

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

PATRICK J. LYNCH, as President of the Police
Benevolent Association of the City of New York, Inc., on
behalf of himself and all police officers employed by the
City of New York, and THE POLICE BENEVOLENT
ASSOCIATION OF THE CITY OF NEW YORK, INC.,

Plaintiffs-Petitioners,

-against-

THE CITY OF NEW YORK and MICHAEL
McSWEENEY, in his official capacity as City Clerk of
the City of New York,

Defendants-Respondents,

-and-

THE NEW YORK CITY CIVILIAN COMPLAINT
REVIEW BOARD,

Nominal Defendant-Respondent.

Index. No. _____

**ORAL ARGUMENT
REQUESTED**

VERIFIED ARTICLE 78 & DECLARATORY JUDGMENT PETITION

MICHAEL T. MURRAY
Office of the General Counsel of
the Police Benevolent
Association of the City of New
York, Inc.
125 Broad Street
New York, New York 10004

GOLENBOCK EISEMAN ASSOR BELL &
PESKOE LLP
711 Third Avenue, 17th Floor
New York, New York 10017

Attorneys for Plaintiffs-Petitioners

Of Counsel:
Christopher T. Luise

Plaintiffs-Petitioners Patrick J. Lynch (“Lynch”), as President of the Police Benevolent Association of the City of New York, Inc. (the “PBA”), on behalf of himself and all police officers employed by the City of New York, and the PBA (collectively, “Petitioners”), for their Verified Article 78 & Declaratory Judgment Petition (“Petition”) against defendants-respondents the City of New York (“City”) and Michael McSweeney, in his official capacity as City Clerk (collectively, “Respondents”), and nominal defendant-respondent the New York City Civilian Complaint Review Board (“CCRB” or “Nominal Respondent”), respectfully allege as follows:

PRELIMINARY STATEMENT

1. Respondents violated the Municipal Home Rule Law (“MHRL”), and have undermined core principles of New York City government that vest the budget-setting power in the City Council and other elected officials, by submitting to public vote a fatally flawed ballot measure (“Ballot Question #2”) that included as a purported Charter amendment a new provision tying CCRB’s budget to the budget of the New York City Police Department (“NYPD”). There is no legal authority for Respondents to bypass the procedures set forth in the Charter and Administrative Code for determining the budget each year by the Mayor and City Council, by instead setting the budget of an agency such as CCRB in the Charter by public vote. Because Ballot Question #2, submitted to voters in November 2019, included such an impermissible Charter amendment, the measure must now be stricken in its entirety.

2. The Charter sets forth the framework for City government and is not meant to be subject to easy or frequent change. In contrast, budgets depend on a vast number of variable facts and circumstances. Not surprisingly, the statute governing Charter amendment, the MHRL, does not authorize such an attempt to use a referendum process to establish the budget of a City agency in the Charter. It grants only a limited power for direct action by the electorate, and that power does not extend to matters (i) that are not directly related to existing Charter provisions, or

(ii) that may impinge upon or restrict the exercise of power and discretion by the City Council or other elected officials.

3. Charter § 440 – the only section of the Charter that addresses CCRB – establishes CCRB as a City agency and defines its power to investigate and recommend discipline for certain limited categories of complaints made by the public against police officers. It says nothing about CCRB’s budget. Nonetheless, the purported amendment at issue would add a new subsection to Charter § 440, which would guarantee CCRB a budget no less than a fixed percentage of the NYPD’s budget (the “CCRB Budget Guarantee”). Nothing in § 440 or anywhere else in the Charter directly relates to this new provision.

4. Moreover, the CCRB Budget Guarantee clearly impinges upon and restricts the budget-setting authority of the Mayor and the City Council. The Charter expressly grants the Council the power to adopt the budget each fiscal year, based on proposals and modifications submitted by the Mayor. The Mayor’s and the Council’s power over the budget includes the power to determine the appropriations for agencies such as CCRB, based in part on each agency’s relative ability to demonstrate needs based on current circumstances. Setting CCRB’s budget by referendum clearly erodes the Mayor’s and the Council’s budget-setting power.

5. The CCRB Budget Guarantee not only violates the MHRL, but creates a slippery slope with potential long-lasting and difficult-to-reverse ill effects. The system of government in this City vests the budget-setting power in elected officials for a reason: they have the resources and expertise to determine an appropriate budget taking all facts and circumstances into account. If agency budgets are permitted to be established in the Charter by referendum, it will tie the hands of elected officials to determine an appropriate overall budget each fiscal year and to make modifications as changing circumstances may warrant.

