APL-2020-00021

To be argued by
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(15 MINUTES REQUESTED)

Court of Appeals

STATE OF NEW YORK

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

- against -

DAVE LEWIS,

Defendant-Appellant.

BRIEF FOR RESPONDENT

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INTRODUCTION

By permission of the Honorable Paul G. Feinman, granted on February 10, 2020, defendant Dave Lewis appeals from an October 24, 2019 decision and order of the Appellate Term, First Department, unanimously affirming the October 25, 2018 judgment of the Criminal Court of the City of New York, New York County (Heidi Cesare, J.), convicting him, after a bench trial, of one count each of Failure to Exercise Due Care to Avoid Collision with a Bicyclist (Vehicle and Traffic Law ["VTL"] § 1146[c][1]) and Failure to Yield to a Bicyclist (N.Y.C. Admin. Code ["AC"] § 19-190[b]). *People v. Lewis*, 65 Misc. 3d 141(A), *1 (App. Term 1st Dept. 2019); *see* A4-A5. The court sentenced defendant to concurrent terms of, respectively, 15 days in jail and 30 days in jail. Defendant has completed his sentence.

On June 12, 2017, at 8:15 a.m., on West 26th Street between Seventh and Eighth Avenues in Manhattan, defendant was driving a bus behind Dan Hanegby, who was riding a CitiBike bicycle. The roadway was lined on both sides by parked cars, including a white van and a double-parked black SUV, which were parked directly across from one another. As both the bus and Hanegby approached the bottleneck created by the van and SUV, defendant honked his horn and attempted to overtake Hanegby. As the front half of the bus passed Hanegby, defendant heard a commotion, looked in his mirror, and saw Hanegby on the ground. A rear tire of the bus ran over Hanegby's torso. Defendant stopped the bus and went over to check on Hanegby. An ambulance arrived and took Hanegby to the hospital, where he subsequently died as a result of the injuries he sustained.

By misdemeanor complaint dated October 3, 2017, defendant was charged with one count each of Failure to Exercise Due care to avoid Collision with a Bicyclist (VTL § 1146[c][1]) and Failure to Yield to a Bicyclist (AC § 19-190[b]). On December 15, 2017, defendant moved to dismiss the accusatory instrument against him, arguing in pertinent part that AC § 19-190 is unconstitutionally vague and preempted by state law. On March 14, 2018 the Honorable Josh E. Hanshaft denied defendant's motion. On September 12, 2018, defendant proceeded to a bench trial before the Honorable Heidi Cesare. On September 20, 2018, the court found defendant guilty on both counts. On October 22, 2018, the court sentenced defendant as noted above.

On appeal to the Appellate Term, First Department, defendant argued that the evidence establishing his guilt was legally insufficient and that the verdict was against the weight of the evidence because the court erroneously charged that VTL § 1146 and AC § 19-190 required proof of ordinary, "civil" negligence, not criminal negligence. Additionally, defendant claimed that the trial court's application of a civil negligence standard rendered VTL § 1146 and AC § 19-190 unconstitutional and that at least the latter provision is preempted by the Penal Law.

On October 24, 2019, the Appellate Term unanimously affirmed defendant's conviction. The court rejected defendant's legal sufficiency claim, finding that it was both unpreserved and meritless since the totality of the evidence, including the security video depicting the collision, supported the conclusion that defendant failed to exercise due care. *Lewis*, 65 Misc. 3d 141(A), *1; *see* A4-A5. Additionally, relying on its decision in *People v. Torres*, 65 Misc. 3d 19, 22-23 (App. Term 1st Dept. 2019), the court found that AC § 19-190 was not preempted by state law and was not unconstitutional for using a civil negligence standard. *Lewis*, 65 Misc. 3d 141(A), *1; *see* A4-A5. On February 10, 2020, Judge Feinman granted defendant's application for leave to appeal. *People v. Lewis*, 34 N.Y.3d 1160 (2020); *see* A3.

On appeal to this Court, defendant contends that the evidence was legally insufficient to establish that defendant was criminally negligent. Defendant also argues that the Appellate Term erred when it found that AC § 19-190 was not

preempted by state law and was not unconstitutional for using a civil negligence standard as the basis for criminal liability.

QUESTIONS PRESENTED

1. Whether the lower court erred in charging that the statutes require proof of civil negligence rather than criminal negligence.
   The Appellate Term answered this question in the negative.

2. Whether the evidence was insufficient to prove criminal negligence.
   The Appellate Term answered this question in the negative.

SUMMARY OF ARGUMENT

Defendant failed to exercise due care when he struck and killed Dan Hanegby with the bus he was driving in contravention of VTL § 1146 and AC § 19-190. Both statutes impose criminal liability when a defendant fails to exercise "due care," a culpable mental state defined by ordinary, civil negligence. The Appellate Term correctly concluded that civil negligence was an acceptable *mens rea*. Of course, this makes sense because if strict liability crimes, which result in criminal liability and require no mental state at all, are constitutional, then it follows that civil negligence, a more culpable mental state, is constitutional as well. This decision followed precedent from this Court, federal courts, and other state courts, which have recognized that "[c]riminal liability for death caused by ordinary negligence is sometimes imposed by statute." *People v. Haney*, 30 N.Y.2d 328, 334 n.7 (1972).

Additionally, the Appellate Term correctly recognized that AC § 19-190 is not preempted by either the Penal Law or Vehicle and Traffic Law. Indeed, the four

enumerated culpable mental states listed in the Penal Law is not an exhaustive list. For instance, this Court has recognized depraved indifference as a culpable mental state despite the fact that it is not listed as such in the Penal Law. *People v. Feingold*, 7 N.Y.3d 288, 294 (2006). Likewise, municipalities such as the New York City legislature regularly passes legislation regulating traffic which mirrors that contained in the Vehicle and Traffic Law, and it is expressly permitted to do so. *See* VTL §§ 1640, 1642.

THE EVIDENCE AT TRIAL

The People's Case

Between 8:00 a.m. and 8:15 a.m. on June 12, 2007, LANNETT PEREZ was riding on a private bus in Manhattan driven by defendant. Perez was seated in the front row, passenger side seat closest to the window (Perez: A111; RA239, RA241, RA268).[1] Defendant had been Perez's bus driver for two or three months (Perez: A119; RA242, RA269-RA270). Although Perez never vocalized any complaints about defendant's driving, there were times that she felt defendant had gotten too close to other cars or pedestrians or did not make wide enough turns (Perez: A119; RA270-RA271).

When the bus turned from Eighth Avenue onto West 26th Street, Perez was fully awake, looking out the window (Perez: A113; RA242-RA243, RA274-RA275).

[1] Parenthetical references preceded by "A" refer to defendant's appendix. Parenthetical references preceded by "RA" refer to respondent's appendix.

Meanwhile, CAROLINE ERISS was at the southeast corner of West 26th Street and Eighth Avenue, walking to work and talking to her mother on her cellphone (Eriss: A71, A76; RA90, RA92, RA101-RA102).

West 26th Street between Seventh and Eighth Avenues is a one-way street with traffic flowing east and parking along both the north and south curb lines (People's Exhibit 1 [video of the collision]; Eriss: A74; RA96-RA97; Cardimone: A100; RA184, RA205). The speed limit on the street is 25 miles per hour (Cardimone: A100; RA184-RA185). On June 7, 2017, a number of security cameras recorded the flow of traffic on the street (People's Exhibit 1). That morning, there was a "fair amount of traffic" and "the road was super narrow and tight," so that only one lane of traffic could drive through (Eriss: A72; RA91, RA93, RA112; People's Exhibit 1). On the south side of the street, a white transit van was parked flush along the curb and directly across from a black SUV parked on the north side of the street at a distance from the curb, as if it were double parked (Perez: A115; RA245, RA264; People's Exhibit 1).[2]

At around 8:10 a.m., Dan Hanegby was riding a CitiBike bicycle east on West 26th Street (People's Exhibit 1). Hanegby was wearing a suit, a backpack, and over-the-ear headphones (Perez: RA246, RA286; People's Exhibit 1). Hanegby did not

[2] At trial, the People introduced into evidence as People's Exhibit 1 a disc containing three different camera angles depicting the collision. A copy of the exhibit will be filed with the Court under separate cover.

have a helmet on (Perez: RA286-RA287; People's Exhibit 1). Hanegby cycled along the south side of the street, just ahead of the bus defendant was driving (Eriss: A71; RA92; Perez: A113; RA243; People's Exhibit 1). The bus and Hanegby moved at a "normal" rate of speed (Eriss: A72; RA93, RA112; Perez: RA245). When the bus was about two to four car lengths from Hanegby, defendant began "blowing his horn." Perez thought to herself, "Why is he blowing the horn? Where does he want the cyclist to go?" (Perez: A113-A114; RA243-RA244, RA246, RA263, RA280, RA282). Hanegby did not react when defendant honked at him (Perez: RA246). Defendant's actions "startled" Perez because she "knew that [defendant] was way too close" to Hanegby and saw that "there wasn't going to be enough room for both the bus and [Hanegby] to get by" (Perez: A113; RA243, RA264, RA285).

