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COURT OF APPEALS

STATE OF NEW YORK

PATRICK LYNCH, et al.

Respondents,

-against-

No. 119

THE CITY OF NEW YORK, et al.,

Appellants.

20 Eagle Street
Albany, New York 12207
May 8, 2014

Before:

CHIEF JUDGE JONATHAN LIPPMAN
ASSOCIATE JUDGE VICTORIA A. GRAFFEO
ASSOCIATE JUDGE SUSAN PHILLIPS READ
ASSOCIATE JUDGE ROBERT S. SMITH
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.
ASSOCIATE JUDGE JENNY RIVERA

Appearances:

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Sharona Shapiro
Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: Number 119, Lynch v.
2 City of New York.

3 Counselor? Do you want any rebuttal time,
4 counselor?

5 MR. SNOW: Yes, please, Your Honor, three
6 minutes.

7 CHIEF JUDGE LIPPMAN: Three minutes, sure.
8 Go ahead.

9 MR. SNOW: Okay. Good afternoon. May it
10 please the court. My name is Keith Snow. I'm
11 Assistant Corporation Counsel, and I represent the
12 appellants, the City of New York, as well as its
13 pension funds in this matter.

14 So from the outset tier - - -

15 CHIEF JUDGE LIPPMAN: Tell us how Tier 3
16 plays into this picture as to - - - why is Tier 3 - -
17 - people entitled or not entitled to this - - - this
18 benefit?

19 MR. SNOW: Well, Tier 3 was created as a
20 stand-alone retirement structure. And what that
21 means is it created a new floor, so to speak, so that
22 every benefit that's provided in Article 14 is
23 granted to Tier 3 members, and they do not - - - or
24 they are not, rather, entitled to Tier 1 and 2 - - -
25 Tier 2 benefits in the Administrative Code.

1 CHIEF JUDGE LIPPMAN: Yeah, but this is a
2 particular benefit - - -

3 MR. SNOW: Yes.

4 CHIEF JUDGE LIPPMAN: - - - as to whether
5 or not a Tier 3 can be eligible for this particular
6 benefit that, in layman's terms, basically their
7 pension contribution is paid for; is that what this
8 is all about?

9 MR. SNOW: A portion - - -

10 CHIEF JUDGE LIPPMAN: The five percent or
11 the three percent, whatever it is.

12 MR. SNOW: A portion of the annuity
13 component for Tier 1 and Tier 2 members is - - - is
14 paid for on behalf of the City or another employer so
15 far as the - - -

16 JUDGE GRAFFEO: Did all these plaintiffs
17 initially start in Tier 3 or where they in Tier 2?

18 MR. SNOW: All of the plaintiffs had been
19 in Tier 2 until 2009. How - - -

20 JUDGE GRAFFEO: Does that make a
21 difference?

22 MR. SNOW: It does not. Tier 3 has been
23 around for about forty years. The City has never
24 paid ITHP to any Tier 3 members or Tier 4 members,
25 which has also been around for about thirty years.

1 JUDGE GRAFFEO: But they received these
2 benefits, the pension and the annuity contri - - -

3 MR. SNOW: Tier - - -

4 JUDGE GRAFFEO: - - - and they made an
5 annuity contribution while they were in Tier 2,
6 correct?

7 MR. SNOW: The people who were in Tier 2,
8 based on their date of membership, stayed in Tier 2,
9 and therefore they get that ITHP benefit.

10 JUDGE GRAFFEO: No, my question was these
11 particular plaintiffs, when they were in Tier 2, they
12 did receive the pension contribution and they were
13 allowed to contribute to the annuity, correct?

14 MR. SNOW: I don't believe those are the
15 class of people who would be in this action. The
16 people that - - - that are the plaintiffs - - -

17 JUDGE GRAFFEO: So these people never had
18 the benefits - - -

19 MR. SNOW: Right.

20 JUDGE GRAFFEO: - - - that they're looking
21 for?

22 MR. SNOW: These would be members who
23 became police officers or firefighters after - - -

24 JUDGE GRAFFEO: Okay. That's the
25 clarification - - -

1 MR. SNOW: - - - Tier 3.

2 JUDGE GRAFFEO: - - - I was looking for.

3 CHIEF JUDGE LIPPMAN: So they've always
4 been in Tier 3?

5 MR. SNOW: As of 2009, if they joined the
6 first time, yes, they'd - - - they'd be - - -

7 CHIEF JUDGE LIPPMAN: Okay.

8 MR. SNOW: - - - in Tier 3.

9 JUDGE PIGOTT: Does this all come down to
10 just how you construe that one Section 480(b)?

11 MR. SNOW: I do believe it boils down to
12 that. However, I think it also makes sense, in the
13 statutory steer (sic) - - - tiered structure, you
14 know, as this court has explained in the Guido case,
15 which was cited in our brief, the 1999 Court of
16 Appeals case, and as this court reiterated last month
17 in the Kaslow v. City case, you have to view these
18 cases in the tiered structure.

19 CHIEF JUDGE LIPPMAN: Counsel, what's - - -
20 what's - - - from the - - - from a policy-related
21 perspective, why should the Tier 3 people not get
22 this same benefit? Is it that - - - that the legi -
23 - - you're saying that the legislator's - - -
24 legislature's intent was clearly to end this at
25 people who came on after a certain date? I mean, is

1 - - - is - - - is that what it was? Because it would
2 seem - - - it seems, again, from a more visceral
3 approach, that it might be kind of - - - it seems
4 arbitrary that you're on one side of a certain date,
5 you get it, if you're not, you don't. Is that what
6 it is, that you're saying the legislative intent is
7 clear?

8 MR. SNOW: That - - - that is, in my view,
9 clear, and I would point the court to the legislative
10 history of Section 480, which extended the benefit to
11 Tier 2 and not to Tier 3. When that statute was
12 extended in 1995, pursuant to Chapter 138 - - -

13 CHIEF JUDGE LIPPMAN: Right.

14 MR. SNOW: - - - of 1995, the sponsor's
15 memo, both the Assembly and the Senate, specifically
16 said this statute only applies to Tier 1 and Tier 2
17 members, by way of saying members who joined the
18 system before July 1976.

19 JUDGE PIGOTT: Well, when you look at it
20 that way, it looked to me like what they're saying -
21 - - I mean, they're looking statewide, you know, in
22 all the of Tier 3s in every - - - you know, in every
23 part of the government. And for - - - and for, no
24 doubt, valid reasons, the police and the fire of the
25 City of New York get it a little different. They - -

1 - for some reason, they get this - - - this increased
2 take-home pay provision so they don't have to pay
3 this - - - this percentage. And that seems to have
4 continued all the way through until then. And that's
5 why I asked you if it's - - - if we're looking at
6 strictly statutory construction, is there anything in
7 480 that - - - that says what - - - you did a nice
8 job of describing how this all came about, but if you
9 just took the statute and read it, is there something
10 in there you say, ah, this - - - this is what tells
11 us that these Tier 3 police and fire don't get it?

12 MR. SNOW: Yes, I believe so, because 480
13 does address - - - it specifically mentions any
14 programs that have an expiration date of 1974.

15 JUDGE SMITH: So is the question really
16 whether the program continued to exist after - - -
17 within Tier 3?

18 MR. SNOW: Well, you have to understand,
19 the program still exists for Tier 1 and Tier 2
20 members.

21 JUDGE SMITH: For Tier 1 and Tier 2. But
22 is it - - -

23 JUDGE READ: The question, is it still - -
24 -

25 JUDGE SMITH: But is it the same program as

1 applied to Tier 3; is that the issue?

2 MR. SNOW: Well, there - - - there is no
3 Tier 3 program. Neither the City nor the State - - -

4 CHIEF JUDGE LIPPMAN: So the program - - -

5 JUDGE READ: That's the question - - -

6 CHIEF JUDGE LIPPMAN: - - - doesn't exist
7 for Tier 3 members?

8 MR. SNOW: That's correct. And - - - and -
9 - -

10 JUDGE GRAFFEO: So what chapter amendment
11 discontinued the benefit for Tier 3? Was it 2009?

12 MR. SNOW: No, it was done by way of the
13 2009 veto by the governor who vetoed - - -

14 JUDGE GRAFFEO: So when they didn't - - -

15 MR. SNOW: - - - an extender - - -

16 JUDGE GRAFFEO: - - - when he didn't adopt
17 the extender, that's what extinguished the benefit
18 for anyone in Tier 3?

19 MR. SNOW: Right, because the extender was
20 for Tier 2, so by extending Tier 2 - - -

21 JUDGE SMITH: You say there never was a
22 benefit in Tier 3, so that everyone who was - - - I
23 guess it's sort of - - - there never were City police
24 and fire in Tier 3 either, right, until 2009?

25 MR. SNOW: I'm sorry, could you please

1 repeat the question?

2 JUDGE SMITH: Until 2009, there were never
3 poli - - - the City police and fire - - - police
4 officers and firefighters were never in Tier 3.

5 MR. SNOW: That's correct.

6 JUDGE READ: And - - -

7 MR. SNOW: 2009 was the first - - -

8 JUDGE READ: And there was never this
9 annuity - - - there was never this annuity benefit in
10 the contribution for the annuity benefit for Tier 3?

