APL-2020-00020
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To be argued by:
DEVIN SLACK
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Court of Appeals
State of New York

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

against

CARLOS TORRES,

Defendant-Appellant.

PEOPLE OF THE STATE OF NEW YORK,

Respondent,

against

DAVE LEWIS,

Defendant-Appellant.

BRIEF FOR AMICUS CURIAE CITY OF NEW YORK

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PRELIMINARY STATEMENT AND INTEREST OF THE CITY OF NEW YORK

Motor vehicle crashes are a major public health problem. In a typical month, over a thousand New York City pedestrians and cyclists are injured in traffic collisions. Last year, 152 were killed. These tragedies can be prevented. To that end, the City of New York enacted the Right of Way Law—codified at Administrative Code § 19-190—which penalizes drivers who carelessly fail to yield the right of way to pedestrians and cyclists. The law is based on a simple and common-sense idea: people will drive more safely if they face clear consequences for failing to exercise due care.

Appellants Carlos Torres and Dave Lewis were each found guilty of violating the Right of Way Law after negligently killing someone who had the right of way. The City takes no position on the case-specific issues raised on appeal, like the voluntariness of Torres's plea or the sufficiency of the evidence against Lewis. We instead write to address appellants' claim that the City may not impose criminal liability for ordinary negligence. Numerous statutes—both in New York and elsewhere—do just that, and this Court has already recognized the validity of such measures.

BACKGROUND

A. The serious threat that careless driving poses to the safety of New Yorkers

In 2013, the year before the New York City Council enacted the Right of Way Law, nearly 300 people were killed and 66,000 more were injured in car crashes in the city.[1] By contrast, there were 1,100 shootings that same year, meaning New Yorkers were much more likely to be injured or killed by a car than by a gun.[2] Make no mistake, dangerous driving is a public health crisis.[3]

Dangerous driving is a particular hazard for our most vulnerable residents. Car crashes are the single leading cause of unintentional injury and death for children—and of those

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[1] New York State Department of Motor Vehicles, Summary of New York City Motor Vehicle Crashes 2013, https://perma.cc/DS2E-7ALA.

[2] New York City Office of the Mayor, *Final Weekly Update on Murders and Shootings in 2013* (Dec. 30, 2013), https://perma.cc/BZ4E-AAFJ.

[3] Centers for Disease Control and Prevention, Motor Vehicle Safety, Cost Data and Prevention Policies, https://perma.cc/GL8Y-P578; Mary Beth Kelly, *Treat Traffic Deaths Like the Measles*, StreetBlog NYC, June 5, 2019, https://perma.cc/YTR9-ZGFH.

children, 80% are killed while walking as pedestrians.[4] Seniors, too, are at elevated risk. They make up just 13% of the City's population but 39% of all pedestrian fatalities.[5]

The stories of the victims and the families left behind haunt us, but we must remember them. For example, three-year-old Emur Shavkator was killed by a driver while riding his scooter in a Brooklyn crosswalk, as his mother watched in horror.[6] In another case, Carolyn Egger, a 76-year-old retiree, was killed by the driver of an SUV while crossing the street a few blocks from her home in Jackson Heights, leaving her husband of 55 years devastated.[7] In any given year, there are hundreds of these

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[4] New York City Department of Health & Mental Hygiene, *Understanding Child Injury Deaths: 2010-2014, Child Fatality Review Advisory Team Report*, NYC Vital Signs, Vol. 16, No. 1, at 3 (Apr. 2017), https://perma.cc/5ZK4-DXZX.

[5] New York City Department of Transportation, Safe Streets for Seniors, 6 (2017), https://perma.cc/XHA6-AMCS.

[6] David Meyer, *Candy Truck Driver Kills Three-Year-Old Emur Shavkator in Bath Beach*, StreetBlog NYC, May 2, 2019, https://perma.cc/K2DV-QRZ4.

[7] Esha Ray & Rocco Parascandola, *"I want her back": Distraught widower grieves over death of Queens woman*, DAILY NEWS, Mar. 17, 2020, https://perma.cc/XB6L-NFEW.

stories. And no community has been spared the violence of dangerous driving.

When drivers kill people with their cars, they invariably call it an "accident" (Br. of Appellant Torres ("Torres Br.") 5 & Br. of Appellant Lewis ("Lewis Br.") 2-3, 5-6, 8-10, 26, 28, 37-38, 40-42).[8] But these deaths can be prevented. Dangerous choices by drivers—including the decision to steer a multi-ton vehicle into a right of way while failing to yield—are responsible for 70% of pedestrian fatalities.[9] In the year before passage of the Right of Way Law, drivers who failed to yield the right of way caused six times as many crashes as drunk drivers.[10] If pedestrians were safe in crosswalks and on sidewalks, where they are owed the right of way, hundreds of lives could be saved every year.

