Klostermann v. Cuomo* (City Reply Br. at 20), a declaratory judgment action "contemplates that the parties will voluntarily comply with the court's order," and it is "anomalous" to contend that a declaratory judgment action is improper simply because it may be necessary "to coerce one party who has refused to act in accordance with the judicial

determination" – an "especially offensive" argument as it implies that the party "will deem themselves free to disregard their judicially declared obligations should a court rule in favor of [the other party]." 61 N.Y.2d 525, 538-39 (1984).

The remaining cases cited by the City are completely inapposite. *See Lang v. Hanover Ins. Co.*, 3 N.Y.3d 350, 354-55 (2004) (City Reply Br. at 20) (plaintiff could not bring action against his tortfeasor's insurance company because he did not comply with statutory prerequisites and declaratory judgment statute did not alter this requirement); *Press v. County of Monroe*, 50 N.Y.2d 695, 701-702 (1980) (City Reply Br. at 20) (plaintiff's challenge to legislature's approval of sewer assessment on his property as unconstitutional should have been brought as an Article 78 proceeding). A declaratory judgment action is the correct vehicle for Plaintiffs' claims here.

CONCLUSION

For the foregoing reasons and those presented in Plaintiffs' opening brief, the order of the Appellate Division should be reversed insofar as it is the subject of Plaintiffs' cross-appeal.

Dated: New York, New York
October 3, 2022

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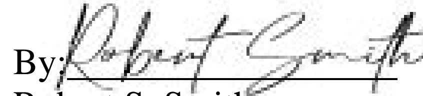
By: 

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

On October 3, 2022

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