To be Argued by:
STEVEN A. ENGEL
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Court of Appeals

of the

State of New York

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

(For Continuation of Caption See Inside Cover)

BRIEF FOR PLAINTIFF-APPELLANT POLICE BENEVOLENT ASSOCIATION OF THE CITY OF NEW YORK, INC.

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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,

Plaintiffs-Appellants,

– against –

THE CITY OF NEW YORK,

Defendant-Respondent.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Local Rule 500.1(f), Plaintiff-Appellant Police Benevolent Association of the City of New York, Inc., states that it has no corporate parents, subsidiaries, or affiliates.

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PRELIMINARY STATEMENT

This appeal concerns the constitutionality of a unique New York City ordinance that threatens criminal penalties against police officers who "restrain an individual" by "sitting, kneeling, or standing on the chest or back in a manner that compresses the diaphragm." N.Y.C. Admin. Code § 10-181(a). Despite two years of litigation, the City of New York still has not explained what it means to compress the diaphragm. Yet the Due Process Clause requires that criminal laws give fair notice of their prohibitions. And that is all the more true where, as here, the law regulates the force police may use in life-and-death situations.

As the unrebutted expert testimony established below, police officers struggling with a resisting arrestee have no way of knowing what effect their actions may have on the diaphragm, an internal muscle in someone else's body. Although the New York State Legislature and half a dozen other states responded to George Floyd's tragic death by tightening use-of-force laws to prevent officers from *intentionally* employing dangerous restraints that cause *injuries*, New York City stands alone in criminalizing restraints that "compress[] the diaphragm" and doing so without regard to the officer's intention or whether such actions cause any injury.

New York City passed this ordinance against a state-law backdrop that addressed the same issue, but in a different manner. Just one week before the City Council acted, the New York State Legislature prohibited the use of "a chokehold

or similar restraint," that "appl[ies] pressure to the throat or windpipe of a person in a manner that may hinder breathing or reduce intake of air." N.Y. Penal Law § 121.13-a; N.Y. Exec. Law § 837-t(1)(b). The statute requires that the officer act "with intent to impede the normal breathing or circulation of the blood of another person," N.Y. Penal Law § 121.11, and that the prohibited restraint "cause[] serious physical injury or death to another person." N.Y. Penal Law § 121.13-a.

Despite the State Legislature's action, the City Council proceeded to adopt a "diaphragm compression" law that was well understood to be fatally vague. Two senior New York City Police Department ("NYPD") officials told the City Council that an officer could not arrest a resisting subject without arguably violating it. *See infra* 9–10. The NYPD Commissioner called it "incredibly reckless." Ethan Geringer-Sameth, *Police Commissioner Repeatedly Contradicts Mayor on NYPD Reform*, Gotham Gazette (July 1, 2020), https://bit.ly/3jcAPwg. Even the City Council recognized these flaws: one member conceded the bill was "a little vague," R322, another had "serious issues with some of the bill's language," R345, and a third said the prohibition "seems subjective and it's not clear," R325. They passed the law anyway.

After the law's adoption, the District Attorneys from New York and Richmond Counties predicted that it would be struck down. *See Manhattan District Attorney Cy Vance on the Recent Spike in Gun Violence*, Spectrum News (July 7,

2020), https://bit.ly/3utNZaz; R317. After Justice Love of Supreme Court, New York County, did precisely that, Mayor Adams called it "a good decision" because the law's prohibition was "not realistic." Sam Raskin, *Eric Adams Blames City Council for 'Unconstitutionally Vague' Chokehold Bill*, NY Post (June 24, 2021), https://bit.ly/36oNlm7.

Despite the wide recognition of the law's constitutional problems, the First Department reversed. It did so by dismissing the unrebutted expert testimony that officers could not know when they "compress[] the diaphragm." While admitting that the law was "imprecise" and "open-ended," the First Department found it "sufficiently definite" because police officers are trained on "the location and function of the diaphragm" and could supposedly comply by avoiding any pressure at all "on a person's chest or back, in the vicinity of the diaphragm." R552–53.

Yet officers can neither avoid potential violations nor know if they have done so. Locked in a dangerous struggle with a resisting arrestee, a police officer does not have the luxury of avoiding transient pressure on the "chest or back" and cannot know whether such pressure unintentionally violates the law. Absent a recognized scientific meaning for the key phrase or any meaningful constraint based on intent or injury, the prohibition violates due process.

The City's diaphragm-compression ban is also preempted because the New York State Legislature has enacted its own detailed regulations regarding arrest

protocols, the rights of arresting police officers, and even the specific question of dangerous restraints. Yet the City's law imposes an additional, different constraint that threatens to strip officers of a right State law gives them: to use all force reasonably believed necessary to effect an arrest, with the exception of injury-inducing chokeholds. N.Y. Penal Law §§ 35.30, 121.13-a. Section 10-181 prescribes rules inconsistent with these precepts.

In attempting to articulate its own response to Mr. Floyd's death, the City blew through the warnings of public officials, prosecutors, and police experts to adopt a vague law. No officer can tell beforehand whether she violated the prohibition, and due process does not tolerate prosecutors arbitrarily selecting unwitting defendants after the fact. However good the City's intentions, the law must yield to the Constitution and the supremacy of state law. The First Department's decision should be reversed.

JURISDICTION

This Court has jurisdiction under N.Y. C.P.L.R. 5601(b)(1). This action directly involves substantial questions concerning the Constitution of the State of New York. The Appellate Division's order was entered May 19, 2022, R549, and notice of appeal was timely filed on June 8, 2022, R546–48. On October 18, 2022, the Clerk of Court terminated its jurisdictional inquiry and set December 19, 2022, for the service of Appellants' briefs and records. All questions raised were preserved

for review.[1] *See* Local R. 500.13(a).

QUESTIONS PRESENTED

1. Whether a law that contains no scienter or injury requirement and criminalizes conduct based solely on the unknowable effects in another person violates due process.

2. Whether New York state law regulating the force officers may use in arrests, including by prohibiting chokeholds and other forms of strangulation, preempts a local law criminalizing uses of force that are otherwise authorized under state law.

STATEMENT OF THE CASE

A. New York Law Balances the Interests of Officers and Arrestees.

New York state law has long regulated the circumstances of arrests. The criminal procedure law dictates the circumstances in which an officer may arrest someone, N.Y. Crim. Proc. Law §§ 140.10(1)–(2), (4)–(6), where an officer may effect such an arrest, *id.* § 140.10(3), and when such an arrest may be effectuated, *id.* § 140.15(1). In doing so, the law balances the interests of the officer and the arrestee, criminalizing the use of excessive force and expressly authorizing the

[1] R351–61 (due process argument in Supreme Court briefing) R493–501 (same); R361–70 (preemption argument in Supreme Court briefing); R501–03 (same); R709–32 (due process argument in Appellate Division briefing); R732–36 (preemption argument in Appellate Division briefing).

reasonable actions necessary to effect an arrest.

