No. 16-1466

IN THE

Supreme Court of the United States

MARK JANUS,

Petitioner,

—v.—

AMERICAN FEDERATION OF STATE, COUNTY, AND MUNICIPAL EMPLOYEES, COUNCIL 31, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR *AMICUS CURIAE* NEW YORK CITY SERGEANTS BENEVOLENT ASSOCIATION IN SUPPORT OF RESPONDENTS

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INTERESTS OF *AMICUS CURIAE*

Amicus New York City Sergeants Benevolent Association ("SBA") files this brief in support of the respondents.[1]

The SBA is the Nation's largest police sergeants union. It is composed of over 13,000 members, including approximately 5,000 active sergeants in the New York City Police Department ("NYPD").

On a daily basis, NYPD sergeants help keep New York City safe. As front line supervisors, NYPD sergeants spend the vast majority of their time in the field. They put their lives on the line by performing classic law-enforcement duties such as: patrolling neighborhoods, conducting investigations, and making arrests. Many of the SBA's members were first responders during the tragic events of September 11, 2001.

The SBA traces its origins to sergeants' fraternal organizations formed at the turn of the 20th century. Ultimately, the SBA won collective bargaining rights in the 1960s. On behalf of all NYPD sergeants, the SBA negotiates a collective bargaining agreement ("CBA") with New York City, administers and processes grievances under the CBA, and provides representation and advice to sergeants in various key areas.

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[1] The parties have filed with the Clerk of the Court letters consenting to the participation of *amici*. No party in this case authored this brief in whole or in part, or made any monetary contribution to its preparation and submission.

But the SBA views its role as extending well beyond collective bargaining and its mission as encompassing any available means to protect the overall well-being of NYPD sergeants. This includes a wide variety of programs designed to provide state-of-the-art benefits and protections for the sergeants and their families.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

New York has a carefully constructed collective bargaining law for public employee unions. Under New York law, the SBA is required to represent all NYPD sergeants in collective bargaining. To finance this work, sergeants are, at a minimum, required to pay "fair share fees" to the SBA. If the SBA is prohibited from receiving such fair share fees from every sergeant, it will be left without any ability to recoup the value of its services enjoyed by free riders—*i.e.,* sergeants who will choose not to pay for the SBA's required representation of them but who will still take advantage of the benefits of that representation. The SBA will lose funding as a result, and thus will be handicapped in fulfilling its duties to represent sergeants in their employee-employer relations as well as in protecting sergeants' overall well-being.

To create an effective collective bargaining process, states such as New York have enacted delicately balanced collective bargaining statutes. Those laws prescribe how negotiations over terms and conditions of employment are to be handled and depend on well-funded unions to be bargaining counterparties in those negotiations. New York, like

many other states, adopted fair share fees to counteract the free-rider problem and maintain unions as well-funded, exclusive bargaining counterparties.[2]

This Court upheld the fair share fee solution against a First Amendment challenge forty years ago in *Abood v. Detroit Board of Education*.[3] The *Abood* Court permitted unions to charge nonmembers for negotiating and administering their CBAs as well as processing employee grievances—but not for the expression of ideological views such as politically oriented lobbying of the government.[4] The Petitioner here seeks to revisit *Abood*, arguing that collective bargaining by public sector unions is indistinguishable from politically oriented lobbying.[5]

This Court should reject the Petitioner's challenge, as the Petitioner fundamentally misapprehends the relationships both: a) between public sector unions and the government when engaged in collective bargaining; and b) between such unions and the workers whom they represent. As to the relationship between unions and the government, there is a principled distinction between lobbying and bargaining: Lobbying typically involves efforts to set or change public policy, such as New York's various legislative or regulatory policies

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[2] *See Harris v. Quinn*, 134 S. Ct. 2618, 2652 (2014) (Kagan, J., dissenting) ("More than 20 States have enacted statutes authorizing fair-share provisions . . . .").

[3] *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977).

[4] See *id.* at 235–36.

[5] *See* Pet'r's Br. 10–18.

governing how the City is policed. On the other hand, bargaining is the process of negotiating the employment-related details that implement those policies consistent with employment laws and workplace realities. Put another way, in the collective bargaining context, unions represent public employees in negotiating with the government in its role as an employer. And the parties negotiate acceptable solutions to employment-specific issues.

As to the relationship between unions and the workers they represent, outside the collective bargaining arena, effective unions like the SBA provide a wealth of benefits and protections to all sergeants that are in no sense political. For NYPD sergeants, these benefits range from advocating for up-to-date bulletproof vests to promoting the need for long-term healthcare for 9/11 first responders.

The Supreme Court has "long held the view that there is a crucial difference, with respect to constitutional analysis, between the government exercising" its power as a sovereign and the government acting "in the context of public employment."[6] *Abood*'s distinction between political lobbying and collective bargaining tracks the distinction between the government's role as a sovereign and the government's role as an employer. When bargaining with its employees over employment terms, the government acts in its capacity as an employer—not as a sovereign. Thus, the distinction adopted in *Abood* between fees for political activities and fees for collective bargaining remains sound.

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[6] *Engquist v. Or. Dep't of Agric.*, 553 U.S. 591, 598 (2008).

Drawing on the SBA's experience negotiating under New York's collective bargaining statute, this *amicus* brief will demonstrate the employment-specific nature of collective bargaining, as well as the importance to this process of exclusive representation by well-funded public employee unions. Both were legislative policy choices that help insulate collective bargaining from politics.

Fifty years ago, New York chose collective bargaining as the solution to severe public sector labor strife that existed despite a state law banning strikes. The State's legislature enacted a collective bargaining statute—*i.e.,* the Taylor Law—that was deliberately designed to limit collective bargaining to employment issues. New York's legislature also decided to ensure that the government would bargain with well-funded unions that could effectively represent public employees, thereby reducing worker discontent, while also giving the government an exclusive bargaining partner.

By both law and practice, the SBA's collective bargaining with New York City is limited to employment issues and is confined by prior agreements. The City expects its unions to agree to wage increases that are equivalent for all unions and the law restricts unions from bargaining over policy decisions, leaving no room in the negotiations for politically oriented lobbying. Instead, much of these negotiations involve identifying cost savings for the City in order to pay for improved wage and benefits packages, as well as reaching mutually beneficial agreements on the employment aspects of policing policies. To demonstrate that negotiations are limited to employment issues, attached to this

amicus brief is the Memorandum of Agreement setting out the most recent CBA between the SBA and New York City. Beyond negotiating a CBA, the SBA also administers the CBA and pursues grievances under it, making sure the City respects the CBA and treats similarly situated employees the same.

