To be argued by:
AMY MCCAMPHILL
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New York Supreme Court
Appellate Division: First Department

POLICE BENEVOLENT ASSOCIATION OF THE CITY OF NEW YORK, INC.; Case No. 2021-03041

(*Continued on the following page*),

Plaintiffs-Respondents,

against

THE CITY OF NEW YORK,

Defendant-Appellant.

BRIEF FOR APPELLANT

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February 22, 2022

Continued list of Plaintiffs-Respondents:

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

Following the tragic death of George Floyd in May 2020 and the ensuing protests that roiled New York City and the nation, the New York City Council enacted a broad suite of police reforms. Plaintiffs, a group of police unions, brought a pre-enforcement challenge to one of those reform measures, a local law that makes it a misdemeanor for an officer effecting an arrest to use chokeholds or certain forms of restraint that impede breathing or blood flow. Supreme Court, New York County (Love, J.) held that a single phrase in the law was unconstitutionally vague and struck down the entire law. This Court should reverse.

The challenged prohibition is not vague. It uses concrete terms with readily ascertainable meaning to bar specifically defined conduct: an officer may not sit, kneel, or stand on the chest or back of an arrestee in a way that compresses the person's diaphragm and thus restricts the person's airflow. The same local law also bans another well-known improper restraint—the chokehold—that is defined in similar terms, and plaintiffs have not asserted that the chokehold ban is vague.

The context and legislative history also leave no room for doubt about what conduct this law prohibits. The City Council expressly intended to target the sort of dangerous restraints that had long been recognized as unsafe—and that received renewed public attention after the harrowing video of George Floyd's murder. And, providing further clarity, the prohibition was intended to codify, and give teeth to, a restriction that had long been found in the NYPD's Patrol Guide.

All of this provides far more clarity about the local law's meaning than the void-for-vagueness doctrine requires—and indeed far more than the legion of less concretely worded prohibitions that have been upheld against vagueness challenges. Contrary to Supreme Court's reasoning, the law provides officers with fair notice of what it prohibits, allowing them to adapt their conduct to avoid running afoul of it.

But even if the challenged statutory language had been vague, it would not justify Supreme Court's remedy of striking down the entire local law. The law's chokehold ban, which plaintiffs did not assert is vague, is readily severable from the remainder. And there

is every indication that the City Council would have wanted that distinct prohibition addressing a separate category of police restraints to stand on its own.

QUESTIONS PRESENTED

1. Did Supreme Court err in holding that the portion of N.Y.C. Administrative Code section 10-181 that criminalizes certain dangerous restraints involving sitting, kneeling, or standing on an arrestee's chest or back is unconstitutionally vague, when the local law uses concrete, commonly understood terms that ask questions of objective fact?

2. Alternatively, did Supreme Court err in striking down the entirety of section 10-181 upon a finding that a single phrase was impermissibly vague, when the local law contains two distinct prohibitions addressing different types of police restraints that are readily severable, and when the record shows that the City Council would have wanted the portion of the law not found vague to stand?

STATEMENT OF THE CASE

The local law that plaintiffs challenge, enacted by the City Council in June 2020, sets limits on police use of certain dangerous restraints. It defines two "[u]nlawful methods of restraint," providing that "[n]o person shall restrain an individual in a manner that restricts the flow of air or blood by [(1)] compressing the windpipe or the carotid arteries on each side of the neck, or [(2)] sitting, kneeling, or standing on the chest or back in a manner that compresses the diaphragm, in the course of effecting or attempting to effect an arrest." N.Y.C. Admin. Code § 10-181(a). For ease of reference, this brief refers to the two components of this law as the "chokehold ban" and the "diaphragm compression ban." The law classifies violations as misdemeanors punishable by imprisonment of up to one year, or a fine of up to $2,500, or both. *Id.* § 10-181(b).

A. Section 10-181's enactment to give teeth to pre-existing NYPD internal prohibitions of the use of chokeholds and other dangerous restraints

Section 10-181 was a response to growing concerns among Council members and the public about police use of force. Several

high-profile deaths at the hands of police, and widespread public protests, drew attention to the fact that internal NYPD policies regulating the use of force were not achieving appropriate compliance. The law aimed to give force to pre-existing prohibitions on dangerous restraints found in the NYPD's Patrol Guide.

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

The earliest version of the local law was first proposed in 2014, in response to the tragic death of Eric Garner following a police chokehold.[1] That proposal included only a chokehold ban.

The accompanying committee report noted that "for more than 20 years, the [NYPD] Patrol Guide has unequivocally prohibited the use of chokeholds," but the effectiveness of that policy had come "under great scrutiny" following Mr. Garner's death.[2] Specifically, the Patrol Guide explicitly prohibits officers from using chokeholds, defined as "any pressure to the throat or

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

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

windpipe, which may prevent or hinder breathing or reduce intake of air."[3] In no uncertain terms, the Patrol Guide states that officers "will NOT" use chokeholds.[4]

Yet as Council Members recognized, NYPD's prohibition unfortunately "failed to deter officers from performing chokeholds."[5] When NYPD representatives opposed the chokehold ban proposal, one Council Member noted that the proposal "really sets out to codify what [NYPD's] own existing policy is."[6]

The 2014 chokehold ban proposal had 28 sponsors—already a majority of the Council.[7] Gwen Carr, Mr. Garner's mother, testified strongly in favor of it, urging the Council to take this "step towards

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[3] *Id.* (quoting NYPD Patrol Guide, § 203-11 pg. 1, effective date Aug. 1, 2013) ("2013 NYPD Patrol Guide"), *available at* https://perma.cc/D69T-GUTK (page 106 of 4495) (captured Feb. 12, 2022). The current NYPD Patrol Guide ("Current NYPD Patrol Guide") has near-identical language in section 221-01 pg. 3, *available at* https://perma.cc/DQL4-HHEE (page 614 of 692) (captured Feb. 12, 2022).

[4] 2013 NYPD Patrol Guide, § 203-11 pg. 1, cited *supra* n.3, (page 106 of 4495); *see also* Current NYPD Patrol Guide, § 221-01 pg. 3, cited *supra* n.3 (page 615 of 692).

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

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

[7] *See* New York City Council, Legislation, File #: Int. 0540-2014, cited *supra* n.1.

police reform and accountability."[8] But after Mayor de Blasio indicated he would veto the bill,[9] it was never put to a vote.[10]

2. The revival of the chokehold ban, expanded to include a diaphragm compression ban, following George Floyd's death

About five years later, in 2020, the chokehold ban proposal was revived, along with a suite of other proposed police reforms.[11] These reforms were spurred by the death of George Floyd in Minnesota, after a police officer kneeled on his back and neck, and the ensuing widespread local and nationwide protests.[12]

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[8] New York City Council, Transcript of the Minutes of the Committee on Public Safety (June 29, 2015), cited *supra* n.5, at 159-61.

[9] *See* Jonathan Allen, "New York City mayor says he would veto police chokehold ban," *Reuters* (Jan. 14, 2015), *available at* https://perma.cc/822R-W4N9.

[10] *See* New York City Council, Legislation, File #: Int. 0540-2014, cited *supra* n.1.

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

[12] *See* New York City Council, Committee Report of the Justice Division, Committee on Public Safety (June 9, 2020), at 4-5, *available at* https://perma.cc/H3KQ-M784; New York City Council, Minutes of the Stated Meeting of Thursday, June 18, 2020, at 1034-35, *available at* https://perma.cc/3KLN-9MGU.