Hanegby continued on his path. Rather than slow down, defendant attempted to overtake Hanegby as he and defendant approached the white van and black SUV (Perez: A115; RA245-RA246; People's Exhibit 1). As Hanegby "tr[ied to] navigate around the white van," he rode directly next to the bus through the tight space (Eriss: RA110). Perez had a "feeling [that] something was going to happen" because the bus was "way too close" to Hanegby. Perez felt that she "could probably" touch Hanegby if the bus window was open (Perez: A113; RA243, RA284, RA329). When she looked back, Perez began "freaking out" because she could no longer see Hanegby. Perez thought that Hanegby might have been hit by the bus (Perez: A113; RA243, RA266).

The bus's front tire struck Hanegby, and after he fell to the ground, the rear tires of the bus ran over his torso (People's Exhibit 1). The bus continued to drive down the street (People's Exhibit 1). Defendant looked in the bus's mirror and said, "[O]h shoot. I think I ran over his foot" (Perez: A114; RA244; RA266). A man standing on the street waved at defendant to slow down and stop, which he did about two car lengths from where Hanegby lay, writhing in pain next to the parked white van (Perez: A114, A123; RA244, RA246, RA266, RA288-RA289, RA301-RA302).

After seeing the bus run Hanegby over, Eriss ran to him and called 911 (Eriss: A72-A73; RA93-RA94). Hanegby's pant leg was ripped open and there was a cut on his leg (Eriss: A73, A76; RA94, RA101). Hanegby appeared to be in shock because he was pale and unable to speak (Eriss: A73, A75; RA94, RA100). Soon, a crowd formed, which included people from the bus (Eriss: A74, A78; RA95-RA96, RA105). Perez walked over to Hanegby, saw that he was lying on the ground, and remained with Hanegby, rubbing his shoulders and asking him his name, until help arrived (Perez: A114; RA244, RA247, RA293).

At around 8:15 a.m., Police Officer CHRISTOPHER THOMPSON and his partner, Officer Aviles, were on patrol in a marked police car when they received a radio report of a pedestrian struck on West 26th Street between Seventh and Eighth Avenues (Thompson: RA116-RA117). When he arrived at the scene, Thompson saw a bus pulled over and a crowd of people surrounding Hanegby, who was lying on the ground "moaning" and "grunting" in pain (Thompson: A81, A97; RA119, RA129,

RA142, RA144). Thompson also saw a bicycle to the side, but at that time, he did not know that the bicycle had been involved in the collision (Thompson: A81; RA119). Thompson called an ambulance, which arrived about 10 to 12 minutes after the collision (Eriss: A74, RA96; Thompson: A82; RA120). Subsequently, Thompson spoke with Perez and learned that Hanegby had been riding a CitiBike and had been struck by the bus (Thompson: A81, A87, A93; RA119, RA130, RA137).[3]

Once the ambulance took Hanegby to the hospital, Officer Thompson filled out an accident report (Thompson: A83; RA121). Defendant identified himself as the bus driver and agreed to speak with Thompson (Thompson: A82-A83; RA120-RA121, RA146). Defendant was calm but "worried" about Hanegby (Thompson: A85; RA124). Defendant said he was driving in a straight line, heading east on West 26th Street (Thompson: A84; RA122). Hanegby was riding along the right side, attempting to get around a parked car when Hanegby "jostled" and came into contact with the bus (Thompson: A84; RA122). Defendant felt a "bump," which was the bus coming into contact with Hanegby (Thompson: A84; RA122). Thompson also collected defendant's driver's license information and information about the bus (Thompson: A95; RA213, RA123, RA139-RA140, RA146-RA147). Once the

[3] At trial, Thompson recalled that, in the wake of the collision Perez did not assign blame to the driver (Thompson: A89; RA132). However, Perez denied telling Thompson that Hanegby veered into the bus (Perez: RA324), and Eriss told a police officer that Hanegby "swerve[d]" left towards the bus to maneuver around the parked white van (Eriss: A77-A78, A80; RA104-RA105, RA107-RA108, RA111).

accident report was completed, Thompson told defendant he was free to leave and Thompson and Aviles went to Bellevue Hospital, where Hanegby had been taken by ambulance (Thompson: A85, A90, A92; RA123-RA124, RA132, RA135).

At around 10:15 a.m. while at the hospital, Officer Thompson learned that Hanegby had died (Thompson: A85; RA124). Thompson called defendant and told him to return to the scene of the collision because Hanegby had died (Thompson: A86, A94; RA125, RA138). Defendant said, "[O]kay, I'm going to be there a little bit late," because he was getting off from work (Thompson: A86; RA125).

Officer Thompson returned to the scene to find that the entire street was blocked off because police were conducting an investigation (Thompson: RA127). In the meantime, someone had returned the CitiBike Hanegby was riding to a nearby CitiBike dock. Officer Aviles recovered the CitiBike Hanegby had been riding from the dock (Thompson: RA127).

At around 11:05 a.m., Police Officer MICHAEL CARDIMONE of the Collison Technical Group arrived at West 26th Street after being told on the telephone that a private bus and a bicycle had gotten into an accident (Cardimone: RA182-RA183, RA209). When Cardimone arrived at the scene, the vehicles involved in the collision were no longer there (Cardimone: A100; RA184, RA205, RA217-RA218). A cone had been placed in the vicinity of where the white van had been parked along the south side of the street (Cardimone: RA185, RA205-RA206, RA210). On the north side of the street, just east of where the collision had taken

place, there was construction netting roping off construction equipment that was parked in the street (Cardimone: RA185). Using Total Work Station "surveying equipment," Officer Cardimone took measurements of the scene and determined that West 26th Street was about 33 feet, 4.47 inches wide (Cardimone: A101-A102; RA186-RA187, RA196-RA197).

In the meantime, defendant had returned to the scene and parked the bus around the corner (Cardimone: A100; RA184). Cardimone inspected and photographed the bus (Cardimone: A101, A103-A104; RA186, RA190-RA191). Cardimone noticed "scuff marks" on the front of the rear passenger side tire (Cardimone: A106; RA195-RA195, RA214, RA228). Cardimone measured the bus and determined that it was 8 feet, 10 inches wide, weighed 50,000 pounds, and had three axels with a total of 10 wheels (Cardimone: A103, A105; RA190, RA192, RA226). Additionally, back at the 10th Precinct, Officer Cardimone inspected and photographed the CitiBike Hanegby had been riding during the collision (Cardimone: A108; RA201-RA202, RA228, RA235). The bicycle had sustained damage to the rear fender, which was pushed against the tire (Cardimone: A105, A108; RA192, RA202, RA235-RA236). The handlebars, which measured 26 inches wide, were not damaged (Cardimone: RA228-RA229, RA236-RA237).

Detective MICHAEL O'CONNOR of the Collision Investigation Squad also responded to West 26th Street (O'Connor: A61; RA93-RA95). When he arrived at

the scene, O'Connor canvassed the area and recovered security video that depicted the collision from three different angles (O'Connor: A62-A63; RA95-RA96).