The SBA needs sufficient funding to represent NYPD sergeants adequately, as the New York legislature intended. Such funding allows the SBA to provide robust representation and services to sergeants and their families. This includes effectively representing and supporting the health and well-being of sergeants who face tragic circumstances—such as 9/11 first responders, officers who are killed in the line of duty, and sergeants who are displaced from their homes by storms like Hurricane Sandy. It also permits the SBA to advocate for safe workplaces with state-of-the-art equipment and procedures. If the Court decides that fair share fees are unconstitutional, free riders will be able to avoid paying their fair share of the cost of securing these benefits. Such a result will upset the New York legislature's carefully crafted collective bargaining statute, which seeks to improve employee relations through collective bargaining between government employers and well-funded unions.

ARGUMENT

I. NEW YORK'S COLLECTIVE BARGAINING STATUTE PURPOSEFULLY REGULATES RELATIONS BETWEEN WELL-FUNDED PUBLIC EMPLOYEE UNIONS AND THE GOVERNMENT IN ITS ROLE AS AN EMPLOYER

A. In Enacting the Taylor Law, the New York Legislature Chose to Replace Increasingly Frequent Public Employee Strikes with Structured Collective Bargaining

In New York, public sector collective bargaining is governed by the Taylor Law, which was enacted in 1967.[7] Twenty years before the Taylor Law's enactment, New York had responded to labor unrest with a law that mandated severe punishments for public employee strikers.[8] Despite this, there were 21 public sector strikes between 1947 and 1964.[9] Shortly after a twelve-day transit

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[7] *See* Public Employees' Fair Employment Act, ch. 392, 1967 N.Y. Sess. Laws 393 (codified as amended at N.Y. Civ. Serv. Law §§ 200–214).

[8] *See* Condon-Wadlin Act, ch. 391, 1947 N.Y. Laws 842 (repealed 1967); *see also* Ronald Donovan, Administering the Taylor Law: Public Employee Relations in New York 5–6 (1990); Kristin Guild, *New York State Taylor Law: History*, Cornell Univ., Restructuring L. Gov't, http://www.mildred warner.org/gov-restructuring/special-projects/taylor-law.

[9] Kate Montgomery Swearengen, *Tailoring the Taylor Law: Restoring a Balance of Power to Bargaining*, 44 Colum. J. L. & Soc. Probs. 513, 518 n.24 (2011).

strike shut down New York City in 1966,[10] Governor Nelson Rockefeller created the Committee on Public Employee Relations, which was chaired by Professor George W. Taylor.[11]

The Taylor Committee concluded that collective bargaining would be the best way to prevent public employee strikes, which "introduce[] an alien force in the legislative processes," infringing on legislators' ability to make decisions that are "responsive to the public will."[12] The Committee thus proposed a law that struck a purposeful balance by both creating a formal collective bargaining system while preserving the ban on public employee strikes.[13] The Taylor Law successfully established a comprehensive system to resolve employment disputes between public employees and their government employers so as to avoid strikes.

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[10] *See* Guild, *supra* note 8.

[11] Final Report, Governor's Committee on Public Employee Relations, 9 (March 31, 1966) [hereinafter the "Taylor Report"], http://www.perb.ny.gov/pdf/1966perr.pdf. The Committee was established "to make legislative proposals for protecting the public against the disruption of vital public services by illegal strikes, while at the same time protecting the rights of public employees." *Id.*

[12] *Id.* at 15; *see id.* at 9 ("[P]rotection of the public from strikes in the public services requires the designation of other ways and means for dealing with claims of public employees for equitable treatment.").

[13] *See id.* at 6–8; Donovan, *supra* note 8, at 39–40.

B. The Modern-Day Taylor Law Provides a Carefully Balanced Framework for New York's Public Employees to Bargain with Their Government Employers through Well-Funded Unions

Today, New York's Taylor Law provides a carefully designed collective bargaining system through which public employees negotiate with their employers to resolve labor disputes.[14] The legislature has amended the Law over time to recalibrate the balance between the public interest in uninterrupted government services and public employee rights. The current version of the Taylor Law reflects the legislature's intent to establish a system that is focused on promoting fair employer-employee relations through bargaining between the government and well-funded unions.

1. To ensure uniform and fair employee relations, New York law grants exclusive representation rights and adequate funding to its public sector unions

Through the Taylor Law, New York purposefully structures its relationship with public sector employees so it can ensure uniform and fair employment contracts. To achieve uniformity, the

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[14] The Taylor Law's stated purpose is "to promote harmonious and cooperative relationships between government and its employees and to protect the public by assuring, at all times, the orderly and uninterrupted operations and functions of government." N.Y. Civ. Serv. Law § 200; *see also City of Watertown v. State Pub. Emp't Relations Bd.*, 733 N.E.2d 171, 173 (N.Y. 2000) ("[T]he public policy of [New York] in favor of collective bargaining is strong and sweeping." (internal quotation marks omitted)).

Law provides for public employee unions to serve as "the exclusive representative . . . of all the employees in the appropriate negotiating unit."[15] Exclusive representation is particularly important to public employers because it enables employers to negotiate uniform deals for similarly situated employees.[16] It also promotes the public policy against strikes by placing responsibility on a single union for the conduct of all employees in the bargaining unit.[17]

Because it gives unions exclusive bargaining rights, the Taylor Law also requires unions to fairly represent all employees in their units, regardless of the employees' membership status.[18] However, such fair representation duties create the potential problem of free riders, *i.e.,* workers who choose not to pay their fees knowing that their unions are required to represent them regardless.[19] To reduce this

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[15] N.Y. Civ. Serv. Law § 204; N.Y.C. Admin. Code § 12-305. The Taylor Law has a local option provision that "permits local governments to enact their own counterparts to certain sections of the Taylor Law." *Mayor of N.Y. v. Council of N.Y.*, 874 N.E.2d 706, 708 (N.Y. 2007). Where relevant this brief will provide a parallel citation to the New York City Collective Bargaining Law, N.Y.C. Admin. Code §§ 12-301–12-316, which also governs the SBA's collective bargaining with New York City.