In early June 2020, a diaphragm compression ban was added to the chokehold ban previously proposed. Specifically, Int. 536-A would have prohibited restraint "in a manner that restricts the flow of air or blood by *compressing the windpipe, diaphragm, or the carotid arteries* on each side of the neck."[13] This proposal made clear that the City Council was interested in criminalizing restraints that restricted breathing or circulation, whether via the diaphragm, the windpipe, or the carotid arteries.

This proposal was again sponsored by an overwhelming majority of the City Council—38 of its 51 members.[14] The Council received hundreds of pages of written submissions from interested parties and members of the public, which overwhelmingly supported the proposed police reforms, including Int. 536-A.[15] Commentors pointed out that many other cities had successfully reduced police fatalities through similar legislation, and that

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[13] Proposed Int. 536-A – 6/4/2020, *available at* https://perma.cc/HXJ5-BPFL (emphasis added).

[14] *See* New York City Council, File #: Int. 0536-2018, cited *supra* n.11.

[15] New York City Council, Hearing Testimony (June 9, 2020), *available at* https://perma.cc/Q2R4-FKY2.

NYPD's existing internal policies had proved insufficient at regulating use of force.[16] Then-Manhattan Borough President Gale Brewer called the bill "long overdue."[17]

The Council held a public hearing lasting nearly ten hours.[18] At the hearing, NYPD Deputy Commissioner Benjamin Tucker agreed that "the unacceptable acts" that "we are all trying to prevent are those that occurred to Mr. Garner and Mr. Floyd," and stated that NYPD would support the local law, "with minor amendments."[19] NYPD representatives explained that they were concerned about liability from grabbing someone's torso, or falling on someone's torso, in a struggle with an arrestee.[20]

About a week later, the Council amended the proposal. In the amended Int. 536-B, the Council clarified and narrowed the diaphragm compression component by revising it to prohibit only

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[16] *See, e.g.*, *id.* at 145.

[17] *Id.* at 1.

[18] New York City Council, Transcript of the Minutes of the Committee on Public Safety (June 9, 2020), *available at* https://perma.cc/6BHU-NXCJ.

[19] *Id.* at 58, 62.

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

restriction of "the flow of air or blood by … *sitting, kneeling, or standing on the chest or back* in a manner that compresses the diaphragm."[21]

By adding the additional language, the City Council brought the proposal in line with NYPD's pre-existing restriction on such restraints. Patrol Guide section 221-02 (11(a)) advises officers to "[a]pply no more than the reasonable force necessary to gain control," and "*[a]void actions* which may result in chest compression, *such as sitting, kneeling, or standing on a subject's chest or back*, thereby reducing the subject's ability to breathe."[22] In the same vein, the Patrol Guide also instructs officers to position

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[21] Proposed Int. 536-B – 6/16/20, *available at* https://perma.cc/2Y5Z-DJV2 (emphasis added).

[22] Current NYPD Patrol Guide, § 221-02 (11(a)), cited *supra* n.3 (pg. 618 of 693) (emphasis added); New York City Council, Committee Report of the Justice Division, Committee on Public Safety (June 18, 2020), at 6 (quoting this language from the NYPD Patrol Guide), *available at* https://perma.cc/W6EB-3R54; *see also* 2013 NYPD Patrol Guide, § 203-11 pg. 1 (page 106 of 4495) ("Whenever possible, members 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."), cited *supra* n.3.

an arrestee "to promote free breathing, as soon as safety permits, by sitting the person up or turning the person onto his/her side."[23]

These NYPD policies are longstanding. Language instructing officers to take care not to impede arrestee breathing has existed in the NYPD Patrol Guide for at least 22 years.[24] And almost 30 years ago, in 1994, then-NYPD Commissioner William Bratton produced a training video for police officers, instructing them on how body pressure can impede breathing.[25] In the video, Dr. Charles Hirsch, City's Chief Medical Examiner, explained: "the greater the weight resting on the individual's back and the more severe the degree of compression, the more difficult it is for them to breathe in."[26] The

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[23] Current NYPD Patrol Guide, § 221-02 (14), cited *supra* n.3 (pg. 619 of 693); *see also* 2013 NYPD Patrol Guide, § 203-11 pg. 2 (page 107 of 4495) ("After an individual has been controlled …, the person should be positioned so as to promote free breathing."), cited *supra* n.3.

[24] In 2000, the Patrol Guide instructed 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." NYPD Patrol Guide (Jan. 1, 2000), § 203-11, *available at* https://perma.cc/JTU4-9W7B (pg. 91 of 1609).

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

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

training video instructed officers not to sit on an arrestee's back and to move arrestees onto their side or into a seated position as soon as possible after they are handcuffed.[27]

The reason for these well-established NYPD policies, as clearly explained by Dr. Hirsch in the NYPD's 1994 video, is straightforward: placing pressure on an arrestee's chest or back can be very dangerous. Indeed, a recent *New York Times* review of 70 cases of people who died in police custody after saying "I can't breathe"—the same dying words spoken by Eric Garner and George Floyd—found that "[m]ost frequently, officers pushed [the decedents] face down on the ground and held them prone with their body weight."[28] For years, courts reviewing claims of excessive police uses of force have recognized that "applying pressure to [a person's] back" carries "a significant risk of positional asphyxiation." *Weigel v. Broad*, 544 F.3d 1143, 1155 (10th Cir. 2008). Yet "compression asphyxia … appears with unfortunate

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

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

frequency" in police excessive force cases, "and presumably occurs with even greater frequency on the street." *Drummond v. City of Anaheim*, 343 F.3d 1052, 1063 (9th Cir. 2003). Thus, the diaphragm compression ban, like the chokehold ban, was designed to address well-known dangers.

The amended Int. 536-B, along with the legislative history repeatedly referencing NYPD's Patrol Guide, demonstrates that the City Council was well aware that longstanding NYPD internal policies prohibited both chokeholds and certain chest and back compressions that impede breathing.[29] Yet, as it had been in 2014 when the chokehold ban was first proposed, the Council remained concerned that these existing prohibitions on this type of use of force were ineffective.

As a bill sponsor declared, "[t]he NYPD banned chokeholds as a matter of policy nearly three decades ago. … Tell that to Eric Garner. Tell that to the hundreds of New Yorkers who file[d]

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[29] *See* New York City Council, Committee Report of the Justice Division, Committee on Public Safety (June 9, 2020), cited *supra* n.12, at 5; New York City Council, Committee Report of the Justice Division, Committee on Public Safety (June 18, 2020), cited *supra* n.22, at 6.

chokehold complaints with the Civilian Complaint Review Board in the years after Eric Garner's death."[30] NYPD representatives admitted that no officer had ever been fired or suspended for the unauthorized use of a chokehold, with the sole exception of Daniel Pantaleo, who used a fatal chokehold on Mr. Garner.[31] Another sponsor agreed "Mr. Garner's death proved that it is not enough that the NYPD prohibits this practice."[32] The legislation's supporters avowed: "We will no longer rely on internal NYPD policy that has failed so many."[33]

The local law passed the City Council by a vote of 47 to 3.[34] It was signed into law by Mayor de Blasio in July 2020, along with

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[30] New York City Council, Transcript of the Minutes of the Stated Meeting (June 18, 2020), at 42 (statements of Council Member Rory I. Lancman), *available at* https://perma.cc/24EU-AHLK.

[31] New York City Council, Transcript of the Minutes of the Committee on Public Safety (June 9, 2020), cited *supra* n.18, at 96-98.

[32] New York City Council, Transcript of the Minutes of the Stated Meeting (June 18, 2020), cited *supra* n.30, at 57 (statements of Council Member Deborah Rose).

