FILED: APPELLATE DIVISION - 1ST DEPT 04/08/2022 06:59 PM
NYSCEF DOC. NO. 16 RECEIVED NYSCEF: 04/08/2022

To be argued by:
AMY MCCAMPHILL
15 minutes requested

New York County Clerk's Index No. 653624/2020

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.

REPLY BRIEF

HON. SYLVIA O. HINDS-RADIX
Corporation Counsel
of the City of New York
Attorney for Appellant
100 Church Street
New York, New York 10007
212-356-2317 or -2502
amccamph@law.nyc.gov

RICHARD DEARING
CLAUDE S. PLATTON
AMY MCCAMPHILL
of Counsel

April 8, 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.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

PRELIMINARY STATEMENT 1

ARGUMENT 4

POINT I 4

THE DIAPHRAGM COMPRESSION BAN IS NOT UNCONSTITUTIONALLY VAGUE 4

A. Text establishes, and context confirms, what harmful conduct the ban aims to prevent. 4

B. Vagueness doctrine does not require greater clarity than the ban provides. 9

C. Plaintiffs identify no valid basis to find the ban vague. 16

1. Plaintiffs' factual arguments are matters for a criminal prosecution. 16

2. The ban appropriately limits liability. 19

POINT II 23

ANY VAGUENESS IN THE DIAPHRAGM COMPRESSION BAN IS NOT A BASIS TO STRIKE DOWN THE SEPARATE CHOKEHOLD BAN 23

POINT III 28

THE LOCAL LAW IS NOT PREEMPTED 28

A. Section 10-181 does not conflict with state law. 29

TABLE OF CONTENTS (cont'd)

Page

B. The State has not occupied the field of regulating police use of force during arrests. 34

CONCLUSION 40

PRINTING SPECIFICATION STATEMENT 41

TABLE OF AUTHORITIES

Page(s)

Cases

Albany Area Builders Ass'n v. Guilderland,
74 N.Y.2d 372 (1989) 38

People ex rel. Alpha Portland Cement Co. v. Knapp,
230 N.Y. 48 (1920) 24, 25

Betancourt v. Bloomberg,
448 F.3d 547 (2d Cir. 2006) 10

Chunhye Kang-Kim v. City of N.Y.,
29 A.D.3d 57 (1st Dep't 2006) 17

Chwick v. Mulvey,
81 A.D.3d 161 (2d Dep't 2010) 38

Cohen v. Board of Appeals,
100 N.Y.2d 395 (2003) 38

In re Cohen,
139 A.D.2d 221 (1st Dep't 1988) 11

Colautti v. Franklin,
439 U.S. 379 (1979) 12, 13

Consolidated Edison Co. v. Town of Red Hook,
60 N.Y.2d 99 (1983) 37-38

DJL Rest. Corp. v. City of N.Y.,
96 N.Y.2d 91 (2001) 35

Garcia v. N.Y.C. Dep't of Health & Mental Hygiene,
31 N.Y.3d 601 (2018) 30, 31, 35

Hertz Corp. v. City of N.Y.,
80 N.Y.2d 565 (1992) 31

TABLE OF AUTHORITIES (cont'd)

Page(s)

Hoffman Estates v. Flipside, Hoffman Estates,
455 U.S. 489 (1982) 10

Int'l Franchise Ass'n v. City of N.Y.,
193 A.D.3d 545 (1st Dep't 2021) 35, 36

Jancyn Mfg. Corp. v. County of Suffolk,
71 N.Y.2d 91 (1987) 30, 34

Kaur v. N.Y.S. Urban Development Corp.,
15 N.Y.3d 235 (2010) 11, 12

McDonald v. N.Y.C. Campaign Fin. Bd.,
117 A.D.3d 540 (1st Dep't 2014) 31

N.Y. State Club Ass'n v. City of N.Y.,
69 N.Y.2d 211 (1987) 32, 37

N.Y.C. Health & Hospitals Corp. v. Council of New York,
303 A.D.2d 69 (1st Dep't 2003) 30-31

N.Y.S. Superfund Coal., Inc. v. N.Y.S. Dep't of Envt'l Conservation,
75 N.Y.2d 88 (1989) 26

Patrolmen's Benevolent Ass'n v. City of N.Y.,
142 A.D.3d 53 (1st Dep't 2016) 28, 30, 32, 34

People v. Berck,
32 N.Y.2d 567 (1973). 7

People v. Bright,
71 N.Y.2d 376 (1988) 16

People v. Carlo,
46 A.D.2d 764 (1st Dep't 1974) 20

TABLE OF AUTHORITIES (cont'd)

Page(s)

People v. Cook,
34 N.Y.2d 100 (1974) 30

People v. Cruz,
48 N.Y.2d 419 (1979) 15

People v. Diack,
24 N.Y.3d 674 (2015) 35

People v. Green,
68 N.Y.2d 151 (1986) 21

People v. Kozlow,
8 N.Y.3d 554 (2007) 5, 8

People v. On Sight Mobile Opticians,
24 N.Y.3d 1107 (2014) 26

People v. Roberts,
31 N.Y.3d 406 (2018) 7, 8

People v. Steele,
26 N.Y.2d 526 (1970) 22

People v. Viviani,
36 N.Y.3d 564 (2021) 24

People v. Wood,
58 A.D.3d 242 (1st Dep't 2008) 22

Singh v. Kolcaj Realty Corp.,
283 A.D.2d 350 (1st Dep't 2001) 17

Sunrise Check Cashing & Payroll Services, Inc. v. Town of Hempstead,
91 A.D.3d 126 (2d Dep't 2011) 31

TABLE OF AUTHORITIES (cont'd)

Page(s)

United States v. Farhane,
634 F.3d 127 (2d Cir. 2011) 4, 7

United States v. Williams,
553 U.S. 285 (2008).. 13, 16

Watson v. City of N.Y.,
157 A.D.3d 510 (1st Dep't 2018)...24

Statutes, Local Laws, and Other Authorities

N.Y.C. Admin. Code § 1-105...25

N.Y.C. Admin. Code § 10-181... *passim*

N.Y. Const. art. IX, § 2 28

Executive Law § 837-t 33

Penal Law § 10.00 22

Penal Law § 35.00 22

Penal Law § 35.30 .... 22, 33, 37

Penal Law § 121.11 33

Penal Law § 121.13-a 32

PRELIMINARY STATEMENT

The police unions conjure confusion where none reasonably exists. The diaphragm compression ban in Administrative Code section 10-181 targets a well-documented and deeply troubling phenomenon—asphyxia caused by police officers' use of certain forms of body-weight restraint during an arrest. Those restraints have caused needless distress, injury, and death, including in notorious incidents that aroused public outrage.