[16] *See* Taylor Report, *supra* note 11, at 29.

[17] *Id.*

[18] *See* N.Y. Civ. Serv. Law § 209-a(2)(c); N.Y.C. Admin. Code § 12-306(b)(3); *Civil Serv. Bar Ass'n, Local 237 v. City of New York*, 474 N.E.2d 587, 590–91 (N.Y. 1984) (noting that the "duty of fair representation on the part of public sector unions [is] predicated on their role as exclusive bargaining representatives").

[19] *See Harris,* 134 S. Ct. at 2656 (Kagan, J., dissenting).

problem and ensure proper funding of public employee unions, the Taylor Law provides a mechanism for those unions to finance their fair representation duties: *i.e.,* recognized unions can collect fair share fees from non-members in an amount equal to membership dues, provided that there is a procedure for non-members to request a refund of the portion of their fees that is used for political or ideological activities.[20] The Taylor Law also gives unions a simple way to collect such fair share fees and membership dues: *i.e.,* employees may authorize their employers to deduct such fair share fees or membership dues from their paychecks and pay them directly to the union.[21] Thus, the New York legislature purposefully crafted a collective bargaining law that provides for exclusive but fair representation of public employees and ensures that public sector unions are well funded so they can effectively bargain with government employers.

2. New York law limits collective bargaining to the terms and conditions of employment

New York law expressly limits collective bargaining to employment issues. The Taylor Law specifically provides for collective bargaining over the "terms and conditions of employment."[22] The Law defines "terms and conditions of employment" to mean "salaries, wages, hours and other terms and

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[20] N.Y. Civ. Serv. Law § 208(3); N.Y.C. Admin. Code § 12-307(a).

[21] N.Y. Civ. Serv. Law §§ 201(2), 208; N.Y.C. Admin. Code § 12-307(a).

[22] N.Y. Civ. Serv. Law §§ 203, 204.

conditions of employment."[23] Thus, the collective bargaining forum is designed for negotiating employment issues—not policy matters.

While promoting negotiation over employment issues, the Taylor Law removes employer policy decisions from the bargaining table. Under the Law, "[a] public employer's decisions are not bargainable as terms and conditions of employment where they are inherently and fundamentally policy decisions relating to the primary mission of the employer."[24] In addition, New York City further restricts collective bargaining with its unions by explicitly enumerating issues that are not within the scope of collective bargaining.[25] By restricting negotiations to employment terms, New York law insulates collective bargaining from the political realm.

3. New York's Public Employee Relations Board is authorized to refer bargaining parties to binding arbitration, insulating collective bargaining from political decision makers

The Taylor Law also created the Public Employment Relations Board ("PERB" or the "Board"), which is empowered to resolve impasses in

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[23] *Id.* § 201(4). Benefits from the public retirement system are specifically excluded. *Id.*

[24] *Cty. of Erie v. State of N.Y. Pub. Emp't Relations Bd.*, 903 N.E.2d 1163, 1165-66 (N.Y. 2009) (internal quotation marks and citation omitted) (alteration adopted).

[25] *See* N.Y.C. Admin. Code § 12-307(b). These issues include determining the standards of selection for employment, taking disciplinary action, relieving employees from duty, and maintaining efficient government operations. *Id.*

public sector collective bargaining, including through binding arbitration.[26] Either party may request the Board's assistance in resolving an alleged impasse.[27] PERB determines whether negotiating parties have reached an impasse and helps resolve that impasse.[28]

For police and other uniformed unions, once PERB determines that an impasse exists, the Taylor Law authorizes the Board first to appoint a mediator to help the parties resolve the dispute.[29] If mediation fails to result in an agreement, the Board must refer the dispute to an arbitration panel consisting of one member chosen by the union, one member selected by the employer, and a third member jointly appointed by the two sides.[30] The panel's rulings are final and binding.[31]

Through PERB's impasse resolution process, the Taylor Law insulates collective bargaining from the political process. As a result, public employees and government employers are able to focus their collective bargaining on employment issues.

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[26] N.Y. Civ. Serv. Law § 205; *see Patrolmen's Benevolent Ass'n of N.Y. v. City of New York*, 767 N.E.2d 116, 118 (N.Y. 2001).

[27] N.Y. Civ. Serv. Law §§ 209(3), (4).

[28] *Id.*

[29] *Id.* § 209(4)(a). New York City's police and fire unions may use the PERB rather than the City's counterpart board. *See id.* § 212(3).

[30] *Id.* § 209(4)(b–c).

[31] *Id.* § 209(4)(c)(vii). For civilian unions, in lieu of binding arbitration, the Taylor Law authorizes PERB to appoint a fact-finding board. Id. § 209(3)(b). Those findings of fact are submitted to the legislature, which then may take action. *Id.* § 209(3)(e–f).

4. Both the Taylor Law's ban on public employee strikes and its requirement that the government respect expired CBAs while negotiating new CBAs foster employment-focused negotiations

The Taylor Law limits the options of the negotiating parties, further isolating employment as the singular focus of collective bargaining. Public sector unions are limited because the Law bans strikes[32] and authorizes public employers to punish violating employees by deducting from their compensation double their daily salary.[33] The Taylor Law also provides that unions who violate the prohibition lose their right to be paid membership dues and fair share fees directly from the employer.[34] The Taylor Law further permits public employers to seek injunctions against strikes and punishments for violating those injunctions.[35] This robust strike ban encourages unions to focus on employment-related issues when negotiating with government employers.

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[32] *See id.* § 210; N.Y.C. Admin. Code § 12-312(e).

[33] N.Y. Civ. Serv. Law § 210(2)(f).

[34] *Id.* §§ 210(3)(a), (f).

[35] *Id.* § 211. Although strikes are rare under the Taylor Law, such punishments have included significant fines and jail time. *See, e.g.*, *N.Y.C. Transit Auth. v. Transp. Workers Union of Am., AFL-CIO*, 822 N.Y.S.2d 579, 586 (N.Y. App. Div. 2006) (fining New York City transit workers' union $2,5 million for a two-and-a-half day strike); *N.Y.C. Transit Auth. v. Transp. Workers Union of Am.*, No. 37469/05, 2006 N.Y. Misc. LEXIS 4046, at *21 (N.Y. Sup. Ct. Apr. 26, 2006) (sentencing the transit workers' union president to a 10-day jail term), *aff'd in part*, 37 A.D.3d 679 (N.Y. App. Div. 2007).

