To be Argued by:
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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)

REPLY 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.

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PRELIMINARY STATEMENT

Like the First Department below, the City of New York avoids grappling with the record as it was developed before the trial court. Supreme Court granted summary judgment in the PBA's favor after police and medical experts testified, without contradiction, that officers involved in struggles with a resisting arrestee cannot know whether the pressure they apply "compresses the diaphragm." In marked contrast with other statutes prohibiting dangerous restraints, including the one that the New York State Legislature adopted at the very same time, the City Council adopted a novel and vague standard and chose to dispense with injury and intent requirements, thus leaving officers with no choice but to gamble on prosecutorial discretion or a justification defense at a criminal trial.

Before this Court, the City claims that Section 10-181 merely "codified" existing practice, relying heavily upon the fact that the NYPD's Patrol Guide has long directed officers, "whenever possible," to "avoid tactics, such as sitting or standing on a subject's chest." *See* City Br. 6 (quoting 1994 Patrol Guide). But this is demonstrably untrue. The preexisting Patrol Guide set general standards, recognized that departures would unavoidably occur, and made no mention of the contested phrase, "compresses the diaphragm." Section 10-181(a) did not "codify" any existing policy when it adopted an entirely new standard and rendered transient and inadvertent violations a crime.

The fact that Section 10-181 departs from existing practice, and the practice in other jurisdictions, is precisely why the Mayor, the Police Commissioner, two District Attorneys, and many other public officials all previously expressed doubt about its constitutionality. It is why medical doctors and police experts appeared and testified against the law before the trial court, and it is why Justice Love found that, under the record below, the law did not provide fair notice to the officers who might run afoul of it.

The question before this Court is not whether the City Council might reasonably have wanted to act in response to the tragic death of George Floyd, but whether the words of this resulting criminal prohibition stand up to constitutional scrutiny. Despite advice from the NYPD and others, the City Council chose an unworkable standard and declined to include any requirement that officers knowingly violate it or cause any injury. In the absence of basic limitations to protect officers operating in good faith, Supreme Court correctly confirmed that there is no way for an officer to evaluate whether pressure imposed on the torso "compresses the diaphragm," and no way to avoid the potential for transient compression among the hundreds of arrests that occur in New York City each day.

The City argues that an officer charged with a crime for violating this standard can invoke a justification defense or introduce expert testimony bearing on whether the actions in fact compressed the arrestee's diaphragm. But due process requires

fair notice before a law enforcement officer may be charged with a crime. A prohibition on actions taken "in a manner that compresses the diaphragm" does not provide that notice because officers cannot know what impact pressure on the chest or back has on the internal functioning of the arrestee's muscle. Officers are not obliged to risk prosecution and hope that the reasonable-doubt standard saves them from criminal liability simply for doing their jobs.

The City likewise cannot explain how the City Council's action is consistent with the judgment that the State Legislature made just one week before the adoption of Section 10-181. This is not a case where the City is seeking to employ its local authority to address a matter that fell within gaps left by the State Legislature. Instead, the State Legislature and the City Council addressed the same issue, at the very same time, but the State Legislature limited criminal prohibitions to intentional acts that cause serious harm. The City does not identify another instance where a locality sought to modify the choice of the State Legislature on an identical topic.

In enacting Section 10-181, the City trespassed on the web of policy judgments that the State Legislature had made concerning arrest protocols generally and dangerous restraints specifically. The State's prohibition on "aggravated strangulation" targets the very same conduct as Section 10-181, but in so doing, it draws very different lines. When the Legislature has so clearly spoken to the very matter at issue, the New York Constitution preempts an effort by the City Council

to adopt a different policy choice.

ARGUMENT

I. THE DIAPHRAGM-COMPRESSION BAN VIOLATES DUE PROCESS.

A. The Ban Criminalizes Conduct Based on Its Unknowable Effects.

The City argues that the diaphragm-compression ban is clear because "compress" and "diaphragm" are English words whose meanings can be found in the dictionary. City Br. 24. Yet that argument misunderstands why the trial court held the law to be unconstitutionally vague. Under well-established caselaw, due process bars a criminal statute from prohibiting conduct based on its unknowable effects. PBA Br. 18–20.