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[8] Joseph Stromberg, *We don't say "plane accident"; we shouldn't say "car accident" either*, VOX, July 20, 2015, https://perma.cc/S934-RVZG.

[9] *See* City of New York, *Vision Zero Action Plan*, 14-16 (2014), https://perma.cc/VW4Z-WGJ2.

[10] *See* Summary of New York City Motor Vehicle Crashes 2013, *supra* n.1 at 4 (comparing crash rates involving alcohol consumption and failure to yield the right of way).

B. The City Council's passage of the Right of Way Law to combat preventable traffic fatalities and injuries

The Right of Way Law is part of the City's Vision Zero initiative.[11] Developed in Sweden, Vision Zero is a philosophy founded on the principle that one life lost to traffic is one too many.[12] Joining several U.S. states that reduced traffic fatalities by 40 to 50% with Vision Zero policies, Mayor de Blasio launched his own Vision Zero working group.[13] The group took a holistic approach, proposing better roadway engineering, public education, and safety legislation, including the Right of Way Law.[14]

The City's Right of Way Law was modeled on a similar State law: Vehicle and Traffic Law § 1146, known as Hayley and Diego's Law. The State Legislature enacted that law in 2010, after a driver left his three-ton van in reverse on a busy street in

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[11] Council of the City of New York, Report of the Human Services Division, Committee on Transportation (Apr. 30, 2014) at 11, https://perma.cc/7P7B-GAYR; Vision Zero Action Plan, *supra* n.9 at 7-9.

[12] Matt Flegenheimer, *De Blasio Looks Toward Sweden for Road Safety*, N.Y. TIMES, May 12, 2014, https://perma.cc/V9Q5-62UU.

[13] Vision Zero Action Plan, *supra* n.9 at 9.

[14] *Id.*

Chinatown; the van jumped a curb and plowed into a class of nursery school children, killing two and injuring eleven.[15]

In response, the State made it a traffic infraction for a driver to injure pedestrians and cyclists "while failing to exercise due care." VTL § 1146(b). A first offense is punishable by a fine, up to 15 days in jail, and the suspension of the driver's license. VTL § 1146(b), (c). A second offense within five years constitutes a misdemeanor punishable by a fine and up to three months in jail. *Id.* § 1146(d); Penal Law § 70.15(2).

Despite the change in State law, traffic fatalities in New York City continued to increase.[16] Three years after the enactment of Hayley and Diego's Law, the fatality rate for pedestrians and cyclists increased by almost 25%.[17] To address this problem in the

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[15] *See* Allison Gendar & Rich Schapiro, *Our Children Were Killed and the Driver Walks Away Without a Ticket: Anguished Moms Demand Justice*, Daily News, Jan. 25, 2009, https://perma.cc/V5R4-WS4S; L. 2010, ch. 333 Bill Jacket at 5, 13, 29; Sponsors' Mem. in Supp. at 1-2, *reprinted in* L. 2010, ch. 333 Bill Jacket at 12-13.

[16] City of New York, Vision Zero: Year Four Report, 13 (2018), https://perma.cc/8M53-L2EA.

[17] April 30, 2014 Committee Report, *supra* n.11 at 10.

uniquely dense landscape of New York City, the City passed the Right of Way Law, codified as Administrative Code § 19-190.

The City's Right of Way Law uses the same "due care" standard as Hayley and Diego's Law. *Compare* VTL § 1146(a), *with* Admin. Code § 19-190(c). But unlike Hayley and Diego's Law, which requires drivers to use due care *whenever* they interact with pedestrians or cyclists, the City's law is focused on protecting vulnerable road users where they have the right of way. The law makes it a traffic infraction to drive without due care and fail to yield to a pedestrian or cyclist with the right of way, even if no one is injured or killed. When a pedestrian or cyclist is injured or killed, the conduct constitutes a misdemeanor.

Whether considered in a vacuum or against the backdrop of lives destroyed by careless driving, the Right of Way Law imposes relatively minor penalties. A traffic infraction is punished with fines up to $50 and up to 15 days in jail. A misdemeanor is punished with fines up to $250 and up to 30 days in jail. A driver who kills a pedestrian with the right of way can thus be jailed for

30 days, at most. By contrast, graffiti can be punished with up to a year in jail. *Id.* §§ 145.60, 70.15(1).

C. The Right of Way Law convictions on appeal

1. The criminal case arising out of Carlos Torres's killing of a pedestrian who had the right of way

In February 2016, Elise Lachowyn was in Manhattan to attend a convention.[18] As she crossed the street in front of the Javits Center, with the walk sign, Carlos Torres crushed her to death with the large commercial vehicle he was driving (Torres Appendix ("TA") 11, 21). The New York County District Attorney charged Torres with violating both the City's Right of Way Law and Hayley and Diego's Law. Torres moved to dismiss only the City law charge, arguing that the statute's "due care" standard is unconstitutional and preempted by State law (TA25-39).

