APL-2022-00078

To be argued by:
AMY MCCAMPHILL
*30 minutes requested*

# Court of Appeals
# State of New York

POLICE BENEVOLENT ASSOCIATION OF THE CITY OF NEW YORK, INC.,

(*Continued on the following page*)

*Plaintiffs-Appellants*,

*against*

THE CITY OF NEW YORK,

*Defendant-Respondent*.

**BRIEF FOR DEFENDANT-RESPONDENT**

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March 3, 2023

*Continued list of Plaintiffs-Appellants:*

SERGEANTS BENEVOLENT ASSOCIATION OF THE CITY OF NEW YORK; LIEUTENANTS BENEVOLENT ASSOCIATION OF THE CITY OF NEW YORK; CAPTAINS ENDOWMENT ASSOCIATION OF THE CITY OF NEW YORK; DETECTIVES' ENDOWMENT ASSOCIATION OF THE CITY OF NEW YORK; PORT AUTHORITY POLICE BENEVOLENT ASSOCIATION INC.; PORT AUTHORITY DETECTIVES' ENDOWMENT ASSOCIATION; PORT AUTHORITY LIEUTENANTS BENEVOLENT ASSOCIATION; PORT AUTHORITY SERGEANTS BENEVOLENT ASSOCIATION; SUPREME COURT OFFICERS ASSOCIATION; NEW YORK STATE COURT OFFICERS ASSOCIATION; NEW YORK STATE POLICE INVESTIGATORS ASSOCIATION, LOCAL NO. 4 OF THE INTERNATIONAL UNION OF POLICE ASSOCIATIONS, AFL-CIO; BRIDGE AND TUNNEL OFFICERS BENEVOLENT ASSOCIATION; TRIBOROUGH BRIDGE AND TUNNEL AUTHORITY SUPERIOR OFFICERS BENEVOLENT ASSOCIATION; METROPOLITAN TRANSPORTATION AUTHORITY POLICE BENEVOLENT ASSOCIATION; POLICE BENEVOLENT ASSOCIATION OF NEW YORK STATE; and NEW YORK CITY DETECTIVE INVESTIGATORS ASSOCIATION DISTRICT ATTORNEYS' OFFICE.

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## PRELIMINARY STATEMENT

For decades, the NYPD has restricted the use of certain dangerous restraints—chokeholds, and sitting, kneeling, or standing on the chest or back—that could cause an arrestee to asphyxiate. The dangers of the latter restraints were illustrated in a 1994 training video by then-Commissioner William Bratton, which detailed how applying body-weight pressure to the chest or back compresses the diaphragm and thus interferes with breathing.

Following incidents that aroused public outrage—including the tragic deaths of Eric Garner and George Floyd—the New York City Council sought to increase deterrence by codifying the NYPD's internal restrictions in a criminal prohibition. The resulting local law makes it a misdemeanor for a law-enforcement officer to impede an arrestee's air or blood flow by means of a chokehold or by sitting, kneeling, or standing on the chest or back so as to compress the diaphragm. A justification defense available under state law permits officers to use these restraints when they reasonably believe it necessary to effect an arrest, prevent escape, or defend themselves or others.

Before the local law had ever been enforced, the plaintiff law-enforcement unions facially challenged it, arguing that the diaphragm-compression ban (but not the chokehold ban) is unconstitutionally vague and that the entire law is preempted by a grab bag of state laws. The Appellate Division, First Department unanimously rejected plaintiffs' challenges and upheld the law, reversing a lower court's ruling to the extent that it had declared the law void for vagueness. This Court should affirm.

The diaphragm-compression ban, adopted in response to grave concerns raised by widely publicized incidents of positional asphyxia, is not unconstitutionally vague. It tells law-enforcement officers in concrete, objective terms what conduct to avoid: sitting, kneeling, or standing on an arrestee's chest or back so as to put pressure on the diaphragm and impair breathing. N.Y.C. Admin. Code § 10-181(a). The City's police officers, as highly trained professionals, can and should understand what not to do; indeed, adhering to their training will ensure compliance with the law. And the prosecution would have to prove any violation and negate any justification defense, if invoked, beyond a reasonable doubt.

The factual disputes that plaintiffs attempt to inject into the case, largely through testimony of retained experts, do not support a vagueness challenge. Plaintiffs do not seriously contend that they're unable to understand what conduct the local law prohibits. Their argument instead is that officers are entitled to know when their body-weight pressure is causing diaphragm compression so that they can continue to use these restraints on arrestees without risk of criminal sanction. But the NYPD has long urged officers to avoid *all* sitting, kneeling, or standing on arrestees' chests or backs—that is, not to use these restraints at all.

Moreover, any difficulty in identifying when one has crossed the line between undesirable conduct and criminal act presents no vagueness concern—just as courts have upheld laws criminalizing drunk driving or excessive noise, among many others, that require steering clear of a defined line that can be difficult to locate in practice. At most, plaintiffs' expert opinions go to whether the local law has been violated or how to construe it in edge cases, not to what the law fundamentally covers. They provide no basis to strike down the ban from the jump in a pre-enforcement facial challenge.

If the diaphragm-compression ban were vague, however, that still would not support plaintiffs' request to enjoin the separate chokehold ban, which plaintiffs have never challenged on vagueness grounds. Separation-of-powers principles require that the City Council's work be preserved to the extent that it reasonably can be. The chokehold ban is a distinct prohibition, and the City Council manifestly would have wanted it to stand on its own.

Plaintiffs' preemption claims, which both lower courts rejected, are also meritless. Only weighty evidence of preemptive intent should suffice to strip the City Council's ability to address dangerous uses of force by the City's own law-enforcement officers on the City's own streets—events that roil the City like few others. But plaintiffs come nowhere close to marshaling such evidence. They point to no provision of state law that the local law conflicts with. And the scattered state-law provisions that plaintiffs invoke do not remotely evince an intent to oust the City from exercising its core home-rule powers to regulate the conduct of law enforcement and protect its own citizens from injury and death.

## QUESTIONS PRESENTED

1. Did the Appellate Division correctly reject plaintiffs' facial challenge to N.Y.C. Administrative Code section 10-181 as unconstitutionally vague?

2. If section 10-181's diaphragm-compression ban were unconstitutionally vague, should plaintiffs' request to leverage that claim into an injunction against the law's separate chokehold ban nonetheless be rejected?

3. Did the Appellate Division correctly reject plaintiffs' claims that state law preempts section 10-181?

## STATEMENT OF THE CASE

The local law that plaintiffs challenge, section 10-181, prohibits police use of certain dangerous restraints. It defines two "[u]nlawful methods of restraint," providing that "[n]o person shall restrain an individual in a manner that restricts the flow of air or blood by [(1)] compressing the windpipe or the carotid arteries on each side of the neck, or [(2)] sitting, kneeling, or standing on the chest or back in a manner that compresses the diaphragm, in the course of effecting or attempting to effect an arrest." N.Y.C. Admin. Code § 10-181(a). The law classifies violations as misdemeanors

punishable by imprisonment of up to one year, or a fine of up to $2,500, or both. *Id.* § 10-181(b). The law codifies restrictions that had previously appeared in the NYPD Patrol Guide.

### A. The NYPD's longstanding restrictions on the use of chokeholds and on sitting, kneeling, or standing on an arrestee's chest or back

Language instructing officers to take care not to impede arrestee breathing has existed in the NYPD Patrol Guide for decades. As early as 1993, NYPD banned officers' use of chokeholds and certain other restraints, including standing on an arrestee's chest, that could impede breathing.[1] By 2000, the Patrol Guide instructed that NYPD officers "will NOT use chokeholds."[2] It also provided that, "[w]henever possible, [officers] should make every effort to avoid tactics, such as sitting or standing on a subject's

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[1] Ian Fisher, *Kelly Bans Choke Holds by Officers*, N.Y. Times, Nov. 24, 1993, *available at* https://www.nytimes.com/1993/11/24/nyregion/kelly-bans-choke-holds-by-officers.html.

[2] NYPD Patrol Guide (Jan. 1, 2000), § 203-11, *available at* https://perma.cc/JTU4-9W7B (page 91 of 1609) (captured Feb. 12, 2022); *see also* NYPD Patrol Guide (Aug. 1, 2013), § 203-11, *available at* https://perma.cc/D69T-GUTK (page 106 of 4495) (captured Feb. 12, 2022).

chest, which may result in chest compression, thereby reducing the subject's ability to breathe."[3]

The dangers of putting pressure on an arrestee's chest or back have long been clear. Almost 30 years ago, in 1994, then-NYPD Commissioner William Bratton produced a training video for police officers that instructed them on how body pressure can impede breathing.[4] In the video, Dr. Charles Hirsch, then the City's Chief Medical Examiner, explained that "if you're face down and your abdomen is compressed, it raises the abdominal contents and makes it more difficult for your diaphragm to contract"; an accompanying graphic demonstrated the role of the diaphragm in breathing and depicted how pressure on a prone person's chest or back can interfere with diaphragm function and restrict breathing.[5] Further, Dr. Hirsch said, "the greater the weight resting on the

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[3] NYPD Patrol Guide (Jan. 1, 2000), § 203-11, cited *supra* n.2; NYPD Patrol Guide (Aug. 1, 2013), § 203-11, cited *supra* n.2.

[4] "Preventing In-Custody Deaths" (Sept. 9, 1994), *available at The Evolution of William Bratton, in 5 Videos,* N.Y. Times, July 25, 2016, *at* https://www.nytimes.com/interactive/2016/07/24/nyregion/bratton-nypd-videos.html.