In turn, the Taylor Law limits government employers by requiring that the government "continue all the terms of an expired agreement until a new agreement is negotiated."[36] This requirement "preserve[s] the status quo in situations where a CBA between a public employer and its employees has expired and a new one has yet to be agreed upon."[37] This frees the parties from the possibility of employer manipulation of wages, hours, or benefits during negotiations, thereby focusing them on bargaining over the employment issues at hand.

5. Striking down fair share fees will upset the Taylor Law's carefully balanced employee relations scheme

The New York legislature has purposefully crafted and periodically recalibrated the Taylor Law so as to provide a process that insulates collective bargaining from politics and promotes employment-focused collective bargaining between well-funded public employee unions and government employers. Reducing that funding will upset this carefully constructed statute by weakening the public employee unions and their ability to represent their members. For New York, at stake is 50 years of relative labor peace and rarely interrupted public services.

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[36] N.Y. Civ. Serv. Law § 209-a(1)(e). *See* Richard E. Casagrande et al., *Public Sector Bargaining in New York: Examining PERB's Sunset Doctrine in a New Light*, 59 Alb. L. Rev. 481, 485 (1995) (describing the requirement to honor expired CBAs as a "quid pro quo for the prohibition against public employee strikes").

[37] *City of Yonkers v. Yonkers Fire Fighters, Local 628*, 988 N.E.2d 481, 484 (N.Y. 2013) (alteration adopted).

II. THE SBA'S EXPERIENCE AT THE BARGAINING TABLE CONFIRMS THAT THE TAYLOR LAW FOSTERS A SYSTEM THAT IS LIMITED TO EMPLOYMENT RELATIONS

A. Unions and Government Employers Bargain, Not to Set Policy, but to Determine the Employment Rules That Are Necessary to Implement Those Policies

In New York, collective bargaining is distinct from politically oriented lobbying. The Taylor Law explicitly limits collective bargaining to the "terms and conditions of employment."[38] Policy decisions, on the other hand, are not mandatory subjects of bargaining.[39] Rather, during collective bargaining, public employee unions and employers negotiate mutually beneficial solutions for implementing the employment impacts of these policy decisions.[40]

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[38] N.Y. Civ. Serv. Law §§ 203, 204.

[39] *See Cty. of Erie*, 903 N.E.2d at 1165-66.

[40] *See id.* (noting the impacts of policy decisions are not exempt from bargaining); *see also City of Watertown*, 733 N.E.2d at 174–175 (holding that, while a city's decisions under a statute were not mandatory bargaining subjects, the procedures for whether and how officers could contest those decisions were mandatory subjects); N.Y.C. Admin. Code § 12-307(a) (listing public employer decisions that are not within the scope of collective bargaining, but providing that "questions concerning the practical impact [of those decisions] on terms and conditions of employment . . . are within the scope of collective bargaining").

For example, by law, New York City must pay for its employees' health insurance costs.[41] As a result, collective bargaining is limited to negotiating the specifics of the health insurance plans, such as premium payments and co-pays.[42] In its most recent CBA, the SBA agreed to set up a subcommittee to generate cost savings related to retiree health coverage.[43]

The NYPD's policy decision to adopt community policing is another example of the government setting policy and working out the employment details during collective bargaining. Community policing (known in New York City as "neighborhood policing") requires sergeants to be available to community members, whether they are on duty or not.[44] Through bargaining, the City and the SBA agreed to employment rules that would bring the NYPD into compliance with the requirements of the Fair Labor Standards Act of 1938 ("FLSA"),[45] while supporting the NYPD's

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[41] N.Y.C. Admin. Code § 12-126.

[42] *See* "2011–2018" Sergeants Benevolent Association Memorandum of Agreement [attached hereto as Appendix], 14a–18a (agreeing to work with the City to achieve savings of $3.4 billion in healthcare costs across all of the City's unions). For the Court's benefit, the Memorandum of Agreement between the SBA and New York City setting out the amendments to the predecessor CBA that constitutes the new CBA is attached as an appendix to this *amicus* brief.

[43] *See* App. § 9.

[44] *See* William J. Bratton, The NYPD Plan of Action and the Neighborhood Policing Plan, 4 (2015) http://www.nyc.gov/html/nypd/html/home/POA/pdf/Plan-of-Action.pdf.

[45] Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201–219.

community policing initiative.[46] As these examples show, public employee unions bargain with their government employers, not to lobby for policy changes, but to establish the employment-related details of policies that have already been adopted.

B. Pattern Bargaining Limits the Scope of Labor Negotiations

In practice, collective bargaining in New York is a limited negotiation between public employee unions and employers aimed at updating previous CBAs.[47] The City engages in what is known as "pattern bargaining" in order to streamline its negotiations with 144 unions that represent 337,000 public employees.[48] This means that the first union to reach an agreement establishes a pattern of wage increases during the agreement's term that other unions are expected to respect in their subsequent negotiations.[49] This practice restricts unions from bargaining for better deals than the pattern has set. At a minimum, the pattern sets a baseline, requiring

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[46] *See* App. § 13.

[47] As explained above, expired CBAs must be respected until there are new agreements. *See*, *supra*, Section I.B.4.

[48] *See* City of New York Office of Labor Relations, *State of the Agency 2014–2016*, 11–14 [hereinafter the "OLR Report"], https://www1.nyc.gov/assets/olr/downloads/pdf/OLR/2014-2015-State-of-the-Agency-OLR.pdf.

[49] *See* Citizens Budget Commission, *7 Things New Yorkers Should Know About Municipal Labor Contracts in New York City*, 3 (May 2013), https://cbcny.org/sites/default/files/REPORT_7ThingsUnions_05202013.pdf. In New York City there is one pattern for uniformed officers and another for civilian employees. *See id.*

unions to offer cost savings in other parts of the CBA in order to justify more generous wage increases and benefits enhancements.[50]

For example, the most recent pattern in New York City included no wage increase in the first year of the CBA, followed by increases starting in the second year.[51] The SBA thus had to negotiate cost-saving measures in other parts of its agreement in exchange for receiving a pay increase six months earlier than had been the pattern.[52] The most important cost-saving measure specific to the SBA was an agreement for sergeants to arbitrate future FLSA claims against the City.[53] Sergeants had litigated with the City under the FLSA for nearly a decade before the Second Circuit agreed that sergeants were entitled to be paid overtime for their off-the-clock work.[54] Requiring future arbitration of such claims saved the City significant time and expense. The SBA also agreed to other cost-saving measures, including a reduction in welfare fund contributions,[55] as well as delayed increases to longevity payments.[56]

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[50] *See id.*

[51] *See* OLR Report, *supra* note 48, at 13–14.

