COURT OF APPEALS
STATE OF NEW YORK

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PATRICK LYNCH, as President of the PATROLMEN'S BENEVOLENT ASSOCIATION OF THE CITY OF NEW YORK, INC., on behalf of the Police Officers Who Have Been or May In The Future Be Aggrieved, and the PATROLMEN'S BENEVOLENT ASSOCIATION OF THE CITY OF NEW YORK, INC.,

Plaintiffs-Movants,

-against-

THE CITY OF NEW YORK, the NEW YORK CITY POLICE PENSION FUND, and THE BOARD OF TRUSTEES of the New York City Police Pension Fund,

Defendants-Respondents.

----------X

NOTICE OF MOTION

New York County
Index No. 157286/2015

PLEASE TAKE NOTICE that upon the Memorandum of Law, dated December 21, 2018, the exhibits annexed thereto, and all the pleadings and prior proceedings had herein, Plaintiffs-Movants, PATRICK LYNCH, as President of the PATROLMEN'S BENEVOLENT ASSOCIATION OF THE CITY OF NEW YORK, INC., on behalf of the Police Officers Who Have Been or May In The Future Be Aggrieved, and the PATROLMEN'S BENEVOLENT ASSOCIATION OF THE CITY OF NEW YORK, INC., will jointly move this Court at the Courthouse located at 20 Eagle Street, Albany, New York 12207 on the 31 day of

the 31 day of December, 2018, at 10:00 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, for an order pursuant to CPLR 5602(a)(1) and 22 N.Y.C.R.R. 500.22 granting Plaintiffs permission to appeal to the Court of Appeals from the Decision and Order of the Appellate Division, First Department, entered June 28, 2018, which (1) denied Plaintiffs' motion for summary judgment (2) granted the Defendants' cross motion for summary judgment dismissing the complaint, and (3) reversed the order of Supreme Court, New York County (Chan, J.), which, to the extent appealed from as limited by the briefs, (a) granted Plaintiffs' motion for summary judgment to the extent declaring that defendants violated Administrative Code of City of NY § 13-218(h), and (b) denied Defendants' cross motion for summary judgment dismissing the complaint.

Dated: New York, New York
December 21, 2018

Respectfully submitted,
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Appellate Division: First Department Docket No.: 147286/2015
New York County Supreme Court Clerk's Index No.: 147286/2015

Court of Appeals

State of New York

PATRICK LYNCH, as President of the PATROLMEN'S BENEVOLENT ASSOCIATION OF THE CITY OF NEW YORK, INC., on behalf of the Police Officers Who Have Been or May In The Future Be Aggrieved, and the PATROLMEN'S BENEVOLENT ASSOCIATION OF THE CITY OF NEW YORK, INC.,

Plaintiffs-Movants,

-against-

THE CITY OF NEW YORK, the NEW YORK CITY POLICE PENSION FUND, and THE BOARD OF TRUSTEES of the New York City Police Pension Fund,

Defendants-Respondents.

MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR LEAVE TO APPEAL

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TIMELINESS

Plaintiffs submit this Memorandum of Law in support of the motion for leave to appeal to the Court of Appeals from an order of the Appellate Division, First Department, entered June 28, 2018, ("the Appellate Division Order") that (1) denied Plaintiffs' motion for summary judgment; (2) granted the Defendants' cross motion for summary judgment dismissing the complaint; (3) reversed the order of Supreme Court, New York County (Chan, J.), which, to the extent appealed from as limited by the briefs, (a) granted Plaintiffs' motion for summary judgment to the extent declaring that defendants violated Administrative Code of City of NY § 13-218(h), and (b) denied Defendants' cross motion for summary judgment dismissing the complaint; and (4) directed the Clerk to enter judgment accordingly.

On June 29, 2018, Defendants served Plaintiffs by regular mail with a copy of the Appellate Division Order along with written notice of its entry. A copy of the Appellate Division Order, dated June 28, 2018, with notice of entry, dated June 29, 2018, is annexed as **Exhibit A**. Plaintiffs' deadline to move for leave to appeal was 35 days from June 29, 2018, or August 3, 2018. See CPLR 5513(b) (requiring motions for leave to appeal to be made within thirty days from the order appealed from); CPLR 5513(d) (allowing additional time for regular mail as provided in CPLR 2103[b]); CPLR 2103(b) (allowing five additional days to move for leave to appeal when served with written notice of entry by regular mail).

On August 3, 2018, Plaintiffs moved at the Appellate Division, First Department for leave to appeal to the Court of Appeals. A copy of Plaintiffs' Appellate Division notice of motion for leave to appeal, affirmation in support, and affidavit of service dated August 3, 2018, are annexed as **Exhibit B**. The Appellate Division denied Plaintiffs' motion for leave to appeal on October 23, 2018. A copy of the Appellate Division order denying Plaintiff's motion for leave to appeal, dated October 23, 2018, is annexed as **Exhibit C**.

Defendants served a copy of the Appellate Division order denying Plaintiffs' motion for leave to appeal with notice of entry by regular mail on November 23, 2018. A copy of the notice of entry is annexed as **Exhibit D**. Under CPLR 5513 and 2103(b)(2), Plaintiffs have 35 days, or until December 28, 2018, to move for leave to appeal. Plaintiffs served this motion for leave to appeal on December 21, 2018. A copy of the affidavit of service is annexed as **Exhibit E**.

Accordingly, this motion is timely under CPLR 5513(b), 5513(d), 2103(b).

JURISDICTION

The Court has jurisdiction over this appeal. Under CPLR 5602(a)(1)(i), an appeal to the Court of Appeals can be taken by permission "from an order of the appellate division which finally determines the action and which is not appealable as of right." The Appellate Division Order is not appealable as of right, as none of the four grounds enumerated in CPLR 5601 apply.

Further, the Appellate Division order finally determines the action. The New York State Constitution provides jurisdiction to the Court of Appeals to review final judgments or orders. See NY Const Art VI, § 3(a), (b); CPLR 5501(a). A final order or judgment "disposes of all of the causes of action between the parties in the action or proceeding and leaves nothing for further judicial action apart from mere ministerial matters." Burke v Crosson, 85 NY2d 10, 15 (1995). Here, the Appellate Division, First Department granted the Defendants' cross motion for summary judgment dismissing the complaint. The Appellate Division Order finally determines the action and "leaves nothing for further judicial action apart from mere ministerial matters." Id. Thus, the Appellate Division Order finally determines the action.

Accordingly, the Court has jurisdiction over this appeal.

QUESTION OF LAW TO BE REVIEWED

Does the Child Care Credit Law allow "any member," including tier 3 members, not just tier 1 and tier 2 members, of the New York City Pension Fund to buy back credit for time spent on child care leave?

Yes.

PRELIMINARY STATEMENT

The decision in this case will affect thousands of police officers and their families in profoundly personal ways. Section 13-218(h)[1] of the New York City Administrative Code ("Child Care Credit Law") allows "any member" of the New York City Police Pension Fund ("NYCPPF") to buy back service credit for time spent on unpaid child care leave. The Child Care Credit Law thus allows New York City police officers to avoid rushing back to work after the birth of a child in order to accrue service credit. However, the First Department held the statute inapplicable to the majority of the City's police officers. This Court and the Appellate Division have recognized the public importance of cases defining the pension rights of large numbers of public servants by granting leave in similar cases.

As the First Department's opinion in this case implicitly recognizes, the correctness of its decision is open to serious question. The Court acknowledged that "on its face" the Child Care Credit Law supports Plaintiffs' position, and that the legislative history "does not reflect" any contrary intention. Nonetheless, the First Department found that the legislative history of *later* legislation outweighed these considerations. This finding was an error, because the appropriate inquiry is what the Legislature intended at the time it passed the Child Care Credit Law.

---

[1] Section 13-218(h) of the Code contains two subdivisions h. The subdivision h at issue here is the second one.

The First Department should have interpreted the law as the Legislature drafted it, according to the plain meaning of its text. Its mistaken reliance on the Legislative history of an unrelated statute can only sow confusion in future cases.

This case provides a perfect vehicle to resolve this serious issue of public importance. The dispositive issue in this case is the meaning of the phrase "any member" in the Child Care Credit Law, and an appeal to the Court of Appeals would not be cluttered by minor issues.

In addition, the Court of Appeals would, in the course of deciding this issue, have an opportunity to provide guidance on significant and recurring problems of statutory construction. First, the Court of Appeals could articulate the proper approach when, as here, two different statutes contain statements that each statute controls in the event of a conflict with another statute. It could also clarify for lower courts the circumstances that justify reliance on statements contained in the legislative history of enactments subsequent to the statute in issue. And it could decide whether it is appropriate, in considering the history of subsequent legislation, to rely upon statements that may be colored by the position taken by one of the parties after the governing enactment was passed.

Finally, members of the NYCPPF, their families, and NYCPPF Administrators deserve the certainty of an authoritative statement from the State's highest court.

FACTUAL AND PROCEDURAL BACKGROUND

In 2000, the Legislature passed the Child Care Credit Law, a law specific to New York City that allowed police officers to buy back service credit for unpaid time spent on child care leave. See New York City Administrative Code ("the Code") § 13-218 (h); L 2000, ch 594 (explaining that the purpose of the Child Care Credit Law was to preserve retirement benefits during a period of child care leave). The Child Care Credit Law was part of a series of pension initiatives aimed at assisting working parents. See, e.g., Bill Jacket, L 1999, ch 646 at 9 (explaining that the reforms were intended to discourage New York City Police officers who were "parents [from] rush[ing] back to the workplace without properly caring for their children"); L 2000, ch 552 at 14-15; L 2000, ch 594.

The Child Care Credit Law allows "any member" of the NYCPPF to buy back credit for the time that he or she "is absent without pay for child care leave of absence" as long as he or she "contributes to the pension fund an amount which such member would have contributed during the period of such child care leave, together with interest thereon." Code § 13-218(h). The statute provides that "[i]n the event there is a conflict between the provisions of this subdivision and the provisions of any other law or code to the contrary, the provisions of this subdivision shall govern." Id.

After Defendants (collectively "the City") refused to permit Tier 3 police officers to purchase service credit for time spent on child care leave, Plaintiffs commenced this action seeking, *inter alia*, an order declaring that the Child Care Credit Law applied to all police officers, including Tier 3 police officers hired after July 1, 2009 (32-45).[2]

On cross-motions for summary judgment, the Supreme Court held that the plain and unambiguous language of the Child Care Credit Law required the application of the benefit to "any member" of the NYCPPF irrespective of his or her tier (8-20). The Supreme Court concluded that the legislative history is consistent with the plain meaning of the text and does not contain any indication that the Legislature excluded Tier 3 officers from the law (15-19).[3]

The City appealed, arguing that under First Department and Court of Appeals case law, the terms of article 14 govern when article 14 conflicts with the Administrative Code. In support of this contention, the City relied primarily on Matter of Kaslow v City of New York (23 NY3d 78, 80 [2014]).

First Department (1) denied Plaintiffs' motion for summary judgment (2) granted the Defendants' cross motion for summary judgment dismissing the

[2] Numbers in parenthesis refer to pages of the record on appeal.

[3] On procedural issues, the Supreme Court denied the motion for a default judgment and granted the City's cross motion to compel acceptance of their late-filed answer (13-14). The Supreme Court also granted the City's motion to the extent of converting the action into an Article 78 proceeding, but denied the City's summary judgment motion (14-15, 19). Finally, the Supreme Court awarded Plaintiffs costs and disbursements (19).

complaint, (3) reversed the order of Supreme Court, New York County (Chan, J.); and (4) directed the Clerk to enter judgment accordingly. The First Department agreed with Plaintiffs that "on its face [the Child Care Credit Law] does not distinguish between tiers of membership" and that "legislative history ... does not reflect any intent to distinguish between the tiers in the pension system." See Exhibit A at 2. In addition, the First Department noted that the Child Care Credit Law "affords the credit to 'any member' of the Police Pension Fund'." Furthermore, the First Department concluded that "Tier 3 police officers' pension benefits are governed by article 14 of the RSSL *and* title 13 of the Administrative Code." Id. (emphasis added). But the First Department did not rely on Kaslow.[4]

Nevertheless, the First Department reached the conclusion that Tier 3 police officers are not entitled to the benefits of the Child Care Credit Law because the Court reasoned that "article 14 contains no provision for service credit for unpaid child care leave for tier 3 police officers." Id. "In the face of this conflict," the Court concluded, "article 14 governs." Id.[5] The Court referenced the conflict provision in RSSL § 500(a) (article 14), enacted in 1976, which provides: "In the event that there is a conflict between the provisions of this article and the

[4] The First Department implicitly rejected the City's contention that Kaslow held article 14 governs when it conflicts with the Administrative Code. This conclusion is unsurprising. Unlike the provision at issue in Kaslow, the Child Care Credit Law has a conflict provision that supersedes any previously enacted provisions that may conflict with its own.

[5] The fact that service credit for time on child care leave is codified in the City Code and not in Article 14 does not create a conflict, as Plaintiffs argued below and continue to maintain.

provisions of any other law or code, the provisions of this article shall govern." Id. at 3. But the Court did not explain why that provision should be held to nullify the subsequently enacted conflict provision in the Child Care Credit Law, which was passed in 2000 and provides: "In the event there is a conflict between the provisions of [The Child Care Credit Law] and the provisions of any other law or code to the contrary, the provisions of this subdivision shall govern." Code § 13-218(h).

