

Index No. 163646/2025

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

IN THE MATTER OF THE APPLICATION OF SAMY
FELIZ, MERY VERDEJA, ASHLEY VERDEJA, JULIE
AQUINO, AND JUSTICE COMMITTEE, INC.,

Petitioner,

For a Judgment and Order Pursuant to Article 78 of the
Civil Practice Law and Rules

- against -

JESSICA TISCH, in her official capacity as the
Commissioner of the New York City Police Department,
NEW YORK CITY POLICE DEPARTMENT, and
LIEUTENANT JONATHAN RIVERA,

Respondent.

**RESPONDENTS' MEMORANDUM OF LAW IN
SUPPORT OF THEIR CROSS-MOTION TO
DISMISS THE ARTICLE 78 PETITION**

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PRELIMINARY STATEMENT

Respondents Jessica Tisch (“Commissioner Tisch”), in her official capacity as the Commissioner of the New York City Police Department, New York City Police Department, and Lieutenant Jonathan Rivera (“Lt. Rivera”) (collectively, “Respondents”) respectfully submit this memorandum of law in support of their cross-motion to dismiss the Petition pursuant to CPLR 3211(a)(3) and (7) and 7804(g). Petitioners Samy Feliz, Mery Verdeja, Ashley Verdeja, Julie Aquino, and Justice Committee, Inc., (collectively, “Petitioners”) seek a judgment from this court overriding the determination of Commissioner Tisch to retain Lt. Rivera as an NYPD employee and ordering Respondents to terminate Lt. Rivera in accordance with the recommendation of NYPD Deputy Commissioner Rosemarie Maldonado following the death of Allan Feliz. The Petition fails as a matter of law, for three reasons:

First, Petitioners plainly lack standing to challenge Commissioner Tisch’s disciplinary determination regarding the employment status of Lt. Rivera. The Petition fails to establish that the Petitioners have suffered a legally cognizable injury-in-fact resulting from the Commissioner’s decision, and even it did, the injury would not be within the zone of interest required by law.

Second, the Petition is before the wrong court. The question posed by the Petition is whether the Commissioner’s decision was supported by substantial evidence or was arbitrary and capricious. As a straightforward matter of New York State law, this question must be answered by the Appellate Division and should be transferred to that Court.

Third, the Petition fails on the merits. Commissioner Tisch applied the law to the record before her, explaining why she reached the conclusion that she did and why she disagreed with her certain points made by Commissioner Maldonado. By doing so, the decision is supported by substantial evidence and is neither arbitrary nor capricious. .

For these reasons and as further described below, the Court should deny the Petition and dismiss this proceeding in its entirety.

STATEMENT OF FACTS¹

A. The October 17, 2019 Traffic Stop of Allan Feliz

On October 17, 2019, at 2:53 p.m., the deceased, Allan Feliz (“Mr. Feliz”), was stopped for a seatbelt violation by Respondent Lt. Rivera,² Police Officer Edward Barrett (“PO Barret”), and Police Officer Michelle Almanzar (“PO Almanzar”). Petition Ex.³ 6, pg. 3; Ex. 7, pg. 1 PO Barrett and PO Almanzar approached the driver’s side window of the vehicle and requested identification from Mr. Feliz. Ex. 6, pg. 4. Ex. 7, pg. 3. Lt. Rivera approached the front passenger-side door. *Id.* Mr. Feliz provided PO Barrett with an identification belonging to Petitioner Samy Feliz. *Id.* A check on the license provided returned three open warrants for minor offenses. *Id.* As a result, Mr. Feliz was asked to step out of the vehicle because it was believed he was the subject of the outstanding warrants and subject to arrest. Ex. 6, pg. 4-5; Ex. 7, pg. 3. PO Barrett was going to perform a pat down of Mr. Feliz. Ex. 6, pgs. 4-5. Feliz complied and stepped out of the vehicle. Ex. 6, pg. 4-5; Ex. 7, pg. 3. PO Barrett asked Mr. Feliz “[y]ou have anything on you you’re not supposed to have?” to which Mr. Feliz responded that he “did not.”⁴ *Id.* When PO Barrett turned to PO Almanzar to give her Mr. Feliz’s license and registration, Mr. Feliz returned

¹ This statement of facts is derived from the Petition and its exhibits. Those allegations, but not the conclusions, are deemed true solely for the purpose of this cross-motion to dismiss. However, allegations that are conclusory, inherently incredible, or unequivocally contradicted by documentary evidence are not entitled to a presumption of truth. *Leder v. Spiegel*, 31 A.D.3d 266, 267 (1st Dep’t 2006), *aff’d* 9 N.Y.3d 836 (2007).

² At the time of the incident, Rivera held the rank of Sergeant. On September 30, 2022 Rivera was promoted to the rank of Lieutenant.

³ All further citations to the Petition’s Exhibits are abbreviated herein to “Ex.” for the relevant exhibits.

⁴ A post-incident investigation found that Mr. Feliz had one ziplock bag of cocaine, four tablets of methamphetamine, one tablet of unknown substance, and 2 paper packet(s) containing solid material residue. Ex. 6, OAG Report, Exhibit 3.

to the vehicle and began to pull the door closed and reached for the gearshift, attempting to put the car into drive and escape. Ex. 6, pg. 5; Ex. 7, pg. 3.