At around 12:30 p.m., Detective O'Connor spoke with defendant, who was "a little shaken up" (O'Connor: A63-A65; RA96-RA98, RA119-RA120). Defendant said he had made several stops along his route to drop off passengers and then made a right turn from Eighth Avenue onto West 26th Street (O'Connor: A64; RA97). On West 26th Street, defendant saw Hanegby in the middle of the road (O'Connor: A64; RA97). Defendant honked the horn but was not sure whether Hanegby heard him because he was wearing over-the-ear headphones (O'Connor: A64; RA97, RA118). Defendant "proceed[ed] left to go around the bicyclist" (O'Connor: A64-65; RA97-RA98). Defendant "heard a commotion, felt something, stopped, looked in the mirror and saw the bicyclist on the ground" (O'Connor: A65; RA98). O'Connor administered a portable breath test, a Drager drug test, and various field sobriety tests to defendant, which all indicated that he was not under the influence of alcohol or drugs (O'Connor: A66; RA114).[4]

[4] After talking to Detective O'Connor, defendant was free to leave and O'Connor did not issue any tickets or take any further action at that time (O'Connor: A67; RA100, RA117-RA118). O'Connor inspected the bus and did not find any evidence related to the crash (O'Connor: RA51). In his initial report, O'Connor included that the bicyclist had swerved into the bus (O'Connor: RA51-RA52). After his investigation, O'Connor concluded that the left handlebar of Hanegby's bicycle got caught on the front wheel of the bus (O'Connor: A69; RA56). O'Connor determined that Hanegby had drifted north, but he could not conclusively determine what was the cause of the collision (O'Connor: A69; RA56).

Defendant's Case

On June 12, 2017, between 10:30 a.m. and 11:00 a.m., traffic accident reconstruction expert JOHN KARPOVICH surveyed West 26th Street between Seventh and Eighth Avenues (Karpovich: RA391-RA392, RA395, RA426-RA428, RA435). The street did not have a bike lane. Where it has bicycle lanes, New York City recommends that the lanes measure at least five feet wide (Karpovich: RA408-RA411).

Karpovich used the Total Work Station to measure the scene and determined that West 26th Street measured 33.5 feet wide (Karpovich: RA388, RA398, RA428, RA461-RA464). Karpovich also inspected and measured the CitiBike, which at its widest point—the handlebars—measured 2.1 feet (Karpovich: RA402). Finally, he examined the bus (Karpovich: RA394). The bus was 8.5 feet wide and had side mirrors that extended one foot on each side (Karpovich: RA398-RA399, RA440-RA441, RA465).

Karpovich also spoke with the superintendent of a building located at 216 West 26th Street, who said that the building had a security video that captured the collision (Karpovich: RA392, RA428). Karpovich watched the video and he realized that the collision scene no longer looked the same as it did at the time the collision occurred because several of the cars, including the white van and the black SUV were no longer present, which meant he could not measure those vehicles himself (Karpovich: RA392, RA395). Using the security video and a vehicle database, Karpovich

determined the make and model of those cars and estimated that the white van was 20.4 feet long and 6.6 feet wide and the black SUV was 15.6 feet long and 6.2 feet wide (Karpovich: RA399, RA439).

Based on his review of the security video, Karpovich estimated that, at the time of the collision, there had been "just over 14 feet" between the black SUV and the white van (Karpovich: RA472, RA475). Karpovich further estimated that the distance between the bus and the white van had been about five feet, and there had been about 1.1 feet between the bus and the black SUV (Karpovich: RA401, RA403, RA461). Ultimately, Karpovich concluded that the left handlebar of Hanegby's bicycle had been "within one foot" of the bus (Karpovich: RA473).

POINT I

DEFENDANT'S GUILT WAS PROVEN BY LEGALLY SUFFICIENT EVIDENCE (Answering Defendant's Brief, Point II).

Defendant was convicted of failure to exercise due care to avoid a collision with a cyclist and failure to yield to a bicyclist after the bus he was driving ran over and killed Dan Hanegby, who was riding a CitiBike. On appeal, defendant contends that the trial court should have applied a criminal negligence standard and that, under that standard, the evidence was legally insufficient (DB: 35-42). As explained further, *infra*, defendant's challenges to the legal sufficiency of the evidence are unpreserved. Those challenges are also meritless.

A verdict is based on legally sufficient evidence "if there is any valid line of reasoning and permissible inferences that could lead a rational person to conclude that every element of the charged crime has been proven beyond a reasonable doubt." *People v. Gordon*, 23 N.Y.3d 643, 649 (2014) (internal quotations omitted); *People v. Danielson*, 9 N.Y.3d 342, 349 (2007). When reviewing the sufficiency of the evidence, this Court must consider the trial evidence "in the light most favorable to the prosecution and recognize that the People are entitled to all reasonable evidentiary inferences." *Gordon*, 23 N.Y.3d at 649.

To find defendant guilty of failure to exercise due care to avoid a collision with a cyclist, the People were required to demonstrate that, while failing to exercise "due care" to avoid a collision on a public roadway, defendant struck a cyclist with his bus and caused "serious physical injury." *See* VTL § 1146(a), (c)(1). There is a "rebuttable presumption" that if defendant caused serious physical injury while failing to exercise due care to avoid a collision, he "operated the motor vehicle in a manner that caused such serious physical injury." VTL § 1146(c)(2). Similarly, to prove defendant guilty of failure to yield to a cyclist, the People were required to show that, while failing to yield to a cyclist who had the right of way and failing to exercise due care to avoid a collision, defendant's bus struck the cyclist and caused physical injury. *See* AC § 19-190(b), (c).

Significantly, Judge Cesare held that a civil negligence standard would apply for the "due care" provisions of both VTL § 1146 and AC § 19-190. The People were,

therefore, required to prove that defendant failed to act with the level of care that would be "exercised by reasonably prudent drivers." *Lewis*, 61 Misc. 3d 1216(A) at *2; Judge Cesare's Decision: A14, A18; Court's Written Charge: RA569-RA572. The evidence at trial amply established defendant's guilt of both crimes. Of course, defendant admitted to both Officer Thompson and Detective O'Connor that he was the driver of the bus, and undeniably Hanegby was riding his bicycle on a street without a bicycle lane where he had the right of way when he was struck and killed.

Accordingly, the only contested issue for Judge Cesare to consider was whether defendant failed to exercise "due care." Here, the security video unquestionably established that defendant failed to exercise the level of care that a reasonably prudent driver would. To begin, if defendant wanted to pass Hanegby, it was defendant's obligation to do so at a safe distance. *See* VTL § 1122-a (when "overtaking" a bicycle from behind the vehicle must pass to the left "at a safe distance until safely clear" of that bicycle). Instead, heedless of Hanegby's wellbeing, defendant attempted to traverse through a narrow opening between two parked cars simultaneously with Hanegby. By defendant's own estimate, the gap between the parked van and SUV was only about 14 feet; defendant attempted to shoot that gap in a 50,000 pound bus, nearly nine feet wide—11 feet including the protruding side mirrors—leaving at most five feet for Hanegby to maneuver a bike that was more than two feet wide. That is not a safe distance, and defendant's maneuver was "imprudent" to say the least.

Security footage, which was trained on the exact site where the collision occurred, showed that there was a white van parked on the right side of the street and on the left side, there was a black SUV that was double-parked, thereby narrowing the roadway (People's Exhibit 1). Then, at virtually the exact same time, Hanegby and the bus driven by defendant appear in view of the camera. It is apparent that the two were close to one another and that they were each keeping up with the flow of traffic. The bus did not slow down as one would expect while traversing a tight space with a bicycle flanking one's vehicle and, in fact, appears to be moving faster than the bicycle as it attempted to squeeze past Hanegby between the two parked cars (People's Exhibit 1). Then, after the bus driven by defendant knocked Hanegby off of his bicycle, defendant continued to drive, running over Hanegby's torso with the rear wheel of the bus (People's Exhibit 1). Of course, in the aftermath of the collision, the video shows Hanegby writhing on the ground, unable to stand while he was waiting for an ambulance (People's Exhibit 1). Undoubtedly, this video alone was sufficient to establish that defendant failed to exercise due care while driving the bus, which resulted in Hanegby's death.

Here, too, Lanette Perez and Caroline Eriss were eyewitnesses to the crime. Perez, who was riding as a passenger on the bus defendant drove and was seated in the front passenger seat, had virtually the same view of the roadway that defendant did. Perez recalled that while driving on West 26th Street in the vicinity of Seventh and Eighth Avenues, she saw Hanegby riding ahead of the bus. When the bus was

about two to four car lengths behind the bicycle, Perez detailed how defendant honked his horn and she wondered, "Where does he want the cyclist to go?" (Perez: RA243-RA244, RA246, RA263, RA280, RA282). Perez testified that defendant's behavior "startled" her because she believed the bus was too close to Hanegby and recalled that there was not enough room for both the bus and bicycle to get through the tight space (Perez: RA243, RA264, RA285). Similarly, Eriss perceived the roadway as being "super narrow and tight" (Eriss: RA93). Thus, the risk to Hanegby was readily apparent, but defendant ignored it.