Instead, the Court relied on the legislative history of a yet later statute, a 2012 amendment that eliminated the child care leave buy-back for corrections officers. See Exhibit A at 3-5. The Court observed that the Senate Introducer's Memo states that the purpose of the 2012 bill was "'to make new NYC Tier 3 uniformed correction members ineligible to obtain service credit for child care leave *in order to equate their benefits with Tier 3 police/fire benefits.*'" Id. at 5 (quoting Senate Introducer's Mem in Support and Division of the Budget Bill Mem, Bill Jacket, L 2012, ch 18 at 10 and 18; emphasis added by First Department).

ARGUMENT

POINT I

THIS CASE MERITS COURT OF APPEALS REVIEW

A. This Case Presents The Court With A Novel Issue Of Public Importance

An issue merits Court of Appeals review when "the issues are novel or of public importance, present a conflict with prior decisions of this Court, or involve a conflict among the departments of the Appellate Division." 22 NYCRR § 500.22(b)(4).

This case presents a novel issue of law that is profoundly important: whether the Child Care Credit Law allows "any member," including tier 3 members – or only tier 1 and tier 2 members – of the NYCPPF to buy back credit for time spent on child care leave. Code § 13-218(h).

The resolution of this question will affect thousands of New York City police officers and their families. The First Department held that only tier 1 and tier 2 members are eligible to buy back service credit for time spent on child care leave, but over half of Plaintiffs' approximately 24,000 members are outside of tiers 1 and 2, and that proportion will continue to increase as tier 1 and tier 2 members leave the system. Therefore, under the First Department's decision, a growing majority of New York City police officers are ineligible for the benefits of the Child Care Credit Law. This decision will have a direct, personal effect on

those officers and their families, because the ability to purchase service credit plays an important role in an officer's decision regarding when to return to work after the birth of a child. Allowing an officer to purchase service credit for time spent on child care leave helps officers avoid rushing back to work after the birth of a child in order to accrue service credit. See L 2000, ch 594 at 4; L 1999, ch 646 at 9. Officers should be able to make these decisions with certainty about their pension rights, and only a decision from the State's highest Court can provide that certainty.

More generally, issues affecting a public servant's rights within a public pension system have been recognized as having significant public importance. This Court and the Appellate Division have frequently granted leave to appeal in cases that define the pension rights of public servants. See, e.g., Kaslow v City of New York, 21 NY3d 854 (2013) (Court of Appeals leave grant); Lynch v City of New York, 2013 NY Slip Op 83448(U) (Appellate Division leave grant); Weingarten v Bd. of Trustees of New York City Teachers' Retirement Sys., 98 NY2d 575, 579 (2002) (Court of Appeals leave grant); Scanlan v Buffalo Public School System, 89 NY2d 809 (1997) (Court of Appeals leave grant);[6] Doctors Council v New York City Employees' Retirement Sys., 132 AD2d 456 (1st Dept

[6] The Court of Appeals also granted leave in three cases related to Scanlan. See Leister v Bd. of Educ. of Brentwood Union Free School Dist., 89 NY2d 809 (1997); Clark v Bd. of Educ. for Kingston School Dist., 89 NY2d 809 (1997); Kaufman v Bd. of Educ. of Jericho Union Free School Dist., 89 NY2d 809 (1997).

1987) (Appellate Division leave grant). This case is no less leaveworthy than the cases cited.

The dispositive issue presented in this case has never been decided by this Court, and resolution of that issue will affect the lives of thousands of public servants. See 22 NYCRR § 500.22(b)(4).

B. The First Department's Decision Conflicts with Court of Appeals and Appellate Division Precedent

1. The First Department's Decision Conflicts with Court of Appeals and Appellate Division Precedent Holding that A Prior General Statute Yields to a Later Specific or Special Statute

The First Department decision conflicts with Court of Appeals and Appellate Division precedent holding that a prior general statute yields to a later specific or special statute. This Court has instructed that a "well established rule of statutory construction provides that a prior general statute yields to a later specific or special statute." Dutchess Cty. Dep't of Soc. Servs. Ex rel. Day v Day, 96 NY2d 149, 153 (2001). The Appellate Division Departments have faithfully followed this principle. For example, in Erie County Water Auth. v Kramer, the Fourth Department acknowledged the "general rule of construction that a prior general statute yields to a later specific or special statute. 4 AD2d 545, 550 (4th Dept 1957), affd, 5 NY2d 954 (1959). The Second and Third Departments have applied the same rule. See, e.g., Wager v Pelham Union Free Sch. Dist., 108

AD3d 84, 89 (2d Dept 2013); Matter of Level 3 Communications, LLC v Clinton County, 144 AD3d 115, 119 (3d Dept 2016), lv denied, 29 NY3d 918 (2017).

The First Department in this case, by contrast, refused to apply this principle. Instead, the Court found that the Child Care Credit Law and article 14 conflicted, and held that article 14 controlled. Thus, the First Department decision here conflicts with precedent from both the Court of Appeals and the other Appellate Division Departments. The Court of Appeals should grant leave to resolve this conflict. See 22 NYCRR § 500.22(b)(4).

2. The First Department's Decision Conflicts with Court of Appeals and Appellate Division Precedent Holding that the Legislature cannot Retroactively Interpret a Previously Enacted Statute

The First Department's decision also conflicts with Court of Appeals and Appellate Division precedent holding that the Legislature cannot retroactively interpret a previously enacted statute. This Court has repeatedly instructed that "'[t]he Legislature has no power to declare, retroactively, that an existing statute shall receive a given construction when such a construction is contrary to that which the statute would ordinarily have received.'" Caprio v New York State Dept. of Taxation and Fin., 25 NY3d 744, 755 (2015) (quoting Matter of Roosevelt Raceway v Monaghan, 9 NY2d 293, 304 [1961]). The Second, Third and Fourth Departments have recognized this principle. See, e.g., James Square Assocs. LP v Mullen, 91 AD3d 164, 172 (4th Dept 2011) (quoting Roosevelt Raceway, 9 NY2d

at 304 [1961]) aff'd, 21 NY3d 233 (2013); Island Waste Servs., Ltd. v Tax Appeals Tribunal of State of NY, 77 AD3d 1080, 1083 (3d Dept 2010), lv denied, 16 NY3d 712 (2011) (same); Boltja v Southside Hosp., 186 AD2d 774, 775 (2d Dept 1992) (same).

In this case, however, the First Department did not even acknowledge the existence of this principle. Instead, the First Department expressly relied on the statements made in the Legislative history of a subsequently enacted statute. The courts often rely a sponsor's memo as evidence for the legislative intent of the statute resulting from the bill the sponsor was introducing. See Matter of Suarez v Williams, 26 NY3d 440, 447-48 (2015) (interpreting Domestic Relations Law § 72 (2) and citing the sponsor's memo for the legislative purpose of the enactment of Domestic Relations Law § 72 (2) and subsequent amendments); Cayuga Indian Nation of NY v Gould, 14 NY3d 614, 649, cert denied, 562 US 953 (2010) (interpreting Tax Law § 471-e and citing the sponsor's memo for the legislative purpose of Tax Law § 471-e); Matter of Williams v Department of Corr. & Community Supervision, 136 AD3d 147, 154 (1st Dept 2011) (interpreting New York's Sexual Assault Reform Act, Executive Law § 259-c [14], ["SARA"] and citing the sponsor's memo for the legislative purpose of SARA); 259 W. 12th, LLC v Grossberg, 89 AD3d 585, 586 (1st Dept 2011) (interpreting RPAPL 753 [4] and citing the sponsor's memo for the legislative purpose of RPAPL 753 [4]). But the

First Department used the sponsor's memo for a very different purpose: as evidence of the legislative intent of an unrelated, previously enacted statute over a decade earlier, not the bill being introduced. This is exactly what the United States Supreme Court and the New York Court of Appeals have instructed the courts not to do. Thus, the First Department's decision in this case conflicts with Court of Appeals and Appellate Division case law. The Court of Appeals should grant leave to resolve this conflict. See 22 NYCRR § 500.22(b)(4).

3. The First Department Should have applied the Child Care Credit Law as Drafted by The Legislature

The First Department should have applied the statute as the Legislature drafted it. When interpreting a statute, "a court's primary consideration 'is to ascertain and give effect to the intention of the Legislature.'" County of Broome v Badger, 55 AD3d 1191, 1192-93 (3d Dep't 2008) (quoting Riley v County of Broome, 95 NY2d 455, 463 [2000]). "[T]he statutory text is the clearest indicator of legislative intent and courts should construe unambiguous language to give effect to its plain meaning." Id. (quoting Matter of DaimlerChrysler Corp. v Spitzer, 7 NY3d 653, 660 [2006]).

Here, the statutory text is clear and unambiguous. The plain text of Section 13-218(h) conclusively establishes the Legislature's intent to afford the benefits of the Child Care Credit Law to present and future members of the NYCPPF, including those who joined after July 1, 2009. The statute allows "any member" to

buy back credit for the time that he or she "is absent without pay for child care leave of absence" as long as he or she "contributes to the pension fund an amount which such member would have contributed during the period of such child care leave, together with interest thereon." Code § 13-218(h).

As discussed, the reasons the First Department gave for its refusal to interpret the text of the Child Care Credit law as drafted by the Legislature are flawed. The court relied heavily on a provision in article 14 saying that it applies if it conflicts with any other law, yet did not mention that Child Care Credit Law contains a substantively identical conflict provision. Compare Code § 13-218(h) with RSSL § 500(a). And it also relied on the Legislature's unrelated amendments to a later statute, ignoring well-established principles of statutory construction.

The First Department has thus erred in a way that will harm thousands of dedicated public servants. Its error should be corrected.

C. The Case Presents an Opportunity to Provide Guidance on Recurring Problems of Statutory Interpretation

This case also carries public importance because it would provide this Court with the opportunity to provide guidance to the lower courts on problems that will arise in cases of statutory interpretation, not just in the pension area, but in all areas of the law.

This Court should have the opportunity to articulate the principles of statutory construction that apply when two conflicting statutes both contain

statements that the statute controls in the event of a conflict with another statute. The First Department held that RSSL § 500(a) conflicts with the New York City Administrative Code § 13-218(h), stating: "[w]hile Administrative Code § 13-218(h) affords the credit to 'any member' of the Police Pension Fund, article 14 contains no provision for service credit for unpaid child care leave for tier 3 police officers." The First Department concluded: "In the face of this conflict between the two, article 14 governs." But Section 13-218(h) of the Code contains virtually identical language. Compare Code § 13-218(h) with RSSL § 500(a). The First Department did not explain why the 1976 provision should prevail over the 2000 one, even though this Court has instructed that a "well established rule of statutory construction provides that a prior general statute yields to a later specific or special statute." Dutchess Cty. Dep't of Soc. Servs. Ex rel. Day, 96 NY2d at 153. This Court should grant leave to make clear that the rule of Dutchess Cty. provides the proper framework for resolving this sort of conflict.

In addition, this case would present this Court with the opportunity to clarify for the lower courts the appropriate circumstances, if any, that justify reliance on statements contained in memoranda in support of subsequent legislation. The First Department, interpreting the Child Care Credit Law passed in 2000, relied heavily on the statements contained in a 2012 memorandum in support of a bill eliminating a child care leave buy-back for certain corrections officers. See Exhibit A at 16-

18. The memorandum does not indicate its author. Even assuming the statement was from a legislator, this Court has instructed the courts to be cautious when relying on statements from legislators because they are not part of the statutory text. See Knight-Ridder Broadcasting, Inc. v Greenberg, 70 NY2d 151, 159 (1987); Matter of Delmar Box Co. (Aetna Ins. Co.), 309 NY 60, 67 (1955); Matter of Morse (Bank of Am.), 247 NY 290, 302-303 (1928); Woollcott v Shubert, 217 NY 212, 221 (1916).

Even more questionable is reliance on a memorandum written by an anonymous legislator (or perhaps a legislative aide) a dozen years after the relevant statute was passed. The memorandum is at best evidence of what the 2012 Legislature thought, not what the 2000 Legislature thought. As this Court has repeatedly explained, "[t]he Legislature has no power to declare, retroactively, that an existing statute shall receive a given construction when such a construction is contrary to that which the statute would ordinarily have received." Caprio, 25 NY3d at 755 (quoting Matter of Roosevelt Raceway v Monaghan, 9 NY2d 293 [1961]); see McKinney's Cons Law of NY, Book 1, Statutes § 75 (same). Accordingly, this Court has refused to rely on memoranda when interpreting the Legislative intent of previously enacted statutes. See, e.g., Consol. Edison Co. v Dep't of Envtl. Conservation, 71 NY2d 186, 195 n4 (1988) (holding that the letter on which the litigant relied "was prepared some two years after the 1983 Act was

passed and such postenactment history, even by a bill's sponsor, is not a reliable indication of what the legislative body as a whole intended"); Delmar Box Co., 309 NY at 67 (holding that "the views expressed by the assemblyman who introduced the bill in 1952...cannot serve as a reliable index to the intention of the legislators who passed the bill" because "they were stated, not in the course of debate on the floor of the legislature, but in a memorandum submitted to the governor after the passage of the bill, and there is no showing that the other legislators were aware of the broad scope apparently intended for the bill by its sponsor").

