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 INTERNATIONAL UNION OF POLICE ASSOCIATIONS, AFL-CIO, BRIDGE AND TUNNEL OFFICERS BENEVOLENT ASSOCIATION, TRIBOROUGH BRIDGE AND TUNNEL AUTHORITY SUPERIOR OFFICERS

(For Continuation of Caption See Inside Cover)

REPLY BRIEF FOR PLAINTIFFS-APPELLANTS

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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.

Plaintiffs-Appellants Sergeants Benevolent Association of the City of New York, Lieutenants Benevolent Association of the City of New York, Captains Endowment Association of the City Of New York, Detectives' Endowment Association of the City of New York, Port Authority Police Benevolent Association Inc., Port Authority Detectives' Endowment Association, Port Authority Lieutenants Benevolent Association, Port Authority Sergeants Benevolent Association, Supreme Court Officers Association, New York State Court Officers Association, New York State Police Investigators Association, Local No. 4 of the International Union of Police Associations, AFL-CIO, Bridge and Tunnel Officers Benevolent Association, Triborough Bridge and Tunnel Authority Superior Officers Benevolent Association, Metropolitan Transportation Authority Police Benevolent Association, Police Benevolent Association of New York State and New York City Detective Investigators Association District Attorneys' Office

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PRELIMINARY STATEMENT

As Plaintiffs-Appellants explained in their opening brief, Section 10-181 regulates police conduct in the course of effecting or attempting to effect an arrest, but it uses language that is unconstitutionally vague. A key part of Section 10-181 makes it a criminal offense for a police officer to effect or attempt to effect an arrest by "sitting, kneeling, or standing on the chest or back in a manner that compresses the diaphragm." (R8.) The problem with Section 10-181 is that the phrase "in a manner that compresses the diaphragm" is unconstitutionally vague because it does not give a person of ordinary intelligence fair notice of what conduct is prohibited, and does not provide clear standards for enforcement, thereby unlawfully permitting arbitrary enforcement. (*See, e.g.*, Plaintiffs-Appellants' Opening Br. ("Br.") at 1–6.)

The City's opposition brief claims Section 10-181 is not vague because the key words in the statute—"in a manner that compresses the diaphragm"—are easily understood because they say the same thing that is said in NYPD Patrol Guide, or in a 1994 police training video, or because a patrol officer can guess about what might be happening with the diaphragm. None of this makes any sense. In effect, the City wants the Court to re-write Section 10-181. The City's opposition is based on pretending Section 10-181 says something it does not say.

For example, the City claims "[t]he law codifies restrictions that had previously appeared in the NYPD Patrol Guide" (Opp'n 6), but that is false. The

City points to language in the Patrol Guides that provides that "[w]henever possible, [officers] should make every effort to avoid tactics, such as sitting or standing on a subject's chest, which may result in chest compression, thereby reducing the subject's ability to breathe." (Opp'n 6–7.) The key phrase in Section 10-181 does not say that. Section 10-181 specifically says something different, something specifically referring to a "manner" of "compressing" the diaphragm, which is not explained or defined in the Patrol Guides.

The City also claims that Section 10-181's prohibition was explained in a 1994 training video (Opp'n 1, 7), but that too is false. The City says the training video informs officers that "if you're face down and your abdomen is compressed, it raises the abdominal contents and makes it more difficult for your diaphragm to contract." (Opp'n 7.) But the key phrase in Section 10-181 does not bar "compressing the abdomen." Section 10-181 says something different. The 1994 training video does not talk at all about compressing the diaphragm, and instead talks about how the diaphragm contracts.

Moreover, the unrebutted evidence in the trial court was that the phrase "in a manner that compresses the diaphragm" has no definite meaning. (R. 20–21.) The City effectively ignores the fact that all of the testimony and evidence support the position that no one can understand what exactly the key phrase purports to prohibit. (*See, e.g.*, Br. at 2–5.)

The City's reliance on dictionary definitions does nothing to make Section 10-181 comprehensible, because the statute's combination of words in the phrase "in a manner that compresses the diaphragm" is not common usage, not technical usage, and not defined or explained. All of the unrebutted evidence is that Section 10-181's combination of words is not comprehensible and provides no way for anyone—police officers, the public, district attorneys, or anyone else—to tell if it could ever have happened.