Even defendant's own statements to Officer Thompson and Detective O'Connor partially corroborated the security video and testimony of Perez and Eriss. Indeed, Thompson testified that defendant identified himself as the driver of the bus, and said that he was driving straight east on West 26th Street when a cyclist, who was riding on the right side of the street, attempted to get around a parked car and purportedly "jostled" into the bus (Thompson: RA122). Defendant said that he felt a "bump," which he believed was the bus coming into contact with Hanegby (Thompson: RA122). Likewise, defendant told O'Connor that Hanegby was riding in the middle of the street and that defendant honked his horn but did not know if Hanegby had heard it, and that he then "heard a commotion, felt something, stopped, looked in the mirror and saw the bicyclist on the ground" (O'Connor: RA25-RA26).

Additionally, Officer Cardimone measured the bus, determining that it was 8 feet, 10 inches wide and weighed 50,000 pounds (Cardimone: RA190, RA192,

RA226). Cardimone further testified that he examined the bicycle Hanegby was riding. Cardimone testified that the handlebars were 26 inches wide and that the rear fender had sustained damage (Cardimone: RA202, RA228-RA229, RA236-RA237). Cardimone observed that there were "scuff marks" on the rear, passenger side tire, the inference being that the scuff marks were the result of the bus tire making contact with Hanegby's bicycle (Cardimone: RA194-RA195, RA228). Of course, this meshed with the security video which showed that the bus tire made contact with Hanegby's bicycle, causing him to lose control and fall to the ground and then get run over by the bus's rear tires. All told, the People's evidence clearly established that defendant failed to exercise due care when he struck and killed Hanegby.

Accordingly, defendant contends that the court erred in applying a civil negligence standard, that rather the proper standard is criminal negligence, and that, as such, the evidence was legally insufficient to meet the criminal negligence standard (DB: 35-42). More particularly, defendant contends that "ordinary accidents do not amount to criminal negligence" (DB: 37), and that the defendant's actions did not amount the level of "moral blameworthiness that is the touchstone of criminal negligence" (DB: 40). Instead, he argues that he was a "conscientious driver," pointing out that "[n]o passenger voiced a concern" about his driving (DB: 38). Additionally, defendant notes that he honked his horn "to warn" Hanegby and that the street measurements were sufficient for both the bus and the bicycle to pass; therefore, defendant contends that it was "understandable" that defendant believed he

could pass Hanegby (DB: 38-39). Defendant also cites his conduct following the collision—namely that he stopped the bus, attended to Hanegby, was "distraught," and cooperated with the police—as evidence that his actions did not amount to criminal negligence (DB: 39).

At the outset, defendant's contentions are unpreserved. During his motion for a trial order of dismissal, defendant did not contend that AC § 19-190 had to be read to include a *mens rea* of criminal negligence. And, while defendant later asked the trial court to charge itself with such a standard, as detailed in Point II, *infra*, that request was rooted in the law of the case doctrine. Thus, none of defendant's current contentions concerning the *mens rea* of AC § 19-190 were before the trial court.

Moreover, defendant offered different factual contentions as well. Thus, at the end of the People's case, defendant contended, with respect to AC § 19-190, that there was no proof regarding where the bicycle Hanegby was riding came from and if it was defendant who failed to yield to Hanegby or vice versa (RA380-RA381). Additionally, defense counsel argued that under both AC § 19-190 and VTL § 1146 the People failed to prove that defendant committed any misconduct or that he was speeding or distracted while driving (RA381). Finally, counsel challenged Perez's testimony as inconsistent and contended that the video showed that there was plenty of space for the bus and the bicycle to pass through the street (RA381-RA382). Then, at the close of all the evidence, defense counsel simply "renew[ed]" his prior motion (RA498). In short, defendant relied entirely on different arguments to challenge the

proof below. *See People v. Gray*, 86 N.Y.2d 10, 19 (1995); *see also People v. Santos*, 86 N.Y.2d 869, 870-71 (1995) (legal sufficiency preservation rules apply in bench trials). In any event, as discussed at length in Point II, *infra*, the court properly applied a civil negligence standard to define due care. And, defendant's contentions are otherwise unpersuasive.

Defendant's attempt to dismiss his failure to exercise due care by arguing that since there was "approximately five feet" between the bus and the parked van, "the bus and Hanegby shared a space that New York City finds more than suitable to safely accommodate a motor vehicle" (DB: 38-39), should be rejected out of hand. Although it is true that New York City recommends that a bicycle lane measure five feet in width, that does not absolve drivers from exercising due care to ensure the safety of cyclists using the bicycle lanes. Moreover, in this case, the street where the collision occurred did not have a bicycle lane, and the very fact that Mr. Hanegby was killed shows the error in defendant's judgment in estimating that there was sufficient space for both the bus and the bicycle to pass through the narrow roadway.

To be sure, prior to June 7, 2017, Perez never complained to defendant or his supervisors that he was an unsafe driver, but she made clear that she felt he drove too close to other cars or pedestrians and did not turn wide enough (Perez: RA270-RA271). Further, Perez testified that, despite the fact that Hanegby was riding just in front of the bus and they were approaching a narrow bottleneck in the thoroughfare because large cars were parked on either side of the street directly across from one

another, defendant did not slow down (Perez: RA245). Instead, defendant continued driving, attempting to overtake Hanegby (Perez: RA245-RA246).

Assuming *arguendo* that criminal negligence was the standard that the court should have applied to define "due care," the People would have been required to prove that defendant "fail[ed] to perceive a substantial and unjustifiable risk" that death or injury would occur, and that the risk was "of such nature and degree that the failure to perceive it constitute[d] a gross deviation from the standard of care that a reasonable person would observe in the situation." Penal Law § 15.05(4). Here, the evidence adduced at trial readily met that standard. Defendant was driving a nearly nine-foot wide, 50,000-pound bus down a narrow street that had cars parked on both sides, including one car that was double-parked at the exact location of the collision. Rather than allow Hanegby to traverse the narrowest point in the roadway first on his bicycle, defendant opted to try and pass Hanegby through a gap not two yards wider than his bus simultaneously with Hanegby. That defendant failed to perceive the "substantial and unjustifiable risk" that his large bus and the bicycle were not going to both fit through the tight space is clear. And, tragically for Hanegby, that "gross deviation of the standard of care," resulted in his death.

Citing *People v. Cabrera*, 10 N.Y.3d 370, 378 (2008), defendant argues that an "ordinary accident" does not equate to criminal negligence (DB: 37-38). In fact, although "one traffic infraction 'does not ipso facto establish criminal negligence, it would not be accurate to say that a trier of fact may never conclude that in light of . . .

any number of other factors,' one traffic infraction may constitute criminal negligence." *People v. Mitchell*, 213 A.D.2d 562, 562 (2d Dept. 1995), quoting *People v. Senisi*, 196 A.D.2d 376, 379 (2d Dept. 1994). Here, the combination of defendant's actions—his disregard for Hanegby, who legally had the right of way, driving too close to the bicycle, misjudging the amount of space for both to safely pass through the narrow street, and overestimating how long it would take the bus to pass the bicycle—amounted to criminal negligence. Besides, both *Cabrera*, 10 N.Y.3d at 377 and *People v. Boutin*, 75 N.Y.2d 692, 697-98 (1990) (cited at DB: 38, 40), plainly state that a defendant will be found criminally negligent where he engages in "risk-creating conduct" that results in death. And, as discussed above, defendant engaged in such "risk-creating" conduct when, while driving a 50,000-pound bus, he attempted to overtake a cyclist on a narrow roadway that had been further narrowed by parked cars. *See Cabrera*, 10 N.Y.3d at 376, citing *People v. Paul V.S.*, 75 N.Y.2d 944, 945 (1990) (noting that criminal negligence was established where the defendant "accelerated after being warned by his passenger to slow down" before striking and killing someone).

In sum, defendant's guilt of both charges was proven by legally sufficient evidence.

POINT II

THE COURT PROPERLY CHARGED A CIVIL NEGLIGENCE STANDARD UNDER ADMINISTRATIVE CODE § 19-190 AND VEHICLE AND TRAFFIC LAW § 1146 (Answering Defendant's Brief, Point I).