PO Barrett attempted to pull Mr. Feliz out of the car. Ex. 6, pgs. 5-6. A struggle ensued between PO Barrett and Mr. Feliz. Ex. 6, pgs. 5-6; Ex. 7, pgs. 3. During the struggle, Lt. Rivera deployed a taser through the front passenger-side window hitting Mr. Feliz's upper chest area which stunned him temporarily. Ex. 6, pg. 5; Ex. 7, pg. 3. Mr. Feliz was able to remove one of the two taser prongs and continued his attempt to drive away. *Id.* Lt. Rivera entered the passenger side of the car climbed onto the passenger. He drew his service weapon and pointed it at Mr. Feliz, yelling, "Yo, if I have to fucking end up shooting you, bro, . . . Yo, boss, I'm going to fucking shoot you." Ex. 6, pg. 5; Ex. 7, pg. 5. Mr. Feliz continued trying to put the car into drive. *Id.* Lt. Rivera reholstered his service weapon. *Id.* Climbing fully across the passenger, Lt. Rivera repeatedly hit Mr. Feliz and tried to push him out of the car. He also used his Taser to strike Mr. Feliz. *Id.*

Throughout this struggle, which lasted for approximately 90 seconds, Lt. Rivera and Mr. Feliz were fighting for control of the gearshift, with Mr. Feliz trying to put the car into drive and Lt. Rivera trying to keep the gearshift in park. Ex. 6, pg. 5. PO Barrett was standing between the open driver-side door and the car, grappling with Mr. Feliz. *Id.* PO Almanzar was yelling at Mr. Feliz to get out of the car and calling to Lt. Rivera to get the gearshift in park. *Id.*

Suddenly the car surged forward several feet, as PO Barrett continued struggling with Mr. Feliz. *Id.* Then the car abruptly accelerated backward several feet. *Id.* Officer Almanzar cried out "Oh my god" as PO Barrett was pushed by the driver-side door to the rear of the car. Ex. 8, pg. 10. The car suddenly stopped, and the driver-side door slammed shut. Ex. 6, pg. 6. Lt. Rivera could no longer see PO Barrett. *Id.* Given where PO Barrett had been standing a moment earlier, Lt.

Rivera believed that PO Barrett had been hit by the driver-side door and had fallen to the ground, beneath the wheels of the car. *Id.* Lt. Rivera believed that any further movement of the vehicle would have resulted in PO Barrett being crushed under the car. To save PO Barrett's life, Lt. Rivera took out his service weapon and shot Mr. Feliz once in the chest. *Id.* PO Barrett had in fact been pushed towards the rear of the car but had not fallen; PO Barrett rushed back to the driver-side window as the gunshot went off. *Id.*

After Mr. Feliz was shot, officers removed him from the car and Lt. Rivera immediately called for an ambulance. Ex. 8, pg. 11. Life-saving measures were performed by Lt. Rivera and PO Barrett until an ambulance arrived. *Id.* Mr. Feliz was transported to Montefiore Hospital where he was pronounced dead. Ex. 6, pg. 6-7.

B. The New York State Office of the Attorney General Investigates the October 17, 2019 Traffic Stop.

Pursuant to the authority vested by Executive Order No. 147, which empowers the New York State Office of the Attorney General ("OAG") with the power as special prosecutor "to investigate, and if warranted, prosecute certain matters involving the death of an unarmed civilian...caused by a law enforcement officer," the OAG opened an investigation into the shooting death of Mr. Feliz by Lt. Rivera. Ex. 6. The investigation included reviewing, among other things, NYPD body worn camera footage from Lt. Rivera, PO Barrett, and PO Almanzar; all NYPD paperwork generated regarding the matter; civilian video footage, interviews with all officers involved; and an interview of the passenger in Mr. Feliz's vehicle. Ex. 6.

In September 2020, the OAG issued a report (the "OAG Report") explaining that it was declining to prosecute Lt. Rivera, as there was "insufficient evidence to establish that [Lt.] Rivera committed a crime in connection with the death of Mr. Feliz." Ex. 6. The OAG Report concluded that "[a]lthough [Lt.] Rivera's perception of the risk to PO Barrett, as provided in his

account of the incident, was not ultimately accurate, it was a reasonable perception—or at least not an obviously unreasonable one—particularly in light of the considerable video evidence consistent with this account.” Ex. 6. The OAG Report also explained that the evidence “strongly suggests” that Lt. Rivera’s decision to shoot Mr. Feliz was justified under New York law and that “there is no reason to doubt” that Lt. Rivera discharged his firearm because he believed that doing so was necessary to save the life of his fellow officer and that “the totality of the evidence strongly suggests that [Lt. Rivera’s] belief was reasonable.” Ex. 6. Included with the public release of the report were links to the body-worn camera footage. Ex 6, fn 12.