The City also points to the Appellate Division decision in this case, where it says Section 10-181 should be understood to bar pressure anywhere in the "vicinity" of the diaphragm. (Opp'n 17–18.) But that too is simply a re-writing of Section 10-181. The City Council could have passed a statute barring pressure in the "vicinity" of the diaphragm, but it did not do that. Nor did the City Council write Section 10-181 to say that any sitting, kneeling, or standing that may interfere with breathing is barred. Again, Section 10-181 says something quite different, something that has no clear meaning that can provide guidance to police officers or district attorneys.

This Court should not rewrite Section 10-181 because that is a function for the legislature. If there is a need for legislation that is not already covered by other State and local laws, then City Council can take that up and draft a law that can actually be understood and applied. Section 10-181 does not do that.

Nor has the City offered any cogent explanation for why Section 10-181 is not preempted. As written, Section 10-181 is in irreconcilable conflict with State law regulating the use of force by police officers, and allowing the law to stand will undermine the legislative balance struck by the State legislature.

This Court should reverse the Appellate Division's judgment and enter summary judgment in favor of Plaintiffs-Appellants.

REPLY ARGUMENT

I. SECTION 10-181 IS UNCONSTITUTIONALLY VAGUE

A. The City improperly seeks to rewrite Section 10-181

The City begins its brief by emphasizing a 1994 training video that it says explains how "applying body-weight pressure to the chest or back compresses the diaphragm and thus interferes with breathing." (Opp'n 1.) The City misrepresents this video, which does not say what the City claims on the first page of its brief. Dr. Charles Hirsch, the opining doctor in the video who never submitted any testimony to the trial court below, does not shed any light on the meaning of the phrase "compresses the diaphragm." He does not even utter the phrase. Instead, he uses wholly different terminology, such as whether the "abdomen is compressed," which he notes "raises the abdominal contents and makes it more difficult for [the] diaphragm to contract." (Opp'n 7.) Nothing is said about compressing the

diaphragm. What the video says is foreign to the phrase "in a manner that compresses the diaphragm" used in Section 10-181.[1]

The 2000 and 2013 NYPD Patrol Guides relied on by the City also fail to solve the problem with Section 10-181. The City points to NYPD training materials which "teach officers how to safely and lawfully effectuate an arrest." (Opp'n 49.) But as previously shown (Br. 29–30), these training materials do not explain the phrase "compresses the diaphragm." For that reason, the trial court rightly held that this reinforced "the inescapable conclusion . . . that the training materials fail to meaningfully address the legal definition of 'compresses the diaphragm.'" (R21.) The City claims the NYPD Patrol Guides and other materials have long counseled against "sitting or standing on a subject's chest, which may result in chest compression, thereby reducing the subject's ability to breathe." (Opp'n 6–7.) But what Section 10-181 actually says is something different. When the City Council enacted Section 10-181, it chose not to use the same language that was in the NYPD Patrol Guides. In the thousands of pages of Patrol Guide materials the City relies on—some 6,104 pages altogether—the phrase "in a manner that compresses the

[1] Moreover, this video was not part of the record submitted to the trial court, and was instead first raised at the Appellate Division in the City's briefing. (R574–75.) The City's failure to present such evidence at the trial court deprived Plaintiffs-Appellants of the opportunity to test this decades-old hearsay and should not be considered now. *See People v. Hicks*, 287 N.Y. 165, 174 (1941) ("Points raised by briefs, not properly presented by the record, are ordinarily not considered by the court.").

diaphragm" is never explained. The City's claim that Section 10-181 merely codifies the Patrol Guides (Opp'n 6), therefore, is false.

Nor does the City's collection of hearsay newspaper articles help anyone understand the meaning of Section 10-18. Consider the 1993 newspaper clipping that the City cites, which was also not part of the record below. It does not use Section 10-181's problematic phrase "in a manner that compresses the diaphragm," does not even mention the word "diaphragm," and instead addresses other issues, such as a bar-arm hold that can "crush[] the larynx" or a carotid hold that "compresses the carotid arteries in the neck and temporarily cuts off blood to the brain." (Opp'n 6 n.1.)

The City also collects statements found in disparate case law, but none of that case law actually discusses the phrase "in a manner that compresses the diaphragm." (Opp'n 8–9 (citations omitted).) Again, the City Council chose to use a vague phrase in Section 10-181 that is not used in any body of case law. These cases do not address the actual issue before the Court: what is meant by conduct that "compresses the diaphragm."