6. The invalidity of the CCRB Budget Guarantee renders the entirety of Ballot Question #2 invalid. Respondents presented the CCRB Budget Guarantee to the voters together with a number of other proposed changes to CCRB's Charter combined into a single ballot question (*i.e.*, Ballot Question #2). Voters were not permitted to consider and vote on the other portions of Ballot Question #2 without the invalid CCRB Budget Guarantee. Rather, voters were forced to give a single "yes" or "no" vote on the entire package of proposals under Ballot Question #2. Because Respondents chose to present the proposed changes to CCRB's Charter to the voters in this manner, the invalidity of the CCRB Budget Guarantee requires the Court to declare Ballot Question #2 invalid in its entirety. The Court does not have authority to sever invalid portions from a ballot question. The ballot question must stand or fall in its entirety. Moreover, even if the Court had authority to sever, the circumstances do not support the exercise of that authority here. There is no basis to conclude that the voters would have approved Ballot Question #2 if the invalid CCRB Budget Guarantee had not been included in the ballot question. Severance in these circumstances would put the Court in the role of legislator and thereby violate the separation of powers doctrine.

7. Pursuant to CPLR Articles 78 and 30, the Court should declare that the CCRB Budget Guarantee is invalid because it violates the MHRL, and that the invalidity of the CCRB Budget Guarantee renders Ballot Question #2 invalid in its entirety.

PARTIES

8. Plaintiff-Petitioner PBA is the designated collective bargaining agent for approximately 24,000 police officers employed by the NYPD. The PBA negotiates and advocates on police officers' behalf with the City and the NYPD in matters of policy, terms and conditions of employment, and matters relating to police officers' general welfare, including, without limitation, with respect to rules, regulations, and laws that impact police officers, such as

the CCRB Budget Guarantee. PBA has its principal place of business in New York City at 125 Broad Street, New York, New York, and pays taxes to the City. Police officers that PBA represents are also New York City residents, voters, and taxpayers.

9. Plaintiff-Petitioner Lynch is a New York City police officer, and is the duly elected President of the PBA. Lynch is a New York City resident and registered voter, and pays taxes to the City.

10. Defendant-Respondent the City is a municipal corporation duly organized and existing under the laws of the State of New York.

11. Defendant-Respondent Michael McSweeney is the City Clerk of the City of New York.

12. Nominal Defendant-Respondent CCRB is an agency of the City, existing pursuant to New York City Charter, Ch. 18-A, § 440. CCRB's purpose is to be a fair, impartial, and independent body to investigate complaints from the public against police officers involving excessive use of force, abuse of authority, discourtesy, or use of offensive language.

JURISDICTION AND VENUE

13. This Court has subject matter jurisdiction pursuant to CPLR Article 78, because, by including the CCRB Budget Guarantee on the November 5, 2019 ballot, submitting it for public vote, and adopting it as a Charter amendment, Respondents "failed to perform a duty enjoined upon [them] by law" pursuant to CPLR § 7803(1), exceeded their authority pursuant to CPLR § 7803(2), and/or made, and are making, determinations that are "in violation of lawful procedure" and "affected by an error of law" pursuant to CPLR § 7803(3).

14. This Court also has subject matter jurisdiction pursuant to CPLR § 3001 to render a declaratory judgment that the CCRB Budget Guarantee and Ballot Question #2 are invalid Charter amendments.

15. This Court has personal jurisdiction over Respondents and Nominal Respondent because each has its principal place of business in New York, and Respondents and Nominal Respondent transact business within the State pursuant to CPLR § 302(a)(1).

16. Venue lies in New York County pursuant to CPLR §§ 506(b) and 7804(b) because, among other things, it is where Respondents' and Nominal Respondent's principal offices are located.

BACKGROUND

The Charter's General Framework For City Government, And The Municipal Home Rule Law Governing Charter Amendment

17. The New York City Charter serves as the local constitution and establishes the structure of City government. It sets forth the key institutions and processes of the City's political system and broadly defines the authority and responsibilities of City agencies and elected officials.

18. New York City also has an Administrative Code, which provides detail and elaboration on the powers granted in the Charter.

19. The Administrative Code is intended to be flexible and to yield to changing conditions, while the Charter contains primary grants of power and expresses fundamental principles of government, which are not expected to change except over long periods of time. Corporation Counsel, Opinion No. 10-86, 1986 WL 377402, at *13 (Aug. 1, 1986) (attached hereto as Exhibit 1) (citing Board of Statutory Consolidation, *Report to the Legislature*, at xli (Dec. 16, 1937)).

20. Under appropriate circumstances, the Charter can be amended in one of several ways, including: amendment by the City Council through the normal legislative process, a voter-

initiated petition process, or the establishment of a Charter Revision Commission under the MHRL.

21. As relevant here, MHRL § 36(2) provides that the City Council may adopt a local law providing for “the establishment of a commission to draft a new or revised city charter.”