C. NYPD’s Force Investigation Division Separately Investigates the October 17, 2019 Traffic Stop.

Approximately 13 months later, on November 20, 2020, a representative from Petitioner Justice Committee filed a complaint with the Civilian Complaint Review Board (“CCRB”) asserting twenty allegations of misconduct against Lt. Rivera, PO Barrett, PO Almanzar, and two other officers. Ex. 7. In a June 11, 2021 report, the NYPD’s Force Investigation Division (“FID”) found that Lt. Rivera’s use of force was consistent with Department policy. Ex. 8. The Report was delivered to the Department’s Force Review Board, which convened in June 2021 and found that the discharge was within Department use-of-force guidelines. Ex. 9. On August 9, 2021, then-Commissioner Dermot Shea adopted the findings of the Board. Ex. 9.

On December 2, 2021, the extended 26-month statute of limitations⁵ to bring departmental charges against Lt. Rivera expired. Ex. 8. On December 8, 2021 CCRB received the FID file. Ex. 8. On May 10, 2023, CCRB voted to substantiate the charges against Lt. Rivera. Ex. 8.

⁵ Under Civil Service Law 75, an agency has 18-months to serve an employee with notice of charges for misconduct. Due to the COVID-19 tolling, the statute of limitations was extended an additional 8 months.

D. Lt. Rivera is Served With Charges and Specifications

On June 4, 2024, approximately 30 months after the expiration of the statute of limitations, Lt. Rivera was served with charges alleging two specifications:

Specification No. 1: Lieutenant Jonathan Rivera on or about October 17, 2019, at approximately 1453 hours, while assigned to the 52 Precinct and on date, in the vicinity of Bainbridge Avenue and East 211th Street, Bronx County, used force without police necessity in that, with the intent to cause serious physical injury, he intentionally fired a shot from his firearm at Allan Feliz causing series physical injury.

PG 221-01	Force Guidelines
PG 221-02	Use of Force
New York Penal Law 120.10(1)	Assault in the First Degree

Specification No. 2: Lieutenant Jonathan Rivera on or about October 17, 2019, at approximately 1453 hours, while assigned to the 52 Precinct and on date, in the vicinity of Bainbridge Avenue and East 211th Street, Bronx County, abused his authority as a member of the New York City Police Department, in that he intentionally placed or attempted to place Allan Feliz in reasonable fear of serious physical injury or death by pointing his firearm at Allan Feliz and threatening to shoot Allan Feliz without police necessity.

P.G. 203-10, Page 1, Paragraph 5 (now encompassed by A.G. 304-06, Page 1, Paragraph 1)	Public Contact— Prohibited Conduct
New York Penal Law 120.14(1)	Menacing in the Second Degree.

Ex. 8.

Because the charges were not served within the statute of limitations, the disciplinary proceedings were conducted under the “crime exception” to the New York Civil Service Law, which directs that disciplinary charges may be prosecuted by an agency “where the

misconduct ‘complained of and described in the charges would, if proved in a court of appropriate jurisdiction constitute a crime.’” *See* N.Y. Civ. Serv. L. § 75(4); Ex. 8. Accordingly, the CCRB was required to prove, by a preponderance of the evidence that Lt. Rivera’s misconduct constituted the crimes as alleged in Specification No. 1 (Assault in the First Degree) and Specification No. 2 (Menacing in the Second Degree). Ex. 8. Lt. Rivera raised the defense of justification, and CCRB was required to disprove Lt. Rivera’s defense by a preponderance of the evidence. Ex. 8.

E. Deputy Commissioner Maldonado Recommends Termination

After a Department trial in which Lt. Rivera, PO Barrett, PO Almanzar, and an expert witness testified, on March 5, 2025, Deputy Commissioner Rosemarie Maldonado determined that CCRB proved Specification No. 1 by a preponderance of the evidence. Ex. 8. She further determined that CCRB failed to prove Specification No. 2 by a preponderance of the evidence thereby dismissing the charge. Deputy Commissioner Maldonado then recommended that Lt. Rivera be dismissed from service. Ex. 8.

F. Commissioner Tisch Issues Her Determination.

Commissioner Tisch issued a preliminary decision on July 3, 2025. Ex. 9. CCRB submitted objections on July 10, 2025. Ex. 10. Commissioner Tisch issued the final agency decision on August 15, 2025. Ex. 11.

Commissioner Tisch’s decision provided a thorough review of the record before her and the procedural history of the case. She then explained the legal question before her as follows:

“There is no dispute that Respondent shot and killed Mr. Feliz. The question is whether, as a matter of New York law, the shooting was justified. Under New York Penal Law § 35.30, a police officer may use deadly physical force if (1) the officer reasonably believes that a person has committed an offense; (2) the officer is attempting to arrest that person; and (3) the officer reasonably believes that the use of deadly force is necessary to defend himself or another person from

what the officer reasonably believes to be the use or imminent use of deadly physical force. The burden was on the CCRB, as the prosecuting agency, to disprove the applicability of the justification defense by a preponderance of the evidence. Respondent reasonably believed that Mr. Feliz had multiple active warrants and was subject to arrest, and Mr. Feliz plainly committed the offense of resisting arrest as the officers tried to take him into custody. Indeed, the CCRB's expert testified that the officers had probable cause to arrest Mr. Feliz and that he resisted arrest (Tr. 74, 79). What is in dispute is the third prong of the test: whether Respondent reasonably believed that the use of deadly force against Mr. Feliz was necessary to save Officer Barrett. This question has a subjective component (did Respondent have this belief) and an objective component (was this belief reasonable). Like the Attorney General and the Deputy Commissioner of Trials, I will consider each of these matters in turn."