Defendant argues that AC § 19-190 and VTL § 1146 are unconstitutional as applied in this case because the trial court charged itself using a civil negligence standard rather than a criminal negligence standard (DB: 33-34). As defendant sees it, civil negligence cannot serve as the basis for criminal responsibility. Defendant continues that, because neither statute calls for a strict liability standard, the only standard to be applied is criminal negligence (DB: 16-31). Additionally, defendant argues that the court's application of a civil negligence standard to AC § 19-190 renders that statute preempted because it conflicts with the Penal Law (DB: 31-33). Defendant's claims are only partially preserved and entirely meritless.

A. Relevant Record

Prior to trial, defendant filed an omnibus motion in which he moved to dismiss the count under AC § 19-190 on several grounds. First, defendant argued that the AC § 19-190 count in the complaint should be dismissed because the complaint failed to allege facts sufficient to establish that defendant acted without due care (Defendant's Motion to Dismiss: A33-A36). Defendant next argued that AC § 19-190 was unconstitutionally vague because it employed a civil negligence standard written within a criminal statute (Defendant's Motion to Dismiss: A42-A46). Defendant

seemingly argued that AC § 19-190 necessitated a strict liability standard (Defendant's Motion to Dismiss: A42). However, defendant said nothing about the constitutionality of VTL § 1146. Finally, defendant contended that AC § 19-190 was preempted by state law, complaining that it conflicted with VTL § 1146 because the punishment under AC § 19-190 was greater and that it conflicted with Penal Law § 15.15 because it imposed criminal liability based on a mental state less culpable than was required (Defendant's Motion to Dismiss: A36-A41).

On March 14, 2018, the Honorable Josh E. Hanshaft denied defendant's motion in its entirety. With regard to the facial sufficiency of the complaint, Hanshaft found that based on the facts alleged, "the [c]ourt may reasonably infer that defendant failed his obligation to carefully look out for a bicyclist and to use reasonable care to avoid hitting any bicyclist on the roadway" (Judge Hanshaft's Decision: A22-A23). Alternatively, the court also found that the allegations were sufficient to meet a criminal negligence standard (Judge Hanshaft's Decision: A23).

Hanshaft next found that AC § 19-190 was not preempted by state law (Judge Hanshaft's Decision: A23). The court denied defendant's motion to dismiss AC § 19-190 on the grounds that it was preempted by VTL § 1146, because the court observed that VTL § 1642(a) expressly permitted local governments to enact traffic regulations and that AC § 19-190 was one such law (Judge Hanshaft's Decision: A23-A24). The judge also determined that the laws were "generally consistent in language and intent" (Judge Hanshaft's Decision: A24). Additionally, Hanshaft disagreed with defendant's

argument that Penal Law § 15.15 "exclusively delineate[d] culpable mental states," and found that AC § 19-190 was not preempted by Penal Law § 15.15 because the Penal Law is "not the sole authority in this area," and it noted that "alternative mental states are recognized" by the courts of the state (Judge Hanshaft's Decision: A24). Hanshaft found that failure to exercise due care was a culpable mental state (Judge Hanshaft's Decision: A24).

Finally, Hanshaft determined that AC § 19-190 was not unconstitutionally vague. The court noted that there was "no categorical indication explicitly denoting that a violation of a statute resulting in criminal liability is expressly limited to the above four mental states" (Judge Hanshaft's Decision: A26). Accordingly, the court rejected defendant's claim that "due care" as a civil negligence rendered AC § 19-190 unconstitutional and, thus, determined that defendant failed to demonstrate that AC § 19-190 was unconstitutionally vague (Judge Hanshaft's Decision: A26).

About six months later, during the charge conference on September 20, 2018, defense counsel essentially abandoned his challenges to the constitutionality of AC § 19-190. Based on Hanshaft's reference to criminal negligence when discussing the facial sufficiency of the complaint in his written decision, defense counsel argued that Judge Hanshaft's decision imposed a criminal negligence standard on the case (9/20/18 Minutes: RA358). Counsel sought to invoke the law of the case doctrine and asked the court to charge itself on the failure to exercise due care using a criminal negligence standard (9/20/18 Minutes: RA359-RA362).

Judge Cesare denied defendant's request to charge a criminal negligence standard because "by its own plain language" AC § 19-190 and VTL § 1146 require proof that defendant failed to exercise due care, and the court found "no basis in law to impose a different, more onerous standard where the statutory language [was] plain and clear." *See Lewis*, 61 Misc. 3d 1216(A) at *2; *see* Judge Cesare's Decision: A18. Cesare also found that the law of the case doctrine was inapplicable here because Judge Hanshaft's reference to criminal negligence was in rejecting a challenge to the facial sufficiency of the accusatory instrument, not in discussing the standard applicable to define "due care." *See Lewis*, 61 Misc. 3d 1216(A) at *2; *see* Judge Cesare's Decision: A18-A19. Accordingly, Judge Cesare denied defendant's request to charge a criminal negligence standard (9/20/18 Minutes: RA371, RA373). Instead, the court charged a civil negligence standard. *See Lewis*, 61 Misc. 3d 1216(A) at *2; *see* Judge Cesare's Decision: A12-A20.

B. Defendant's challenges to VTL § 1146 are entirely unpreserved.

Now, defendant contends that a civil negligence standard is impermissible for either statute, that each must include a *mens rea* of criminal negligence, and that at least AC § 19-190 is preempted by a provision of the Penal Law. Preliminarily, defendant's arguments are, at most, only partially preserved. "A challenge to the constitutionality of a statute must be preserved." *People v. Baumann & Sons Buses, Inc.*, 6 N.Y.3d 404, 408 (2006), citing *People v. Davidson*, 98 N.Y.2d 738 (2002); *see People v. Iannelli*, 69 N.Y.2d 684, 685 (1986), *cert. denied* 482 U.S. 914 (1987). The preservation requirement

"is no mere formalism, but ensures that the drastic step of striking duly enacted legislation will be taken not in a vacuum but only after the lower courts have had an opportunity to address the issue and the unconstitutionality of the challenged provision has been established beyond a reasonable doubt." *Baumann & Sons Buses, Inc.*, 6 N.Y.3d at 408, citing *Matter of Van Berkel v. Power*, 16 N.Y.2d 37, 40 (1965).

Defendant did not raise any constitutional challenge whatsoever to VTL § 1146 before the trial court, and the court's decision ruled on the constitutionality of the municipal provision exclusively. To the extent that defendant suggested at trial that the court should charge itself on criminal negligence, defendant's contention appeared to be founded on the law of the case doctrine. Accordingly, defendant has failed to preserve any constitutional challenge to VTL § 1146. *See Baumann & Sons Buses, Inc.*, 6 N.Y.3d at 408; *see generally People v. Russell*, 71 N.Y.2d 1016, 1017-18 (1988) ("The purposes and requirements of the preservation rules are not satisfied by intertwining and piggy backing distinct procedural steps of the criminal proceeding"); *People v. Rodriguez*, 47 A.D.3d 406, 407 (1st Dept. 2008) (any evidentiary issue left unresolved by the court was deemed abandoned by defendant's failure to insist on the ruling).

In any event, defendant's arguments are wrong.

C. Civil negligence is a constitutional *mens rea* for criminal liability.

Statutory enactments are presumed to be valid, and a defendant seeking to invalidate a statute as unconstitutional must demonstrate its invalidity "beyond a reasonable doubt." *People v. Tichenor*, 89 N.Y.2d 769, 773 (1997), *cert denied* 522 U.S.

918 (1997) (internal quotation marks omitted), quoting *People v. Pagnotta*, 25 N.Y.2d 333, 337 (1969).

AC § 19-190(a) states that "any driver of a motor vehicle who fails to yield to a pedestrian or person riding a bicycle when such pedestrian or person has the right of way shall be guilty of a traffic infraction." AC § 19-190(b) continues that a driver who violates subsection (a) and "whose motor vehicle causes contact with a pedestrian or person riding a bicycle and thereby causes physical injury, shall be guilty of a misdemeanor." Finally, AC § 19-190(c) states, "It shall not be a violation of this section if the failure to yield and/or physical injury was not caused by the driver's failure to exercise due care."