[52] *See id.* at 14; App. § 4.a(i).

[53] *See* OLR Report, *supra* note 48, at 14; App. § 13.V.

[54] *See Mullins v. City of New York*, 653 F.3d 104, 105–06 (2d Cir. 2011).

[55] *See* App. § 7.

[56] *See* App. § 5. Longevity payments are salary bumps based on length of service.

Collective bargaining is more complex than is described above. However, the core negotiation over cost savings in exchange for wage increases demonstrates that collective bargaining is narrowly focused on employment issues—not political ones.

C. Other Collectively Bargained Initiatives Are Further Removed from Politics.

In its most recent agreement, the SBA negotiated various changes that were only relevant to the government's role as an employer, many of which were cost-neutral and intended to provide sergeants with greater flexibility, improve morale, and effectuate the City's diversity initiatives. For example, the SBA and the City agreed to a pilot program for sergeants to exchange work days with each other.[57] Another pilot program allows sergeants to donate accrued leave days to co-workers who have exhausted their leave due to medical emergencies.[58] The SBA negotiated a third pilot program permitting pairs of sergeants who are married or domestic partners to coordinate their shifts to accommodate child care needs.[59]

In the SBA's experience, collective bargaining is limited to negotiations over employment issues. Lobbying and policy-making occur outside of this process and are therefore distinct from it.

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[57] *See* App. § 10.

[58] *See* App. § 11.

[59] *See* App. § 12.

III. BY BEING MORE THAN JUST A NEGOTIATOR, THE SBA PROVIDES SERGEANTS WITH AN ARRAY OF SERVICES AND A HELPING HAND IN TIMES OF NEED

A. The SBA's Work on behalf of Sergeants and Their Families in Times of Need Demonstrates the Importance of Well-Funded Unions

The SBA views its role as protecting the overall well-being of NYPD sergeants—not just negotiating for their labor contracts. This includes helping sergeants and their families through trying times. Two noteworthy examples are the SBA's work on behalf of 9/11 first responders as well as in the aftermath of Hurricane Sandy. Among its efforts for 9/11 rescue and recovery workers, the SBA educated the public about rare cancers that are linked to 9/11 exposure, including successfully demanding that the NYPD release medical records for a study of that link.[60] Further, in the aftermath of Hurricane Sandy, the SBA delivered food and supplies to displaced sergeants and helped them re-settle their families, hire contractors, buy new furniture, apply for federal funding, and make insurance claims.

The SBA assists sergeants in need on a daily basis. It administers a Widows and Children's Fund for the families of deceased sergeants, which pays for

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[60] Ed Mullins, *SBA President's Message*, Frontline (N.Y.C. Sergeants Benevolent Association), 2012, at 3, 24, http://sbanyc.net/documents/extras/frontline/magazine201205.pdf.

their healthcare.[61] The SBA also provides support to sergeants who are caring for sick family members. NYPD sergeants can turn to the SBA no matter their problem, and, as a well-funded union, the SBA can use its resources to assist them.

B. Because It Is Well-Funded, the SBA Is Able to Provide Other Critical Services to Its Bargaining Unit

Among the SBA's functions outside of collective bargaining, are the legal representation of sergeants, and the administration of bargained-for benefits. The SBA provides representation for sergeants whenever they need it, including: supporting sergeants' due process rights to representation anytime they are involved in a critical incident, internal affairs review, or disciplinary proceeding; and bringing litigation on behalf of sergeants, such as the FLSA litigation mentioned above.[62] The SBA also administers bargained-for prescription drug plans, annuity and life insurance plans, and a wellness program that has been effective in reducing health issues linked to the stress of the sergeants' jobs.

Moreover, the SBA monitors the City's compliance with the negotiated CBA. As ambiguities and interpretation questions arise, the SBA makes sure that the agreement is administered as the parties intended it. The SBA seeks to ensure that the agreement is uniformly applied to all sergeants,

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[61] Widows and Children's Fund, https://sbanypd.nyc/donate/widows-and-childrens-fund/ (last visited Jan 3, 2018).

[62] *See*, *supra*, Section II.B.

so that similarly situated sergeants are treated the same. When the parties cannot reach an agreement, the SBA represents sergeants in bringing grievances.[63]

The SBA further serves as an advocate for all NYPD sergeants. The SBA brings attention to issues including: whether sergeants' protective gear, such as bullet proof vests, are up-to-date; whether sergeants are trained in state-of-the-art law enforcement techniques; and whether NYPD policies are implemented so as to reduce the likelihood that sergeants are put in harm's way. Through its advocacy efforts, the SBA works to ensure that NYPD sergeants have the safest and most appropriate workplace that is conducive to their role as front line officers.

This work is not political in nature—rather, it simply protects the well-being of NYPD sergeants. Removing some of the SBA's funding by enabling free riders to game the system would hamper the union's efforts to support the overall well-being of NYPD sergeants. The SBA would thus become a weaker counterparty to the government and a less able representative of the sergeants. This would upset the legislature's carefully balanced collective bargaining statute, which relies on well-funded unions representing and supporting public employees in order to achieve labor peace and

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[63] *See Bd. of Educ. v. Ambach*, 517 N.E.2d 509, 512 (N.Y. 1987) ("Grievance procedures . . . . enable the union to participate in administering the contract it negotiated; they aid the employer by channeling grievances into one forum providing one set of remedies; and they permit efficient protection of employee rights.").

uninterrupted public safety services. NYPD sergeants put their lives on the line every day. They are entitled to the sort of comprehensive representation that the SBA provides without fear that free riders will take unfair advantage of these benefits without paying for them.

CONCLUSION

For the foregoing reasons and those set forth in the briefs of Respondents, this Court should affirm the decision of the Court of Appeals.

Respectfully submitted.