The Criminal Court denied the motion (TA158-67), after which Torres pleaded guilty to both charges (TA175). The Criminal Court revoked Torres's driving privileges for six months

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[18] Tom Wilson, *Pedestrian Fatally Struck Near NYC Convention Center*, N.Y. POST, Feb. 12, 2016, https://perma.cc/Q2JS-QBFA.

and ordered him to pay a $750 fine and complete a driving class (TA14-15). Torres served no jail time. The Appellate Term, First Department affirmed his conviction (TA4-10).

2. The criminal case arising out of Dave Lewis's killing of a cyclist who had the right of way

On June 12, 2017, Dan Hanegby biked to work for the last time.[19] As he rode along West 26th Street, Dave Lewis approached him from behind, driving a 50,000-pound commuter bus (Lewis Appendix ("LA") 100-03, 113-14). Lewis honked the horn and then, without slowing down, decided to pass, even though the street is narrow, with only one traffic lane and parking on both sides (LA113-15). As Lewis pulled past, he struck the bike's handlebars, causing Hanegby to fall; Lewis then drove over Hanegby with the bus's rear tires (LA69). Hanegby died a few hours later, leaving behind a widow and two small children (LA22).

The New York County District Attorney charged Lewis with violating the City's Right of Way Law, along with Hayley and

[19] Hannah Alani, *Family Recalls Life of Avid Cyclist, as Questions are Raised About His Death*, NY TIMES, June 16, 2017.

Diego's Law (LA29). Like Torres, Lewis argued that the Right of Way Law's due care standard is unconstitutional and preempted by State law (LA36-46). The Criminal Court denied the motion (LA21) and then convicted Lewis after hearing from six witnesses and watching three videos of the crash from multiple angles (LA6, 170).[20] The court sentenced Lewis to 30 days in jail for violating the Right of Way Law and 15 days (concurrent) for violating Hayley and Diego's Law (*id.*). The court also ordered Lewis to attend a six-week driving class and suspended his driver's license for six months (*id.*). The Appellate Term, First Department affirmed his conviction (LA4).

[20] Lewis's appendix omits the transcript pages indicating the admission of video evidence (9/12/18 Tr. at 27-33). Video of the crash is also available online at https://www.youtube.com/watch?v=PRDPV11Dq3k and https://www.youtube.com/watch?v=PSyIBpJr-h0.

ARGUMENT

POINT I

NEW YORK CITY'S RIGHT OF WAY LAW IS CONSTITUTIONAL

Torres and Lewis argue that the State and Federal constitutions bar legislatures from imposing any criminal penalties for careless conduct (Torres Br. 24-29; Lewis Br. 33-34), even where those penalties are relatively minor and even where that conduct has fatal consequences. This argument is a radical departure from both history and precedent.

A. The due process clause permits criminal liability for ordinary negligence.

1. Courts must give effect to the standard of culpability chosen by the legislature.

The due process clauses of the State and Federal Constitutions impose few limits on a legislature's power to define the elements of a crime.[21] State and local legislatures are

[21] New York courts interpreting the State Constitution's due process clause "consistently rel[y] on U.S. Supreme Court decisions." *People v. Grimes*, 32 N.Y.3d 302, 314 (2018). *See also People v. Kohl*, 72 N.Y.2d 191, 199-200 (1988) (refusing to deviate from the "sound jurisprudence of the Supreme Court").

responsible for crafting the criminal law to protect the public, and courts must defer to their decisions with respect to "the definition of criminal conduct." *Martin v. Ohio*, 480 U.S. 228, 232 (1987); *see also People v. Roberts*, 31 N.Y.3d 406, 418 (2018) (courts must defer to legislature's "definition of a crime" to suppress the "mischief sought to be remedied"). This deference gives way rarely, and only when a criminal statute offends a principle of justice so "old and venerable" as to be considered fundamental. *Kahler v. Kansas*, 140 S. Ct. 1021, 1028 (2020).

The Supreme Court has repeatedly rejected the idea that there is a fundamental right to be convicted, in every case, only on proof of a particular state of mind. As Justice Marshall once put it, "this Court has never articulated a general constitutional doctrine of *mens rea*." *Powell v. Texas*, 392 U.S. 514, 535 (1968) (plurality opinion); *see also Copeland v. Vance*, 893 F.3d 101, 122 (2d Cir. 2018) ("[T]he Supreme Court has been at pains not to constitutionalize *mens rea*."), *cert. denied*, 139 S. Ct. 2714 (2019). Lawmakers have "wide latitude" to "exclude elements of

knowledge and diligence" from a crime's definition. *Lambert v. California*, 355 U.S. 225, 228 (1957).

