To be Argued by:
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(Time Requested: 15 Minutes)

New York Supreme Court

Appellate Division—First Department

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.

Appellate Case No.: 2021-03041

BRIEF FOR PLAINTIFF-RESPONDENT POLICE BENEVOLENT ASSOCIATION OF THE CITY OF NEW YORK, INC.

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PRELIMINARY STATEMENT

In the weeks following the death of George Floyd, the City Council hastily adopted a so-called "diaphragm law," which sought to prohibit an officer from applying force to an arrestee's torso when it compresses the diaphragm. *See* N.Y.C. Admin. Code § 10-181. Nearly two years later, Appellant City of New York (the "City") still cannot explain what the law means. Yet the Due Process Clause requires that criminal laws give especially clear notice of their prohibitions. *See, e.g.*, *Johnson v. United States*, 576 U.S. 591, 595 (2015). And this is all the more true where, as here, the law regulates the force that police may use in life-and-death situations.

The decision by Supreme Court, New York County (Love, J.) to strike down this law as unconstitutionally vague was not just correct, but it did not come as a surprise to anyone who had been paying attention. Virtually every City official who discussed the law recognized its problems. Prior to the law's enactment, two senior officials of the New York City Police Department ("NYPD") told the City Council that they could not imagine how an officer might arrest a resisting subject without arguably violating it. In discussing the law, one City Council Member admitted the bill was "a little vague," R322, another had "serious issues with some of the bill's language," R345, and a third said the prohibition "seems subjective and it's not clear," R325.

After the law was adopted, the District Attorneys from New York and Staten Island Counties predicted that the law would be struck down. *See Manhattan District Attorney Cy Vance on The Recent Spike in Gun Violence*, Spectrum News (July 7, 2020), https://bit.ly/3utNZaz; R317. Then-NYPD Commissioner Dermot Shea described the law as "incredibly reckless," Ethan Geringer-Sameth, *Police Commissioner Repeatedly Contradicts Mayor on NYPD Reform*, Gotham Gazette (July 1, 2020), https://tinyurl.com/3jxj2buf, and after Supreme Court's decision, now-Mayor Eric Adams expressed the view "that was a good decision by the Supreme Court," because the City Council had failed to "sit down with technical experts" and instead adopted a prohibition that was "not realistic." Sam Raskin, *Eric Adams blames City Council for 'unconstitutionally vague' chokehold bill*, NY Post (June 24, 2021), https://bit.ly/36oNlm7.

Given these widespread concerns, Supreme Court's decision is considerably less surprising than this appeal. If the City Council believed it necessary to prohibit chokeholds, then there was no reason why it could not follow the models of other States, rather than rushing through this novel and vague law. Like many other jurisdictions, the New York State Legislature has recently adopted a prohibition on chokeholds that bars arresting officers from engaging in specific, intentional acts that result in serious injury or death. *See* N.Y. Penal Law § 121.13-a.

But the City took a unique approach by prohibiting officers from standing, sitting, or kneeling on the torso in a manner that "compresses the diaphragm," and the vagueness of that term is made considerably worse by the absence of any mens rea or injury requirement. As Plaintiffs' experts testified below, a police officer seeking to subdue someone resisting arrest simply cannot know whether his actions violate the statute or prevent them from doing so. The law would thus force police officers facing physical altercations to choose between defending themselves and subjecting themselves to Section 10-181's criminal penalties.

In addition to being vague, the Council lacked the authority to adopt it, because the New York State Legislature has occupied the field of arrest protocols. New York law prohibits officers from employing injury-inducing chokeholds, but otherwise authorizes officers to use all force reasonably believed necessary to effect an arrest. N.Y. Penal Law §§ 35.30, 121.13-a. Section 10-181 does not merely go beyond these precepts; it attempts to supplant them. The judgment should be affirmed on this ground too.

QUESTIONS PRESENTED

1. Whether Supreme Court erred in holding that a law, which contains no scienter or injury requirement and criminalizes conduct based solely on its unknown effects on an internal organ, is unconstitutionally vague.

2. Whether the City may attack the lower court judgment based on a severability argument not presented below, and in any event, whether the Court

should sever the provision that was necessary to the statute's enactment.

3. Whether New York law regulating the force officers may use in arrests, including by prohibiting chokeholds and other forms of strangulation, preempts a local law criminalizing conduct expressly authorized under state law.

BACKGROUND

I. SECTION 10-181

The City Council first considered an anti-chokehold measure in February 2014, following the death in custody of Eric Garner. *See* N.Y.C. Council, Int. No. 0540-2014, https://bit.ly/3qF438j. That proposal would have prohibited police officers from using a "chokehold" in the course of effecting an arrest. *Id.* After NYPD officials expressed concerns with the proposal, Mayor de Blasio announced that he would veto the bill. *See* Brief for Appellant (hereinafter "App.Br.") 7 (citing *Jonathan Allen, New York City mayor says he would veto police chokehold ban*, Reuters (Jan. 14, 2015), https://bit.ly/36bUZAz). The City Council did not adopt it.

A. The City Council Adopts Section 10-181 in the Immediate Wake of George Floyd's Death

Following the outcry over George Floyd's death in Minnesota, the City Council revived the dormant chokehold ban, proposing an amendment that would expand the prohibition to include restrictions of airflow caused "by compressing the windpipe, diaphragm, or the carotid arteries." A subsequent amendment led to the bill's current form, which the City Council adopted on June 18, 2020.

Section 10-181 provides:

> a. 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.
>
> b. Penalties. Any person who violates subdivision a of this section shall be guilty of a misdemeanor punishable by imprisonment of not more than one year or a fine of not more than $2,500, or both.
>
> c. Any penalties resulting from a violation of subdivision a of this section shall not limit or preclude any cause of action available to any person or entity injured or aggrieved by such violation.

Notably, Section 10-181 imposes liability without regard to whether the offender has acted intentionally or knowingly, and without regard to whether the victim has suffered any injury.