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New York City Sergeants
Benevolent Association

January 19, 2018

APPENDIX

"2011 – 2018" Sergeants Benevolent Association Memorandum of Agreement ("SBA MOA")

MEMORANDUM OF AGREEMENT made this 24th day of February, 2015, *("2011 – 2018 Sergeants Benevolent Association Memorandum of Agreement")* by and between the Sergeants Benevolent Association ("the Union") and the City of New York ("the Employer");

WITNESSETH

WHEREAS, the undersigned parties desire to enter into collective bargaining agreements, including this *SBA MOA* and agreements successor to the existing unit agreement expiring on August 29, 2011, to cover the employees represented by the Union ("Employees"); and

WHEREAS, the undersigned parties intend by this *SBA MOA* to cover all cost-related matters and to incorporate the terms of this *SBA MOA* into the Successor Unit Agreement,

NOW, THEREFORE, it is jointly agreed as follows:

Section 1. Term.

The term of the Successor Unit Agreement shall be August 30, 2011 through August 29, 2018, eighty-four (84) months from the expiration date of the Predecessor Unit Agreement.

Section 2. Continuation of Terms.

All terms of the Predecessor Unit Agreement shall be continued except as modified pursuant to this *SBA MOA*.

Section 3. Prohibition of Further Cost-Related Demands.

No party to this *SBA MOA* shall make further cost-related demands during the term of this *SBA MOA*.

Section 4. General Wage Increase

a. The general increases, effective as indicated, shall be:

(i) Effective August 30, 2011, Employees shall receive a rate increase of 1.0%.

(ii) Effective February 28, 2013, Employees shall receive an additional rate increase of 1.0%.

(iii) Effective February 28, 2014, Employees shall receive an additional rate increase of 1.0%.

(iv) Effective February 28, 2015, Employees shall receive an additional rate increase of 1.0%.

(v) Effective February 29, 2016, Employees shall receive an additional rate increase of 1.5%.

(vi) Effective March 30, 2017, Employees shall receive an additional rate increase of 2.5%.

(vii) Effective March 30, 2018, Employees shall receive an additional rate increase of 3.0%.

b. The increases provided for in this Section 4 a. shall be calculated as follows:

(i) the increases in Section 4a. (i) shall be based upon the base rates (which shall include salary or incremental schedules) in effect on August 29, 2011.

(ii) the increases in Section 4a. (ii) shall be based upon the base rates (which shall include salary or incremental schedules) in effect on February 27, 2013.

(iii) the increases in Section 4a. (iii) shall be based upon the base rates (which shall include salary or incremental schedules) in effect on February 27, 2014.

(iv) the increases in Section 4a. (iv) shall be based upon the base rates (which shall include salary or incremental schedules) in effect on February 27, 2015.

(v) the increases in Section 4a. (v) shall be based upon the base rates (which shall include salary or incremental schedules) in effect on February 28, 2016.

(vi) the increases in Section 4a. (vi) shall be based upon the base rates (which shall include salary or incremental schedules) in effect on March 29, 2017.

(vii) the increases in Section 4a. (vii) shall be based upon the base rates (which shall include salary or incremental schedules) in effect on March 29, 2018.

c. The increases provided in this Section 4 shall be applied to the base rates and salary grades fixed for the applicable title.

Section 5. Longevity Payments

Longevity payments will be increased with the increases listed in Section 4a. (iv)-(vii).

Section 6. Health Savings and Welfare Fund Contributions

The May 5, 2014 Letter Agreement regarding health savings and welfare fund contributions between the City of New York and the Municipal Labor Committee, will be attached as an Appendix, and is deemed part of this *SBA MOA* and incorporated in the Successor Unit Agreement.

Section 7. Welfare Fund Contributions

Effective May 1, 2015, welfare fund contributions for both active and retirees will be decreased by $200 per annum.

Section 8. Terminal Leave Lump Sum Payment

The resolution of the Board of Estimate of the City of New York dated June 27, 1957, states the following:

> *Members of the Force shall be granted terminal leave with pay upon retirement not to exceed one month for every ten years of service, pro-rated for a fractional part thereof provided, however, that no terminal leave shall be granted to an employee against whom departmental disciplinary charges are pending.*

Effective May 1, 2015, the parties agree that such employees as described in the Resolution above and are entitled to payment and who are members of the Union shall now be entitled to voluntarily choose the option of a one-time lump

sum payment as their terminal leave benefit in lieu of their current terminal leave benefit prior to retirement. Such payments shall be made as soon as practicable after retirement.

In the event that a change in legislation is needed to effectuate this agreement, the parties agree to jointly support the necessary legislation to implement the terms of this Section 8.

Section 9. Retiree Health Sub-Committee

There shall be a sub-committee with representatives of both the City and the Union to meet and discuss issues of health coverage for employees who retire prior to the age of 55 and have health benefits coverage from another employer. The parties shall share in the savings generated. The parties may agree to expand their discussion of issues regarding retiree health subject to mutual agreement.

Section 10. Exchange of Work Days (Mutuals)

Effective the date of ratification of this Agreement, the Department shall implement a Pilot Program for twelve (12) months that will permit sergeants of the same assigned command performing similar duties to exchange tours voluntarily when there is no interference with police service and provided that the program does not generate any FLSA overtime. This Pilot Program is subject to the following provisions:

1. Sergeants are not permitted to perform two consecutive tours. (e.g. perform duty on a third platoon followed by a first platoon).

2. The exchanged tours may be on the same calendar day or on different calendar days (including RDOs).
3. The mutual must be completed within one FLSA cycle. (Tours cannot be exchanged from different FLSA cycles).
4. The mutual tour itself cannot generate overtime. A sergeant may receive pre-tour or post-tour overtime, but not overtime for performing the mutual tour (including a mutual tour on a RDO).
5. Both sergeants must be qualified to perform the necessary duty.
6. All mutual requests must be submitted at least five (5) days in advance and approved by the Commanding Officer. Requests for a mutual will not be unreasonably denied.
7. Once a mutual has been approved by the Commanding Officer, both sergeants are scheduled to work the mutual tour.
8. An absence on the first tour of a mutual does not void the second mutual tour. (The sergeant is still scheduled to perform the second mutual tour).
9. There is no Administrative Sick on a mutual tour. (Sergeant must report Regular Sick).
10. Detective Rescheduling Rules are triggered by an absence on a mutual tour and permits the Department to reschedule any sergeant without 24 hour notice or

the payment of contractual overtime to cover the mutual tour on any sergeant's scheduled work day.