Ex. 11.

Turning first to the subjective test and then to the objective test, Commissioner Tisch carefully considered the evidence and explained her reasoning. While she ultimately agreed with the conclusion of the OAG, the opinion explicitly and repeatedly reflects her own analysis, independent judgment, and inferences from the record before her. Ex. 11. She also weighed countervailing arguments and explained her points of disagreement with Commissioner Maldonado. Ex. 11. Ultimately, Commissioner Tisch concluded that Lt. Rivera subjectively believed that lethal force was necessary to save PO Barrett's life, that this belief was objectively reasonable, and that accordingly the shooting of Mr. Feliz was justified. Ex. 11.

ARGUMENT

POINT I

PETITIONERS LACK STANDING TO CHALLENGE THE DETERMINATION OF COMMISSIONER TISCH

Petitioners lack standing to challenge the discretionary determination of Commissioner Tisch to retain Lt. Rivera because the injuries claimed are both conjectural and marginally related to the challenged government action. “Standing is a threshold requirement for a party seeking to challenge a governmental action, imposing upon the complaining party an obligation to demonstrate that he or she has suffered an injury in fact that is both distinct from that of the public and ‘falls within the zone of interests or concerns sought to be promoted or protected by the statutory provision under which the agency has acted.’” *Davis v. New York State Dept of Educ.*, 96 A.D.3d 1261, 1262 (3d Dept 2012)(citing *New York Assn of Nurse Anesthetists v. Novello*, 2 N.Y.3d 207, 211 [2004]). An “injury-in-fact” must be concrete, *i.e.*, an actual harm—not one based upon conjecture—suffered by the petitioner because of the governmental action. *New York Assn of Nurse Anesthetists*, 2 N.Y.3d at 211.

Petitioners alleged injuries because of Commission Tisch’s decision are both speculative and indistinct from any alleged harm sustained by any member of the public. Petitioners admit that they seek termination of Lt. Rivera because they speculate that he will retaliate against them as a member of the NYPD at some undetermined time and in some undetermined way, and because, in their view, the City is less safe because he remains on the force. Moreover, NYC Charter §434(a), pursuant to which Commissioner Tisch acted, cannot confer standing because that provision empowers the Commissioner—and the Commissioner alone—to control the administration and operation of the NYPD.

Petitioners’ Have Not Suffered an Injury-in-Fact

The Petition fails to allege a concrete individualized injury in fact because of Commissioner Tisch's decision. To assert standing, a party filing suit must allege they have suffered an injury in fact. *See Valley Forge Christian College v. Americans United for the Separation of Church and State*, 454 U.S. 464, 473 (1981) ("The exercise of judicial power, which can so profoundly affect lives, liberty, and property of whom it extends, is therefore restricted to litigants who can show 'injury in fact' resulting from the action which they seek to have the court adjudicate."). Courts define an "injury-in-fact" as "an actual legal stake in the matter being adjudicated." *Soc'y of Plastics Indus. v. County of Suffolk*, 77 N.Y.2d 761, 772-73 (1991).

Petitioners have failed to allege any legal stake they have in challenging Commissioner Tisch's decision to retain Lt. Rivera, as they hold no personal or property right in his continued employment with the NYPD or in how Commissioner Tisch carries out her duties in accordance with the discretion vested in her pursuant to the NYC Charter. As it pertains to challenges of employment determinations, only those who have an interest in the employment have standing to sue. *See generally, Bd. of Regents v. Roth*, 408 U.S. 564 (1972); *Perry v. Sindermann*, 408 U.S. 593 (1972); *Rao v. Gunn*, 73 N.Y.2d 759 (1988).

Indeed, interest in an outcome of an agency determination does not in and of itself confer an actual injury when the desired outcome is not achieved. Courts are reluctant to find standing for third parties regarding agency disciplinary determinations where the agency declines to impose discipline or investigate a complaint. *See Matter of Whitfield v. New York State Off. of Professional Med. Conduct*, 237 A.D.3d 1393 (3d Dep't 2025) (finding no injury to petitioners following respondents decision not to pursue misconduct charges for allegations of medical malpractice for non-party physician); *Wade v. Suffolk County Medical Soc.*, 88 A.D.2d 602 (1982) (finding that petitioner lacked standing to challenge decision of the medical society which declined to discipline

the non-party member physician); *Matter of Izzo v. New York State Dep't of Health*, 134 A.D.3d 1514 (3d Dept 2015) (“a patient complaining of professional misconduct has no standing to challenge the determination of a disciplinary body not to pursue disciplinary action.”); *Morrow v. Cahill*, 278 A.D.2d 123 (1st Dept 2000)(*holding* no direct and harmful effect on petitioner for the grievance committee’s failure to institute disciplinary proceedings on petitioner’s former counsel); *Sassower v. Comm’n on Jud. Conduct of N.Y.*, 289 A.D.2d 119 (1st Dept 2001)(*affirming* dismissal of an Article 78 seeking to compel the respondent to investigate petitioner’s complaint to judicial misconduct against a judge who ruled against her); *Shanks v. Donovan*, 32 A.D.2d 1037 (2d Dept 1969)(*holding* that parents of school children do not have standing to challenge the Board of Education’s decision to decline discipline of a teacher who engaged in a strike).