Similarly, the United States Supreme Court has repeatedly held that "the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one." US v Price, 361 US 304, 313 (1960); see Marvin M. Brandt Revocable Tr. v United States, 572 US 93, 134 (2014); Pension Benefit Guar. Corp. v LTV Corp., 496 US 633, 650 (1990). See also Sullivan v Finkelstein, 496 US 617, 631-32 (1990) (Scalia, J., concurring) (describing subsequent legislative history as "a contradiction in terms").

The circumstances surrounding the politically expedient statement contained in the memorandum relied on in this case make it especially unreliable. The memorandum comments on the Child Care Credit Law, which was passed several years earlier. And its author's interpretation of the Child Care Credit Law may well have been influenced by the City's practice of denying the benefit to Tier 3

police officers, which, by that point, had been continuing for years,. The author may simply have assumed the City's view of the statute was correct. In other words, the argument accepted by the First Department has a bootstrap quality: it is based on a memorandum that may be tainted by the very error that Plaintiffs are seeking to have the courts correct. This Court should make clear that reliance on such legislative history is inappropriate.

POINT II

THIS CASE IS THE RIGHT VEHICLE FOR RESOLUTION OF THESE ISSUES

This case is the right vehicle for the resolution of the important questions identified above. The meaning of the phrase "any member" in the Child Care Credit Law presents a discrete legal issue that is not clouded by factual, jurisdictional or other ancillary issues.

There is no reason to wait for another case to get a Court of Appeals ruling on this important issue. Members of the NYCPPF and their families are suffering and will suffer real hardship. Some police officers will undoubtedly cut short their child care leave, forever losing the opportunity to spend precious time with their families. That is precisely the problem the Legislature intended to remedy when it passed the series of pension reforms, including the Child Care Credit Law, which were aimed at assisting working parents. See L 2000, ch 594 at 4; L 1999, ch 646 at 9. Deferring a definitive, authoritative statement from the State's highest Court

on this issue will aggravate the hardship and will serve no useful purpose. Furthermore, the Court should grant leave to resolve the conflicts created by the First Department's decision with those of this Court and other Appellate Divisions concerning statutory conflicts and reliance on legislative history of subsequent laws to interpret a prior enacted law.

CONCLUSION

Plaintiffs respectfully request that leave be granted so that this important case can be resolved by this Court.

Dated: Uniondale, New York
December 21, 2018

Respectfully submitted,
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Claude S. Platton, Esq.
CORPORATION COUNSEL OF THE CITY OF NEW YORK
Attorneys for Defendants-Respondents
100 Church Street
New York, New York 10007
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CORPORATE DISCLOSURE STATEMENT

Pursuant to Section 500.1(f) of the Rules of Practice for this Court, the undersigned counsel for the Patrolmen's Benevolent Association of the City of New York, Inc. certifies that Patrolmen's Benevolent Association of the City of New York, Inc. does not have any parents, subsidiaries or affiliates.

Exhibit A

At a Term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York on October 23, 2018.

Present - Hon. Rolando T. Acosta, Presiding Justice,
John W. Sweeny Jr.
Troy K. Webber
Marcy L. Kahn
Jeffrey K. Oing, Justices.

----------X

Patrick Lynch, etc., et al.,
Plaintiffs-Respondents,

M-3854
Index No. 157286/15

-against-

The City of New York, et al.,
Defendants-Appellants.

----------X

Plaintiffs-respondents having moved for leave to appeal to the Court of Appeals from the decision and order of this Court, entered on June 28, 2018 (Appeal No. 6995),

Now, upon reading and filing the papers with respect to the motion, and due deliberation having been had thereon,

It is ordered that the motion is denied.

ENTERED:

CLERK

PLEASE TAKE NOTICE that an Order, of which the within is a copy, was duly entered in the office of the Clerk of the Appellate Division of the Supreme Court in and for the First Judicial Department on October 23, 2018.

Dated: November 23, 2018

ZACHARY W. CARTER
Corporation Counsel
of the City of New York
Attorney for Appellants
100 Church Street
New York, New York 10007

By: _____
JOHN MOORE
Assistant Corporation Counsel
212-356-0840

To:

Henry Mascia, Esq.
RIVKIN RADLER LLP
926 RXR Plaza
Uniondale, NY 11556
Attorney for Respondents

New York County Clerk's Index No. 157286/15

New York Supreme Court
Appellate Division: First Department

Patrick Lynch, etc., et al.,

Plaintiffs-Respondents,

against

The City of New York, et al.,

Defendants-Appellants.

APPELLATE DIVISION
ORDER AND NOTICE OF ENTRY

ZACHARY W. CARTER
Corporation Counsel
of the City of New York
Attorney for Appellants
100 Church Street
New York, New York 10007

Date and timely service of a copy of the within Order and Notice of Entry is hereby admitted.

New York, N.Y. _____, 2018

_____, Esq.

Attorney for _____

Exhibit B

RIVKIN RADLER LLP
ATTORNEYS AT LAW

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HENRY M. MASCIA
(516) 357-3018
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August 3, 2018

Appellate Division
First Department
27 Madison Avenue
New York, New York 10010

Attention: Clerk of the Court

Re: Lynch v. The City of New York
New York County Index No. 157286/2015
RR File No.: 892908-00002

Dear Sir or Madam:

This office is co-counsel for Plaintiffs-Respondents, Patrick Lynch, as President of the Patrolmen's Benevolent Association of the City of New York, Inc., on behalf of the police officers who have been or may in the future be aggrieved, and the Patrolmen's Benevolent Association of the City of New York, Inc., in connection with the above-referenced appeal.

Enclosed for filing please find an original NOTICE OF MOTION, AFFIRMATION IN SUPPORT OF MOTION AND ALL SUPPORTING DOCUMENTATION in the above-captioned matter. We have also enclosed a check for $45.00 to cover your fee for filing this document.

Kindly time-stamp the duplicate of the first page of the Notice of Motion to acknowledge receipt of this filing and return to this office in the self-addressed, stamped envelope enclosed.

If you have any questions concerning the above, please feel free to contact me.

Very truly yours,

RIVKIN RADLER LLP

Henry Mascia

HM:paw
Enc.

RIVKIN RADLER
ATTORNEYS AT LAW

To: CORPORATION COUNSEL OF
THE CITY OF NEW YORK
NYC Law Department
100 Church Street, Room 5-174
New York, NY 10007

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: FIRST JUDICIAL DEPARTMENT

----------X

PATRICK LYNCH, as President of the PATROLMEN'S BENEVOLENT ASSOCIATION OF THE CITY OF NEW YORK, INC., on behalf of the Police Officers Who Have Been or May In The Future Be Aggrieved, and the PATROLMEN'S BENEVOLENT ASSOCIATION OF THE CITY OF NEW YORK, INC.,

Plaintiffs-Movants,

-against-

THE CITY OF NEW YORK, the NEW YORK CITY POLICE PENSION FUND, and THE BOARD OF TRUSTEES of the New York City Police Pension Fund,

Defendants-Respondents.

----------X

NOTICE OF MOTION

New York County
Index No. 157286/2015

PLEASE TAKE NOTICE that upon the annexed Affirmation of Henry Mascia, dated August 3, 2018, and the exhibits annexed thereto and all the pleadings and prior proceedings had herein, Plaintiffs-Respondents, PATRICK LYNCH, as President of the PATROLMEN'S BENEVOLENT ASSOCIATION OF THE CITY OF NEW YORK, INC., on behalf of the Police Officers Who Have Been or May In The Future Be Aggrieved, and the PATROLMEN'S BENEVOLENT ASSOCIATION OF THE CITY OF NEW YORK, INC., will jointly move this Court at the Courthouse located at 27 Madison Avenue, New

York, New York 10010 on the 20th day of August, 2018, at 10:00 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, for an order pursuant to CPLR 5602(a)(1) and Rule 600.14(b) granting Plaintiffs permission to appeal to the Court of Appeals from the Decision and Order of the Appellate Division, First Department, entered June 28, 2018, with a notice of entry mailed on June 29, 2019, by regular mail, which (1) denied Plaintiffs' motion for summary judgment (2) granted the Defendants' cross motion for summary judgment dismissing the complaint, and (3) reversed the order of Supreme Court, New York County (Chan, J.), which, to the extent appealed from as limited by the briefs, (a) granted Plaintiffs' motion for summary judgment to the extent declaring that defendants violated Administrative Code of City of NY § 13-218(h), and (b) denied Defendants' cross motion for summary judgment dismissing the complaint.

PLEASE TAKE FURTHER NOTICE that, pursuant to CPLR 2214(b), any answering affidavit shall be served and filed at least seven (7) days before the return date of this application, and any reply shall be served and filed at least one (1) day before the return date of this application.

Dated: Uniondale, New York
August 3, 2018

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Of Counsel:
Robert S. Smith

Respectfully submitted,
RIVKIN RADLER LLP

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MICHAEL T. MURRAY
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David W. Morris
Christopher T. Luise

Attorneys for Plaintiffs-Movants

TO: Zachary W. Carter, Esq.
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SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: FIRST JUDICIAL DEPARTMENT

----------X

PATRICK LYNCH, as President of the PATROLMEN'S BENEVOLENT ASSOCIATION OF THE CITY OF NEW YORK, INC., on behalf of the Police Officers Who Have Been or May In The Future Be Aggrieved, and the PATROLMEN'S BENEVOLENT ASSOCIATION OF THE CITY OF NEW YORK, INC.,

Plaintiffs-Movants,

-against-

THE CITY OF NEW YORK, the NEW YORK CITY POLICE PENSION FUND, and THE BOARD OF TRUSTEES of the New York City Police Pension Fund,

Defendants-Respondents.

----------X

AFFIRMATION IN SUPPORT OF MOTION FOR LEAVE TO APPEAL

New York County
Index No. 157286/2015

HENRY MASCIA, an attorney duly admitted to practice in the Courts of the State of New York affirms the following to be true under penalty of perjury:

1. I am an attorney with Rivkin Radler LLP, counsel for PATRICK LYNCH, as President of the PATROLMEN'S BENEVOLENT ASSOCIATION OF THE CITY OF NEW YORK, INC., on behalf of the Police Officers Who Have Been or May In The Future Be Aggrieved, and the PATROLMEN'S BENEVOLENT ASSOCIATION OF THE CITY OF NEW YORK, INC.

(hereinafter "Plaintiffs"), and I am fully familiar with the facts and circumstances of this matter.

2. Plaintiffs submit this affirmation in support of the motion for leave to appeal to the Court of Appeals from the order of this Court, entered June 28, 2018, ("the Appellate Division Order") with a notice of entry mailed on June 29, 2019, by regular mail, which (1) denied Plaintiffs' motion for summary judgment; (2) granted the Defendants' cross motion for summary judgment dismissing the complaint; (3) reversed the order of Supreme Court, New York County (Chan, J.), which, to the extent appealed from as limited by the briefs, (a) granted Plaintiffs' motion for summary judgment to the extent declaring that defendants violated Administrative Code of City of NY § 13-218(h), and (b) denied Defendants' cross motion for summary judgment dismissing the complaint; and (4) directed the Clerk to enter judgment accordingly. A copy of the Appellate Division Order with notice of entry is annexed as **Exhibit A**. A copy of the notice of appeal is annexed as **Exhibit B**.

3. The Court should grant Plaintiffs' motion for leave to appeal because this case presents questions of public importance that the Court of Appeals should resolve.

PRELIMINARY STATEMENT

4. The decision in this case will affect thousands of police officers and their families in profoundly personal ways. Section 13-218(h)[1] of the New York City Administrative Code ("Child Care Credit Law") allows "any member" of the New York City Police Pension Fund ("NYCPPF") to buy back service credit for time spent on unpaid child care leave. The Child Care Credit Law thus allows New York City police officers to avoid rushing back to work after the birth of a child in order to accrue service credit. However, this Court has held the statute inapplicable to the majority of the City's police officers. This Court and the Court of Appeals have recognized the public importance of cases defining the pension rights of large numbers of public servants by granting leave in similar cases.

5. As this Court's opinion in this case implicitly recognizes, the correctness of its decision is open to serious question. The Court acknowledged that "on its face" the Child Care Credit Law supports Plaintiffs' position, and that the legislative history "does not reflect" any contrary intention. While this Court found that the legislative history of later legislation outweighed these considerations, the Court of Appeals could well disagree.

6. This case provides a perfect vehicle to resolve this serious issue of public importance. The dispositive issue in this case is the meaning of the phrase

[1] Section 13-218(h) of the Code contains two subdivisions h. The subdivision h at issue here is the second one.

"any member" in the Child Care Credit Law, and an appeal to the Court of Appeals would not be cluttered by minor issues.

7. In addition, the Court of Appeals would, in the course of deciding this issue, have an opportunity to provide guidance on several significant and recurring problems of statutory construction. First, the Court of Appeals could articulate the proper approach when, as here, two different statutes contain statements that each statute controls in the event of a conflict with another statute. It could also clarify for lower courts the circumstances that justify reliance on statements contained in the legislative history of enactments *subsequent* to the statute in issue. And it could decide whether it is appropriate, in considering the history of subsequent legislation, to rely upon statements that may be colored by the position taken by one of the parties after the governing enactment was passed.