As Supreme Court recognized, 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)). By prohibiting restraints where they "compress[] the diaphragm," the ordinance presumes that officers can know the impact that transient pressure may have on an internal muscle within the thoracic cage. But putting pressure on an arrestee's chest or back will not necessarily "compress the diaphragm." As Dr. Oppenheimer testified, there is no "practical way[]" for an officer to tell "whether or how diaphragm function is being affected" during an arrest. R425; *see also* R387 ("During a struggle while attempting to make an arrest, an officer will not be able to know" the effect "external compression of the thoracic cage may be having on

breathing." (testimony of Dr. Lettieri)). As a result, Section 10-181 "places an impossible burden on a police officer making an arrest of a resisting subject." R376 (Commissioner Kelleher); *see also* R410 (similar) (Captain Monaghan). Section 10-181 thus founders on the proposition that a criminal prohibition is void for vagueness where the defendant cannot reasonably know when her actions would violate it. PBA Br. 18–20.

1. The City's Position Runs Contrary to Well-Established Caselaw.

On appeal, the City argues that the PBA's cases are distinguishable, but saying it does not make it so. In *Colautti v. Franklin*, the Supreme Court struck down a statute prohibiting a doctor from conducting an abortion where the fetus "is viable" or "may be viable" on the ground that these "confusing and ambiguous" restrictions failed to provide doctors with notice when they might face liability. 439 U.S. 379, 394 (1979). As with the diaphragm-compression ban, a doctor could not know whether the fetus had reached the point of viability, much less whether it "may be viable."

The City seeks to distinguish *Colautti* on the ground that the statute's "dual prohibitions" were not "sufficiently detailed and differentiated." City Br. 32. But that ignores the Court's detailed consideration of the "uncertainty of the viability determination itself," which turned on many different medical circumstances, as well as the fact that reasonable physicians might not agree whether and when the fetus

"has advanced to the stage of viability." *See Colautti*, 439 U.S. at 395–96.

The Court therefore struck down the law in *Colautti* because it contained no meaningful protection for doctors who wanted to comply, but could not predict what prosecutors and juries might later say given the uncertainty of the standard. And as in the case of Section 10-181, the vagueness problem was "compounded by the fact that the Act subjects the physician to potential criminal liability without regard to fault." *Id.* at 395. As *Colautti* explained, "the constitutionality of a vague statutory standard is closely related to whether the standard incorporates a requirement of *mens rea*." *Id.* This is precisely the case here, where the officer cannot know the effect of his actions at the time of the incident, and the statute provides no advance protection where the officer did not intend to violate it.

While the City seeks to dismiss *Colautti* as a case involving what the Supreme Court had recognized to be a constitutional right, City Br. 32, the Court did not rest its decision on that ground. It merely emphasized that the prevailing vagueness standard "*appears to be especially true* where the uncertainty induced by the statute threatens" a constitutional right. 439 U.S. at 391 (emphasis added). The Court's analysis relied upon cases recognizing that due process requires fair notice before criminal liability may be imposed, even when no other constitutional right was

implicated.[1]

Apart from *Colautti*, the City also fails to reckon with this Court's precedents, which similarly confirm that criminal liability may not depend upon the unknowable impact that conduct may have on others. Thus, this Court has voided noise restrictions that depended upon whether a sound "annoyed" or "disturbed" others. *See People v. Golb*, 23 N.Y.3d 455 (2014); *People v. N.Y. Trap Rock Corp.*, 57 N.Y.2d 371 (1982). The City dismisses these cases as involving "laws that are highly subjective, abstract, or open-ended," City Br. 30–31, but that is hardly a ground for distinction. Like Section 10-181, these statutes were not "informative on [their] face," *N.Y. Trap Rock Corp.*, 57 N.Y.2d at 378, and a defendant could not know with reasonably clarity whether his action would violate the statute, *id.* at 380–81.

2. Supreme Court Correctly Found that Officers Could Not Know When Their Actions "Compress the Diaphragm."

Ultimately, the City cannot overcome the record below, which establishes no material factual dispute over whether an officer may know when a maneuver "compresses the diaphragm." PBA Br. 20–23. Before the trial court, the PBA established that an officer can neither "see what is happening internally" to an

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[1] *See, e.g., United States v. U.S. Gypsum Co.*, 438 U.S. 422, 434–46 (1978); *Papachristou v. Jacksonville*, 405 U.S. 156, 163 (1972); *Boyce Motor Lines v. United States*, 342 U.S. 337, 342 (1952).

arrestee nor "tell what may be happening with the diaphragm." R425. The City did not produce *any conflicting evidence*, relying instead on training materials that defined the diaphragm and told officers not to sit, stand, or kneel on an arrestee. Yet, as the trial court recognized, the NYPD's training materials "simply ignored the issue entirely by simply imposing a blanket ban on any activity that could lead to even the possibility of compressing the diaphragm." R20.