The City is thus engaging in the same effort at re-writing the statute that led the Appellate Division to rewrite Section 10-181 to prohibit sitting, kneeling, or standing "in the vicinity of the diaphragm." (R553.) This Court's role in construing Section 10-181 is to consider whether the ***text*** of the statute gives fair notice of what

it prohibits—not whether the City Council might have enacted a different statute. *See People v. Bright*, 71 N.Y.2d 376, 382 (1988). It is not this Court's role to rewrite Section 10-181. (*See* Br. 33 (citing *Sexauer & Lemke v. Luke A. Burke & Sons Co.*, 228 N.Y. 341, 345 (1920) (Cardozo, J.).)

Moreover, the combination of the words "manner," "compresses," and "diaphragm" are not meaningful when paired together, as all the expert evidence shows. Because "the diaphragm is not a compressible muscle given its anatomical location within the chest cavity and the direction of its contractile displacement" (R423 ¶ 2), it does not make sense to prohibit conduct "in a manner that compresses the diaphragm." Not every combination of words conveys a meaning. The City's reliance on dictionary definitions in no way explains the problems created by Section 10-181 when the City Council chose to use words that have no common usage, no technical usage, and no practical sense that can guide police, district attorneys, or the public.

The City's reliance on broad purposes, such as the "context" of the law's enactment (Opp'n 28), only further underscores that the City is unable to explain the text of Section 10-181. Contrary to the City's suggestions, no one denies that Section 10-181 was enacted in response to tragedies such as those suffered by Eric Garner or George Floyd. The problem is that the City Council's intentions were not translated into valid legislation. Criminal liability under Section 10-181 cannot turn

on a vague sense of what its drafters might have intended but did not write. This is also why the City is wrong that "the legislature codified a policy that had been in place for decades" through its enactment of Section 10-181. (Opp'n 29.) Codification of policy requires a pre-existing policy, and on this point the record is clear: there was never *any* policy prohibiting conduct "in a manner that compresses the diaphragm" before the enactment of Section 10-181.

Finally, Section 10-181's legislative history is not informative here, contrary to the City's suggestion. (Opp'n 28.) An officer of ordinary intelligence is fairly assumed to be aware of the text of a statute and thus be on notice as to what it requires of him or her. *Bright*, 71 N.Y.2d at 382–83. But the public is not charged even with "knowledge of Committee Reports." *United States v. R.L.C.*, 503 U.S. 291, 308–09 (1992) (Scalia, J., concurring).

Further, the City does not identify any legislative history shedding light on the meaning of "compresses the diaphragm." As Plaintiffs-Appellants have shown (Br. 12–16), members of the City Council and other government officials have already admitted the law is vague. Chairman Richards stated "the diaphragm portion of the bill, was left a little vague." (R322.) Speaker Johnson described the reference to a diaphragm as "subjective" and "not clear." (R325.) Councilmember Deutsch observed "there are serious issues with some of the bill's language." (R345.) Commissioner Tucker, testifying at a hearing for Int. No. 536-A, stated it was

"actually hard to imagine a scenario in which an officer would not open him or herself to criminal liability" and expressly recommended removing the words "diaphragm" and adding the word "intentional." (R344; 536-A Hr'g Tr. 62:3–5, June 9, 2020.) Deputy Commissioner Chernyavsky said the bill "doesn't make sense." (R344.) As these and other statements make plain, the City's reliance on legislative history and other statements contemporaneous to the enactment of Section 10-181 only confirms that Section 10-181 is vague.

B. The City improperly ignores the evidence and expert testimony presented to the trial court, all of which supports the conclusion that Section 10-181 is improperly vague

In contrast to the City's submissions, Plaintiffs-Appellants set forth evidence that actually does address the problematic text of Section 10-181 and which is the only record evidence on the meaning of "compresses the diaphragm." This unrebutted testimony from medical and police experts unanimously demonstrates that Section 10-181 is vague because "compresses the diaphragm" fails to give fair notice of what it purports to criminalize. (*See* Br. 23–29.)

The City offers no reasonable argument for why this testimony does not provide dispositive guidance. The City has no excuse for its irresponsible and obviously false statement that "Plaintiffs do not seriously contend that they're unable to understand what conduct the local law prohibits." (Opp'n 3.) That is exactly what Plaintiffs-Appellants argue. To cite just one example, Dr. Beno Oppenheimer opined

that "the diaphragm is not a compressible muscle given its anatomical location within the chest cavity and the direction of its contractile displacement." (*See* Br. 24–25; R423 ¶ 2.)[2] As a result, the phrase "compresses the diaphragm" is medically "vague and confusing," and for that reason the terms "diaphragmatic compression" or "compression of the diaphragm" are "not generally used or widely accepted in medicine to describe a mechanism with potential for impeding or limiting diaphragmatic function." (R423 ¶ 2, 425 ¶ 10.)