Nor is any particular kind of moral blameworthiness required for a criminal offense, as Torres and Lewis claim (Torres Br. 12: Lewis Br. 18). *See Lambert*, 355 U.S. at 228 ("We do not go with Blackstone in saying that 'a vicious will' is necessary to constitute a crime."). Rather, there has been a "centuries long evolution" in the assessment of moral accountability, during which governments have adjusted criminal doctrines—including *mens rea* requirements—in light of the "changing religious, moral, philosophical, and medical views of the nature of man." *Powell*, 392 U.S. at 535-36; *see also Kahler*, 140 S. Ct. at 1027-29. There are no rigid constitutional rules to prevent state and local governments from deciding when a person should be held criminally accountable.

There is thus no constitutional rule against basing a crime on conduct displaying a lack of due care. The Supreme Court long ago explained that a legislature may punish the "negligent person" to "stimulate proper care" where "mere negligence" may

be dangerous to the public. *United States v. Balint*, 258 U.S. 250, 252-53 (1922) (affirming conviction under drug law that did not require defendant to act knowingly); *accord People v. Grogan*, 260 N.Y. 138, 146 (1932) (statutes "declaring negligence a crime" are "constitutional"). Due process does not limit a legislature's right to choose a standard of culpability less than knowing or reckless.

To be sure, when a legislature intends to adopt a lesser standard, it must do so clearly. If a statute is silent as to the level of culpability required, leaving its intent unclear, the court may read in a requirement that the defendant act knowingly or intentionally, especially if the statute involves a lengthy criminal sentence or a common law crime that required specific intent at the time of the nation's founding. *See Staples v. United States*, 511 U.S. 600, 616 (1994); *Morissette v. United States*, 342 U.S. 246, 261-62 (1952). But that is a rule of statutory construction, not a requirement of due process. *Staples*, 511 U.S. at 605; *see also Elonis v. United States*, 575 U.S. 723, 135 S. Ct. 2001, 2009 (2015) (when statute is silent as to required culpability, courts must use statutory presumptions to determine legislative intent); *United*

States v. X-Citement Video, 513 U.S. 64, 69-70 (1994) (refusing to "assume" Congress intended to omit knowledge requirement).

In *Staples*, for example—a case Torres and Lewis quote in a misleading manner (Torres Br. 12; Lewis Br. 19)—the Supreme Court interpreted a federal criminal statute that did not identify a specific level of culpability and punished violators with up to 10 years in prison. 511 U.S. at 616 (1994). Looking at the statutory language and history, the Court concluded that Congress intended a defendant to be convicted under the statute only if he acted knowingly. *Id.* at 604-20. Had Congress intended to do away with knowledge, "it would have spoken more clearly to that effect." *Id.* at 620.

But *Staples* expressly noted that a legislature "remains free" to use a lesser degree of culpability—even to completely "eliminat[e] a *mens rea* requirement"—so long as it does so "explicitly." 511 U.S. at 605, 615 n.11. *See also Liparota v. United States*, 471 U.S. 419, 424 (1985) ("Of course, Congress *could* have intended this broad range of conduct be made illegal … [but] given the paucity of material suggesting that Congress did so intend, we

are reluctant to adopt such a sweeping interpretation."). *Staples* thus recognizes the broad flexibility afforded legislatures in defining criminal responsibility.

Courts are only "reluctant to *infer*" an ordinary negligence standard. *Elonis*, 135 S. Ct. at 2001 (emphasis added). When a legislature makes clear that it *intended* such a standard to be used, courts are obligated to enforce the law as it is written. And the courts did just that in the cases Torres and Lewis cite (Torres Br. 11-13, 25; Lewis Br. 18-19, 38, 40). In *People v. Montanez*, 41 N.Y.2d 53, 56 (1976), for example, the defendant was charged with second degree manslaughter, which the State Legislature defined as "recklessly caus[ing] the death of another person." Penal Law § 125.15(1). All the Court did there was apply the recklessness standard selected by the Legislature, noting that recklessness requires a higher degree of culpability than gross negligence and that, in turn, requires a higher degree of culpability than ordinary negligence. *Id*. The other cited cases made similar observations

when applying the specified standard of culpability.[22] None suggested that a court may override a legislature's considered judgment as to the proper standard.

The job of the courts is to ascertain the legislative intent and to interpret the statute consistent with that intent. *People v. Roberts*, 31 N.Y.3d 406, 418 (2018). Here, it is undisputed that City Council intended the Right of Way Law to use an ordinary negligence standard (LA42, TA25). The court below properly applied that standard.