Section 11. Annual Leave Donation Program

A. The City of New York and the Sergeants Benevolent Association, in order to assist uniformed members of the service in the rank of sergeant who have exhausted all available leave and need to take a prolonged absence from duty due to the medical emergency of an immediate family member, have agreed to implement a Pilot Program entitled "Annual Leave Donation Program," which shall expire on August 29, 2018. Sergeants who anticipate using a significant amount of leave to resolve issues caused by a major illness or medical condition of an immediate family member, may apply. The Pilot Program will be sponsored by the Department.

B. All sergeants are eligible to participate as donors or recipients. Donations of accrued annual leave must be made in full day increments and will be debited from the donor's annual leave balance after review of the form and credited to the annual leave bank as full days. Only accrued annual vacation leave may be donated. Lost time, chart days, terminal leave, or any time which is not vacation is not eligible for this program. All donations of accrued annual leave are voluntary. Donations cannot be directed to a particular sergeant. Donations will be included in a pool of annual leave to be dispersed by a joint Labor/Management

panel. Donations into the "Annual Leave Donation Program" are not permitted in the calendar year of a sergeant's separation from the Department, and any such donations shall be retroactively withdrawn and returned to the individual.

C. A sergeant must have donated at least one vacation day to the pool to be eligible for a disbursement during the life of the Pilot Program. A sergeant may donate a maximum of five vacation days per calendar year. A sergeant may receive a maximum disbursement equal to one year's vacation time that would be accrued by the sergeant in the same year. In cases of extreme hardship, the Labor/Management Panel may waive the required donation to the "Annual Leave Donation Program" prior to a disbursement, as well as, the maximum disbursement and donation limits.

D. All decisions concerning the implementation of the "Annual Leave Donation Program" and the eligibility of the donor/donee will be mutually agreed upon by the Labor/Management panel. All decisions must comply with IRS Revenue Ruling 90-29. The decisions of the Labor/Management panel are final and not subject to review, appeal or any grievance procedures. The Labor/Management panel shall consist of four members, two members each from the SBA and the Department. A majority vote is necessary to receive a disbursement from the program.

E. This "Annual Leave Donation Program" shall only be implemented in accordance with IRS Revenue Ruling 90-29 and as required by law.

Section 12. Coordination of Shifts with Spouses and/or Registered Domestic Partners

In an effort to assist sergeants who are experiencing child care/family issues and have a member of the department who is either their spouse or a registered domestic partner, the Department shall upon ratification of this Agreement implement a Pilot Program for twelve (12) months that will permit sergeants to request a change of tour within their assigned command or request transfer to a command with an opening on their desired tour. Sergeants requesting said accommodations must submit a UF 49 to their commanding officer detailing the reasons for the accommodation for a tour change within their command or submit a UF 57 to their commanding officer for submission to the Personnel Bureau detailing the reasons for the accommodation. The sergeant's request will not be unreasonably denied.

Section 13. Fair Labor Standards Act Issues

Whereby, the parties intend to prevent potential future claims under the federal Fair Labor Standards Act ("FLSA"), the parties hereby agree as follows:

I. Right to Schedule Chart Time

(a) The NYPD shall have the right to schedule employee chart time in order to prevent sergeants from exceeding the FLSA overtime threshold in a 28-day cycle. This

provision does not waive any rights the NYPD has to schedule chart time in the absence of an agreement.

(b) The Union agrees to withdraw, with prejudice, the following cases and/or actions: Chart Time Improper Practice Petition (BCB-4086-14).

II. Staggered Tours

(a) The NYPD shall have the right to stagger the scheduled starting and finishing times of sergeants in order to prevent sergeants from performing off-the-clock work before the scheduled beginning of their tour. This provision does not waive any rights the NYPD has to alter starting and finishing times in the absence of an agreement.

(b) Sergeants are not permitted to perform any work before their scheduled starting time or after their scheduled finishing time without the prior approval of a superior officer.

III. Off-Duty Work

(a) Sergeants assigned to Detective Track Commands, as defined in Administrative Guide Procedure 320-35 and Operations Order No. 19 of 2011, shall receive a stipend of $705 per year as compensation for up to one and one-half (1.5) hours of work each week performed off-duty via phone, e-mail, text, or in any other manner. The election of compensatory time is not available for off-duty work.

(b) No sergeant assigned to Detective Track Commands shall spend more than one and one-half (1.5) hours per week on off-duty work without the prior approval of a superior officer. In the event this limit is exceeded under circumstances that made it impossible to obtain prior approval (e.g., as a result of an emergency), the sergeant must so notify a superior officer within 24 hours thereafter.

(c) No sergeant assigned to any non-Detective Track Command shall spend any time on off-duty work without the prior approval of a superior officer. If a sergeant assigned to a non-Detective Track Command is contacted off-duty by a superior officer such approval is presumed.

(d) Time spent receiving notifications will not qualify as off-duty work under this section.

IV. Definition of a Superior Officer

For purposes of these paragraphs, a "superior officer" shall mean a person superior to that sergeant in that sergeant's chain of command.

V. Resolution of Disputes

(a) All claims arising from the application of the matters described in paragraphs II(b) and III, above, alleging violations of the federal Fair Labor Standards Act involving claims of off-duty work or pre or post-shift work, and all other claims involving the interpretation or application of these paragraphs, shall be subject to the Agreement's

grievance and arbitration procedure as the final, binding, sole and exclusive remedy for such violations, and employees covered by this Agreement shall not file suit or seek relief in any other forum. The parties will take all steps necessary to ensure that claims within the scope of this paragraph are resolved pursuant to and in accordance with the grievance and arbitration provision of the collective bargaining agreement.

(b) Arbitrators shall apply applicable law as it would be applied, and shall have such powers as would be exercised, by the appropriate court in rendering decisions on the claims covered by paragraph V(a), above.

(c) The claims subject to resolution in accordance with paragraph V(a), above, shall not be arbitrated by way of a group grievance. All claims between a member and the Department must be decided individually.

(d) The arbitrator shall have no authority or jurisdiction to process, conduct, or rule upon any group grievances, or to consolidate any individual claims in one proceeding absent mutual consent of the parties hereto.

V. Prohibition on Use in Any Proceeding

Other than the up to 1.5 hours per week of off-duty work described in paragraph III(a), nothing contained in paragraph III shall be used in any proceeding to establish the compensability of time worked.