The law adopted by the City Council in response to these gravest of concerns tells law enforcement officers what conduct to avoid when effecting an arrest: sitting, kneeling, or standing on an arrestee's chest or back so as to put pressure on the diaphragm and impair breathing. New York City police officers, highly trained professionals, can and should understand what not to do. Decades ago, Commissioner Bratton laid that out in a well-known training video, and today's NYPD continues to train officers how to avoid the prohibited conduct. The diaphragm compression ban codifies NYPD's policy in a criminal law to achieve greater deterrence, given recent tragedies.

There is no relevance to the factual disputes that plaintiffs attempt to inject into the case through testimony of retained experts. At most, those opinions go to whether the law has been violated or how to construe it in edge cases, not to what the law fundamentally covers. Such opinions can be presented in a criminal prosecution under the law, if one occurs. They do not provide grounds to strike the law down from the jump in a pre-enforcement challenge.

But even if the diaphragm compression ban were facially vague, there would be no warrant for Supreme Court's decision to strike down section 10-181's separate chokehold ban too. Contrary to the unions' contentions, the City did not forfeit its ability to object to that extreme overreach. The courts' core obligation to the separation of powers means that the City Council's work must be preserved to the extent that it reasonably can be. Section 10-181's chokehold ban is wholly distinct from the diaphragm compression ban. A perceived vagueness problem with the latter does not begin to justify striking down the former.

Equally meritless is plaintiffs' preemption challenge, which Supreme Court rightly rejected. Only weighty evidence of preemptive intent should suffice to strip the City Council's ability to address dangerous uses of force by the City's own law enforcement officers on the City's own streets—events that roil this City like few others. But the unions come nowhere close to marshaling such evidence. They point to no provision of state law that the local law conflicts with; officers can readily comply with both state and local law. And the scattered state-law provisions that plaintiffs invoke do not remotely evince an intent to occupy the field and thereby oust the City from exercising its core home-rule powers to regulate the conduct of law enforcement and protect its own citizens from injury and death.

ARGUMENT

POINT I

THE DIAPHRAGM COMPRESSION BAN IS NOT UNCONSTITUTIONALLY VAGUE

A. Text establishes, and context confirms, what harmful conduct the ban aims to prevent.

The diaphragm compression ban provides far more than the constitutionally required degree of clarity about what it prohibits. The ban makes it a misdemeanor for a law enforcement officer effecting an arrest to sit, kneel, or stand on the arrestee's chest or back if, as a result, the arrestee's diaphragm is compressed, restricting their ability to breathe. Admin. Code § 10-181. As explained in the City's opening brief, the ban's meaning is clear from its text (Brief for Appellant ("App. Br.") 28-34) and confirmed by the context of its enactment (*id*. at 34-39). *See United States v. Farhane*, 634 F.3d 127, 143 (2d Cir. 2011) ("[C]ontext, common usage, and legislative history [can] combine to serve on both individuals and law enforcement officers the notice required by due process.").

Beginning with the text, plaintiffs fail to identify any uncertainty about the meaning of the familiar words "diaphragm" and "compresses," much less about the other terms, including "restrain an individual," "in a manner that restricts the flow of air or blood," or "by … sitting, kneeling, or standing on the chest or back." Admin. Code § 10-181(a). Plaintiffs' grumbles about the City's reference to a *dictionary* shows just how far they must strain (Brief for Respondent Unions ("Unions' Br.") 35). Courts commonly use dictionaries as tools of statutory interpretation, including when resolving vagueness challenges. *See, e.g.*, *People v. Kozlow*, 8 N.Y.3d 554, 558, 560-61 (2007).

The context and legislative history further confirm what conduct the local law prohibits. The diaphragm compression ban was enacted to outlaw a well-known dangerous practice, one that the NYPD had internally restricted for decades. The 1994 training video by then-Commissioner William Bratton demonstrates, through re-enactments and animations, precisely what officers should *not* do—apply body-weight pressure to an arrestee's chest or back—and explained in straightforward terms *why*: such

pressure can interfere with diaphragmatic function and thus with breathing.[1] On the video, the City's chief medical examiner explains the risks of these types of restraints, and an accompanying graphic depicts how the diaphragm is compressed—confirming that process to be exactly what those words' ordinary meaning suggests.[2]

In the years since Commissioner Bratton's foundational video was recorded, public awareness of positional asphyxia's dangers has only increased (*see, e.g.*, App. Br. 12-13). The City Council expressly invoked the high-profile death of George Floyd, and stated its intention to incorporate and give teeth to the NYPD's long-standing prohibition, which was failing on its own to deter officers' use of these dangerous restraints (App. Br. 7-14).

While the local law's text alone defeats plaintiffs' vagueness challenge, they are wrong to contend that only the law's words

---

[1] "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.