The City's primary rejoinder to this and other testimony is to mischaracterize it as presenting "factual questions" that are "relevant to the requirement of proof beyond a reasonable doubt." (Opp'n 49.) This makes no sense. The question before the Court is whether the text of Section 10-181 is so vague that it fails to provide fair notice and cannot be fairly enforced. The core of this inquiry is whether the City Council, in enacting a criminal statute subjecting officers to up to a year in prison, chose a phrase that can actually guide police, district attorneys, and the public. Section 10-181 is too vague to provide meaningful guidance. As Dr. Oppenheimer observes, the diaphragm is not compressible, and that means an element of the offense proscribed by Section 10-181 is necessarily unclear and vague and therefore

[2] The City complains that Dr. Christopher Lettieri did not parrot exactly what Dr. Oppenheimer said. (Opp'n 48.) Yet the City falls short of asserting—and rightly so—that these expert opinions are not consistent with each other. Each confirms that the key phrase in Section 10-181 cannot be understood.

incapable of a sound construction. Nor can a jury be asked to resolve this question of law. Section 10-181 simply fails to provide fair notice of what it prohibits, and for that reason the City is wrong that this facial challenge is improper: Section 10-181 is vague because "no standard of conduct is specified at all." *Coates v. City of Cincinnati*, 402 U.S. 611, 614 (1971). As a result, police officers "must necessarily guess at its meaning." *Id.* (citation omitted). It would be unconstitutional to wait to resolve this issue until an officer is charged with violating Section 10-181.

Lacking any response to the unrebutted expert testimony below, the City wrongly tells the Court to ignore it. This is more than a little ironic—the City literally begins its brief by invoking hearsay statements by a doctor from almost thirty years ago, despite failing to present that evidence at the trial court on summary judgment. Regardless, though, the City is mistaken that the testimony in the record should not be considered here. Expert guidance is frequently an essential tool for assessing the meaning of technical words in the law. (*See* Br. 23–24 (citing *Ord. of Ry. Conductors of Am. v. Swan*, 329 U.S. 520 (1947).)[3] While the City contends that

[3] *See also Nelson v. Sun Mut. Ins. Co.*, 71 N.Y. 453, 458–59 (1877) (finding, with respect to "port-risk," a "compound word and phrase," that "[w]e see no reason . . . why it was not proper at the trial to take the testimony of men expert in this business to explain to the court the meaning of this technicality."); *Atl. Mut. Ins. Co. v. Comm'r*, 523 U.S. 382, 387 (1998) (considering the technical meaning of "reserve strengthening" by evaluating testimony from trial experts, and after concluding that the term was ambiguous, applying *Chevron* deference to agency construction); *Shell Petroleum, Inc. v. United States*, 182 F.3d 212, 220 (3d Cir. 1999) ("Reliance on expert definitions of terms of art is a sound 'general rule of construction'" (citation

the rule in the United States Supreme Court's *Swan* decision is inapposite because it "did not involve a void-for-vagueness analysis" (Opp'n 52), this fails to appreciate the purpose of assessing such testimony, as made clear in *Swan* and many other cases. Construing a statute is the first step of assessing whether a statute is unconstitutionally vague, and it therefore follows that the City is wrong that the unrebutted expert opinions before the Court "have no place in plaintiffs' vagueness challenge." (Opp'n 22.) This testimony is directly relevant, and the City and Appellate Division were wrong to ignore it. This testimony is the *only* probative evidence before this Court on the meaning (or, more accurately, lack of meaning) of Section 10-181.