Like AC § 19-190, VTL § 1146(a) states that "[e]very driver of a vehicle shall exercise due care to avoid colliding with any bicyclist, pedestrian, or domestic animal upon a roadway." VTL § 1146(b)(1) continues that "[a] driver of a motor vehicle who causes physical injury . . . to a pedestrian or bicyclist while failing to exercise due care in violation of subdivision (a) of this section, shall be guilty of a traffic infraction." VTL § 1146(c)(1) provides the same penalty for a driver who causes "serious physical injury."

"Due care" has generally been understood to be a culpable mental state. Notably, several state courts have understood due care to refer to "ordinary" civil negligence, *i.e.*, departure from the conduct of a reasonably prudent person. *See Torres*, 65 Misc. 3d at 22 ("Manifestly, if there is no constitutional infirmity in a crime that

requires no mental state at all, then, a fortiori, there is no constitutional infirmity in an offense that requires proof of defendant's failure to exercise due care, a more culpable mental state."); *People v. Walters*, 64 Misc. 3d 862, 864-65 (Crim. Ct. N.Y. Co. 2019) (civil negligence standard does not render AC § 19-190 unconstitutional); *People v. Gurung*, 54 Misc. 3d 1208(A), *1-2 (Crim. Ct. N.Y. Co. 2017) (finding AC § 19-190 was not unconstitutional for applying a civil negligence standard); *People v. Urena*, 54 Misc. 3d 978, 987 (Crim. Ct. Queens Co. 2016) (holding that AC § 19-190 applied a civil negligence standard to define "due care" and noting that "[g]iven that a due care-reasonably prudent standard is recognized in several New York criminal statutes and has been upheld by the Court of Appeals, it is clear that the standard is accepted…").

Significantly, it has consistently been recognized that a legislature may, through criminal statutes, protect public safety and welfare without regard to mental culpability. *See United States v. Freed*, 401 U.S. 601, 607 (1971); *Morissette v. United States*, 342 U.S. 246, 254 (1952); *United States v. Balint*, 258 U.S. 250, 251-52 (1922); *see also* Penal Law § 15.10; *Morgenthau v. Khalil*, 73 A.D.3d 509, 510 (1st Dept. 2010); *People v. Wood*, 58 A.D.3d 242, 251-52 (1st Dept. 2008). Such "public welfare offenses," even though imposing strict liability, do not violate due process. *See Balint*, 258 U.S. at 252 (state may punish certain acts without regard to actor's intent or knowledge). In turn, it is plain that a public welfare statute can impose sanctions on a showing of ordinary negligence. *See generally Haney*, 30 N.Y.2d at 334 n.7 ("Criminal liability for death caused by ordinary negligence is sometimes imposed by statute.").

Public welfare offense have several general characteristics. First, they typically regulate "potentially harmful or injurious items" in the broad interest of protecting public safety. *See Staples v. United States*, 511 U.S. 600, 607 (1994); *Morissette*, 342 U.S. at 255. The conduct targeted by such statutes need not be immediate, and often "merely create[s] the danger or probability" of later harms; thus, "whatever the intent of the violator, the injury is the same." *Morissette*, 342 U.S. at 256. Moreover, the violator stands in the best position to prevent the harm, simply by exercising reasonable care. *Id.* at 256-57; *Balint*, 258 U.S. at 254; *see also Freed*, 401 U.S. at 609-10. Additionally, public welfare statutes generally impose only "light penalties," such as fines or short periods of incarceration, and convictions entail relatively little social stigma. *See Staples*, 511 U.S. at 616-17; *Morissette*, 342 U.S. at 256.

Defendant acknowledges that the mental state in AC § 19-190—the failure to exercise due care—is identical to the mental state set forth in VTL § 1146, which defines a class B misdemeanor as well as a traffic infraction. Nevertheless, defendant argues that the four culpable mental states defined in the Penal Law comprise an "exclusive" list of culpable mental states, which does not include civil negligence as a culpable mental state for criminal liability (DB: 20-24). In defendant's view, criminal liability in New York cannot be premised on a mental state of civil negligence, and in turn, criminal negligence is the standard "that most obviously breathes life into" the failure to exercise due care standard (DB: 27). Defendant's argument is at odds with settled law.

To be sure, Penal Law § 15.10 states that "[t]he minimal requirement for criminal liability is the performance by a person of conduct which includes a voluntary act or the omission to perform an act which he is physically capable of performing." But, Penal Law § 15.10 goes on to explain that, "[i]f such conduct is all that is required for commission of a particular offense, or if an offense or some material element thereof does not require a culpable mental state on the part of the actor, such offense is one of 'strict liability.'" Clearly then, criminal negligence is not the minimum requirement for criminal liability—strict liability crimes are possible, legal, and constitutional. *See*, *e.g.*, *Khalil*, 73 A.D.3d at 510; *Wood*, 58 A.D.3d at 250-51. If there is no *per se* constitutional infirmity in a strict liability offense, it follows that there cannot be one in an offense that requires proof of the defendant's ordinary negligence, a more culpable mental state. *See*, *e.g.*, *Haney*, 30 N.Y.2d at 334 n.7.

Moreover, criminal statutes are not limited to one of the mental states defined by Penal Law §§ 15.05 or 15.10. Certainly, Penal Law § 15.00(6) states that "[c]ulpable mental state means 'intentionally' or 'knowingly' or 'recklessly' or with 'criminal negligence' as these terms are defined in section 15.05." However, Penal Law § 15.05 further specifies that the definitions therein "are applicable to this chapter" only. Therefore, as the Appellate Term correctly held in *Torres*, 65 Misc. 3d at 23, and as properly applied in this case, the Penal Law "does not limit" the mental states that could apply to the offense defined outside of the Penal Law. *See also People v. M&H Used Auto Parts & Cars, Inc.*, 22 A.D.3d 135, 143 (2d Dept. 2005) (holding that the

"clear language" of Penal Law § 15.15[1] "suggests" that it "does not apply to crimes defined outside the Penal Law").

Moreover, this Court has made it abundantly clear that, even for purposes of the Penal Law, there are more than those four culpable mental states. For instance, the Court has "explicitly" stated that "depraved indifference to human life is a culpable mental state." *Feingold*, 7 N.Y.3d at 294; *see also People v. Williams*, 24 N.Y.3d 1129 (2015); *People v. Matos*, 19 N.Y.3d 470, 475 (2012); *People v. Prindle*, 16 N.Y.3d 768, 770-71 (2011).

There are also crimes outside the Penal Law that are defined by a mental state that is less than the Penal Law standard of criminal negligence. For example, Reckless Driving, a misdemeanor codified in VTL § 1212, is defined as operating a vehicle "in a manner which unreasonably interferes with the free and proper use of the public highway, or unreasonably endangers users of the public highway." Although that crime requires proof of "[m]ore than mere negligence," *People v. Bohacek*, 95 A.D.3d 1592, 1594 (3d Dept. 2012), this Court has observed that a charge of reckless driving can be sustained by conduct that does "not rise to the level of moral blameworthiness required to sustain a charge of criminally negligent homicide." *People v. McGrantham*, 12 N.Y.3d 892, 892-94 (2009) (holding that grand jury evidence regarding defendant's operation of a vehicle was legally sufficient to support a charge of reckless driving, but not a charge of criminally negligent homicide).

Furthermore, this Court has noted that "[c]riminal liability for death caused by ordinary negligence is sometimes imposed by statute." *Haney*, 30 N.Y.2d at 334 n.7. It went on to explain that, while "most of these statutes are confined to deaths arising out of automobile accidents," there are also examples of "ordinary negligence sufficient to establish liability for a nonvehicular homicide." *Id.* It could not be clearer that it is legal, acceptable, and constitutional to utilize ordinary civil negligence as a *mens rea* in a criminal statute. In fact, criminal statutes that require a *mens rea* of civil negligence have been upheld by various federal courts. *United States v. Pruett*, 681 F.3d 232, 242 (5th Cir. 2012) (holding that Clear Water Act "requires only proof of ordinary negligence"); *United States v. Ortiz*, 427 F.3d 1278, 1279 (10th Cir. 2005) (finding that Clean Water Act "criminalizes any act of ordinary negligence that leads to the discharge of a pollutant into the navigable waters of the United States"); *United States v. Hanousek*, 176 F.3d 1116, 1121 (9th Cir. 1999), *cert. denied* 528 U.S. 1102 (2000) ("It is well established that a public welfare statute may subject a person to criminal liability for his or her ordinary negligence without violating due process.").