Saddled with this record, the City offers a desultory defense of the First Department's dismissal of the expert testimony as opinions going to "the ultimate legal issue." R554; *see* City Br. 51. Yet the four experts plainly addressed the facts that *inform* the ultimate issue, not the ultimate issue itself. *See, e.g.*, R425 (an officer cannot tell "whether or how diaphragm function is being affected" during an arrest or "see what is happening internally" (Dr. Oppenheimer)). The experts' conclusion that an officer cannot know when he is violating the ban reflects a factual judgment, not a legal conclusion. And if the City wanted to contest those matters, then the time to do so was before the trial court. While the City suggests that this expert testimony should instead be introduced in "defending against a criminal prosecution if and when brought," City Br. 40, that completely ignores the fact that a police officer has a constitutional right not to be prosecuted under an ordinance that fails to provide fair notice in the first place.

According to the City, "an officer facing prosecution" could simply offer this

testimony to "argu[e] that the law was not violated." City Br. 49. The City thus believes that officers should do what they need to do, risk and suffer prosecution, and then argue to the jury that the law they stand accused of violating *cannot be complied with*. If this were the law, then it would obviate the void-for-vagueness doctrine. Yet due process does not require citizens to "guess" the meaning of criminal statutes. *People v. Dupont*, 107 A.D.2d 247, 253 (1st Dep't 1985). Instead, it guarantees "adequate warning of what the law requires." *Stuart*, 100 N.Y.2d at 420–21.

B. In Defending the Law, the City Relies Primarily on Regulatory Cases Involving Greater Precision, Mens Rea, and Civil Consequences.

The City defends the First Department's decision by arguing that this Court "has not required a high degree of precision in criminal or civil statutes." City Br. 29–30. Yet none of these cases involved a criminal prohibition like Section 10-181, and most involved challenges to civil ordinances, which are subject to a "less strict vagueness test." *Hoffman Estates v. Flipside*, 455 U.S. 489, 498 (1982). As the Supreme Court has explained, sophisticated businesses are capable of conforming their conduct to economic regulations, and there is thus a "greater tolerance of enactments with civil, rather than criminal, penalties because the consequences of imprecision are qualitatively less severe." *Id.*

For this reason, the City can hardly rely upon this Court's recent decisions in

Independent Insurance Agents & Brokers of New York, Inc. v. New York State Department of Financial Services, 39 N.Y.3d 56 (2022), and *Town of Delaware v. Leife*, 34 N.Y.3d 234 (2019). The first case rejected a challenge by the life-insurance industry to administrative regulations restricting their sales to clients; and notably, in that case, the agency's regulation expressly defined each of the challenged terms. *See Indep. Ins. Agents*, 39 N.Y.3d at 65 (rejecting challenges to the terms "recommendation," "suitability information," and "best interest"). As for *Leife*, the Court there held only that the owner of a 68-acre property had reasonable notice that he needed to obtain a permit before deciding to host a three-day music concert. 34 N.Y.3d at 248.

Similarly, in *Gold v. Lomenzo*, this Court upheld the suspension of the license of a real estate broker for "demonstrated untrustworthiness"—a term "sufficiently certain to real estate brokers" guided by the "standards of that calling"—after the broker had been found to have cheated a client. 29 N.Y.2d 468, 477–78 (1972). *Freidman v. State* upheld the removal of a judge "for cause," recognizing that such a standard had been defined in several past cases. 24 N.Y.2d 528, 539 (1969). And *Kaur v. New York State Urban Development Corp.* upheld the authority of an administrative agency to cite the owner of a blighted property for maintaining a "substandard or insanitary area." 15 N.Y.3d 235, 262 (2010). The challenged term there was defined in the text, and the Court held that while "blight" may be an

"elastic concept," it is nonetheless knowable and definable. *Id.* at 256. None of these cases supports the constitutionality of Section 10-181's criminal prohibition.