[5] *See id.* video at 4:05 to 4:42.

individual's back and the more severe the degree of compression, the more difficult it is for them to breathe in."[6] The video instructed officers not to sit on an arrestee's back and to move arrestees onto their side or into a seated position as soon as practically possible.[7]

Confirming what Dr. Hirsch and Commissioner Bratton knew nearly three decades ago, a recent *New York Times* review of 70 cases of people who died in police custody after saying "I can't breathe"—the same dying words spoken by Eric Garner and George Floyd—found that "[m]ost frequently, officers pushed [the decedents] face down on the ground and held them prone with their body weight."[8] So too, for years courts reviewing claims of excessive police uses of force have recognized that "applying pressure to [a person's] back" carries a "significant risk of positional asphyxiation." *Weigel v. Broad*, 544 F.3d 1143, 1155 (10th Cir. 2008). Yet "compression asphyxia … appears with unfortunate

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[6] *Id.* at 4:32 to 4:42.

[7] *Id.* at 5:27 to 5:47, 6:48 to 7:35.

[8] Mike Baker et al., *Three Words, 70 Cases. The Tragic History of 'I Can't Breathe*,' N.Y. Times, June 29, 2020, *available at* https://www.nytimes.com/interactive/2020/06/28/us/i-cant-breathe-police-arrest.html.

frequency" in police excessive-force cases, "and presumably occurs with even greater frequency on the street." *Drummond v. City of Anaheim*, 343 F.3d 1052, 1063 (9th Cir. 2003).

### B. Section 10-181's enactment to give teeth to pre-existing NYPD internal restrictions on these dangerous restraints

Section 10-181 was a response to growing concerns among Council Members and the public about police use of force. Several high-profile deaths at the hands of police, and widespread public protests, drew attention to the fact that internal NYPD policies regulating the use of force were not achieving appropriate compliance. The law aimed to give force to the pre-existing prohibitions on dangerous restraints in the NYPD Patrol Guide.

#### 1. The first chokehold-ban proposal, following Eric Garner's death

The earliest version of the local law was proposed in 2014, in response to the tragic death of Eric Garner following police use of a chokehold.[9] That proposal included only a chokehold ban.

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[9] *See* N.Y. City Council, Legislation, File #: Int. 0540-2014, *available at* https://perma.cc/KQF8-HGPX (captured Feb. 12, 2022).

The accompanying committee report noted that "for more than 20 years, the [NYPD] Patrol Guide has unequivocally prohibited the use of chokeholds," but the effectiveness of that policy had come "under great scrutiny" following Garner's death.[10] As Council Members recognized, NYPD's prohibition unfortunately "failed to deter officers from performing chokeholds."[11] When NYPD representatives opposed the proposal, one Council Member noted that the proposal "really sets out to codify what [NYPD's] own existing policy is."[12]

The 2014 chokehold ban proposal had 28 sponsors—already a majority of the 51-member Council.[13] But after then-Mayor de Blasio indicated he would veto the bill,[14] it was never put to a vote.[15]

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[10] N.Y. City Council, Committee Report of the Governmental Affairs Division (June 29, 2015), at 6, *available at* https://perma.cc/F3CH-7E9A.

[11] N.Y. City Council, Transcript of the Minutes of the Committee on Public Safety (June 29, 2015), at 55 (statements by Council Member Rory I. Lancman), *available at* https://perma.cc/FJH8-SSMH.

[12] *Id.* at 110-11 (statements by Council Member Robert E. Cornegy, Jr.).

[13] *See* N.Y. City Council, Legislation, File #: Int. 0540-2014, cited *supra* n.9.

[14] *See* Jonathan Allen, *New York City Mayor Says He Would Veto Police Chokehold Ban*, Reuters, Jan. 14, 2015, *available at* https://perma.cc/822R-W4N9.

[15] *See* N.Y. City Council, Legislation, File #: Int. 0540-2014, cited *supra* n.9.

### 2. The revival of the chokehold ban, expanded to include a diaphragm-compression ban

Five years later, in 2020, the chokehold ban proposal was revived.[16] The City Council's renewed interest in the proposal was spurred by the death of George Floyd in Minnesota, after a police officer kneeled on his back and neck, and the ensuing widespread local and nationwide protests.[17]

In June 2020, a diaphragm-compression ban was added to the proposed chokehold ban. Specifically, Int. 536-A would have prohibited restraint "in a manner that restricts the flow of air or blood by *compressing the windpipe, diaphragm, or the carotid arteries* on each side of the neck."[18] This proposal made clear that the City Council was interested in criminalizing restraints that

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[16] *See* N.Y. City Council, File #: Int. 0536-2018, *available at* https://perma.cc/D35D-3ED7 (captured Feb. 12, 2022).

[17] *See* N.Y. City Council, Committee Report of the Justice Division, Committee on Public Safety (June 9, 2020), at 4-5, *available at* https://tinyurl.com/ycx2xzdv; N.Y. City Council, Minutes of the Stated Meeting of Thursday, June 18, 2020, at 1035, *available at* https://tinyurl.com/2p8at5m7.

[18] Proposed Int. 536-A – 6/4/2020, *available at* https://tinyurl.com/5dbvn4es (emphasis added).

restricted breathing or circulation, whether via pressure applied to the diaphragm, the windpipe, or the carotid arteries.

This proposal was again sponsored by an overwhelming majority of the City Council—39 members.[19] At a City Council public hearing, an NYPD Deputy Commissioner agreed that "the unacceptable acts" that "we are all trying to prevent are those that occurred to Mr. Garner and Mr. Floyd," and stated that NYPD would support the local law, "with minor amendments."[20] NYPD representatives explained that they were concerned about liability from grabbing or falling on someone's torso in a struggle with an arrestee.[21] In a colloquy with the representatives, the bill's sponsor confirmed that the NYPD was not objecting to the lack of an express justification defense in the legislation, and noted that a "life or death defense exists and [is] fixed in state penal law … [w]hich the Council could not take away or interfere with."[22]

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[19] *See* N.Y. City Council, File #: Int. 0536-2018, cited *supra* n.16.

[20] N.Y. City Council, Transcript of the Minutes of the Committee on Public Safety (June 9, 2020), at 58, 62, *available at* https://tinyurl.com/47cyuhrf.

[21] *Id.* at 101, 112-13, 135-36.

[22] *Id.* at 99.

The City Council then amended the proposal, clarifying and narrowing the diaphragm-compression component by revising it to prohibit only restriction of "the flow of air or blood by … *sitting, kneeling, or standing on the chest or back* in a manner that compresses the diaphragm."[23] By adding the additional language, the Council brought the proposal in line with NYPD's pre-existing restriction on such restraints. Indeed, the amended Int. 536-B, along with the legislative history repeatedly referencing NYPD's Patrol Guide, demonstrates that the City Council was well aware that longstanding NYPD internal policies already instructed officers not to perform chokeholds, and to avoid sitting, kneeling, or standing on an arrestee's chest or back.[24] Yet the Council, as it had been in 2014 when the chokehold ban was first proposed, remained

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[23] Proposed Int. 536-B – 6/16/20, *available at* https://tinyurl.com/ytn9zbm3 (emphasis added).

[24] *See* N.Y. City Council, Committee Report of the Justice Division, Committee on Public Safety (June 9, 2020), cited *supra* n.17, at 5; N.Y. City Council, Committee Report of the Justice Division, Committee on Public Safety (June 18, 2020), at 6, *available at* https://tinyurl.com/ymxhe2vx.

concerned that these existing restrictions were ineffective in deterring use of the covered restraints.[25]

The local law passed the City Council by a vote of 47 to 3,[26] and was later codified as New York City Administrative Code section 10-181. That same summer, the State Legislature enacted the Eric Garner Anti-Chokehold Act, codified as Penal Law section 121.13-a.[27] This law criminalizes law-enforcement use of chokeholds and similar breathing restrictions to the neck, nose, or mouth that cause serious injury or death.

### 3. NYPD training materials instructing officers how to avoid liability for unlawful restraints under city and state law

After section 10-181 and the state chokehold law were passed, NYPD issued new training materials informing its officers of the laws and reiterating its longstanding policies against both

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[25] N.Y. City Council, Transcript of the Minutes of the Stated Meeting (June 18, 2020), at 43 (statement of Council Member Rory I. Lancman that "[w]e will no longer rely on internal NYPD policy that has failed so many"), *available at* https://tinyurl.com/2rm4bt9z.

[26] N.Y. City Council – Action Details (June 18, 2020), Int. 0536-2018 Version B, *available at* https://on.nyc.gov/34HOULu (last visited Feb. 28, 2023).

[27] New York State Senate, Senate Bill S6670B, *at* https://www.nysenate.gov/legislation/bills/2019/s6670.

chokeholds and restraints in which officers sit, kneel, or stand on an arrestee's chest or back (*see* Record on Appeal ("R") 71-75, 77-97, 167-69, 178-88, 194-95, 203-04, 209-10).

These training materials also explain the function and location of the diaphragm, the carotid arteries, and the trachea (or windpipe) (R95). As the materials explain: "[t]he diaphragm, located below the lungs, is the major muscle of respiration. It is a large, dome-shape muscle that contracts rhythmically and continually, and, most of the time, involuntarily" (R95).