11 MR. SNOW: Never, since its inception.

12 JUDGE GRAFFEO: Is there any particular
13 legislative language here, in any of these acts, that
14 clearly address these benefits that they're seeking?

15 MR. SNOW: Well, I believe the - - - the
16 governor's division of budget memo in 2007 explicitly
17 said that this does not apply to Tier 3. In
18 extending 480 at the time, the memo explicitly says
19 that this is not designed to apply to Articles 14,
20 15, and 18. And of course Article 14 is the Tier 3
21 statute at issue here.

22 JUDGE PIGOTT: So if you read the statute,
23 it sounds like it applies. So you need - - - you
24 have to read the statute with the governor's veto
25 message in 2007, and that tells you it would apply,

1 but for the fact that the governor had vetoed its
2 application for Tier 3.

3 MR. SNOW: Well, yes. You also have to
4 consider too - - - later on, when the Tier 5
5 legislation came out, pursuant to Chapter 504 of
6 2009, those benefits were kind of closed off and made
7 permanent. And - - - and permanency is not quite
8 what you think. That's what's traditionally done in
9 pension laws when a tier is shut down. And you'll
10 see that this was done: when the Tier 3 legislation
11 came out, Tier 2 was closed off. And when the tier 5
12 legislation came out, both tiers 3 and 4, which were
13 temporary benefits and still open, were also closed
14 off. So this was part of the governor's follow-up
15 from his veto.

16 CHIEF JUDGE LIPPMAN: You mean you seal it
17 the way it is with whatever benefits you have. But
18 you could have someone who winds up getting into that
19 tier because they get back credit or something and -
20 - -

21 MR. SNOW: Yeah, absolutely.

22 CHIEF JUDGE LIPPMAN: So it's not like it's
23 totally sealed.

24 MR. SNOW: Absolutely. The reason it's
25 done, from a - - - from a pension legislation

1 perspective, is that you want to make sure that the
2 members have State Constitutional protections to
3 those rights. And that - - -

4 JUDGE SMITH: I don't understand why the
5 closing off of - - - you say Tier - - - Tier 3 was
6 closed off in 2009? What was closed off in 2009?

7 MR. SNOW: Yeah, Tier - - - Tier 3 was, for
8 - - - for certain State - - -

9 JUDGE SMITH: What does that prove? How
10 does that relate to our case?

11 MR. SNOW: I use it as reference, as an
12 example to say when you close off a tier, you make
13 any temporary provisions permanent so that you can
14 afford Constitutional protections to them. It does
15 not expand the coverage; it just makes the - - - the
16 benefit permanent so that members who meet the
17 eligibility requirements - - -

18 JUDGE SMITH: Okay. And - - - and from
19 that what is the inference you're asking us to draw?

20 MR. SNOW: That when the ITHP extender was
21 made permanent, it did not expand the coverage of
22 that; what it merely did is made it permanent for
23 those people who met the eligibility requirements,
24 which were namely Tier 1 and Tier 2 individuals.

25 JUDGE SMITH: Okay. There's - - - there's

1 still a circu - - - I mean, doesn't it all come down,
2 ultimately, to what 480 means?

3 MR. SNOW: I believe that's the ultimate
4 question.

5 JUDGE SMITH: I mean, if it wasn't
6 permanent then, it's not permanent now; if it was
7 permanent then, it is permanent now.

8 MR. SNOW: No, it - - - it is permanent.
9 The question is - - -

10 JUDGE SMITH: I'm sorry. If it wasn't - -
11 -

12 MR. SNOW: - - - to whom - - -

13 JUDGE SMITH: - - - expandable.

14 MR. SNOW: Right. To whom does it apply.
15 And again - - -

16 JUDGE SMITH: Yeah.

17 MR. SNOW: - - - I think when you look at
18 the history - - -

19 JUDGE SMITH: But isn't - - - aren't really
20 just interpreting the word "program" in 480, when you
21 come right down to it?

22 MR. SNOW: That's one aspect of it, but
23 again, I think you have to look at it from the
24 overall statutory tiers, because it needs to make
25 sense in the application. Again, there's no ITHP - -

1 - ITHP program in Tier 3. If you look at Tier 1 and
2 Tier 2, there are about six provisions that are
3 mentioned in ITHP.

4 JUDGE SMITH: There couldn't have been an
5 ITHP program in - - - an ITHP program in Tier 3 until
6 2009, because the ITHP program is - - - is limited to
7 police and firefighters, right?

8 MR. SNOW: No, it's available to all State
9 and City Tier 1 and - - - and Tier 2 members,
10 generally speaking.

11 JUDGE SMITH: I see, they all get - - -

12 MR. SNOW: Right, so when it was made
13 permanent - - -

14 JUDGE GRAFFEO: There's teachers in the
15 program, too, right?

16 MR. SNOW: Yes, teachers are also in - - -
17 as long as they're Tier 1 and Tier 2.

18 JUDGE SMITH: Then I'm confused. And
19 they've been in Tier 3 for years?

20 MR. SNOW: Technically, they were in Tier 3
21 for a while but then they were later folded into Tier
22 4.

23 JUDGE SMITH: Okay. Maybe - - - I guess I
24 need a more basic education. There - - - Tier 1 and
25 Tier 2 included a lot of ITHP people. Was there ever

1 a time when Tier 3 included ITHP people?

2 MR. SNOW: Never.

3 JUDGE SMITH: Was there ever a time when
4 people, who had been getting the ITHP, moved from
5 Tier 2 to Tier 3 before 2009?

6 MR. SNOW: Well, Section 502, subdivision
7 (d) speaks to that, and that's really one of the key
8 parts - - -

9 JUDGE SMITH: Well, is the answer yes or
10 no?

11 MR. SNOW: Someone who was in Tier 1,
12 retired with an ITHP benefit, rejoined the system and
13 then became subject to Tier 3, if that person retired
14 again, he or she would be eligible for the ITHP,
15 simply because it's - - - it's a holdover from being
16 - - -

17 CHIEF JUDGE LIPPMAN: But generally, you
18 can't lose it once you have it.

19 JUDGE SMITH: Well, so you're - - -

20 MR. SNOW: Yes.

21 JUDGE SMITH: But you're saying that was
22 specifically provided for by an express statute.

23 MR. SNOW: That's correct, 502(d).

24 JUDGE SMITH: So that doesn't really tell
25 us anything about the problem of somebody who's been

1 happily getting an ITHP benefit in Tier 2 forever and
2 then finds himself in Tier 3. That problem did not
3 exist until 2009?

4 MR. SNOW: I'm sorry, I didn't understand
5 the question.

6 JUDGE SMITH: The problem - - - you have a
7 problem. Somebody who's been getting ITHP all these
8 years and then he finds himself move - - - he finds
9 himself - - - well, I guess he doesn't find himself,
10 but his successors, that classification of people are
11 suddenly moved to Tier 3. That did not happen until
12 2009?

13 MR. SNOW: For police officers and
14 firefighters in the City.

15 CHIEF JUDGE LIPPMAN: Yeah, but they're not
16 move - - -

17 JUDGE SMITH: It didn't happen for anyone
18 else?

19 CHIEF JUDGE LIPPMAN: I'm sorry.

20 JUDGE SMITH: I'm sorry.

21 CHIEF JUDGE LIPPMAN: Go ahead.

22 JUDGE SMITH: Did it happen - - - is there
23 someone it did happen for before 2009?

24 MR. SNOW: I see my time is up.

25 CHIEF JUDGE LIPPMAN: Go ahead.

1 MR. SNOW: Can I answer the question?

2 CHIEF JUDGE LIPPMAN: Answer the question,
3 sure.

4 MR. SNOW: Did it happen to someone before
5 2009?

6 JUDGE SMITH: Yes.

7 MR. SNOW: Yes, all City and State
8 employees who joined the system after July 1976. No
9 one, at that point, besides City fire and police,
10 were eligible for the ITHP - - -

11 JUDGE SMITH: And prior to '76 they had
12 been getting the increased take-home pay?

13 MR. SNOW: Everybody had, yes.

14 JUDGE SMITH: I had not understood that.
15 Okay.

16 CHIEF JUDGE LIPPMAN: But you're talking
17 about people in a particular position. The
18 individual people, they're not moved from one to the
19 other. Once you're - - - you're - - - you're in a
20 certain tier, that's where you're in.

21 MR. SNOW: Right, once you're joined, your
22 benefits are fixed.

23 CHIEF JUDGE LIPPMAN: You're talking about
24 people who come into that job, they're now Tier 3 or
25 Tier 4 or Tier 5, or whatever it might be, depending

1 on when they enter the system.

2 MR. SNOW: Right. Traditionally speaking,
3 the further you go along in the tiers, the less - - -

4 CHIEF JUDGE LIPPMAN: Less benefits - - -

5 MR. SNOW: - - - generous the benefits are.

6 CHIEF JUDGE LIPPMAN: - - - you have.

7 Okay.

8 JUDGE PIGOTT: Nothing got better.

9 CHIEF JUDGE LIPPMAN: Judge Pigott.

10 JUDGE PIGOTT: May I ask one more question?

11 CHIEF JUDGE LIPPMAN: Sure.

12 JUDGE PIGOTT: If - - - so up until 2009,
13 if there were people that were joining the - - - the
14 system, they would have - - - they had a contributory
15 portion, three percent or five percent, or whatever
16 it was, except police and fire and maybe some others.
17 But we're talking about police and fire here, right?