B. Numerous City Officials Express Concerns Over Section 10-181's Vagueness, Legality, and Workability

Since the time Section 10-181 was proposed, numerous City officials have expressed concern that police officers could not reasonably be expected to comprehend, or practically comply with, its terms. Benjamin Tucker, the NYPD's First Deputy Commissioner, appeared before the City Council on June 9 and explained that New York State "penal law already includes a statute criminalizing, criminal obstruction of breathing and strangulation," and "it is actually hard to imagine a scenario in which an officer would not open himself or herself to criminal

liability or discipline when effecting the arrest of a resisting subject." Transcript of the Minutes of the Committee of Public Safety held on June 9, 2020, at 50:23–51:5, 60:23–25, 61:20–24, https://bit.ly/3umkSWi; *see also id.* at 135:17–21 (NYPD Assistant Deputy Commissioner Oleg Chernyavsky stating, "When you are in the middle of a struggle as a police officer, you sometimes don't realize what's going on . . . [t]here is something to be said about an intentional chokehold.").

Councilmember Chaim Deutsch, who voted to approve, stated that "there are serious issues with some of the bill's language, which would essentially criminalize a police officer's behavior . . . if they take steps to subdue a prisoner as they attempt to make an arrest." R345 (citing Transcript of the Minutes of the Stated Meeting held on June 18, 2020, at 71:7-14, https://bit.ly/3wu82rG). He expressed concern that the provision would cause NYPD members to "be afraid of being prosecuted for reasonable actions that they take in the course of their job." *Id.* at 71:16–20. Donovan Richards, the Chairman of the City Council's Public Safety Committee, conceded that the diaphragm-compression ban was "a little vague." R322. And City Council Speaker Corey Johnson called the ban "subjective and . . . not clear." R325.

Following the ordinance's adoption, two of New York City's district attorneys doubted that it could be enforced. New York County District Attorney Cyrus Vance cited the provision's "ambiguity" and its imposition of "strict liability," and

predicted that "legal challenges . . . will be successful," in part, because the ordinance is "at risk as a statute because of preemption by the State." Spectrum News, *supra*. Staten Island District Attorney Michael E. McMahon opined that the provision "actually defies common sense in the restrictions it places on police officers who we expect and need to respond to dangerous and critical life and death situations." R317.

Police Commissioner Dermot Shea also expressed grave concerns, calling the law "incredibly reckless" and objecting that it would criminalize even accidental pressure on a suspect's torso. Geringer-Sameth, *supra*. After Supreme Court's decision in this case, now-Mayor Eric Adams said, "that was a good decision by the Supreme Court," because it was "not realistic" to criminalize "touch[ing] someone's chest." Raskin, *supra*.

II. ONE WEEK BEFORE THE CITY COUNCIL, THE NEW YORK STATE LEGISLATURE ENACTS ITS OWN CHOKEHOLD LAW

Section 10-181 was not the only effort to regulate police officers' behavior in the wake of George Floyd's death. On June 12, 2020, one week before the City Council enacted Section 10-181, Governor Cuomo signed into law the "Eric Garner anti-chokehold act." That law prohibits "aggravated strangulation," which is defined as the intentional use of "a chokehold or similar restraint" or "criminal obstruction of breathing or blood circulation" by a police officer or a peace officer when those actions cause "serious physical injury or death to another person." N.Y.

Penal Law § 121.13-a.

The law provides that "[c]riminal obstruction of breathing or blood circulation" occurs when a person intentionally "applies pressure on the throat or neck of such person" or "blocks the nose or mouth of such person." *Id.* § 121.11. The use of "a chokehold or similar restraint" is described as "appl[ying] pressure to the throat or windpipe of a person in a manner that may hinder breathing or reduce intake of air." N.Y. Exec. Law § 837-t(1)(b). In marked contrast with Section 10-181, the New York Penal Law requires an action "with intent to impede the normal breathing or circulation of the blood of another person," N.Y. Penal Law § 121.11, and that action must result in serious physical injury or death, *id.* § 121.13-a.

New York State also regulates other aspects of arrests. New York law provides that a police or peace officer "may use physical force when and to the extent he or she reasonably believes such to be necessary to effect [an] 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." *Id.* § 35.30(1). New York law also delineates the circumstances in which a police officer may arrest someone, N.Y. Crim. Proc. Law §§ 140.10(1)–(2), (4)–(6), where an officer may effect such an arrest, *id.* § 140.10(3), and when such an arrest may be effectuated, *id.* § 140.15(1).

III. PROCEDURAL HISTORY

On August 5, 2020, Respondent Police Benevolent Association of the City of New York, Inc. ("PBA") and other law enforcement unions brought this action in New York County Supreme Court.[1] R33. The complaint asserted that Section 10-181's diaphragm-compression ban was unconstitutionally vague and was preempted by New York state law. On Plaintiffs' motion for a preliminary injunction, Supreme Court agreed that Plaintiffs were likely to succeed on the merits, because "the statute's wording appears unconstitutionally vague" in failing to delineate how an officer would know his actions compress a suspect's diaphragm. R16. The trial court, however, denied preliminary relief on the ground that Plaintiffs had not demonstrated irreparable harm. R228, 350.

Following cross-motions for summary judgment, Supreme Court enjoined the diaphragm-compression ban as unconstitutionally vague. The court concluded that the law was not preempted, because "nothing in the legislative history" of the state anti-chokehold law "indicates that the state legislature intended to preempt other legislative remedies," R12, and that Section 10-181 creates no "restrictions on rights under State law," R14. But the court struck down the law as unconstitutionally

[1] PBA is the largest municipal police union in the world, representing approximately 24,000 police officers employed by the NYPD.

vague, reasoning that neither the law itself nor NYPD training materials produced by the City "meaningfully explain[s] what is meant by 'compresses the diaphragm.'" R20. Indeed, the training materials on which the City heavily relied "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 best the materials could muster is a definition of the term "diaphragm"—a "large, dome-shaped muscle that contracts rhythmically and continually, and most of the time, involuntarily." R20. But simply defining the term did not provide officers with notice concerning whether and how their actions might compress it.

Having found this language "inescapably" vague, Supreme Court rejected the City's severability argument, which asked the trial court to strike the phrase "compresses the diaphragm" from the law and thereby *expand* the prohibition to bar any "sitting, kneeling, or standing on the chest or back" of an arrestee. R22–23. Notably, the City did *not* argue that Supreme Court should *narrow* the provision by upholding the chokehold ban and striking the diaphragm-compression ban.