8. Finally, members of the NYCPPF, their families, and NYCPPF Administrators deserve the certainty of an authoritative statement from the State's highest court.

QUESTION OF LAW TO BE REVIEWED BY THE COURT OF APPEALS

> Does the Child Care Credit Law allow "any member," including tier 3 members, not just tier 1 and tier 2 members, of the New York City Pension Fund to buy back credit for time spent on child care leave?

Yes

FACTUAL AND PROCEDURAL BACKGROUND

9. In 2000, the Legislature passed the Child Care Credit Law, a law specific to New York City police officers that allowed police officers to buy back service credit for unpaid time spent on child care leave. See New York City Administrative Code ("the Code") § 13-218 (h); L 2000, ch 594 (explaining that the purpose of the Child Care Credit Law was to preserve retirement benefits during a period of child care leave). The Child Care Credit Law was part of a series of pension initiatives aimed at assisting working parents. See, e.g., Bill Jacket, L 1999, ch 646 at 9 (explaining that the reforms were intended to discourage New York City Police officers who were "parents [from] rush[ing] back to the workplace without properly caring for their children"); L 2000, ch 552 at 14-15; L 2000, ch 594.

10. The Child Care Credit Law allows "any member" of the NYCPPF to buy back credit for the time that he or she "is absent without pay for child care leave of absence" as long as he or she "contributes to the pension fund an amount which such member would have contributed during the period of such child care leave, together with interest thereon." Code § 13-218(h). The statute provides that "[i]n the event there is a conflict between the provisions of this subdivision and the provisions of any other law or code to the contrary, the provisions of this subdivision shall govern." Id.

11. After Defendants City of New York ("the City") refused to permit Tier 3 police officers to purchase service credit for time spent on child care leave, Plaintiffs commenced this action seeking, *inter alia*, an order declaring that the Child Care Credit Law applied to all police officers, including Tier 3 police officers hired after July 1, 2009 (32-45).[2]

12. On cross-motions for summary judgment, the Supreme Court held that the plain and unambiguous language of the Child Care Credit Law required the application of the benefit to "any member" of the NYCPPF irrespective of his or her tier (8-20). The Supreme Court concluded that the legislative history is consistent with the plain meaning of the text and does not contain any indication that the Legislature excluded Tier 3 officers from the law (15-19).[3]

13. The City appealed. In the Appellate Division Order, this Court (1) denied Plaintiffs' motion for summary judgment (2) granted the Defendants' cross motion for summary judgment dismissing the complaint, (3) reversed the order of Supreme Court, New York County (Chan, J.); and (4) directed the Clerk to enter judgment accordingly.

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[2] Numbers in parenthesis refer to pages of the record on appeal.

[3] On procedural issues, the Supreme Court denied the motion for a default judgment and granted the City's cross motion to compel acceptance of their late-filed answer (13-14). The Supreme Court also granted the City's motion to the extent of converting the action into an Article 78 proceeding, but denied the City's summary judgment motion (14-15, 19). Finally, the Supreme Court awarded Plaintiffs costs and disbursements (19).

14. The Court agreed that "on its face [the Child Care Credit Law] does not distinguish between tiers of membership" and that "legislative history ... does not reflect any intent to distinguish between the tiers in the pension system." See Exhibit A at 2. In addition, the Court noted that the Child Care Credit Law "affords the credit to 'any member' of the Police Pension Fund'." Furthermore, the Court concluded that "Tier 3 police officers' pension benefits are governed by article 14 of the RSSL and title 13 of the Administrative Code." Id.

15. Nevertheless, the Court reached the conclusion that Tier 3 police officers are not entitled to the benefits of the Child Care Credit Law because the Court reasoned that "article 14 contains no provision for service credit for unpaid child care leave for tier 3 police officers." Id. "In the face of this conflict," the Court concluded, "article 14 governs." Id. The Court referenced the conflict provision in RSSL § 500(a) (article 14), enacted in 1976, which provides: "In the event that there is a conflict between the provisions of this article and the provisions of any other law or code, the provisions of this article shall govern." Id. at 3.

16. But the Court did not explain why the conflict provision in RSSL § 500(a) overrides the subsequently enacted conflict provision in the Child Care Credit Law from 2000 which provides: "In the event there is a conflict between the provisions of [The Child Care Credit Law] and the provisions of any other law or

code to the contrary, the provisions of this subdivision shall govern." Code § 13-218(h).

17. Instead, the Court relied on the legislative history of a later statute. See Exhibit A at 3-5. The Court relied on a 2012 amendment that eliminated the child care leave buy-back for corrections officers. Id. at 4. The Court observed that the Senate Introducer's Memo states that the purpose of the bill was "'to make new NYC Tier 3 uniformed correction members ineligible to obtain service credit for child care leave *in order to equate their benefits with Tier 3 police/fire benefits.*'" Id. at 5 (quoting Senate Introducer's Mem in Support and Division of the Budget Bill Mem, Bill Jacket, L 2012, ch 18 at 10 and 18).

ARGUMENT

POINT I

THIS CASE MERITS COURT OF APPEALS REVIEW

A. This Case Presents the Court with Novel Issues of Public Importance

18. An issue merits Court of Appeals review when "the issues are novel or of public importance, present a conflict with prior decisions of this Court, or involve a conflict among the departments of the Appellate Division." 22 N.Y.C.R.R. § 500.22(b)(4).

19. This case presents novel issues of law that are profoundly important to the public. The core issue in this case is whether the Child Care Credit Law allows

"any member," including tier 3 members – or only tier 1 and tier 2 members – of the NYCPPF to buy back credit for time spent on child care leave. Code § 13-218(h).

20. The resolution of this question will affect thousands of New York City police officers and their families. This Court held that only tier 1 and tier 2 members are eligible to buy back service credit for time spent on child care leave, but over half of Plaintiffs' approximately 24,000 members are outside of tiers 1 and 2, and the proportion increases as tier 1 and tier 2 members leave the system. Therefore, under this Court's decision, a growing majority of New York City police officers are ineligible for the benefits of the Child Care Credit Law. This decision will have a direct, personal effect on those officers and their families, because the ability to purchase service credit plays a role in when an officer decides to return to work after the birth of a child. Allowing an officer to purchase service credit for time spent on child care leave helps officers avoid rushing back to work after the birth of a child in order to accrue service credit. See L 2000, ch 594 at 4; L 1999, ch 646 at 9. Officers should be able to make these decisions with certainty about their pension rights, and only a decision from the State's highest Court can provide that certainty.

21. More generally, issues affecting a public servant's rights within a public pension system have been recognized as having significant public

importance. This Court and the Court of Appeals have consistently granted leave to appeal to the Court of Appeals in cases that define the pension rights of public servants. See, e.g., Kaslow v City of New York, 21 NY3d 854 (2013) (Court of Appeals leave grant); Lynch v City of New York, 2013 N.Y. Slip Op. 83448(U) (leave grant from this Court); Weingarten v Bd. of Trustees of New York City Teachers' Retirement Sys., 98 NY2d 575, 579 (2002) (Court of Appeals leave grant); Scanlan v Buffalo Public School System, 89 N.Y.2d 809 (1997) (Court of Appeals leave grant)[4]; Doctors Council v New York City Employees' Retirement Sys., 132 AD2d 456 (1st Dept 1987) (leave grant from this Court). This case is no less leaveworthy than the cases cited.

22. The dispositive issue presented in this case has never been decided by the Court of Appeals, and resolution of that issue profoundly affects the personal decisions of thousands of public servants. See 22 N.Y.C.R.R. § 500.22(b)(4).

B. Public Importance of Providing Guidance on Questions on Recurring Problems of Statutory Interpretation

23. This case also carries public importance because it would provide the Court of Appeals with the opportunity to provide guidance to the lower courts on problems that will arise in cases of statutory interpretation not just in the pension area, but in all areas of the law.

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[4] The Court of Appeals also granted leave in three cases related to Scanlan. See Leister v Bd. of Educ. of Brentwood Union Free School Dist., 89 NY2d 809 (1997); Clark v Bd. of Educ. for Kingston School Dist., 89 NY2d 809 (1997); Kaufman v Bd. of Educ. of Jericho Union Free School Dist., 89 NY2d 809 (1997).

24. Specifically, the Court of Appeals should have the opportunity to articulate the principles of statutory construction that apply when two conflicting statutes both contain statements that the statute controls in the event of a conflict with another statute. This Court held that RSSL § 500(a) conflicts with the New York City Administrative Code § 13-218(h), stating: "[w]hile Administrative Code § 13-218(h) affords the credit to 'any member' of the Police Pension Fund, article 14 contains no provision for service credit for unpaid child care leave for tier 3 police officers." This Court concluded: "In the face of this conflict between the two, article 14 governs."

25. Section 13-218(h) of the Code and RSSL, article 14 both contain language that each statute will govern in the event that it conflicts with another statute.

26. Although the Court did not cite any cases analyzing similar statutes, the Court of Appeals has instructed that a "well established rule of statutory construction provides that a prior general statute yields to a later specific or special statute." Dutchess Cty. Dep't of Soc. Servs. Ex rel. Day v. Day, 96 N.Y.2d 149, 153 (2001). If some other factor warrants a departure from that general principle, the Court of Appeals should articulate that factor to provide guidance to the lower courts facing similar circumstances.

27. In addition, this case would present the Court of Appeals with the opportunity to clarify for the lower courts the circumstances that justify reliance on statements contained in memoranda in support of subsequent legislation.

28. This Court, interpreting the Child Care Credit Law passed in 2000, relied heavily on the statements contained in a 2012 memorandum in support of a bill eliminating a child care leave buy-back for certain correction members. See Exhibit A at 16-18. The memorandum does not indicate its author. Even assuming the statement was from a legislator, the Court of Appeals has instructed the courts to be cautious when relying on statements from legislators because they are not part of the statutory text. See Knight-Ridder Broadcasting, Inc. v. Greenberg, 70 N.Y.2d 151, 159 (1987); Matter of Delmar Box Co. (Aetna Ins. Co.), 309 N.Y. 60, 67 (1955); Matter of Morse (Bank of Am.), 247 N.Y. 290, 302-303 (1928); Woollcott v. Shubert, 217 N.Y. 212, 221 (1916).

29. Still more questionable is reliance on a memorandum written by a legislator (or perhaps a legislative aide) a dozen years after the relevant statute was passed. The memorandum is at best evidence of what the 2012 Legislature, not the 2000 Legislature, thought. As the Court of Appeals has repeatedly explained, "'[t]he Legislature has no power to declare, retroactively, that an existing statute shall receive a given construction when such a construction is contrary to that which the statute would ordinarily have received.'" Caprio v. New York State

Dept. of Taxation and Fin., 25 N.Y.3d 744, 755 (2015) (quoting Matter of Roosevelt Raceway v. Monaghan, 9 N.Y.2d 293 [1961]); see McKinney's Cons. Law of N.Y., Book 1, Statutes § 75 (same). Accordingly, the Court of Appeals has refused to rely on memoranda when interpreting the Legislative intent of previously enacted statutes. See, e.g., Consol. Edison Co. v. Dep't of Envtl. Conservation, 71 N.Y.2d 186, 195 n.4 (1988) (holding that the letter on which the litigant relied "was prepared some two years after the 1983 Act was passed and such postenactment history, even by a bill's sponsor, is not a reliable indication of what the legislative body as a whole intended"); Delmar Box Co., 309 N.Y. 60, 67 (1955) (holding that "the views expressed by the assemblyman who introduced the bill in 1952...cannot serve as a reliable index to the intention of the legislators who passed the bill" because "they were stated, not in the course of debate on the floor of the legislature, but in a memorandum submitted to the governor after the passage of the bill, and there is no showing that the other legislators were aware of the broad scope apparently intended for the bill by its sponsor").

31. The United States Supreme Court has been no less critical, describing subsequent legislative history as a "contradiction in terms..." See Sullivan v. Finkelstein, 496 U.S. 617, 631-32 (1990) (concurring). Like the Court of Appeals, the United States Supreme Court has repeatedly held that "the views of Congress form a hazardous basis for inferring the intent of an earlier one." US v. Price, 361

U.S. 304, 313 (1960); see Marvin M. Brandt Revocable Tr. v United States, 572 U.S. 93, 134 (2014); PBGC v. LTV Corp., 496 US 633, 650 (1990).

32. The circumstances surrounding the politically expedient statement contained in the memorandum relied on in this case make it especially unreliable. The memorandum comments on the Child Care Credit Law, which was passed several years earlier. And its author's interpretation of the Child Care Credit Law may well have been influenced by the City's practice, which had been continuing for years, of denying the benefit to Tier 3 police officers. The author may simply have assumed the City's view of the statute was correct. In other words, the argument accepted by this Court has a bootstrap quality: it is based on a memorandum that may be tainted by the very error that Plaintiffs are seeking to have the courts correct. The public and the lower courts deserve guidance from the Court of Appeals about whether, and under what circumstances, reliance on such legislative history is appropriate.