22. MHRL § 36(5)(a) provides that the Commission “shall review the entire charter of such city and prepare a draft of a proposed new or revised charter of such city. If the commission shall decide to leave a part of the existing charter unchanged, it may propose in one or more amendments a revision of the remaining parts.”

23. Pursuant to MHRL § 36(5)(b), “[s]uch new charter or amendments shall be completed and filed in the office of the city clerk in time for submission to the electors not later than the second general election after the charter commission is created and organized.” The Commission may “submit a revision of the existing charter in one or more amendments,” and “shall prescribe the form of the questions to be submitted” to the electors. MHRL § 36(5)(b).

24. To be approved, the ballot question must receive “the affirmative vote of a majority of the qualified electors of the city voting thereon.” MHRL § 36(5)(d).

The City Council Created A General Framework For CCRB In The Charter, But Did Not Address Or Guarantee CCRB’s Budget

25. In December 1992, the City Council passed Local Law 1 of 1993, approved by the Mayor on January 5, 1993, which repealed and replaced § 440 of the Charter to establish the CCRB in its current all-civilian form, independent of the NYPD. A true and correct copy of Charter § 440 (prior to the changes at issue here) is attached hereto as Exhibit 2.

26. Charter § 440 sets forth the general framework for the CCRB.

27. For example, § 440(a) sets forth CCRB’s purpose:

It is in the interest of the people of the city of New York and the New York City police department that the investigation of complaints concerning misconduct by officers of the department towards members of the public be complete, thorough and impartial. These inquiries must be conducted fairly and independently, and in a manner in which the public and the police department have confidence. An independent civilian complaint review board is hereby established as a body comprised solely of members of the public with the authority to investigate allegations of police misconduct as provided in this section.

28. Section 440(b) sets forth the composition of the Board – 13 members – and Board members’ terms.

29. Section 440(c) sets forth the powers and duties of the Board. Section 440(c)(1) defines CCRB’s limited jurisdiction (commonly referred to as “FADO” jurisdiction):

The board shall have the power to receive, investigate, hear, make findings and recommend action upon complaints by members of the public against members of the police department that allege misconduct involving excessive use of force, abuse of authority, discourtesy, or use of offensive language, including, but not limited to, slurs relating to race, ethnicity, religion, gender, sexual orientation and disability.

Charter § 440(c)(1) (boldface added).

30. Nothing in Charter § 440 mentions or pertains to CCRB’s budget.

New York Law Vests The Budget-Setting Power In Elected Officials

31. The Charter vests the City Council with power to adopt the budget each fiscal year, based on proposals and modifications submitted by the Mayor. The New York City Administrative Code sets forth additional procedures for the budget-setting process between the Mayor and City Council, including specific procedures for these elected officials to determine the appropriations that will be made to City agencies. The Charter and Administrative Code do not permit direct control over the budget by the public.

32. For example, the Charter provides that the Mayor prepares a preliminary budget, and submits it to the City Council for hearings and responses by the Council. Charter §§ 236, 247.

33. In connection with the Mayor's preparation of the preliminary budget, the Administrative Code provides for agencies to submit departmental estimates to the Director of Management and Budget in the Mayor's Office, who forwards copies to the City Council, Board of Estimate, and each community board and borough board. Admin. Code § 5-502.

34. The Administrative Code requires the agency estimates to demonstrate "the necessity for the funds requested," and include "particularly and in detail the reasons for all individual increases or decreases compared with the budget as modified for the prior year." Admin. Code § 5-504.

35. The Mayor's preliminary budget to the Council must set forth the proposed appropriations for each agency "as the mayor shall deem advisable." Admin. Code § 5-507.

36. Pursuant to the Charter, the Council holds hearings on the preliminary budget and makes findings and recommendations to the Mayor. Charter § 247. The Mayor must then submit an executive budget to the Council, together with a budget message explaining his proposals. Charter §§ 249, 250.

37. Among other things, the Mayor's budget message must address appropriations made for agencies, including:

For each agency, a comparison of the proposed appropriations for the ensuing fiscal year with (i) the amounts appropriated in the current expense budget as originally adopted and as modified through the first eight months of the current fiscal year, (ii) the amounts actually expended in the previous fiscal year and (iii) the amounts actually expended through the first eight months of the current fiscal year and the estimated expenditures for the balance of the current fiscal year.

Charter § 250.

38. The Charter sets forth procedures for borough presidents to provide responses to the Mayor and City Council on the executive budget. Charter § 251.

39. The City Council then holds public hearings on the proposed budget, and also receives input from agencies. Charter § 253.

40. The City Council has a team of analysts, attorneys, economists, and administrative staff who provide Council members with research on budgetary actions and their fiscal impact, and monitor and evaluate agency spending. New York City Council, *The City Budget*, available at <https://council.nyc.gov/budget/>.