18 MR. SNOW: We are talking about police and
19 fire, but they also have a contributory plan. I know
20 there's some discussions in the lower court that
21 there's circumstances where it's not contributory.
22 That really doesn't happen all that much.

23 JUDGE PIGOTT: No, no, I know that, but
24 what I'm saying is that everybody did, but then
25 there's this provision that says with police and fire

1 we're going to make you whole; we're going to cover
2 the costs - - - I know I'm not being percentage-wise
3 correct, but the point of this ITHP was to pay their
4 vigorish for them, that extra part that they
5 otherwise would have had to pay, right?

6 MR. SNOW: It was to reduce, not eliminate,
7 but to reduce their annuity portion.

8 JUDGE PIGOTT: Yeah.

9 MR. SNOW: And again, Tier 2, on average,
10 they contribute about two percent, given the five
11 percent ITHP. So the jump up to three percent for -
12 - - for Tier 3 made sense.

13 CHIEF JUDGE LIPPMAN: And Tier 1, they
14 don't contribute anything?

15 MR. SNOW: They have the same actuarial
16 thing; it depends on the date when they come in, so
17 it'll range anywhere from - - -

18 CHIEF JUDGE LIPPMAN: Okay, counsel.

19 MR. SNOW: - - - eight percent - - -

20 JUDGE GRAFFEO: I have - - -

21 CHIEF JUDGE LIPPMAN: I'm sorry, Judge
22 Graffeo.

23 JUDGE GRAFFEO: - - - just one question.

24 CHIEF JUDGE LIPPMAN: Then Judge Read.

25 JUDGE GRAFFEO: There's a slight difference

1 in the language for the statutes between the police
2 and firefighters, do you view that as - - - is there
3 any difference?

4 MR. SNOW: I - - - I don't know what
5 provision - - -

6 JUDGE GRAFFEO: Okay.

7 MR. SNOW: - - - you speak of.

8 JUDGE GRAFFEO: All right.

9 CHIEF JUDGE LIPPMAN: Judge Read?

10 JUDGE GRAFFEO: You see them both the same?

11 MR. SNOW: Generally speaking - - -

12 JUDGE GRAFFEO: The results should be - - -

13 MR. SNOW: - - - they are the same.

14 JUDGE GRAFFEO: - - - the same for both
15 categories?

16 CHIEF JUDGE LIPPMAN: Isn't it that one is
17 only the annuity, or something like that?

18 MR. SNOW: Well, that would be the
19 difference between Tier 2 and Tier 3.

20 CHIEF JUDGE LIPPMAN: Okay.

21 MR. SNOW: Tier 2 is annuity - - -

22 CHIEF JUDGE LIPPMAN: Judge Read, go ahead.

23 JUDGE READ: Well, I just - - - in 480(b),
24 is - - - is it your - - - I thought you were arguing
25 - - - are you arguing that the program referred to

1 there is the - - - the program that's in the Code - -
2 - in the Administrative Code?

3 MR. SNOW: Well, the ITHP program, you have
4 to understand, exists for the State and the City.

5 JUDGE READ: Right.

6 MR. SNOW: So there are ITHP provisions in
7 the Tier 1, Tier 2 State provisions, as well as the
8 Administrative Code for the City - - -

9 JUDGE READ: Okay.

10 MR. SNOW: - - - provisions. That's why it
11 was done in a separate article so that it could cover
12 - - -

13 JUDGE READ: Both.

14 MR. SNOW: - - - all of the Tier 1, Tier 2
15 provisions.

16 JUDGE READ: But that's the program that
17 you think it's referring to?

18 MR. SNOW: Well, they're each individual
19 programs.

20 JUDGE READ: Okay.

21 CHIEF JUDGE LIPPMAN: Okay, counselor,
22 you'll have your rebuttal time.

23 MR. SNOW: Thanks.

24 CHIEF JUDGE LIPPMAN: Let's hear from your
25 adversaries.

1 Counselor?

2 MR. SEELIG: Good afternoon. May it please
3 the court. My name is Philip Seelig, and I'm
4 representing the NYPD Captains Endowment Association
5 and the FDNY Uniformed Fire Officers Association.

6 CHIEF JUDGE LIPPMAN: Counsel, does - - -
7 capsulize why you think that these Tier 3 plaintiffs
8 - - -

9 MR. SEELIG: Yes.

10 CHIEF JUDGE LIPPMAN: - - - are entitled to
11 this benefit. Where - - - where is it?

12 MR. SEELIG: I'm pleased - - -

13 CHIEF JUDGE LIPPMAN: Is it in the language
14 of 480? Where is it?

15 MR. SEELIG: I'm pleased to do so.

16 CHIEF JUDGE LIPPMAN: Yeah, go ahead.

17 MR. SEELIG: I think that the City's
18 version is a very tortured version of the statutes,
19 and it's similar to a drunk using a lamppost for
20 support rather than illumination. So let me try and
21 - - -

22 CHIEF JUDGE LIPPMAN: Well, illuminate us.

23 MR. SEELIG: - - - bring some clarity - - -

24 CHIEF JUDGE LIPPMAN: Tell us - - -

25 MR. SEELIG: Let's look at - - -

1 CHIEF JUDGE LIPPMAN: - - - where it is in
2 the statute.

3 MR. SEELIG: - - - Section 480, which is
4 the most pertinent of the statutes - - -

5 CHIEF JUDGE LIPPMAN: Right, go ahead.

6 MR. SEELIG: - - - at issue. There are
7 three Sections in 480, (a), (b), and (c). (a), as a
8 general framework, says, "Every temporary right,
9 privilege, benefit conferred pursuant to the
10 provisions of general" and goes on. ITHP is not a
11 benefit; it's a contribution. Benefit is twenty
12 year, half pay. Benefit is a death benefit.

13 JUDGE PIGOTT: Well, I guess that's subject
14 to debate, but - - -

15 MR. SEELIG: But if you look - - -

16 JUDGE PIGOTT: I - - -

17 MR. SEELIG: I'm sorry.

18 JUDGE PIGOTT: I thought I understand - - -
19 understood Mr. Snow to, essentially, agree with what
20 it says, but then says if you look at what Governor
21 Paterson's veto did, it stopped it.

22 MR. SEELIG: No, the only thing Governor
23 Paterson's veto did was to stop members who were
24 hired - - - uniformed firefighters and police
25 officers who were hired after July 1st, 2009 to

1 remain in Tier 2. They were placed in Tier 3.

2 JUDGE SMITH: How about - - -

3 MR. SEELIG: That was separate from Section
4 480, which preserved, under Section (b), eight months
5 after the veto of Governor Paterson, the contribution
6 rate into the fund, and it carved out police officers
7 and firefighters, in Section (b), as continuing the
8 pre-January 1st, 1976 contribution rate.

9 CHIEF JUDGE LIPPMAN: Even if they're in
10 Tier 3?

11 MR. SEELIG: And - - - I'm sorry?

12 CHIEF JUDGE LIPPMAN: Even if they're in
13 Tier 3?

14 MR. SEELIG: There is certainly no
15 exclusion. It doesn't say police officers - - - that
16 the fund for police officers who remained as Tier 1
17 and Tier 2, exclusive and not - - -

18 JUDGE SMITH: Well, but tier - - -

19 MR. SEELIG: - - - and to - - -

20 JUDGE SMITH: But there were only two tiers
21 when this was initially enacted in 1974, right?

22 MR. SEELIG: That's correct, but they
23 preserved it, and the - - - the legislature is
24 presumed to know that the governor had passed
25 legislation - - - or had vetoed legislation eight

1 months earlier that said that members will now be
2 placed in Tier 3 if - - -

3 JUDGE SMITH: Well, on your - - -

4 MR. SEELIG: - - - as police and
5 firefighters who were hired after that date.

6 JUDGE SMITH: So on your theory, the
7 program went out of existence for eight months and
8 was then revived when the legislature passed the - -
9 -

10 MR. SEELIG: In my theory, it's not a
11 program; it's a contribution rate und - - -
12 authorized under 480(b) - - -

13 JUDGE SMITH: If it's not a program - - -

14 MR. SEELIG: - - - Romanette (ii).

15 JUDGE SMITH: If it's not a program, then
16 480(b) has nothing to do with it. It's 480(b) says
17 any program is hereby - - - is extended.

18 MR. SEELIG: It says except as provided in
19 paragraph 2 of this subdivision, and in paragraph 2,
20 it's referring to contributions to be assumed by the
21 employer.

22 JUDGE SMITH: Oh, so you say that 480(b)(i)
23 has nothing to do with it, and 480 - - -

24 MR. SEELIG: I'm sa - - -

25 JUDGE SMITH: - - - and 480(b)(ii) is what

1 we should be looking at.