The individual Petitioners allege emotional harms because of Commissioner Tisch’s decision not to terminate Lt. Rivera’s employment with the NYPD and overrule Deputy Commissioner Maldonado’s determination. Petitioner Justice Committee, Inc., alleges a financial harm because of community organizing and advocacy on behalf of the individual Petitioners in favor of terminating Lt. Rivera. While the individual Petitioners allege they have suffered an emotional harm, these harms were not a direct result of Commissioner Tisch’s discretionary determination to overrule the decision of the Deputy Commissioner. Indeed, Petitioners do not contest that the harm flows directly from the death of Mr. Feliz. *See* M. Verduja Aff. ¶ 16; Feliz Aff.; A. Verduja Aff. ¶¶ 23-25; Aquino Aff. ¶ 14.⁶ These exact harms were again alleged because of the OAG’s declination to prosecute Lt. Rivera for the shooting. A. Verduja Aff. ¶¶ 23-25; 27. And to be sure, Petitioners further admit that the relief sought—termination of Lt. Rivera—will

⁶ Petitioner Aquino has a pending action against Respondents Rivera and NYPD claiming, among other things, emotional damages because of the incident and alleging claims for, among other things, negligent hiring and retention. *See Samy Feliz et al v. The City of New York et al*, Bronx County Index No. 26934/2020E.

not eliminate the harm caused but will only mitigate some of their emotional harm. *See* Feliz Aff ¶¶ 46-47; M. Verduja Aff ¶¶ 36-37; A. Verduja Aff. ¶¶57, 59; Aquino Aff. ¶ 38. More so, Petitioners' allegations that, because of retaining Lt. Rivera, they (or members of the community) will be harmed by Rivera in the future (Feliz Aff ¶¶ 24, 41-42), that his continued employment makes New York City unsafe (M. Verduja Aff ¶ 32), or that it will permit other officers to act with impunity (A. Verduja Aff. ¶¶ 46; 58) is precisely the type of speculative and generalized harm that will not confer standing.

Likewise, the financial harm alleged to have been suffered by the organizational Petitioner did not flow directly from Commissioner Tisch's determination. Justice Committee, Inc.'s use of its funds to advocate for the individual Petitioners following the death of Mr. Feliz is consistent with the advocacy work it regularly conducts. Liam Aff. ¶¶ 4-5; 7-9. Third parties generally do not have standing to sue for financial expenditures made on behalf of another. *See Bolofsky v. City of New York*, 2020 N.Y. Misc. LEXIS 7850 at *2 (Sup Ct. N.Y. County 2020)(Petitioner's appearance and payment of fees on his clients' behalf at administrative hearings does not confer standing). Justice Committee does not allege that any action taken by the Respondents caused financial harm in a way that affected—or continues to affect—the operations of the organization, such as, a diminution or cessation in funding, or that the Respondents prevented Justice Committee from utilizing its funds on behalf of the deceased or his family. Nor have they demonstrated how terminating Lt. Rivera will permit Justice Committee to recoup the expenses paid towards their organizing efforts.

Thus, none of the Petitioners have demonstrated that they suffered a concrete, individualized harm as a direct result of the decision-making of Commissioner Tisch regarding an employee disciplinary matter.

Petitioners' Alleged Harms Do Not Fall Within the Zone of Interests That Are Promoted by NYC Charter § 434(a)

The Petitioners further lack standing because the injuries they describe do not fall within the zone of interest sought to be promoted by NYC Charter §434(a), pursuant to which Commissioner Tisch acted. In the context of challenges to administrative action, courts require a petitioner to “show that the administrative action will in fact have a harmful effect on the petitioner and that the interest asserted is arguably within the zone of interest to be protected by the statute.” *Dairylea Cooperative, Inc. v. Walkley*, 38 N.Y.2d 6, 9 (1975). Here, Section 434 gives the NYPD Commissioner with control over the “administration, disposition and discipline of the department, and of the police force of the department.” This provision places the sole responsibility for discipline within the purview of the Commissioner. Petitioners, none of whom were parties in the underlying disciplinary action, do not articulate any harms that fall within the scope of the interests protected by Section 434(a). Indeed, NYC Admin Code § 14-116 describes the circumstances in which department disciplinary decisions can be challenged in an Article 78 proceeding; Petitioners do not come within the scope of that statute. As members of the public with no relationship to the NYPD, Petitioners lack standing to sue for grievances against the discretionary decision-making of the commissioner under the NYC Charter. Accordingly, Petitioners do not have standing, and the Petition must be dismissed.