41. Moreover, the Council is authorized to attach conditions to agency funding, such as requiring agencies to provide data to the Council. Such terms and conditions are a tool the Council uses for accountability, oversight, and documentation. New York City Council, *Agency Funding Conditions*, available at <https://council.nyc.gov/budget/agency-funding-conditions/>.

42. The City Council ultimately must adopt the budget. Charter §§ 254, 255.

The 2019 Charter Revision Commission

43. In April 2018, pursuant to MHRL § 36, the City Council passed, and the Mayor approved, Local Law 91 of 2018, establishing a Charter Revision Commission (“Commission”) to review the entire Charter and prepare a draft of a proposed new Charter or proposed Charter amendments for submission to the electors.

44. The Commission held a series of meetings between July 2018 and July 2019. The Commission’s process for generating ballot proposals, however, was rife with irregularities. For example, the Commission publicly announced that its June 2019 meetings would be limited to voting on the Commission’s proposals and preparing the final proposals and ballot questions to submit to the City Clerk. At its meeting on June 12, 2019, a majority of the Commission voted

down the proposal to expand CCRB's authority to investigate alleged material false statements made by accused police officers under CCRB investigation. As such, this proposal should not have been included on the ballot in the November 5, 2019 general election. However, without public notice and without giving the public an opportunity to object or provide further input, and lacking any procedural mechanism to do so, at a meeting on June 18, 2019, the Commission purported to "reconsider" this proposal and it passed by a narrow margin after apparent undisclosed, closed-door discussions among Commission members. The process was further tainted by CCRB's use of taxpayer money to advocate for an affirmative vote by the public on the proposed ballot measures that CCRB deemed beneficial to itself, in blatant violation of the prohibition against an agency using public funds to attempt to influence a public vote. *See, e.g., CCRB, What's True on Question 2?: Myth vs. Fact, available at <https://www1.nyc.gov/site/ccrb/about/outreach/charter2019.page>.*

The Improper Ballot Referendum To Set CCRB's Budget In The Charter

45. In March 2019, CCRB submitted a request to the Commission that the Charter be amended to tie CCRB's budget to the NYPD's budget.

46. The Commission received numerous objections to this proposal, which pointed out, among other things, that setting the budgets of agencies such as CCRB in the Charter, and doing so by referendum, is not consistent with this City's form of government; would divest the City Council and Mayor of their budget-setting power; and is not in the City's interests.

47. For example, the NYPD objected to the CCRB budget proposal:

Every city agency or office must be able to justify their respective requests for funding based on their unique and demonstrated needs. The [NYPD's] budget is complex and based in no small part on emerging technologies, equipment needs and upgrades, personnel, evolving training, infrastructure requirements, and counterterrorism operations. We are certain that the CCRB can outline a list of factors that dictate their annual expenses and funding needs. It is that list of

factors, unique to the CCRB, which should serve as the basis for their budget, and not factors unique to the NYPD.

NYPD, *Statement of Oleg Chernyavsky, Executive Director, Legislative Affairs, New York City Police Department* (Mar. 7, 2019), at 3 (attached hereto as Exhibit 3).

48. The Mayor’s Office of Management and Budget (“OMB”) also objected to this proposal:

Determining the appropriate level of funding for City agencies is the most important aspect of the budget process established by the Charter. That process currently works in an efficient manner to prioritize funding among many competing needs. Legislatively establishing fixed budgets for certain agencies without regard to the City’s budget process undermines the ability to set appropriate funding levels on a year by year basis. It would also diminish the ability of the Mayor and the Council to meet demands by allocating funds in a manner that meets the City’s most pressing needs. For example, fixed budgets cannot be altered and will structurally limit choices a Mayor can make in an emergency or recession to preserve core services.

OMB, *2019 CRC Expert Forum, Supplemental Written Testimony* (Mar. 29, 2019), at 4 (attached hereto as Exhibit 4).

49. The Citizens Budget Commission (“CBC”), a nonprofit civic organization, also objected to the proposal, noting that “[a]dopting formula or self-determined budgets for [CCRB or other agencies] would restrict mayoral and Council discretion over budget priorities and could lead to spending increases without appropriate oversight.” CBC, *Testimony on Charter-Defined Budget and Management Practices* (Mar. 11, 2019), at 4 (attached hereto as Exhibit 5).

50. CBC previously explained why proposals for formula budgets or guaranteed budgets by public vote violate New York’s democratic budget process. It noted, among other things, that:

The budget process used in New York City is born of democratic principle The voters elect an executive and legislators to represent their interests with regard to how government money, including their tax dollars, is spent. . . . The Mayor and the Council ultimately make the decisions that set the budget priorities

for the coming year, and these elected officials are answerable to their constituents. . . . Guaranteeing an official money does not necessarily make him or her more independent; it is more likely to serve as a protective device against true political accountability in the budget process.