Nor do the two New York criminal cases cited by the City. In *People v. Kozlow*, the Court rejected, in a few words, a defendant's alternative argument that a statute prohibiting the knowing dissemination of indecent materials to a minor would be unconstitutionally vague because of its use of the word "depicts." 8 N.Y.3d 554, 561 (2007). The statute required knowing conduct and had a readily understandable meaning. And in *People v. Stephens*, the Court upheld a Syracuse noise ordinance that prohibited "'unnecessary noise' based on an objective standard—specifically, 'a reasonable person of normal sensibilities.'" 28 N.Y.3d 307, 314 (2016). The ordinance listed "ten non-exclusive standards to be considered" in making that determination, including whether the noise could "be heard over 50 feet from such person's car on a public road." *Id.* Given that level of precision, the Court found that statute "sufficiently definite" to provide fair notice and thus distinguishable from past noise ordinances that had been held unconstitutionally vague. *Id.*

The City also cites a number of federal cases that it believes rejected "similar arguments." City Br. 42. Yet in those cases, while the defendants argued that there was uncertainty about when the legal standard had been violated, they did not show fundamental uncertainty concerning what the standard meant in the first place, and

the courts recognized that any uncertainty over meaning was significantly cabined by mens rea requirements. Thus, in *Kolbe v. Hogan*, a Maryland law prohibited the possession of identified assault weapons or "copies" of those weapons made from parts of the banned weapons. 849 F.3d 114, 149 (4th Cir. 2017). The Fourth Circuit rejected the argument "that the typical gun owner would not know" whether a jury-rigged weapon involving the interchangeable parts of another was a prohibited copy. *Id.* at 148.

The other cases are to the same effect. *United States v. Paul* involved a "knowing" violation of the child-pornography laws, 551 F.3d 516, 525 (6th Cir. 2009), and *Interactive Media Entertainment & Gaming Ass'n v. Attorney General* concerned a statute "prohibit[ing] a gambling business from *knowingly* accepting" the proceeds of an illegal Internet wager, 580 F.3d 113, 116–17 (3d Cir. 2009) (emphasis added). As to *United States v. Gibson*, which involved a prohibition on a sex offender frequenting a place "primarily used by children," the Ninth Circuit specifically held that it would imply into the statute the requirement that the violation be committed "knowingly." 998 F.3d 415, 419 (9th Cir. 2021). None of these cases involved a circumstance where the defendant might not know, in the first instance, what it means to violate the statute and where the government claimed the authority to prosecute an individual for an inadvertent violation.

The same line of reasoning applies equally to the cases involving driving-

under-the-influence laws and noise-abatement statutes, which both the First Department and the City rely upon. City Br. 43–44 (citing *Henderson v. McMurray*, 987 F.3d 997 (11th Cir. 2021), *Stephens*, 28 N.Y.3d 307, *Bohannon v. State*, 497 S.E.2d 552 (Ga. 1998), *Sereika v. State*, 955 P.2d 175 (Nev. 1998), and *Fuenning v. Superior Ct.*, 680 P.2d 121 (Az. 1983)). As explained in the PBA's opening brief, all of these cases involved standards that are capable of true measurement and that a defendant can reasonably know he is approaching. PBA Br. 26.

By contrast, here, the diaphragm-compression ban is not so capable of objective measurement, because there is no clear meaning as to how and when the diaphragm is "compressed" by pressure on the upper body. While the City quotes the First Department's observation that officers "may tell when the pressure . . . is making it hard for the person to breathe," City Br. 45, that is not what the statute says. Section 10-181 does not even appear to require proof that the officer *knew* his actions were in fact preventing the arrestee from breathing. What is more, the City's atextual standard is hardly clearer as a standard for *criminal* prosecution, and it amounts effectively to an admission that the statute's actual text is not good enough.

C. The Diaphragm-Compression Ban Invites Arbitrary Enforcement.

The City is also unable to rebut the fact that the diaphragm-compression ban "invites arbitrary enforcement" by punishing unavoidable, de minimis contacts. *Johnson v. United States*, 576 U.S. 591, 595 (2015). The ordinance invites wide

discretion, allowing prosecutors to pick among defendants, particularly given the absence of any mens rea or injury requirement.