[2] *Id.* (video from 3:36 to 4:42).

may be considered (Brief for Respondent Police Benevolent Association ("PBA Br.") 29; *see* Unions' Br. 41-42). Context and legislative history are important interpretive sources. *See Farhane*, 634 F.3d at 143; *People v. Roberts*, 31 N.Y.3d 406, 423 (2018) (considering legislative history in construing Penal Law provision). Courts need not blind themselves to clear evidence of what legislation was intended to accomplish and what the regulated parties understand about the legislation's meaning—especially where, as here, the legislature codified a policy that had been in place for decades. *See Roberts*, 31 N.Y.3d at 418-19 (court construing criminal statute "should consider the mischief sought to be remedied" (cleaned up)).[3]

Contrary to plaintiffs' suggestion (PBA Br. 30), they are not helped by the Court of Appeals' statement in *People v. Berck* that a criminal statute must be "informative on its face," 32 N.Y.2d 567, 569 (1973). The diaphragm compression ban *is* informative on its face. *Berck* did not demand pellucid text or dismiss all other

---

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

evidence of statutory meaning. As the Court of Appeals has repeatedly said, the text is only "the starting point" in understanding a statute. *Roberts*, 31 N.Y.3d at 418 (cleaned up).

The inquiry's proper sweep is confirmed by *Kozlow*, where the Court of Appeals rejected a vagueness challenge to a statute criminalizing transmission of indecent material to minors. 8 N.Y.3d at 561. In concluding that the statute's term "depict" encompassed sexually explicit representations in text as well as those in visual media, the Court relied on dictionary definitions and legislative materials. *Id.* at 558-60. Plaintiffs' rejoinder—that the Court of Appeals' holding consisted of "a single paragraph" (PBA Br. 22)—shows they cannot distinguish the case.

If plaintiffs' view were correct, the legion of appellate decisions interpreting criminal statutes that are less than perfectly clear would all have been improperly decided—the statutes would have been void for vagueness on their face and should not have been construed in resolving a criminal prosecution. But the fact that questions can be posed about a statute doesn't mean the statute is unconstitutionally vague. It

just means that courts have a role in construing statutes when they're applied. Plaintiffs' facial challenge seeks to short-circuit that process without justification.

Meanwhile, plaintiffs themselves turn to extrinsic sources that are not appropriate for consideration. Courts should not be distracted by the stated views of various elected officials about the wisdom or clarity of a law, such as those plaintiffs cite (PBA Br. 1-2, 6-7; Unions' Br. 2, 11-15, 42-43). As Supreme Court correctly found, such statements are "irrelevant" to the question whether the ban is constitutional (R22). A vagueness challenge does not test whether a law is good policy. And whether legislation provides constitutionally sufficient clarity is a matter for the courts.

B. Vagueness doctrine does not require greater clarity than the ban provides.

Plaintiffs cannot overcome the City's showing that vagueness doctrine demands no greater precision than the diaphragm compression ban provides (App. Br. 24-27, 31-34). They instead try to shift the goalposts, arguing that regulations of

police use of force must be written "in the clearest of terms" (PBA Br. 16). But their special pleading falls flat—there is no heightened due process standard for police officers.

The searching inquiry that plaintiffs demand is warranted only for regulations that threaten to restrict the exercise of constitutional rights. *See Betancourt v. Bloomberg*, 448 F.3d 547, 552-53 (2d Cir. 2006); *see also Hoffman Estates v. Flipside, Hoffman Estates*, 455 U.S. 489, 499 (1982). But the diaphragm compression ban does not implicate any constitutionally protected conduct of officers. The rights at issue are instead those of city residents to be free from unjustified restraints that can cause injury, trauma, or death.

Plaintiffs also dispute that law enforcement officers, through their extensive training, can be expected to know how to avoid violating the laws that regulate their profession (PBA Br. 15-16). But they have no answer to the point that, just as regulated business entities "can be expected to consult relevant legislation," *Hoffman Estates*, 455 U.S. at 498, highly trained police officers are on notice of laws that affect their work. And in New York City,

where NYPD officers have been trained for decades against performing the very restraints now covered by the local law, it strains credulity to claim that officers are unable to determine what conduct is prohibited.

Next, plaintiffs throw up a series of weak distinctions to try to counter the City's cases upholding statutes with less concrete terms than those in the diaphragm compression ban (PBA Br. 21-22; Unions' Br. 26-27). Even if some of those cases concerned phrases with "a long life in the law" (Unions' Br. 26; *see also* PBA Br. 21), the diaphragm compression ban also "does not exist in a vacuum," *In re Cohen*, 139 A.D.2d 221, 224 (1st Dep't 1988). Rather, it addresses a widely recognized problem and aligns with decades-old NYPD policies. And while plaintiffs point out that some of the City's cases concern civil statutes (PBA Br. 21), they have little to say about the many others we cited that uphold criminal statutes against vagueness challenges (*see, e.g.*, App. Br. 31-32, 42-43).

The strained quality of plaintiffs' arguments is perhaps best illustrated by their treatment of *Kaur v. N.Y.S. Urban*

Development Corp., 15 N.Y.3d 235 (2010), as if it turned on the existence of a statutory definition for the challenged phrase (Unions' Br. 27). The Court of Appeals' vagueness analysis did not rely on the statutory definition—"a slum, blighted, deteriorated or deteriorating area," *Kaur*, 15 N.Y.3d at 254—which was hardly more precise than the defined phrase "substandard or insanitary area." Instead, the Court rejected the vagueness challenge in *Kaur* because mathematical precision in statutory language is not required to satisfy due process. *Id.* at 256.

In addition to being unable to distinguish the City's cases, plaintiffs fail to identify examples of courts finding vagueness in statutes with concrete, objective terms like those at issue here. For example, this case is nothing like *Colautti v. Franklin*, 439 U.S. 379 (1979) (PBA Br. 17). The statute there was found vague because it prohibited abortion of a fetus that either was "viable" or "may be viable," without explaining how the standards differed. *Id.* at 390-94. *Colautti* is thus a straightforward example of the principle that "[w]hat renders a statute vague is not the possibility that it will sometimes be difficult to determine whether the

incriminating fact it establishes has been proved; but rather the indeterminacy of precisely what the fact is." *United States v. Williams,* 553 U.S. 285, 306 (2008).