Nonetheless, the City tries to avoid this testimony by arguing that there is no need to rely on expert guidance here because the phrase "compresses the diaphragm" is not technical in nature and, instead, carries its "ordinary meanings." (Opp'n 50–51.) But the City offers no evidence explaining how this novel phrase using medical

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omitted)); *Konover Dev. Corp. v. Waterbury Omega, LLC*, 281 A.3d 1221, 1234 (Conn. App. Ct. 2022) (concluding that "it was not improper for the [trial] court to rely on [an expert's] testimony in determining the meaning of the statutory language"), *cert. denied*, 284 A.3d 627 (Conn. 2022); *Dynacon, Inc.* v. *D & S Contracting, Inc.*, 899 P.2d 613, 620 (N.M. Ct. App. 1995) (recognizing that "interpretation of technical language in a statute can and should be informed by evidence concerning how those technical terms are interpreted by experts in the pertinent field"); *Willis v. City of Des Moines*, 357 N.W.2d 567, 571 (Iowa 1984) ("When technical words, or terms of art of a profession are used [in a statute or ordinance], opinion evidence by experts from the profession may be admitted to explain their meaning.").

terminology about an internal organ has ***any*** ordinary meaning. Indeed, although the City appears to have conducted a comprehensive search for this phrase dating back to at least 1993, it fails to identify even a single instance of someone using the phrase "compresses the diaphragm" in this context before the enactment of Section 10-181.

In any event, the City is itself inconsistent on whether "compresses the diaphragm" contemplates technical terminology. Where convenient, the City insists that "the pertinent words" of Section 10-181 "have an ordinary meaning." (Opp'n 25.) But elsewhere, the City attempts to show that any vagueness concerns presented by Section 10-181 are mitigated by training materials that it argues provide "clear notice of how to surely comply" with Section 10-181's prohibitions. (Opp'n 36.) The City argues that police officers, as "highly trained professionals, can and should understand what not to do," and that "adhering to their training will ensure compliance with the law." (Opp'n 2.) Plaintiffs-Appellants have already demonstrated the irrelevancy of these training materials, which do not address the problematic phrase and, in any event, cannot cure a constitutionally infirm statute. (*See* Br. 29–30.) But irrelevant or not, the City's reliance on these materials as an interpretative guide tacitly concedes that this is not a question of "ordinary meaning." The very fact that the City believes this phrase requires "training" to properly understand shows that it is technical and is properly the subject of expert

elucidation. And that makes eminent sense: understanding how internal organs respond to external stressors, or how police officers properly effectuate arrest, are both concepts well outside the domain of ordinary understanding. There is consequently no basis for categorically ignoring medical and police professional opinions on the meaning of this key phrase, as the City argues throughout its briefing and as the Appellate Division incorrectly found. (R554.) These opinions are the best available evidence as to the meaning of this phrase and should be accorded respect by this Court when it decides the question before it.

C. Section 10-181 invites arbitrary enforcement because it is vague, unclear, and lacks intelligible guidelines for enforcement and adjudication

The City similarly fails to show that Section 10-181 would not invite arbitrary enforcement. As a threshold matter, the City is simply wrong when it asserts that a "less stringent vagueness test applies" because Section 10-181 purportedly "do[es] not implicate the exercise of a fundamental right." (Opp'n 22.) A law that subjects police officers to up to a year of imprisonment undoubtedly implicates fundamental rights. *See, e.g.*, *United States v. Nasir*, 982 F.3d 144, 178 (3d Cir. 2020) (Bibas, J., concurring) ("Penal laws pose the most severe threats to life and liberty, as the Government seeks to brand people as criminals and lock them away."). It is for that very reason that criminal laws are to be strictly construed in favor of the accused, to the extent they are even capable of such a construction. *See, e.g.*, *United States v.*

Wiltberger, 18 U.S. (5 Wheat.) 76, 95 (1820) ("The rule that penal [] laws are to be construed strictly, is perhaps not much less old than construction itself.") (Marshall, J.); *cf. United States v. Cong. of Indus. Orgs.*, 335 U.S. 106, 142 (1948) ("Blurred signposts to criminality will not suffice to create it.") (Rutledge, J., concurring). The City is therefore mistaken that "there is no legal entitlement to be able to go up to the line of prohibited conduct with impunity." (Opp'n 46.) Going up to the line "with impunity," *i.e.*, without punishment, is the entire point: the criminal law must provide fair notice so that free individuals can conform their conduct to avoid punishment and the deprivation of liberty.

Section 10-181 does not present a problem of close cases; this is not, as the City suggests, an instance where "a man's fate depends on his estimating rightly, that is, as the jury subsequently estimates it, some matter of degree." (Opp'n 41 (quoting *United States v. Powell*, 423 U.S. 87, 93 (1975).) The problem is whether Section 10-181 provides fair notice when it prohibits conduct "in a manner that compresses the diaphragm," which must be given effect to avoid treating it as meaningless surplusage. (Br. 34–35.) Attempting to give effect to this element of the offense is impossible here. The phrase itself is vague: as Dr. Oppenheimer observed, the diaphragm is not a compressible muscle. And it is also vague within its statutory context: there is no way to determine when or whether this "compression" occurs in

a way different from the compression that may occur when "sitting, kneeling, or standing on the chest or back."