CBC, *Testimony by Courtney Wolf, Research Associate* (Aug. 2, 2010), at 2 (attached hereto as Exhibit 6).

51. Charter Revision Commissioner Stephen Fiala, a former New York City Council Member and current County Clerk for Richmond County, also objected to the CCRB budget proposal:

You know, right in this chamber and in the committee halls across the street for the last many months City Council committees have been wrestling with budget proposals for the next Fiscal Year, and they are right now wrestling with this in the final stages. The idea of a body trying to import into the Charter what should be left in my view to the normal legislative process is a slippery slope.

Excerpt of Tr. of Commission Minutes, June 18, 2019, at 36:14-22 (attached hereto as Exhibit 7).

52. On July 24, 2019, the Commission issued its Final Report, containing the proposed amendments to the Charter that the Commission decided to present to voters at the November 5, 2019 general election. The Commission re-issued the Final Report on August 2, 2019 with certain non-substantive technical changes. An excerpted copy of the Commission's Final Report, dated August 2, 2019, is attached hereto as Exhibit 8.

53. The CCRB Budget Guarantee is unrelated to existing Charter provisions, and thus the Commission had to propose an entirely new subsection to Charter § 440 to contain the CCRB Budget Guarantee. In particular, the Commission proposed adding an entirely new subsection (g) to Charter § 440 requiring that, beginning in fiscal year 2021 and for each fiscal year thereafter, CCRB's personnel budget must be not less than an amount sufficient to fund personnel equal to 0.65 percent of the number of uniform budgeted headcount of the NYPD for that fiscal year. Ex. 8 at 115-16. Proposed new section (g) would further require that "[t]he

calculation to determine the minimum appropriations for the personal services expenses of the civilian complaint review board pursuant to this paragraph shall be set forth in the preliminary expense budget, the executive expense budget, and the adopted budget.” *Id.* at 116.

54. The proposed new subsection (g) would only allow for deviation from CCRB’s guaranteed budget if, prior to the adoption of the budget or a budget modification, the Mayor can overcome a newly-created burden of demonstrating that reducing CCRB’s budget below the guaranteed amount “is fiscally necessary and that such reduction is part of a plan to decrease overall appropriations or is due to unforeseen financial circumstances, and the mayor sets forth the basis for such determinations in writing to the council and the civilian complaint review board at the time of submission or adoption, as applicable, of any budget or budget modification containing such reduction.” *Id.*

Respondents Presented Voters With Ballot Question #2, A Single Measure That Included The CCRB Budget Guarantee Among Other Proposed Changes To Charter § 440

55. The Commission proposed the CCRB Budget Guarantee as part of Ballot Question #2 for the November 5, 2019 general election. *Id.* at 109. However, Ballot Question #2 also included numerous other proposed changes to Charter § 440 relating to CCRB, including: (i) increasing the size of the Board from 13 to 15 members and other changes to the Board’s composition; (ii) requiring the Police Commissioner to provide CCRB with a written explanation for departing from CCRB’s disciplinary recommendations; (iii) authorizing CCRB to investigate the truthfulness of any material statement made by an accused police officer under CCRB investigation; and (iv) allowing the Board to delegate its subpoena power to CCRB’s Executive Director.¹ *Id.*

¹ For reasons set forth herein, Ballot Question #2 is invalid in its entirety because of the inclusion of the invalid CCRB Budget Guarantee. Even putting aside the invalid CCRB Budget Guarantee, however,

56. Respondents presented Question #2 to the voters as follows:

BALLOT QUESTION

This proposal would amend the City Charter to:

Increase the size of the Civilian Complaint Review Board (CCRB) from 13 to 15 members by adding one member appointed by the Public Advocate and adding one member jointly appointed by the Mayor and Speaker of the Council who would serve as chair, and to provide that the Council directly appoint its CCRB members rather than designate them for the Mayor's consideration and appointment;

Require that the CCRB's annual personnel budget be high enough to fund a CCRB employee headcount equal to 0.65% of the Police Department's uniformed officer headcount, unless the Mayor makes a written determination that fiscal necessity requires a lower budget amount;

Require that the Police Commissioner provide the CCRB with a written explanation when the Police Commissioner intends to depart or has departed from discipline recommended by the CCRB or by the Police Department Deputy (or Assistant Deputy) Commissioner for Trials;

Allow the CCRB to investigate the truthfulness of any material statement that is made within the course of the CCRB's investigation or resolution of a complaint by a police officer who is the subject of that complaint, and recommend discipline against the police officer where appropriate; and

Allow the CCRB members, by a majority vote, to delegate the board's power to issue and seek enforcement of subpoenas to compel the attendance of witnesses and the production of records for its investigations to the CCRB Executive Director.