POINT II

THIS CASE IS THE RIGHT VEHICLE FOR RESOLUTION OF THESE ISSUES

33. This case is the right vehicle for the resolution of these issues of public importance. The dispositive issue is the meaning of the phrase "any member" in the Child Care Credit Law. This question presents a discrete legal issue that is not clouded by factual, jurisdictional or other insignificant issues.

34. There is no reason to wait for another case in which to get a Court of Appeals ruling on this issue. Members of the NYCPPF and their families are suffering and will suffer real hardship. Some police officers will undoubtedly cut short their child care leave, forever losing the opportunity to spend precious time with their families. That is precisely the infirmity the Legislature intended to remedy when it passed the series of pension reforms, including the Child Care Credit Law, aimed at assisting working parents. See L 2000, ch 594 at 4; L 1999, ch 646 at 9. Deferring a definitive, authoritative statement from the State's highest Court on this issue will aggravate the hardship and will serve no useful purpose.

35. Plaintiffs respectfully request that leave be granted so that this important case can be resolved by the New York Court of Appeals.

Dated: Uniondale, New York
August 3, 2018

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Attorneys for Plaintiffs-Movants

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Exhibit A

Acosta, P.J., Sweeny, Webber, Kahn, Oing, JJ.

6995 Patrick Lynch, etc., et al., Plaintiffs-Respondents, Index 157286/15

-against-

The City of New York, et al., Defendants-Appellants.

Zachary W. Carter, Corporation Counsel, New York (John Moore of counsel), for appellants.

Rivkin Radler LLP, Uniondale (Cheryl F. Korman of counsel), for respondents.

Order and judgment (one paper), Supreme Court, New York County (Margaret A. Chan, J.), entered April 13, 2017, which, to the extent appealed from as limited by the briefs, granted plaintiffs' motion for summary judgment to the extent of declaring that defendants violated Administrative Code of City of NY § 13-218(h), and denied defendants' cross motion for summary judgment dismissing the complaint, unanimously reversed, on the law, without costs, the motion denied, and the cross motion granted. The Clerk is directed to enter judgment accordingly.

Plaintiffs contend that defendants violated Administrative Code of City of NY § 13-218(h) by excluding police officers in tier 3 of the stateretirement system, i.e., officers who joined the system on or after July 1, 2009, from the retirement benefits conferred by the provision. Administrative Code § 13-218(h)

Tier 3 was established for public employees who joined the system on or after July 1, 1976 (*see* RSSL § 500[a]). However, as a result of a legislative amendment and a series of legislative extensions, police officers who joined the system after July 1, 1976 were assigned tier 2 status, and that situation continued until 2009. Police officers hired after July 1, 2009 became members of tier 3 (*see* RSSL §§ 440[c]; 500[c]; *Lynch v City of New York*, 23 NY3d 757, 765-767 [2014]). Tier 3 police officers' pension benefits are governed by article 14 of the RSSL and title 13 of the Administrative Code. RSSL § 500(a) provides that, "[i]n the event that there is a conflict between the provisions of this article and the provisions of any other law or code, the provisions of this article shall govern." While Administrative Code § 13-218(h) affords the credit to "any member" of the Police Pension Fund, article 14 contains no provision for service credit for unpaid child care leave for tier 3 police officers. In the face of this conflict between the two, article 14 governs.

In 2004, the legislature amended the Administrative Code to extend the unpaid child care leave service credit benefit to tier 1 and 2 correction officers (*see* Administrative Code § 13-107[k], added by L 2004, ch 581). Like section 13-218(h), which grants the benefit to "any member" of the Police Pension Fund, section 13-107(k) grants this benefit to "any correction member."

218(h), not to make the unpaid child care leave service credit benefit available to tier 3 police officers but "to make new NYC Tier 3 uniformed correction members ineligible to obtain service credit for child care leave *in order to equate their benefits with Tier 3 police/fire benefits*" (Senate Introducer's Mem in Support and Division of the Budget Bill Mem, Bill Jacket, L 2012, ch 18 at 10 and 18 [emphasis added]). This legislation is consistent with the legislative intent in the creation of tier 3, "a comprehensive retirement program designed to provid[e] uniform benefits for all public employees and eliminat[e] the costly special treatment of selected groups . . . inherent in the previous program" (*Lynch v City of New York*, 23 NY3d at 765 [internal quotation marks omitted]).

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: JUNE 28, 2018

CLERK

PLEASE TAKE NOTICE that an Order, of which the within is a copy, was duly entered in the office of the Clerk of the Appellate Division of the Supreme Court in and for the First Judicial Department on June 28, 2018.

Dated: June 29, 2018

ZACHARY W. CARTER
Corporation Counsel
of the City of New York
Attorney for Appellants
100 Church Street
New York, New York 10007

By: _____
JOHN MOORE
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212-356-0840

To:

Cheryl F. Korman, Esq.
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Uniondale, NY 11556
Attorney for Respondents

New York County Clerk's Index No. 157286/15

New York Supreme Court
Appellate Division: First Department

Patrick Lynch, etc., et al.,

Plaintiffs-Respondents,

against

The City of New York, et al.,

Defendants-Appellants.

APPELLATE DIVISION
ORDER AND NOTICE OF ENTRY

ZACHARY W. CARTER
Corporation Counsel
of the City of New York
Attorney for Appellants
100 Church Street
New York, New York 10007

Date and timely service of a copy of the within Order and Notice of Entry is hereby admitted.

New York, N.Y. _____, 2018

_____, Esq.

Attorney for _____

THE CITY OF NEW YORK
LAW DEPARTMENT
100 CHURCH STREET
NEW YORK, N.Y. 10007

Appeals, 6th floor

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Cheryl F. Korman, Esq.
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FOR POLICE & FIRE EMERGENCY ONLY
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Exhibit B

Supreme Court of the State of New York
County of New York

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PATRICK LYNCH, as President of the Patrolmen's Benevolent Association of the City of New York, Inc., on behalf of the police officers who have been or may in the future be aggrieved, and the PATROLMEN'S BENEVOLENT ASSOCIATION OF THE CITY OF NEW YORK, INC.,

Plaintiffs,

- against -

THE CITY OF NEW YORK, the NEW YORK CITY POLICE PENSION FUND, and the BOARD OF TRUSTEES OF THE NEW YORK CITY PENSION FUND,

Defendants.

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NOTICE OF APPEAL

Index No. 157286/2015

PLEASE TAKE NOTICE that defendants hereby appeal to the Appellate Division, First Department from the decision and judgment of Supreme Court, New York County (Chan, J.), entered on April 13, 2017.

Dated: New York, New York
May 9, 2017

ZACHARY W. CARTER
Corporation Counsel
of the City of New York
Attorney for Defendants

By: _____
DEVIN SLACK
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To: Brian M. Culnan
John F. Queenan
ISEMAN, CUNNINGHAM, RIESTER
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9 Thurlow Terrace
Albany, New York 12203
518-462-3000
Attorneys for Plaintiffs

Supreme Court of the State of New York
County of New York

PATRICK LYNCH, as President of the Patrolmen's Benevolent Association of the City of New York, Inc., on behalf of the police officers who have been or may in the future be aggrieved, and the PATROLMEN'S BENEVOLENT ASSOCIATION OF THE CITY OF NEW YORK, INC.,

Plaintiffs,

- against -

THE CITY OF NEW YORK, the NEW YORK CITY POLICE PENSION FUND, and the BOARD OF TRUSTEES OF THE NEW YORK CITY PENSION FUND,

Defendants.

PREARGUMENT STATEMENT

Index No. 157286/2015

1. The title of the proceeding and the full names of the parties are stated in the caption above. There has been no change of parties.

2. The attorneys for the parties are as follows.

Defendants-appellants:

ZACHARY W. CARTER
Corporation Counsel of the City of New York
100 Church Street
New York, New York 10007
212-356-2500

Plaintiffs-respondents:

Brian M. Culnan
John F. Queenan
ISEMAN, CUNNINGHAM, RIESTER & HYDE, LLP
9 Thurlow Terrace
Albany, New York 12203
518-462-3000

3. In this converted article 78 proceeding, petitioners challenge the New York City Police Pension Fund's determination that only police officers hired before July 1, 2009 (commonly known as Tier 2 members) are eligible to purchase pension credit for absences without pay due to child care leave under New York City Administrative Code § 13-218(h).

4. Defendants appeal from the decision and judgment of Supreme Court, New York County (Chan, J.) entered on April 13, 2017, which, inter alia, granted plaintiffs' motion for summary judgment, denied defendants' cross-motion for summary judgment, and declared that defendants have violated and continue violate Administrative Code § 13-218(h) by refusing to permit all police officers, including those hired on or after July 1, 2009 in Tier 3, to avail themselves of benefits under that provision.

5. Supreme Court erred in entering judgment in plaintiffs' favor because, inter alia, Administrative Code § 13-218(h) does not apply to Tier 3 police officers, whose entitlement to pension credit is instead governed by article 14 of the Retirement and Social Security Law.

Dated: New York, New York
May 9, 2017

ZACHARY W. CARTER
Corporation Counsel
of the City of New York
Attorney for Defendants

By: 
DEVIN SLACK
Deputy Chief, Appeals Division
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STATE OF NEW YORK
SUPREME COURT COUNTY OF NEW YORK

PATRICK LYNCH, as President of the PATROLMEN'S BENEVOLENT ASSOCIATION OF THE CITY OF NEW YORK, INC., on behalf of the Police Officers Who Have Been or May In The Future Be Aggrieved, and the PATROLMEN'S BENEVOLENT ASSOCIATION OF THE CITY OF NEW YORK, INC.,

Plaintiffs,

-against-

THE CITY OF NEW YORK, the NEW YORK CITY POLICE PENSION FUND, and THE BOARD OF TRUSTEES of the New York City Police Pension Fund,

Defendants.

NOTICE OF ENTRY

Index No. 157286/2015

PLEASE TAKE NOTICE that the annexed is a true copy of a Decision and Judgment duly entered and filed in the Office of the New York County Clerk on the 13th day of April, 2017.

Dated: Albany, New York
April 13, 2017

ISEMAN, CUNNINGHAM, RIESTER & HYDE, LLP

By: _____

John F. Queenan, Esq.
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9 Thurlow Terrace
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THE CITY OF NEW YORK
Corporation Counsel of the City of New York
100 Church Street
New York, New York 10007

THE NEW YORK CITY POLICE PENSION FUND
233 Broadway, 19th Floor
New York , New York 10279

THE BOARD OF TRUSTEES OF THE NEW YORK CITY POLICE PENSION FUND
233 Broadway, 19th Floor
New York , New York 10279

Caption corrected with approval of Judge Chan's part clerk in absence of the law clerk. MAT/mc

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 52

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PATRICK LYNCH, as President of the PATROLMEN'S BENEVOLENT ASSOCIATION OF THE CITY OF NEW YORK, INC., on behalf of the Police Officers Who Have Been or May in the Future Be Aggrieved, and the PATROLMEN'S BENEVOLENT ASSOCIATION OF THE CITY OF NEW YORK, INC.,

Plaintiffs,

-against-

Index No. 157286/2015

THE CITY OF NEW YORK, the NEW YORK CITY POLICE PENSION FUND and THE BOARD OF TRUSTEES of the New York City Police Pension Fund,

Defendants.

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Margaret A. Chan, J.:

Plaintiffs, the Patrolmen's Benevolent Association of the City of New York, Inc. (PBA) and its President, Patrick Lynch, challenge defendants' interpretation and application of the Child Care Credit Law for certain of its members. On behalf of the PBA and the police officers who have been or may be aggrieved in the future, they move for an order: (i) pursuant to CPLR 3215, for a default judgment against defendants; and (ii) pursuant to CPLR 3212, for summary judgment and declaring that all police officers hired by the New York Police Department (NYPD), including those hired after July 1, 2009, may avail themselves of the benefits afforded by New York City Administrative Code (Admin Code § 13-218 (h). Defendants, the City of New York (City) and the New York City Police Pension Fund (PPF), cross-move for an order: (i) converting this action to an Article 78 proceeding, and dismissing all claims accruing prior to four months from the filing of this action, as time-barred; (ii) compelling plaintiffs to accept service of defendants' late answer; and (iii) pursuant to CLR 3212, for summary judgment dismissing the claim.

BACKGROUND

Plaintiff Patrick Lynch, a New York City police officer, is the President of plaintiff PBA, the collective bargaining agent for New York City police officers. Defendant PPF is one of five public employee retirement programs maintained by the City which was created pursuant to Subchapter 2 of Chapter 2 of Title 13 of the Admin Code (§§ 13-214-13-267.1) (defts' exh 1, complaint at ¶¶ 5-10).

Tiers 1 and 2 and NYC Administrative Code § 13-218 (h)

Police officers, as well as other city employees who joined the City retirement system prior to July 1, 1973, are classified in Tier 1 (*see generally Civil Serv. Empls. Assn., Local 1000, AFSCME, AFL-CIO v Regan*, 71 NY2d 653 [1988]). Tier 1 members' benefits are governed by Subchapter 2 of Chapter 2 of Title 13 of the Administrative Code.