Contrary to PBA's characterization, *Colautti* has nothing to say about "unknowable effects" of an action (PBA Br. 17), which appears to be a legal standard PBA created from whole cloth. Rather, *Colautti* turned on whether the statute's dual prohibition was sufficiently clear. In contrast to the law in *Colautti*, the diaphragm compression ban contains a single prohibition stated in concrete, objective terms. The other cases cited by PBA concern subjective standards (PBA Br. 18), and so too are inapposite.

Plaintiffs try to distinguish cases concerning drunk-driving laws and noise regulations, but their efforts only highlight how apt the City's analogy to those laws is (PBA Br. 23-24). PBA asserts that someone driving after drinking, or someone producing a loud noise, can "reasonably determine when he is close to the line" of what the statutes prohibit, even if that person can't pinpoint where the line is (*id.* at 24). But the diaphragm compression ban is no different. An officer who is "sitting,

kneeling, or standing on the chest or back" of an arrestee, Admin. Code § 10-181(a), and observing that the arrestee is in respiratory distress (and thus that their "flow of air or blood" is restricted, *id.*), is on fair notice that this conduct may well be violating the diaphragm compression ban—even if that officer can't see inside the arrestee's body to determine with scientific certainty whether the person's diaphragm is being compressed.

PBA's assertions notwithstanding (PBA Br. 17, 19), the effects of sitting, kneeling, or standing on someone's chest or back are no more "unknowable" than the effects of drinking alcohol before driving, or the effects of making very loud noises around other people. In each instance, the core cause-and-effect is well understood, and the lack of perfect information may lead a person to avoid some conduct that wouldn't end up violating the statute. But where, as here, there is no risk of chilling constitutionally protected conduct, the possibility that prudent individuals may seek safe harbor raises no constitutional concerns. Instead, it presents a policy question that is not for the courts to answer.

To be sure, blood-alcohol level, unlike diaphragm compression, can be assessed by a breathalyzer test, but plaintiffs are wrong to suggest that difference matters (*see* Unions' Br. 28-29). Some drivers may have access to breathalyzers, but most do not, and even fewer did in the decades when the relevant prohibitions were enacted. Yet all drivers are held to the legal blood-alcohol limit. And it is settled that intoxication need not be scientifically tested to establish liability. *See People v. Cruz*, 48 N.Y.2d 419, 428 (1979). The existence of "recognized and long-accepted tests applied for intoxication" (Unions' Br. 28) may make drunk-driving laws easier to prosecute than the diaphragm compression ban, but a party seeking to avoid liability faces the same need to tread carefully.

Nor are plaintiffs' concerns about arbitrary enforcement well-founded (PBA Br. 25-29; Unions Br. 37, 40). Vagueness doctrine disfavors laws that lack "objective standards," allowing arrest or prosecution based on government officials' "own personal, subjective idea of right and wrong," and thereby "furnish[ing] a convenient tool for harsh and discriminatory

enforcement … against particular groups deemed to merit their displeasure." *People v. Bright*, 71 N.Y.2d 376, 383 (1988) (cleaned up). The diaphragm compression ban does not empower such misuse. It prohibits only concrete conduct, without reference to subjective standards. And it obligates a prosecutor to prove, beyond a reasonable doubt, that the officer's conduct compressed the arrestee's diaphragm. Plaintiffs can hardly complain about this high bar to prosecution and conviction.

C. Plaintiffs identify no valid basis to find the ban vague.

1. Plaintiffs' factual arguments are matters for a criminal prosecution.

The core of plaintiffs' challenge is not about the clarity of the diaphragm compression ban, but instead the possibility of uncertainty whether a violation has occurred (*see, e.g.*, PBA Br. 13, 17, 19; Unions' Br. 30, 32-36, 38). Yet plaintiffs do not dispute the principle that factual questions about whether a criminal law has been violated are addressed "not by the doctrine of vagueness, but by the requirement of proof beyond a reasonable doubt." *Williams*, 553 U.S. at 306. Thus, plaintiffs' factual arguments,

going to the difficulty of knowing whether a violation has occurred, rather than what a violation entails, should be raised in the context of a criminal prosecution where they can be resolved on the facts of the case.

For these reasons, the affidavits of plaintiffs hired experts,[4] professing confusion about diaphragm compression, don't bear on the legal question of whether the statutory language is sufficiently clear. As this Court has repeatedly recognized, "[e]xpert testimony is not properly utilized … to supplant the judicial function" by resolving questions of law. *Chunhye Kang-Kim v. City of N.Y.*, 29 A.D.3d 57, 60 (1st Dep't 2006); *Singh v. Kolcaj Realty Corp.*, 283 A.D.2d 350, 351 (1st Dep't 2001). Tellingly, neither one of plaintiffs' briefs points to a single case in which a court's void-for-vagueness analysis was premised on such evidence.

The experts' opinions are puzzling in any event. Plaintiffs cite one such opinion contending that the local law fails to

---

[4] Plaintiffs' expert Patrick E. Kelleher was paid $350 per hour (R374); Dr. Christopher Lettieri was paid $510 per hour (R386); John Monaghan was paid $350 per hour (R409); and Dr. Beno Oppenheimer was paid $450 per hour (R424).

adequately distinguish diaphragm compression from the "normal contraction or flattening" that the diaphragm experiences in regular breathing (Unions' Br. 4 (cleaned up)). But prohibited diaphragm compression occurs only from sitting, kneeling, or standing on a person's chest or back, and only when the person's air or blood flow is thereby impeded. The "normal contraction or flattening" of the diaphragm during breathing is thus the *opposite* of the compression that violates the ban. There is no reasonable claim of confusion there.