Since 1968, this justification defense has provided that a police or peace officer "may use physical force when and to the extent he or she reasonably believes such to be necessary to effect [an] 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." N.Y. Penal Law § 35.30(1); *see* McKinney 1968 Session Laws of N.Y., 191st Session, Vol. 1, Ch. 73, at 111–13, § 8. Police groups advocated for this statutory defense out of concern that prior law forced officers to make dangerous choices when it came to the use of force against those resisting arrest. *See* N.Y. S. Mem. of Support, S.B. 4104-A, Assemb. B. 5980-A, at 3 (Mar. 11, 1968). According to the New York State Police, the bill "properly expanded the use of force in response to many complaints," and "the proper place for a person arrested to challenge the authority of the arresting officer should be in the courts." N.Y. State Police, Mem. Recommending Approval of S.B. 4104-A, at 2 (Mar. 11, 1968).

In the summer of 2020, following the outcry over George Floyd's death in Minnesota, New York State prohibited the use of chokeholds that injure arrestees. On June 12, 2020, Governor Cuomo signed into law a new prohibition on "aggravated strangulation," which includes the intentional use of "a chokehold or similar restraint" or "criminal obstruction of breathing or blood circulation" by an

officer when those actions cause "serious physical injury or death to another person." N.Y. Penal Law § 121.13-a.

Under the law, "[c]riminal obstruction of breathing or blood circulation" occurs when a person intentionally "applies pressure on the throat or neck of such person" or "blocks the nose or mouth of such person." *Id.* § 121.11. The use of "a chokehold or similar restraint" is defined as "appl[ying] pressure to the throat or windpipe of a person in a manner that may hinder breathing or reduce intake of air." N.Y. Exec. Law § 837-t(1)(b). The state law requires not just injury, but "intent to impede the normal breathing or circulation of the blood of another person." N.Y. Penal Law § 121.11.

Even while expanding the prohibitions against excessive force, the state law continues to strike the balance between officer and arrestee concerns. The sponsors' memorandum states that it "'does not bar any affirmative defenses or justifications for the use of force . . . as outlined in Section 35.30 of the Penal Law,' and as such is not a strict liability offense." Governor's Mem. of Approval, Assemb. B. 6144-B (June 12, 2020). In fact, the Governor's approval memorandum for the 2020 chokehold law specifically cited the justification defense as essential to adoption of the state chokehold ban. *Id.*

B. The City Adopts a Vague Law that Disturbs the Balance of Officer and Arrestee Interests.

While the State was adopting the anti-chokehold law, the City Council

considered its own prohibition. In the summer of 2020, the City Council renewed an earlier anti-chokehold bill, but expanded it to prohibit officers also from restricting an arrestee's airflow by "compress[ing] the diaphragm." Just one week after the State adopted its chokehold ban, the City adopted this expanded set of prohibitions related to the very same conduct:

> a. Unlawful methods of restraint. No person shall restrain an individual in a manner that restricts the flow of air or blood by compressing the windpipe or the carotid arteries on each side of the neck, or 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.
>
> b. Penalties. Any person who violates subdivision a of this section shall be guilty of a misdemeanor punishable by imprisonment of not more than one year or a fine of not more than $2,500, or both.
>
> c. Any penalties resulting from a violation of subdivision a of this section shall not limit or preclude any cause of action available to any person or entity injured or aggrieved by such violation.

NYC Admin. Code § 10-181.

The City's law differs materially from state law. Instead of just prohibiting chokeholds, it also prohibits standing, sitting, or kneeling on an arrestee "in a manner that compresses the diaphragm." Thus, the City's law does not prohibit all standing, sitting, or kneeling, but it provides no guidance on how one does so in a manner that compresses the diaphragm. Notably, while the state prohibition requires proof of (i) an intent to restrict breathing or blood flow *and* (ii) the infliction of serious injury, the City law imposes liability without regard to the offender's intent or whether the

victim in fact suffered any harm at all.

C. Officials Criticize the City Law's Vagueness and Workability.

Prior to the City's adoption of Section 10-181, numerous City officials expressed concern that officers could not reasonably be expected to comprehend or comply with the law. Benjamin Tucker, the NYPD's First Deputy Commissioner explained that New York State "penal law already includes a statute criminalizing, criminal obstruction of breathing and strangulation," and that "it is actually hard to imagine a scenario in which an officer would not open himself or herself to criminal liability or discipline when effecting the arrest of a resisting subject." City Council, Public Safety Committee, Transcript of June 9, 2020, Meeting at 50:23–51:5, 60:23–25, 61:20–24, https://bit.ly/3umkSWi. Assistant Deputy Commissioner Oleg Chernyavsky similarly stated, "[w]hen you are in the middle of a struggle as a police officer, you sometimes don't realize what's going on." *Id.* at 135:17–21.

Councilmember Chaim Deutsch, who voted to approve the law, stated that "there are serious issues with some of the bill's language, which would essentially criminalize a police officer's behavior . . . if they take steps to subdue a prisoner as they attempt to make an arrest." City Council, Transcript of June 18, 2020 Meeting at 71:7-14, https://bit.ly/3wu82rG. He expressed concern that the provision would cause NYPD members to "be afraid of being prosecuted for reasonable actions that they take in the course of their job." *Id.* at 71:16–20. Donovan Richards, the

Chairman of the City Council's Public Safety Committee, conceded that the diaphragm-compression ban was "a little vague." R322. And City Council Speaker Corey Johnson called the ban "subjective and . . . not clear." R325.

After the City Council adopted the diaphragm law, two district attorneys doubted that it could be enforced. New York County District Attorney Cyrus Vance cited the provision's "ambiguity" and its imposition of "strict liability," and predicted that "legal challenges . . . will be successful," in part because the ordinance is "at risk as a statute because of preemption by the State." Spectrum News, *supra*. Staten Island District Attorney Michael E. McMahon opined that the provision "actually defies common sense in the restrictions it places on police officers who we expect and need to respond to dangerous and critical life and death situations." R317.

Police Commissioner Dermot Shea called the law "incredibly reckless" and objected that it would criminalize accidental pressure on a suspect's torso. Geringer-Sameth, *supra*. After Supreme Court's decision, now-Mayor Eric Adams said, "that was a good decision," because the City Council had failed to "sit down with technical experts" and instead adopted a prohibition that was "not realistic." Raskin, *supra*.

D. Police Unions Successfully Challenge the Diaphragm Law Before New York County Supreme Court.

On August 5, 2020, Plaintiff-Appellant Police Benevolent Association of the City of New York, Inc. ("PBA") and sixteen other law enforcement unions brought

this action in New York County Supreme Court.[2] R33. The complaint asserted that Section 10-181's diaphragm-compression ban violated due process under the New York Constitution and was preempted by New York state law. On the plaintiffs' motion for a preliminary injunction, Supreme Court agreed that Plaintiffs were likely to succeed on the merits, R16, but it found no irreparable harm. R228, 350.

On cross motions for summary judgment, the police unions submitted four expert opinions establishing that an arresting officer could not know whether the diaphragm is being compressed in the course of an arrest. Dr. Beno Oppenheimer, a NYU professor of cardiothoracic surgery and the chief of surgical intensive care, opined that there is no "practical way[]" for an officer to tell "whether or how diaphragm function is being affected" during an arrest. R425.