First, the City states that "no special equipment is needed to assess [the] effect" of pressure on the movement of an arrestee's diaphragm. City Br. 34–35. This is a factual assertion, and the uncontested record stands to the contrary. R382, 387, 423–25. Plaintiffs' experts confirmed that measuring the ability of the diaphragm to move would require specialized medical equipment.

Second, the City claims that the phrase "sitting, kneeling or standing" provides an adequately "straightforward path for officers to avoid liability." City Br. 35–36. But the statute does not prohibit all "sitting, kneeling or standing" in connection with an arrest, and police experts made clear that such uses of pressure may be necessary, at least on a transient basis, to safely neutralize someone resisting arrest. The statute does not contain any standard to separate the unlawful use of force from a necessary, transient, or inadvertent one.

While the City argues that the Penal Law's general requirement of a "voluntary" act should be enough to save the ban, City Br. 36, there is a difference between a voluntary act and one taken with intention or knowledge. Even strict-liability crimes may involve voluntary acts. *See People v. Guevara*, 189 A.D.3d 455, 457 (1st Dep't 2020) (penal law's "voluntary action" requirement "is subsumed within the intent elements" of substantive crimes), *rev'd on unrelated grounds*, 37 N.Y.3d

1014 (2021). Here, it is not the case that the officer must "choos[e] to sit, kneel, or stand on an arrestee's torso," City Br. 36, and even if it were, that merely reads "compresses the diaphragm" out of the statute.

Finally, the City relies heavily on the justification defense as a way of narrowing the criminal prohibition. City Br. 36–39. As the First Department recognized, the justification defense would apply to prosecutions under Section 10-181, and Plaintiffs have never contended otherwise. But due process demands that a defendant receive fair notice beforehand of what actions would violate a criminal statute. The City cannot flip the order and force officers to defend the reasonableness of their conduct *after the fact*.

Indeed, this Court has previously rejected the notion that a justification defense can save a law without an intent requirement. *People v. Munoz*, 9 N.Y.2d 51 (1961). The City attempts to distinguish *Munoz* on the ground that the justification defense itself was unconstitutionally vague. City Br. 38–39. But the justification defense in *Munoz* was not itself attacked as unconstitutional. Rather, the government argued, as the City does here, that the defense might save an otherwise-vague law, and this Court squarely rejected the argument. *Munoz*, 9 N.Y.2d at 57–58.

The City suggests that, if necessary, the Court could save the law by "reading [a] scienter requirement into" the ban. City Br. 53. Section 10-181 would certainly be less vague if the Court concluded that an officer must intentionally compress the

diaphragm of the arrestee for the purpose of restricting his ability to breathe. But even with such an instruction, officers would still be hard-pressed to understand when their conduct had the prohibited effect on a muscle located within the arrestee's body.

At bottom, the City cannot explain why the City Council would adopt a criminal ordinance that lacks injury or mens rea requirements. In the absence of such restrictions, there is a genuine risk of arbitrary enforcement.

D. The Ban's Text Provides Insufficient Guidance.

The City repeatedly echoes the First Department's core mistake: attempting to give the inherently vague diaphragm-compression ban meaning by adding new criteria to its text. But criminal statutes must be "informative on [their] face," without resort to syllogisms or extratextual supplements. *N.Y. Trap Rock Corp.*, 57 N.Y.2d at 378.

Although the City contends that the terms "compress" and "diaphragm" are defined in the dictionary, City Br. 24–25, it still cannot explain how police officers may know when the application of force "compresses the diaphragm." The question is not whether each of these words has a definition, but whether the ban's prohibition may be objectively ascertained, in advance, by an officer. And the answer to that question, as established by Plaintiffs' expert testimony, is clearly no.

The City argues that the related chokehold ban in Section 10-181 involves a

parallel structure, prohibiting an officer from "compressing the windpipe or the carotid arteries on each side of the neck." While the absence of a mens rea or injury requirement may raise some questions about the chokehold prohibition, the two prohibitions are not in fact equivalent. There is a material difference between prohibiting an officer from grabbing a person's neck and putting pressure on the windpipe and arteries located just under the skin—a chokehold—and prohibiting an officer from imposing pressure "on the chest or back in a manner that compresses the diaphragm." In the former instance, the pressure is directly applied to the very part of the body affected. In the latter, the officers are expected to determine how pressure applied anywhere on the torso would impact the functioning of a muscle located in the lower abdomen. This they cannot do.