2 MR. SEELIG: That's what governs here for
3 police and firefighters. For other employees, (a),
4 (b), Romanette (i) and (c) apply - - -

5 JUDGE SMITH: It looks to me like - - -

6 MR. SEELIG: - - - but for police and
7 firefighters - - -

8 JUDGE SMITH: It looks to me like for - - -
9 subdivision (ii) is fooling around with the
10 contribution rate, so doesn't this go to whether it's
11 five percent or two and a half percent?

12 MR. SEELIG: Yes, it does, because it says
13 that it should be considered to be the payroll period
14 preceding January 1st, 1976. That date is important
15 because that's when - - -

16 JUDGE SMITH: Yeah, but how - - -

17 MR. SEELIG: - - - the MLC - - -

18 JUDGE SMITH: - - - how do you read
19 subdivision (ii) to govern anything other than "the
20 rate of such contribution"? That's the subject of
21 the sentence.

22 MR. SEELIG: Yes, the rate of the
23 contribution - - - when they used that date, that's
24 the date that the legislature reduced - - - January
25 1st was the date - - - of 1976, they reduced it from

1 five percent ITHP, to two and a half percent.

2 JUDGE SMITH: Okay. How - - -

3 MR. SEELIG: Therefore, it was preserving
4 the five percent for police and firefighters.

5 JUDGE SMITH: Okay. But how does that - -
6 - but how does that tell you whether - - - so you're
7 saying - - - you're saying there was no program. Why
8 did - - - how did - - - what kept the ITHP in
9 existence for - - -

10 MR. SEELIG: It was initiated by an MLC
11 agreement with the City, in which the City had, in
12 the year 2000 - - -

13 JUDGE SMITH: Okay, but that's - - -

14 MR. SEELIG: - - - that - - -

15 JUDGE SMITH: But that's not a law.

16 MR. SEELIG: No, but it was - - - the law
17 was encouraged as part of the agreement. The
18 agreement preser - - -

19 JUDGE SMITH: What law? What's the law? I
20 mean, I've been thinking it was for - - -

21 MR. SEELIG: The law is the 480 that you're
22 looking at. That was the embodiment of the MLC
23 agreement - - -

24 JUDGE PIGOTT: But 4 - - -

25 MR. SEELIG: - - - between the City and - -

1 -

2 JUDGE PIGOTT: But 480 - - - go ahead. I'm
3 sorry.

4 MR. SEELIG: I'm sorry - - - between the
5 City and the respective unions of the MLC, of which I
6 served - - -

7 JUDGE SMITH: Well, I - - -

8 MR. SEELIG: - - - as co-chair for fourteen
9 years.

10 JUDGE SMITH: I have been thinking, and
11 maybe I was just confu - - - I'm obviously a little
12 confused. I have been thinking that - - - that what
13 did it, what implemented that - - - that agreement
14 was the - - - was the language that said any program
15 is hereby extended. You're saying it's something
16 else that did it?

17 MR. SEELIG: If you want to use the word
18 "program", that's fine. I don't - - -

19 JUDGE SMITH: I don't want to use it.

20 MR. SEELIG: I don't believe that that's -
21 - -

22 JUDGE SMITH: I'm trying to read the
23 statute.

24 MR. SEELIG: I believe that the language of
25 numerette (ii) is what governs here, under Section

1 (b) of 480, and clearly they talk about contributions
2 to the police pension fund - - -

3 JUDGE PIGOTT: Yeah, but that - - -

4 MR. SEELIG: - - - and the amount of that
5 contribution for its members.

6 I'm sorry. Go ahead, Your Honor.

7 JUDGE PIGOTT: That's okay. But if you
8 look at the subject of the - - - of 480(b), the
9 subject of the sentence, it says, "Any program under
10 which all or part of a contribution which would
11 otherwise be made to its employees". You want to
12 distinguish program and - - - and contribution, but I
13 - - - I think what they're saying here is that any
14 program which affects a contribution, and then it
15 goes on to talk about percentages.

16 MR. SEELIG: Well, it says except section
17 Romanette (ii), so I think Romanette (ii) is the
18 appropriate section to focus the court's attention
19 on.

20 JUDGE PIGOTT: But do you agree with me
21 that what (b) is talking about is programs?

22 MR. SEELIG: I'm saying that it's a
23 contribution rate as - - -

24 JUDGE PIGOTT: All right.

25 MR. SEELIG: - - - per - - -

1 JUDGE PIGOTT: So we have a disagreement
2 there. If it's program, it's not what you say it is.
3 If it's contribution, then you're right. Is that how
4 it breaks down?

5 MR. SEELIG: Well, I think whether you use
6 the nomenclature "program" or whether you use the
7 term "contribution", either way, Section (b), sub - -
8 - Romanette (ii), provides a requirement for a five
9 percent contribution because that was the rate prior
10 to January 1st, 2000, and - - - rather 1976.

11 One last point, and that is - - -

12 JUDGE GRAFFEO: Under your rationale, would
13 this also mean that your clients in Tiers 4 and 5
14 also receive the benefit?

15 MR. SEELIG: They are not in 4 and 5. The
16 only police - - - currently, the only police officers
17 and firefighters to be hired will be in Tier 3. That
18 is - - -

19 JUDGE GRAFFEO: There's no 4 and 5 now?

20 MR. SEELIG: There's no 4 and 5 for them.
21 And I do want to make one further clarification - - -

22 CHIEF JUDGE LIPPMAN: Finish, counsel. You
23 have - - -

24 JUDGE READ: I have a question.

25 CHIEF JUDGE LIPPMAN: First answer Judge

1 Read's question, yes.

2 JUDGE READ: The affect - - - if we would
3 agree with you, the affect for these employees would
4 be they'd have a totally noncontribu - - - they
5 wouldn't contribute at all to their pension?

6 MR. SEELIG: Their contribution, as is true
7 for many police officers, would be picked up by the
8 City. The City has gained a tremendous benefit,
9 because - - -

10 JUDGE READ: Well, let me - - -

11 MR. SEELIG: - - - under Tier 1 - - -

12 JUDGE READ: - - - let me finish it. So
13 they would not make a contribution at all. How is
14 that consistent with all of this being part of
15 pension reform - - -

16 MR. SEELIG: Because - - -

17 JUDGE READ: - - - in terms of reduced
18 costs?

19 MR. SEELIG: Because the pension reform to
20 reduce costs was a diminution of benefits, and the
21 cost to fund such a pension plan was reduced in each
22 succeeding tier, with a possible exception of Tier 4.

23 JUDGE SMITH: Was it never part - - -

24 MR. SEELIG: And so - - -

25 JUDGE SMITH: Was it never a part of - - -

1 MR. SEELIG: So - - -

2 JUDGE SMITH: - - - the reform to make the
3 pensions contributory or to make them more - - - to
4 make them contributory to a greater degree?

5 MR. SEELIG: No, they - - - they wanted to
6 have contributions in the Tier 3 and Tier 4 and later
7 plans. Instead of using an actuarial determination
8 based on the date that the member enrolled in the
9 pension plan, they used a blended rate. So the
10 difference, when Judge Friedman dissented and he said
11 it's all about annuity and the language of annuity in
12 the Administrative Code of 13-226 and 13-326, for
13 police and fire, respectively, he misunderstood the
14 application. It wasn't about annuity; it was about -
15 - - the ITHP was about reducing the employee's
16 portion - - -

17 CHIEF JUDGE LIPPMAN: Okay, counselor.

18 MR. SEELIG: - - - of the contribution.

19 CHIEF JUDGE LIPPMAN: Counselor?

20 JUDGE SMITH: I'm sorry.

21 CHIEF JUDGE LIPPMAN: Oh, Judge Smith, go
22 ahead.

23 JUDGE SMITH: I know I'm going to take us
24 forever but - - -

25 CHIEF JUDGE LIPPMAN: Go ahead.

1 JUDGE SMITH: The ITHP, as originally
2 instituted, as it was - - - as it was enacted as part
3 of the Administrative Code, back in 1963, that did
4 speak directly to the annuity, didn't it? It said
5 that the - - - that the annuity payments shall be
6 offset.

7 MR. SEELIG: Yes, because the structure of
8 all pension plans in the system at that time provided
9 - - -

10 JUDGE SMITH: Okay.

11 MR. SEELIG: - - - for an annuity - - -

12 JUDGE SMITH: I get the idea.

13 MR. SEELIG: - - - as the mechanism for - -
14 -

15 JUDGE SMITH: Okay. So my ques - - -

16 MR. SEELIG: - - - members' contributions.

17 JUDGE SMITH: - - - my question really is
18 then isn't the question whether the structure became
19 sufficiently different that we no longer had the same
20 program?