Chapter 382 of the Laws of 1973 created Article 11 of the Retirement and Social Security Law (RSSL §§ 400-451), which established Tier 2 for public employees who joined the retirement system after July 1, 1973. This tier was created to "deal with the steeply mounting costs of public employee pensions" (*Lynch v City of New York*, 23 NY3d 757, 762 [2014] [internal quotation marks and citation omitted]). Police officers hired after June 30, 1973, but prior to July 1, 2009, are classified as Tier 2 members of the PPF. Pension benefits of Tier 2 police officers are governed by Article 11 of the Retirement and Social Security Law, and, to the extent that its provisions are not in conflict with Article 11, by the Administrative Code. The benefits of Tier 1 and Tier 2 are basically the same, and will be referred to in this decision, collectively, as Tier 2 (*see Lynch v City of New York*, 23 NY3d at 761).

Section 13-218 of the Administrative Code, entitled "Credit for Service," was amended by Chapter 694 of the Laws of 2000 (effective Dec. 8, 2000) to include subdivision h. This subdivision allows police officers to obtain credit for certain periods of absences without pay for child care leave. Specifically, it provides, as follows:

> h.* Notwithstanding the provisions of subdivision c of this section, any member who is absent without pay for child care le[a]ve of absence pursuant to regulations of the New York city police department shall be eligible for credit for such period of child care leave provided such member files a claim for such service credit with the pension fund by December thirty-first, two thousand one or within ninety days following termination of the child care leave, whichever is later, and contributes to the pension fund an amount which such member would have contributed during the period of such child care leave, together with interest thereon. Service credit provided pursuant to this subdivision shall not exceed one year of credit for each period of authorized child care leave. In the event there is a conflict between the provisions of this subdivision and the provisions of any other law or code to the contrary, the provisions of this subdivision shall govern.
>
> *There are two subdivisions h.

This provision, known as the Child Care Credit Law, was passed as part of a series of pension initiatives that, among other things, were aimed at helping working parents (*see* Bill Jacket, L 1999, ch 646 at 9 [statute intended to discourage "parents [from] rush[ing] back to the workplace without properly caring for their children"). Other pension enhancements were also enacted by the legislature that year (*see Lynch v City of New York*, 23 NY3d at 764).

Tier 3 under Article 14 of Retirement And Social Security Law

Chapter 890 of the Laws of 1976 created Article 14 of the Retirement and Social Security Law, known as Tier 3 (RSSL §§ 500-520), which became effective January 1, 1977 (*see Lynch v City of New York*, 23 NY3d at 765). "Tier 3 was a comprehensive retirement program designed to provide uniform benefits for all public employees and eliminate the costly special treatment of selected groups . . . inherent in the previous program" (*id.* [internal quotation marks omitted] [quoting Mem from Robert J. Morgado [Secretary to the Governor] to Judah Gribetz [Governor's counsel], Bill Jacket, L 1976, ch 890). Despite the creation of Tier 3, Article 14 temporarily retained police and fire members hired from July 27, 1976 through June 30, 2009, as Tier 2 pension members (RSSL § 500 [c]; *see also Lynch v City of New York*, 23 NY3d at 765-767). Every two years, from 1981 until 2009, the legislature amended the RSSL to enact a two-year Tier 2 extender for police and fire members, even though Tier 2 was closed to virtually all other categories of public employees hired after July 26, 1976 (*Lynch v City of New York*, 23 NY3d at 766-767).

On June 2, 2009, however, then-Governor Paterson vetoed the bill that would have afforded Tier 2 status to police officers hired during the two-year period from July 1, 2009 through June 30, 2011 (*id.*). The governor remarked that "these are not routine times" and proposed new Tier 5 legislation which was going to "mak[e] certain cost-saving changes for new entrants into the public pension system, while still providing a high level of benefits for public retirees" (*id.*, 23 NY3d at 767 [internal quotation marks and citation omitted]). The governor indicated that he did not want to keep re-enacting the same provisions that were contributing to the City's financial troubles, without accompanying reform (*id.*). As a result, police officers hired after June 30, 2009 became Tier 3 members having been specifically excluded from Tier 4, and their pension rights are governed by Article 14 of the RSSL (*id.*).

Article 14 § 513, entitled "Credit for service," contains various subsections for part-time service, previous service, and creditable service. It also includes a subsection h which addresses child care leave, but only for corrections officers. Specifically, it provides, in relevant part, as follows:

> Notwithstanding any other provision of this section, any general member in the uniformed correction force of the New

> York city department of correction who is absent without pay for a child care leave of absence pursuant to regulations of the New York city department of correction shall be eligible for credit for such period of child care leave provided such member files a claim for such service credit with the retirement system by December thirty-first, two thousand five or within ninety days of the termination of the child care leave, whichever is later, and contributes to the retirement system an amount which such member would have contributed during the period of such child care leave, together with interest thereon

(RSSL § 513 [h]). It further provides that, if there is a conflict between this provision and the provisions of any other law or code, this subsection would govern, but that it shall not apply to any New York city uniformed correction/sanitation revised plan member (i.e., a member hired after March 31, 2012 [*see* RSSL § 501 [25]).

Tier 6 was created by the legislature in December 2009, but it did not change the Tier 3 status of City police and fire members appointed on or after July 1, 2009 (*Lynch v City of New York*, 23 NY2d at 767). However, more recent pension reform measures (Chapter 18 of the Laws of 2012) created a new tier - Tier 3 revised plan members (also known as Tier 6) - for police officers hired after March 31, 2012 (RSSL § 501 [26]; *see Lynch v City of New York*, 23 NY3d at 767 n 8).

On July 17, 2015, plaintiffs brought this action seeking a declaratory judgment on behalf of all Tier 3 police officers who have been, or may in the future be, aggrieved by defendants' policy not to apply Admin Code § 13-218 (h), and thereby prohibiting them from availing themselves of the benefits of the child care leave credit. They seek a judgment that defendants' policy is in violation of law, and a declaration that all NYPD officers may avail themselves of the benefits afforded by that code provision, regardless of their hire date (defts' exh 1, complaint).

In seeking summary judgment, plaintiffs urge that all NYPD officers are entitled to receive the credit set forth in the Child Care Credit Law, Admin Code § 13-218 (h). They make the following arguments:

i. the statutory language states that it would apply to "any member," and contemplates future applications by officers seeking the child care credit;

ii. the legislative history supports their view because the purpose of the 1999-2000 pension reform bills, collectively, was to improve benefits for public employees, to assist working parents, and to reinstate employees to their original tiers regardless of breaks in service;

iii. Admin Code § 13-218 (h) has neither been repealed nor amended to apply only to certain classes of officers, and that such a limitation should not be read into the statute;

iv. there is no reasonable explanation why Article 14 of the Retirement and Social Security Law should not be read in conjunction with Admin Code § 13-218 (h), as defendants acknowledge they must do with regard to Article 11; and

v. there is no express language in either Article 14 or the Administrative Code that supports defendants' contention, that only Tier 2 police officers are able to avail themselves of the child care benefits set forth in Admin Code § 13-218 (h).

Plaintiffs assert that their claims may be maintained as a declaratory judgment action, because there are no fact-specific issues that must be resolved by the court.

In opposition, defendants counter plaintiffs' arguments as follows:

i. pursuant to RSSL § 513 (h), the only members of Tier 3 who can obtain service credit for child care leave without pay are corrections officers hired before April 1, 2012;

ii. that when Tier 6 (also known as Tier 3 revised plan members) was created in April 2012, the legislature addressed the omission of Tier 3 police officers from RSSL § 513 (h), not by expanding the child care credit to such police officers, but by eliminating the eligibility of corrections officers hired after March 31, 2012 in order to bring the pension credit afforded to corrections officers in parity with the lesser benefit afforded to police officers;

iii. that plaintiffs' claim that the pension rights of Tier 3 police officers include the child care service credit provision contained in the Administrative Code is baseless as RSSL § 500 (a) provides that the provisions of Article 14 shall govern Tier 3 members in the case of a conflict with the provisions of any other law or code;

iv. that RSSL § 501 contains the definitions for "credited service" (section 501 [3]) and "creditable service" (section 501 [4]), both of which refer to section 513 for determining what service qualifies to be counted as credited service;

v. that the service credit available to Tier 3 police officers is governed entirely and exclusively by RSSL § 513, and not by any Administrative Code provision; and

vi. that because RSSL § 513 (h) limits child care service credit to correction officers who were appointed prior to April 1, 2012, Tier 3 police officers cannot seek such credit under the conflicting provision of Admin Code § 13-218 (h).

DISCUSSION

The branch of plaintiffs' motion for a default judgment is denied. Plaintiffs' motion for summary judgment is granted; defendants' cross-motion for summary judgment is denied; and it is declared that all police officers, including those hired after July 1, 2009 in Tier 3, may avail themselves of the benefit of the child care service credit provide by Administrative Code § 13-218 (h). The branch of defendants' cross-motion to convert this action into an Article 78 proceeding is granted.

Motion for Default Judgment

Plaintiffs contend that they are entitled to a default judgment against defendants because defendants served and filed their answer three days after the agreed upon extended deadline, without sufficient excuse, and without moving to compel plaintiffs to accept their answer, which demonstrates willfulness. In the exercise of this court's discretion, a default judgment is denied. Defendants' counsel provided a reasonable excuse for its short delay of three days in filing and serving its answer, which was caused by defendants' counsel's failure to consider a religious holiday's impact on her supervisor's ability to review a draft of the answer. Also, plaintiffs have failed to show any prejudice from this brief delay (*see Gantt v North Shore-LIJ Health Sys.*, 140 AD3d 418, 418-419 [1st Dept 2016]; *Cirillo v Macy's, Inc.*, 61 AD3d 538, 540 [1st Dept 2009]).

While defendants' excuse is not particularly compelling, especially in light of the fact that they had already obtained several extensions of their time to answer, law office failure may constitute "good cause" for a delay (*see Yea Soon Chung v Mid Queens LP*, 139 AD3d 490, 490 [1st Dept 2016]; *Lamar v City of New* York, 68 AD3d 449, 449 [1st Dept 2009]), and there is no evidence of willfulness (*see Marine v Montefiore Health Sys., Inc.*, 129 AD3d 428, 429 [1st Dept 2015]). Moreover, there is a strong public policy in favor of resolving controversies on their merits (*see Oberon Sec. LLC v Parmar*, 135 AD3d 446, 446-447 [1st Dept 2016]; *Myers v City of New York*, 110 AD3d 652, 652 [1st Dept 2013]).

Defendants are not required to file an affidavit of merit on their cross-motion, where, as here, no default order or judgment has been entered (*Cirillo v Macy's, Inc.*, 61 AD3d at 540; *see also Lamar v City of New York*, 68 AD3d at 449; *Jones v 414 Equities LLC*, 57 AD3d 65, 81 [1st Dept 2008]). Therefore, plaintiffs' motion for a default judgment is denied; defendants' cross-motion to compel plaintiffs to accept service of their late answer is granted; and service is deemed effective on September 23, 2015, with issue being joined on that date (*see* CPLR 3012 [d]; *Myers v City of New York*, 110 AD3d at 652).

Conversion to Article 78 Proceeding

Plaintiffs' challenge to the validity of defendants' interpretation and implementation of the RSSL and Admin Code §13-218 (h), pursuant to which defendants denied child care service credit to Tier 3 police officers, is converted to an Article 78 proceeding. "[W]here a quasi-legislative act by an administrative agency . . . is challenged on the ground that it 'was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion' (CPLR 7803 [3]), a proceeding in the form prescribed by Article 78 can be maintained," and the four-month statute of limitations for special proceedings governs (*New York City Health & Hosps. Corp. v McBarnette*, 84 NY2d 194, 204 [1994]).

While an agency's generally applicable decisions "do not lend themselves to consideration on their merits" under Article 78's mandamus to review, because they involve "rational choices among competing policy considerations," in some cases, "even a nonindividualized, generally applicable quasi-legislative act such as a regulation or an across-the-board rate-computation ruling can be challenged" as lacking a rational basis, affected by an error of law, or arbitrary and capricious (*id.*; *see also Lynch v City of New York*, 23 NY3d 757 [declaratory judgment claim, challenging whether City violated RSSL § 480 [b] [i] for failing to contribute required amounts to pensions of Tier 3 police and fire members, converted to Article 78]; *Matter of Kaslow v City of New York*, 23 NY3d 78 [2014] [Article 78 proceeding appropriate to determine meaning of "Credited Service" under RSSL for Tier 3 CO-20 retirement plan for correction officer]). Plaintiffs' claim here presents such an instance.

Plaintiffs assert that defendants' interpretation of the Child Care Credit Law "is effected by an error of law" (pltfs' mem at 1). They urge that the PPF's application of the various statutory and administrative code provisions, including Articles 11 and 14 of the RSSL, and Administrative Code § 13-218 (h), has no foundation in, and represents an irrational construction of, the governing statutes. This claim is clearly encompassed within CPLR 7803 (3) as grounds for mandamus to review, which includes challenges as to "whether a determination . . . was affected by an error of law or was arbitrary and capricious" (CPLR 7803 [3]; *see also New York City Health & Hosps. Corp. v McBarnette*, 84 NY2d at 205). Accordingly,

this matter is converted to an Article 78 proceeding, pursuant to CPLR 103 (c). As defendants correctly contend, this subjects plaintiffs' claim to the four-month statute of limitations contained in CPLR 217. In matters seeking mandamus the statute of limitations begins to run upon the refusal to perform such a duty (*see Donoghue v New York City Dept. of Educ.*, 80 AD3d 535, 536 [1st Dept 2011]; *Kolson v New York City Health & Hosps. Corp.*, 53 AD2d 827, 827 [1st Dept 1976]). In this instance, the accrual date would be calculated from the date a NYPD pensioner was denied the credit set forth in Child Care Credit Law.