The City also seeks to provide meaning to the law by arguing that the Patrol Guide and police training materials clarify the diaphragm-compression ban. Yet as Supreme Court found, the training materials do not inform officers how they can tell whether the diaphragm is being compressed. R21. They merely instruct the officers what the diaphragm is and advise them to avoid standing, sitting, or kneeling in the course of making an arrest. R20–21. And even if the training materials said something useful, even official, agency-promulgated interpretive guidance cannot "cure an omission or add certainty and definiteness to otherwise vague language." *M. Kraus & Bros. v. United States*, 327 U.S. 614, 622 (1946). These police training

documents cannot render the vague diaphragm-compression ban constitutionally clear.

Faced with the limits of these training materials, the City admits that "the role of the training materials is to teach officers" and "not to explain the mean of a local law." City Br. 49. It then argues that "the NYPD is free to set stricter internal standards for its officers' behavior" than the law requires. *Id.* But Plaintiffs have not challenged that proposition or the composition of these materials; it was the City who introduced them before the trial court in an effort to clarify the vague diaphragm-compression ban.

Even if the training materials were somehow relevant, they provide no help to the City in its claim that Section 10-181 is clear. The City repeatedly argues that the NYPD's training materials, including a 29-year-old video, demonstrate that the ban is pellucidly clear. City Br. 25–26, 36. Yet the meaning of criminal statute must be "informative on its face." *N.Y. Trap Rock Corp.*, 57 N.Y.2d at 378. Commissioner Bratton, in 1994, did not set out to interpret what a 2020 ordinance would mean, and he could not have reduced the statute's vagueness, even if he had tried.

The authors of the 1994 video not only lacked clairvoyance, but there is nothing in the video that helps interpret the meaning of "compresses the diaphragm." Dr. Hirsch explains on the video that when the "abdomen is compressed," it may make it harder for the arrestee's "diaphragm to contract" in the course of breathing.

City Br. 7. Yet Section 10-181 does not prohibit an officer from "compressing the abdomen." In addition, as the City describes it, the NYPD video "instructed officers not to sit on an arrestee's back and to move arrestees on their side or into a seated position as soon as *practically possible*." City Br. 7 (emphasis added). In other words, the NYPD video recognizes that officers may restrain arrestees in ways that could violate Section 10-181, but it directs them to move them away from such constricted positions "as soon as *practically* possible."

Just like the video, the Patrol Guide's similar direction that "*[w]henever possible,* [officers] should make *every effort* to avoid tactics, such as sitting or standing on a subject's chest" demonstrates that the Section 10-181 standard is completely unworkable. City Br. 6–7 (emphases added). The Patrol Guide confirms the NYPD's view that it is *not always possible* for an officer to avoid sitting or standing on an arrestee in the heat of a struggle, but it does not otherwise explain what it means to "compress the diaphragm" of an arrestee.

In the end, the City may be correct that George Floyd's death highlighted the risks of positional asphyxia and gave the City Council a strong reason to try to do something to deter such conduct in New York City. City Br. 27–29. Yet the City cannot sincerely argue that Section 10-181 codified any existing practice, and the City Council's desire to do something does not mean that a vague criminal prohibition, which lacks an intent or injury requirement, may constitutionally be

applied against inadvertent and transient uses of force.

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

The City's theory of severability is not properly before this Court and is without merit, even if it were. The City Council considered the very result that the City advocates now—a freestanding chokehold ban—and rejected it. PBA Br. 34. The City cannot wish away this simple fact.

The City admits, as it must, that it did not raise its current severability theory before the trial court, yet it asserts that Plaintiffs "have no authority for" the proposition that it could waive severability. City Br. 58. But federal cases routinely find waiver under such circumstances. *See City of Hazleton v. Lozano*, 563 U.S. 1030 (2011); *Centro de la Comunidad Hispana de Locust Valley v. Town of Oyster Bay*, 868 F.3d 104, 118 (2d Cir. 2017). And the City does not itself cite any cases where the court accepted a severability argument despite the fact that the government had not advanced the argument or presented any evidence before the trial court concerning the legislature's intention.