21 MR. SEELIG: No, it's very minutely
22 different. The difference is that in Tier 1 and Tier
23 2, the rate of the members' contribution was based on
24 the age in which they joined the system. The younger
25 they were, it was presumed, for a police officer or a

1 firefighter, the more they would have to pay in to
2 actuarially pay the longer pension. And if they were
3 older, they might pay a different rate. Where in
4 Tier 3, based on the wisdom of the legislature and
5 their actuaries, they determined, instead, to replace
6 the actuarial determination of a contribution rate
7 for a member to a blended rate of three percent,
8 recognizing that the cost to fund Tier 3 was less,
9 because the benefit levels in Tier 3, and its
10 succeeding pensions, were not as - - - as beneficial
11 to the members and as rich - - -

12 JUDGE READ: So you're saying - - -

13 MR. SEELIG: - - - to the members.

14 JUDGE READ: - - - it's consistent with the
15 notion that this was all part of pension reform?

16 MR. SEELIG: It's con - - - well, when you
17 say whether it's consistent or not, the legislature
18 believed they wanted to preserve for police the ITHP
19 that they would be picked up.

20 And one last thing is the City is not
21 getting hurt here. Instead of paying five percent
22 per employee, which, on average, the employee's
23 contribution were greater or needed to be greater
24 than that, so the City was kicking in five percent,
25 it was reduced to three percent after July 1st.

1 CHIEF JUDGE LIPPMAN: Okay, counsel, let's
2 hear from your colleague.

3 MR. SEELIG: Thank you.

4 CHIEF JUDGE LIPPMAN: Thank you.

5 MR. MCGUIRE: May it please the court.
6 James McGuire for Patrick Lynch and the PBA.

7 First of all, I'd say I hope the court will
8 ignore the belated legislative history that was just
9 cited by my adversary. These are snippets from - - -
10 from the - - - from bill jackets from one extender,
11 for example, where you have sponsors inexplicably
12 stating that the ITHP extender depends upon when the
13 employee was hired. There's no such language in that
14 statute. In all other bill jackets that I've looked
15 at, there's no such language.

16 JUDGE PIGOTT: I think what - - -

17 MR. MCGUIRE: No sponsor's memorandum can
18 contradict the text of the statute.

19 JUDGE PIGOTT: If - - -

20 MR. MCGUIRE: But - - -

21 JUDGE PIGOTT: If we put this in simpler
22 terms, this is a hold harmless. I mean, it's so
23 police and fire don't have to contribute to their
24 pensions. It gives - - - it increases their take-
25 home pay. That's - - -

1 MR. MCGUIRE: That's exactly right, Your
2 Honor. This benefit - - - the benefit that's at
3 issue here is not known as the decreased annuity - -
4 - annuity contribution - - -

5 JUDGE PIGOTT: Right.

6 MR. MCGUIRE: - - - benefit.

7 JUDGE PIGOTT: But Mr. - - -

8 MR. MCGUIRE: It's the increa - - -

9 JUDGE PIGOTT: - - - Mr. Snow's point then
10 is that in 2007 or 9 - - - I forget whenever the
11 governor did this - - - said we can't afford this
12 anymore. Now, I - - - I don't want to fight the
13 financial aspect of it, but he said we can't do it
14 anymore. And just like everybody else, Tier 1 and 2
15 civilians don't contribute; Tier 3s do. And - - -
16 and this seemed to - - - to say in Tier 3s
17 everybody's contributing now because we need the
18 money.

19 MR. MCGUIRE: To - - -

20 JUDGE PIGOTT: Is that wrong?

21 MR. MCGUIRE: No - - - yes, it is.

22 JUDGE PIGOTT: Okay.

23 MR. MCGUIRE: In 2000, Governor Paterson
24 vetoed one of the extenders that had been going on
25 for a long time, which would have extended Tier 2

1 status to police officers, notwithstanding the date
2 that was otherwise specified in Tier 3, because the
3 State couldn't afford Tier 2 benefits. It doesn't
4 follow - - - those - - - it doesn't follow that Tier
5 3, which already has inferior benefits, right, that
6 ITHP isn't consistent with that.

7 JUDGE GRAFFEO: You mean the percentage of
8 salary that you get when you retire is less in Tier 3
9 than Tier 2?

10 MR. MCGUIRE: There are many, many
11 differences that are stated - - -

12 JUDGE GRAFFEO: Whatever it is - - -

13 MR. MCGUIRE: - - - the years - - -

14 JUDGE GRAFFEO: - - - your - - -

15 MR. MCGUIRE: - - - the years of service -
16 - -

17 JUDGE GRAFFEO: Your periodic pension check
18 is less if you're Tier 3 than Tier 2.

19 MR. MCGUIRE: Well, there - - - there are
20 many differences. It will - - - it will be, in part,
21 a function of - - - it increases the number of years
22 before you're eligible for a fifty percent final
23 average salary. It makes it instead of a three-year
24 determinant, it's a one-year determinant - - -

25 JUDGE PIGOTT: Nobody is scrambling to get

1 into Tier 3 that's in 1 or 2.

2 MR. MCGUIRE: I'm sorry?

3 JUDGE PIGOTT: Nobody is scrambling to get
4 into Tier 3 - - -

5 MR. MCGUIRE: Exactly, and that's why - - -

6 JUDGE PIGOTT: - - - from Tier 1.

7 MR. MCGUIRE: Right. So Governor Paterson
8 vetoes the extender, and then six or seven months
9 later si - - - and I don't see how that's conceivably
10 relevant to the legislature's intent in 480. And
11 this is about statutory construction. But in any
12 event, Governor Paterson is the one who then signs
13 the bill that makes ITHP permanent. This is a
14 program.

15 CHIEF JUDGE LIPPMAN: Counsel, why is your
16 position consistent with the legislative - - - the
17 broader legislative purpose of all of this? Judge
18 Read talked before about pension reform. Is this
19 some consistency in what's happening, or is it - - -
20 or is it just picking apart these different statutory
21 terms?

22 MR. MCGUIRE: Your Honor, we shouldn't even
23 be getting into this because this is a case of pure
24 statutory construction. You have a 480(b) progra - -
25 - it extends and secures benefits secured by many

1 ITHP programs. 13-226 has been a dinosaur, a dead
2 letter for over forty years.

3 JUDGE PIGOTT: But maybe Mr. Snow - - - I
4 mean, he'll address this, I'm sure, but I think one
5 of his points is that as of '07 there was no more
6 program; there is no program in 3; you can't extend a
7 program that doesn't exist, and since these officers
8 and firefighters came in in '09, they got into a
9 pension plan where there was no program of ITHP, and
10 therefore there's nothing to extend as far as Tier 3.

11 MR. MCGUIRE: But there's nothing in the
12 governing statute. The statute before you is 480 - -
13 -

14 JUDGE PIGOTT: But it doesn't create - - -

15 MR. MCGUIRE: And the - - -

16 JUDGE SMITH: 480(b)(i) or 480(b)(ii)?

17 MR. MCGUIRE: Both. 480 - - - you know,
18 480(b) continues any programs that had been in
19 existence.

20 JUDGE SMITH: Okay. But I'm - - -

21 MR. MCGUIRE: And it doesn't - - -

22 JUDGE SMITH: I thought your colleague was
23 saying, and may I misunderstood him, that we could
24 forget about (b)(i) and just read (b)(ii). It seems
25 to me (b)(i) is the one that says any program is - -

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MR. MCGUIRE: I'm not - - - I don't know -
- - I'm not sure what my colleague was saying. ITHP
is a program; it's been in existence for over sixty
years. It's resided exclusively in 480(b) for over
forty years, and it's a program, and we just look at
the language of that statute.

JUDGE SMITH: But - - -

MR. MCGUIRE: And - - -

CHIEF JUDGE LIPPMAN: It's a program or
it's a contribution rate?

MR. MCGUIRE: No, the statute extends
programs pursuant to which the - - - the employer
picks up all or part of the portion of the
contribution toward retirement. It doesn't
distinguish between - - -

JUDGE SMITH: But on the other hand - - -

MR. MCGUIRE: - - - annuities - - -

JUDGE READ: It doesn't define the program

- - -

MR. MCGUIRE: - - - and any other kinds of

- - -

JUDGE READ: - - - though, does it?

MR. MCGUIRE: Excuse me?

JUDGE READ: I mean, it doesn't define what

1 the program is.

2 MR. MCGUIRE: That's right; that's the
3 point. The legislature's - - -

4 JUDGE READ: Well, how can you read it - -
5 - how can you read it, then, without reading it in
6 the context of all of these other provisions?

7 MR. MCGUIRE: Because - - - because there
8 were other programs and the legislature prescinded
9 from the details of the particulars because they were
10 concentrating - - -

11 JUDGE SMITH: But - - -

12 MR. MCGUIRE: - - - on - - -

13 JUDGE SMITH: But isn't the gist of it that
14 each and every then-existing program of this kind is
15 hereby continued?

16 MR. MCGUIRE: That's right, and - - -

17 JUDGE SMITH: And isn't there a reasonable
18 debate, at least, about whether the - - - when it
19 says this particular program is continued, the
20 program, as it existed in the City legislation then,
21 was defined, in this very convoluted way, as an
22 offset against an annuity. You say you can't read it
23 that narrowly, but isn't that - - - isn't it open to
24 that reading?

25 MR. MCGUIRE: No - - - no, I don't think it

1 is, because first of all, 13-226 established a
2 contingent right to the pro - - - to this benefit,
3 you know, that lasted for some twenty years or so,
4 and then 480(b) took over, and the legislature
5 legislated at a different level of generality - - -

6 JUDGE SMITH: Well, doesn't 480(b) say, in
7 substance, 13-226 is hereby extended?

8 MR. MCGUIRE: No, it - - - but Your Honor,
9 I think Your Honor - - - I think Your Honor is
10 operating under the assumption that the only ITHP
11 program in the world, at the time that this was
12 enacted, was the 13-226 program.