As Dr. Oppenheimer explained, the diaphragm "contracts," "shortens," and "descends" every time someone normally breathes. R425. Yet "the diaphragm is not a compressible muscle given its anatomical location within the chest cavity and the direction of its contractile displacement." R423. Because of their "vagueness and ambiguity," the terms "diaphragmatic compression" and "compression of the diaphragm" are not "widely accepted in medicine to describe a mechanism with

[2] PBA is the largest municipal police union in the world, representing approximately 24,000 police officers employed by the NYPD.

potential for impeding or limiting diaphragmatic function." R425. Dr. Christopher Lettieri, a professor of the Uniformed Services University of the Health Sciences and a fellow of the American College of Chest Physicians, agreed that "there is no way for police officers to determine, in the course of an arrest, whether they are . . . compress[ing] the diaphragm." R382.

Two decorated former police officers, John Monaghan and Patrick Kelleher, opined that based on their experience there is no "clear and well-understood way of telling" when an arrestee's diaphragm is compressed, R410, and that officers lack "any external action or signal" that would tell them "what is going on inside a person being arrested," R375. In addition, those officers opined that "when a suspect resists, an officer may incidentally sit, kneel, or stand on the suspect's chest or back as part of a struggle." R376. And they criticized the training materials relied upon by the City because they failed to explain "how anyone could compress the diaphragm or what that would look like" or "how to tell when unobserved 'compression' inside the body is different from normal contracting or flattening." R411.

Supreme Court granted the unions' motion for summary judgment and enjoined the diaphragm law as unconstitutionally vague. R17–19. Supreme Court observed that the expert testimony was unrefuted that an officer could not know whether an arrestee's diaphragm is being compressed during an arrest. R17–19. The court reasoned that neither the law itself nor NYPD training materials "meaningfully

explain[s] what is meant by 'compresses the diaphragm.'" R20. Indeed, the training materials "ignored the issue entirely by simply imposing a blanket ban on any activity that could lead to even the possibility of compressing the diaphragm." *Id.* Simply defining the term "diaphragm" did not provide officers with notice concerning whether and how their actions might compress it. *Id.*

Having found this language "inescapably" vague, Supreme Court rejected the City's position on severability. The City did not ask Supreme Court simply to strike the diaphragm-compression ban, but rather to strike the phrase "compresses the diaphragm" from the law, which would thereby *expand* the prohibition to bar any "sitting, kneeling, or standing on the chest or back" of an arrestee. R21–23. Supreme Court held that rewriting the law in that way would contravene "the intent of the legislature," which had not codified the expanded provision. R23. Finding "insufficient evidence presented of the intentions of the New York City Council," the court "decline[d] to usurp the role of the New York City Council." R23. The court entered judgment and enjoined enforcement of Section 10-181. R23.

E. The First Department Reverses.

The Appellate Division, First Department, reversed. R549–54. The appellate court held that the relevant state laws did not "clearly evince a desire to preempt the field," though it did not identify the relevant "field." R551. The court similarly concluded that the ban's breadth relative to State law was "not sufficient to create a

conflict." R551.

As to due process, the Appellate Division acknowledged the ban's "imprecise" nature, R552–54, but it dismissed the expert opinions, writing only that "[t]o the extent plaintiffs' experts opine on the ultimate legal issue, they are not properly considered." R554 (citation omitted). The court found the statute sufficiently definite "when measured by common understanding and practices," since officers "can be (and are) trained on the location and function of the diaphragm." R552. The court accepted that "the impact on the diaphragm may be impossible to assess precisely without specialized tools or equipment," but found "the effects of the officer's conduct" not "unknowable or incapable of reasonable estimation." R553.

The court further held that the absence of a mens rea requirement was "not dispositive" because criminal liability "always requires a 'voluntary act,'" and "a justification defense would also be available." R552. While recognizing that there was no injury requirement, the court found it sufficient that, in addition to the "compression of the diaphragm," the officer must have "sat, kneeled, or stood on a person's chest or back" and "restricted the flow of air or blood." R552–53.

SUMMARY OF ARGUMENT

The First Department's decision should be reversed because the diaphragm-compression ban violates due process and is preempted by state law. *First*, Section

10-181's diaphragm-compression ban violates due process, because a criminal statute must provide ordinary people fair notice of the prohibited conduct. Supreme Court correctly held that the ban's "confusing" language flunks this test. R19. The unrebutted expert testimony established that an officer could not know without specialized equipment whether a use of force "compressed" the diaphragm.

The diaphragm-compression ban also invites arbitrary enforcement. The prohibition on "sitting," "kneeling," and "standing" on an arrestee's torso provides no standard separating the unlawful use of force from a necessary, transient, or inadvertent one. The law does not ban all sitting, kneeling, and standing, and it does not require a minimum amount of pressure, duration, or injury. The absence of such standards is particularly egregious because an arresting officer may well be involved in a struggle in which her own life is at stake. Those terms may cover a case where an officer intentionally and for a prolonged period applies significant force to a subdued subject. But they also apply to an officer's transient use of her body weight or her knee to the extent necessary to handcuff a person resisting arrest. Given the likelihood of inadvertent violations in such a struggle, these terms invite arbitrary enforcement.

The diaphragm-compression ban's problems are compounded by the absence of an intent or injury requirement. Both this Court and the U.S. Supreme Court have recognized that such elements may save an otherwise vague statute by excluding

inadvertent or trivial violations, thereby narrowing prosecutorial discretion. Had this law been limited to intentional obstructions of an arrestee's breathing, or the prolonged use of such force leading to serious injury, then a reasonable officer might avoid violating it. Yet the law contains no such limitations, and thus may apply to inadvertent, momentary, and de minimis applications of force.

Second, Section 10-181 is preempted. The New York State Legislature has broadly regulated the use of physical force during arrests, providing detailed procedures for police conduct before, during, and after arrests. It has specifically delineated arresting officers' rights, authorizing officers to employ reasonable uses of force, with an express exception for chokeholds. The City Council may not contradict the State Legislature's judgment. The New York Penal Law contains several provisions aimed at preventing the risk of asphyxiation during arrest. Those regulations have occupied the field and conflict with the City law.

ARGUMENT

I. THE DIAPHRAGM-COMPRESSION BAN VIOLATES DUE PROCESS.

The City's unique diaphragm-compression ban violates basic principles of due process. Most problematic, it regulates conduct based solely on its unknowable effects in another person, criminalizing even accidental compressions of an arrestee's diaphragm. This is because without specialized equipment, it is impossible to know whether the diaphragm is being compressed. The ban also fails

to delineate the amount or duration of pressure that must be applied to the torso, introducing yet more vagueness and opportunities for arbitrary enforcement. These problems might have been ameliorated had the ban had contained a scienter or injury requirement. But it inexplicably omits both of those due-process safeguards, rendering it effectively a strict-liability prohibition on the de minimis application of pressure.

The First Department erred by holding otherwise. In a cursory opinion, it dismissed the undisputed expert record, brushed off the ban's vagueness as "imprecision," disregarded Supreme Court's analysis, and failed to address several of Plaintiffs' arguments. This Court should reverse and reaffirm that due process requires criminal statutes to be drafted with reasonable precision.