Additionally, courts in many other states have upheld criminal culpability on the basis of ordinary, civil negligence. *See*, *e.g.*, *State v. Hazelwood*, 946 P.2d 875, 879 (Alaska 1997) ("it is firmly established in our jurisprudence that a mental state of simple or ordinary negligence can support a criminal conviction"); *People v. Brunette*, 194 Cal. App. 4th 268, 124 Cal. Rptr.3d 521, 534 (Ct. App. 2011) (noting that ordinary negligence "will generally serve as the basis for tort liability and occasionally for

criminal liability"); *Hoover v. State*, 958 A.2d 816, 821 (Del. 2008) (recognizing the "power of a legislature to define a crime based upon ordinary negligence"); *State v. Tabigne*, 88 Hawai'i 296, 304, 966 P.2d 608, 616 (1998) (upholding legislative introduction of "a less culpable state of mind called 'simple negligence'—essentially a civil standard of negligence"); *State v. Labonte*, 120 Vt. 465, 468-469, 144 A.2d 792, 794 (1958) (allowing imposition of criminal penalties upon a showing of "ordinary negligence such as would impose civil liability" so long as the negligence was "proved beyond a reasonable doubt"). In fact, many states impose criminal liability on the

basis of civil negligence specifically with respect to traffic crimes.[5] Other states go so far as to allow convictions for manslaughter based on ordinary, civil negligence.[6]

Still, other states criminalize ordinary negligence but only when the statute defines a public welfare offense,[7] or where the defendant negligently engages in

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[5] *See*, *e.g.*, *Egle v. People*, 159 Colo. 217, 222, 411 P.2d 325, 327 (1966) ("A showing of simple negligence, therefore, was sufficient to support the conviction" for causing death by driving in a careless manner while under the influence of alcohol); *State v. Kluttz*, 9 Conn. App. 686, 695, 521 A.2d 178, 183 (App. Ct. 1987) (vehicular negligent homicide statute lawfully criminalized "the ordinary civil standard of negligence, namely, the failure to use due care"); *Commonwealth v. Angelo Todesca Corp.*, 446 Mass. 128, 137, 139, 842 N.E.2d 930, 939 (2006) ("A finding of ordinary negligence suffices" to establish vehicular homicide; "simple negligence" is "determined by the same standard employed in tort law"); *Commonwealth v. Carlson*, 447 Mass. 79, 85, 849 N.E.2d 790, 795 (2006) ("finding of ordinary negligence is sufficient to establish a violation" of vehicular homicide statute); *People v. Marshall*, 74 Mich. App. 523, 526-527 n.1, N.W.2d 351, 353 n.1 (1977) ("We reject the interpretation that ordinary negligence cannot support criminal liability. Negligent driving resulting in death supports criminal liability."); *State v. Mollman*, 2003 S.D. 150, 674 N.W.2d 22, 25-26 (2003) ("a finding of ordinary negligence is sufficient to establish vehicular homicide and therefore the appropriate standard of causation is 'that employed by tort law'").

Others allow civil negligence to be the basis of a driving under the influence crime, *see, e.g.*, *Koch v. State*, 222 So. 3d 1088, 1094 (Miss. Ct. App. 2017), *cert. denied* 222 So. 3d 312 (2017), or for careless driving. *See, e.g.*, *State v. Yarborough*, 122 N.M. 596, 603, 930 P.2d 131, 138 (1996) (holding that convictions for petty misdemeanors, including careless driving, requires only a showing of ordinary civil negligence).

[6] *People v. Traylor*, 46 Cal. 4th 1205, 1209, 210 P.3d 433, 436 (2009) (recognizing crime of manslaughter based on "ordinary negligence"); *Kelly v. Commonwealth*, 267 S.W.2d 536, 539 (Ky. Ct. App. 1954) (recognizing "three degrees of manslaughter," one of which requires proof of "ordinary negligence" and carries "the smallest penalty"); *State v. Hayes*, 244 Minn. 296, 297, 299-300, 70 N.W.2d 110, 113 (1955) (Allowing that "the legislature may make ordinary negligence sufficient as a standard to support a charge of felony" manslaughter for "shooting another with a gun. . . when resulting from carelessness in mistaking the person shot for a deer"); *Ball v. State*, 173 P.3d 81, 91 (Okla. Crim. App. 2007) ("this Court held that ordinary negligence resulting in death is sufficient to warrant a conviction for second-degree manslaughter"); *State v. Williams*, 4 Wash. App. 908, 913, 484 P.2d 1167, 1171 (1st Div. 1971) (involuntary manslaughter "committed even though the death of the victim is the proximate result of only simple or ordinary negligence").

inherently dangerous activities.[8] Indeed, the Supreme Court has recognized that the scope of criminally culpable mental states has grown over time, "especially in the expanding regulatory area involving activities affecting public health, safety, and welfare." *Freed*, 401 U.S. at 607. In that light, it is clear that it is legal, acceptable, and constitutional to utilize ordinary civil negligence as a *mens rea* in a criminal statute.

Notably, AC § 19-190 fits comfortably into the definition of a public welfare offense. First, vehicles, particularly when driven through areas in which bicycles have the right of way, pose a significant danger to the public.[9] Furthermore, a person driving a vehicle in an area where cyclists have the right of way is in the best position to avert harm and, in exercising "no more care than society might reasonably expect," can readily avoid striking pedestrians with his or her vehicle. *See Morissette*, 342 U.S. at 256-57. Thus, the City Council was justified in requiring "a degree of diligence for the protection of the public," *id.* at 257, and a civil negligence reading of AC § 19-190 is constitutional.

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[7] *See Haxforth v. State*, 117 Idaho 189, 191, 786 P.2d 580, 582 (Ct. App. 1990); *Cornella v. Justice Court*, 132 Nev. 589, 377 P.3d 97, 99 (2016).

[8] *State v. Barnett*, 218 S.C. 415, 427, 63 S.E.2d 57, 61 (1951) (finding "simple negligence causing the death of another" sufficient to impose criminal liability if the negligent act is "necessarily dangerous to human life or limb").

[9] For example, in 2014, 249 New Yorkers were killed as a result of a motor vehicle crash and over 60,000 people were injured. New York State Department of Motor Vehicles, Summary of New York City Motor Vehicle Crashes 2014, Table 1, *available at* http://on.ny.gov/2iSmyEa. At that rate, a New Yorker is either killed or seriously injured by a motor vehicle collision every two hours. City of New York, Vision Zero Action Plan, 7 (2014), *available at* http://on.nyc.gov/2iSbarG.

Nonetheless, defendant contends that applying a civil negligence standard to AC § 19-190 and VTL § 1146 renders both statutes unconstitutional (DB: 17-30). Defendant argues that the Penal Law does not recognize civil negligence as a culpable mental state and that the list of culpable mental states defined in Article 15 of the Penal Law is "exclusive" (DB: 20, 24). Additionally, defendant contends criminal liability requires moral blameworthiness and thus, cannot be based on civil negligence (DB: 18-19). But, as just demonstrated, those argument are all wrong.

More generally, defendant seems to take umbrage with the fact that a civil standard looks at the conduct in light of what a "reasonable person" would do, which as defendant sees it, is at odds with the premise that in order for a person to be found criminally liable, his conduct must be morally blameworthy (DB: 18-19). However, the "reasonable person" standard is contained within the criminal negligence statute, which has been found to be constitutional. Penal Law § 15.05(4); *see*, *e.g.*, *Haney*, 30 N.Y.2d at 333-35; *People v. Rosenbloom*, 45 A.D.2d 794, 794 (3d Dept. 1974); *Rossi v. County Court of Schoharie County*, 31 A.D.2d 715, 716 (3d Dept. 1968).[10]

Defendant attempts to sidestep the reality that in *Feingold* this Court recognized a *mens rea* other than those listed in Article 15 of the Penal Law by arguing that the

[10] It bears note that all of the protections inherent in a criminal proceeding still inure to the defendant's benefit, even under a civil negligence standard. Foremost, the People still bear the burden of proving a defendant's guilt beyond a reasonable doubt. And, of course, a defendant enjoys the rights, such as to assistance of counsel, to trial, and to silence, that apply in any other criminal proceeding.

first-degree reckless endangerment statute at issue in *Feingold* was valid simply because it had a culpable mental state of depraved indifference to human life "in *addition* to the recklessness element" (DB: 22 n.8) (emphasis in original). But defendant's attempt to misdirect this Court should be rejected out of hand because, as discussed above, this Court's "explicit[ ]" holding in *Feingold* made clear that "depraved indifference to human life is a culpable mental state," which necessarily means that it is possible to have a mental state outside of the four enumerated mental states contained in the Penal Law. *Feingold*, 7 N.Y.3d at 294.