Shall this proposal be adopted?

57. Thus, voters were not given an opportunity to consider and vote on any single CCRB proposal in isolation; rather, they were required to vote either for or against Ballot Question #2 in its entirety.

58. Respondents submitted Ballot Question #2 to the electors at the November 5, 2019 general election. Ballot Question #2 received an affirmative vote of a majority of the electors voting thereon.

PBA does not concede the validity of the other portions of Ballot Question #2, and expressly reserves its rights with respect thereto.

59. The approved Charter amendments, including the CCRB Budget Guarantee and the other amendments contained in Ballot Question #2, have been designated as Local Law 215 of 2019. An excerpt of the City Clerk's Certification of Local Law 215 of 2019 is attached hereto as Exhibit 9.

FIRST CAUSE OF ACTION

(Request for Relief under Article 78 of the CPLR)

60. Petitioners incorporate by reference the allegations set forth in all of the preceding paragraphs of this Petition as if fully set forth herein.

61. The CCRB Budget Guarantee is not a valid Charter amendment that may be accomplished by a public vote under the MHRL because: (i) it does not directly relate to any existing provision of the Charter and thus is not an "amendment" under MHRL § 36; and/or (ii) it would impinge upon and restrict the powers and discretion of the Mayor and the City Council to determine an appropriate budget each year.

62. The New York Constitution vests the power to legislate in a representative legislature, not directly in the hands of the people. N.Y. Const., Art. III, § 1.

63. The legislative authority of the City of New York rests with the City Council. Charter § 21.

64. To the extent there may be direct legislative action by the people, that authority must rest on a specific constitutional or statutory grant. There is no constitutional or statutory grant of authority for the CCRB Budget Guarantee by public vote.

65. MHRL § 36 does not authorize the CCRB Budget Guarantee.

66. The City's Corporation Counsel and the New York State Attorney General's Office, as well as the courts, have agreed that there are limits on the type of Charter amendment

that may be accomplished by public vote under the MHRL. *See* Ex. 1; Office of Attorney General, 1976 N.Y. Op. Atty. Gen. No. 199, 1976 WL 350292 (May 18, 1976) (attached hereto as Exhibit 10).

67. To be a valid Charter amendment accomplished by public vote under the MHRL, the change (i) must be directly related to an existing provision of the Charter or, if it is unrelated, the Court must find that (ii) an amendment unrelated to an existing provision may be adopted by the referendum procedure. As to the latter prong, a change that impinges upon or restricts the exercise of power and discretion by the local legislative body or other elected officials may not be accomplished by public vote.

68. The CCRB Budget Guarantee is not a proper Charter amendment accomplished by public vote under the MHRL because it does not directly relate to an existing provision of the Charter. While Charter § 440 creates CCRB and sets forth its powers, it does not mention or allude to, let alone contain a specific reference to, CCRB's budget, and nothing else in the Charter directly relates to the new provision tying CCRB's budget to the NYPD's budget.

69. The CCRB Budget Guarantee is not a valid Charter amendment accomplished by public vote for the additional reason that it impinges upon and restricts the exercise of power and discretion by the Mayor and the City Council to determine the budget. The Charter vests in the Mayor the power to monitor and evaluate agency spending and determine the budget, and vests in the Council the power to adopt the budget. The Mayor and the Council have analysts, attorneys, economists, and administrative staff to assist in this process. The City Council must adopt the City's budget, including the appropriations made to each agency, together with any terms and conditions that the Council may wish to impose on an agency's funding, each fiscal year based on the applicable facts and circumstances at the time. The CCRB Budget Guarantee

clearly infringes on the Mayor's and the Council's budget-setting power by restricting their discretion to set the budget for CCRB, and by earmarking funds for CCRB and thereby preventing the Mayor and the Council from using those funds for other purposes.

70. There is no legal authority in New York City for direct action by the public to set the budgets of agencies such as CCRB.

71. New York's system of government, and the Charter, Administrative Code, and MHRL, prohibit establishing the budgets of agencies such as CCRB in the Charter by referendum, and for good reason. The public does not have teams of analysts, accountants, and attorneys to make complex budget determinations. Indeed, the CCRB Budget Guarantee was not accompanied by any explanation of how the new appropriations for CCRB are going to be funded, and it was presented to the public in a take-it-or-leave-it fashion with other non-budgetary proposed changes to CCRB, lumped together in the same ballot question.