Supreme Court rejected the City's argument on the ground that rewriting the law in that way would contravene "the intent of the legislature," which had not codified such an expansive provision. R23. Finding "insufficient evidence presented of the intentions of the New York City Council," the court "decline[d] to usurp the role of the New York City Council." R23. The court entered judgment

and enjoined enforcement of Section 10-181. R23. The City appealed. R4.

SUMMARY OF ARGUMENT

The judgment should be affirmed for two reasons. *First*, Section 10-181's diaphragm-compression ban is unconstitutionally vague. Due process requires, as a first principle, that the text of a criminal statute provide ordinary people fair notice of the prohibited conduct. Law enforcement officers should particularly receive the benefit of the doubt when it comes to regulating the force they may apply in a potentially life-or-death struggle with resisting arrestees. Supreme Court correctly held that the diaphragm-compression ban's "confusing" language "lacks meaning" and flunks this test. R19.

Although the City contends that the terms "compress" and "diaphragm" are defined in the dictionary, it still cannot explain how police officers may know in advance when an application of force "compresses the diaphragm." Supreme Court credited unrebutted expert testimony, which established that an officer could not know without specialized medical equipment whether a use of force "compressed" the diaphragm. Because the law provides no guidance on the amount or duration of force that might violate it, the experts also showed that the ban would be violated in ordinary encounters with a resisting arrestee where an officer wrestling with a detainee might necessarily or inadvertently apply force to the torso.

Section 10-181's problems are compounded by the absence of an intent or injury requirement. The U.S. Supreme Court has recognized that such elements may save an otherwise vague statute by excluding inadvertent or trivial violations, thereby narrowing discretion in enforcement. Had this law been limited to intentional obstructions of an arrestee's breathing, or the prolonged use of such force leading to serious injury, then a reasonable officer might know how to avoid violating it. Yet the law contains no such limitations, and may instead apply to inadvertent, momentary, and de minimis applications of force. Such a standardless prohibition practically invites arbitrary enforcement.

Supreme Court also correctly held that the diaphragm-compression ban is not severable. The trial court correctly rejected the City's request to strike the phrase, "compresses the diaphragm," and thereby expand the law to prohibit any act of sitting, kneeling, or standing on an arrestee's torso. There was no justification to expand the criminal prohibition to apply to uses of force that cause no harm and do not even obstruct anyone's breathing.

The City on appeal abandons this severability argument and argues for the first time that the diaphragm-compression ban should be cleaved from the chokehold ban. But the City cannot attack the judgment below based on a fact-based theory never advanced below. Even had the City not waived this argument, it would also contravene legislative intent because the City Council had previously rejected a freestanding chokehold ban. If the City Council now wants to adopt that law, then

it should seek to pass it, but it is not the role of the courts to effectively adopt measures that the City Council did not.

Second, Section 10-181 is preempted. The New York State Legislature has broadly regulated the use of physical force during arrests, providing detailed procedures for police conduct before, during, and after arrests. Although Supreme Court noted that the legislative history for New York's chokehold ban does not speak to the adoption of different local laws, the Legislature separately has authorized officers to employ reasonable uses of force, and the City Council has no discretion to contradict that judgment. The New York Penal Law contains several provisions aimed at preventing the risk of asphyxiation during arrest, and those regulations have occupied the field and conflict with the City law, preempting Section 10-181.

ARGUMENT

I. SUPREME COURT CORRECTLY STRUCK DOWN THE DIAPHRAGM-COMPRESSION BAN AS IMPERMISSIBLY VAGUE

The diaphragm-compression ban is unconstitutionally vague. First, the ban regulates conduct solely based on the conduct's results, results which are unknowable to the offender. It criminalizes the compression of another person's diaphragm, a fact one simply cannot know without specialized equipment. Second, the ban invites arbitrary enforcement, because it lacks standards detailing the amount or duration of pressure that must be applied to the torso. Lacking any scienter or injury requirement, the law does not provide any standards against which

prosecutors, judges, or police officers may know when an officer has run afoul of it.

A. Police Officers Are Entitled to Due Process and the Benefit of the Doubt

Due process prohibits "a criminal law so vague that it fails to give ordinary people fair notice of the conduct it punishes, or so standardless that it invites arbitrary enforcement." *Johnson v. United States*, 576 U.S. 591, 595 (2015). As Supreme Court recognized, the vagueness doctrine serves two related purposes: first, it provides citizens with "adequate warning of what the law requires so that [they] may act lawfully," and second, it "prevent[s] arbitrary and discriminatory enforcement by requiring boundaries sufficiently distinct for police, Judges and juries to fairly administer the law." R14 (quoting *People v. Stuart*, 100 N.Y.2d 412, 420–21 (2003)); *see also Kolender v. Lawson*, 461 U.S. 352, 358 (1983) (recognizing that a criminal statute lacking "minimal guidelines to govern law enforcement" creates "a standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections" (citation omitted)).

The City argues that police officers should receive a lesser degree of due process than other citizens, because as "highly trained professionals" with the "sophistication to understand what is prohibited under the law regulating their work," the "vagueness standard applies with less force here." App. Br. 51–52. This is a remarkable position, which conflicts directly with established law. Police officers forced to make life-and-death decisions in the heat of the moment receive

greater leeway, not less, when it comes to the threat of sanctions imposed after the fact.

In support of the City's argument for "due process lite," the City cites only the Supreme Court's decision in *Hoffman Estates v. Flipside*, 455 U.S. 489 (1982), *see* App.Br.52, but that case only confirms why the City is mistaken. In *Hoffman Estates*, the Court rejected a vagueness challenge against a *civil* ordinance, recognizing that sophisticated businesses may be subject to a "less strict vagueness test" when it comes to business licenses. 455 U.S. at 498. But the Court did not stop there. *Hoffman Estates* explained that there is a "greater tolerance of enactments with civil, *rather than criminal*, penalties because the consequences of imprecision are qualitatively less severe." *Id.* at 498–99 (emphasis added); *see also Chatin v. Coombe*, 186 F.3d 82, 86–87 (2d Cir. 1999).

The Court further "recognized that a scienter requirement may mitigate a law's vagueness, especially with respect to the adequacy of notice to the complainant that his conduct is proscribed." 455 U.S. at 499. In other words, *Hoffman Estates* made clear that a criminal statute without a scienter requirement would be subject to the strictest scrutiny for vagueness. Of course, that scrutiny applies directly to Section 10-181.