A. The Ban Criminalizes Conduct Based Solely on Its Unknowable Effects in Another Person.

Due process prohibits "a criminal law so vague that it fails to give ordinary people fair notice of the conduct it punishes, or so standardless that it invites arbitrary enforcement." *Johnson v. United States*, 576 U.S. 591, 595 (2015); *see also People v. Stuart*, 100 N.Y.2d 412, 420-21 (2003) (same).[3] This Court's precedents disallow

[3] The PBA and other Plaintiffs brought this claim solely under the due process clause of the New York State Constitution, R283–88, but this Court applies the same standard and relies on both federal and state caselaw in resolving void-for-vagueness claims. *See, e.g.*, *People v. Stephens*, 28 N.Y.3d 307, 312 (2016).

criminal prohibitions that (1) fail to give "adequate warning of what the law requires" such that reasonable people "may act lawfully" or (2) enable "arbitrary and discriminatory enforcement" by failing to provide "boundaries sufficiently distinct for police, Judges and juries to fairly administer the law." R14 (quoting *Stuart*, 100 N.Y.2d at 420–21). The City's ordinance does both.

Supreme Court correctly held that Section 10-181 fails to give officers "adequate warning of what [it] requires." R14 (citing *People v. Cruz*, 48 N.Y.2d 419, 423–24 (1979)). This is because, as Plaintiffs' expert testimony shows, officers cannot know whether or when their conduct "compresses the diaphragm" of another person. R14, R17–19. Rather than addressing this testimony, the First Department dismissed it "[t]o the extent plaintiffs' experts opine on the ultimate legal issue." R554. This was error: the diaphragm-compression ban violates due process.

1. Laws that criminalize conduct based on unknowable effects in another person violate due process.

Due process bars a statute from criminalizing actions based on the unknowable effects of an individual's conduct in another person. Both this Court and the U.S. Supreme Court have invalidated laws that do exactly that. For instance, in *Colautti v. Franklin*, the U.S. Supreme Court struck down a statute prohibiting a physician from performing an abortion where a fetus "may be" viable. 439 U.S. 379, 391–94 (1979). According to the Court, the statute did not provide any means by which a physician might reasonably know when an abortion would violate the

statute, a problem "compounded by the fact that the Act subjects the physician to potential criminal liability without regard to fault." *Id.* at 394.

New York courts have similarly struck down harassment statutes that turn on the unknowable consequences of creating noise. In *People v. New York Trap Rock Corp.*, this Court voided a restriction on any sound that "annoys, disturbs, injures or endangers the comfort, repose, health, peace or safety of a person." 57 N.Y.2d 371, 375 (1982) (citation omitted). As in *Colautti*, the statute prohibited actions based on their effects on another person that could not be known in advance. The statute was not "informative on its face," *id.* at 378 (citation omitted), leading to doubt that any defendant could possibly know whether the creation of a sound would violate the statute, *id.* at 380–81. *Accord People v. Golb*, 23 N.Y.3d 455, 466–67 (2014) (striking statute criminalizing communication "in a manner likely to cause annoyance or alarm" (citation omitted)); *People v. Dupont*, 107 A.D.2d 247, 253 (1st Dep't 1985) (noting that "men of common intelligence" cannot "be forced to guess" the meaning of a similar statute (citations omitted)).

To take another example, in *People v. Kleber*, the court voided an ordinance that prohibited "the keeping of any animals which by causing frequent or long continued noise shall disturb the comfort or repose of any person or persons in the vicinity." 168 Misc. 2d 824, 825 (N.Y. Just. Ct. Nassau Cnty. 1996) (citation omitted). It noted that the statute's standard was "subjective" and that it was "not

possible to know beforehand" whether the sound in question annoyed someone else. *Id.* at 835–36. These cases establish that due process does not tolerate criminal penalties for conduct based on its causing an unknowable effect in another person.

2. Undisputed expert testimony established below that an officer cannot know when the diaphragm is being compressed.

The diaphragm-compression ban shares the same constitutional defect because officers cannot know when they violate it. The unrebutted opinions of four experts—two accomplished physicians and two decorated police officers—establish that there is no medically accepted definition of "diaphragm compression" and that an officer can neither know nor avoid doing so during an arrest. Because the law imposes criminal penalties based on those unknowable effects in another person, it is, as Supreme Court held, "inescapably" vague, and cannot survive due process scrutiny. R22–33.

Dr. Beno Oppenheimer, a recognized expert on respiratory mechanics, R423–24, opined that there is no "practical way[]" for an officer to tell "whether or how diaphragm function is being affected" during an arrest. R425. An officer has "no way . . . to see what is happening internally" to an arrestee or "to tell what may be happening with the diaphragm." R425. The terms "diaphragmatic compression" and "compression of the diaphragm" are not "widely accepted in medicine to describe a mechanism with potential for impeding or limiting diaphragmatic function." R425.

Dr. Christopher Lettieri agreed that "there is no way for police officers to determine, in the course of an arrest, whether they are . . . compress[ing] the diaphragm." R382. He opined that "without some way of observing what is happening internally it is impossible to tell what effect . . . pressure on the chest or back may be having on the diaphragm." R387. Furthermore, "[d]uring a struggle while attempting to make an arrest, an officer will not be able to know" the effect on breathing of "external compression of the thoracic cage." R387. Dr. Lettieri and Dr. Oppenheimer both agreed that "diaphragm compression" has no scientific meaning, and officers could not know what impact their actions had on the arrestee's diaphragm.

In addition, two police experts, John Monaghan and Patrick Kelleher, testified based on their law enforcement experience. Captain Monaghan, a former NYPD Commanding Officer and a Harvard M.P.A., opined that there is no "clear and well-understood way of telling" when an arrestee's diaphragm is compressed. R410. Commissioner Kelleher, a retired First Deputy Commissioner, likewise opined that officers lack "any external action or signal" that would tell them "what is going on inside a person being arrested." R375. Officers have no way to know whether the diaphragm is flattening and contracting simply from breathing or instead from the officer's conduct. R375. Commissioner Kelleher stated that the ban "places an impossible burden on a police officer making an arrest of a resisting suspect." R376.

The City neither challenged the admissibility of this testimony nor submitted any contrary evidence. Instead, the City relied on the testimony of Gregory Sheehan, the Executive Officer of the NYPD Police Academy, who explained that NYPD officers are trained not to "sit, kneel, or stand on the chest or back of a subject," R74–75, and that officers are instructed that the diaphragm is "located below the lungs" and "contracts rhythmically and continually, and most of the time, involuntarily." R75. But as Supreme Court recognized, neither his testimony nor his affidavit contained any guidance as to the key statutory term, namely, when the officers' actions would "compress" the diaphragm. R21.

These training materials were patently insufficient. A criminal statute "must be informative *on its face*." *People v. Berck*, 32 N.Y.2d 567, 569 (1973) (emphasis added); *see M. Kraus & Bros. v. United States*, 327 U.S. 614, 622 (1946) (even official interpretive guidance cannot "cure an omission or add certainty and definiteness to otherwise vague language"). Thus, even if the City's training materials did expound on the meanings of the ban's vague terms, it would make no difference, because the statute itself must provide the answer. *See N.Y. Trap Rock Corp.*, 57 N.Y.2d at 378; *see Golb*, 23 N.Y.3d at 466–67. Even so, the City's training materials do not explain the meaning of the statutory term, much less do so in a manner that would be generally understood by those reading the law. The training materials are no clearer than the ban itself—they provide a brief anatomical

description of the "diaphragm" but say nothing about what would "compress" it.