NYPD officer training includes multiple demonstrations and drills teaching techniques to safely and lawfully "achieve control of an uncompliant subject" (R187; *see also* R148-56, 160-64, 173-75). For example, one video provides re-enactments of both prohibited and permitted types of arrest restraints.[28] The training video also acknowledges that NYPD had already banned chokeholds, and had

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[28] Rocco Parascandola and Thomas Tracy, *New NYPD Training Video Warns Cops Against Using Illegal Chokeholds or Kneeling on Neck and Back*, N.Y. Daily News, July 3, 2020, *available at* https://www.nydailynews.com/new-york/nyc-crime/ny-nypd-puts-out-new-training-video-on-how-to-subdue-suspects-20200703-khcztr23sfb37b2r33uhqljivi-story.html.

already trained officers not to sit, kneel, or stand on an arrestee's chest or back.[29]

### C. The proceedings below, concluding with the First Department's unanimous decision upholding section 10-181

Plaintiffs, a group of law-enforcement unions, brought a pre-enforcement challenge to section 10-181 on two grounds. They argued that the local law (1) violates the State Constitution's right to due process by allegedly being unconstitutionally vague and (2) is preempted by state law. The parties cross-moved for summary judgment.

Although Supreme Court rejected plaintiffs' preemption challenge (R10-14), it found that section 10-181 was void for vagueness. In the court's view, the diaphragm-compression ban "offers no guidance on how an officer is to determine whether his or her actions are causing a suspect's diaphragm to be compressed" (R16 (cleaned up)).[30] The court focused entirely on the diaphragm-

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[29] *Id.* video at 1:26 to 1:34.

[30] This brief uses "(cleaned up)" to indicate that internal quotation marks, alterations, or citations have been omitted from quotations.

compression ban—indeed, it noted that "none of plaintiffs' arguments even suggest that the portion of Section 10-181 banning chokeholds is in any way vague" (R16). Yet the court struck down the local law in its entirety.

The First Department unanimously reversed Supreme Court's vagueness ruling and declared the law constitutional (R550-54). The court held that the diaphragm-compression ban "is sufficiently definite to give notice of the prohibited conduct and does not lack objective standards or create the potential for arbitrary or discriminatory enforcement" (R552). In particular, the court concluded that the only challenged language—the phrase, "in a manner that compresses the diaphragm"—is "sufficiently definite when measured by common understanding and practices" (R552 (cleaned up)) to enable police officers to understand what the terms "diaphragm" and "compress" mean in this context (R552).

The court rejected plaintiffs' arguments regarding the purported difficulty of assessing diaphragm compression. The court reasoned even if "the impact on the diaphragm may be impossible to assess precisely without specialized tools or equipment," that

"does not render the effects of the officer's conduct unknowable or incapable of reasonable estimation" (R553). Rather, "[a] trained police officer" can assess whether the officer is approaching the line of impermissible conduct by monitoring whether "the pressure he is exerting on a person's chest or back, in the vicinity of the diaphragm, is making it hard for a person to breathe"—just like someone drinking alcohol can assess when they might be too intoxicated to legally drive, or someone producing loud noise can assess whether their noise might cross the legal limits (R553).

The court noted that plaintiffs' concerns about broad liability were misplaced. For one thing, criminal liability requires a "voluntary act" (R552 (citing Penal Law § 15.10)). Moreover, state law provides a justification defense (R552 (citing Penal Law § 35.30)), which would protect officers who found it necessary to use a prohibited restraint to effect an arrest, prevent an arrestee's escape, protect themselves, or protect others. Last, the court noted that plaintiffs "g[a]ve scant attention to the other statutory conditions for liability" that require the prosecution to prove beyond a reasonable doubt that a police officer sat, kneeled, or stood on a

person's chest or back, and in doing so restricted that person's air or blood flow (R552-53).

Further, the First Department affirmed Supreme Court's determination that section 10-181 is not preempted by state law (R551). The court found no evidence that the State Legislature intended to preempt the field with laws that "delineate the circumstances in which a police officer may arrest someone or use physical force and [that] create criminal liability for aggravated strangulations" (R551). Nor is there any conflict between section 10-181 and the state aggravated-strangulation law (R551).

Plaintiffs noticed appeals as of right under CPLR 5601(b)(1). After conducting a jurisdictional inquiry, this Court ordered briefing.

## ARGUMENT

This pre-enforcement facial challenge to local legislation must meet a high bar. Municipal ordinances carry "an exceedingly strong presumption of constitutionality." *People v. Stephens*, 28 N.Y.3d 307, 312 (2016) (cleaned up). Further, in a facial challenge, which is "the most difficult challenge to mount successfully," *United States*

*v. Salerno*, 481 U.S. 739, 745 (1987), the plaintiff "must carry the heavy burden" of showing that the statute is invalid "in *all* of its applications," *Indep. Ins. Agents & Brokers of N.Y., Inc. v. N.Y.S. Dep't of Fin. Servs.*, 39 N.Y.3d 56, 65 (2022) (cleaned up). Facial challenges are "generally disfavored," *People v. Stuart*, 100 N.Y.2d 412, 422 (2003), because they "often rest on speculation, flout the fundamental principle of judicial restraint that courts should avoid unnecessary constitutional adjudication, and threaten to short circuit the democratic process," *Copeland v. Vance*, 893 F.3d 101, 111 (2d Cir. 2018) (cleaned up). Plaintiffs cannot carry their burden as to either their vagueness or preemption challenges to section 10-181.

## POINT I

## THE LOCAL LAW'S DIAPHRAGM-COMPRESSION BAN IS NOT UNCONSTITUTIONALLY VAGUE

As the Appellate Division correctly held, section 10-181's diaphragm-compression ban easily withstands plaintiffs' pre-enforcement facial vagueness challenge. The local law uses concrete, objective terms to describe the conduct it prohibits. And,

providing further clarity, the City Council expressly intended the law to criminalize conduct that was well-known to be dangerous and that NYPD internal rules had long admonished officers to avoid.

While plaintiffs profess uncertainty about what it means to compress the diaphragm, the meaning of that phrase is clear, and the NYPD has understood it at least since 1994, when Commissioner Bratton released a training video explaining the dangers of positional asphyxia arising from compressing the diaphragm by sitting, kneeling, or standing on the chest or back. Moreover, as a practical matter, plaintiffs' concerns are misplaced because the local law provides clear standards to guide officers' conduct and limit liability, and officers may avail themselves of a justification defense that any prosecution must negate beyond a reasonable doubt.

The key concern animating plaintiffs' challenge—that compliance may be difficult for an officer to assess—does not implicate the vagueness doctrine. As the Appellate Division recognized, many other concededly valid statutes establish clear

lines that may nonetheless be difficult to locate in practice, requiring a person to make a judgment about whether their conduct is prohibited. Plaintiffs' experts' opinions may be raised by the defense in a prosecution under the local law if one is ever brought. They have no place in plaintiffs' vagueness challenge.

### A. The diaphragm-compression ban defines the scope of liability with sufficient clarity.

A law must be sufficiently definite "to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden." *People v. Bright*, 71 N.Y.2d 376, 382-83 (1988) (cleaned up). Section 10-181 readily satisfies this standard. Since its prohibitions do not implicate the exercise of a fundamental right, a less stringent vagueness test applies. *Copeland*, 893 F.3d at 114; *see Hoffman Ests. v. Flipside, Hoffman Ests.*, 455 U.S. 489, 499 (1982).[31] The text and other sources of statutory meaning provide ample notice of what conduct the diaphragm-compression ban

[31] While plaintiffs bring their claim solely under the State Constitution, New York courts frequently cite federal case law in resolving state vagueness claims. *See, e.g.*, *Stephens*, 28 N.Y.3d at 312. Thus, this brief cites applicable federal and state case law.

prohibits—far more notice, in fact, than precedent has required. *See, e.g.*, *Grayned v. City of Rockford*, 408 U.S. 104, 110 (1972) ("[W]e can never expect mathematical certainty from our language."). The law offers clear guidance to law-enforcement officers on how to avoid liability and guards against arbitrary enforcement.

### 1. Text establishes, and context confirms, what harmful conduct the ban prohibits.

Section 10-181 makes it a misdemeanor for a law-enforcement officer effecting an arrest to sit, kneel, or stand on the arrestee's chest or back if, as a result, the arrestee's diaphragm is compressed, restricting their ability to breathe. N.Y.C. Admin. Code § 10-181. The meaning of this prohibition is clear from the law's text and confirmed by the context of its enactment. *See Town of Delaware v. Leifer*, 34 N.Y.3d 234, 248 (2019) (considering statute's "plain text"); *United States v. Farhane*, 634 F.3d 127, 143 (2d Cir. 2011) ("[C]ontext, common usage, and legislative history [can] combine to serve on both individuals and law enforcement officers the notice required by due process.").

The statutory language that plaintiffs challenge relies on two concrete, definite terms: "compress" and "diaphragm." Those terms' meaning can readily be discerned from their dictionary definitions. *See People v. Ocasio*, 28 N.Y.3d 178, 181 (2016) (recognizing dictionary definitions as "useful guideposts" for statutory meaning (cleaned up)). The diaphragm is the "body partition of muscle and connective tissue … separating the chest and abdominal cavities."[32] "[B]y its contraction and relaxation," the diaphragm "plays an important role" in breathing.[33] And "compress" means "to press or squeeze together."[34] In combination, a person "compresses the diaphragm" by pressing or squeezing the anatomical structure located between the chest and abdomen that affects breathing. So the statutory phrase "in a manner that compresses the diaphragm" clarifies that sitting, kneeling, or standing on the chest or back is unlawful if it obstructs air or blood flow via this mechanism.

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[32] "Diaphragm," *Merrian-Webster*, *available at* https://perma.cc/7PJP-UJ6D (captured Feb. 12, 2022).

[33] "Diaphragm," *Webster's Unabridged Dictionary* (3d. ed. 1981).

[34] "Compress," *Merriam-Webster*, *available at* https://perma.cc/68TV-3PTQ (captured Feb. 12, 2022).