POINT II

CPLR 7804(G) REQUIRES THAT AN ARTICLE 78 PETITION WHICH RAISES A SUBSTANTIAL EVIDENCE ISSUE AS THE INSTANT PETITION DOES, BE TRANSFERRED TO THE APPELLATE DIVISION

Pursuant to CPLR Section 7804(g), an Article 78 proceeding which raises an issue of whether a determination was based on substantial evidence requires that:

[T]he court shall make an order directing that [the proceeding] be transferred for disposition to a term of the appellate division held within the judicial department embracing the county in which the proceeding was commenced. When the proceeding comes before it, whether by appeal or transfer, the appellate division shall dispose of all issues in the proceeding...

CPLR 7804(g).

The substantial evidence standard is described by the New York Court of Appeals as a quantum of proof that is more than seeming or imaginary, and is not based on “surmise, conjecture, speculation or rumor” but “is less than a preponderance of the evidence, overwhelming evidence or evidence beyond reasonable doubt.” *300 Gramatan Ave. Assoc. v. State Div. of Human Rights*, 45 N.Y.2d 176, 180-81 (1978). Substantial evidence means “such relevant proof as a reasonable mind may accept to support a conclusion or ultimate fact.” *People ex rel Vega v. Smith*, 66 N.Y.2d 130, 139 (1985) (*quoting 300 Gramatan Ave. Assoc.*, 45 N.Y.2d at 180)

Indeed, the Supreme Court may retain jurisdiction over the matter only if the Article 78 petition fails to raise a substantial evidence issue or where an asserted objection such as statute of limitations may dispose of the proceedings. *See* CPLR § 7804(g); *see e.g., Matter of Abdur-Rahim v Dept. of Hous. Preserv. & Dev.*, 2010 NY Slip Op 30264[U] at *9-10 (Sup Ct, NY County 2010) (“[t]he Court of Appeals has explained that ‘CPLR 7804(g) authorizes the court in which the article 78 proceeding is commenced to decide any issues which would terminate the case if no issue of substantial evidence is raised. Otherwise, the section requires the court to transfer the case to the Appellate Division for disposition’”) (*quoting Al Turi Landfill, Inc. v. N.Y. State Dept. of Environmental Conservation*, 98 N.Y.2d 758 (2002)).

Additionally, the question of whether a substantial evidence question is raised in an Article 78 proceeding is determined by the substance of the petition and not by the petitioners' characterization of the claims. *See Mtr. of Save the Pine Bush, Inc. v. Planning Bd. of the City of Albany*, 83 A.D.2d 741 (3d Dep't 1981), *appeal dismissed*, 61 N.Y.2d 668, *Iv. denied*, 61 N.Y.2d 602 (1983). Moreover, "[t]he substantial evidence question is raised where...the petitioner challenges an NYPD determination, made after a disciplinary trial directed by law at which evidence is taken." *Pantaleo v. O'Neill*, 2020 N.Y. Misc. LEXIS 710 at *2 (N.Y. Sup. Ct. February 3, 2020). Further, "upon transfer, the Appellate Division may also consider, address, and determine whether the penalty imposed upon the petitioner was so disproportionate to the offense that it shocks the judicial conscience, thus constituting an abuse of discretion as a matter of law." *Id.* at *3.

The instant Article 78 proceeding raises an issue of substantial evidence because the Petitioners, although not categorizing it as such, challenge the evidentiary sufficiency of Commissioner Tisch's determination that Lt. Rivera was justified in the shooting death of Mr. Feliz. Specifically, Petitioners argue that the agency decision "constituted arbitrary and capricious agency action by Commissioner Tisch and constituted an abuse of discretion granted to her as Police Commissioner under the New York City Charter." Pet. ¶¶ 138-39. Petitioners further argue that Commissioner Tisch's dismissal of Specification 1 against Rivera "constituted arbitrary and capricious agency action" and "an abuse of discretion granted to her under the City Charter as the Police Commissioner." Pet ¶¶ 139-140. Petitioners then conclude that Commissioner Tisch's rejection of "the credibility findings of the hearing officer who heard live testimony subject to cross-examination without addressing those credibility findings with particularity constituted arbitrary and capricious agency action." Pet. ¶ 141.

Since the Petitioners are challenging the evidentiary basis of Commissioner Tisch's determination, this case must be transferred to the Appellate Division for review. *See Pantaleo*, 2020 N.Y. Misc. LEXIS 710 at *2-3.

POINT III

THE PETITION FAILS TO STATE A CAUSE OF ACTION

The argument that Commissioner Tisch's decision was arbitrary and capricious is meritless. To challenge an agency determination, a party must establish that the agency's action was arbitrary and capricious and lacked a rational basis. CPLR 7803(3); *Matter of Beck-Nichols v. Bianco*, 20 N.Y.3d 540, 559 (2013). "Courts cannot interfere unless there is no rational basis for the exercise of discretion, or the action is without sound basis in reason and taken without regard to the facts. *Matter of Save America's Clocks v. City of New York*, 33 N.Y.3d 198, 207 (2019)(citing *Matter of Pell v. Board of Educ.*, 34 N.Y.2d 222, 231 [1974]). Once a court determines that a rational basis for the agency determination exists, "it must sustain the determination even if the court concludes that it would have reached a different result than the one reached by the agency." *Matter of Peckham v. Calogero*, 12 N.Y.3d 424, 430 (2009). The review is deferential, for it is not the role of the courts to weigh the desirability of any action or choose among alternatives. *Matter of Save America's Clocks*, 33 N.Y.3d at 207 (citing *Matter of Friends of P.S. 163, Inc. v. Jewish Home Lifecare, Manhattan*, 30 N.Y.3d 416, 430 [2017]).