These difficulties are only worsened by the fact that Section 10-181 lacks mens rea and injury requirements.[4] The City does not refute that Section 10-181's lack of a mens rea requirement shows that the statute lacks meaningful guardrails against arbitrary enforcement. (Opp'n 53.) Instead, it concedes that the Court could, if necessary, read such a requirement into the statute to cure this constitutional infirmity. This concession underscores that Section 10-181 creates "a trap for those who act in good faith." *Colautti v. Franklin*, 439 U.S. 379, 395 (1979) (citation omitted). Meanwhile, the City concedes that Section 10-181 lacks an injury requirement but asserts this is not "necessary to withstand vagueness scrutiny." (Opp'n 53.) While it is true that not all criminal laws require an injury requirement, such as laws criminalizing unlawful possession, the lack of such a requirement for a violent offense means that there is no objective metric for assessing whether Section 10-181 has been violated.

[4] The City attempts to distract from these deficiencies by suggesting that Plaintiffs-Appellants have "a profound lack of appreciation for the grave problem of positional asphyxia." (Opp'n 53.) This needlessly casts aspersions at Plaintiffs—who are acutely aware of this problem—while again invoking a red herring. Problematic as it is, "positional asphyxia" is not the text of Section 10-181 and is not the textual issue before this Court.

Undeterred, the City tries to dodge these problems by suggesting that a "prudent" officer could "steer well clear of prohibited conduct to ensure that they avoid liability" (Opp'n 41), such as by wholly ceasing to sit, kneel, or stand on the chest or back while effecting or attempting to effect an arrest on a suspect. But this does nothing to rehabilitate the problematic element of Section 10-181. A police officer effecting arrest does not cross the line into criminally culpable conduct unless and until he sits, kneels, or stands on the chest or back "in a manner that compresses the diaphragm." No one—not the experts who testified before the trial court, not the Appellate Division, and not the City—has been able to explain what this means or how anyone could distinguish this element of the offense from the kind of compression that occurs when someone sits, kneels, or stands on a suspect's chest or back. An officer who has satisfied the first element—sitting, kneeling, or standing on the chest or back—is therefore exposed to arbitrary criminal prosecution and conviction because of a vague and ultimately indecipherable element of the offense—"in a manner that compresses the diaphragm." This is a classic recipe for arbitrary enforcement and conviction.

The City's lengthy analogies to noise, blood-alcohol level, and similar statutes therefore miss the point. (*See, e.g.*, Opp'n 18, 30–31.) These statutes rely on concrete tests for objective, well-known phenomenon, such as the levels of alcohol in the bloodstream or measurable distances. (*See* Br. 31–32.) Although the City

asserts that "the task of assessing compliance in these circumstances is no more difficult" than when an officer "assess[es] intoxication and impairment without resort to a blood-alcohol test" (Opp'n 35), this fails to appreciate the problem with Section 10-181. No adult of ordinary intelligence can reasonably deny knowledge of what is meant by "intoxication" while driving a motor vehicle or by "unnecessary noise" hearable from 50 feet away. (*Id.* at 31, 35) In the City's example, the question is whether the facts—such as an officer's assessment of the accused's intoxication or a blood-alcohol test—support a finding of criminal liability under a statute prohibiting drunk driving. But Section 10-181 presents the opposite problem: even if the facts were undisputed, there is no way to predict whether Section 10-181 has been violated because its text is inherently vague. Section 10-181's "diaphragm-compression ban," as the City styles it (Opp'n 45), lacks any measure of objectivity. While officers might "steer clear" of criminal liability under Section 10-181 by entirely ceasing to restrain suspects, it is far from clear how they could avoid criminal liability by ceasing to "compress[] the diaphragm" while engaging in otherwise permissible conduct—conduct, it bears repeating, that officers are often duty-bound to perform in the line of duty.