On the merits, the City asks this Court to serve as a super-legislator and guess what kind of law the City Council might have wanted to adopt, contending that "the City Council has strongly supported a chokehold ban ever since Eric Garner's death." City Br. 54. Yet the City cannot deny that the City Council considered, but never adopted, such a measure. It was not until George Floyd's death and the

urgency it created that the City enacted Section 10-181, which combined the chokehold ban with the diaphragm-compression ban.

Finally, the City argues that the Court should apply "the City Administrative Code's default rule in favor of severability." City Br. 55. Yet "[t]he presence of such a clause . . . is not dispositive," especially where, as here, the clause is in a general code and not the "act" itself. *Nat'l Advert. Co. v. Town of Niagara*, 942 F.2d 145, 148 (2d Cir. 1991). Even so, the City's argument for a "default rule in favor of severability" begs the question of *which* rule of severability. Before the trial court, the City argued that the City Council wanted to excise "compresses the diaphragm" and expand the prohibition. Now, the City asks the Court to sever the entirety of the second prohibition and preserve the chokehold ban. Rather than re-writing the statute, the better practice is to find waiver, *see O'Sullivan v. O'Sullivan*, 206 A.D.2d 960, 960 (2d Dep't 1994), and to allow the City Council to address the issue on a blank slate following a decision of this Court.

II. SECTION 10-181 IS PREEMPTED.

A. Section 10-181 Is Field Preempted.

As the PBA argues in its opening brief, Section 10-181 is preempted by the State Legislature's "comprehensive and detailed regulatory scheme" in the general area of arrest protocols and in the more specific field of preventing airway obstruction during arrest. *People v. Diack*, 24 N.Y.3d 674, 679 (2015) (quoting

Consol. Edison Co. of N.Y. v. Town of Red Hook, 60 N.Y.2d 99, 105 (1983)); *see* PBA Br. 35–40.

The City dismisses the State's detailed arrest protocols because these measures were enacted at "varying times, and in differing circumstances," and are insufficiently "unified." City Br. 65–66 (quoting *Int'l Franchise Ass'n v. City of N.Y.*, 193 A.D.3d 545, 547 (1st Dep't 2021)). But neither *International Franchise Association* nor any other case holds that the State Legislature must adopt a statutory scheme all at once before the Court will conclude that it has occupied the field. And even if there were such a requirement, Penal Law 121.13-a, the state chokehold ban, would be more than sufficient to occupy the field of airway obstruction during arrests. Indeed, the legislative history indicates that the State Legislature considered the existing regulations (including Penal Code 35.30, the justification defense) at great length. PBA Br. 40. The City further ignores swaths of the criminal procedure code that address the how, when, and where of law enforcement arrests. *See* N.Y. Crim. Proc. Law §§ 140.10(1)–(6), 140.15(1).

The City is surely correct that the justification defense "continues to apply to any prosecutions under local law." City Br. 66. But that defense does not stand alone. Instead, it is part of a web of other state laws regulating arrests, creating a pervasive scheme concerning the obligations and liabilities of arresting officers, many of whom may operate across multiple jurisdictions in the state. The state

chokehold ban was specifically drafted and approved on the understanding that together with the justification defense, it would define the scope of an officer's liability in connection with potentially dangerous restraints. Governor's Mem. of Approval, Assemb. B. 6144-B (June 12, 2020). Together, state law thus provides that officers may use any force reasonably necessary to effectuate an arrest but may not intentionally employ a chokehold or similar obstruction that causes death or serious injury.

At the time the City adopted the ordinance, the State had considered the very same problem and adopted its own regulation. In so doing, the State Legislature drew its own conclusions, defining the scope of liability for arresting officers. By introducing additional restrictions and by removing both the scienter and injury requirements contained in the state law, the City struck a balance that directly impedes the operation of the State program. Section 10-181 thus "regulat[es] the same subject matter as a state law," and does so "inconsistent with the State's transcendent interest." *Chwick v. Mulvey*, 81 A.D.3d 161, 169 (2d Dep't 2010). It is therefore field preempted.

The City attempts to distinguish *Consolidated Edison* and *Chwick* on the ground that they involved "comprehensive regulatory scheme[s]," enacted all at once. City Br. 66–67. This simply ignores the state chokehold ban, which overlaps one-for-one with Section 10-181 and was enacted within days of that provision. It

also ignores the fact that the state chokehold ban was targeted specifically toward the NYPD. It is indisputable that the state law was enacted specifically to regulate the NYPD's arrest protocols, *see* R349, and that the catalyst for both laws was George Floyd's death. PBA Br. 36–38.