Hoffman Estates therefor does not suggest that police officers would be entitled to a lower degree of scrutiny, and in fact, the law runs the other way. In the context of civil suits against police officers, the Supreme Court has recognized that they operate in situations of extreme stress and danger, and their safety—even their lives—turns on "split-second judgments[] in circumstances that are tense, uncertain, and rapidly evolving." *Plumhoff v. Rickard*, 572 U.S. 765, 775 (2014) (quoting *Graham v. Connor*, 490 U.S. 386, 396–97 (1989)). Whether an officer has employed reasonable force under the Fourth Amendment is thus based on "the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Id.* Only when an officer has acted objectively unreasonably and in violation of clearly established law may he or she be held liable in a civil case.

Those same concerns should apply with full force to the test for vagueness. The City Council has adopted a law seeking to restrict officers' ability to protect themselves during physical encounters. Police officers are plainly entitled, at least, to the full protection of the Due Process Clause against vague laws. If the City wishes to impose criminal penalties on an officer's use of force during a dangerous encounter with someone unlawfully resisting arrest, then it must do so in the clearest of terms to ensure that officers may not be held liable for unintentional or reasonable actions in defense of themselves or other members of the public. Section 10-181 does not meet that standard.

B. The Diaphragm-Compression Ban Criminalizes the Unknown Effects of an Officer's Conduct.

Section 10-181 fails first and foremost because an officer simply cannot know whether or when an action "compresses the diaphragm." R14. Before the trial court, Plaintiffs presented expert testimony demonstrating that it was practically and medically impossible for an officer to know whether the force he or she applies to an arrestee "compresses the diaphragm." Because the ban is entirely contingent on this language, it must fail based on this deficiency alone.

1. Due Process Does Not Permit a Criminal Penalty Based on the Uncertain Consequences of an Action

The City argues that the diaphragm-compression ban is clear because "compress" and "diaphragm" are English words whose meanings can be found in the dictionary. App.Br.29–30. Yet that argument completely misunderstands why Supreme Court struck down the law. Due Process bars a statute from criminalizing an action based on its unknowable effects. In *Colautti v. Franklin*, the U.S. Supreme Court struck down as vague a statute prohibiting a physician from performing an abortion where a fetus "may be" viable. 439 U.S. 379, 391–94 (1979). According to the Court, the statute did not provide any means by which a physician might reasonably know when an abortion would violate the statute, and that problem was "compounded by the fact that the Act subjects the physician to potential *criminal*

liability *without regard to fault*." *Id.* at 394 (emphases added).

New York courts have similarly struck down harassment statutes when their violation turns on the impossible-to-predict question whether the actions created annoyance or anxiety in another person. For example, in *People v. New York Trap Rock Corp.*, the Court of Appeals struck down a restriction on any sound that "annoys, disturbs, injures or endangers the comfort, repose, health, peace or safety of a person." 57 N.Y.2d 371, 375 (1982). The Court found the ordinance's standards problematically "subjective" and expressed doubt that one could know in advance when a sound "annoyed" someone else. *Id.* at 380–81; *see also People v. Golb*, 23 N.Y.3d 455, 466–67 (2014) (striking statute criminalizing communication "in a manner likely to cause annoyance or alarm" (citation omitted)); *People v. Dupont*, 107 A.D.2d 247, 253 (1st Dep't 1985) (same language).

Likewise, in *People v. Kleber*, the court struck down an ordinance that prohibited "the keeping of any animals which by causing frequent or long continued noise shall disturb the comfort or repose of any person or persons in the vicinity." 168 Misc. 2d 824, 825 (Just. Ct. 1996). It noted that the standard was "subjective" and that it was "not possible" for a potential defendant to know whether the sound in question created annoyance in another person. *Id.* at 835–36. These cases reinforce the principle that due process does not permit the government to

criminalize conduct based on its causing an unknowable effect in another person.

2. Experts Testified that an Officer Cannot Know When His or Her Action "Compresses the Diaphragm"

The trial court record confirmed that police officers simply cannot know whether or when their actions might "compress the diaphragm." Dr. Beno Oppenheimer, a surgical critical care specialist, opined that there is no "practical way[]" for an officer to tell "whether or how diaphragm function is being affected" during an arrest. R425. An officer has "no way . . . to see what is happening internally" to an arrestee or "to tell what may be happening with the diaphragm." R425. Dr. Oppenheimer further explained that because of their "vagueness and ambiguity," the terms "diaphragmatic compression" and "compression of the diaphragm" are not "widely accepted in medicine to describe a mechanism with potential for impeding or limiting diaphragmatic function." *Id.*

Dr. Christopher Lettieri agreed that "there is no way for police officers to determine, in the course of an arrest, whether they are . . . compress[ing] the diaphragm." R382. He opined that the phrase "compresses the diaphragm" is "unclear, vague and confusing" and that "without some way of observing what is happening internally it is impossible to tell what effect . . . pressure on the chest or back may be having on the diaphragm." R387. Furthermore, "[d]uring a struggle while attempting to make an arrest, an officer will not be able to know" the effect on breathing of "external compression of the thoracic cage." R387. Dr. Lettieri echoed

Dr. Oppenheimer's view, writing that the ban "is too confusing and vague to give fair notice of what is prohibited and how to tell whether prohibited actions are occurring or have occurred during an arrest or attempted arrest." R387.

Two decorated former police officers, John Monaghan and Patrick Kelleher, reinforced this conclusion based on their experience. Captain Monaghan opined that there is no "clear and well-understood way of telling" when an arrestee's diaphragm is compressed. R410. Commissioner Kelleher likewise opined that officers lack "any external action or signal" that would tell them "what is going on inside a person being arrested." R375. Officers have no way to know whether the diaphragm is flattening and contracting simply from breathing or instead from the officer's conduct. R375. Commissioner Kelleher stated that the ban "places an impossible burden on a police officer making an arrest of a resisting suspect." R375.

In response, the City did not submit expert testimony that contravened those conclusions. The City offered the affidavit of Gregory Sheehan, the Executive Officer of the NYPD Police Academy, who explained that NYPD officers are trained not to "sit, kneel, or stand on the chest or back of a subject," and are instructed that the diaphragm is an internal organ in the body. R74–75. As Supreme Court recognized, these training materials may instruct officers, as a matter of department policy, how to avoid situations that could run afoul of the statute, but they "fail to meaningfully address the legal definition of 'compresses the diaphragm.'" R21.