Plaintiffs founder in their attempts to show that this language is unconstitutionally vague. While the unions complain that the challenged term is not defined in the statute or in the legislative history (Brief for Plaintiffs-Appellants ("Unions' Br.") 23), there is no requirement for a legislature to define every term. *See Friedman v. State*, 24 N.Y.2d 528, 539 (1969). Here, such a definition is unnecessary because the pertinent words have an ordinary meaning. And while the full phrase "in a manner that compresses the diaphragm" may not be "in common usage" (Unions' Br. 23), that is also of no moment because the phrase is readily understandable.

Indeed, the record shows no confusion about the meaning of these terms. NYPD's training materials define the word "diaphragm" similarly to its dictionary definition, as a dome-shaped muscle located below the lungs that enables breathing (R95). And none of plaintiffs' experts professed to be confused about which body part the local law referenced. Plaintiffs' medical expert Dr. Beno Oppenheimer, in fact, defined "diaphragm" very much as the NYPD training materials do (R424-25). And while NYPD training

materials do not explicitly define the term "compress," there is no record of any confusion regarding this term; indeed, plaintiffs do not claim that use of the same word in the chokehold ban portion of section 10-181 renders that portion vague.

Other portions of section 10-181 also confirm that the text of the diaphragm-compression ban is clear. *See Farhane*, 634 F.3d at 142 (considering another portion of statute in vagueness challenge). The prohibition of diaphragm compression is textually analogous to the chokehold ban, which plaintiffs have never asserted is vague. As just noted, both components of the local law prohibit officers from taking actions that "compress" a specific internal body part—the diaphragm in one case and the windpipe or carotid artery in the other. Both components also prohibit officers from implementing such restraints "in a manner that restricts the flow of air or blood" of the restrained individual. Just as the chokehold ban is not vague for defining the prohibited conduct using these familiar terms, neither is the diaphragm-compression ban.

The context and legislative history of the local law's enactment further show what conduct the local law prohibits. *See*

*Stephens*, 28 N.Y.3d at 314 (upholding ordinance that was "tailored to a specific context" to address a problem that "has become common knowledge" (cleaned up)); *see also People v. Roberts*, 31 N.Y.3d 406, 423 (2018) (considering legislative history in construing Penal Law provision). The diaphragm-compression ban was enacted to outlaw a well-known dangerous practice, one that the NYPD had internally restricted for decades. The 1994 training video featuring Commissioner Bratton demonstrated, through re-enactments and animations, precisely what officers should *not* do—apply body-weight pressure to an arrestee's chest or back—and explained in straightforward terms *why*: such pressure can interfere with diaphragmatic function and thus with breathing (*see supra* at 7-8). On the video, the City's chief medical examiner explained the risks of these types of restraints, and an accompanying graphic depicted how the diaphragm is compressed by pressure applied to the chest or back of a prone subject—confirming that process to be exactly what those words' ordinary meaning suggests.

This understanding was embodied in a restriction that appeared in the Patrol Guide in substantially similar form for at least two decades before section 10-181's enactment, along with a similarly longstanding Patrol Guide prohibition on chokehold use (*see supra* at 6-7). The local law closely tracks these pre-existing internal restrictions. Indeed, the legislative history makes clear that the City Council wasn't looking to break new ground with section 10-181, but to increase adherence to the restrictions already in place. The Council concluded that, in the absence of a legislative requirement, officers were not following important departmental rules regarding use of force (*see supra* at 13-14).

Providing yet further clarity about the local law's scope, the diaphragm-compression ban and the companion chokehold ban were enacted amidst widespread protests against improper police uses of force, in particular the deaths of Eric Garner and George Floyd. *See Roberts*, 31 N.Y.3d at 418-19 (courts construing criminal statutes "should consider the mischief sought to be remedied" (cleaned up)). The local law was adopted in the context of "today's heightened level of public awareness regarding the problem," *Burg*

*v. Mun. Ct.*, 673 P.2d 732, 741 (Cal. 1983)—namely, the dangers of placing pressure on the chest or back of an arrestee lying prone on the ground. Courts need not blind themselves to clear evidence of what legislation was intended to accomplish and what the regulated parties understand about the legislation's meaning—especially where, as here, the legislature codified a policy that had been in place for decades.

### 2. Vagueness doctrine requires no greater clarity than the ban provides.

The local law's key terms are far more definite and specific than language found in other statutes held by this Court not to be unconstitutionally vague. Indeed, except in certain cases where First Amendment-protected activity is implicated, *see, e.g.*, *People v. Golb*, 23 N.Y.3d 455, 467 (2014), this Court has not required a high degree of precision in criminal or civil statutes and has largely rejected vagueness challenges.

For example, even in upholding a conviction for attempted dissemination of indecent materials, this Court held that the word "depict" was "sufficiently definite," even if "imprecise," to supply

fair notice that purely verbal descriptions of sexual acts, without any images, were prohibited. *People v. Kozlow*, 8 N.Y.3d 554, 561 (2007) (cleaned up); *see also, e.g.*, *People v. Foley*, 94 N.Y.2d 668, 681-82 (2000). Similarly, the Court upheld statutory language referring to a "substandard or insanitary area," recognizing that "mathematical … precision" is not required. *Kaur v. N.Y.S. Urban Dev. Corp.*, 15 N.Y.3d 235, 256 (2010) (cleaned up)[35]; *see also Indep. Ins. Agents & Brokers of N.Y., Inc.*, 39 N.Y.3d at 65-69; *Town of Delaware*, 34 N.Y.3d at 247-48; *Gold v. Lomenzo*, 29 N.Y.2d 468, 476-78 (1972); *Friedman*, 24 N.Y.2d at 539; *Stephens*, 28 N.Y.3d at 314-15.

The instances in which this Court has found statutes void for vagueness—in cases cited by plaintiffs (Brief for Plaintiff-Appellant PBA ("PBA Br.") 19-20)—demonstrate that the doctrine is concerned with laws that are highly subjective, abstract, or open-

[35] While the challenged phrase in *Kaur* had a statutory definition, that definition—"a slum, blighted, deteriorated or deteriorating area," *Kaur*, 15 N.Y.3d at 254—was hardly more precise than the defined phrase "substandard or insanitary area." This Court's analysis did not rely on the statutory definition, but rather on the fact that the challenged phrase was "sufficiently definite." *Id.* at 256 (cleaned up).

ended. These include a criminal prohibition of communicating "in a manner likely to cause annoyance or alarm," *Golb*, 23 N.Y.3d at 467-68; *see also People v. Dietze*, 75 N.Y.2d 47 (1989), and a noise regulation that prohibited any sound that "annoys, disturbs, injures or endangers the comfort [or] repose" of a person, *People v. N.Y. Trap Rock Corp.*, 57 N.Y.2d 371, 375 (1992). In contrast, this Court later rejected a vagueness challenge to a noise ordinance that prohibited disturbance of "a reasonable person of normal sensibilities" due to noise from over 50 feet away on a public highway because it employed an objective standard. *Stephens*, 28 N.Y.3d at 315 (cleaned up).

Plaintiffs fail to identify examples of courts finding vagueness in statutes with concrete, objective terms like those at issue here. For example, this case is nothing like *Colautti v. Franklin*, 439 U.S. 379 (1979), on which plaintiffs rely (PBA Br. 18-19). The statute in that case prohibited abortion of a fetus that either "is viable" or "may be viable," without providing a metric for the latter element or explaining how the two elements differed. *Id.* at 390-94. Contrary to PBA's characterization, *Colautti* has nothing to say about

"unknowable effects" of an action (PBA Br. 18), which appears to be a legal standard PBA created from whole cloth. *Colautti* was instead concerned with whether the statute's dual prohibitions were sufficiently defined and differentiated. 439 U.S. at 391-92. In contrast to the law in *Colautti*, the diaphragm-compression ban contains a single prohibition stated in concrete, objective terms. Moreover, *Colautti* applied a heightened vagueness standard because it was concerned with what was at that time a federal constitutional right. *See id.* at 391. Police officers, however, have no right to employ dangerous restraints, and indeed were trained not to do so even long before section 10-181 was enacted.

Contrary to their suggestion (PBA Br. 22; Unions' Br. 30), plaintiffs are not helped by the Court's statement in *People v. Berck* that a criminal statute must be "informative on its face," 32 N.Y.2d 567, 569 (1973). The diaphragm-compression ban *is* informative on its face. And *Berck* did not demand pellucid text or dismiss all other evidence of statutory meaning apart from the text. Indeed, more recently, in *Kozlow*, in upholding a criminal statute against a vagueness challenge, this Court noted that the statute's text,

although perhaps "imprecise," was "sufficiently definite … when measured by common understanding and practice." 8 N.Y.3d at 561.

If plaintiffs were right about how much clarity is required, the legion of New York appellate decisions interpreting criminal statutes that are less than perfectly clear would all have been improperly decided—the statutes would have been void for vagueness on their face and should not have been construed in resolving a criminal prosecution. But the fact that questions can be posed about a criminal statute doesn't mean it is unconstitutionally vague. It just means that courts have a role in construing such statutes if and when they're applied. Plaintiffs' facial challenge seeks to short-circuit that process without justification.

In sum, "perfect clarity and precise guidance [are not] required" of a criminal prohibition. *United States v. Williams*, 553 U.S. 285, 304 (2008) (cleaned up); *see also Kozlow*, 8 N.Y.3d at 561. Rather, "[d]ue process requires only a reasonable degree of certainty so that individuals of ordinary intelligence are not forced to guess at the meaning of statutory terms." *Foss v. Rochester*, 65

N.Y.2d 247, 253 (1985). Here, the terms of the local law are concrete and clear. The Court should not "strain[] to inject doubt as to the meaning of words where no doubt would be felt by the normal reader." *United States v. Powell*, 423 U.S. 87, 93 (1975).