In fact, the City's training materials underscore the statute's vagueness. In instructing officers on how to comply with the law, NYPD does not train officers in how to avoid diaphragm compression, but simply tells them not to sit, stand, or kneel on an arrestee *at all*. Because it is not possible to know when the officers might compress the diaphragm of another, the NYPD concluded that the only way to comply was to try to avoid the regulated conduct altogether. As Supreme Court recognized, the training materials "simply ignore[]" the ban's vague terms. R20.

3. The First Department erred in ignoring the undisputed expert record, Plaintiffs' arguments, and Supreme Court's reasoning.

Although Supreme Court evaluated the summary judgment record in detail, the First Department dismissed this expert testimony entirely, saying only that "[t]o the extent plaintiffs' experts opine on the ultimate legal issue, they are not properly considered." R554 (citation omitted). But the four expert opinions were not legal opinions. *Cf. Singh v. Kolcaj Realty Corp.*, 283 A.D.2d 350, 351 (1st Dep't 2001) (disregarding expert opinion on causation where the proffered opinion was identical to the causation standard). Rather, they addressed the facts that *inform* the ultimate issue—whether there was an objective meaning of "compress the diaphragm" and whether, as a matter of science or law enforcement experience, officers could know when they were compressing an arrestee's diaphragm. For example, Dr. Oppenheimer concluded that an officer cannot tell "whether or how diaphragm

function is being affected" during an arrest or "see what is happening internally." R425. The other three expert opinions similarly bore on the facts that inform the ultimate question of fair notice. R375, 387, 410. Those unrebutted opinions show that it is impossible for an officer to know whether she is violating Section 10-181 during an arrest.

While ignoring this expert testimony, the First Department essentially made its own findings of fact, stating that even if "the impact on the diaphragm may be impossible to assess precisely without specialized tools or equipment" it "does not render the effects of the officer's conduct unknowable or incapable of reasonable estimation." R553. But the First Department offered no legal or factual citations in support of this reasoning, much less specify "any new findings of fact . . . with the same particularity as did the trial court." *Kahn v. Kahn*, 43 N.Y.2d 203, 210 (1977) (citing N.Y. C.P.L.R. 5712(c)(2)).

The question here is not, as the First Department suggested, whether it "may be impossible to assess *precisely*" the compression of the diaphragm without medical equipment. R553 (emphasis added). Rather, as the experts made clear, the problem is that there is "*no way*" to tell when the diaphragm is being "compressed," R425 (emphasis added), and that "an officer *will not be able to know*," R387 (emphasis added). An officer cannot tell whether the diaphragm is "compressed" *to any degree of precision*.

Similarly, the First Department attempted to rationalize its rejection of Dr. Oppenheimer's testimony that the term "compression" is not "widely accepted in medicine," R425, by concluding that the term could still be understood even if "it may not be the most accurate word, from a medical standpoint." R552. But as in *Colautti*, police officers should not be required to guess at the meaning of a term that even physicians reject as too unclear to be useful. 439 U.S. at 391–94.

The First Department believed 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 breath[e]." R553. But in so doing, the First Department read in both a mens rea requirement and a legal standard that are not present in the law. Section 10-181(a) does not proscribe only actions by police that *knowingly* make it "hard for the person to breathe." It applies to even a de minimis application of force if it "compresses the diaphragm" and "restricts the flow of air or blood." N.Y.C. Admin. Code § 10-181(a). The First Department's decision thus reinforces the conclusion that the text alone does not put officers on notice of the conduct that may subject them to criminal liability.

The First Department viewed the diaphragm-compression ban to be equivalent to laws that this Court has upheld, such as those prohibiting excessive noise or driving under the influence ("DUI"). *See People v. Stephens*, 28 N.Y.3d 307, 314–15 (2016) (noise restrictions); *Cruz*, 48 N.Y.2d at 427–28 (DUI laws). Yet

in both instances, the statutes involve criminal restrictions that were both capable of objective measurement and that could be avoided by those subject to the laws. Sound is measured in decibels and intoxication by blood alcohol content. People engaged in such conduct can measure their actions by easily available "rules of thumb" based on how loud they are or how much they have had to drink, to say nothing of the more precise measurements available by portable equipment, such as a decibel meter or a breathalyzer.[4]

Thus, even though someone who violates a noise ordinance may not be "in a strong position to ascertain" whether his noise could be heard inside a nearby building, he knows that he has produced a loud noise and could reasonably estimate when his conduct might approach the line. *See Henderson v. McMurray*, 987 F.3d 997, 1004 (11th Cir. 2021); *see also Stephens*, 28 N.Y.3d at 310 (upholding a law that prohibited a person from the creation of "'unnecessary noise' emanating beyond 50 feet from a motor vehicle operated on a public highway"). Likewise, a driver may not know his precise blood-alcohol content, *see, e.g.*, *Bohannon v. State*, 497 S.E.2d 552, 555 (Ga. 1998), but he can readily count the number of drinks and calculate whether he is danger of crossing the legal limit. This case, in contrast,

[4] *See* Am. Acad. of Audiology, Levels of Noise, https://bit.ly/3WlWNeF; Blood Alcohol Content (BAC) Calculator, https://bit.ly/3W3C13S.

involves a term lacking a clear meaning and any means of objective measurement.

The First Department also believed that even if the term "compress" were "imprecise" or "open-ended," R552, there is no "indeterminacy" as to whether the diaphragm is compressed. R553–54. But the compression of the diaphragm is not an objective fact, and even if it were, it would still be unknowable in advance. Thus, in *Colautti*, the completely *objective* question of a fetus's viability did not save the law when it required doctors to engage in guesswork. 439 U.S. at 391–94. Nor is this problem cured by the requirement of proof beyond a reasonable doubt, as the First Department suggested. R553. The burden of proof does not strip the accused of her right to clear guidance concerning the scope of the law, and the arbitrary nature of prosecutorial discretion compounds, rather than cures, the problems of an unknowable standard. *People v. Munoz*, 9 N.Y.2d 51, 57–58 (1961).

Finally, the First Department incorrectly viewed the NYPD training materials as ameliorating the due-process problem by requiring officers to "err on the side of caution." R554. The NYPD's prophylactic policy does nothing to cure the ban's facial vagueness. The training materials do not define, explain, or give context to the ban's problematic terms. Instead, they simply tell officers not to sit, stand, or kneel on an arrestee in *any* circumstance. Even if officers could comply with such a policy in connection with routine arrests, the record confirmed that officers could not necessarily do so when the subject resists arrestee. R376. And it is the *statute*,

not an agency's training materials, that must satisfy constitutional scrutiny and provide fair notice. *See Golb*, 23 N.Y.3d at 466–67; *N.Y. Trap Rock Corp.*, 57 N.Y.2d at 378; *Berck*, 32 N.Y.2d at 569; *M. Kraus & Bros.*, 327 U.S. at 622. The City cannot solve the due process problem imposed by its vague criminal law by asking officers to "hold themselves to a higher standard." R554.