Instead, they just avoid the issue.

Accordingly, the record before Supreme Court was clear and unrebutted that police officers cannot know in advance whether their actions would compress the diaphragm of an arrestee and therefore violate the law. As Supreme Court correctly recognized, this is enough for Section 10-181 to fail constitutional scrutiny.

3. The City Cannot Defend This Statute by Relying on Other Laws that Did Not Criminalize an Unknowable Effect

The City seeks to defend the law on the ground that its key terms "are far more definite and specific than language found in many other cases not to be vague." App.Br.31. But saying that does not make it so. The City cites four cases in support, none of which is similar. App.Br.31–32. Three of those cases are civil, not criminal, and they involve general standards of conduct, which had been filled in through administrative interpretations. Thus, in *Gold v. Lomenzo*, the Court of Appeals upheld the suspension of a real estate broker's license for "demonstrated untrustworthiness" after he had been found to have cheated his clients. 29 N.Y.2d 468, 477–78 (1972). *Freidman v. State* upheld the removal of a judge "for cause," recognizing that the standard had been defined in several past cases. 24 N.Y.2d 528, 539 (1969). And *Kaur v. New York State Urban Development Corp.* upheld the authority of an administrative agency to cite the owner of a blighted property for

maintaining a "substandard or insanitary area." 15 N.Y.3d 235, 262 (2010).

The City cites only a single New York criminal case, *People v. Kozlow*, and there, the court rejected, in a single paragraph, a defendant's alternative argument that a statute prohibiting the disseminating of indecent materials to minor was unconstitutionally vague because it was not clear whether the word "depicts" covered verbal descriptions as well as visual ones. 8 N.Y.3d 554, 561 (2007). Neither that case nor any of the others cited involved a statute criminalizing the unknown effects of conduct.

The City next seeks to dismiss this ambiguity by arguing that a law may be constitutional even if it is "difficult . . . to determine whether [its] clear requirements have been met." App.Br.41 (quoting *United States v. Williams*, 553 U.S. 285, 306 (2008)). The City cites cases involving statutes prohibiting the possession of assault rifles and child pornography. App.Br.42. Yet both laws had clear meanings and mens rea requirements. Thus, in *Kolbe v. Hogan*, the Maryland law prohibited the possession of identified assault weapons or "copies" of those weapons made from parts of the banned weapons. 849 F.3d 114, 149 (4th Cir. 2017). The Fourth Circuit rejected the argument "that the typical gun owner would not know" whether a "copycat" weapon involving the interchangeable parts of another was a prohibited copy. *Id.* at 149.

In *United States v. Paull*, the Sixth Circuit similarly upheld a federal ban on child pornography, rejecting the argument that the defendant lacked the "capacity to know whether the charged items contain actual minors" instead of "simulated child pornography." 551 F.3d 516, 525 (6th Cir. 2009). The court made short shrift of this argument because the statute clearly identified what was prohibited and required proof of a "knowing" violation. The defendant's argument that he could not know for sure whether his pornography was authentic was no more plausible than a defendant charged with purchasing cocaine, arguing that he could not have been sure at the time of the purchase whether it was fake. *See id.* at 525–26. Neither of these cases has any bearing on the diaphragm-compression ban.[2]

The City gets no further in relying on decisions upholding restrictions on noise levels and DUI laws, both of which contain measurable standards that provide fair notice to the reasonable person. *See* App.Br.42–45. Even though an offender may not be "in a strong position to ascertain" whether his noise could be heard inside a nearby building, the offender knew that he had produced a loud the noise and could reasonably estimate when her conduct might approach the line. *See Henderson v. McMurray*, 987 F.3d 997, 1004 (11th Cir. 2021); *see also People v. Stephens*, 28

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[2] The City also argues that "[f]actual questions about whether the law has been violated are addressed 'not by the doctrine of vagueness, but by the requirement of proof beyond a reasonable doubt.'" App.Br.41 (quoting *Williams*, 553 U.S. at 306). The law surely does require proof beyond a reasonable doubt as to each element of a crime, but that does not mean the accused lacks a right to clear guidance concerning the scope of the law. The City's argument would expose defendants to completely arbitrary enforcement and eviscerate the vagueness doctrine.

N.Y.3d 307, 310 (2016) (upholding a law that prohibited a person from the creation of "'unnecessary noise' emanating beyond 50 feet from a motor vehicle operated on a public highway").

Likewise, even though a driver may not know his precise blood-alcohol content, *see, e.g.*, *Bohannon v. State*, 497 S.E.2d 552, 555 (Ga. 1998), he can know he has been drinking and reasonably determine when he is close to the line. These laws are thus very different from the situation here, when an officer cannot know whether his actions are compressing an arrestee's diaphragm in the first place and there is no statutory threshold (much less a mens rea requirement) separating lawful from unlawful conduct.

Finally, while the City seeks to situate this prohibition among the many other statutes that have banned chokeholds in the wake of the deaths of Eric Garner and George Floyd, it cannot cite a single law that has imposed a diaphragm-compression ban. The City cites seven different statutes from around the country "prohibiting officers from using restraints that restrict breathing." App.Br.15 n.36. Yet not a single one refers to "compressing the diaphragm" or even to "sitting," "standing," or "kneeling" in the course of effectuating an arrest. The City's citation to these other laws thus confirms that the language of this statute is simply unprecedented.

C. The Diaphragm-Compression Ban Lacks the Basic Requirements To Avoid Arbitrary Enforcement

In addition to an officer's inability to know when he or she "compresses the diaphragm" of an arrestee, the diaphragm-compression ban lacks the kind of guidance necessary to provide fair notice and avoid arbitrary enforcement. In adopting the law, the City Council sought to prohibit the kinds of actions witnessed during the death of George Floyd, but the law does not contain an intent requirement or any kind of threshold to separate reasonable law-enforcement conduct from the kind of unreasonable conduct witnessed in the Floyd case.[3] Despite the concerns expressed by NYPD officials at hearings on the law, the City Council inexplicably failed to address how the law would apply to physical skirmishes between officers and resisting detainees, which may result in unintentional or transient violations. These problems compound the constitutional difficulties because the absence of clear standards practically ensures arbitrary enforcement.