[33] *Id.* at 43 (statements of Council Member Rory I. Lancman).

[34] New York City Council – Action Details (June 18, 2020), Int. 0536-2018 Version B, *at* https://on.nyc.gov/34HOULu (last visited Feb. 15, 2022).

other police reforms,[35] and subsequently codified as New York City Administrative Code section 10-181.

In the same month that the City Council enacted section 10-181, New York State passed the Eric Garner Anti-Chokehold Act, now codified as Penal Law section 121.13-a. This state law criminalizes law enforcement use of chokeholds that result in serious injury or death.[36]

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[35] *See* Correspondence, Office of the Mayor of the City of New York to the Clerk of the City Council (July 15, 2020), *available at* https://perma.cc/5NV2-QZL3.

[36] Since the deaths of Eric Garner and George Floyd, many other jurisdictions across the country enacted similar police reforms, prohibiting officers from using restraints that restrict breathing. For instance, Colorado prohibits officers "from using a chokehold upon another person," with "chokehold" broadly defined as a "method by which a person applies sufficient pressure to a person to make breathing difficult or impossible," which "*includes but is not limited* to any pressure to the neck, throat, or windpipe that may prevent or hinder breathing or reduce intake of air." Colo. Rev. Stat. § 18-1-707 (2.5) (emphasis added)). Nevada prohibits officers from using chokehold or placing any person in their custody "in any position which compresses his or her airway or restricts his or her ability to breathe." Nev. Rev. Stat. Ann. § 193.350(1),(2). And Delaware created a new felony for officers who knowingly or intentionally use a chokehold on another person, with "chokehold" broadly defined as a "technique intended to restrict another person's airway, or prevent or restrict the breathing of another person." Del. Code Ann. tit. 11, § 607A. These examples are not exhaustive. *See, e.g.*, Cal. Gov. Code § 7286.5(a) (prohibiting law enforcement authorization of chokeholds or "techniques … that involve a substantial risk of positional asphyxia"); Conn. Gen. Stat. § 53a-22(d) (setting limits on an arresting officer's use of "a chokehold or other method of restraint applied to the neck area or that otherwise impedes the ability to breathe or restricts blood circulation to the brain of another person"); 720 Ill. Comp. Stat. Ann. 5/7-5.5(a) (restricting officer use of chokeholds or any "restraint above the shoulders with risk of asphyxiation"); Vt. Stat. Ann. tit. 13, § 1032

(cont'd on next page)

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

After the state and local laws were passed, NYPD issued new training materials informing its officers of the laws and reiterating NYPD's longstanding policies against both chokeholds and restraints in which officers sit, kneel, or stand on an arrestee's chest or back (Record on Appeal ("R") 71-75, 77-97, 167-69, 178-88, 203-04, 209-10).

These training materials also explain the function and location of the diaphragm, the carotid arteries, and the trachea, or windpipe (R95). In particular, NYPD's training materials explain: "[t]he diaphragm, located below the lungs, is the major muscle of respiration. It is a large, dome-shape muscle that contracts rhythmically and continually, and, most of the time, involuntarily" (R95). The training materials further explain that the diaphragm

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(criminalizing officer use of chokeholds that causes serious injury or death, with "chokehold" defined to include any "action that applies any pressure to the throat, windpipe, or neck in a manner that limits the person's breathing or blood flow").

contracts upon inhalation so that the chest cavity enlarges, and expands upon exhalation, pushing air out of the lungs (R95).

NYPD officer training includes multiple demonstrations and drills teaching techniques on how to safely, and lawfully, "achieve control of an uncompliant subject" (R187; *see also* 148-56, 160-64, 173-75). For example, a training video released by NYPD for its officers provides reenactments demonstrating both the types of arrest restraints that are permitted and the types that are prohibited.[37] The video demonstrates how officers can safely restrain an arrestee on the floor without using prohibited restraints.[38] It also acknowledges that NYPD had already banned chokeholds, and had already trained officers not to sit, kneel, or stand on an arrestee's chest or back.[39]

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[37] Rocco Parascandola and Thomas Tracy, "New NYPD training video warns cops against using illegal chokeholds or kneeling on neck and back," *Daily News*, July 3, 2020, *available at* https://www.nydailynews.com/new-york/nyc-crime/ny-nypd-puts-out-new-training-video-on-how-to-subdue-suspects-20200703-khcztr23sfb37b2r33uhqljivi-story.html.

[38] *Id.* at 3:54 to 4:09.

[39] *Id.* at 1:26 to 1:34.

B. Supreme Court's decision striking down the entirety of section 10-181

Plaintiffs, a group of police unions, brought a pre-enforcement challenge to section 10-181 on two grounds. They argued that (1) the local law is preempted by the newly enacted section 121-13-a of the New York State Penal Law, and (2) the local law violates due process on the ground that it is unconstitutionally vague. The parties cross-moved for summary judgment.

Supreme Court rejected plaintiffs' preemption challenge, finding that section 10-181 did not conflict with state law, and that the State Legislature had not assumed full responsibility for the field of regulating permissible uses of force by police officers (R10-14). But the court found that section 10-181 violated due process because it was impermissibly vague. In reaching that holding, the court focused entirely on the diaphragm compression portion of the local law. Indeed, the court noted that "none of plaintiffs' argument even suggest that the portion of Section 10-181 banning chokeholds is in any way vague" (R16).

The court rejected plaintiffs' arguments that the diaphragm compression ban's lack of a mens rea or injury requirement

rendered it impermissibly vague; as the court noted, neither is needed to withstand a due process challenge (R15). Moreover, because sitting, kneeling, and standing on a person's chest or back are voluntary rather than inadvertent acts, "the lack of a mens rea requirement is not an issue" (R16).

However, the court concluded that the diaphragm compression ban nevertheless was unconstitutionally vague because "the statute offers no guidance on how an officer is to determine whether his or her actions are causing a suspect's diaphragm to be compressed" (R16 (cleaned up)).[40] The court reviewed training materials submitted by NYPD and concluded that the materials did not "meaningfully explain what is meant by 'compresses the diaphragm'" (R20). Rather, "[t]he NYPD appears to have … 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). The court failed to recognize that NYPD had, for years, instructed its officers not to sit, kneel, or stand on an

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

arrestee's chest or back, and that the training materials that NYPD issued after enactment of the diaphragm compression ban accorded both with this longstanding internal policy and with the statutory prohibition.

The court also considered, and rejected, the City's request to strike the supposedly vague phrase—"in a manner that compresses the diaphragm"—from the local law, because the court found that doing so could significantly expand the law's scope in a way that the City Council may not have intended (R22-23). Yet the court did not consider whether the diaphragm compression ban portion of the law should be severed from the chokehold ban, thereby allowing the latter to be upheld. Instead, although plaintiffs had not asserted that the chokehold portion of the law was vague, the court struck down the local law in its entirety.

SUMMARY OF ARGUMENT

Supreme Court erred in striking down section 10-181 in response to plaintiffs' vagueness challenge. The diaphragm compression ban provides far more than constitutionally adequate notice of the conduct it prohibits. It uses concrete, objective terms

to describe a form of restraint that a police officer may not lawfully use in effecting an arrest: sitting, kneeling, or standing on the arrestee's chest or back in a way that compresses the diaphragm and restricts the person's breathing. Highly trained law enforcement officers should have no difficulty discerning what conduct the law prohibits.

Were further clarity necessary, the diaphragm compression ban's legislative history amply provides it. The City Council revised the proposed ban before enactment to parallel and codify the longstanding restriction in the NYPD's Patrol Guide on sitting, kneeling, or standing on an arrestee's chest or back. And the Council made plain its intention to criminalize a dangerous form of restraint that is a well-documented cause of injury and death of arrestees and that had been brought to the forefront of public consciousness by the murder of George Floyd.