13 JUDGE SMITH: No, I think I've gotten over
14 that. I admit - - -

15 MR. MCGUIRE: Okay.

16 JUDGE SMITH: - - - I had that impression -
17 - -

18 MR. MCGUIRE: But what - - -

19 JUDGE SMITH: - - - a while ago, but I
20 think I got over that.

21 MR. MCGUIRE: Okay. Well, the point is
22 that there were many of them. And the - - - and - -
23 - and - - -

24 JUDGE SMITH: Okay. But - - -

25 MR. MCGUIRE: - - - and the purpose of the

1 - - -

2 JUDGE SMITH: - - - but this says any
3 program; it means each and every one, doesn't it?

4 MR. MCGUIRE: That's - - - that's right,
5 and it uses very broad language. It's - - - and - -
6 - which would otherwise be made - - - a program
7 "which expires or terminates is hereby extended,
8 notwithstanding any other law", but the key part is
9 "under which the employer assumes all or part of the
10 contributions which would otherwise be made by its
11 employees". How can it possibly matter to the
12 legislature that more money is put into the pockets
13 of the officers? That's the goal: increased take-
14 home pay.

15 JUDGE SMITH: Let me approach it in a
16 slightly different way. In 1976, when Tier 3 came
17 in, and when everyone then expected that it would
18 extend to police and fire, apparently, although it
19 didn't - - - I mean, the police were writing - - -

20 MR. MCGUIRE: Right.

21 JUDGE SMITH: - - - rather upset letters
22 saying this is Armageddon. And this is a huge
23 sweeping overhaul of pensions. If you're going - - -
24 if you plan to - - - if the ITHP program for police
25 and fire, the one that was extended to them - - - for

1 them in 1974, if that's being continued as part of
2 Tier 3, wouldn't you expect the legislature to say
3 that explicitly at some point?

4 MR. MCGUIRE: To say what explicitly, Your
5 Honor?

6 JUDGE SMITH: To say that ITHP is part of
7 Tier 3.

8 MR. MCGUIRE: I don't - - - well, first of
9 all, they did in 508-a. 508-a, of Article - - - of
10 Article 13, which is a Tier 3 article, expressly
11 contemplates the applic - - - applicability of the
12 ITHP benefit - - -

13 JUDGE SMITH: Well, no, but that's a - - -

14 MR. MCGUIRE: - - - to Tier 3.

15 JUDGE SMITH: - - - that's a statute that
16 was added, in identical terms, to several articles,
17 right?

18 MR. MCGUIRE: Right. Right, which is - - -

19 JUDGE SMITH: And it does say "if any" in
20 it.

21 MR. MCGUIRE: Right, it - - - right it does
22 "if any" because not - - - Your Honor, because not
23 every Tier 3 employee had an ITHP program. It was
24 not necessarily across the State every Tier 3
25 employee had an underlying program by its employer of

1 an ITHP benefit.

2 JUDGE SMITH: Okay. Why - - -

3 MR. MCGUIRE: So it had to say it.

4 JUDGE SMITH: I guess maybe then my
5 question is why isn't it - - - why was not it, if you
6 like, even more explicit? Why don't they just say,
7 when they're - - - they're defining this whole new
8 creature, Tier 3, and they - - - and they - - - you
9 say you're preserving the ITHP program, why doesn't
10 it say so?

11 MR. MCGUIRE: Well, they could have done
12 that. The fact that they didn't is not something
13 that Your Honor can draw any conclusions from,
14 because the broad language of 480(b) already answers
15 the question. The legislature - - - look, you know,
16 my adversary has challenged us and said, in its reply
17 brief, that we had ignored the legislative history of
18 this. So - - - you know, so we went back and - - -
19 and looked at the legislative history of this case.
20 And - - - and there is a predecessor to 480, enacted
21 in 1973, the year before; we cite it in our brief, a
22 freestanding provision of law. And the first - - -
23 and Section 2 of the bill establishes - - - it
24 doesn't quote 480(b), but it's the same language,
25 480. And then there's other analogs to 480(a), and

1 there's other analogs to 480(c). So let me - - -

2 JUDGE PIGOTT: Before you go there, can I
3 just get back - - -

4 MR. MCGUIRE: Sure.

5 JUDGE PIGOTT: - - - I want to catch up to
6 you. Mr. Snow says there is no program; after '09,
7 there is no program. And - - -

8 MR. MCGUIRE: Sure, the program continues
9 to exist now. It's - - -

10 JUDGE PIGOTT: Where is it?

11 MR. MCGUIRE: It's in 480(b).

12 JUDGE PIGOTT: Well - - -

13 MR. MCGUIRE: It's been there for forty - -
14 -

15 JUDGE PIGOTT: His point is that this says
16 any program under which, and it goes on, an employer.
17 And as we're all saying, this applies in all sixty-
18 two counties and all of the municipalities.

19 MR. MCGUIRE: Right.

20 JUDGE PIGOTT: So if you've got a program
21 in Buffalo, New York - - -

22 MR. MCGUIRE: Right.

23 JUDGE PIGOTT: - - - then it's going to be
24 extended. But if you don't have a program in
25 Buffalo, New York, this doesn't apply.

1 MR. MCGUIRE: Exactly.

2 JUDGE PIGOTT: And he's saying there is no
3 program in New York.

4 MR. MCGUIRE: There's always been a program
5 in New York. It's been in first - - - established -
6 - -

7 JUDGE PIGOTT: Where is it?

8 MR. MCGUIRE: - - - a discretionary right
9 in - - -

10 JUDGE READ: Where is it for tier - - -

11 MR. MCGUIRE: - - - in thirt - - - in thirt
12 - - -

13 JUDGE READ: Where is for Tier 3, though?
14 Where is it for Tier 3?

15 MR. MCGUIRE: There's nothing in Tier 2
16 that says that - - - that it's applicable thereto.
17 It's all a function of 480(b). It's not like there's
18 some provision of Article 2 - - -

19 JUDGE PIGOTT: But doesn't that mean - - -

20 MR. MCGUIRE: - - - that says this is
21 hereby an ITHP benefit.

22 JUDGE PIGOTT: Doesn't that mean, then,
23 that 480(b) is creating the program?

24 MR. MCGUIRE: 480(b) - - - 480(b) secures a
25 program that - - - all programs that had been in

1 existence at the time, and it secured them under
2 particular terms, under general terms.

3 JUDGE PIGOTT: I can't find the program.
4 That's what I'm looking - - -

5 MR. MCGUIRE: But - - -

6 JUDGE RIVERA: But isn't it a program as it
7 applies, and he's saying there's no Tier 3 for it to
8 apply to? I'm - - -

9 MR. MCGUIRE: But that's just - - - that's
10 just a conclusion that it doesn't apply; you have to
11 look at the language of it. The legislature used
12 broad language. That's why the DiBrizzi case that we
13 - - - that we quoted in our brief is so important
14 here. Matter of DiBrizzi ba - - - it says as
15 follows: "A general law may, and frequently does,
16 originate in some particular case or class of cases
17 which is in the mind of the legislature at the time,
18 but, so long as it is expressed in general language,
19 the courts cannot, in the absence of express
20 restrictions, limit its application to those cases,
21 but must apply it to all cases that come within its
22 terms and its general purpose and policy."

23 JUDGE SMITH: Maybe the debate, then, is
24 when you - - - the words we're talking about - - - I
25 think maybe the words we're talking about are the

1 words "any program under which an employer in a
2 public retirement system funded by the State or one
3 of its political subdivisions assumes all or part of
4 the contribution". It's the question whether that
5 language is general or specific. It looks specific
6 to me.

7 MR. MCGUIRE: It's - - - well, it's
8 certainly general in this sense, it says "all or part
9 of the contributions"; it doesn't distinguish between
10 the nature of the contributions. And why would it?

11 JUDGE SMITH: But it's talking about
12 existing programs. It's not talking about - - - it
13 could have said "Any employer who is now" - - -

14 MR. MCGUIRE: Right.

15 JUDGE SMITH: It could have said, "Any
16 employer who is now paying part of all the
17 contributions has to keep paying them." It doesn't
18 that.

19 MR. MCGUIRE: Right.

20 JUDGE SMITH: It says any program is hereby
21 extended. Isn't that different?

22 MR. MCGUIRE: Right, but it's continually
23 extended, and every time it's extended - - - and it's
24 in our brief - - - there is no substantive
25 distinction - - - the law recognizes this - - -

1 between the - - - an extender and an original act - -
2 - enactment of it. And - - -

3 JUDGE PIGOTT: That's right, but he says it
4 ended at 3, that in 2009, when this new program came
5 in, there was - - - there's nothing to extend because
6 there's nothing there.