Plaintiffs' related argument that an arrestee could become short of breath for reasons other than diaphragm compression (Unions' Br. 33, 38), is not a reason to find the law vague, but instead amounts to a potential defense in a criminal prosecution. Indeed, such an "other causes" argument was the main defense asserted in Derek Chauvin's trial for the murder of George Floyd.[5] As in any criminal trial, the standard of proof beyond a reasonable

---

[5] Eric Levenson, "Derek Chauvin's defense is using these 3 arguments to try to get an acquittal in George Floyd's death," *CNN* (April 12, 2021), *available at* https://www.cnn.com/2021/04/12/us/derek-chauvin-defense-strategy/index.html.

doubt protects against conviction if the fact of the legal violation remains uncertain.

2. The ban appropriately limits liability.

Plaintiffs' assertions notwithstanding, the diaphragm compression ban affords officers a clear path to avoiding liability. Any officer unsure how to comply with the local law may consult the training video created by the NYPD following the law's passage, which contains reenactments of permissible and prohibited restraints.[6] And officers can avoid any potential liability simply by continuing to follow the NYPD's longstanding policies against dangerous body-weight restraints (*see* App. Br. 46-52), which they were supposed to follow all along.

Plaintiffs adopt, but fail to justify, Supreme Court's conclusion that the NYPD's written training materials expose the diaphragm compression ban as vague (PBA Br. 20, 31; Unions' Br.

---

[6] Rocco Parascandola and Thomas Tracy, "New NYPD training video warns cops against using illegal chokeholds or kneeling on neck or 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.

4-5, 27, 30-31, 37-40). The fact that the training materials do not explicitly discuss diaphragm compression is of no moment. The NYPD has long instructed its officers not to sit, kneel, or stand on arrestees' chests or backs, without limitation to situations where the arrestees' diaphragm was compressed as a result. The choice to keep the same instruction in place after the local law was enacted reflects not confusion, but sound judgment: avoiding any sitting, kneeling, or standing on an arrestee's chest or back remains a sure way to avoid liability—and a good way to avoid causing unnecessary harm to the citizens whom officers are sworn to protect and serve.

Nor is there valid cause for concern that the ban will sweep in accidental or fleeting conduct, as PBA contends (PBA Br. 26-27). The local law ensures in multiple ways that only dangerous diaphragm compression, and not "transient[] or inadvertent" pressure (*id.* at 26), constitutes a violation. First, as with any criminal statute, liability requires an voluntary act. *See, e.g.*, *People v. Carlo*, 46 A.D.2d 764, 764 (1st Dep't 1974). Second, as discussed below, the law is subject to a justification defense

where the force used is reasonable. *See infra* pp. 22. Third, the ban prohibits only diaphragm compression caused by sitting, kneeling, or standing on the chest or back. And fourth, only conduct that impedes air or blood flow is unlawful. If plaintiffs believe any uncertainty remains about, for example, whether any "pressure with a knee" would constitute "kneeling" (PBA Br. 26), they are free to argue against that construction in a criminal prosecution, in the unlikely event one is ever brought on such facts. *See, e.g.*, *People v. Green*, 68 N.Y.2d 151, 153 (1986) (discussing the rule of lenity). Here, too, plaintiffs are wrong to suggest that all questions about a criminal law's meaning raise facial vagueness concerns that justify striking it down in a pre-enforcement posture.

While plaintiffs attack the diaphragm compression ban's lack of a mens rea or injury requirement (PBA Br. 27-29; Unions' Br. 24-26), they admit that neither element is necessary to withstand vagueness scrutiny (PBA Br. 28; Unions' Br. 24). And their rhetoric—describing the prohibited restraints as "inherently innocent" conduct (Union's Br. 25; *see also id.* at 37)—betrays a

profound lack of appreciation for the grave problem of positional asphyxia. In any event, if plaintiffs were right that the diaphragm compression ban needs a mens rea requirement to avoid vagueness, the right step would be to read one in as a matter of constitutional avoidance, not to strike the ban down. *Cf. People v. Wood*, 58 A.D.3d 242, 251-53 (1st Dep't 2008).

Plaintiffs also overlook how liability is further limited by the justification defense provided by Penal Law section 35.30(1) (App Br. 49 n.58). This defense is available in prosecutions for any "offense," Penal Law § 35.00, which expressly includes conduct prohibited by local law, *id.* § 10.00(1). Thus, an officer would not be liable if they "reasonably believe[d]" resort to prohibited diaphragm compression was "necessary to effect the arrest, or to prevent the escape from custody, or in self-defense or to defend a third person from what he or she reasonably believes to be the use or imminent use of physical force." Penal Law § 35.30(1). The prosecutor would have to disprove that defense beyond a reasonable doubt. *See, e.g.*, *People v. Steele*, 26 N.Y.2d 526, 528 (1970). Plaintiffs' concerns about officers' safety in a

life-threatening situation are thus entirely unfounded (PBA Br. 7, 11, 14-15, 26; Unions' Br. 13-14).

POINT II

ANY VAGUENESS IN THE DIAPHRAGM COMPRESSION BAN IS NOT A BASIS TO STRIKE DOWN THE SEPARATE CHOKEHOLD BAN

Even if the diaphragm compression ban were unconstitutionally vague (and it is not), Supreme Court plainly erred in also striking down the separate chokehold ban in Administrative Code section 10-181, which plaintiffs never even challenged as unconstitutionally vague. Judicial restraint and respect for the separation of powers require a court to disturb no more of a legislature's work than appropriate (*see* App. Br. 53). Supreme Court failed to do so. If this Court concludes that the diaphragm compression ban is impermissibly vague, it should nonetheless modify Supreme Court's judgment to leave the distinct chokehold ban intact.