The lower court failed to contend with this overwhelming evidence of statutory meaning. Its ruling was instead motivated by concerns about the ban's potential application that have no place in a vagueness analysis—especially in a challenge to the law on its

face, brought before any officer has been charged under it. The court credited plaintiffs' professed concern that officers will be unable to tell when an arrestee's diaphragm is being compressed. But criminal statutes frequently require people to exercise judgment to ensure that they maintain compliance with a defined legal standard—including many laws that, like this one, turn on phenomena occurring inside the body that cannot be directly observed.

Time and again, such laws have been upheld against vagueness challenges, because factual uncertainty about whether a clear standard has been violated is not a vagueness concern. Thus, the views of plaintiffs' medical experts about whether and when compression of the diaphragm occurs do not affect the vagueness analysis. An officer charged with violating the diaphragm compression ban would be free to present those medical opinions to the jury, where the standard of proof beyond a reasonable doubt protects against conviction in any cases where the fact of violation remains uncertain.

The court's concerns about officers' ability to comply with the diaphragm compression ban were misguided in any event. The law prohibits conduct that results in an arrestee's breathing being impaired, and officers can be expected to recognize when such impairment is occurring. Even more clearly, it is not difficult for an officer to know when they are sitting, standing, or kneeling on an arrestee's back. Moreover, police officers are trained on how to comply with the law, and following their training would enable them to avoid violating it.

Finally, and in the alternative, Supreme Court erred by failing to consider whether, even if it *were* vague, the diaphragm compression ban could be severed from the local law's distinct chokehold ban. There is abundant evidence that the City Council would have wanted the chokehold ban to stand even if the diaphragm compression ban could not. The legislative history shows that the Council was critically concerned with banning each form of restraint. Plaintiffs did not assert that the chokehold ban is vague, and the chokehold ban could easily be preserved intact if the diaphragm compression ban were struck from the law. At the very

least, therefore, the court should have allowed the chokehold ban to stand.

ARGUMENT

POINT I

THE LOCAL LAW'S BAN ON RESTRAINTS THAT COMPRESS THE DIAPHRAGM IS NOT IMPERMISSIBLY VAGUE

Supreme Court erred in striking down the diaphragm compression ban as unconstitutionally vague.[41] Municipal statutes carry "an exceedingly strong presumption of constitutionality." *People v. Stephens*, 28 N.Y.3d 307, 312 (2016) (cleaned up). And plaintiffs assert a facial challenge—in other words, they claim that the law can be valid in "no set of circumstances"—which is "the most difficult challenge to mount successfully." *United States v. Salerno*, 481 U.S. 739, 745 (1987); *see Berry v. N.Y.S. Dep't of Taxation & Fin.*, 162 A.D.3d 606, 607 (1st Dep't 2018).

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[41] While plaintiffs bring their claim solely under the state Constitution, the federal Constitution's due process clause has identical language. *Compare* N.Y. Const. art. I § 6, *with* U.S. Const. amend. XIV. New York courts apply the same standards, and frequently cite federal case law, in resolving both state and federal void-for-vagueness claims. *See, e.g.*, *People v. Stephens*, 28 N.Y.3d 307, 312 (2016). Thus, this brief cites applicable federal and state case law.

Such facial challenges, which require "the court to examine the words of the statute on a cold page and without reference to the defendant's conduct," are "generally disfavored." *People v. Stuart*, 100 N.Y.2d 412, 421, 422 (2003). That is because those claims "often rest on speculation, flout the fundamental principle of judicial restraint that courts should avoid unnecessary constitutional adjudication, and threaten to short circuit the democratic process." *Copeland v. Vance*, 893 F.3d 101, 111 (2d Cir. 2018) (cleaned up).

The diaphragm compression ban easily withstands plaintiffs' pre-enforcement facial challenge. The local law uses concrete, objective terms to ask clear questions of fact. And, providing further clarity, the City Council expressly intended to criminalize conduct that was well-known to be dangerous, that NYPD internal rules already admonished officers to avoid using, and that had been on display in the murder of George Floyd.

Supreme Court's stated concern in striking down the local law—that compliance would be difficult for an officer to assess—was in error. Any potential difficulty in assessing compliance in borderline cases does not implicate the vagueness doctrine. Many

other valid statutes establish clear lines that may nonetheless be difficult to locate in practice, requiring a person to make a judgment about whether their conduct is prohibited. And the local law provides clear standards to guide officers' conduct.

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

A statute must be sufficiently definite "to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden." *People v. Bright*, 71 N.Y.2d 376, 382-83 (1988) (cleaned up). Courts evaluating a vagueness challenge ask whether the statute's "plain text," *Town of Delaware v. Leifer*, 34 N.Y.3d 234, 248 (2019), considered along with "context, common usage, and legislative history," provide "both individuals and law enforcement officers the notice required by due process," *United States v. Farhane*, 634 F.3d 127, 143 (2d Cir. 2011). Since section 10-181's prohibitions do not threaten the exercise of a constitutionally protected right, such as freedom of speech, the vagueness test should not be stringently applied. *Copeland*, 893 F.3d at 114; *see Hoffman Estates v. Flipside, Hoffman Estates*, 455 U.S. 489, 499

(1982). The test does not demand "mathematical certainty." *Grayned v. City of Rockford*, 408 U.S. 104, 110 (1972).

Supreme Court failed to properly apply these principles. Most significant, the meaning of the diaphragm compression ban is clear from its text. It prohibits officers from (1) "restrain[ing] an individual," (2) "in a manner that restricts the flow of air or blood," by (3) "sitting, kneeling, or standing on the chest or back in a manner that compresses the diaphragm." Admin. Code § 10-181(a). This prohibition, and the companion chokehold ban that is defined with similar wording, were enacted in response to high-profile police killings of civilians involving these methods of restraint, as well as evidence that officers were not abiding by the existing prohibitions of these same practices in the NYPD Patrol Guide. Given the text, enactment history, legislative history, and context, there was no valid basis for Supreme Court to conclude that the diaphragm compression ban is unconstitutionally vague.

1. The terms of the diaphragm compression ban are clear.

A statute is not vague if it employs terms with a "common understanding" that thereby provide notice of what is prohibited. *People v. Kozlow*, 8 N.Y.3d 554, 561 (2007) (cleaned up); *see also United States v. Vuitch*, 402 U.S. 62, 72 (1971). The diaphragm compression ban uses just such terms.

To start, the vast majority of the terms in the prohibition are concededly clear. Plaintiffs have never claimed that there is any uncertainty about the meaning of the phrases "restrain[ing] an individual"; "in a manner that restricts the flow of air or blood"; or "sitting, kneeling, or standing on the chest or back." Admin. Code § 10-181(a). Nor have they suggested that the combination of these words in the phrase "restricts the flow of air or blood by … sitting, kneeling, or standing on the chest or back" is in any way unclear.

The only language that plaintiffs challenged, and that Supreme Court held was vague, is the last element, which provides that the prohibited restraint is unlawful if done "in a manner that compresses the diaphragm." Admin. Code § 10-181(a). But this language is not vague, either. The phrase clarifies the scope of the

prohibited conduct—sitting, kneeling, or standing on the chest or back so as to obstruct air or blood flow is prohibited if the arrestee's diaphragm is thereby compressed.