B. The Diaphragm-Compression Ban Invites Arbitrary Enforcement.

The First Department also erred because Section 10-181 is "so standardless that it invites arbitrary enforcement." *Johnson*, 576 U.S. at 595. The ban violates this constitutional minimum by failing to delineate the amount or duration of pressure required to "compress the diaphragm" and because it requires neither mens rea nor an injury. While the City ostensibly adopted the ban to prevent the excessive force that led to George Floyd's death—where a subdued arrestee was sat upon for nearly ten minutes—the statute sweeps far beyond such conduct.[5] The statute could be violated by the kind of de minimis and transient pressure that commonly arises in the context of struggling with a resisting arrestee. Such an open-ended prohibition—lacking any mens rea or injury requirement—provides no standards for prosecutors and invites arbitrary enforcement. Yet the First Department did not consider this

[5] *See* Nicholas Bogel-Burroughs, *Prosecutors Say Derek Chauvin Knelt on George Floyd for 9 Minutes 29 Seconds, Longer than Initially Reported*, N.Y. Times (Mar. 30, 2021), https://nyti.ms/35PhQ4W.

issue at all.

1. Because officers struggling with a resisting arrestee may unavoidably violate the ban, the law invites arbitrary enforcement.

Section 10-181 prohibits an officer from "sitting," "kneeling," and "standing" on an arrestee's torso in a "manner that compresses the diaphragm." As the police experts made clear, such a restriction "places an impossible burden on a police officer making an arrest of a resisting suspect." R376. As Commissioner Kelleher observed, if an officer in a physical struggle applies pressure with his knee to the suspect's back, that might constitute "kneeling" under Section 10-181. R375. Yet Section 10-181 does not explain how officers are "to determine when some act in an arrest struggle is prohibited." R375. As Mayor Adams similarly observed, "[i]f you were ever put in a position where you had to wrestle with someone that was carrying a knife or dangerous instrument like an icepick, if you start saying that you can't touch the person's chest area, that's a big mistake." Raskin, *supra*.

Section 10-181 provides no standard to separate the unlawful use of force from a necessary, transient, or inadvertent one. The law does not require a minimum amount of pressure, duration, or injury. The absence of such standards is particularly egregious because an arresting officer could well be involved in a struggle in which her own life is at stake. As a result, officers may be forced to make "split-second judgments[] in circumstances that are tense, uncertain, and rapidly evolving" between saving their own lives and being subject to criminal liability. *Plumhoff v.*

Rickard, 572 U.S. 765, 775 (2014) (quoting *Graham v. Connor*, 490 U.S. 386, 396–97 (1989)).[6] Absent any meaningful standards governing the use of force in those circumstances, the law invites arbitrary enforcement.

2. The ban's problems are compounded by the absence of a scienter or injury requirement.

The law's problems are compounded by the absence of any requirement of mens rea or actual injury. The U.S. Supreme Court "has long recognized that the constitutionality of a vague statutory standard is closely related to whether that standard incorporates a requirement of mens rea." *Colautti*, 439 U.S. at 395. Unclear, strict-liability criminal statutes are "little more than a trap for those who act in good faith." *Id.* (quoting *United States v. Ragen*, 314 U.S. 513, 524 (1942)) (quotation marks omitted); *see also United States v. Cordoba-Hincapie*, 825 F. Supp. 485, 513 (E.D.N.Y. 1993) (noting "constitutional aversion" in both contexts "to capturing the unwitting person who did not seek to violate the law" (citing *Papachristou v. City of Jacksonville*, 405 U.S. 156, 162–63 (1972))). This Court has held that strict liability offenses require a "reasonable relationship between the public safety, health, morals or welfare and the act prohibited." *Munoz*, 9 N.Y.2d at

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[6] While the First Department recognized that the justification defense may permit the use of reasonable force under circumstances that overlap with the ban, that merely goes to show that the State has preempted the field of arrest regulations. *See infra* Part II. And in any event, the availability of the justification defense does not relieve City legislators of their constitutional obligations.

58 (collecting cases). And the federal courts have likewise sharply limited strict-liability crimes to heavily regulated actions that are "inherent[ly] danger[ous]." *United States v. Burke*, 888 F.2d 862, 866 (D.C. Cir. 1989) (citation omitted); *accord United States v. Moore*, 486 F.2d 1139, 1241 n.182 (D.C. Cir. 1973) (strict-liability or "regulatory" crimes are allowed because they are directed toward those who have "assumed" a "responsibility" to adhere to a higher standard of care).

Section 10-181's lack of a mens rea or injury requirement compounds its constitutional defects by drastically increasing the likelihood that officers may readily and inadvertently violate the provision. Had the law prohibited an officer from intentionally obstructing an arrestee's breathing, then it might have largely avoided this problem. Similarly, an injury requirement would have gone a long way to distinguishing transient uses of force from the kind of prolonged action in the George Floyd case. But as enacted, the ban creates "a standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections" with no boundaries to their discretion. *Kolender v. Lawson*, 461 U.S. 352, 358 (1983) (citation omitted). It cannot stand.

The First Department barely acknowledged these concerns. It sidestepped the lack of a mens rea requirement as "not dispositive" because criminal liability "always requires a 'voluntary act.'" R552 (citing N.Y. Penal Law § 15.10). But in the context of police use of force, the requirement of a "voluntary" act is not a

limiting factor. An officer may "voluntarily" struggle with a resisting arrestee, yet the law penalizes the kinds of actions that may foreseeably and unavoidably result from the engagement. That renders the ban effectively a strict-liability crime.

The First Department brushed aside the absence of intent because "[a] justification defense would also be available" under Penal Law Section 35.30. R552. But this Court in *Munoz* rejected an analogous argument in support of the City's law prohibiting the possession of a pen knife. 9 N.Y.2d at 57–58. In *Munoz*, as here, the City argued that a justification defense (proving that the knife was carried for a proper purpose) obviated any problem stemming from the lack of an intent requirement. *Id.* at 57. Yet this Court held that "[t]his language does not help to save the validity of the section, but only renders it more obscure and contradictory." *Id.* The Court reasoned that the only reason to remove intent as an element and to make it relevant only to an affirmative defense would "be to enable prosecution of those whom the police believe to be bad boys or girls." *Id.* at 58. The same goes here: the City's only reason for omitting the intent requirement is to provide prosecutorial latitude of exactly the sort that *Munoz* forbids.

Finally, as to the statute's lack of an injury requirement, the First Department took comfort in the "other statutory conditions for liability": the "compression of the diaphragm," that the officer must have "sat, kneeled, or stood on a person's chest or back," and that this action must have "restricted the flow of air or blood." R552–53.

But requiring that the officer's compression "restricts the flow of air or blood" in some measure and for some duration does not weed out inadvertent and transient violations. The absence of both injury and intent requirements reflects an open invitation to arbitrary enforcement.