The First Department has observed "the Commissioner is afforded "great leeway" in disciplinary matters. *Matter of Bonifacio v. Sewell*, 227 A.D.3d 584, 586, (1st Dep't 2024) (citing *Matter of Kelly v Safir*, 96 N.Y.2d 32, 38, (2001)); see also Administrative Code of City of NY § 14-115; *Matter of Santos v. Sewell*, 228 A.D.3d 597, 598, (1st Dep't 2024) ("great leeway is

accorded the Police Commissioner's determination concerning appropriate punishment because the Commissioner, not the courts, are accountable to the public for the integrity of the police force"). Furthermore, courts generally have "no discretionary authority or interest of justice jurisdiction in reviewing the penalty imposed by the Police Commissioner." *Kelly v. Safir*, 96 N.Y.2d 32, 38 (2001) (citing *Matter of Featherstone v. Franco*, 95 N.Y.2d 550, 554 [2000]). Judicial review of administrative determinations is confined to "facts and record adduced before the agency." *Featherstone v. Franco*, 95 N.Y.2d 550, 554 (2000) (citing *Matter of Yarbough v. Franco*, 95 N.Y.2d 342, 347 [2000]). A hearing officer's findings are "not conclusive and may be overruled by the official upon whom has been imposed the power to remove or mete out the discipline, provided of course, that the latter's action is supported by substantial evidence." *Simpson v. Wolansky*, 38 N.Y.2d 391, 394 (1975).

Commissioner Tisch's decision to overrule the determination of the Deputy Commissioner following a hearing upon written charges preferred against Lt. Rivera was rationally based and supported by substantial evidence in the record. Exs. 9; 11. In exercising her discretionary authority granted by the NYC Charter, Commissioner Tisch determined that the record established that the CCRB had failed to disprove that Lt. Rivera's justification defense—as set forth in Penal Law 35.30—by a preponderance of the evidence. Exs. 9; 11.

Commissioner Tisch applied both the subjective and objective tests under the law of justification, considered the evidence bearing on those tests, and gave thorough explanations as to why, on the record before her, Lt. Rivera prevailed on those tests. She also carefully assessed the reasons given by Commissioner Maldonado for coming to the contrary conclusion and explained why she disagreed with Commissioner Maldonado's analysis. Commissioner Tisch's opinion,

reflecting care, deliberation, a thorough weighing of the record evidence, and consideration of contrary arguments, is the very antithesis of an arbitrary and capricious decision.

With respect to the subjective test, Commissioner Tisch agreed with the OAG Report that “there is no obvious reason to doubt that [Lt. Rivera] actually believed what he claimed to believe.” Exs 9, 11. In doing so, Commissioner Tisch looked to “the totality of what transpired during the car stop and subsequent struggle.” Exs 9, 11.

Commissioner Tisch determined that, as the officers fought with Mr. Feliz and attempted to prevent his escape, both Lt. Rivera and PO Barrett were in danger. Exs 9, 11. However, as Commissioner Tisch pointed out that, “[Lt. Rivera] repeatedly sought to mitigate the threat without using lethal force. He deployed his taser at Mr. Feliz; he pulled out his firearm and threatened to shoot Mr. Feliz; he hit Mr. Feliz, he used his Taser to strike Mr. Feliz.” Exs 9, 11. Commissioner Tisch further noted that “after [Lt. Rivera] drew his firearm and threatened to shoot Mr. Feliz, [Lt. Rivera] *reholstered his firearm*. [Lt. Rivera] seemed determined not to shoot.” Exs 9, 11. Commissioner Tisch further noted that “[e]ven when the car lurched forward—increasing the risk that the car would continue to accelerate and that Respondent, with his body extended in the car, would be dragged with it, putting Respondent in severe jeopardy—he still did not discharge his firearm.” Exs 9, 11. Commissioner Tisch continued:

“After all this, [Lt. Rivera] only resorted to lethal force when the car lurched backward. What had changed? The answer is obvious: In that moment, [Lt. Rivera] believed that Officer Barrett was under the car and was going to be killed if the car moved again.

To the extent the suggestion is that Respondent was generally impatient or was otherwise quick on the draw, everything that had transpired to that point is to the contrary. And if the suggestion is that [Lt. Rivera] just happened to run out of patience at the exact moment when the car lurched back and Officer Barrett was knocked out of view, that is a

completely implausible coincidence. Given the timeline of what transpired, by far the most plausible reason that [Lt. Rivera] discharged his firearm was because he believed that doing so was necessary to save Officer Barrett's life."