The phrase relies on two concrete, definite terms: "compress" and "diaphragm." Those terms' meaning can readily be discerned from a dictionary. *See People v. Ocasio*, 28 N.Y.3d 178, 181 (2016) (recognizing dictionary definitions as "useful guideposts") (cleaned up); *see also People v. Lombardo*, 61 N.Y.2d 97, 104-05 (1984). The diaphragm is the "body partition of muscle and connective tissue … separating the chest and abdominal cavities."[42] And the diaphragm "by its contraction and relaxation … plays an important role" in breathing.[43] "Compress" means "to press or squeeze together."[44] Together, then, a person "compresses the diaphragm" by pressing or squeezing the anatomical structure located between the chest and abdomen, which can interfere with breathing. The statutory

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

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

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

language therefore identifies both the prohibited conduct and the effect that the law aims to prevent.

Unsurprisingly, the record shows no confusion about the meaning of these terms. NYPD's training materials define the word "diaphragm" similarly to its dictionary definition, as a dome-shaped muscle located below the lungs (R95). The training materials further explain that the diaphragm contracts and expands as a person breathes, allowing air to enter and leave the lungs (R95). And none of plaintiffs' experts professed to be confused about which body part the local law referenced or where that body part is located. Plaintiffs' medical expert Doctor Beno Oppenheimer defined "diaphragm" very much as the NYPD training materials do: "[t]he diaphragm is a dome-shaped muscle which is located deep within the chest … and which acts as a partition separating the thoracic and abdominal cavities" (R424). Dr. Oppenheimer further explained, consistent with NYPD training materials, that the diaphragm contracts during inhalation to expand the lungs (R425). And while NYPD training materials do not explicitly define the term "compress," there is no record of any confusion regarding this

term; indeed, plaintiffs do not claim that use of the same word in the chokehold ban portion of section 10-181 renders that portion vague.

Indeed, the local law's key terms are far more definite and specific than language found in many other cases not to be vague. For example, in a statute regulating realtors, the Court of Appeals held that the term "'untrustworthiness' is sufficiently certain" to apprise "of the scope of permissible activities." *Gold v. Lomenzo*, 29 N.Y.2d 468, 477-78 (1972). The Court has also held that "[t]he fact that the term 'for cause' is not defined by the … provision authorizing the removal of a Judge does not render it void for vagueness." *Friedman v. State*, 24 N.Y.2d 528, 539 (1969). Similarly, the Court upheld statutory language referring to a "substandard or insanitary area," as not facially unconstitutional for vagueness. *Kaur v. N.Y.S. Urban Dev. Corp.*, 15 N.Y.3d 235, 256 (2010). And in upholding a conviction for attempted dissemination of indecent materials to a minor where the defendant had communicated purely verbal descriptions of sexual acts without any images, the Court held that the word "depict" was "sufficiently

definite," even if "imprecise," to supply fair notice that the charged conduct was prohibited. *Kozlow*, 8 N.Y.3d at 561 (cleaned up).

In contrast, the instances in which courts have found statutes void for vagueness demonstrate that the doctrine is concerned with standards that are highly subjective, abstract, or open-ended. These include a statute that prohibited communications "in a manner likely to cause annoyance or alarm," *People v. Golb*, 23 N.Y.3d 455, 467-68 (2014); *see also People v. Dietze*, 75 N.Y.2d 47 (1989) (also striking down a harassment statute), and a loitering statute that required persons to produce "credible and reliable" identification upon demand, *Kolender v. Lawson*, 461 U.S. 352, 358 (1983); *see also Bright*, 71 N.Y.2d at 383-84 ("[A] statute that merely prohibits loitering, without more, is unconstitutionally vague."); *City of Chi. v. Morales*, 527 U.S. 41, 62 (1999) (invalidating loitering law where guilt hinged on officer's "inherently subjective" determination of whether an individual was stationary with "no apparent purpose"). These examples also confirm that vagueness concerns are heightened when statutes implicate the exercise of

constitutional rights, such as freedom of speech and movement. *See, e.g.*, *Kolender*, 461 U.S. at 358.

But the local law at issue here is starkly different. The meaning of the words "diaphragm" and "compression" are neither subjective, abstract, nor open-ended. And section 10-181's prohibitions do not infringe on the exercise of any constitutional right. Quite to the contrary: they govern the professional conduct of highly trained officers who are vested with extraordinary authority that implicates *private citizens'* most treasured rights.

Were there room for confusion about the prohibition's scope—and there is not—it would not be enough to invalidate the ban. Courts have long held that "perfect clarity and precise guidance have never been required" in legislation. *United States v. Williams*, 553 U.S. 285, 304 (2008) (cleaned up). Rather, "[d]ue process requires only a reasonable degree of certainty so that individuals of ordinary intelligence are not forced to guess at the meaning of statutory terms." *Foss v. Rochester*, 65 N.Y.2d 247, 253 (1985).

Here, the terms of the local law are concrete and clear. Any arguments to the contrary are meritless. *See United States v.*

Powell, 423 U.S. 87, 93 (1975) ("Such straining to inject doubt as to the meaning of words where no doubt would be felt by the normal reader is not required by the 'void for vagueness' doctrine, and we will not indulge in it.").

2. The legislative history and statutory context provide even greater clarity about the law's meaning.

While statutory analysis necessarily begins with the text, courts also consider both statutory context and legislative history to determine whether a law provides the notice required by due process. *Farhane*, 634 F.3d at 143. Here, the statutory language is sufficiently concrete, on its own, to overcome plaintiffs' vagueness challenge, and these additional considerations only provide further clarity as to the local law's meaning.

To start, other portions of the local law confirm that the text of the diaphragm compression ban is clear. *See Farhane*, 634 F.3d at 142 (considering other provisions of a statute to provide context for statutory meaning). The prohibition is textually very similar to section 10-181's chokehold ban, which plaintiffs have never asserted is vague. Both components prohibit officers from taking

actions that "compress" a specific body part—the windpipe or carotid arteries in the case of the chokehold ban, and the diaphragm in the case of the diaphragm compression ban. And both components of the local law prohibit officers from implementing such restraints "in a manner that restricts the flow of air or blood" of the restrained individual. Just as the chokehold ban is not vague, neither is the diaphragm compression ban.

The revisions the local law underwent before passage further illuminate its meaning. When the diaphragm compression ban was first proposed, it was folded into the chokehold ban—the legislation would have prohibited restraint "in a manner that restricts the flow of air or blood by compressing the windpipe, diaphragm, or the carotid arteries on each side of the neck."[45] Hearing concerns from NYPD that the law might both sweep in unintentional conduct, such as falling on a person's chest or back, and reach torso restraints in a standing position that officers may find necessary, the Council segregated the law's two prohibitions and revised the

[45] Proposed Int. 536-A – 6/4/2020, *cited* supra n.13.

diaphragm compression portion to prohibit only restricting air or blood flow as a result of "sitting, kneeling, or standing on the chest or back."[46] The revisions narrowed the local law's scope by clarifying what specific acts by a police officer were prohibited.

In addition, the legislative history shows that the diaphragm compression ban was enacted to criminalize conduct that the Council understood was already restricted by NYPD's Patrol Guide. The local law closely tracks that pre-existing restriction, which has appeared in the Patrol Guide in substantially similar form for at least 22 years.[47] And, as the 1994 training video from then-Commissioner Bratton demonstrates, for decades NYPD has instructed its officers to refrain from using exactly these kinds of dangerous restraints because of the well-known danger that placing weight on a person's chest or back can impede diaphragm function and thus interfere with breathing.[48]

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[46] *See supra* n.20-21 and accompanying text.

[47] *See supra* n.22-24.