Lacking any good response on this point, plaintiffs attempt to insulate Supreme Court's error by invoking waiver. But between plaintiffs' two briefs there is not a single citation to a

state court decision holding that the issue of severability even *can* be waived (*see* PBA Br. 33-35; Unions' Br. 45). Nor are we are aware of any such decision. This absence likely reflects the separation-of-powers values at play, as well as New York law's strong preference for severability, *see, e.g.*, *People ex rel. Alpha Portland Cement Co. v. Knapp*, 230 N.Y. 48, 62-63 (1920) (Cardozo, J.); *People v. Viviani*, 36 N.Y.3d 564, 583 (2021).

In any event, the City did not waive the issue of severability by failing to oppose a remedy that exceeded the scope of plaintiffs' vagueness challenge in the first place. That is particularly true where plaintiffs mounted no argument below that the law's two separate prohibitions had to rise or fall together—they never argued, for example, that the two are inextricably intertwined, as they plainly are not.

Even if the point were unpreserved, a legal argument may be raised for the first time on appeal "as long as the issue is determinative and the record on appeal is sufficient to permit review." *Watson v. City of N.Y.*, 157 A.D.3d 510, 511 (1st Dep't 2018). Severability turns on the statutory text and legislative

record—which are fully available on appeal and cited in plaintiffs' briefs (*see, e.g.*, Unions' Br. 9 n.1). Although plaintiffs suggest that they would have proffered additional factual material if the City had made different arguments below (PBA Br. 34-35), they give no hint about what that might be.

Beyond preservation, plaintiffs have next to nothing. To start, although they cite section 10-181's lack of a severability clause (PBA Br. 35 n.6), they overlook that section 1-105 establishes a general rule of severability that applies throughout the Administrative Code. It states that "[i]f any clause … of the code shall be adjudged … invalid, such judgment shall not affect, impair or invalidate the remainder thereof, but shall be confined in its operation to the clause … directly involved in the controversy." Admin. Code § 1-105. Thus, while a presumption of severability applies even in the absence of a severability clause, *see Alpha Portland Cement Co.*, 230 N.Y. at 62-63, here we have a severability clause as well.

There is also abundant evidence that the City Council would have wanted the chokehold ban to stand on its own. Beginning

with the local law's text, as explained in our opening brief (App. Br. 54) the chokehold ban and diaphragm compression ban are distinct prohibitions of different "unlawful methods" of arrest restraint. Admin. Code § 10-181(a). They thus have "independent legislative purpose." *People v. On Sight Mobile Opticians*, 24 N.Y.3d 1107, 1110 (2014). Indeed, the law's very title—"a Local Law to amend the administrative code of the City of New York, in relation to chokeholds and other such restraints"—foregrounds the chokehold component.[7] Moreover, as we have shown (App. Br. 56), and plaintiffs do not dispute, either component can be excised without affecting the comprehensibility or effectiveness of the other. *Cf. N.Y.S. Superfund Coal., Inc. v. N.Y.S. Dep't of Envt'l Conservation*, 75 N.Y.2d 88, 94 (1989). Plaintiffs have no answer to these textual points.

The legislative record also provides clear support for severability. The City Council initially took up a standalone chokehold ban in 2014, following the death of Eric Garner (*see*

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

App. Br. 5-7, 13-14). The legislation had strong support—indeed, a majority of Council members sponsored the bill.[8] It failed to become law because of the Mayor's veto threat (*id.* at 7). Trying again in 2020, the Council reiterated that the local law was important because it would prevent the use of chokeholds (*see id.* at 7-9, 55). There is not a scrap of evidence that the Council would have wanted police officers to be free to use chokeholds with impunity if it could not also prohibit them from using a different type of harmful restraint.

While plaintiffs point out that the law did not end up being enacted until after the diaphragm compression ban was added (PBA Br. 36), the question is not whether a majority on the City Council preferred to ban both categories of restraints—it plainly did. Almost by definition, the enacted law reflects the legislative body's collective preference. The relevant question, though, is whether the City Council would have wanted the chokehold ban to fall if it had been told in advance that the separate diaphragm

---

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

compression ban would be struck down. And there is no basis to suggest that it would have—certainly nothing that would overcome New York law's preference for severability and the express severability clause set forth in the Administrative Code.

POINT III

THE LOCAL LAW IS NOT PREEMPTED

There is no merit to plaintiffs' attempt to resuscitate their failed preemption arguments as an alternative basis for affirmance (PBA Br. 36-40; Unions' Br. 46-56). Supreme Court rightly rejected those challenges (R10-14). Section 10-181 is authorized by "New York's constitutional 'home rule' provision," which accords municipalities "'broad police powers ... relating to the welfare of [their] citizens,' provided local governments refrain from adopting laws that are inconsistent with the Constitution or state statutes." *Patrolmen's Benevolent Ass'n v. City of N.Y.*, 142 A.D.3d 53, 58 (1st Dep't 2016) (quoting *Jancyn Mfg. Corp. v. County of Suffolk*, 71 N.Y.2d 91, 96 (1987)); N.Y. Const. art. IX, § 2(c)). Plaintiffs show no such inconsistency. Their protestations notwithstanding, state law does not prohibit the City from using

its home rule powers to prevent harm to its citizens by regulating law enforcement officers' use of force within its borders.

As most New Yorkers know, tragedies resulting from police use of force unsettle this City as little else does—the deaths of Eric Garner and George Floyd are recent examples but sadly not the only ones. Ours is a diverse and dense city where people of all stripes live and work shoulder to shoulder—and where the polity's ability to discuss and respond to such events is crucial. Before concluding that the State has disabled the City's government from regulating how law enforcement officers—overwhelmingly the City's own NYPD—use dangerous restraints on the City's streets, the Court should require strong evidence that the state legislature intended to take that step. Plaintiffs identify nothing close.

A. Section 10-181 does not conflict with state law.

Plaintiffs' conflict preemption theory has no merit, as Supreme Court correctly held (R12-14). The local law does not conflict with state law, but just prohibits some conduct that state law also prohibits and other conduct that state law is silent about.