2. There is nothing unusual about a crime based on ordinary negligence.

This Court should have no qualms about giving effect to the City Council's judgment in crafting the legislation at issue here, which is perfectly consistent with the long history, both in New

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[22] *See People v. Cabrera*, 10 N.Y.3d 370 (2008) (defendant charged with criminally negligent homicide); *People v. Ladd*, 89 N.Y.2d 893 (1996) (defendant charged with criminally negligent homicide and reckless driving); *People v. Boutin*, 75 N.Y.2d 692 (1990) (defendant charged with criminally negligent homicide); *People v. Haney*, 30 N.Y.2d 328 (1972) (same); *People v. Angelo*, 246 N.Y. 451 (1927) (defendant charged with culpably negligence homicide); *People v. Paris*, 138 A.D.2d 534 (2d Dep't 1988) (defendant charged with criminally negligent homicide); *People v. Rosenheimer*, 209 N.Y. 115 (1913) (defendant charged with knowingly leaving the scene of a collision).

York and across the country, of using ordinary negligence as a standard of culpability in criminal law. *See People v. Grogan*, 260 N.Y. 138, 146 (1932) (statutes "declaring negligence a crime" are "constitutional"); *Tenement House Dep't v. McDevitt*, 215 N.Y. 160, 169 (1915) (Cardozo, J.) (observing that criminal law may require a person "to conform to the average standard of conduct"). For example, the 1909 Penal Law made it a misdemeanor to "negligently furnish[] … improper scaffolding," Consol. Laws, ch. 40, Penal Law § 1276 (1909); to "negligently receive[]" too many passengers on a navigable vessel, *id.* § 1890; and to "[n]egligently set fire" to woods, *id.* § 1900(2).[23]

Today's Penal Law continues to define crimes in terms of simple negligence. For example, Penal Law § 260.10 makes it a misdemeanor for a parent or other person legally responsible for a child to fail to "exercise reasonable diligence" to prevent the child from being abused or neglected. *See People v. Carroll*, 93 N.Y.2d

[23] The Penal Law then defined negligence as "want of … attention to the nature or probable consequences" that a "prudent man ordinarily bestows," and numerous provisions proscribed conduct based on that standard. Consol. Laws, ch. 40, Penal Law § 3(1) (1909) (construction of terms).

564 (1999) (affirming conviction under Penal Law § 260.10). Similar negligence-based crimes exist outside the Penal Law. *See* N.Y. Navigation Law § 45 (failure to navigate vessel in "careful and prudent manner" is misdemeanor); N.Y. Agric. & Mkts. Law § 123 (misdemeanor for owner of dangerous dog to "negligently" permit dog to injure others); VTL § 1146 (Hayley and Diego's Law). According to Torres and Lewis's reasoning, all of these statutes are invalid.

But to the contrary, this Court has upheld the constitutionality of criminal statutes using an ordinary negligence standard and noted their legitimacy. In 1951, this Court affirmed a second-degree manslaughter conviction based on ordinary negligence. *People v. Sandgren*, 302 N.Y. 331 (1951). Manslaughter at that time included any homicide resulting from a dangerous animal "kept without ordinary care" and could be punished with a prison term of up to 15 years. Penal Law § 1052

(1909).[24] The Court explained that the legislature "had in mind … negligence which flowed from lack of ordinary care." *Sandgren*, 302 N.Y. at 339. The law was justified because the "safeguarding and preservation of human life" is "one of the foundation stones of organized society." *Id*. at 340.

Fifteen years later, the Court considered a traffic law, VTL § 1180, which outlaws driving faster than is "reasonable and prudent"—that is, negligent driving—and punishes such conduct with fines and imprisonment. *People v. Nappi*, 18 N.Y.2d 136, 138-39 (1966). The Court rejected a claim that the statute was vague and found that a driver violated the law if he "failed and neglected [to] appropriately reduce his speed" when circumstances required him to do so. *Id*. A few years later, the Court expressly noted that criminal liability for "ordinary negligence is sometimes imposed by statute," especially for "deaths arising out of automobile accidents." *People v. Haney*, 30 N.Y.2d 328, 334 n.7 (1972).

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[24] As Torres notes (Torres Br. 27-28), one had to know the animal was dangerous, in the same way that drivers know that driving a car carelessly is dangerous.

More recently, this Court affirmed a conviction under a statute partially based on negligence. *People v. Stuart*, 100 N.Y.2d 412, 427 (2003). The offense of stalking in the fourth degree prohibits certain conduct that one "reasonably should know" would cause the victim to be fearful. Penal Law § 120.45(1). The defendant argued that the statute "must contain a requirement that the offender intend a specific *result*." *Id.* at 426. The Court rejected that argument, explaining that the Legislature was free to "focus[] on what the offenders do, not what they mean by it or what they intend as their ultimate goal." *Id.* Recognizing that the choice of an ordinary negligence standard for that part of the law was "purposeful," the Court honored that legislative judgment. *Id.*