[48] *See supra* n.25-28 and accompanying text.

Indeed, the committee reports preceding the legislation's passage discuss NYPD's existing Patrol Guide rules and the Council's concern that officers were not following those rules.[49] The legislation's sponsors consistently explained as much, stating that "it is not enough that the NYPD prohibits this practice;"[50] and asserting "[w]e will no longer rely on internal NYPD policy that has failed so many."[51] One sponsor, Council Member Rory Lancman, explained in this litigation that NYPD's "long history of failing to enforce its own Patrol Guide and protect the public from chokeholds and other dangerous breathing restraints is why the Chokehold Law was passed."[52] Lancman cited data showing that from 2014 through September 2020, the Civilian Complaint Review Board received over 1,000 complaints about chokeholds and other

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[49] *See* New York City Council, Committee Report of the Justice Division, Committee on Public Safety (June 9, 2020), cited *supra* n.12, at 5; New York City Council, Committee Report of the Justice Division, Committee on Public Safety (June 18, 2020), cited *supra* n.22, at 6.

[50] New York City Council, Transcript of the Minutes of the Stated Meeting (June 18, 2020), cited *supra* n.30, at 57.

[51] *Id.* at 43.

[52] Affirmation of Rory I. Lancman, dated Sept. 17, 2020, Supreme Court NYSCEF Docket No. 43 ("Lancman Aff."), at ¶ 24.

restraints that impede breathing, confirming that NYPD's Patrol Guide prohibitions were unfortunately not effective at curbing these dangerous practices.[53]

Moreover, the diaphragm compression ban did not arise "in a vacuum." *Matter of Cohen*, 139 A.D.2d 221, 224 (1st Dep't 1988). It, and the companion chokehold ban, were enacted amidst widespread protests against improper police uses of force, and in particular the murder of George Floyd by a police officer who knelt on his back and neck. The committee reports show that the high-profile deaths of Mr. Floyd and Eric Garner motivated the Council to act; the officers' actions toward these two men exemplified the conduct that

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[53] Lancman Aff. at ¶ 19. Lancman also cited the following reports:

- "A Mutated Rule: Lack of Enforcement in the Face of Persistent Chokehold Complaints in New York City," New York City Civilian Complaint Review Board, 2014, *available at* https://perma.cc/Q27T-JXFG;
- "Observations on Accountability and Transparency in Ten NYPD Chokehold Cases," New York City Department of Investigation, The Office of the Inspector General for the NYPD, January 2015, *available at* https://perma.cc/NR9L-VL49;
- J. David Goodman, "Some New York Police Officers Were Quick to Resort to Chokeholds, Inspector General Finds," *The New York Times*, Jan. 12, 2015, *available at* https://perma.cc/94NN-9T7U.

Lancman Aff. at ¶¶ 11, 13.

the Council intended to criminalize.[54] And NYPD was well aware of this; at the Council hearing, an NYPD representative agreed that "the unacceptable acts" that "we are all trying to prevent are those that occurred to Mr. Garner and Mr. Floyd."[55] The local law was adopted in the context of "today's heightened level of public awareness regarding the problem," *Burg v. Mun. Ct.*, 673 P.2d 732, 741 (Cal. 1983), namely: the dangers of placing pressure on the chest or back of an arrestee on the floor.

In short, the objective terms of the local law are clear, and the statutory context and history further enhance that clarity.

B. Supreme Court's reasons for invalidating the local law are flawed and insupportable.

In finding that the diaphragm compression ban was vague, Supreme Court did not look closely at the local law to determine whether it was sufficiently clear. Instead, the court's holding turned

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[54] *See* New York City Council, Committee Report of the Justice Division, Committee on Public Safety (June 9, 2020), cited *supra* n.12, at 4; New York City Council, Committee Report of the Justice Division, Committee on Public Safety (June 18, 2020), cited *supra* n.22, at 5; Minutes of the Stated Meeting of Thursday, June 18, 2020, cited *supra* n.12, at 1034-35.

[55] New York City Council, Transcript of the Minutes of the Committee on Public Safety (June 9, 2020), cited *supra* n.18, at 62.

on its conclusion that "the statute offers no guidance on how an officer is to determine whether his or her actions are causing a suspect's diaphragm to be compressed" (R16) (cleaned up). The court quoted plaintiff's expert for the proposition that "there is no way for police officers to determine, in the course of an arrest, whether they are violating § 10-181 by acting 'in a manner that compresses the diaphragm'" (R18). These concerns are misplaced—both as a matter of vagueness doctrine and as a factual matter.

1. Any potential difficulty in assessing diaphragm compression does not implicate the vagueness doctrine.

Supreme Court failed to recognize that the void-for-vagueness doctrine asks whether individuals can fairly discern *what* is prohibited, not whether they always can tell *whether* the prohibited act has occurred. Here, there is no difficulty in determining what conduct is prohibited, even if, as Supreme Court suggested, there may be a question in some instances whether the statute has been violated.

Many statutes require people to estimate whether their conduct would violate the law without being certain, and, as a

result, may lead prudent individuals to steer well clear of prohibited conduct to ensure that they avoid liability. *See Powell*, 423 U.S. at 93 ("[T]he law is full of instances where a man's fate depends on his estimating rightly, that is, as the jury subsequently estimates it, some matter of degree.") (cleaned up). But as the U.S. Supreme Court has explained, a law is vague only if it is "unclear as to what fact must be proved." *FCC v. Fox TV Stations, Inc.*, 567 U.S. 239, 253 (2012).

If, instead, it is "difficult in some cases to determine whether [a law's] clear requirements have been met," that uncertainty doesn't raise a question of vagueness. *Williams*, 553 U.S. at 306; *see also People v. Illardo*, 48 N.Y.2d 408, 415 (1979) (noting that the possibility of "imaginable instances in which [there is] some difficulty in determining on which side of the line a particular fact situation falls" does not render a law "impermissibly vague"). Factual questions about whether the law has been violated are addressed "not by the doctrine of vagueness, but of the requirement [in criminal cases] of proof beyond a reasonable doubt." *Williams*, 553 U.S. at 306.

For this reason, courts have long rejected arguments similar to the one credited by Supreme Court here—that a statute is vague because it is hard to know whether one's conduct has violated it. For example, in *Kolbe v. Hogan*, 849 F.3d 114, 149 (4th Cir. 2017), in rejecting a vagueness challenge to a gun safety law, the Fourth Circuit held that whether "the typical gun owner would … know whether the internal components of one firearm are interchangeable with the internal components of some other firearm" is irrelevant, because the standard for determining what qualifies as a copy of an assault weapon is sufficiently clear. And the Sixth Circuit rejected a vagueness challenge to a federal child pornography law notwithstanding difficulty of determining whether images depicted "actual minors" or "virtual images of simulated child pornography." *United States v. Paull*, 551 F.3d 516, 525-26 (6th Cir. 2009).