Commissioner Tisch then considered each of the reasons that Commissioner Maldonado came to the opposite conclusion and explained why she disagreed. First, while Commissioner Maldonado was concerned that, following the shooting, Lt. Rivera had not inquired regarding PO Barrett's safety, Commissioner Tisch noted that "[Rivera] saw that Officer Barrett was safe and upright next to the car" obviating the need to inquire. Commissioner Tisch also reasoned that Lt. Rivera "had just shot Mr. Feliz, and together with his fellow officers was try to perform life-saving measures. I do not think anyone can make assumptions about [Lt. Rivera's] state of mind in the aftermath of the shooting, let alone assumptions about what he should have said or done." Ex. 11.

Second, she disagreed with Deputy Commissioner's interpretation of Lt. Rivera's statement following that shooting that his hand had been "tired." Ex. 11. Commissioner Tisch explained:

[t]his was an incredibly dangerous situation, and yes, what made it so frightening was that with the engine on and [Rivera] fighting with Mr. Feliz to put the car in park, [Rivera's] hand was getting tired—if Mr. Feliz successfully overpowered him for control of the gearshift, both Officer Barrett and [Rivera] were in grave danger. We know that [Rivera] did not use lethal force simply because his hand was getting tired; he only did so when the car lurched backward, the driver-side door pushed officer Barrett back and he disappeared from [Rivera's] view. It was only then—when the apparent risk to Officer Barrett had gone up exponentially—that Respondent used lethal force.

Ex. 11.

Third, Commissioner Tisch acknowledged Commissioner Maldonado's point that Lt. Rivera's testimony regarding his hand being tired from administering CPR was implausible.

Commissioner Tisch *agreed* with Commissioner Maldonado that the testimony was inaccurate, but disagreed as to what followed from that conclusion:

“I agree with the Deputy Commissioner that, given the context in which the statement was made, [Lt. Rivera] was clearly referring to his struggle in the car, not to administering CPR. But here is the problem: [Lt. Rivera] was testifying about statements that he made *five years earlier*. To the extent that he did not accurately remember what he meant, this is hardly shocking. And in any event, the issue is not what [Lt. Rivera] meant when he referred to his hand being tired. What matters is why he shot Mr. Feliz. In my view, the answer to that question is clear.”

Ex. 11.

Fourth, Commissioner Tisch responded to Commissioner Maldonado’s concern that, earlier in the encounter, Lt. Rivera had threatened to shoot Mr. Feliz, and only did so when PO Barrett was no longer at the door. Commissioner Tisch explained that “this demonstrates that [Lt. Rivera] was not prepared to fire because he and Officer Barrett were at risk. He only fired once he believed that Officer Barrett’s life was in imminent danger.” Ex. 11

Turning to the objective test, Commissioner Tisch determined that Lt. Rivera’s belief that lethal force was necessary to save PO Barrett’s life was reasonable. Once again, she explained the reasoning underlying her decision:

“Given what had just transpired—the car lurching backward, Officer Barrett being pushed away from the vehicle, and then falling out of view—it was reasonable for [Lt. Rivera] to believe that Officer Barrett had been hit by the car door and had fallen under the car. And given Mr. Feliz’s repeated, unyielding efforts to move the gearshift into drive despite all efforts by the officers, it was reasonable for [Lt. Rivera] to believe that Mr. Feliz would continue to do so, putting Officer Barrett’s life in immediate peril.” And again, Commissioner Tisch acknowledged Commissioner Maldonado’s contrary view and explained why she had reached a different conclusion. While Commissioner Maldonado believed that the risk to PO Barrett was too

speculative and that Lt. Rivera should have taken additional steps to determine where PO Barrett was situated. Commissioner Tisch reasoned that “this did not account for the circumstances at hand” and that, under those circumstances Lt. Rivera “was not in a position to call a time-out and scour the driver side of the car to figure out where Officer Barrett was positioned.”

Ex 11.

Likewise, what Commissioner Maldonado took as “flippant and dismissive” testimony, Commissioner Tisch saw as a “fair and realistic assessment of an incredibly fast-moving, dangerous situation, in which [Lt. Rivera] was required to make a split-second decision when he believed that his fellow officer’s life was at immediate risk.” Ex. 11. And while Commissioner Maldonado viewed this as inconsistent testimony by Lt. Rivera, Commissioner Tisch, considering all the evidence, did not.

This was a deliberate, thorough, and carefully reasoned decision by the Police Commissioner, based on substantial evidence in the record before her. There was nothing remotely arbitrary and capricious about it. As the authority vested with the power to determine departmental discipline, her decision must be afforded deference, and her decision should be upheld.

CONCLUSION

For all the reasons set forth herein, Respondents respectfully request that this Court dismiss the Petition in its entirety, that judgment be entered for Respondents, and that Respondents be granted costs, fees, and disbursements together with such other and further relief as the Court deems just and proper. In the alternative, Respondents respectfully request that the Petition be transferred to the Appellate Division, First Department, and, upon transfer, the Petition should be dismissed in its entirety and the relief sought therein should be denied in all respects.

Dated: New York, New York
January 13, 2026

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CERTIFICATION OF COMPLIANCE

Pursuant to 22 NYCRR 202.8-b, the total number of words in the foregoing memorandum of law, inclusive of point headings and footnotes, excluding the caption, certificate of compliance, and signature block is 6,946.

By: _____/s/_____
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