C. The Diaphragm-Compression Ban Cannot Be Severed from the Chokehold Ban.

Once the diaphragm-compression ban falls, the City's theory of severability must as well. Even if the City had preserved its severability argument, which it first advanced in its reply brief in Supreme Court, it is without merit.[7] The City initially argued for a theory of severability that would have *expanded* the scope of Section 10-181: it asked the court to excise the phrase "compresses the diaphragm," such that the law would then prohibit any "sitting, kneeling, or standing on the chest or back, in the course of effecting or attempting to effect an arrest." R482. In other words, the ban would then read as a blanket prohibition against any such actions by the officer, no matter whether the actions had the effect of compressing the diaphragm or otherwise obstructing breathing.[8] Supreme Court correctly rejected

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[7] The City's failure to advance this theory in its opening brief below constituted waiver. *See, e.g.*, *O'Sullivan v. O'Sullivan*, 206 A.D.2d 960, 960 (2d Dep't 1994).

[8] It is hardly surprising that the City would make such an argument, since that would seem to be the practical effect of the law: by enacting a vague diaphragm-compression ban, the NYPD has had no choice but to train its officers not to sit,

the City's efforts to sever the diaphragm-compression ban and prohibit any act of sitting, standing, or kneeling. R22–23.

The City's alternative theory of severability, which it presented for the first time to the First Department, fares no better. Whether a court should sever an unconstitutional provision depends on "whether the Legislature . . . would have wished the statute to be enforced with the invalid part exscinded." *People ex rel. Alpha Portland Cement Co. v. Knapp*, 230 N.Y. 48, 60 (1920); *see Nat'l Advert. Co. v. Town of Niagara*, 942 F.2d 145, 148 (2d Cir. 1991) (citing *Knapp*). Here, the City Council had previously considered an earlier version of Section 10-181 that contained only the chokehold ban. But it was not until the diaphragm-compression ban was "added to the chokehold ban previously proposed," R571, that the proposal became law. The City cannot argue that the legislature would have wanted the statute to be enforced with the invalid part removed when the City Council previously rejected the very statute that would result from the City's excision.

II. SECTION 10-181 IS PREEMPTED BY STATE LAW.

In addition to Section 10-181's due process problem, the provision is preempted by New York law. State law comprehensively regulates the who, what,

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stand, or kneel on arrestees *in any circumstances*, making the law essentially a blanket ban on standing, sitting, or kneeling on arrestees.

when, and where of police arrest authority. Taken together, New York has pervasively regulated the circumstances of law enforcement arrests. It has expressly authorized the use of reasonable force and identified those means of restraints, such as chokeholds, that are prohibited. The City's law directly conflicts with the balance struck by the State, both with the state chokehold ban and the state's pervasive set of regulations of officer/arrestee interactions.

New York recognizes two forms of preemption: field preemption and conflict preemption. *See In re Chwick v. Mulvey*, 81 A.D.3d 161, 167 (2d Dep't 2010). Both arise out of New York's "home rule provision," which is the source of local legislative power. N.Y. Const. art IX, § 2(c); *see Chwick*, 81 A.D.3d at 167. Field preemption occurs when a locality inserts itself into a field over which the State Legislature "has assumed full regulatory responsibility." *Chwick*, 81 A.D.3d at 167. Conflict preemption occurs when a local law "directly conflicts" with a state law. *Id.* The preemption doctrine "is a significant restriction on a local government's home rule powers," since it "embodies 'the untrammeled primacy of the Legislature to act . . . with respect to matters of State concern.'" *People v. Diack*, 24 N.Y.3d 674, 679 (2015) (quoting *Albany Area Bldrs. Assn. v Town of Guilderland*, 74 N.Y.2d 372, 377 (1989)). Section 10-181 is preempted in both ways.

A. Section 10-181 Is Field Preempted.

Section 10-181 is field preempted by the State Legislature's scheme to

regulate the protocols of an arrest and the use of force during arrest. Field preemption is implied by a "comprehensive and detailed regulatory scheme in a particular area." *Diack*, 24 N.Y.3d at 679 (quoting *Consol. Edison Co. of N.Y. v. Town of Red Hook*, 60 N.Y.2d 99, 105 (1983)). It springs from "the nature of the subject matter being regulated and the purpose and scope of the State legislative scheme, including the need for State-wide uniformity in a given area." *Id.* (citation omitted). For preemption purposes, a "field" can be very specific. For example, in *Consolidated Edison*, this Court invalidated a local law "because the Legislature has pre-empted such local regulation in the field of siting of major steam electric generating plants." 60 N.Y.2d at 105.

State law provides a comprehensive and detailed scheme governing arrests, as well as a specific statute targeting airway obstructions during arrests, the very same issue as Section 10-181. New York law delineates the circumstances under which a police officer may arrest someone, N.Y. Crim. Proc. Law §§ 140.10(1)–(2), (4)–(6), where an officer may effect an arrest, *id.* § 140.10(3), and when an arrest may be effected, *id.* § 140.15(1). State law also specifically gives police officers a right to "use physical force when and to the extent he or she reasonably believes such to be necessary to effect [an] arrest." N.Y. Penal Law § 35.30(1).

In addition, the State Legislature adopted specific protections against airway obstructions during arrest. Just one week before the diaphragm-compression ban,

the State adopted Section 121.13-a of the Penal Code, which makes it a class C felony for police to obstruct breathing or blood circulation, thereby causing serious physical injury or death. That provision was adopted specifically to regulate NYPD arrests, because the committee concluded "that the NYPD's ban on the use of chokeholds is not sufficient to prevent police officers from using this method to restrain individuals whom they are trying to arrest." R349 (committee report excerpt). And the State Assembly bill specifically identifies the NYPD's use of chokeholds, including the Eric Garner incident, as the reason for the bill. N.Y. State Assemb., Mem. in Support of Legislation, A6144B (as revised, June 8, 2020). The State thus regulated the same area as the City and for the very same reasons.

The legislative debate around Section 121.13 reinforces this preemptive choice. The debate was focused not only on chokeholds but also on the potential more broadly for asphyxiation, including considerable discussion about the death of George Floyd. Senator Goodell, who supported the bill, described Mr. Floyd's death as "certainly unjustified" and likely amounting to felony manslaughter under existing New York law. N.Y. State Assemb., Transcript of Debate, at 7 (remarks of Sen. Goodell) (June 8, 2020). Senator Mosley, the bill's sponsor, also engaged with Senator Goodell in a lengthy colloquy regarding the parameters of existing liability. *Id.* at 8–13. Senator Vanel, too, spoke at some length about the George Floyd incident. *Id.* at 18–19. There is no serious argument here that the State Legislature

failed to consider the Floyd incident or the full scope of the problem. Yet New York made a conscious decision to criminalize only intentional chokeholds that result in injury.

This Court's decision in *Diack* found field preemption in analogous circumstances. 24 N.Y.3d 674. In *Diack*, the State had enacted sex offender residency restrictions for certain categories of offenders, but a local law went further, barring all sex offenders from residing near schools or parks. *Id.* at 683. This Court recognized that the local law had not directly contradicted the state scheme but found this "of no moment," because the State had demonstrated, through its comprehensive regulatory regime, an intent to occupy the whole field of "sex offender management." *Id.* at 682. So too here. Section 10-181 goes well beyond Section 121.13-a by introducing additional restrictions and by removing both the scienter and injury requirements contained in the state law. Even if Section 10-181 could be viewed as merely imposing an additional restriction, it intrudes on a field that the State Legislature directly and pervasively regulated.