Finally, the City is mistaken that Section 10-181 does not invite arbitrary enforcement because defendants can challenge other elements of the offense or invoke other requirements of the criminal law. Although the City rightly notes that

criminal liability under Section 10-181 is limited to the extent that a restraint "restricts the flow of air or blood," that limitation—a different element of the offense—does not answer whether "compresses the diaphragm" provides fair notice of what it prohibits. (Opp'n 34–35.) The City similarly errs, as did the Appellate Division, in suggesting that a justification defense under Penal Law § 35.30(1), the criminal law's voluntary act requirement, or the constitutional requirement of proof beyond a reasonable doubt could cure Section 10-181's vagueness. (Opp'n 35–37; R552.) As Plaintiffs-Appellants showed in their opening brief (Br. 37–38), these separate features of the criminal law do not shed any light on what constitutes criminal conduct under Section 10-181.

D. This Court should not rewrite Section 10-181 by severing the diaphragm-compression ban

This Court should also reject the City's suggestion that Section 10-181 should be rewritten to sever parts of it. First, although the City asserts that the City Council would not have wanted the chokehold ban "to rise or fall with the diaphragm-compression ban" (Opp'n 54), this is complete speculation. No evidence suggests that this is the case. The City Council only enacted Section 10-181 after adopting the language that renders Section 10-181 vague, and this is just another instance of the City attempting to rewrite the statute without going through the proper legislative means. As Justice Love recognized at the trial court below (R23), it is axiomatic that legislatures, not courts, are the only entities empowered to enact criminal laws.

See, e.g., *People v. Blanchard*, 288 N.Y. 145, 147-48 (1942) ("[T]he definition of criminal offenses and the prescription of punishment therefor is part of [the] legislative power.").

Second, the City has waived this argument because it did not raise it until its reply briefing before the trial court below. The City seeks to avoid this problem by speculating that severability is not waivable, which it surmises "likely reflects the core separation-of-powers values at play." (Opp'n 58.) The argument fails. For one, the case it cites—*Telaro v. Telaro*, 25 N.Y.2d 433 (1969)—does not support its argument, because questions of severability and the proper scope of Section 10-181 "might have been obviated by the action of the [trial] court then, or by that of the other party." *Id.* at 438. The purpose behind requiring parties to raise arguments at a lower tribunal or waive them is to avoid *post hoc* efforts to expand the scope of an appellate court's review of the record below. And even setting that aside, there is no reason to suppose that severability, as opposed to other legal arguments, can be asserted at any time. The "separation-of-powers values" invoked by the City do not support it either, because, as noted above, only the legislature—not the judiciary—has the power to define punishment.

Third, even if the City had argued for this construction of the statute below, it should be rejected now because it would raise State law preemption problems even more serious than those already affecting Section 10-181. *See infra* § II. The City

Council drafted Section 10-181 in the context of State law that had already criminalized chokeholds causing "serious physical injury or death to another person." *See* N.Y. Penal Law § 121.13-a. Rewriting the statute to be even closer to Penal Law Section 121.13-a would be inappropriate because it would be preempted by State law. The proposed rewriting of Section 10-181 would directly conflict with the scope of criminal liability already imposed by Section § 121.13-a of the State Penal Law. This Court should accordingly decline the City's invitation to rewrite Section 10-181.

II. SECTION 10-181 IS PREEMPTED BY STATE LAW

A. Section 10-181 is field preempted

The City fails to rebut Plaintiffs-Appellants' showing that Section 10-181 is field preempted by New York State law. Contrary to the City's suggestion (Opp'n 64), there is no requirement that the State legislature make an express statement of field preemption. *See Consol. Edison Co. of N.Y. v. Town of Red Hook*, 456 N.E.2d 487, 490 (N.Y. 1983) ("The intent to pre-empt need not be express," and "may be implied . . . from the fact that the Legislature has enacted a comprehensive and detailed regulatory scheme in a particular area"). Rather, the circumstances before the Court amply support the conclusion that the State legislature intended to preempt the field here. Though the City seeks to characterize the Eric Garner Anti-Chokehold Act of 2020, Penal Law § 121.13-a, and the laws preceding its enactment

as "scattered" and a "grab bag of provisions" (Opp'n 65), this mischaracterization does not change the import of these enactments. Through Section 121.13-a, the State prohibited what Section 10-181 purports to prohibit, and did so within a framework for the use of force by police officers. These provisions constitute the State legislature's considered judgment on how best to strike a balance between the many competing public policy interests in this field, and the City should not be allowed to disturb this balance through its own intrusions in this field.