Section 14. Conditions of Payment.

The general wage increases provided for in Section 4 of the *SBA MOA* shall be payable as soon as practicable upon execution of the *SBA MOA* and after the effective date of such increases.

Section 15. Approval of Agreements.

This *SBA MOA* and the successor unit agreement are subject to approval in accordance with applicable law.

Section 16. Incorporation of Certain Provisions into Other Agreements.

All applicable provisions of this *SBA MOA* shall be incorporated into the *Successor Unit Agreement*.

Section 17. Savings Clause.

In the event that any provision of this *SBA MOA* is found to be invalid, such invalidity shall not impair the validity and enforceability of the remaining provisions of this *SBA MOA*.

WHEREFORE, we have hereunto set our hands and seals this __ day of February 2015.

FOR THE CITY OF NEW YORK

By: /s/_____
ROBERT W. LINN
Commissioner of Labor Relations

FOR THE SERGEANTS BENEVOLENT ASSOCIATION

By: /s/_____
EDWARD MULLINS
President

OFFICE OF LABOR RELATIONS

40 Rector Street, New York, N.Y. 10006-1705
nyc.gov/olr

[LETTERHEAD]

[Seal of the City of New York]

February 24, 2015

Edward D. Mullins, President
Sergeants Benevolent Association
31 Worth Street
New York, NY 10013

RE: SBA MOA for the period August 30, 2011 to August 29, 2018

Dear Mr. Mullins:

This letter confirms the parties' mutual understanding that the Sergeants Benevolent Association ("SBA"), in adopting the May 5, 2014 Letter Agreement regarding health savings and welfare fund contributions between the City of New York and the Municipal Labor Committee ("MLC"), does not waive any rights the SBA has regarding future MLC Agreements, or any rights the SBA has to negotiate any healthcare or welfare fund matters in future bargaining with the City of New York.

If the above accords with your understanding, kindly execute the signature line provided below.

Sincerely,
/s/_____
ROBERT W. LINN

ACCEPTED AND AGREED ON BEHALF OF SBA

BY: /s/_____
Edward Mullins, SBA President

THE CITY OF NEW YORK
OFFICE OF LABOR RELATIONS

40 Rector Street, New York, NY 10006-1705
http://nyc.gov/olr

[LETTERHEAD]

[Seal of the City of New York]

ROBERT W. LINN
Commissioner

May 5, 2014

Harry Nespoli
Chair, Municipal Labor Committee
125 Barclay Street
New York, NY 10007

Dear Mr. Nespoli:

This is to confirm the parties' mutual understanding concerning the following issues:

1. Unless otherwise agreed to by the parties, the Welfare Fund contribution will remain constant for the length of the successor unit agreements, including the $65 funded from the Stabilization Fund pursuant to the 2005 Health Benefits Agreement between the City of New York and the Municipal Labor Committee.

2. Effective July 1, 2014, the Stabilization Fund shall convey $1 Billion to the City of New York to be used to support wage increases and other economic items for the current round of collective bargaining (for the period up to and including fiscal year 2018). Up to an additional total amount of $150 million will be available over the four year period from the Stabilization Fund for the welfare funds, the allocation of which shall be determined

by the parties. Thereafter, $ 60 million per year will be available from the Stabilization Fund for the welfare funds, the allocation of which shall be determined by the parties.

3. If the parties decide to engage in a centralized purchase of Prescription Drugs, and savings and efficiencies are identified therefrom, there shall not be any reduction in welfare fund contributions.

4. There shall be a joint committee formed that will engage in a process to select an independent healthcare actuary, and any other mutually agreed upon additional outside expertise, to develop an accounting system to measure and calculate savings.

5. The MLC agrees to generate cumulative healthcare savings of $3.4 billion over the course of Fiscal Years 2015 through 2018, said savings to be exclusive of the monies referenced in Paragraph 2 above and generated in the individual fiscal years as follows: (i) $400 million in Fiscal Year 2015; (ii) $700 million in Fiscal Year 2016; (iii) $1 billion in Fiscal Year 2017; (iv) $1.3 billion in Fiscal Year 2018; and (v) for every fiscal year thereafter, the savings on a citywide basis in health care costs shall continue on a recurring basis. At the conclusion of Fiscal Year 2018, the parties shall calculate the savings realized during the prior four-year period. In the event that the MLC has generated more than $3.4 billion in cumulative healthcare savings during the four-year period, as determined by the jointly selected healthcare actuary, up to the first $365 million of such additional savings shall be credited proportionately to each union as a one-time lump sum

pensionable bonus payment for its members. Should the union desire to use these funds for other purposes, the parties shall negotiate in good faith to attempt to agree on an appropriate alternative use. Any additional savings generated for the four-year period beyond the first $365 million will be shared equally with the City and the MLC for the same purposes and subject to the same procedure as the first $365 million. Additional savings beyond $1.3 billion in FY 2018 that carry over into FY 2019 shall be subject to negotiations between the parties.

6. The following initiatives are among those that the MLC and the City could consider in their joint efforts to meet the aforementioned annual and four-year cumulative savings figures: minimum premium, self-insurance, dependent eligibility verification audits, the capping of the HIP HMO rate, the capping of the Senior Care rate, the equalization formula, marketing plans, Medicare Advantage, and the more effective delivery of health care.

7. Dispute Resolution

   a. In the event of any dispute under this agreement, the parties shall meet and confer in an attempt to resolve the dispute. If the parties cannot resolve the dispute, such dispute shall be referred to Arbitrator Martin F. Scheinman for resolution.

   b. Such dispute shall be resolved within 90 days.

c. The arbitrator shall have the authority to impose interim relief that is consistent with the parties' intent.

d. The arbitrator shall have the authority to meet with the parties at such times as the arbitrator determines is appropriate to enforce the terms of this agreement.

e. If the parties are unable to agree on the independent health care actuary described above, the arbitrator shall select the impartial health care actuary to be retained by the parties.

f. The parties shall share the costs for the arbitrator and the actuary the arbitrator selects.

If the above accords with your understanding and agreement, kindly execute the signature line provided.

Sincerely,

/s/_____
Robert W. Linn
Commissioner

Agreed and Accepted on behalf of the Municipal Labor Committee

BY: /s/_____
Harry Nespoli, Chair