1. The Ban Cannot Clearly Be Applied When an Arrestee Is Actively and Violently Resisting Arrest

Section 10-181 prohibits an officer from "sitting," "kneeling," and "standing." Although the meaning of those terms (standing apart from the diaphragm-compression ban) may be ascertainable when a police officer is intentionally and for

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[3] *See* Nicholas Bogel-Burroughs, *Prosecutors say Derek Chauvin knelt on George Floyd for 9 minutes 29 seconds, longer than initially reported*, N.Y. Times (Mar. 30, 2021), https://nyti.ms/35PhQ4W.

a prolonged period applying such force to a subdued subject—as in the George Floyd case—the meaning of those terms becomes completely vague when an arrestee resists a lawful arrest, and the officer is forced to wrestle in an attempt to subdue him.

As the expert testimony and the public comments made clear, officers who seek safely and lawfully to subdue a suspect may necessarily and inevitably find themselves in a situation where a knee, a back, or a foot applies pressure to the arrestee's torso.[4] As Commissioner Kelleher asked, if an officer in a physical struggle with an arrestee applies pressure with a knee to the suspect's back, might that constitute "kneeling" under Section 10-181? Section 10-181 does not explain how officers are "to determine when some act in an arrest struggle is prohibited." R375.

Other than the vague and problematic reference to "diaphragm compression," Section 10-181 provides no standard to separate the unlawful use of force from a necessary, transient, or inadvertent one. The law does not require a minimum amount of pressure, impose any kind of duration requirement, or identify an injury requirement. The absence of such standards is particularly egregious because an arresting officer could well be involved in a struggle in which her own life is at stake.

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[4] As Mayor Adams has said, "If you were ever put in a position where you had to wrestle with someone that was carrying a knife or dangerous instrument like an icepick, if you start saying that you can't touch the person's chest area, that's a big mistake." Raskin, *supra*.

Absent clearer thresholds, the law invites arbitrary enforcement.

2. The Ban Contains No Scienter or Injury Requirement

These vagueness problems are compounded by the absence of any requirement of mens rea or actual injury. The U.S. Supreme Court "has long recognized that the constitutionality of a vague statutory standard is closely related to whether that standard incorporates a requirement of mens rea." *Colautti*, 439 U.S. at 395. Unclear, strict-liability criminal statutes are "little more than a trap for those who act in good faith." *Id.* (quoting *United States v. Ragen*, 314 U.S. 513, 524 (1942)) (quotation marks omitted). The New York Court of Appeals has similarly held that local laws that avoid the "necessity of proving criminal intent" exacerbates a law's vagueness. *People v. Munoz*, 9 N.Y.2d 51, 57–58 (1961).

There is no dispute that the diaphragm-compression ban lacks a mens rea requirement. An officer may violate it by (1) "sitting, kneeling, or standing on the chest or back" (2) "in a manner that compresses the diaphragm" (3) "in the course of affecting or attempting to affect an arrest." The ban does not require that the officer intend to compress the diaphragm or even know that he is doing so. In addition, the statute does not contain any requirement that the officer cause an injury to the detainee beyond a transient compression of the diaphragm.

While the City argued below that in the absence of an "explicit mens rea standard," the court should infer a requirement of "ordinary negligence," R471, the

City now has abandoned that argument and agrees that "a law enforcement officer would be criminally liable for . . . sitting, standing or kneeling on the back or chest of a subject *regardless of the circumstances presented to the officer at the time of the arrest*," R473 (emphasis added).

The fact that the diaphragm-compression law imposes strict liability on officers compounds the constitutional problem. Although the trial court observed that neither a mens rea standard nor an injury requirement standard "is a requirement" of due process, R15, the U.S. Supreme Court has emphasized repeatedly that the lack of such objective limitations can increase the likelihood that a law would be unconstitutionally vague. Moreover, while some strict-liability crimes may be constitutional, *see United States v. Dotterweich*, 320 U.S. 277, 281 (1943), the Court has limited those offenses to heavily regulated actions that are "inherent[ly] danger[ous]." *United States v. Burke*, 888 F.2d 862, 866 (D.C. Cir. 1989) (citation omitted); *People v. Small*, 157 Misc. 2d 673, 679–80 (Sup. Ct. 1993).

Strict-liability crimes are disfavored for the same reason as vague crimes: "In either type of case, the constitutional aversion is to capturing the unwitting person who did not seek to violate the law." *United States v. Cordoba-Hincapie*, 825 F. Supp. 485, 513 (E.D.N.Y. 1993); *see also id.* ("There is much similarity between saying that a law is unconstitutional because it punishes the person who lacks criminal intent and saying it is unconstitutional because it captures the person who

cannot know whether that law applies to his or her conduct." (citing *Papachristou v. City of Jacksonville*, 405 U.S. 156, 162–63 (1972))).

Section 10-181's lack of a mens rea requirement compounds its infirmities by making it more likely that an officer may inadvertently violate the prohibition, thereby inviting arbitrary enforcement against the unwary. Had the law prohibited an officer from intentionally trying to obstruct an arrestee's breathing, then it might have avoided that situation. Similarly, an injury requirement would have gone a long way to distinguishing transient uses of force from the kind of prolonged action in the George Floyd case. As it stands, a prosecutor reviewing a case may have nearly unbounded discretion in determining whether an officer may be charged under the law for otherwise actions in defense of himself.

D. The City Cannot Save the Ban by Relying on Extrinsic Materials

Saddled with Section 10-181's vague text, the City devotes much of its brief to trying to find meaning in NYPD training materials and the ban's legislative history. App.Br.30–31, 34–39, 49–52. But due process requires that the *law* gives fair notice of what is required, and officers cannot be expected to scour external sources to divine meaning of a criminal prohibition. More to the point, nothing in those materials resolves Section 10-181's constitutional defects.

At the outset, the City identifies no legal authority for the proposition that either legislative history or police training materials can clarify a vague criminal law.

Indeed, courts have long held that even official interpretations of vague criminal statutes cannot save them. For example, in *M. Kraus & Bros. v. United States*, the U.S. Supreme Court held that the government's reasonable interpretation of a criminal provision could not "cure an omission or add certainty and definiteness to otherwise vague language." 327 U.S. 614, 622 (1946). The Court of Appeals has similarly emphasized that a criminal statute "must be informative *on its face*." *People v. Berck*, 32 N.Y.2d 567, 569 (1973) (emphasis added). These cases make clear that it is the *text* of the law that must put reasonable people on notice of the criminal law.