Law enforcement officers will have no difficulty complying with both state and local law.

To begin, plaintiffs advance the wrong legal standard (PBA Br. 39-40; Unions' Br. 53). It is well established that conflict preemption does not arise just because "both the State and local laws seek to regulate the same subject matter." *Jancyn*, 71 N.Y.2d at 97; *see also Garcia v. N.Y.C. Dep't of Health & Mental Hygiene*, 31 N.Y.3d 601, 617 (2018). A local law is conflict preempted only if it prohibits conduct that state law affirmatively permits, or imposes additional restrictions on rights afforded by state law, "so as to inhibit the operation of the State's general laws." *Patrolmen's Benevolent Ass'n*, 142 A.D.3d at 61-62 (cleaned up). No conflict arises where a local law merely prohibits something "that might generally be considered permissible by virtue of state law's silence on the issue." *Patrolmen's Benevolent Ass'n*, 142 A.D.3d at 62; *accord People v. Cook*, 34 N.Y.2d 100, 109 (1974).[9]

---

[9] The few cases cited by plaintiffs where conflict preemption was found (Unions' Br. 53) reflect these principles. In *N.Y.C. Health & Hospitals Corp. v. Council of New York*, 303 A.D.2d 69, 77-78 (1st Dep't 2003), the local law set limits on a public hospital system's ability to outsource security guards,

(cont'd on next page)

A lower threshold for preemption could overwhelm municipal legislative power, displacing any local legislation that went beyond state law and "rendering the power of local governments illusory." *Garcia*, 31 N.Y.3d at 617. So time and again this Court and the Court of Appeals have recognized that New York City may adopt local laws that are more stringent than statewide laws regarding the same subject matter. Examples include a local law prohibiting more types of discrimination than were prohibited by state law, *Hertz Corp. v. City of N.Y.*, 80 N.Y.2d 565, 569 (1992); a local law setting more restrictive campaign contribution limits than state law, *McDonald v. N.Y.C. Campaign Fin. Bd.*, 117 A.D.3d 540, 540-41 (1st Dep't 2014); and a local law setting prohibitions on discriminatory law enforcement stops and arrests that exceeded state law's, *Patrolmen's*

---

when state law expressly granted the hospital system "complete autonomy" in that area. And in *Sunrise Check Cashing & Payroll Services, Inc. v. Town of Hempstead*, 91 A.D.3d 126, 139 (2d Dep't 2011), a local ordinance restricted the siting of check-cashing establishments, when the state "Legislature ha[d] vested" a state agency "with the authority to determine appropriate locations" for such establishments, and existing state licenses for such business conflicted with the local ordinance's restrictions. Nothing remotely analogous has occurred here.

Benevolent Ass'n, 142 A.D.3d at 61-68. So too here: because state law contains no " language specifically permitting police officers to engage" in the conduct forbidden by local law, *Patrolmen's Benevolent Ass'n*, 142 A.D.3d at 62, there is no conflict preemption.

Plaintiffs are off-base in pointing to Penal Law section 121.13-a, the Eric Garner Anti-Chokehold Act enacted in 2020, which criminalizes law enforcement officers' use of chokeholds that cause serious physical injury or death (PBA Br. 39; Unions' Br. 53-54). That statute does not address diaphragm compression caused by sitting, kneeling, or standing on an arrestee's back or chest, and so could not conflict with the local law's diaphragm compression ban. And the fact that state law criminalizes only chokeholds that cause more serious harm does not amount to affirmative authorization for police to use chokeholds that cause less serious harm. *See, e.g., N.Y. State Club Ass'n v. City of N.Y.*, 69 N.Y.2d 211, 221-22 (1987); *Patrolmen's Benevolent Ass'n*, 142 A.D.3d at 62. Moreover, the state statute imposes more severe penalties—as a class-C felony versus a

misdemeanor—thereby complementing, rather than conflicting with, the local law's prohibition.

Nor does the state law's mens rea requirement (PBA Br. 40; Unions' Br. 54-55) raise any conflict. The state law prohibits officers from doing either of two things: (1) committing "criminal obstruction of breathing or blood circulation" as defined in Penal Law section 121.11, or (2) using a chokehold as defined in Executive Law section 837-t. The latter prohibition specifies no particular mens rea requirement—just as no specific mens rea requirement is specified in the City's chokehold ban.

Equally flawed is plaintiffs' contention that Penal Law section 35.30 "expressly allows" the dangerous restraints prohibited by section 10-181 (PBA Br. 39-40; Unions' Br. 55). Rather, as previously discussed, that statute provides a justification defense for officers charged with a crime for their conduct in effecting an arrest. Penal Law § 35.30(1). But that justification defense fully applies in prosecutions under local law, *see supra* pp. 22, including any prosecutions that might be brought

under section 10-181. Thus, by definition, section 10-181 cannot criminalize anything that the justification defense covers.

Plaintiffs get it backwards. The fact that state law provides officers with a justification defense in no way indicates that they can't be subject to criminal liability in the first place. The opposite is true: the justification defense exists because officers *can* be charged with violations of criminal laws. And if anything, the legislature's express direction that the Penal Law's justification defenses apply to local criminal laws, as well as state criminal laws, provides powerful evidence that the legislature did *not* intend for the sections establishing those defenses to preempt local criminal laws that might implicate them.

B. The State has not occupied the field of regulating police use of force during arrests.

Plaintiffs' field preemption theory is equally meritless. While the State's intent to occupy the field may be either express or implied, in either case the intent must be "clearly evinced." *Jancyn*, 71 N.Y.2d at 97; *Patrolmen's Benevolent Ass'n*, 142 A.D.3d at 58. Here it plainly is not. Plaintiffs cannot dispute that no

express statement of field preemption exists. They instead rely on implied field preemption, but their argument is baseless.