B. Section 10-181 is conflict preempted

The Court should also reject the City's arguments that Section 10-181 is not conflict preempted. First, the City wrongly asserts that Section 10-181 is not conflict preempted because Section 121.13-a "does not address diaphragm compression caused by sitting, kneeling, or standing on an arrestee's back or chest." (Opp'n 61.) As Plaintiffs-Appellants have shown (Br. 45–46), this ignores the balance struck by the State legislature in ensuring that officers are able to effectively enforce the law and protect others while also subject to laws that rightfully protect the public from impermissible police conduct. Clear rules are necessary for police officers to discharge their duties, and with respect to the sphere of conduct purportedly criminalized by Section 10-181, the State legislature has already enacted a legislative scheme that provides these clear rules. Municipal intrusions into this legislative scheme upset this balance and undermine the State legislature's considered judgment

on what constitutes effective law enforcement. And this conflict becomes even starker if the City's severability analysis is adopted: the "diaphragm compression" ban, vague though it is, is the only portion of Section 10-181 that purports to regulate different conduct.

The City also asserts that Section 10-181 is not in conflict with State law because Section 121.13-a purportedly has no express mens rea requirement. (Opp'n 62.) But as the City recognizes, the statute's cross-reference to Section 121.11—the portion most relevant to Section 10-181's proscriptions, above all the "diaphragm compression" ban—expressly states that guilt requires an "intent to impede the normal breathing or circulation of the blood of another person." N.Y. Penal Law § 121.11. Section 10-181 simply lacks this requirement and thus imposes criminal liability on police officers who are otherwise acting in conformity with the balance struck by the State legislature.

Further, the City is wrong when suggesting that Section 121.13-a's injury requirement does not prevent the City Council from enacting a statute that has *no* injury requirement whatsoever. Criminal liability under Section 121.13-a is only possible if a police officer "causes serious physical injury or death to another person." Penal Law § 121.13-a. Section 10-181 dispenses of this requirement altogether, creating a clear obstacle to the balance struck by the State legislature

when considering when and to what extent police officers may use force while discharging their duties to the public.

Finally, the Court should reject the City's argument that because Section 35.30 can be asserted as a defense to "any prosecutions that might be brought under section 10-181," it follows that "by definition, section 10-181 cannot criminalize anything that the justification defense covers." (Opp'n 63.) The City cites no authority for this novel assertion and it does not change that Section 10-181 is preempted by State law.

CONCLUSION

The Appellate Division decision granting summary judgment to the City should be reversed and judgment should be entered in favor of Plaintiffs-Appellants declaring that Section 10-181 is void, and enjoining its enforcement.

Dated: New York, New York
March 20, 2023

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CERTIFICATE OF WORD COUNT

Pursuant to Rule 500.13(c) of the Rules of the Court of Appeals, Plaintiffs-Appellants certify that this computer-generated brief was prepared using a proportionally spaced typeface.

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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 or at

On March 20, 2023

deponent served the within: **REPLY BRIEF FOR PLAINTIFFS-APPELLANTS SERGEANTS BENEVOLENT ASSOCIATION OF THE CITY OF NEW YORK, LIEUTENANTS BENEVOLENT ASSOCIATION OF THE CITY OF NEW YORK, CAPTAINS ENDOWMENT ASSOCIATION OF THE CITY OF NEW YORK, DETECTIVES' ENDOWMENT ASSOCIATION OF THE CITY OF NEW YORK, PORT AUTHORITY POLICE BENEVOLENT ASSOCIATION INC., PORT AUTHORITY DETECTIVES' ENDOWMENT ASSOCIATION, PORT AUTHORITY LIEUTENANTS BENEVOLENT ASSOCIATION, PORT AUTHORITY SERGEANTS BENEVOLENT ASSOCIATION, SUPREME COURT OFFICERS ASSOCIATION, NEW YORK STATE COURT OFFICERS ASSOCIATION, NEW YORK STATE POLICE INVESTIGATORS ASSOCIATION, LOCAL NO. 4 OF THE INTERNATIONAL UNION OF POLICE ASSOCIATIONS, AFL-CIO, BRIDGE AND TUNNEL OFFICERS BENEVOLENT ASSOCIATION, TRIBOROUGH BRIDGE AND TUNNEL AUTHORITY SUPERIOR OFFICERS BENEVOLENT ASSOCIATION, METROPOLITAN TRANSPORTATION AUTHORITY POLICE BENEVOLENT ASSOCIATION, POLICE BENEVOLENT ASSOCIATION OF NEW YORK STATE AND NEW YORK CITY DETECTIVE INVESTIGATORS ASSOCIATION DISTRICT ATTORNEYS' OFFICE**

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Sworn to before me on March 20, 2023

Mariana Braylovskiy

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