Nor is New York alone in using ordinary negligence as a standard of criminal responsibility. For instance, under the federal Seaman's Manslaughter Act, 18 U.S.C. § 1115, a law that dates to the 1800s and is still enforced today, an employee of a commercial vessel whose "negligence" or "inattention to his duties"

causes a death can be sent to prison for up to 10 years.[25] Two federal circuit courts have upheld the law against due process challenges. The Fifth Circuit explained that "any degree of negligence is sufficient to meet the culpability threshold." *United States v. O'Keefe*, 426 F.3d 274, 278 (5th Cir. 2005). Because Congress's intent was clear, the court was "required to give effect to the language of the statute according to its terms." *Id.* at 279. *See also United States v. Alvarez*, 809 F. App'x 562, 569 (11th Cir. 2020) (rejecting due process challenge to Seaman's Manslaughter Act).

The Clean Water Act similarly imposes criminal penalties for "negligent violations" of certain provisions. 33 U.S.C. § 1319(c)(1). Three federal circuit courts have rejected due process challenges to the statute. *See United States v. Pruett*, 681 F.3d 232, 242 (5th Cir. 2012); *United States v. Ortiz*, 427 F.3d 1278,

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[25] After a Staten Island ferry crashed and killed 11 people in 2003, the pilot and his supervisor—who was not even on the vessel at the time of the crash—both pleaded guilty to violating the law and were each sentenced to over a year in prison. William K. Rashbaum & Sewell Chan, *Pilot and Supervisor Sentenced in '03 Staten Island Ferry Crash*, N.Y. TIMES, Jan. 10, 2006, https://perma.cc/F97S-78RG.

1283 (10th Cir. 2005); *United States v. Hanousek*, 176 F.3d 1116, 1121 (9th Cir. 1999). As one explained, the law on its face "requires only proof of ordinary negligence," and courts are "bound" to enforce the legislature's plain intent. *Pruett*, 681 F.3d at 242-43.

Other states, too, have long imposed criminal penalties for ordinary negligence, especially when it comes to the negligent operation of a motor vehicle. Nevada defines vehicular manslaughter to include "simple negligence" that "proximately causes the death of another person." Nev. Rev. St. § 484B.657. North Carolina makes it a misdemeanor to "unintentionally" kill someone with a vehicle. N.C. Gen. Stat. 20-141.4(a2). Massachusetts criminalizes operating a vehicle "negligently so that the lives or safety of the public might be endangered." Mass. Gen. L. ch. 90, § 24G(b). In Vermont, a person who drives "in a negligent manner" can be imprisoned for a year. 23 Vt. Stat. § 1091(a). *See also Leocal v. Ashcroft*, 543 U.S. 1, 8 n.6 (2004) (discussing state criminal laws based on negligence).

Due process challenges to these and similar statutes have been rejected over and over again. *See, e.g.*, *Cornella v. Churchill Cnty.*, 377 P.3d 97, 104-06 (Nev. 2016) (upholding Nevada's "ordinary negligence" vehicular manslaughter statute as consistent with due process); *North Carolina v. Smith*, 368 S.E.2d 33, 37 (N.C. Ct. App. 1988) (holding that due process permits a criminal conviction based on "ordinary negligence"); *Massachusetts v. Berggren*, 496 N.E.2d 660, 661 (Mass. 1986) ("ordinary negligence suffices" to establish violation of criminal statute proscribing the negligent operation of a motor vehicle); *Vermont v. Labonte*, 144 A.2d 792, 794 (Vt. 1958) ("[T]he power of a legislature to define a crime based upon ordinary negligence has been recognized in numerous jurisdictions."); *South Carolina v. Barnett*, 63 S.E.2d 57, 61 (S.C. 1951) (holding that "inherently dangerous" character of automobiles justifies a "simple negligence" standard of culpability); *Washington v. Hedges*, 113 P.2d 530, 536 (Wash. 1941) (the use of ordinary negligence is "within the province of the legislature"); *Michigan v. McMurchy*, 228 N.W. 723, 728 (Mich. 1930) (noting that the high rate of

fatalities prompted "law to curb … negligent driving which caused death, in cases where the negligence was less than gross").

We could go on, but the point is made. Negligence-based crimes are not "all but unheard of in criminal law" (Torres Br. 11). Rather, New York, the federal government, and states across the country have imposed criminal liability for ordinary negligence for over a hundred years. Where the legislature's intent to do so is clear, as it is here, the due process clause poses no impediment.[26]

B. Far from vague, the Right of Way Law turns on a universally understood standard.

Torres and Lewis argue in passing that the Right of Way Law is too vague to be enforced as it is written (Torres Br. 25; Lewis Br. 33-34). This claim is meritless given the clear and common instructions of the law. The Right of Way Law builds on