The Second Department reached a similar conclusion in *Chwick*, which held that the state penal law occupied the field of firearms regulations, striking a local ordinance that banned the possession of "deceptively colored" firearms. 81 A.D.3d 161. Although state law said nothing specifically about firearms' coloration, it contained extensive requirements regarding firearms licensing. *Id.* at 172. Despite

the fact that the local ordinance did not directly touch upon licensing, the court found that the State's "comprehensive" scheme left too little "room for local ordinances to operate." *Id.* Here, the state scheme goes even further than the state laws in *Chwick*, since it touches specifically on the question of preventing asphyxiation during arrests.

The First Department offered only a cursory analysis to the contrary. It did not discuss the various state laws that regulate this area. Instead, it merely asserted that such laws did not "clearly evince a desire to preempt the field," without identifying the "field" at issue. R551. The court thus did not consider whether the State had already occupied the specific field of asphyxiation-inducing restraints or the broader field of officer conduct during arrests.

In addition, the Appellate Division cited its own decision in *PBA v. City of New York*, 142 A.D.3d 53 (1st Dep't 2016), in rejecting preemption. R551. Yet that case addressed whether the State's criminal-procedure law "preempted the area of antidiscrimination" in police practices. *PBA*, 142 A.D.3d at 59. The court reviewed the state criminal procedure code and found that it did not evince legislative desire "to preclude localities from addressing the discriminatory conduct of law enforcement officers." *Id.* at 61 (citing *N.Y. Trap Rock Corp.*, 57 N.Y.2d at 378). Here, in contrast, the New York State Legislature considered the very same problem at the very same time as the City and made a very different judgment. There

is ample evidence that the State Legislature's specific arrest-protocol regulations occupied the entire field of use of force during an arrest.

B. Section 10-181 Is Conflict Preempted.

Section 10-181 is also conflict preempted because it criminalizes behavior that state law expressly allows. Where the State allows them to use reasonable force to effectuate an arrest, other than what is expressly prohibited, the City would identify additional restrictions. The City's home-rule authority does not permit it to disrupt the balance struck by the state legislature on the very same subject.

A local law is preempted if it "prohibit[s] what would be permissible under State law . . . or impose[s] prerequisite additional restrictions on rights under State law." *Consol. Edison*, 60 N.Y.2d at 107–08 (citations omitted; cleaned up). Here, New York not only regulates the same area as the City's diaphragm-compression ban, but it also strikes a very different balance of what it prohibits and what it permits. In adopting its own chokehold ban, the Legislature specifically preserved conduct necessary to effect an arrest. It made clear that the new law "'does not bar any affirmative defenses or justifications for the use of force . . . as outlined in Section 35.30 of the Penal Law,' and as such is not a strict liability offense." Governor's Mem. of Approval, Assemb. B. 6144-B (June 12, 2020). And the Governor's approval memorandum specifically cited the justification defense—which authorizes reasonable physical force to effect an arrest—as essential to

adoption of the state chokehold ban. *Id.* Thus, the state chokehold ban and the justification defense together establish that officers may use any force reasonably necessary to effect an arrest, but may not intentionally employ a chokehold or similar obstruction that causes death or serious injury.

Section 10-181 conflicts with these provisions by prohibiting reasonable uses of force by police that state law has specifically authorized. Section 10-181 creates a carve-out from these provisions for even accidental, momentary applications of force during an arrest. Section 10-181 is not a generally applicable assault provision, but rather a law specifically directed at "arrests." That creates a clear conflict with state law. R551.

The Second Department applied this principle in *Sunrise Check Cashing & Payroll Services, Inc. v. Town of Hempstead*, which found preemption where a local law prohibited check-cashing businesses outside specific zoning districts. 91 A.D.3d 126 (2d Dep't 2011). State banking laws required a state regulator to determine whether an applicant for a check-cashing license was established "in an appropriate location." *Id.* at 138. The local law's zoning requirements did not necessarily conflict with state law, yet the court held that the local ordinance's "direct consequence" was to "render illegal what is specifically allowed by State law," namely, the state-sanctioned right of check-cashing businesses to operate at approved locations. *Id.* at 134 (citation omitted). Put differently, "a right or benefit

which was expressly given by State law has been curtailed or taken away by" the local law. *Id.* at 139 (citation omitted; cleaned up). Here, too, the local law strips officers of a right granted to them by state law: to defend themselves by using reasonably necessary force during an arrest.

The First Department acknowledged the availability of the justification defense but did not appreciate that such a defense underscores the case for preemption. R552. Section 10-181 has disturbed the considered balance by shifting the burden to officers: conduct that state-law permits becomes conduct that the officer must prove to avoid conviction. And it is cold comfort to police officers to tell them that they may not be able to avoid *prosecution*, but that they should be able to avoid *conviction*. As a practical matter, NYPD advises police officers to avoid this situation entirely by refraining from standing, sitting, or kneeling on arrestees all together. But that is no answer to preemption, since every instance of conflict between state and local law could be "avoided if the regulated actor had simply ceased acting." *Mutual Pharm. Co. v. Bartlett*, 570 U.S. 472, 488 (2013). The City's law thus frustrates the purposes and objectives of state law by discouraging officers from reasonable and effective uses of force authorized under state law.

The First Department viewed the state law as a regulatory "floor" that the City was free to exceed. R551 (citing *McDonald v. N.Y. City Campaign Finance Bd.*, 117 A.D.3d 540, 541 (1st Dep't 2014)). Yet New York State already struck the

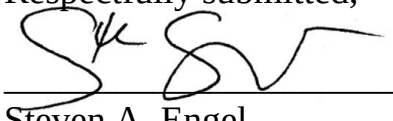
balance by prohibiting dangerous chokeholds but otherwise authorizing reasonable force. The City does not just "raise the bar"—instead, it would disrupt that balance by prohibiting otherwise reasonable acts that compresses the diaphragm. *See, e.g.*, *Pusatere v. City of Albany*, Index No. 909653-21, Doc. 76 (Decision/Order), at 1–3 (N.Y. Sup. Ct. Albany Cnty. June 30, 2022) (finding a local housing law barred by conflict preemption when it imposed additional procedural requirements on landlords seeking to evict tenants otherwise eligible for eviction under state law). And the wide berth for prosecutors to bring charges under this uncertain ordinance will only further disincentivize officers from undertaking the conduct that state law has approved. In the face of conflict between state and local law, the New York Constitution makes clear that the City law must yield.

CONCLUSION

For the reasons explained, the judgment below should be reversed.

Dated: New York, NY
December 16, 2022

Respectfully submitted,



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CERTIFICATE OF COMPLIANCE

I hereby certify pursuant to Rule 500.13(c) that the foregoing brief was prepared on a computer using Microsoft Word.

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STATE OF NEW YORK)		**AFFIDAVIT OF SERVICE**
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I, Tyrone Heath, 2179 Washington Avenue, Apt. 19, Bronx, New York 10457, being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age and resides at the address shown above.

On December 16, 2022

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Sworn to before me on
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Mariana Braylovskiy

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