72. The importance of having experienced experts charged with crafting municipal budgets was underscored during the Charter Revision Commission's deliberations, during which Commissioners struggled to grasp the budgetary concepts and implications of the CCRB Budget Guarantee. For example, they questioned the meaning of budgetary concepts underlying the CCRB Budget Guarantee such as "personal service costs" and "personnel budget," which they referred to as a "technical thing," and questioned, without answer, whether CCRB will even be able to absorb the increased personnel provided for under the change. *See, e.g.,* Ex. 7 at 34:13-35:6, 38:14-24, 39:24-43:5.

73. A purported budget determination at the Charter level, such as the CCRB Budget Guarantee, would have widespread and long-lasting effects by tying up funds and limiting the ability of elected officials to achieve an appropriate budget in a given year taking all facts and

circumstances into account. The representative process established under New York law does not allow such determinations to be made by referendum.

74. The undesirable effects of permitting the public to engage in budget earmarking are highlighted by contrasting New York’s representative process for determining the budget with the alternative “ballot box budgeting” provided under California law:

California is known for its “ballot box budgeting,” by which general fund revenues are earmarked for specific purposes by way of voter referendum. A 2002 report by the California Budget Project estimated that about two-thirds of California’s general fund revenues are earmarked for specific purposes That means that in the face of falling revenues, California has only a small portion of its budget from which to cut in order to achieve budget balance. The result is deep cuts to welfare and social services programs, parks and other “unprotected” budget areas. . . . Consideration of these practical issues supports maintaining the current budgetary discretion exercised annually by the mayor and the council; allocating the appropriate level of funding to an agency or entity based on its particular needs in a given year is precisely what the current budget process is intended to achieve.

CBC, *Wolf Testimony*, at 2-3 (Ex. 6).

75. The CCRB Budget Guarantee is not a valid Charter amendment. By including the CCRB Budget Guarantee on the November 5, 2019 ballot, submitting it for public vote, and adopting it as a Charter amendment in Local Law 215 of 2019, Respondents “failed to perform a duty enjoined upon [them] by law” pursuant to CPLR § 7803(1), exceeded their authority pursuant to CPLR § 7803(2), and/or made, and are making, determinations that are “in violation of lawful procedure” and “affected by an error of law” pursuant to CPLR § 7803(3).

76. The Court should hold that the CCRB Budget Guarantee is invalid and null and void, and should strike the CCRB Budget Guarantee from the Charter.

SECOND CAUSE OF ACTION

(Request for Relief under Article 78 of the CPLR)

77. Petitioners incorporate by reference the allegations set forth in all of the preceding paragraphs of this Petition as if fully set forth herein.

78. Because the CCRB Budget Guarantee is invalid and should not have been presented to the voters, the other portions of Ballot Question #2 are invalid in their entirety as well because (i) the MHRL prohibits the Court from severing other portions of Ballot Question #2; and (ii) the common law and the separation of powers doctrine also prohibit the Court from re-writing the ballot measure to exclude the invalid provision, particularly where, as here, there is no basis to conclude that the voters would have approved Ballot Question #2 if the invalid CCRB Budget Guarantee had not been included.

79. MHRL § 36(5)(d) provides that:

If any question submitted by the charter commission receives the affirmative vote of a majority of the qualified electors of the city voting thereon, the proposal submitted thereby shall take effect as specified therein and the new charter or the amendment or amendments to the existing charter as so proposed shall become operative as prescribed therein

80. As this provision explicitly only permits a question to take effect “*as specified therein*,” and for the proposed amendments to become operative “*as so proposed*” and “*as prescribed therein*,” it does not give the Court authority to excise invalid portions of a ballot question to attempt to salvage the remainder.

81. Under the MHRL, where a portion of the proposed ballot question is invalid, it renders the entire proposal, of which it is a part, invalid.

82. Moreover, where a portion of a municipal determination, such as Ballot Question #2, is invalid, it would be pragmatically impossible, as well as jurisprudentially unsound, for the

Court to attempt to identify and excise particular provisions while leaving the remainder of the provision intact, and thus the provision must be declared invalid in its entirety. There is no room for the Court to impose its own version of a more adequate measure or proper determination. Thus, the Court is not permitted to re-write Ballot Question #2 and the local law implementing it to exclude the CCRB Budget Guarantee.

83. Attempting to sever the invalid CCRB Budget Guarantee from Ballot Question #2 and its implementing legislation would be particularly inappropriate under the circumstances here because, by virtue of the manner in which Respondents presented the proposed changes to CCRB's Charter to the voters in a single question, there is no basis to conclude that the voters would have approved the other portions of Ballot Question #2 if the invalid CCRB Budget Guarantee had not been included. The other CCRB changes, without the CCRB Budget Guarantee, may not have received the necessary vote.