It is undisputed that there is no "declaration of State policy by the State Legislature" supporting plaintiffs' claim. *DJL Rest. Corp. v. City of N.Y.*, 96 N.Y.2d 91, 95 (2001) (cleaned up). Nor do plaintiffs assert any need for statewide uniformity. *See Garcia*, 31 N.Y.3d at 618. This case is a far cry from *People v. Diack* (Unions' Br. 48), for example, where state regulations noted the need to prevent a community from "attempt[ing] to shift its responsibility" to house sex offenders onto other communities. 24 N.Y.3d 674, 686 (2015) (cleaned up).

Plaintiffs instead assert that "the Legislature has enacted a comprehensive and detailed regulatory scheme." *DJL Rest. Corp.*, 96 N.Y.2d at 95 (cleaned up) (*see* PBA Br. 37; Unions' Br. 49-51). But this Court has instructed that "scattered provisions, enacted at widely varying times, and in differing circumstances," do not evince clear legislative intent to "supersede all existing and future local regulation." *Int'l Franchise Ass'n v. City of N.Y.*, 193 A.D.3d

545, 547 (1st Dep't 2021) (quoting *Jancyn Mfg. Corp.*, 71 N.Y.2d at 99) (cleaned up).

And that is all that plaintiffs can muster here. They cite the Eric Garner Anti-Chokehold Act, enacted in 2020; a Penal Law affirmative defense to state strangulation laws for a valid medical or dental reason, enacted in 2010; provisions of the Criminal Procedure Law concerning authority to arrest without a warrant that were first enacted in 1970; and two justification defenses—one for officers, one general—in the Penal Law, which both have existed in some form since the 1960's (PBA Br. 37, 39; Unions' Br. 49-51). This grab bag of provisions hardly constitutes a detailed and comprehensive scheme designed to exclusively regulate the field of police use of force. *See, e.g.*, *Int'l Franchise Ass'n*, 193 A.D.3d at 547.

In a similar vein, PBA argues that because "[s]everal provisions of state law specifically regulate arrests" (PBA Br. 37), the field of use of force during an arrest is preempted. But the mere fact that the State has passed laws in a given area is

insufficient to establish preemption. *See, e.g.*, *N.Y. State Club Ass'n*, 69 N.Y.2d at 221.

Plaintiffs also argue that section 10-181 somehow intrudes on the inquiry required by Penal Law section 35.30 regarding reasonable police use of force (Union's Br. 49-50). Not so. As explained above, section 35.30 provides a justification defense to use of force during an arrest; this provision only has meaning if officers can be prosecuted for arrest-related offenses in the first place. And, since the Penal Law expressly makes its justification defenses applicable to prosecutions brought under local laws, it confirms that the State did *not* intend to occupy the field.

The cases that plaintiffs seek to rely on (Unions' Br. 48) only highlight their claim's deficiencies. In those cases, unlike here, the state legislature had enacted a comprehensive regulatory scheme, rather than a handful of laws adopted at different times, for different reasons. For example, in *Consolidated Edison Co. v. Town of Red Hook*, the State had enacted, all in one go, a comprehensive scheme for the siting of steam electric-generating facilities throughout the State, comprising about ten statutory

provisions designed to work together. 60 N.Y.2d 99, 103 (1983) (discussing Article VIII of the Public Service Law); *see also Chwick v. Mulvey*, 81 A.D.3d 161, 171 (2d Dep't 2010) (single lengthy and detailed statute evinced "an intent to set forth a uniform system of firearm licensing in the state"); *Albany Area Builders Ass'n v. Guilderland*, 74 N.Y.2d 372, 379 (1989) (local law at issue would have enabled a municipality "to circumvent" the State's "uniform scheme" for highway budgeting (cleaned up)).

Legislative history also does not support field preemption. *See Cohen v. Board of Appeals*, 100 N.Y.2d 395, 402 (2003). Plaintiffs rely on single line from a state legislative committee report referencing the NYPD's failure to prevent the use of chokeholds (PBA Br. 38; *see also* Unions' Br. 52). This differs greatly from the "[n]umerous sources in the legislative history" indicating intent to occupy a regulatory field credited in *Cohen*, 100 N.Y.2d at 402, a case which plaintiffs attempt to rely on (Unions' Br. 48). Moreover, as Supreme Court correctly recognized, the mere fact that the state legislature expressed concern about NYPD's failure "to enforce its own employee

manual" does not clearly evince an intent "to preempt other legislative remedies" aimed at addressing the same problem (R12) (cleaned up).

Rather, "[w]here, as here, the State legislature has not indicated that it intends to preclude any 'additional, not inconsistent legislation,' a local law that is consistent with the State's legislative objective is not preempted" (R12 (quoting *McDonald*, 117 A.D.3d at 541)). Plaintiffs fail to explain how the state legislature's recognition of the problem of NYPD use of chokeholds somehow evinces a legislative intent to tie the City's hands from addressing that very problem.

In short, no statewide enactments, alone or together, come close to ousting New York City's legislators from addressing the use of dangerous restraints in our City, on our streets, by our police officers.

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
April 8, 2022

Respectfully submitted,

HON. SYLVIA O. HINDS-RADIX
Corporation Counsel
of the City of New York
Attorney for Appellant

By:
AMY MCCAMPHILL
Assistant Corporation Counsel

100 Church Street
New York, NY 10007
212-356-2317
amccamph@law.nyc.gov

RICHARD DEARING
CLAUDE S. PLATTON
AMY MCCAMPHILL
of Counsel

PRINTING SPECIFICATION STATEMENT

This brief was prepared on a computer, using Century Schoolbook 14 pt. for the body (double-spaced) and Century Schoolbook 12 pt. for the footnotes (single-spaced). According to Microsoft Word, the portions of the brief that must be included in a word count contain 6,990 words.