Summary Judgment

The plaintiffs' motion for summary judgment is granted, and defendants' cross-motion for summary judgment is denied. And this court declares that police officers, including those hired after July 1, 2009 in Tier 3, may avail themselves of the benefit of the child care service credit contained in Admin Code § 13-218 (h).

In interpreting a statute, this court's primary consideration "is to ascertain and give effect to the intention of the Legislature" (*Riley v County of Broome*, 95 NY2d 455, 463 [2000] [internal quotation marks and citation omitted]). While the text of the statute "is the clearest indicator of legislative intent and courts should construe unambiguous language to give effect to its plain meaning" (*Matter of DaimlerChrysler Corp. v Spitzer*, 7 NY3d 653, 660 [2006]), the legislative history may also be relevant (*see Riley v County of Broome*, 95 NY2d at 463). The court notes that, where the issue presented to the court is one purely of statutory interpretation, "there is little basis to rely on any special competence or expertise of the administrative agency," and the court "need not accord any deference to the agency's determination" (*Matter of Albano v Board of Trustees of N.Y. City Fire Dept., Art. II Pension* Fund, 98 NY2d 548, 553 [2002] [quotation marks and citation omitted]; *see also International Union of Painters & Allied Trades v New York State Dept. of Labor*, 147 AD3d 1542, 2017 NY Slip Op 01112, * 1-2 [4th Dept 2017] [Labor Department's interpretation is contrary to plain meaning of statute language, so no deference is required]).

The clear language of Administrative Code § 13-218 (h) provides that "any member" of the NYPD, "who is absent without pay for child care le[a]ve of absence" pursuant to department regulations "shall be eligible for credit for such period of child care leave," provided the member files a claim for the credit with PPF "by December thirty-first, two thousand one or within ninety days following termination of the child care leave, whichever is later," and contributes to the pension fund the amounts the member would have contributed during the child care period, with interest. It also provides that, if "there is a conflict between the provisions of this subdivision and the provisions of any other law or code to the contrary, the provisions of this subdivision shall govern" (Admin Code § 13-218 [h]). This plainly and unambiguously states that it applies to "any member," and, contrary to defendants' interpretation, does not limit its application to Tier 2 police officers

only. In addition, the statute contemplates future applications by police officers seeking child care leave credit, by including language that they must submit their applications "within ninety days following the termination of the child care leave, *whichever is later*" (emphasis added). Administrative Code § 13-218 (h) has not been repealed or amended to apply only to certain tiers of police officers.

This code provision (L 2000, ch 594), also known as the Child Care Credit Law, was enacted as part of a series of pension reform measures in 1999 and 2000. In the Memorandum in Support by the New York State Assembly, the legislature clearly stated the purpose of the bill: "[t]his bill will allow members of the police pension fund to obtain retirement credit for absences due to child care leave" (Mem in Support, Bill Jacket, L 2000, ch 594). It stated, as justification for the provision, that "[d]ue to the nature of modern police work, many police officers are forced to take leaves of absence after the birth of a child or an adoption" and that this would provide "these officers with a mechanism to restore their retirement benefits by making contributions to offset a portion of the costs" (*id.*). The stated purpose of the various pension initiatives in the 1999-2000 pension reform bills was to "improve benefits" for public employees (pltfs' exh H, Bill Jacket, L 1999, ch 646 at 10 [tier reinstatement regardless of breaks in service]), "grant public employees more credit for all their years in public service," and address inequities in the retirement systems (pltfs' exh I, Bill Jacket, L 2000, ch 552 at 9, 14-15). The reforms also were aimed at assisting working parents (pltfs' exh H, Bill Jacket, L 1999, ch 646 at 9 [discourage "parents [from] rush[ing] back to the workplace without properly caring for their children"]; Mem in Support, Bill Jacket, L 2000, ch 594). This legislative history supports the plain statutory text, that the legislature intended the child care benefit to apply to all members of the PPF. There is nothing in the legislative history that reflects a common understanding that this child care leave benefit was only to be available to Tiers 1 and 2 (*cf. Lynch v City of New York*, 28 NY3d at 774).

Defendants' contention, that Tier 3 police officers are governed exclusively by Article 14 of the RSSL, and that RSSL § 513 provides the exclusive provision for service credit, is unavailing. First, it is noted that both Articles 11 and 14, and the general laws setting forth the benefits for Tiers 2 and 3, respectively, were enacted years before Administrative Code § 13-218 (h), which also states that "[i]n the event there is a conflict between the provisions of this subdivision and the provisions of any other law or code to the contrary, the provisions of this subdivision shall govern." More importantly, Administrative Code § 13-218 (h) does not conflict with Articles 11 and 14.

Further, defendants fail to explain why Article 14 should not be read in conjunction with Administrative Code § 13-218 (h), when Article 11 is read in conjunction therewith, and affords the benefits thereof to Tier 2 police officers. While Article 14 § 500 (a) provides, in relevant part:

> Notwithstanding any other provision of law . . . the provisions of this Article [14] shall apply to all members who join or rejoin a public retirement system of the state on or after July first nineteen hundred seventy-six . . . In the event that there is a conflict between the provision of this Article and the provisions of any other law or code, the provisions of this Article shall govern.

Article 11 § 440 (a) contains an analogous provision, with the identical last sentence. If, as defendants urge, RSSL § 500 (a) bars the application of Administrative Code § 13-218 (h) to Tier 3 police officers, then, similarly, RSSL § 440 (a) would bar it as to Tier 2 police officers, which defendants admit is not the case.

Defendants also fail to explain what conflict exists between Administrative Code § 13-218 (h) and Article 14. The administrative code provision gives police officers the ability to buy back pension credit for unpaid child care leaves, while Article 14 § 513 (h) provides corrections officers with a similar child care leave benefit. Specifically, that provision states, in relevant part, that "any general member in the uniformed correction force" who takes a child care leave of absence without pay according to department regulations, files a claim and contributes to the retirement system the appropriate amount they would have contributed, may receive credit for up to one year. In 2012, the legislature amended the provision to limit the correction department members who could use it by providing that: "the provisions of this subdivision shall not apply to a member of the uniformed force of the New York city department of correction who is a New York city uniformed correction/sanitation revised plan member" (RSSL § 513 [h]). This amendment was passed when the legislature created Tier 3 revised plans (also known as Tier 6).

The statute's legislative history, when it was originally enacted in 2005, supports plaintiffs' arguments that this section 513 (h) was not intended to repeal Admin Code § 13-218 (h), nor is it in conflict with that code provision. Thus, the New York State Senate's Introducer's Memorandum in Support stated that the purpose of the statute was to "[a]llow[] correction members of the New York City Employees' Retirement System to obtain retirement credit for absences due to child care leave" (Bill Jacket, L 2005 Senate Bill 3339, ch 477, Introducer's Mem in Support [Introducer's Mem in Support]). It stated that Tiers 1 and 2 correction members already received this benefit (chapter 581 of the Laws of 2004, Admin Code § 13-107 [k]), and that the benefit was intended to be offered to all correction members, but was mistakenly omitted from the original bill, and this 2005 statute was to correct that oversight (Bill Jacket, Introducer's Mem in Support). It further stated that:

> "In 2001 [sic], similar legislation was signed into law to allow members of the police pension fund to obtain

retirement credit for periods of leave for child care. This bill expands that concept to allow correction officers the same privilege."

It went on to state that "[l]ike police officers, many correction officers are forced to take a leave of absence after the birth of a child or an adoption," and this would provide correction officers with the same mechanism that the police officers have to restore their benefits (*id.*). In the Budget Report on Bills (Bill Jacket at 3, 2005 Senate Bill 3339, B-201 Budget Report on Bills), the Division of Budget stated that "Chapter 594 of the laws of 2000 granted an identical benefit to NYC police officers," this bill was to fix an inadvertent mistake in Chapter 581 of the Laws of 2004, and that it and the City had no objection.

The City's citation to the Governor's Program Bill 2011 does not warrant a different conclusion. That Memorandum addressed proposed pension reforms, which sought to create a new tier for members of all the various state, local and city employees who first became members of the pensions funds on or after July 1, 2011. Those pension reforms ended up creating a new tier for employees who first became members on or after April 1, 2012, Tier 6, or sometimes referred to as Tier 3 revised plan members. The reforms led to the 2012 amendment to RSSL § 513 (h) which limited the correction officers' child care leave benefit to Tier 3 correction members, and excluded Tier 3 revised plan correction officer members. The amendment did not address police officers' child care leave benefits.

Defendants' reliance on *Matter of Kaslow v City of New York* (23 NY3d 78) is misplaced. That case involved a retired correction officer's claim for credit for non-uniformed as well as uniformed service under Administrative Code § 13-155 (a) (3) (c), a Tier 2 benefit calculation formula, but then elected to apply RSSL § 504-a (c) (2), as a Tier 3 CO-20 plan member, to compute the amount owed to him for additional correction service beyond 20 years, which only looked at uniformed service. The *Kaslow* Court held that the petitioner's pick-and-choose approach to the provisions "would maximize his pension but does not create a harmonious whole" (*id.* at 88). Instead, the Court found that the New York City Employees' Retirement System's explanation of how the RSSL provision at issue "applie[d] and fit[] into the overall statutory design is coherent and reasonable" (*id.*). It found a direct conflict between the provisions calculating both uniformed and non-uniformed service for the correction officer's pension.

In contrast, there is no such direct conflict here. The defendants fail to explain why recognizing the Tier 3 police officers' right to buy back pension credit for a child care leave under Administrative Code § 13-218 (h), and the Tier 3 uniformed correction officers' right to that same buy-back benefit, fails to create a harmonious whole. Unlike the petitioner in *Kaslow*, plaintiffs are not picking and choosing provisions to give them the most advantageous pension. Rather, their

interpretation shows that RSSL § 513 (h) was meant to give correction officers some of the same child care credit benefit police officers already enjoy.

Accordingly, it is

ORDERED that the branch of plaintiffs' motion for a default judgment is denied, and the branch of defendants' cross-motion, to compel plaintiffs to accept service of their late answer, is granted, with service and filing of the answer deemed complete on September 23, 2015; and it is further

ORDERED that the branch of defendants' cross-motion to convert this declaratory judgment action into an Article 78 proceeding, and then to dismiss the proceeding as time-barred, is granted only to the extent of converting the action to an Article 78 proceeding which is subject to the four-month statute of limitations contained in CLPR 217; and it is further

ORDERED that the branch of plaintiffs' motion for summary judgment, which seeks a declaration that defendants have violated Administrative Code § 13-218 (h), is granted; and it is further

ORDERED that the branch of defendants' cross-motion for summary judgment dismissing the complaint, is denied; and it is further

ADJUDGED and DECLARED that defendants the City of New York, the New York City Police Pension Fund, and the Board of Trustees of the New York City Police Pension Fund have violated and continue to violate Administrative Code § 13-218 (h) by refusing to permit all police officers, including those hired on or after July 1, 2009 in Tier 3, from availing themselves of the benefits afforded by that statute; and it is further

ADJUDGED that plaintiffs (A) do recover from defendants (B)(C)(D) costs in the amount of $ 200.00 and disbursements in the amount of $ 550.00, making in all a total of $ 750.00.

Dated: March 27, 2017

FILED
APR 13 2017
COUNTY CLERK'S OFFICE
NEW YORK

ENTER:

J.S.C.

M. A. T.
CLERK

(A) PATROLMEN'S BENEVOLENT ASSOCIATION OF THE CITY OF NEW YORK, INC.
125 Broad Street, 11th Floor
New York, New York 10004-2400

[redacted]

THE CITY OF NEW YORK
Corporation Counsel of the City of New York
(B) 100 Church Street
New York, New York 10007

THE NEW YORK CITY POLICE PENSION FUND
(C) 233 Broadway, 19th Floor
New York , New York 10279

THE BOARD OF TRUSTEES OF THE NEW YORK CITY POLICE PENSION FUND
(D) 233 Broadway, 19th Floor
New York , New York 10279

{01271060}

STATE OF NEW YORK
SUPREME COURT COUNTY OF NEW YORK

PATRICK LYNCH, as President of the PATROLMEN'S BENEVOLENT ASSOCIATION OF THE CITY OF NEW YORK, INC., on behalf of the Police Officers Who Have Been or May In The Future Be Aggrieved, and the PATROLMEN'S BENEVOLENT ASSOCIATION OF THE CITY OF NEW YORK, INC.,

Plaintiffs,

-against-

THE CITY OF NEW YORK, the NEW YORK CITY POLICE PENSION FUND, and THE BOARD OF TRUSTEES of the New York City Police Pension Fund,

Defendants.