### 3. The ban appropriately limits liability and precludes arbitrary enforcement.

Section 10-181 provides ample guidance to officers on how to avoid liability and does not invite arbitrary enforcement. This guidance derives not just from the plain meaning of the phrase "in a manner that compresses the diaphragm," but also from the law's other textual and contextual aspects. *See Stuart*, 100 N.Y.2d at 428 (declining to read "in isolation" phrase challenged as vague, which was "but one element of a statute that fully defines the prohibited act").

First, the local law specifies that only compression of the diaphragm that impedes circulation or air flow is prohibited. As the Appellate Division rightly observed (R553), no special equipment is needed to assess that effect. Indeed, as noted above (*see supra* at 26), the chokehold ban contains the same limitation, and plaintiffs

have never challenged that ban as vague. Moreover, as discussed further below (*see infra* Point I.B.1), the task of assessing compliance in these circumstances is no more difficult than with other criminal prohibitions, such as laws against drunk driving, that have been upheld against vagueness challenges. Just as an officer can assess intoxication and impairment without resort to a blood-alcohol test, *see People v. Cruz*, 48 N.Y.2d 419, 428 (1979), an officer can also identify, without medical-imaging technology, when a restraint applying body-weight pressure to an arrestee's torso is impeding air or blood flow.

Second, the local law provides a practical, straightforward path for officers to avoid liability by specifying that only diaphragm compression from "sitting, kneeling, or standing on the chest or back" is prohibited. This limiting language is no accident: the City Council amended the ban before enactment to address the NYPD's concern that the original version might encompass seemingly any torso restraint while effecting an arrest (*see supra* at 12-13). As the Appellate Division correctly recognized (R552), plaintiffs' expressed concern that officers "may unavoidably violate the ban" (PBA Br.

29 (italicization removed)) overlooks the requirement of voluntary sitting, kneeling, or standing on an arrestee's chest or back. *See* Penal Law § 15.10 (specifying that criminal liability requires a voluntary act). Reasonable people should have no trouble distinguishing between inadvertently pressing on an arrestee's chest or back during "arrest struggle" (Unions' Br. 4, 26-27), and choosing to sit, kneel, or stand on an arrestee's torso—and an act among the latter trio would have to be proven beyond a reasonable doubt in the event of any prosecution.

Because of this narrowing language, compliance with NYPD's longstanding policy restricting such restraints is enough to avoid liability. NYPD's training shows officers, through clear, simple demonstrations, how to safely and lawfully restrain an arrestee (R148-56, 160-64, 173-75, 187; *see also supra* n.28). Even if officers are uncertain in the field whether their actions are compressing an arrestee's diaphragm, they have clear notice of how to surely comply.

Third, liability is further limited by the justification defense provided by Penal Law § 35.30(1). This defense is available in

prosecutions for any "offense," Penal Law § 35.00, which expressly includes conduct prohibited by local law, *id.* § 10.00(1). Thus, an officer would not be liable if they "reasonably believe[d]" that resort to a prohibited restraint—even if it causes diaphragm compression and obstructs breathing—was "necessary to effect the arrest, or to prevent the escape from custody, or in self-defense or to defend a third person from what he or she reasonably believes to be the use or imminent use of physical force." Penal Law § 35.30(1). The prosecution would have to disprove that defense beyond a reasonable doubt. *See, e.g.*, *People v. Steele*, 26 N.Y.2d 526, 528 (1970). Plaintiffs' concerns about officers' safety in a life-threatening situation are thus unfounded.

Plaintiffs do not contend with the significance of this justification defense. They note (PBA Br. 7, 40) that the Governor, in signing into law the bill that became Penal Law section 121.13-a—the State's chokehold ban—explicitly referenced this justification defense, and stated that, because the bill "does not bar any affirmative defenses or justifications for the use of force," it "is

not a strict liability offense." Governor's Mem. of Approval, Assemb. B. 6144-B (June 12, 2020) (cleaned up).

Yet plaintiffs fail to appreciate that the same justification defense applies to section 10-181—even though the local law's sponsor noted before passage that the defense would apply (*see supra* at 12), and the City explained below that the prosecution would bear the burden of disproving it when it is invoked. As a result of this defense, there is no basis for plaintiffs' stated concern that an officer must worry about "transient use of her body weight or her knee" if "necessary to handcuff a person resisting arrest" (PBA Br. 15). The justification defense allows for use of force that an officer "reasonably believe[s]" is "necessary to effect the arrest" of a suspect, Penal Law § 35.30(1), and, like the law's elements, is subject to a standard of proof beyond a reasonable doubt.

Plaintiffs' reliance on *People v. Munoz*, 9 N.Y.2d 51 (1961) (PBA Br. 32) also misses the mark. In that case, this Court found that a convoluted justification defense included as part of the challenged local law, which provided that carrying an otherwise prohibited knife was lawful if carried for a lawful purpose, made

the statute "more obscure and contradictory" and did not cure its vagueness. *Id.* at 57. The justification defense in Penal Law § 35.30, in contrast, is undisputedly not vague. Indeed, plaintiffs repeatedly invoke the defense as evidence that the state chokehold ban is appropriately limited (PBA Br. 7, 40-41).

Finally, plaintiffs' concerns about arbitrary enforcement (PBA Br. 28-33; Unions' Br. 38-39) have no sound basis because the diaphragm-compression ban is based on concrete, objective terms. Vagueness doctrine disfavors laws that lack "objective standards," allowing arrest or prosecution based on government officials' "own personal, subjective idea of right and wrong," and thereby "furnish[ing] a convenient tool for harsh and discriminatory enforcement … against particular groups deemed to merit their displeasure." *Bright*, 71 N.Y.2d at 383 (cleaned up). The diaphragm-compression ban does not enable such misuse. It prohibits only concrete conduct, without reference to subjective standards. And it obligates a prosecutor to prove, beyond a reasonable doubt, that the officer sat, kneeled, or stood on the arrestee's chest or back and thereby obstructed the arrestee's

breathing by compressing the diaphragm—and to disprove, beyond a reasonable doubt, an officer's justification defense, when invoked. Plaintiffs can hardly complain about this high bar to prosecution and conviction.

### B. Plaintiffs' arguments challenging the clear terms of the local law are unavailing.

Plaintiffs raise a host of meritless objections to the clear, objective terms of the local law. Plaintiffs' primary arguments—regarding the professed difficulty of assessing compliance—are simply not constitutional vagueness concerns. The remainder of their scattershot arguments are equally baseless.

#### 1. Plaintiffs' factual arguments are a matter for defending against a criminal prosecution if and when brought.

The evidence that plaintiffs submitted below, and that they seek to rely on now (PBA Br. 20-21, 23-24; Unions Br. 24-29), invokes a concern that an officer may not be able to tell when diaphragm compression is occurring. But that potential uncertainty does not implicate the vagueness doctrine.

Many statutes require a person to estimate whether their conduct would violate the law without being certain, and, as a result, may lead prudent individuals to steer well clear of prohibited conduct to ensure that they avoid liability. *See Powell*, 423 U.S. at 93 ("[T]he law is full of instances where a man's fate depends on his estimating rightly, that is, as the jury subsequently estimates it, some matter of degree." (cleaned up)). But "[w]hat renders a statute vague is not the possibility that it will sometimes be difficult to determine whether the incriminating fact it establishes has been proved; but rather the indeterminacy of precisely what the fact is." *Williams*, 553 U.S. at 306; *see also FCC v. Fox TV Stations, Inc.*, 567 U.S. 239, 253 (2012) (a law is vague only if it is "unclear as to what fact must be proved").

Thus, if it is "difficult in some cases to determine whether [a law's] clear requirements have been met," that uncertainty doesn't raise a question of vagueness. *Williams*, 553 U.S. at 306; *see also People v. Illardo*, 48 N.Y.2d 408, 415 (1979) (noting that the possibility of "imaginable instances in which [there is] some difficulty in determining on which side of the line a particular fact

situation falls" does not render a law "impermissibly vague"). Factual questions about whether the law has been violated are addressed "not by the doctrine of vagueness, but by the requirement [in criminal cases] of proof beyond a reasonable doubt." *Williams*, 553 U.S. at 306.

For this reason, courts have long rejected arguments similar to the one espoused by plaintiffs here. For example, one federal court of appeals, in rejecting a vagueness challenge to a gun law, held that the standard for determining what qualifies as a "copy" of an assault weapon was reasonably clear, regardless of whether "the typical gun owner" could readily apply the standard in close cases. *Kolbe v. Hogan*, 849 F.3d 114, 149 (4th Cir. 2017), *abrogated in part by N.Y. State Rifle & Pistol Ass'n v. Bruen*, ___ U.S. ___, 142 S. Ct. 2111 (2022). Similarly, another court rejected a vagueness challenge to federal child-pornography laws, despite the alleged difficulty of determining whether images depicted "actual minors" or "virtual images." *United States v. Paull*, 551 F.3d 516, 525-26 (6th Cir. 2009) (cleaned up). Another court, in rejecting a vagueness challenge to a prohibition on visiting any "place primarily used by

children," concluded that the phrase is "not indeterminate," "[e]ven if it may not be entirely clear whether a particular place is primarily used by children." *United States v. Gibson*, 998 F.3d 415, 419 (9th Cir. 2021). Still another court rejected a facial vagueness challenge to an online-gambling statute despite plaintiff's claim that "it will often be difficult to determine … over the Internet … whether the bet is unlawful." *Interactive Media Ent. & Gaming Ass'n v. Att'y Gen. of the U.S.*, 580 F.3d 113, 116-17 (3d Cir. 2009).