84. Indeed, here the CCRB Budget Guarantee to increase CCRB's budget may have had direct ramifications for other proposed changes under Ballot Question #2, such as the proposal to increase CCRB's size (*e.g.*, increasing the Board from 13 to 15 members) and to expand CCRB's powers (*e.g.*, giving CCRB new authority over alleged false statements), rendering it particularly inappropriate to sever this part of Ballot Question #2.

85. It is not for a Court to legislate by severing the proposals under Ballot Question #2. To do so would be a violation of the separation of powers between the co-equal branches of government.

86. Accordingly, the CCRB Budget Guarantee is not severable from the other portions of Ballot Question #2.

87. Because of the inclusion of the invalid CCRB Budget Guarantee within the same ballot question, the Court should hold that Ballot Question #2 is invalid and null and void in its entirety, and should strike from Charter § 440 the changes that were made pursuant to Ballot Question #2.

THIRD CAUSE OF ACTION

(Request for Declaratory Relief under Article 30 of the CPLR)

88. Petitioners incorporate by reference the allegations set forth in all of the preceding paragraphs of this Petition as if fully set forth herein.

89. There is a ripe, justiciable controversy between Petitioners and Respondents with respect to whether the CCRB Budget Guarantee is a valid Charter amendment accomplished by public vote under the MHRL, and as to the validity of the CCRB Budget Guarantee, Local Law 215 of 2019 implementing the CCRB Budget Guarantee, and proposed new subsection (g) of Charter § 440.

90. There is also a ripe, justiciable controversy between Petitioners and Respondents with respect to the validity of Ballot Question #2 in its entirety, and its implementing legislation, because of the inclusion of the invalid CCRB Budget Guarantee within Ballot Question #2 with the other proposed changes to CCRB's Charter.

91. For reasons set forth above, which are incorporated by reference herein, the Court should issue a declaratory judgment declaring that the CCRB Budget Guarantee, Local Law 215 of 2019 implementing the CCRB Budget Guarantee, and new subsection (g) of Charter § 440 are invalid and null and void.

92. Additionally, for reasons set forth above, which are incorporated by reference herein, the Court should issue a declaratory judgment declaring that, because of the inclusion of

the invalid CCRB Budget Guarantee within the same ballot question, Ballot Question #2, and its implementing legislation, are invalid and null and void in their entirety.

RELIEF REQUESTED

WHEREFORE, Petitioners request that this Court enter an Order and Judgment:

- (a) Holding that Respondents failed to perform a duty enjoined upon them by law, exceeded their authority, and/or made, and are making, determinations that are in violation of lawful procedure and affected by an error of law by including the CCRB Budget Guarantee on the November 5, 2019 ballot, submitting it for public vote, and adopting it as a Charter amendment in Local Law 215 of 2019;
- (b) Declaring that the CCRB Budget Guarantee, Local Law 215 of 2019 implementing the CCRB Budget Guarantee, and new subsection (g) of Charter § 440 are invalid and null and void;
- (c) Declaring that Ballot Question #2, its implementing legislation, and the changes to Charter § 440 reflecting Ballot Question #2 are invalid and null and void in their entirety;
- (d) Striking new subsection (g) from Charter § 440;
- (e) Striking in their entirety from Charter § 440 the changes that were made pursuant to Ballot Question #2;
- (f) Awarding Petitioners attorneys' fees, as well as costs and disbursements against Respondents pursuant to CPLR § 8101; and
- (g) Granting such other and further relief as the Court deems just and proper.

Dated: New York, New York
January 27, 2020

MICHAEL T. MURRAY
Office of the General Counsel of
the Police Benevolent
Association of the City of New
York, Inc.
125 Broad Street
New York, New York 10004

Of Counsel:
Christopher T. Luise

Respectfully submitted,

GOLENBOCK EISEMAN ASSOR
BELL & PESKOE LLP

By: 

Jacqueline G. Veit
Matthew C. Daly

711 Third Avenue
New York, New York 10017
(212) 907-7300

Attorneys for Plaintiffs-Petitioners

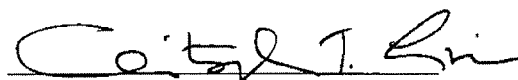
VERIFICATION

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

Christopher T. Luise, being duly sworn, deposes and says:

I am Associate General Counsel of the Police Benevolent Association of the City of New York, Inc., Plaintiff-Petitioner in the above-entitled action.

I have read the foregoing Verified Article 78 & Declaratory Judgment Petition and all the material allegations are true and accurate to the best of my personal knowledge, except to the extent allegations therein are made upon information and belief, and, as to those allegations, I believe them to be true. The grounds for my belief include (a) public statements by Respondents and their representatives; (b) public statements by third parties; and (c) other materials referred to in the Petition.


Christopher T. Luise

Sworn to before me
this 27th day of January, 2020


Notary Public