Courts have similarly rejected vagueness challenges to noise ordinances premised on the difficulty of determining noise levels. The Eleventh Circuit recently rejected a challenge to a law penalizing excessive noise as measured from "inside a nearby

building"; the fact that the plaintiffs "are not in a strong position to ascertain the fact of audibility" in a nearby building did not make the prohibition vague, since the law's prohibition set a definite standard. *Henderson v. McMurray*, 987 F.3d 997, 1004 (11th Cir. 2021) (cleaned up). And the Court of Appeals upheld a noise ordinance that it found was "sufficiently definite to put a person on notice that playing music which can be heard over 50 feet from such person's car on a public road, in a manner that would annoy or disturb 'a reasonable person of normal sensibilities' is forbidden conduct"; the court held that this "objective standard affords police sufficiently clear standards for enforcement." *Stephens*, 28 N.Y.3d at 315 (cleaned up).[56]

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[56] Nor are these decisions unusual—they are consistent with many other rulings rejecting vagueness challenges. *See also United States v. Gibson*, 998 F.3d 415, 419 (9th Cir. 2021) (rejecting vagueness challenge to a restriction forbidding defendant to visit any "place primarily used by children," and concluding that the phrase is "not indeterminate," … "[e]ven if it may not be entirely clear whether a particular place is primarily used by children"); *Interactive Media Ent. & Gaming Ass'n v. Attorney General of the United States*, 580 F.3d 113, 116-17 (3d Cir. 2009) (rejecting a facial void-for-vagueness challenge to online gambling criminal law and dismissing as irrelevant plaintiff's claim that "it will often be difficult to determine the jurisdiction from which an individual gambler initiates a bet over the Internet, and consequently, whether the bet is unlawful").

Applying similar reasoning, courts have repeatedly rejected vagueness challenges to laws prohibiting driving under the influence of alcohol that define intoxication in terms of blood-alcohol level. The courts concluded that such laws are not vague even if members of the public have no practical way to assess whether they are over the proscribed blood-alcohol limit. *See, e.g.*, *Bohannon v. State*, 497 S.E.2d 552, 555 (Ga. 1998); *Sereika v. State*, 955 P.2d 175, 177 (Nev. 1998); *Burg*, 673 P.2d at 739-42. As the Supreme Court of Georgia explained regarding such a law, "where the statute informs the public that a person who has consumed a large amount of alcohol chooses to drive at his own risk, the statute is sufficiently definite in informing the public so that it might avoid the proscribed conduct." *Bohannon*, 497 S.E.2d at 555 (cleaned up). The Arizona Supreme Court, addressing a similar statute, stated the principle more broadly: "Where a statute gives fair notice of what is to be avoided or punished, it should not be declared void for vagueness simply because it may be difficult for the public to determine how far they can go before they are in actual violation." *Fuenning v. Superior Ct.*, 680 P.2d 121, 129 (Az. 1983).

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

Nor does the fact that a law focuses on a phenomenon that occurs inside the body make the law vague. For example, the local law's chokehold ban—unchallenged by plaintiffs on vagueness grounds—focuses on compression of the arrestee's carotid artery or windpipe. Drunk driving statutes focus on the level of alcohol concentration in the driver's bloodstream. Noise statutes focus on perception of sound by individuals located elsewhere. None are unconstitutionally vague for that reason. To the extent the Supreme Court's vagueness ruling was motivated by the fact that an arrestee's diaphragm is not directly observable (*see* R19), that concern was misplaced.

Finally, this case law likewise refutes the suggestion by one of plaintiffs' two medical experts that the diaphragm compression

ban is vague because, in his view, "[i]n a strict sense, the diaphragm is not a compressible muscle" (R423). It is notable that plaintiff's other medical expert did not express that opinion (R387). But even so, an officer facing prosecution under the local law would be entitled to offer the medical opinion to a jury as a reason why the law had not been violated. Such factual questions are relevant to the requirement of proof beyond a reasonable doubt for any criminal conviction, but do not affect whether a law provides constitutionally sufficient notice of conduct it prohibits. *See Williams*, 553 U.S. at 306; *see also Copeland*, 893 F.3d at 118. Any potential factual indeterminacy in the application of the local law does not support plaintiffs' facial vagueness challenge.

2. In any event, an officer need not assess diaphragm compression to ensure compliance.

In addition to being incorrect as a matter of vagueness doctrine, Supreme Court's reasoning greatly overstated the difficulty of avoiding liability under the local law. Indeed, in this facial challenge, which plaintiffs brought prior to any officer being charged with violating section 10-181, Supreme Court's speculation

about the difficulty of compliance is a particularly inappropriate basis to strike down the law on its face. To assure compliance with the law, an officer need not even assess diaphragm compression, because the law includes other clear guideposts to guide an officer's conduct.

First, the local law specifies that only compression of the diaphragm that impedes circulation or air flow is prohibited. And as Supreme Court recognized, "officers, as part of their job duties, can be and are trained on the dangers of restricting air or blood circulation" (R19). An officer who is using a restraint that puts body-weight pressure on an arrestee's torso can be expected to monitor whether an arrestee is having difficulty breathing or their circulation is dangerously impeded.

No special training or equipment is needed to make that assessment. Indeed, the Court of Appeals squarely rejected an analogous argument that penal laws criminalizing impairment and intoxication while driving were vague in the absence of a blood-alcohol test, holding that "the concept of intoxication does not require expert opinion." *People v. Cruz*, 48 N.Y.2d 419, 428 (1979).

The Court explained that because a layperson, "including the defendant and those charged with administering the law," should be able to determine whether a person's consumption of alcohol has impaired his ability to drive, or "rendered him incapable of operating a motor vehicle as he should … the statute provides reasonable warning of what is prohibited and sufficient standards for adjudication." *Id.* Just as an officer can assess intoxication and impairment without resort to a blood-alcohol test, an officer can identify, without medical imaging technology, when a restraint applying body-weight pressure to an arrestee's torso is impeding air or blood flow. Thus, plaintiffs' arguments that an officer cannot assess compliance while making an arrest (*see* R356, 425) are simply unfounded.

Second, the local law provides a practical, clear path for officers to avoid liability by specifying that only diaphragm compression from "sitting, kneeling, or standing on the chest or back" is prohibited. As Supreme Court correctly noted, these are voluntary, intentional acts that are easily and objectively understood (*see* R16). Indeed, the City Council amended the

diaphragm compression ban before enactment to address NYPD's concern that the original version might criminalize accidentally falling on a suspect's chest or back while effecting an arrest.[57]

Because of this narrowing language, compliance with NYPD's longstanding policy restricting such restraints is enough to avoid liability under the law.[58] This policy is straightforward and easy to follow. And NYPD's training shows officers, through clear, simple demonstrations, how to safely, and lawfully, restrain arrestees (R148-56, 160-64, 173-75, 187; *see also supra* n.37). Even if officers are uncertain whether their actions are compressing an arrestee's diaphragm, they have clear notice of how to surely comply with the law. Plaintiffs' contention that the local law requires them to "steer[] an extraordinarily wide berth" (R494) is factually incorrect.

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[57] *See supra* n.18-22 and accompanying text. And as Supreme Court correctly concluded (R15-16), the diaphragm compression ban did not need a mens rea requirement to render it sufficiently clear. There is no rule that criminal statutes must include a mens rea element to avoid vagueness. *See Copeland*, 893 F.3d at 122.

[58] The fact that the NYPD Patrol Guide has long restricted this conduct shows that police officers generally do not need these restraints to safely and effectively subdue an arrestee (*see* R148-56, 160-64, 173-75, 187 (NYPD training materials demonstrating how to safely and lawfully attain control over a non-compliant arrestee)). And if the use of such a restraint by officers were ever necessary to protect themselves or others in a life-threatening situation, state law affords them a justification defense. *See* Penal Law § 35.30.

This concern is also not a matter for the vagueness doctrine, as the case law discussed above shows. For example, someone drinking alcohol may feel compelled to drink considerably less than the amount that would trigger the prohibition on drunk driving to ensure that they steer clear of violating the law. But this feature—arguably, a salutary feature that encourages safer driving—does not render it void for vagueness. So too, the diaphragm compression ban is not vague even if, in practice, officers feel compelled to avoid any sitting, kneeling, or standing on arrestees' chests or backs to be sure to avoid impeding the arrestees' breathing by compressing their diaphragms.