In short, defendant's argument that a civil negligence *mens rea* is unconstitutional is wholly without merit.

D. AC § 19-190 is not preempted by New York State Penal Law.

Defendant's claim that AC § 19-190 must be struck down because it is preempted by state law is equally unavailing. By the "home rule" provisions of the State Constitution and statutory authority, the New York City Council has been granted the authority to adopt local laws related to public welfare. *See* N.Y. Const., art. IX, § 2(c)(ii); Municipal Home Rule Law 6 10(1). Notably, Municipal Home Rule Law § 11 lists areas where the City is prohibited from enacting local laws; unsurprisingly, vehicle and traffic regulations is not among them.

In areas where the City is permitted to legislate, its authority is broad but not limitless. In two situations, state law will be said to preempt local enactments. First, the City may not enact a law that conflicts with the state constitution or state statutes.

See DJL Rest. Corp. v. City of New York, 96 N.Y.2d 91, 95 (2001). A local law conflicts with state law where it prohibits what would be permissible under the state law or imposes additional restrictions or prerequisites on rights granted under state law. *Patrolmen's Benev. Assn. of the City of N.Y., Inc. v. City of New York*, 142 A.D.3d 53, 61-62 (1st Dept. 2016), citing *Zakrzewska v. New School*, 14 N.Y.3d 469, 480 (2010); *see generally People v. De Jesus*, 54 N.Y.2d 465, 472 (1981).

Second, the City may not legislate in a field in which "the State Legislature has assumed full regulatory responsibility." *See DJL Rest. Corp.*, 96 N.Y.2d at 95. The Legislature may expressly articulate its intent to occupy the field, or may do so by implication. *Id.* In particular, the Legislature's enactment of a "comprehensive and detailed regulatory scheme in a particular area" will be found to preempt a local law in the same field. *See N.Y. State Club Assn. v. City of New York*, 69 N.Y.2d 211, 217 (1987), *aff'd* 487 U.S. 1 (1988); *Jancyn Mfg. Corp. v. County of Suffolk*, 71 N.Y.2d 91, 97 (1987) (local laws are preempted when "the State has clearly evinced a desire to preempt an entire field thereby precluding any further local regulation" because local regulation "would tend to inhibit the operation of the State's general law and thereby thwart the operation of the State's overriding policy concerns") (internal citations and quotation marks omitted); *Consol. Edison Co. v. Town of Red Hood*, 60 N.Y.2d 99, 105 (1983).

Preliminarily, it is important to note that it is expected that local governments will pass their own traffic laws and regulations. Indeed, the state constitution

provides that "every local government shall have the power to adopt and amend local laws not inconsistent with the provisions of this constitution or any general law relating to . . . [t]he acquisition, care, management and use of its highways, roads, streets, avenues and property." N.Y. Const., art. IX § 2(c)(ii)(6); *see also* Municipal Home Rule Law § 10(2)(a)(6); *People v. Randazzo*, 60 N.Y.2d 952 (1983). Thus, AC § 19-190 falls squarely within the ambit of authorized legislation. Moreover, rather than criminalizing what the state allows, AC § 19-190 merely strengthens the criminal penalty for injuring pedestrians and cyclists that was already authorized by VTL § 1146. Because AC § 19-190 does "not prohibit what the State law permits nor allow what the State law forbids," it is "not inconsistent" with state law. *Wholesale Laundry Bd. of Trade, Inc. v. New York*, 17 A.D.2d 327, 329 (1st Dept. 1962), *aff'd* 12 N.Y.2d 998 (1963).

Defendant's claim that AC § 19-190 must be struck down because it purportedly conflicts with Penal Law § 15.05 and his attempts to introduce a new culpable mental state of civil negligence in conflict with the state's supposed intent to occupy the field of criminally culpable mental states (DB: 31-33), is devoid of merit. Indeed, defendant's conflict preemption argument is nothing more than a rehashing

of his earlier argument that civil negligence is not a permissible *mens rea* for criminal offenses. As explained above in detail, this is incorrect.[11]

Briefly, Penal Law § 15.15(1) is limited to offenses defined in the Penal Law, implying that beyond the four culpable mental states enumerated in Penal Law § 15.15(1), there are other possible mental states allowed for in non-Penal Law offenses. Moreover, Penal Law § 15.15(2) states that where no culpable mental state "is expressly designated" in the statute, that a culpable mental state "*may*" be read into the statute (emphasis added). And, unless a statute "clearly" requires strict liability, it should be "construed as defining a crime of mental culpability." Penal Law § 15.15(2). Of course, the rules of construction for strict liability crimes apply to "offenses defined both in and outside" of the Penal Law. *See* Penal Law § 15.15(2). Defendant equates the requirement that a non-strict liability crime be a crime of moral culpability with the condition that one of the four culpable mental states be defined

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[11] Defendant "join[s] Point I(A)(2)" of defendant Carlos Torres' brief, arguing that AC § 19-190 is also preempted by VTL § 1146 (DB: 33 n.11). Defendant Torres argues that AC § 19-190 directly conflicts with VTL § 1146 because it punishes the same conduct "more harshly" (Torres Brief: 23). However, this argument misapprehends what conflict preemption is and runs counter to what local governments are authorized to do. The mere fact that AC § 19-190 provides for harsher punishment than VTL § 1146 does not invalidate the city ordinance. *See People v. Lewis*, 295 N.Y. 42, 50 (1945) (noting that having harsher penalties under New York City Administrative Code than under state law for selling black market chickens during wartime did not invalidate statute). Indeed, there are several instances where conduct deemed to be a traffic infraction under the Vehicle and Traffic Law were codified as misdemeanors under the Administrative Code of the City of New York. *Compare* VTL § 1144(a) *with* AC § 10-164 (failure to yield to emergency vehicles); VTL § 1234 *with* AC § 19-176) (bicycling on the sidewalk). Thus, AC § 19-190 is not preempted by the Vehicle and Traffic Law.

by the Penal Law. But, plainly, the Legislature did not intend to limit criminal liability to conduct that was committed with one of the mental states set for in Penal Law § 15.15(1) (*contra* DB: 25 n.9; 31-33). *See M&H Used Auto Parts & Cars, Inc.*, 22 A.D.3d at 142.

Certainly, the staff notes from 1964 suggest that in codifying the Penal Law the legislature wished to clarify many "hazy adverbial terms," and ultimately settled on the four mental states enumerated in Penal Law § 15.15 (DB: 21 [citing Denzer & McQuillan, Practice Commentary to PL § 15.05 (1967)]). But in the three-quarters of a century since then, both the state and federal governments have imposed criminal liability on the basis of civil negligence. *See* VTL § 1146(d); Agriculture and Markets Law § 370; *Pruett*, 681 F.3d at 242; *Ortiz*, 427 F.3d at 1279; *Hanousek*, 176 F.3d at 1121. Moreover, as was noted above, this Court has upheld multiple instances of culpable mental states in criminal statutes beyond those delineated in the Penal Law. *See Williams*, 24 N.Y.3d at 1129 (recognizing depraved indifference to human life as a culpable mental state); *Feingold*, 7 N.Y.3d at 294 (same); *McGrantham*, 12 N.Y.3d at 893-94 (tacitly acknowledging that the misdemeanor of Reckless Driving defined in VTL § 1212 has a lesser mental state than criminal negligence as defined in Penal Law § 15.05).

Thus, AC 19-190 is not preempted by the Penal Law.

* * *

In sum, a civil negligence standard for AC § 19-190 and VTL § 1146 is constitutional and AC § 19-190 is not preempted by New York state law.

CONCLUSION

The order of the Appellate Term should be affirmed.

Respectfully submitted,

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WORD COUNT CERTIFICATION

I, AMANDA KATHERINE REGAN, Assistant District Attorney, hereby certify that the word count for this brief is 11461, excluding the Table of Contents and Table of Authorities. The word processing system used to prepare this brief and to calculate the word count was Microsoft Word 2016. The brief is printed in Garamond, a serifed, proportionally spaced typeface. The type size is 14 points in the text and headings, and 13 points in the footnotes.