Courts have similarly refused to grant *Chevron* deference to agency interpretations of criminal laws. *See, e.g.*, *United States v. Apel*, 571 U.S. 359, 369 (2014) (noting that the U.S. Supreme Court has "never held that the Government's reading of a criminal statute is entitled to any deference"); *accord Guedes v. ATF*, 140 S. Ct. 789, 790 (2020) (statement of Gorsuch, J., respecting the denial of certiorari) ("[W]hatever else one thinks about *Chevron*, it has no role to play when liberty is at stake. . . . Instead, we have emphasized, courts bear an 'obligation' to determine independently what the law allows and forbids." (quoting *Abramski v. United States*, 573 U.S. 169, 191 (2014))).

Here, the City seeks to rely on materials a step removed from official regulations. While these materials cannot supplant the text, they also fail to solve

the constitutional problem because they are no less vague than the ban itself. The City points out that the NYPD's training materials define the meaning of the word "diaphragm." App.Br.29–30. But defining the meaning of an internal organ does not provide any clarity as to what may compress it. The NYPD's training materials, as Supreme Court recognized, "have simply ignored the issue entirely by simply imposing a blanket ban on any activity that could lead to even the possibility of compressing the diaphragm." R20. NYPD trains its officers not to sit, stand, or kneel on an arrest, and it provides a brief anatomical description of the diaphragm. But "[t]here is no substance" in this guidance, "and the issue itself is simply ignored." R20–21.

The legislative history similarly provides no more help. The City seeks to draw meaning from the revisions to Section 10-181, pointing out that the initial proposal would have criminalized any restraint "in a manner that restricts the flow of air or blood by compressing the windpipe, diaphragm, or the carotid arteries." App.Br.35. But the Council revised the law, apparently "concern[ed]" that the provision "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." *Id.* at 35–36. Yet the fact that the prior draft was more expansive does not help provide guidance on the current law. While the Council's revisions may

have narrowed the law's scope, they did not replace vague terms with clear ones.

The City also argues that the legislative history demonstrates that the ban sought "to criminalize conduct that the Council understood was already restricted by NYPD's Patrol Guide." App.Br.36. Yet there is not congruence between the diaphragm-compression ban and the NYPD's policy against sitting, standing, or kneeling on a detainee. That policy does not inform officers about what it means to "compress[] the diaphragm." As Supreme Court recognized, the Patrol Guide simply avoids the issue, and if anything, numerous public officials "expressed misgivings and acknowledgement of the statute's vague language." R22. Therefore, the legislative history reflects that even the people who voted for it did not know how it would apply in practice.

II. THE CITY'S SEVERABILITY ARGUMENT IS WAIVED AND WITHOUT MERIT

Supreme Court correctly rejected the City's efforts to sever the diaphragm-compression ban and prohibit any act of sitting, standing, or kneeling. R22–23. The City now drops the argument but seeks to attack the judgment based on a new severability argument. That argument was waived and, in any event, relies on an unwarranted prediction concerning the City Council's intention.

A. The City Has Waived the Argument that the Diaphragm-Compression Ban Can Be Severed from the Chokehold Ban

This Court need not address severability here because the City presents this argument for the first time on appeal. This Court will not consider arguments raised for the first time on appeal unless they are "purely legal" in nature. *U.S. Bank Nat. Ass'n v. DLJ Mortg. Cap., Inc.*, 146 A.D.3d 603, 603 (1st Dep't 2017). Here, the question of severability presents a mixed question of law and fact, since it depends on the intentions of the legislature as reflected in the legislative history. As Supreme Court recognized, the record below does not contain sufficient evidence record "of the intentions of the New York City Council." R23.

Federal courts have recognized that "the law is well settled that arguments as to severability" can be waived. *Centro de la Comunidad Hispana de Locust Valley v. Town of Oyster Bay*, 868 F.3d 104, 118 (2d Cir. 2017) (citations omitted); *see also Bishop v. Smith*, 760 F.3d 1070, 1096 (10th Cir. 2014) ("[A] severability theory can be forfeited . . . ."); *Telecomms. Reg. Bd. of Puerto Rico v. CTIA-Wireless Ass'n*, 752 F.3d 60, 62 n.2 (1st Cir. 2014); *Lozano v. City of Hazleton*, 620 F.3d 170, 182 (3d Cir. 2010) ("Severability[,] like any non-jurisdictional issue, can be waived . . . ."), *judgment vacated on unrelated grounds sub nom. City of Hazleton v. Lozano*, 563 U.S. 1030 (2011); *Comite de Jornaleros de Redondo Beach v. City of Redondo Beach*, 657 F.3d 936, 951 n.10 (9th Cir. 2011).

In this case, the City advanced a theory of severability that would have expanded the scope of Section 10-181.[5] Below, the City argued that the court should sever the phrase "compresses the diaphragm," such that the law would then prohibit "sitting, kneeling, or standing on the chest or back, in the course of effecting or attempting to effect an arrest." R482. In other words, the ban would read as a blanket prohibition against such actions by the officer, no matter whether the actions had the effect of compressing the diaphragm or otherwise obstructing breathing.

Now on appeal, the City changes course, arguing that the Court should sever the entirety of the prohibition on "sitting, kneeling, or standing" on an arrestee's torso, preserving Section 10-131 as a standalone chokehold ban. App.Br.54–56. The City could have made this same argument when it moved for summary judgment, and had it done so, Plaintiffs could have briefed it and provided additional factual materials bearing on whether the City Council intended each ban to stand without the other. Instead, as Supreme Court noted, the City failed to develop this issue, and the record contained—and still contains—"insufficient evidence . . . of the intentions of the New York City Council." R23. The City's failure to raise this theory deprived Plaintiffs of the opportunity to develop these facts and leaves

[5] The City in fact only advanced its first severability argument in its reply brief, which could itself have constituted an independent source of waiver. *See, e.g.*, *O'Sullivan v. O'Sullivan*, 206 A.D.2d 960, 960 (2d Dep't 1994). The City, however, has now abandoned that argument on appeal.

nothing in the trial record on this question. The City therefore cannot attack Supreme Court's judgment based on a ground not raised below.