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[26] Indeed, legislatures may constitutionally impose criminal liability without even requiring a lack of due care. *See United States v. White Fuel Corp.*, 498 F.2d 619, 623 (1st Cir. 1974) (defendant committed federal crime when oil from its property seeped into harbor, regardless of whether defendant used due care to prevent seepage). Criminal statutes imposing strict or absolute liability are commonplace and have been repeatedly upheld. *E.g., People v. Nogueros*, 42 N.Y.2d 956, 957 (1977) (affirming conviction of company president for failure to obtain workers' compensation insurance, despite defendant's lack of knowledge that policy had been canceled).

the basic, foundational legal concept of due care—as well-established a legal framework as exists and one familiar to everyone—to ensure that drivers do not kill and injure through their carelessness. Indeed, this Court long ago held that a criminal law requiring reasonable driving was not void for vagueness. *See Nappi*, 18 N.Y.2d at 138-39 (upholding law requiring "reasonable and prudent" driving).

Vagueness challenges are analyzed using a two-part test that neither Torres nor Lewis addresses. First, the court asks whether the statute in question is sufficiently definite to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden. *People v. Stephens*, 28 N.Y.3d 307, 312 (2016). Second, the court determines whether the statute provides officials with clear standards for enforcement sufficient to avoid arbitrary and discriminatory application. *Id.* It is well established that when a statute uses terms with accepted meanings, "long recognized in law and life," that statute "cannot be" void for vagueness. *People v. Cruz*, 48 N.Y.2d 419, 428 (1979).

The Right of Way Law requires drivers to use due care when interacting with pedestrians or bicyclists who have the right of way. "Due care" has been defined and explained by centuries of case law, and its inclusion in a statute clearly communicates what conduct is forbidden. Drivers must simply take the care exercised by reasonably prudent drivers, a requirement this Court had "no difficulty" upholding as sufficiently definite in *Nappi*. 18 N.Y.2d at 139. *See also Russell v. Adduci*, 140 A.D.2d 844, 845-56 (3d Dep't 1988) (explaining meaning of "due care"). The concept of "due care" is not vague but rather entirely familiar. Anyone who doesn't understand the meaning of the law shouldn't be driving.

POINT II

STATE LAW ALLOWS THE CITY TO PROTECT VULNERABLE ROAD USERS FROM UNSAFE DRIVERS

Torres and Lewis also contend that the Right of Way Law is preempted by the Penal Law and the Vehicle and Traffic Law (Torres Br. 11-23; Lewis Br. 31-33). But those State laws were not meant to, and indeed clearly do not, preempt the City from

enacting laws to protect pedestrians and cyclists from unsafe drivers.

A. The Penal Law does not preclude the use of ordinary negligence as a standard of culpability.

Torres and Lewis both claim that three sections of the Penal Law give local legislatures a choice of only four culpability standards when enacting criminal laws (Torres Br. 13-16; Lewis at 31-32). Torres argues for field preemption, while Lewis urges conflict preemption (*id.*). But the cited provisions in no way conflict with State law, nor do they set out a "comprehensive and detailed regulatory scheme" such that preemption should be implied. *Garcia v. NYC Dep't of Health & Mental Hygiene*, 31 N.Y.3d 601, 618 (2018).

Penal Law § 15.05 defines four terms used throughout the Penal Law: "intentionally," "knowingly," "recklessly," and "criminal negligence." It is a list of definitions to help courts and lawyers interpret the parts of the Penal Law that use the defined terms. Penal Law § 15.10 sets out the basic requirements for criminal liability under the Penal Law—the performance of a

voluntary act or omission—and defines "strict liability." And Penal Law § 15.15 provides rules of statutory construction, including the one described in *Staples v. United States*, 511 U.S. 600, 616 (1994), and *Elonis v. United States*, 575 U.S. 723, 135 S. Ct. 2001, 2009 (2015): unless a legislature clearly indicates its intent to use a lesser standard, a court should interpret a criminal statute to require mental culpability (*see supra* at 14-16). That rule is the only cited provision that even applies outside the Penal Law. *See People v. M&H Used Auto Parts & Cars, Inc.*, 22 A.D.3d 135, 143 (2d Dep't 2005); Penal Law § 5.02(2) (Penal Law provisions apply to other chapters "unless the context otherwise requires").

Even if all of these provisions applied outside the Penal Law, there is simply no reason to read them as limiting the standards of culpability a legislature may use in defining a crime. Rather, the Penal Law plainly allows a legislature to impose criminal liability for a wide array of conduct, including negligence. As § 15.10 makes clear, "the minimal requirement for criminal liability" is not a culpable subjective mental state, but rather a "voluntary act" or omission. A legislature is thus free to choose a mental state

from § 15.05's menu, opt for a different mental state, or require none at all. So long as it makes its intent clear—as Torres and Lewis concede the City Council has here—the Penal Law is no obstacle.