7 MR. MCGUIRE: I'm not sure which - - - what
8 program he's referring to.

9 JUDGE PIGOTT: Tier 3 that applies to your
10 - - -

11 MR. MCGUIRE: Well, Tier 3 - - - Tier 3
12 came - - - there's nothing in Tier 3 that prevents
13 its applicability, just like there's nothing in Tier
14 2. It's not a program that - - -

15 JUDGE PIGOTT: Not prevents it, but - - -
16 but you seem to be arguing that if this section says
17 what you say it says, then - - - and we were to find
18 with you, then - - - then all of the firefighters in
19 the State of New York would say, hey, we just got an
20 ITHP - - -

21 MR. MCGUIRE: No.

22 JUDGE PIGOTT: - - - because 480 is a law
23 that says we get it.

24 MR. MCGUIRE: Not - - - not at all.

25 JUDGE PIGOTT: There's got to be a program.

1 MR. MCGUIRE: Not - - - right. And there
2 wa - - -

3 JUDGE PIGOTT: Where is it?

4 MR. MCGUIRE: And there was a program, and
5 that's what 480(b)(i) says; it talks about a program
6 which then was in existence.

7 JUDGE PIGOTT: Okay.

8 MR. MCGUIRE: There was one in New York - -
9 -

10 CHIEF JUDGE LIPPMAN: Is a - - -

11 MR. MCGUIRE: - - - and 480 - - -

12 CHIEF JUDGE LIPPMAN: Is a program and a
13 benefit the same thing?

14 MR. MCGUIRE: I don't know; I don't think
15 anything turns on that, Your Honor.

16 CHIEF JUDGE LIPPMAN: I mean, when you say
17 it's a program, the program continues to exist, and
18 you're asked where is the program, it's a benefit
19 that's being paid, and you're saying that benefit
20 continues.

21 MR. MCGUIRE: Right, and it - - - and it -
22 - - it's lived in 480(b), for lo these last forty
23 years, with general terms, and 480(b), Romanette (ii)
24 makes absolutely clear that it applies to all members
25 of the police and - - - police and fire department

1 retirement - - -

2 JUDGE RIVERA: Did - - -

3 JUDGE GRAFFEO: I understand - - -

4 JUDGE RIVERA: Did you negotiate, or was

5 there some bargain for this - - -

6 MR. MCGUIRE: That - - -

7 JUDGE RIVERA: - - - in Tier 3?

8 MR. MCGUIRE: That's another really

9 important point here. My adversary is complaining

10 about how, oh geez, you know, if you accept that it

11 applies to Tier 3 then they don't have to pay any - -

12 -

13 JUDGE RIVERA: No, but did you negotiate

14 it? Was this bargained for - - -

15 MR. MCGUIRE: Right. They don't - - - that

16 they don't have to pay any portion - - -

17 JUDGE RIVERA: But is it - - - did you

18 bargain for it? Is it negotiated? I'm just - - - is

19 that yes - - -

20 MR. MCGUIRE: Yes, it was bargained.

21 JUDGE RIVERA: Yes, okay.

22 MR. MCGUIRE: The City - - - the - - -

23 JUDGE RIVERA: What did you give away for

24 it?

25 MR. MCGUIRE: Okay. The quid pro quo, it's

1 in the record; it's page 140, 142 of the record.
2 What happened is the Municipal Labor Council agreed
3 on a package of reforms, and including a number of
4 pension bills, and one of them increased the ITHP - -
5 - this is in - - - this is in - - - in 2000, to five
6 percent. It had been two - - - two and a half
7 percent - - - to five percent. And in return for
8 this package of bills, the City got, as Mr. Hanley
9 states, 800 million dollars in long-term savings.
10 And now the City wants the police and firefighters to
11 pay for this twice.

12 JUDGE PIGOTT: Well, wait, wait, wait.

13 MR. MCGUIRE: They got it - - -

14 JUDGE PIGOTT: When you say - - -

15 MR. MCGUIRE: They got it back then.

16 JUDGE PIGOTT: When you say it was
17 negotiated what you're saying is that some
18 politicians got together and said I'll support your
19 bills in Albany if you support my bills in Albany.

20 MR. MCGUIRE: And then the politicians - -
21 - politicians went along with it. They - - -

22 JUDGE PIGOTT: But it wasn't a CBA. I
23 thought the question - - - and maybe I misunderstood
24 Judge Rivera - - - I thought the question was did the
25 unions sit down with management and say, you know,

1 this is what we want, this is what we need, this what
2 we want you to give, and you gave up something in
3 return.

4 MR. MCGUIRE: Yes, and we - - -

5 JUDGE PIGOTT: You're talking about - - -

6 MR. MCGUIRE: - - - gave up - - -

7 JUDGE PIGOTT: - - - negotiations up in
8 Albany with politicians.

9 MR. MCGUIRE: There were negotiations down
10 in the City, and then - - - and then - - - and the
11 politicians in Albany ratified that agreement.

12 JUDGE PIGOTT: Okay.

13 JUDGE READ: So you're - - -

14 MR. MCGUIRE: And they, in 2009, extend the
15 sweeping language of 480(b), right? They make it - -
16 - first they make it - - - they make it five percent,
17 and the - - - and the City gets 800 million dollars,
18 and then in 2009, Governor Paterson approves a bill
19 that makes it permanent. He doesn't veto it. And -
20 - - and that's the same as an original enactment.
21 This - - -

22 JUDGE GRAFFEO: So I have a question.

23 MR. MCGUIRE: - - - program, Judge Smith,
24 it never died.

25 JUDGE READ: To be clear then, your

1 position is the program doesn't refer to the
2 provisions in the Administrative Code at all.

3 MR. MCGUIRE: Well, it - - - it - - - there
4 are - - - there are provisions in the Administrative
5 Code, 13-2 - - -

6 JUDGE READ: Well, the one that talk - - -
7 the one that's talking about - - -

8 MR. MCGUIRE: - - - 13-226 created the
9 contingent right. That's what did it in '63. That
10 became a dinosaur after the predecessor was enacted.
11 And - - -

12 JUDGE READ: So your - - -

13 MR. MCGUIRE: And I still - - -

14 JUDGE READ: So your position is that the
15 provisions that talk about the ITHP - - - if I got
16 the initials correct - - - in the Administrative
17 Code, that that's not what 480(b) is referring to.

18 MR. MCGUIRE: No, that - - - that's right;
19 it's got nothing to do with it. The - - - the
20 conditions for eligibility are simply that there's a
21 program that, pursuant to which, all or part of the
22 contributions of the employees were picked up.
23 That's - - -

24 JUDGE GRAFFEO: I have - - -

25 MR. MCGUIRE: That's - - -

1 JUDGE GRAFFEO: I have a quest - - -

2 MR. MCGUIRE: That's - - -

3 JUDGE GRAFFEO: If we agree with analysis -
4 - - because I understand what you're proposing to
5 us. If we agree with you, are we only continuing
6 this benefit for police and fire, or will it be all
7 programs that affect everything from teachers to
8 sanitation workers who have programs?

9 MR. MCGUIRE: It would only affe - - -

10 JUDGE GRAFFEO: I guess I'm asking - - -

11 MR. MCGUIRE: It would - - - right.

12 JUDGE GRAFFEO: - - - scope of the
13 ramifications.

14 MR. MCGUIRE: It would only affect - - -
15 the record doesn't tell us how many programs there
16 were around the State, but it would only affect State
17 and local retirement systems that had programs that
18 fit within 480(b) and have continued to be extended
19 by the statute.

20 May I make - - -

21 JUDGE GRAFFEO: And there's no way to limit
22 our decision just to the police and fire, what we
23 have in front of us right now?

24 MR. MCGUIRE: If there is particular
25 language somewhere else, I - - - that I don't know

1 about that - - - that, you know, you could - - -

2 JUDGE SMITH: Do you know of any programs
3 that would fit in 480(b) for other than police and
4 fire?

5 MR. MCGUIRE: None - - - none - - - none of
6 that - - - none of that's in the record that I know.

7 But may I make one last point, because I
8 think it's - - -

9 CHIEF JUDGE LIPPMAN: Go ahead.

10 MR. MCGUIRE: - - - really critical.

11 CHIEF JUDGE LIPPMAN: Finish off.

12 MR. MCGUIRE: It was the chapter of the
13 laws of 1973 that created the predecessor. And what
14 happened? There's an analog to 480(b), there's an
15 analog to the 480(a), the benefits, you know,
16 provision that my - - - my colleague was just talking
17 about, and to 480(c).

18 Now, look - - - let's look at the analog to
19 480(a). There's some complexities here, but what
20 happens? The legislature says - - - and that's in
21 Section 4 of the bill - - - it says, "each and every
22 retirement benefit, of whatever nature, including but
23 not limited to retirement allowances, pension", et
24 cetera, of the - - - of, among others, "the New York
25 City Police Pension Fund, shall continue to be

1 applicable to a person who's a member of such
2 retirement system on June 30th, 1973, but only in the
3 form and to the extent thereof as a benefit existed
4 on that date".