Thus, the fact that NYPD trains officers to avoid any sitting, kneeling, or standing on arrestees' chests and backs does not indicate, as Supreme Court erroneously concluded, that the phrase "in a manner that compresses the diaphragm" is impermissibly vague (R20-21). And because NYPD already had long admonished officers not to use those types of restraints—without referring to diaphragm compression—it was wrong for Supreme Court even to assume that the scope of the training guidance was driven by the

enactment of the local law at all—let alone by any uncertainty about its meaning.

Supreme Court's reasoning was also inconsistent. The court rightly commended NYPD for setting more stringent internal standards than the local law requires (R21). Yet the court somehow took NYPD's internal guidelines as evidence that the local law is unclear (R21). But NYPD training indicates nothing of the sort, since NYPD is free to set stricter internal standards than established in applicable law for its officers' behavior. *See, e.g.*, *Galapo v. City of N.Y.*, 95 N.Y.2d 568, 575 (2000). Just as NYPD could set standards of conduct that are more stringent than applicable law before the diaphragm compression ban was enacted into law, it could continue to do so afterwards.

The NYPD training is also significant in another relevant respect. The diaphragm compression ban is not a generally applicable law, but instead applies only to law enforcement officers. Because officers are highly trained professionals with the resources and sophistication to understand what is prohibited under the law regulating their work, the vagueness standard applies with less

force here. *Cf. Hoffman Estates*, 455 U.S. at 498 (noting that statutes that regulate businesses are subject to a "less strict vagueness test" because such entities "can be expected to consult relevant legislation in advance of action"); *accord Copeland*, 893 F.3d at 118. Indeed, the record amply shows that officers receive extensive training on appropriate use of force. This factor further confirms that officers have "fair notice" as to what is forbidden. *See Bright*, 71 N.Y.2d at 382-83 (cleaned up).

POINT II

SHOULD THIS COURT FIND THE DIAPHRAGM COMPRESSION BAN IMPERMISSIBLY VAGUE, IT SHOULD SEVER THAT PORTION AND UPHOLD THE DISTINCT CHOKEHOLD BAN

If this Court nonetheless agrees with plaintiffs that the phrase "compresses the diaphragm" is impermissibly vague on its face, it should still reverse Supreme Court's order because the court improperly failed to sever that portion of the local law and uphold the law's distinct prohibition on chokeholds. The City Council's intentions are clear: it would have wanted the chokehold ban

portion of the law to survive. Indeed, the Council has strongly supported such a ban ever since the death of Eric Garner in 2014.

Severability "is a doctrine borne out of constitutional-avoidance principles, respect for the separation of powers, and judicial circumspection when confronting legislation duly enacted by the co-equal branches of government." *Ass'n of Am. R.R.s. v. United States DOT*, 896 F.3d 539, 550 (D.C. Cir. 2018). Thus, a court should avoid "strik[ing] down more of a law than the Constitution or statutory construction principles demand." *Id.*

Whether to sever a portion of a statute is fundamentally "a question of legislative intent, namely 'whether the [L]egislature, if partial invalidity [of the local law] had been foreseen, would have wished [it] to be enforced with the invalid part exscinded, or rejected altogether.'" *People v. Viviani*, 36 N.Y.3d 564, 583 (2021) (quoting *People ex rel. Alpha Portland Cement Co. v. Knapp*, 230 N.Y. 48, 60 (1920)). The answer to the inquiry "must be reached pragmatically, by the exercise of good sense and sound judgment, by considering how the statutory rule will function if the knife is laid to the branch instead of at the roots." *Viviani*, 36 N.Y3d at 538

(cleaned up) (severing unconstitutional portion of statute, including language from within a statutory subsection, because it was "apparent that the Legislature would wish that as much of [the statute] … as can be preserved remain in effect," so as to "bolster the ability of the state to respond more effectively to abuse and neglect of vulnerable persons").

Here, at the very least, the portion of section 10-181 pertaining to chokeholds should be severed and upheld, because the chokehold and diaphragm compression portions are not "inextricably" interwoven. *See People v. On Sight Mobile Operations*, 24 N.Y.3d 1107, 1110 (2014). The local law's plain text establishes them as separate "unlawful methods" to restrain an arrestee. *See* Admin. Code § 10-181(a). By crafting a disjunctive ban, the City Council evidenced its intent that the local law's two distinct prohibitions could each stand on their own.

Legislative history bolsters this conclusion, because the City Council first introduced the two bans at separate times, in response to two different high-profile civilian deaths, those of Eric Garner and George Floyd. When the chokehold ban was first proposed, as

a standalone provision following the death of Eric Garner, it had the strong support of the City Council. And while the Mayor initially was wary of this reform effort, he eventually strongly supported the chokehold ban as well, telling the press that it was "crucial" and "necessary" (R329).

Notably, Supreme Court found no vagueness with respect to the chokehold ban; plaintiffs, moreover, didn't assert any such vagueness or even claim that these provisions are inextricably intertwined. As a sponsors of the local law stated, the bill was intended to "make clear to officers that they really truly, really, really cannot use chokeholds."[59] Yet by striking down the entire law, Supreme Court eviscerated its ban on chokeholds when no infirmity was found in that prohibition, thereby frustrating legislative intent. Supreme Court used an axe, when it should have wielded, at the very most, a scalpel.

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[59] New York City Council, Transcript of the Minutes of the Committee on Public Safety (June 9, 2020), cited *supra* n.18, at 40-41 (statements of Council Member Rory I. Lancman).

If the law's prohibition on restraints that compress the diaphragm were to be excised, section 10-181(a) would remain clear and intelligible:

> Unlawful methods of restraint. No person shall restrain an individual in a manner that restricts the flow of air or blood by compressing the windpipe or the carotid arteries on each side of the neck~~, or sitting, kneeling, or standing on the chest or back in a manner that compresses the diaphragm,~~ in the course of effecting or attempting to effect an arrest.

This abridged version of the local law would still serve an important public safety purpose by criminalizing conduct that the City Council deemed unacceptable—police officer use of chokeholds on arrestees. At the very least, then, the chokehold ban should be preserved.

CONCLUSION

This Court should reverse and uphold Administrative Code section 10-181 in its entirety. In the alternative, this Court should reverse and uphold the portion of section 10-181 banning chokeholds.

Dated: New York, NY
February 22, 2022

Respectfully submitted,

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STATEMENT PURSUANT TO CPLR 5531

NEW YORK SUPREME COURT
APPELLATE DIVISION: FIRST DEPARTMENT

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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 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-Respondents,

-against-

THE CITY OF NEW YORK,

Defendant-Appellant.

Case No. 2021-03041

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1. The index number in the Court below is 653624/2020.

2. The full names of the original parties appear in the caption above. There have been no changes in the parties.

3. This action was commenced in the Supreme Court, New York County.

4. This action was commenced by a Summons and Complaint on August 5, 2020. Issue was joined by a Verified Answer on November 5, 2020.

5. Plaintiffs filed this action to challenge the City's enactment and prospective enforcement of Section 10-181 of the New York City Administrative Code. Section 10-181 criminalizes the use of any restraint that restricts the flow of air or blood by compressing the windpipe or the carotid arteries on each side of the neck, or sitting, kneeling, or standing on the chest of back in a manner that compresses the diaphragm, in the course of effecting or attempting to effect an arrest.

6. This appeal is from a decision and order of the Honorable Laurence L. Love, Supreme Court, New York County, entered on June 22, 2021.

7. This appeal is being taken on a fully reproduced record.