The City tries to distinguish *Diack* on the ground that *Diack*'s sex-offender registry bore a special need for uniform application across the state, as it "prevent[ed] a community from attempting to shift its responsibility for housing sex offenders onto other communities." City Br. 65. But nothing in *Diack* says that implied preemption requires a special need for uniformity. Neither *Consolidated Edison* nor *Chwick* involved any such need. And here, the state chokehold ban was targeted specifically toward the NYPD. The City identifies no evidence that the Legislature was concerned with any other police force in the state.[2]

B. Section 10-181 Is Conflict Preempted.

At bottom, the City cannot deny that the City Council enacted a criminal prohibition on police conduct just one week after the State Legislature adopted its

[2] The City dismisses the ample legislative history supporting this conclusion on the theory that it does not "indicate[] intent to occupy the regulatory field." City Br. 67. Like the First Department, the City does not define the "field" and ignores precedents of this Court demonstrating that a regulatory field can be defined very narrowly. *See* PBA Br. 36; *Consol. Edison*, 60 N.Y.2d at 105. Moreover, the City fails to contend with legislative history making clear that the Legislature acted with particular awareness of the George Floyd incident. PBA Br. 37–38.

own criminal prohibition on the very same subject—actions by arresting officers that pose a risk of asphyxiation. Whether or not the City should generally be disabled from regulating law enforcement arrests based upon the web of state laws, Section 10-181 clearly conflicts with the balance struck by the State Legislature in the summer of 2020, and is thus preempted.

The City first argues that Section 10-181 does not conflict with Penal Law § 121.13-a, the state chokehold ban, because the latter "does not address diaphragm compression" and does not "specifically authorize" it. City Br. 61. It follows, according to the City, that Section 10-181 "merely prohibits more conduct than state law does." City Br. 62. Yet as the PBA explained, PBA Br. 42–43, the State has struck its own balance by prohibiting injury-inducing chokeholds but otherwise authorizing the use of reasonable force. Section 10-181 does not simply add to the state's prohibitions; it answers the very same question the State answered, and it does so very differently. *Cf. Sunrise Check Cashing & Payroll Servs., Inc. v. Town of Hempstead*, 91 A.D.3d 126 (2d Dep't 2011) (local zoning requirements conflict-preempted even though they did not facially conflict with state law); *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) (law barred by conflict preemption when it imposed additional—but not inconsistent—requirements compared to state law).

The City seeks to distinguish *Sunrise Check Cashing & Payroll Services* on

the ground that "existing state licenses" for check-cashing businesses "conflicted with the local ordinance's restrictions." City Br. 61 n.42. But the local ordinance did not facially conflict with state law. The Second Department struck the local ordinance because its "direct consequence" was to "render illegal what is specifically allowed by State law." *Id.* at 134 (citation omitted). So too here: Penal Law § 121.13-a defines unlawful restraints, and Penal Law § 35.30 otherwise gives police officers a right under state law to exercise reasonable force. Section 10-181 chips away at that right.

The City emphasizes that the state and local laws impose completely different classes of criminal liability and that the state law contains a mens rea requirement. City Br. 62. But these differences highlight the conflict between how the City and the State Legislature chose to treat the very same issue. *See* PBA Br. 40–41.

Finally, the City argues that the justification defense—which specifically gives police officers a right to engage in the very maneuvers the diaphragm-compress ban prohibits—does not conflict with Section 10-181. City Br. 63–64. But Section 10-181 is preempted precisely because it requires officers to show that their state-authorized conduct does not violate local law. Section 10-181 is not just a generally applicable criminal-assault provision; it is a specific regulation of arrests and arrest protocols. It effectively creates a carve-out from State policy for even accidental, momentary applications of force. The City Council's action in

derogation of this state policy is preempted.

CONCLUSION

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

Dated: New York, NY
March 21, 2023

Respectfully submitted,

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NEW YORK STATE COURT OF APPEALS
CERTIFICATE OF COMPLIANCE

I hereby certify pursuant to 22 NYCRR PART 500.1(j) that the foregoing brief was prepared on a computer using Microsoft Word.

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Dated: March 20, 2023

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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 March 20, 2023

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Sworn to before me on
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Mariana Braylovskiy

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Commission Expires March 30, 2026

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