5 So the legislature knows how to put
6 limitations like date of hire. They know how to do
7 that. They know how to freeze a particular point in
8 time. But they didn't do that. The very next year,
9 they undid limitations precisely like that, so it's
10 never mattered a whit when you were hired. It
11 matters - - -

12 JUDGE SMITH: Which - - -

13 MR. MCGUIRE: It matters only - - -

14 JUDGE SMITH: - - - two statutes were you
15 referring to?

16 MR. MCGUIRE: - - - whether you're a member
17 of the fi - - - of the police - - -

18 JUDGE SMITH: Which two statutes were you
19 just quoting from?

20 MR. MCGUIRE: I'm talking about Chapter 383
21 of the laws of 1973. It was a predecessor to 4 - - -
22 to Section 480, and you'll also see it discussed by
23 Chief Judge Cook in his opinion in Matter of Bindler,
24 52 N.Y.2d 1.

25 CHIEF JUDGE LIPPMAN: Okay, counsel. Thank

1 you.

2 Counsel, rebuttal.

3 JUDGE GRAFFEO: Can you address the
4 ramification question that I asked your adversary?

5 CHIEF JUDGE LIPPMAN: What other programs
6 are there, counselor, that you know of?

7 MR. SNOW: Well, 480 is a general extender;
8 it extended to quite a few different - - -

9 CHIEF JUDGE LIPPMAN: Yeah, yeah, but we're
10 asking are there others beyond - - -

11 JUDGE GRAFFEO: I mean, are there statewide
12 programs? Are there only programs in New York City?
13 Are there lots of other professions?

14 MR. SNOW: If you're - - -

15 JUDGE GRAFFEO: I'm just trying to get a
16 handle on the - - -

17 MR. SNOW: - - - interested in the
18 applicability - - -

19 JUDGE GRAFFEO: - - - on the breadth of the
20 decision, if we disagree with you.

21 MR. SNOW: The applicability of 480 is
22 addressed in the fiscal note that accompanies Chapter
23 510 of 1974. And what it does it - - -

24 JUDGE GRAFFEO: Can you summarize it for
25 us?

1 MR. SNOW: There's about fifty or sixty
2 different State and City provisions. It doesn't
3 break down the City ITHP programs, but it does go
4 down and break out more of the State programs on an
5 individual basis. So arguably then, I suppose that
6 the next lawsuit will be that the police and fire
7 will say that they're eligible for the State Tier 1
8 benefits because that was also extended and made
9 permanent as well, which obviously does not make any
10 sense.

11 JUDGE PIGOTT: As I understand it as
12 something, I called it a hold harmless; they didn't
13 have to contribute. And as - - - as your adversaries
14 point out or argue, 480's a general law, and this
15 applies, applies, applies, applies, and police and
16 fire don't have to contribute. Tier 3, it comes back
17 in 2009; was there anything in there that said, and
18 by the way, you know, whether Section 480 doesn't
19 apply anymore? Or are you just saying by operation
20 of law because there's a - - - there's a contribution
21 in Tier 3 this is over?

22 MR. SNOW: I think it's all of that. I
23 think the legislative history of 480 says it doesn't
24 apply to Tier 3, and that's explicit in the
25 legislative history that I talked about when I first

1 argued.

2 CHIEF JUDGE LIPPMAN: Why aren't they more
3 explicit in the statute? If they want to say
4 something, why - - - why wouldn't they just say it
5 clearly?

6 MR. SNOW: That's the nature of the
7 benefit. They're very complicated - - -

8 CHIEF JUDGE LIPPMAN: Yeah, but the nature
9 of the statute is it's got to say - - - it's got to
10 say what it means.

11 MR. SNOW: Well, I mean, from a - - - from
12 someone who practices pension law, it's - - - it's
13 done with an understanding of the structure.

14 JUDGE PIGOTT: So when did the program - -
15 - I couldn't find - - - they can't tell me where the
16 program is, and you're telling me it's over. So
17 there must have been a program somewhere in the - - -

18 MR. SNOW: The program ended with that veto
19 which estopped the Tier 2 program.

20 CHIEF JUDGE LIPPMAN: Where was the program
21 that ended with that veto, is what Judge Pigott is
22 asking you.

23 JUDGE PIGOTT: I'm trying to find the body.

24 MR. SNOW: The program at issue is a Tier 1
25 program.

1 JUDGE SMITH: No, where? What piece of
2 legislation?

3 MR. SNOW: Oh, it was done in 1963. I
4 can't recall it off the top of my head.

5 JUDGE SMITH: What's now 13-220-something -
6 - -

7 MR. SNOW: 226.

8 JUDGE SMITH: - - - of the Administrative
9 Code?

10 JUDGE READ: So you answered the question
11 that I asked your adversary, because you said that's
12 the program that's being referred to.

13 MR. SNOW: That's the program, and that is
14 a Tier 1 program, by its nature. And the reason is
15 because it's in the Administrative Code. The
16 Administrative Code says the provisions of this
17 subchapter apply to Tier 1 members, and tier - - -
18 and members - - -

19 CHIEF JUDGE LIPPMAN: Is the program the
20 benefit?

21 MR. SNOW: Again, I don't - - - I'd have to
22 agree with my adversary on that. I'm not certain
23 that that plays any role in the determination.

24 CHIEF JUDGE LIPPMAN: It's not significant?

25 MR. SNOW: I don't think so.

1 CHIEF JUDGE LIPPMAN: What it means is a
2 program that deals with the level of contribution.

3 MR. SNOW: Right. I believe when they
4 reference program with that expiration date, they're
5 referring to - - -

6 JUDGE SMITH: Well, wouldn't you - - -

7 MR. SNOW: - - - a Tier 1 - - -

8 JUDGE SMITH: - - - have a weaker case - -
9 - I mean, what the statute says is any program is
10 hereby extended. If it had said any benefit is
11 hereby extended, wouldn't that be - - - wouldn't that
12 be somehow less specific, more - - - more likely to
13 be adapted to - - -

14 MR. SNOW: Well, again, it did mention the
15 - - - the nature of the benefit or the program, which
16 was paying a part of the contribution or the annuity,
17 so I think that's it.

18 But in the end, the - - - when the Tier 2
19 was - - - was vetoed in 2009, the Governor explicitly
20 said in the veto message, we cannot live with
21 noncontribution plans anymore. That was the reason
22 for the veto. And Tier 3 is a plan with a
23 legislative history that says it's a contribution - -
24 -

25 JUDGE SMITH: It's convincing that the

1 executive branch, in 2009, and it looks like in 2007,
2 that the executive branch indeed thought that - - -
3 that the ITHP program didn't - - - didn't apply under
4 Tier 3. Is that dispositive? I mean, we don't - - -
5 what the legislature thought was important too, and
6 it wouldn't be - - - it wouldn't be a shock to find
7 the legislature a little more generous about pensi -
8 - - in its understanding of pensions than the
9 executive.

10 MR. SNOW: I don't think it's dispositive,
11 but I think they're consistent and they both seem to
12 point to the fact that Tier 3 is a - - - a
13 contributory plan, and that the ITHP is solely
14 applicable to Tier 1 and Tier 2 members, by its very
15 nature in the statute.

16 CHIEF JUDGE LIPPMAN: That's a policy
17 decision that they've made?

18 MR. SNOW: No, the legislature made Tier 3
19 when they - - - when they enacted it, they - - -
20 Section 500 limited the application of certain
21 provisions of Tier - - - of Tier 3 to those members.
22 It said all other provisions don't apply; only these
23 provisions in Article 14 apply.

24 CHIEF JUDGE LIPPMAN: So it's a policy
25 decision not to - - - to have this be a contributory

1 plan, in your view?

2 MR. SNOW: I believe that was a policy
3 decision by the legislature to - - -

4 CHIEF JUDGE LIPPMAN: But is it reflected
5 in - - - in language?

6 MR. SNOW: Absolutely.

7 CHIEF JUDGE LIPPMAN: And your - - - tell
8 us again, your argument hinges on - - - on what exact
9 language where?

10 MR. SNOW: I think it's more of a broad
11 thing, but if it's language, it has to be the
12 language - - -

13 CHIEF JUDGE LIPPMAN: Well, it's a
14 statutory construction, isn't it?

15 MR. SNOW: Right. It would be statutory
16 construction. I would - - - I would say the most
17 important part of it is that Article 14, Tier 3
18 limits the - - - the statutes that apply to them.
19 And that's in Section 500, and it specifically says
20 if you're Tier 3, Article 14 applies to you, and no
21 other provisions of law will. And if they conflict -
22 - -

23 CHIEF JUDGE LIPPMAN: That's the nub of
24 your argument?

25 MR. SNOW: That is. And again, if you look

1 at 517 in Tier 3, it requires three percent of
2 contributions, which is what the legislature wrote
3 into the law and which is what the history of that
4 legislation reflects.

5 CHIEF JUDGE LIPPMAN: Okay.

6 MR. SNOW: Okay.

7 CHIEF JUDGE LIPPMAN: Thank you all.

8 MR. SNOW: Thank you.

9 CHIEF JUDGE LIPPMAN: Appreciate it.

10 (Court is adjourned)

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C E R T I F I C A T I O N

I, Sharona Shapiro, certify that the foregoing transcript of proceedings in the Court of Appeals of Matter of Patrick Lynch, et al. v. The City of New York, et al., No. 119 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

Sharona Shapiro

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