Courts have similarly rejected vagueness challenges to noise ordinances premised on the difficulty of determining noise levels. For example, the Eleventh Circuit recently rejected a challenge to a law penalizing excessive noise as measured from "inside a nearby building"; the fact that the plaintiffs were "not in a strong position to ascertain the fact of audibility" in a nearby building—as they were outside of it—did not make the prohibition vague, since the law's prohibition set a definite standard. *Henderson v. McMurray*, 987 F.3d 997, 1004 (11th Cir. 2021) (cleaned up); *see also Stephens*, 28 N.Y.3d at 315.

Applying like reasoning, courts have repeatedly rejected vagueness challenges to laws prohibiting driving under the influence of alcohol that define intoxication in terms of blood-alcohol level. The courts concluded that such laws are not vague even if members of the public have no practical way to assess whether they are over the proscribed blood-alcohol limit. *See, e.g.*, *Bohannon v. State*, 497 S.E.2d 552, 555 (Ga. 1998); *Sereika v. State*, 955 P.2d 175, 177 (Nev. 1998); *Burg*, 673 P.2d at 739-42.

As the Supreme Court of Georgia explained regarding such a law, "where the statute informs the public that a person who has consumed a large amount of alcohol chooses to drive at his own risk, the statute is sufficiently definite in informing the public so that it might avoid the proscribed conduct." *Bohannon*, 497 S.E.2d at 555 (cleaned up). The Arizona Supreme Court, addressing a similar statute, stated the principle more broadly: "Where a statute gives fair notice of what is to be avoided or punished, it should not be declared void for vagueness simply because it may be difficult for the public to determine how far they can go before they are in actual violation." *Fuenning v. Superior Ct.*, 680 P.2d 121, 129 (Az. 1983).

In all these cases, the fact that a person might not easily measure when their conduct crossed the line set by the statute did not render the statute vague. Instead, what mattered was that the statute set an objective standard, providing fair notice of the conduct that was prohibited. The diaphragm-compression ban, too, provides such an objective standard.

Plaintiffs acknowledge, as they must, the existence of this body of law. They argue that even though someone may not be able to ascertain the decibel volume of noise they are producing, or their blood-alcohol level, a person in such situations will know "that he has produced a loud noise and could reasonably estimate when his conduct might approach the line," or "can readily count the number of drinks and calculate whether he is in danger of crossing the legal limit" (PBA Br. 26). But the same is true here. Indeed, the First Department made exactly this point when it observed that "[a] trained police officer will be able to tell when the pressure he is exerting on a person's chest or back, in the vicinity of the diaphragm, is making it hard for the person to breathe, just as a driver should be able to tell when the amount of alcohol he

consumed is making it unsafe … to drive … and a layperson should be able to tell when he or she is being too loud" (R553).[36]

The unstated premise of plaintiffs' attempts to distinguish the drunk-driving and noise cases appears to be that officers should be able to sit, kneel, or stand on an arrestee's chest or back, even to the point of obstructing breathing, so long as they do not compress the diaphragm (*see* PBA Br. 8 (noting the law "does not prohibit all standing, sitting, or kneeling"), 15 (same); Unions' Br. 23 (noting that the law "does *not* criminalize all restraints … that restrict the flow of air or blood by sitting, kneeling, or standing on the chest or back")). Even assuming it is possible to engage in this conduct without necessarily compressing the arrestee's diaphragm, there is no legal entitlement to be able to go up to the line of prohibited conduct with impunity. Just as someone drinking alcohol may be influenced to drink less than the amount that would trigger the

[36] Plaintiffs are mistaken in suggesting that the Appellate Division rewrote the statute (PBA Br. 25; Unions' Br. 6, 20, 33). The court was simply explaining how compliance could be assessed without perfect knowledge. Just as someone drinking alcohol does not need to know their blood-alcohol level for a drunk-driving prohibition to be lawfully applied to them, an arresting officer need not know the inner workings of an arrestee's diaphragm for the diaphragm-compression ban to be lawfully applied.

prohibition on driving while intoxicated to ensure that they steer clear of violating the law—arguably, a salutary feature that encourages safer driving—officers may be influenced to avoid any sitting, kneeling, or standing on arrestees' chests or backs to be sure to avoid impeding the arrestees' breathing by compressing their diaphragms. That potential dynamic presents no constitutional difficulty.

Next, plaintiffs argue that this Court should look past the drunk-driving cases because, while the concept of intoxication is well-known to the general public, "the effects of external pressure by a police officer during an arrest on an internal organ are not matters of everyday knowledge" (Unions' Br. 32). Wrong again. The City Council passed section 10-181 because the dangers of police chokeholds and positional-asphyxiation restraints *have* unfortunately become matters of everyday knowledge (*see supra* at 6-9). Certainly, these are matters on which law-enforcement officers can, and do, receive training (*see supra* at 6-8, 14-16), as is discussed at length in the record. Moreover, as explained above, the same distinction between uncertainty as to standard and

uncertainty as to violation is applied by courts in all sorts of contexts, on "everyday" matters like intoxication (Unions Br. 32) and more esoteric regulatory matters (*see supra* at 42-43 (citing cases addressing gun classifications, types of online pornographic images, and online-gambling regulation)).

Nor does the fact that a law focuses on a phenomenon that occurs inside the body make the law vague. For example, the local law's chokehold ban—unchallenged by plaintiffs on vagueness grounds—focuses on compression of the arrestee's carotid artery or windpipe. Drunk-driving statutes focus on the level of alcohol concentration in the driver's bloodstream. Noise statutes focus on perception of sound by individuals located elsewhere. None are unconstitutionally vague for that reason.

Finally, this case law likewise refutes the suggestion by one of plaintiffs' two medical experts that the diaphragm-compression ban is vague because, in his view, "[i]n a strict sense, the diaphragm is not a compressible muscle" (R423). Notably, plaintiff's other medical expert did not express that opinion, but rather conceded that compression of the chest or back could cause "significant

disruption of the diaphragm's normal movement and function" (R387). But even so, an officer facing prosecution under the local law, if a prosecution is ever brought, would be entitled to offer medical testimony to a jury in support of an argument that the law was not violated. Such factual questions are relevant to the requirement of proof beyond a reasonable doubt for any criminal conviction, but do not affect whether a law provides constitutionally sufficient notice of conduct it prohibits. *See Williams*, 553 U.S. at 306. Any potential factual indeterminacy in the application of the local law does not support plaintiffs' facial vagueness challenge.

**2. Plaintiffs' other arguments fare no better.**

Plaintiffs' various other arguments are also meritless. First, they point to NYPD training materials, flagging that the materials do not specifically address the meaning of diaphragm compression (PBA Br. 22-23). But the role of the training materials is to teach officers how to safely and lawfully effectuate an arrest, not to explain the meaning of a local law. In any event, as the Appellate Division correctly recognized (A554), the NYPD is free to set stricter internal standards for its officers' behavior than are established in

applicable law. *See, e.g.*, *Galapo v. City of N.Y.*, 95 N.Y.2d 568, 575 (2000).

The NYPD has long instructed its officers not to sit, kneel, or stand on arrestees' chests or backs, without limitation based on whether the arrestees' diaphragm was compressed as a result. The choice to keep the same instruction in place after the local law was enacted reflects not confusion, but sound judgment: avoiding any sitting, kneeling, or standing on an arrestee's chest or back remains a sure way to avoid liability, and a good way to avoid causing unnecessary harm to the citizens whom officers are sworn to protect and serve.

Second, plaintiffs mistakenly assert that the question of whether the diaphragm-compression ban is unconstitutionally vague should be resolved by resorting to their medical experts' testimony. They claim that this testimony is relevant because "the [statutory] phrase uses technical medical terms" (Unions' Br. 23; *see also id.* at 31). But as the Appellate Division recognized (R552), the testimony of plaintiffs' own experts instead suggests that the phrase "in a manner that compresses the diaphragm" is *not*

commonly used in medical parlance (R425). Rather, as discussed (*supra* at 24-25), the words of this phrase instead carry their ordinary meanings.

More broadly, the Appellate Division got it right by rejecting plaintiffs' proffered expert testimony, recognizing that the question of whether the phrase is impermissibly vague is the ultimate legal question at issue (R554 (citing *Singh v. Kolcaj Realty Corp.*, 283 A.D.2d 350, 351 (1st Dep't 2001)); *see also Buchholz v. Trump 767 Fifth Ave., LLC,* 4 A.D.3d 178, 179 (1st Dep't 2004) ("Since the question … is a purely legal one, the motion court should not have allowed the expert to usurp its function as the sole determiner of law."), *aff'd*, 5 N.Y.3d 1 (2005); *cf. Goncalves v. Regent Int'l Hotels, Ltd.*, 58 N.Y.2d 206, 218 (1983) ("[D]eclaring the meaning of a statute is solely within the province of the court …."). Tellingly, plaintiffs have never pointed to a single case in which a court's void-for-vagueness analysis was premised on such evidence.

In an attempt to justify their reliance on expert medical testimony to answer this question of law, plaintiffs reference *Order of Railway Conductors of America v. Swan*, 329 U.S. 520 (1947)

(Unions' Br. 2, 6, 23, 31), but that case has no bearing here. The Supreme Court in *Swan* considered evidence as to the meaning of the term "yard-service employees," which was "a technical term found only in railroad parlance," to determine which division of a regulatory agency had jurisdiction over disputes involving certain employees. *Id.* at 521, 525. *Swan* did not involve a void-for-vagueness analysis. And in *Swan*, unlike here, the term at issue *was* a technical, industry-specific one that expert opinion could shed light on.