Proving this point, the Penal Law itself uses standards not listed in those sections. For example, Penal Law § 120.05(10) provides that a defendant commits assault in the second degree if he causes injury to a public school employee when he knows or "reasonably should know" he is on school grounds—an ordinary negligence standard. And depraved indifference is used throughout the Penal Law. *See, e.g.*, Penal Law § 125.25(2) & (4) (murder in the second degree); § 120.10(3) (assault in the first degree); § 120.25 (reckless endangerment); *see also People v. Feingold*, 7 N.Y.3d 288 (2006). And as explained above (*supra* at 19), many State law offenses outside the Penal Law use other standards. Most notably for our purposes, Hayley and Diego's Law uses the same "due care" standard as the Right of Way Law.

Torres and Lewis nonetheless argue that the Penal Law's default categories do not include one "in between strict liability

and gross negligence" (Torres Br. 17). But again, a legislature is not hamstrung by the list of standards set out in § 15.10. And even if legislatures were, it would not help Torres and Lewis, because the statute defines "strict liability" so broadly that the defined term captures simple negligence too.

If any material element of an offense "does not require a culpable mental state on the part of the actor," the Penal Law classifies it as one of "strict liability." § 15.10. The statute thus divides the world into two camps: on one side are subjective standards of culpability like intentional and knowing misconduct, and on the other side is everything else. "Strict liability" is a catch-all category, capturing both true strict liability (or absolute liability) and objective standards of culpability, like the failure to exercise due care—that is, ordinary negligence. So while the Right of Way Law is not a true strict liability statute, because it requires proof of negligence, *see People v. Sandgren*, 302 N.Y. 331 (1951) (distinguishing between a negligence-based standard of care and true strict liability), it falls within the Penal Law's broad definition of "strict liability" (A161-62). Torres and Lewis's

argument thus fails on its own terms, even setting aside that the Penal Law does not constrain legislatures in deciding whether to impose a culpable mental state for any particular criminal offense.

B. Rather than preempting local regulation, the Vehicle and Traffic Law expressly authorizes the City to regulate the right of way.

Torres and Lewis also claim that the Right of Way Law is inconsistent with Hayley and Diego's Law, VTL § 1146, and thus preempted (Torres Br. at 21-23; Lewis Br. 33 n.11). This argument is similarly meritless. State law is clear that the City may enact its own local laws protecting pedestrians.

The Vehicle and Traffic Law expressly authorizes the City to pass local laws governing "[r]ight[s] of way of vehicles and pedestrians" and the "[u]se of the highway by pedestrians." VTL § 1642(a)(10)-(11).[27] Local laws on these subjects "shall supersede the provisions of this [State law] where inconsistent or in conflict." *Id*. So even if there were a conflict between the City's Right of Way

[27] The term "highway" captures the great bulk of roadways in New York City, as it is defined as the "entire width between the boundary lines of every way publicly maintained when any part thereof is open to the use of the public for purposes of vehicular travel." VTL § 118.

Law and the State Vehicle and Traffic Law, it is the local law that would prevail.

But in fact there is no inconsistency. The Right of Way Law and Hayley and Diego's Law do not punish "the same conduct" differently (Torres Br. 23). The Right of Way Law requires the prosecution to prove that the defendant failed to yield the right of way to a pedestrian—an additional element not present in Hayley and Diego's Law, which requires only proof that the driver caused an injury while failing to use due care. Because the laws are not inconsistent, there is no preemption. *See Town of Concord v. Duwe*, 4 N.Y.3d 870, 872-73 (2005); *Vatore v. Comm'n of Consumer Affairs*, 83 N.Y.2d 645, 649 (1994).

And at any rate, this Court has expressly held that local laws may provide greater penalties for the same conduct than State law without running afoul of the conflict preemption doctrine. In *Zakrzewska v. New School*, the Court held that the State anti-discrimination law did not preempt the City from enacting its own, more demanding anti-discrimination law: "Both prohibit discrimination; [the local law] merely creates a greater

penalty for unlawful discrimination." 14 N.Y.3d 469, at 480-81. While *Zakrzewska* involved civil penalties, Torres and Lewis cite nothing to suggest that the preemption analysis should be different in criminal cases. The City's law is not preempted.

CONCLUSION

This Court should affirm the validity of the City's Right of Way Law, Administrative Code § 19-190.

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Respectfully submitted,

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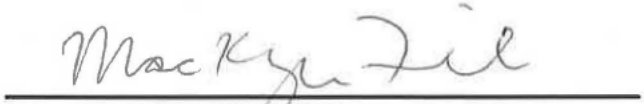
CERTIFICATE OF COMPLIANCE

I hereby certify that this brief was prepared using Microsoft Word 2010, and according to that software, it contains 6,338 words, not including the table of contents, the table of cases and authorities, the statement of questions presented, this certificate, and the cover.



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