BILL OF COSTS

Index No. 157286/2015

COSTS:

Costs before Note of Issue	$200.00 ✓	(CPLR §8201(1))
Total	**$200.00**	

execution 50.00
service 150.00

DISBURSEMENTS:

Fee for Index Number	$210.00 ✓	(CPLR §8018(a))
Request for Judicial Intervention	$95.00 ✓	(CPLR §8020(a))
Fee for Summary Judgment Motion	$45.00 ✓	(CPLR §8301(b))
Total	~~$350.00~~ $550.00	

Totals: ~~$550.00~~ $750.00

The undersigned, an attorney admitted to practice before the Courts of the State of New York, and a member of the law firm of Iseman, Cunningham, Riester & Hyde, LLP, attorneys for plaintiffs herein, states that the costs and disbursements above specified are correct and true and have been or will necessarily be made or incurred herein and are reasonable in amount.

Dated: Albany, New York
April 13, 2017

ISEMAN, CUNNINGHAM, RIESTER & HYDE, LLP

By: _____
John F. Queenan, Esq.
Attorneys for Plaintiffs
9 Thurlow Terrace
Albany, New York 12203
(518) 462-3000

I HEREBY CERTIFY THAT I HAVE ADJUSTED THIS BILL OF COSTS AT
$ 750.00

APR 13 2017
M A T
CLERK

FILED
APR 13 2017
COUNTY CLERK'S OFFICE
NEW YORK

ISEMAN, CUNNINGHAM, RIESTER & HYDE, LLP

By: John F. Queenan
John F. Queenan
Attorneys for Plaintiffs
9 Thurlow Terrace
Albany, New York 12203
Telephone: (518) 462-3000
Fax: (518) 462-4199
Jqueenan@icrh.com

157286/15

Judgment

1-3

FILED AND DOCKETED
APR 13 2017
AT. 3:59 P M
N.Y. CO. CLK'S OFFICE

AFFIDAVIT OF SERVICE ON ATTORNEY BY MAIL

STATE OF NEW YORK, COUNTY OF NEW YORK, SS:

Valentine Bossous, being duly sworn, deposes and says:

That on the 9th day of May 2017 she served the annexed Notice of Appeal

Upon: ISEMAN, CUNNINGHAM, RIESTER & HYDE, LLP
Attorneys for Plaintiffs
9 Thurlow Terrace
Albany, New York 12203

being the address(es) within the State theretofore designated by him/her for that purpose, by depositing a copy of the same, enclosed in a prepaid wrapper in a post office box situated at 100 Church Street in the Borough of Manhattan, City of New York, regularly maintained by the Government of the United States in said City.

Valentine Bossous
Valentine Bossous

Sworn to before me this
9th day of May 2017

NOTARY PUBLIC

MOSES S. WILLIAMS
Commissioner of Deeds
City of New York No. 2-12722
Certificate Filed in New York County
Commission Expires July 1 20 17

Index No. 157286/2015

Supreme Court of the State of New York
County of New York

PATRICK LYNCH, as President of the PATROLMEN'S BENEVOLENT ASSOCIATION OF THE CITY OF NEW YORK, INC., on behalf of the Police Officers Who Have Been or May in the Future Be Aggrieved, and the PATROLMEN'S BENEVOLENT ASSOCIATION OF THE CITY OF NEW YORK, INC.,

Plaintiffs,

-against-

THE CITY OF NEW YORK, the NEW YORK CITY POLICE PENSION FUND, and THE BOARD OF TRUSTEES of the New York City Police Pension Fund,

Defendants.

NOTICE OF APPEAL

ZACHARY W. CARTER
Corporation Counsel of the
City of New York
Attorney for Defendant
100 Church Street
New York, New York 10007

Of Counsel: Devin Slack
Tel: (212) 356-0817
Law Manager No. 2015-035492

Due and timely service is hereby admitted.

New York, N.Y. ....., *2017*

..... *Esq.*

Attorney for.....

AFFIDAVIT OF SERVICE

STATE OF NEW YORK)
) SS. :
COUNTY OF NASSAU)

I, Jennifer Hampton, being sworn, say:

I am not a party to the action, am over 18 years of age and reside in Nassau County, New York.

On August 3, 2018, I served the within **NOTICE OF MOTION, AFFIRMATION IN SUPPORT AND SUPPORTING DOCUMENTATION** by depositing a true copy thereof enclosed in a post-paid wrapper, in an official depository under the exclusive care and custody of the U.S. Postal Service within New York State, addressed to each of the following persons at the last known address set forth after each name:

Zachary W. Carter, Esq.
John Moore, Esq.
Claude S. Platton, Esq.
CORPORATION COUNSEL OF THE CITY OF NEW YORK
Attorneys For Defendants-Respondents
100 Church Street
New York, New York 10007

Jennifer Hampton

Sworn to before me this
3rd day of August, 2018

Notary Public

ELIZABETH P. ELSON
NOTARY PUBLIC-STATE OF NEW YORK
No. 01EL6268370
QUALIFIED IN NASSAU COUNTY
Comission Expires 09-04-2020

4077199 v1

Index No. 157286/2015 *Year*

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: FIRST DEPARTMENT

PATRICK LYNCH, as President of the PATROLMEN'S BENEVOLENT ASSOCIATION OF THE CITY OF NEW YORK, INC., on behalf of the Police Officers Who Have Been or May In the Future Be Aggrieved, and the PATROLMEN'S BENEVOLENT ASSOCIATION OF THE CITY OF NEW YORK, INC.,

Plaintiffs-Respondents,

-against-

THE CITY OF NEW YORK, the NEW YORK CITY POLICE PENSION FUND, and THE BOARD OF TRUSTEES of the New York City Police Pension Fund,

---

Defendants-Appellants.

MOTION FOR LEAVE TO APPEAL

RIVKIN RADLER LLP

Attorneys for Defendants-Appellants
926 RXR PLAZA
UNIONDALE, NEW YORK 11556-0926
(516) 357-3000

FILE# 892908 . 00002 /

To:

Attorney(s) for

Service of a copy of the within *is hereby admitted.*

Dated:

.....

Attorney(s) for

PLEASE TAKE NOTICE

Check Applicable Box

☐ NOTICE OF ENTRY *that the within is a (certified) true copy of a entered in the office of the clerk of the within named Court on* *20*

☐ NOTICE OF SETTLEMENT *that an Order of which the within is a true copy will be presented for settlement to the Hon. one of the judges of the within named Court, at*

on *20* *, at* *M.*

Dated:

RIVKIN RADLER LLP

Attorneys for

926 RXR PLAZA
UNIONDALE, NEW YORK 11556-0926

To:

FILE# _____ . _____ /

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: FIRST JUDICIAL DEPARTMENT

----------X

PATRICK LYNCH, as President of the PATROLMEN'S BENEVOLENT ASSOCIATION OF THE CITY OF NEW YORK, INC., on behalf of the Police Officers Who Have Been or May In The Future Be Aggrieved, and the PATROLMEN'S BENEVOLENT ASSOCIATION OF THE CITY OF NEW YORK, INC.,

Plaintiffs-Movants,

-against-

THE CITY OF NEW YORK, the NEW YORK CITY POLICE PENSION FUND, and THE BOARD OF TRUSTEES of the New York City Police Pension Fund,

Defendants-Respondents.

----------X

NOTICE OF MOTION

New York County
Index No. 157286/2015

PLEASE TAKE NOTICE that upon the annexed Affirmation of Henry Mascia, dated August 3, 2018, and the exhibits annexed thereto and all the pleadings and prior proceedings had herein, Plaintiffs-Respondents, PATRICK LYNCH, as President of the PATROLMEN'S BENEVOLENT ASSOCIATION OF THE CITY OF NEW YORK, INC., on behalf of the Police Officers Who Have Been or May In The Future Be Aggrieved, and the PATROLMEN'S BENEVOLENT ASSOCIATION OF THE CITY OF NEW YORK, INC., will jointly move this Court at the Courthouse located at 27 Madison Avenue, New

Supreme Court
Appellate Division First Dept.
212-340-0400

Receipt # 7 08/08/2018

Type	MOTION
Index	157286/15
Fee	$45.00
Issued By	guest1

27 Madison Ave.
New York, NY 10010

Exhibit C

At a Term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York on October 23, 2018.

Present - Hon. Rolando T. Acosta, Presiding Justice,
John W. Sweeny Jr.
Troy K. Webber
Marcy L. Kahn
Jeffrey K. Oing, Justices.

----------X

Patrick Lynch, etc., et al.,
Plaintiffs-Respondents,

M-3854
Index No. 157286/15

-against-

The City of New York, et al.,
Defendants-Appellants.

----------X

Plaintiffs-respondents having moved for leave to appeal to the Court of Appeals from the decision and order of this Court, entered on June 28, 2018 (Appeal No. 6995),

Now, upon reading and filing the papers with respect to the motion, and due deliberation having been had thereon,

It is ordered that the motion is denied.

ENTERED:

CLERK

Exhibit D

PLEASE TAKE NOTICE that an Order, of which the within is a copy, was duly entered in the office of the Clerk of the Appellate Division of the Supreme Court in and for the First Judicial Department on October 23, 2018.

Dated: November 23, 2018

ZACHARY W. CARTER
Corporation Counsel
of the City of New York
Attorney for Appellants
100 Church Street
New York, New York 10007

By: _____
JOHN MOORE
Assistant Corporation Counsel
212-356-0840

To:

Henry Mascia, Esq.
RIVKIN RADLER LLP
926 RXR Plaza
Uniondale, NY 11556
Attorney for Respondents

New York County Clerk's Index No. 157286/15

New York Supreme Court
Appellate Division: First Department

Patrick Lynch, etc., et al.,

Plaintiffs-Respondents,

against

The City of New York, et al.,

Defendants-Appellants.

APPELLATE DIVISION
ORDER AND NOTICE OF ENTRY

ZACHARY W. CARTER
Corporation Counsel
of the City of New York
Attorney for Appellants
100 Church Street
New York, New York 10007

Date and timely service of a copy of the within Order and Notice of Entry is hereby admitted.

New York, N.Y. _____, 2018
_____, Esq.
Attorney for _____

At a Term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York on October 23, 2018.

Present - Hon. Rolando T. Acosta, Presiding Justice,
John W. Sweeny Jr.
Troy K. Webber
Marcy L. Kahn
Jeffrey K. Oing, Justices.

Patrick Lynch, etc., et al.,
Plaintiffs-Respondents,

M-3854
Index No. 157286/15

-against-

The City of New York, et al.,
Defendants-Appellants.

Plaintiffs-respondents having moved for leave to appeal to the Court of Appeals from the decision and order of this Court, entered on June 28, 2018 (Appeal No. 6995),

Now, upon reading and filing the papers with respect to the motion, and due deliberation having been had thereon,

It is ordered that the motion is denied.

ENTERED:

CLERK

Exhibit E

AFFIDAVIT OF SERVICE

STATE OF NEW YORK)
) SS.:
COUNTY OF NASSAU)

I, **JENNIFER HAMPTON**, being sworn, say:

I am not a party to the action, am over 18 years of age and reside in Nassau County, New York.

On December 21, 2018, I served the within Notice of Motion and Supporting Documentation by depositing a true copy thereof enclosed in a post-paid wrapper, in an official depository under the exclusive care and custody of Federal Express Overnight Delivery, addressed to the following person at the last known address set forth:

Zachary W. Carter, Esq.
John Moore, Esq.
Claude S. Platton, Esq.
CORPORATION COUNSEL OF THE CITY OF NEW YORK
Attorneys for Defendants-Respondents
100 Church Street
New York, New York 10007

Jennifer Hampton
JENNIFER HAMPTON

Sworn to before me this
21st day of December 2018

Erica Louis Petrone
Notary Public

ERICA LOUIS PETRONE
Notary Public, State of New York
No. 01PE6363040
Qualified in Nassau County
Commission Expires August 14, 2021

Index No. 157286/2015 *Year*

NEW YORK STATE COURT OF APPEALS

PATRICK LYNCH, as President of the PATROLMEN'S BENEVOLENT ASSOCIATION OF THE CITY OF NEW YORK, INC., on behalf of the Police Officers Who Have Been or May In the Future Be Aggrieved, and the PATROLMEN'S BENEVOLENT ASSOCIATION OF THE CITY OF NEW YORK, INC.,

Plaintiffs-Respondents,

-against-

THE CITY OF NEW YORK, the NEW YORK CITY POLICE PENSION FUND, and THE BOARD OF TRUSTEES of the New York City Police Pension Fund,

Defendants-Appellants.

NOTICE OF MOTION

RIVKIN RADLER LLP

Attorneys for

Defendants-Appellants
926 RXR PLAZA
UNIONDALE, NEW YORK 11556-0926
(516) 357-3000

FILE# 892908 . 00002 /

To:

Attorney(s) for

Service of a copy of the within *is hereby admitted.*

Dated:

.....

Attorney(s) for

PLEASE TAKE NOTICE

Check Applicable Box

☐ NOTICE OF ENTRY *that the within is a (certified) true copy of a entered in the office of the clerk of the within named Court on* *20*

☐ NOTICE OF SETTLEMENT *that an Order of which the within is a true copy will be presented for settlement to the Hon. one of the judges of the within named Court, at*

on *20* *, at* *M.*

Dated:

RIVKIN RADLER LLP

Attorneys for

926 RXR PLAZA
UNIONDALE, NEW YORK 11556-0926

To:

FILE# _____ . _____ /

Attorney(s) for