In any event, plaintiffs' experts' opinions are puzzling. One such opinion contends that the local law fails to adequately distinguish diaphragm compression from the "normal contraction or flattening" that the diaphragm experiences in regular breathing (Unions' Br. 4 (cleaned up)). But prohibited diaphragm compression occurs only from sitting, kneeling, or standing on a person's chest or back, and only when the person's air or blood flow is thereby impeded. The "normal contraction or flattening" of the diaphragm during breathing is thus the *opposite* of the compression that violates the ban. There is no reasonable claim of confusion there.

Third, while plaintiffs attack the diaphragm-compression ban's lack of a mens rea or injury requirement (PBA Br. 30-33; Unions' Br. 35-38), they admit that neither element is necessary to withstand vagueness scrutiny (Unions' Br. 35). *See Copeland*, 893 F.3d at 122. Indeed, the state law that plaintiffs seemingly prefer, Penal Law section 121-13-a, also has no specific mens rea requirement for its prohibition on police officers' use of a chokehold, as defined in Executive Law section 837-t.[37] Plaintiffs' rhetoric—suggesting that mens rea and injury requirements are necessary to permit "inherently innocent" use of the dangerous restraints (Union's Br. 36 (cleaned up))—betrays a profound lack of appreciation for the grave problem of positional asphyxia. In any event, if a mens rea element were required to avoid vagueness, the right step would be to read one in as a matter of constitutional avoidance, not to strike the ban down. *Cf. People v. Finkelstein*, 9 N.Y.2d 342, 344-45 (1961) (reading scienter requirement into

[37] PBA misdescribes the statute by suggesting that an intent requirement broadly applies to Penal Law section 121.13-a (PBA Br. 2, 7, 38). The other unions correctly recognize that only part of Penal Law section 121.13-a includes an intent requirement (Unions' Br. 16-17, 41-42, 44).

obscenity statute); *see also Carter v. United States*, 530 U.S. 255, 269 (2000).

## POINT II

### VAGUENESS IN THE DIAPHRAGM-COMPRESSION BAN WOULD NOT JUSTIFY STRIKING DOWN THE SEPARATE CHOKEHOLD BAN

Even if the phrase "in a manner that compresses the diaphragm" were impermissibly vague on its face (and it is not), that would in no way imperil the law's distinct prohibition on chokeholds. Plaintiffs' contrary contention is baseless. Judicial restraint and respect for the separation of powers require a court to disturb no more of a legislature's work than it must. Here, the City Council has strongly supported a chokehold ban ever since Eric Garner's death. There is no indication the Council would have wanted the chokehold ban to rise or fall with the diaphragm-compression ban.

Whether to sever a portion of a statute is fundamentally "a question of legislative intent, namely 'whether the legislature, if partial invalidity [of the local law] had been foreseen, would have wished [it] to be enforced with the invalid part exscinded, or

rejected altogether.'" *People v. Viviani*, 36 N.Y.3d 564, 583 (2021) (quoting *People ex rel. Alpha Portland Cement Co. v. Knapp*, 230 N.Y. 48, 60 (1920)). The answer to the inquiry "must be reached pragmatically, by the exercise of good sense and sound judgment, by considering how the statutory rule will function if the knife is laid to the branch instead of at the roots." *Viviani*, 36 N.Y.3d at 583 (cleaned up).

The first indication of the City Council's intent is found in the City Administrative Code's default rule in favor of severability. The relevant provision states that "[i]f any clause … of the code shall be adjudged … invalid, such judgment shall not affect, impair or invalidate the remainder thereof, but shall be confined in its operation to the clause … directly involved in the controversy." N.Y.C. Admin. Code § 1-105. Plaintiffs do not address this provision, much less explain why the Court should disregard it.

Beyond this default rule, severance is appropriate here because the chokehold and diaphragm-compression portions are not "inextricably" interwoven. *See People v. On Sight Mobile Opticians*, 24 N.Y.3d 1107, 1110 (2014). Indeed, the local law's plain

text establishes them as separate "unlawful methods" to restrain an arrestee. *See* N.Y.C. Admin. Code § 10-181(a). As a result, if the law's prohibition on restraints that compress the diaphragm were to be excised, section 10-181(a) would remain clear and intelligible. The abridged version of the local law would still serve an important public-safety purpose by criminalizing conduct that the City Council deemed unacceptable: police officer use of chokeholds on arrestees.[38]

There is abundant evidence that the City Council would have wanted the chokehold ban to stand on its own. Starting with the local law's text, the chokehold ban and diaphragm compression ban, as distinct prohibitions of different "unlawful methods" of arrest restraint, Admin. Code § 10-181(a), have "independent legislative purpose." *On Sight Mobile Opticians*, 24 N.Y.3d at 1110. Indeed, the law's very title—"a Local Law to amend the administrative code

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[38] Plaintiffs' argument that the phrase "in a manner that compresses the diaphragm" should not be severed (Unions' Br. 34-35; PBA Br. 33-34) is a classic straw-man feint. Although the City suggested severance of that language at Supreme Court, we did not press that request in the Appellate Division and do not raise it in this Court.

of the City of New York, in relation to chokeholds and other such restraints"—foregrounds the chokehold component.[39]

The legislative record also provides clear support for severability. The City Council initially took up a standalone chokehold ban in 2014, following the death of Eric Garner (s*ee supra* at 9-10). The legislation had strong support—a majority of Council Members sponsored the bill (*see supra* at 10). It failed to become law because of the Mayor's veto threat—a key fact that PBA conveniently fails to mention (PBA Br. 34).[40] Trying again in 2020, the Council reiterated that the local law was important because it would prevent the use of chokeholds.[41] There is not a scrap of evidence that the Council would have wanted police officers to be free to use chokeholds with impunity if it could not also prohibit them from using a different type of harmful restraint.

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[39] N.Y. City Council, File #: Int. 0536-2018, cited *supra* n.16.

[40] The Mayor eventually strongly supported the proposal, later telling the press that the chokehold ban was "crucial" and "necessary" (R329).

[41] *See* N.Y. City Council, Transcript of the Minutes of the Committee on Public Safety (June 9, 2020), at 40-41 (statement of sponsor Council Member Rory I. Lancman that the proposed bill will "make clear to officers that they really truly, really, really cannot use chokeholds"), *available at* https://tinyurl.com/47cyuhrf.

Lacking any good response on severability, plaintiffs seek to invoke waiver (PBA Br. 33). But they have no authority for their suggestion that the issue of severability even *can* be waived. Nor are we aware of any such decision in this state. This absence likely reflects the core separation-of-powers values at play, as well as New York law's strong preference for severability. *See, e.g.*, *Alpha Portland Cement Co.*, 230 N.Y. at 62-63; *Viviani*, 36 N.Y.3d at 583.

In any event, plaintiffs never challenged the chokehold portion of section 10-181 as vague, and the City did not waive the issue of severability by failing to propose that an unchallenged portion of the statute be left alone. In any event, a legal argument may be raised for the first time on appeal, as long as the argument could not have been "obviated or cured by factual showings or legal countersteps" below. *Telaro v. Telaro*, 25 N.Y.2d 433, 439 (1969). Severability turns on the statutory text and legislative history, and thus can be raised on appeal.

Last, plaintiffs point out that the law did not end up being enacted until after the diaphragm-compression ban was added (PBA Br. 34). But they ignore that the initial chokehold bill's failure

resulted from a threatened veto by Mayor de Blasio—which had nothing to do with that bill's failure to cover diaphragm compression as well as chokeholds. In any event, the question is not whether a majority on the City Council ultimately preferred to ban both categories of restraints—it plainly did. It is a truism that a law as enacted constitutes the best expression of legislative intent. The relevant question for the purpose of severability is a different one: whether the City Council would have wanted the chokehold ban to fall if it had been told in advance that the separate diaphragm-compression ban would be struck down. And there is no basis to suggest that the Council would have wanted that—certainly nothing that would overcome New York law's preference for severability and the express severability clause set forth in the Administrative Code.

## POINT III

## THE LOCAL LAW IS NOT PREEMPTED BY STATE LAW

Both lower courts rejected plaintiffs' preemption challenges (R10-14, 551), and rightly so. Section 10-181 is authorized by New York's constitutional home-rule provision, N.Y. Const. art. IX,

§ 2(c), which accords municipalities "broad police powers ... relating to the welfare of [their] citizens," *Jancyn Mfg. Corp. v. County of Suffolk*, 71 N.Y.2d 91, 96 (1987). Plaintiffs' protestations notwithstanding, state law does not prohibit the City from using these powers to prevent harm to its citizens by regulating law enforcement's use of force within its borders.

### A. Section 10-181 does not conflict with state law.

Plaintiffs' conflict-preemption theory has no merit. The local law does not conflict with state law, but just prohibits more types of conduct than state law does. And "[t]hat is the essence of home rule." *People v. Cook*, 34 N.Y.2d 100, 109 (1974).

Conflict preemption does not arise just because "both the State and local laws seek to regulate the same subject matter." *Jancyn*, 71 N.Y.2d at 97; *see also Garcia v. N.Y.C. Dep't of Health & Mental Hygiene*, 31 N.Y.3d 601, 617 (2018). A local law is conflict preempted only if it prohibits conduct that state law affirmatively permits, or imposes additional restrictions on rights afforded by state law, "so as to inhibit the operation of the State's general laws." *Zakrzewska v. New Sch.*, 14 N.Y.3d 469, 480 (2010) (cleaned up).

No conflict arises where a local law merely prohibits something that is not prohibited by state law. *See Cook*, 34 N.Y.2d at 109. A lower threshold for preemption could overwhelm municipal legislative power, "rendering the power of local governments illusory." *Garcia*, 31 N.Y.3d at 617.[42]

Plaintiffs are off base in pointing to Penal Law section 121.13-a, which criminalizes officers' use of chokeholds and other similar breathing restrictions that cause serious physical injury or death (PBA Br. 40-41; Unions' Br. 44). There is no conflict with the diaphragm-compression ban because this state statute does not address diaphragm compression caused by sitting, kneeling, or standing on an arrestee's back or chest, and certainly does not "specifically authorize[]" such conduct, as PBA claims

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[42] The few cases cited by plaintiffs finding conflict preemption (Unions' Br. 43-44; PBA Br. 41-42) reflect these principles. In *N.Y.C. Health & Hospitals Corp. v. Council of New York*, 303 A.D.2d 69, 77-78 (1st Dep't 2003), the local law set limits on a public-hospital system's ability to outsource security guards, when state law expressly granted the hospital system "complete autonomy" in that area. And in *Sunrise Check Cashing & Payroll Services, Inc. v. Town of Hempstead*, 91 A.D.3d 126, 139 (2d Dep't 2011), a local ordinance restricted the siting of check-cashing establishments, when the state "Legislature ha[d] vested" a state agency "with the authority to determine appropriate locations" for such establishments, and existing state licenses for such business conflicted with the local ordinance's restrictions. Nothing remotely analogous has occurred here.

(PBA Br. 41). The fact that state law criminalizes only chokeholds that cause serious harm does not amount to affirmative authorization to use chokeholds that cause less serious harm. *See, e.g., N.Y. State Club Ass'n v. City of N.Y.*, 69 N.Y.2d 211, 221-22 (1987) (no conflict preemption where local law merely prohibits more conduct than state law does). Further, the state statute imposes more severe penalties—as a class-C felony versus a misdemeanor—thereby complementing, rather than conflicting with, the local law's prohibition.

Nor does a conflict exist with respect to mens rea (Unions' Br. 44-45). Rather, Penal Law section 121.13-a *has no* express mens rea requirement for its prohibition on police use of a chokehold, as defined in Executive Law section 837-t—just as no specific mens rea requirement is specified in the City's local law. Only section 121.13-a's prohibition on other breathing restrictions on the neck, nose, or mouth—namely, criminal obstruction of breathing and blood circulation under Penal Law section 121.11—includes a mens rea requirement of "intent to impede the normal breathing or

circulation." The State, therefore, has not decreed that mens rea is an essential component of every criminal regulation of chokeholds.

Nor is there any conflict between the local law and Penal Law section 35.30 (Unions' Br. 45; *see also* PBA Br. 40-41). As explained above (*see supra* at 36-37), that statute provides a justification defense for officers charged with a crime for their conduct in effecting an arrest. Penal Law § 35.30(1). That defense fully applies in prosecutions under local law (*see supra* at 37), including any prosecutions that might be brought under section 10-181. So, by definition, section 10-181 cannot criminalize anything that the justification defense covers. Plaintiffs' suggestion that section 10-181 somehow overrides the justification defense (*see* PBA Br. 41) is simply mistaken.

Thus, plaintiffs get the impact of the justification defense backward. The fact that state law provides officers with this defense in no way indicates that they can't be subject to criminal liability under local law in the first place. The opposite is true: the justification defense exists because officers *can* be charged with violations of local criminal laws. And if anything, the State

Legislature's express direction that the Penal Law's justification defenses apply to local criminal laws, as well as state criminal laws, provides powerful confirmation that the Legislature did *not* intend for the sections establishing those defenses to preempt local criminal laws that might implicate them.

### B. The State has not occupied the field of regulating police use of force during arrests.

Plaintiffs' field-preemption theory is equally meritless. While the State's intent to occupy the field may be either express or implied, in either case the intent must be "clearly evinced." *Jancyn*, 71 N.Y.2d at 97. Here it plainly is not. Plaintiffs cannot dispute that no express statement of field preemption exists. They instead rely on implied field preemption, but their argument is baseless.

It is undisputed that there is no "declaration of State policy by the State Legislature" supporting plaintiffs' claim. *DJL Rest. Corp. v. City of N.Y.*, 96 N.Y.2d 91, 95 (2001) (cleaned up). Nor do plaintiffs assert any need for statewide uniformity. *See Garcia*, 31 N.Y.3d at 618. This case is a far cry from *People v. Diack* (PBA Br. 35, 36, 38), for example, where state regulations noted the need to

prevent a community from "attempt[ing] to shift its responsibility" for housing sex offenders onto other communities. 24 N.Y.3d 674, 686 (2015) (cleaned up).

Plaintiffs instead assert that "the Legislature has enacted a comprehensive and detailed regulatory scheme." *DJL Rest. Corp.*, 96 N.Y.2d at 95 (cleaned up) (*see* PBA Br. 36; Unions' Br. 39). But they point only to "scattered provisions, enacted at widely varying times, and in differing circumstances," *Int'l Franchise Ass'n v. City of N.Y.*, 193 A.D.3d 545, 547 (1st Dep't 2021): the Eric Garner Anti-Chokehold Act, enacted in 2020; a Penal Law affirmative defense to state strangulation laws for a valid medical or dental purpose, enacted in 2010; a provision of the Criminal Procedure Law concerning authority to arrest without a warrant that was first enacted in 1970; and justification defenses in the Penal Law that have existed in some form since the 1960's (PBA Br. 37; Unions' Br. 40-42). This grab bag of provisions is far from a unified "statutory scheme"—still less one that is "so broad in scope or so detailed" as to warrant preemption. *Jancyn*, 71 N.Y.2d at 99. Nothing in any of

these laws indicates that the State "has been vested … with exclusive jurisdiction over these matters." *Id.*

Section 10-181 in no way "intrudes on the operation" of section 35.30's justification defense (Unions' Br. 40) because that defense continues to apply to any prosecutions under the local law, as explained above. Since the Penal Law expressly makes its justification defenses applicable to prosecutions brought under local laws (*see supra* at 37), it confirms that the State did *not* intend to occupy the field of law enforcement use-of-force regulation.

The cases that plaintiffs seek to rely on only highlight their claim's deficiencies. In those cases, unlike here, the State Legislature had enacted a comprehensive regulatory scheme, rather than a handful of laws adopted at different times, for different reasons. For example, in *Consolidated Edison Co. v. Town of Red Hook* (*see* PBA Br. 36), the Legislature had enacted, all in one go, a comprehensive scheme for the siting of steam electric-generating facilities, comprising about a dozen statutory provisions designed to work together. 60 N.Y.2d 99, 103 (1983) (discussing Article VIII of the Public Service Law); *see also Albany*

*Area Builders Ass'n v. Guilderland*, 74 N.Y.2d 372, 379 (1989) (local law at issue would have enabled a municipality "to circumvent" the State's "uniform scheme" for highway budgeting (cleaned up)); *Chwick v. Mulvey*, 81 A.D.3d 161, 170-71 (2d Dep't 2010) (single lengthy and detailed statute evinced "an intent to set forth a uniform system of firearm licensing in the state").

Legislative history also does not support field preemption. *Cf. Cohen v. Bd. of Appeals*, 100 N.Y.2d 395, 402 (2003). While members of the State Legislature may have also been concerned about the deaths of Eric Garner and George Floyd (PBA Br. 37-38; Unions' Br. 42-43), plaintiffs fail to show any legislative intent to fully occupy the field of use-of-force regulations. In contrast, in *Cohen*, "[n]umerous sources in the legislative history" indicated intent to occupy the regulatory field. 100 N.Y.2d at 402. Plaintiffs fail to explain how the State Legislature's recognition of the problem of NYPD use of chokeholds somehow evinces a legislative intent to tie the City's hands from addressing that very problem.

*  *  *

As most New Yorkers know, tragedies resulting from police use of force unsettle New York City as little else does—the deaths of Eric Garner and George Floyd are recent examples but sadly not the only ones. Ours is a diverse and dense city where people of all stripes live and work shoulder to shoulder—and where the polity's ability to discuss and respond to such events is crucial. Before concluding that the State has disabled the City's government from regulating how law-enforcement officers—overwhelmingly the City's own NYPD—use dangerous restraints on the City's streets, the Court should require strong evidence that the Legislature intended to take that step. Plaintiffs identify nothing close.

## CONCLUSION

This Court should affirm.

Dated: New York, NY
March 3, 2023

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

I hereby certify that this brief was prepared using Microsoft Word, and according to that software, it contains 12,624 words, not including the table of contents, the table of cases and authorities, the statement of questions presented, this certificate, and the cover.

AMY MCCAMPHILL

APL-2022-00078

# Court of Appeals
# State of New York

POLICE BENEVOLENT ASSOCIATION OF THE CITY OF NEW YORK, INC., et al.,

*Plaintiffs-Appellants*,

*against*

THE CITY OF NEW YORK,

*Defendant-Respondent.*

## AFFIRMATION OF SERVICE

AMY MCCAMPHILL, an attorney admitted to practice in the courts of this state, affirms under the penalties of perjury that: on March 3, 2023, I served three copies of the accompanying Brief for Defendant-Respondent on the each of parties listed below, by dispatching the memorandum to the parties by overnight delivery service at the address designated by them for that purpose, pursuant to CPLR 2103(b)(6):

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