B. The City Council Would Likely Not Have Enacted Section 10-181 Without the Diaphragm-Compression Ban

Even if the Court entertained the City's severability argument, it should still reject it. Whether a court should sever an unconstitutional provision depends on "whether the legislature . . . would have wished the statute to be enforced with the invalid part exscinded." *Nat'l Advert. Co. v. Town of Niagara*, 942 F.2d 145, 148 (2d Cir. 1991) (quoting *People ex rel. Alpha Portland Cement Co. v. Knapp*, 230 N.Y. 48, 60 (1920)). The entire statute must fall if the law's "primary purpose . . . could not be given effect" absent the unlawful provision. *City of New York v. Patrolmen's Benevolent Ass'n of City of N.Y., Inc.*, 89 N.Y.2d 380, 394 (1996). The inquiry calls for "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." *Knapp*, 129 N.E. at 207.[6]

As the City recognizes, App.Br.7–8, Section 10-181 was enacted shortly after the death of Mr. Floyd, who was killed following an officer's kneeling on his back for a number of minutes. Before that time, the City Council had considered an earlier

[6] Although it is not by itself "dispositive," the lack of a severability clause in Section 10-181 undermines the City's argument that the bans are severable from one another. *See Nat'l Advert. Co.*, 942 F.2d at 148 (severability clause leads to "particularly strong" presumption of severability (citing *People v. Kearse*, 56 Misc.2d 586, 596 (Civ. Ct. 1968))).

version of Section 10-181 that contained only the chokehold ban. But as the City admits, the Mayor stated he would veto that bill, and the proposal never advanced. App.Br.7. It was not until the diaphragm-compression ban was "added to the chokehold ban previously proposed," *id.* at 8, that the proposal became law. The City now asks the Court to adopt a measure that would produce the very outcome that the City Council had rejected: a standalone chokehold ban. The City cannot argue that "the legislature . . . would have wished the statute to be enforced with the invalid part exscinded" when the legislative history indicates that the City Council previously chose not to pursue such a course. *Nat'l Advert. Co.*, 942 F.2d at 148.

If the City believes that the City Council has changed its mind, then the appropriate course would be for the legislature itself to adopt a new law (if it had that authority). But the appropriate course is not for the courts to adopt a version of the law that the City Council did not.

III. SECTION 10-181 IS PREEMPTED BY NEW YORK LAW.

This Court may also affirm Supreme Court's judgment on the ground that Section 10-181 is preempted by state law. Supreme Court rejected this argument below. Nonetheless, the PBA may "contend as an alternative basis for affirmance . . . that it is entitled to summary judgment on a ground rejected by the [lower] court." *Cataract Metal Finishing, Inc. v. City of Niagara Falls*, 31 A.D.3d 1129, 1130 (4th Dep't 2006) (citations omitted). In view of New York's pervasive

regulation of police officer conduct at the state level, the City Council may not prohibit what the State has expressly permitted.

New York courts recognize two forms of preemption: field preemption and conflict preemption. *See In re Chwick v. Mulvey*, 81 A.D.3d 161, 167 (2d Dep't 2010). Both are functions of New York State's "home rule provision," which is the source of New York City's legislative power. NY Const. art IX, § 2(c); *see Chwick*, 81 A.D.3d at 167. Field preemption occurs when a locality inserts itself into a field over which the State Legislature "has assumed full regulatory responsibility." *Chwick*, 81 A.D.3d at 167. Conflict preemption occurs when a local law "directly conflicts" with a state law. *Id.* Section 10-181 is preempted in both ways.

A. Section 10-181 Is Field Preempted

Section 10-181 is field preempted. The State Legislature has enacted a "comprehensive and detailed" scheme to regulate the protocols of an arrest and the use of force during arrest. *Consol. Edison Co. of N.Y. v. Town of Red Hook*, 60 N.Y.2d 99, 105 (1983). Several provisions of state law specifically regulate arrests. New York law delineates the circumstances when a police officer may arrest someone, N.Y. Crim. Proc. Law §§ 140.10(1)–(2), (4)–(6), where an officer may effect an arrest, *id.* § 140.10(3), and when an arrest may be effected, *id.* § 140.15(1). State law also specifically authorizes "such physical force as is justifiable pursuant to" N.Y. Penal Law Section 35.30, which allows an officer to use force he or she

"reasonably believes . . . to be necessary to effect [an] arrest." These provisions reflect the State Legislature's intent to occupy the field of use of force during an arrest.

The State Penal Law does recognize that an arresting officer may find him or herself subject to prosecution under local laws to which Section 35.30 would provide a defense. *See* N.Y. Penal Law § 10.00(1) (defining "offense" to include violations of some "local law[s]"). Yet the offense established under Section 10-181 is not a generally applicable prohibition, but a law that directly regulates the use of force in connection with an arrest. Penal Law Section 10.00(1) does not contemplate the creation of such arrest-specific regulations.

In addition, here, the State Legislature has not only generally regulated law enforcement arrests, but it has specifically adopted protections against airway obstructions during arrest. Section 121.13-a of the Penal Code makes it a class C felony to obstruct breathing or blood circulation, thereby causing serious physical injury or death. As discussed above, this provision was adopted just one week before the City enacted Section 10-181, and it specifically addressed the adequacy of the NYPD's internal prohibition on chokeholds. *See, e.g.*, R333 (committee report excerpt) ("It is clear that the NYPD's ban on the use of chokeholds is not sufficient to prevent police officers from using this method to restrain individuals whom they are trying to arrest."). Section 121.13-a thereby demonstrates the State's intent to

regulate the entire field of preventing strangulation and asphyxiation during arrest.

The City argued below that Section 121.13-a governs a field that is too narrow to constitute a "regulatory field." R240–41. But the State's anti-chokehold law arises in the context of other laws regulating arrests, and other New York cases demonstrate that for preemption purposes, a "field" can be very specific. For example, the Court of Appeals invalidated a local law "because the Legislature has pre-empted such local regulation in the field of siting of major steam electric generating plants." *Consol. Edison Co. of N.Y.*, 60 N.Y.2d at 105. That "field" is no broader than state laws regulating the use of force by police in the course of arrests.

The City also argued that the Criminal Procedure Law ("CPL") does not "regulate[] the entire field of police conduct." R242. But the scope of the CPL, which governs criminal procedure, is not at issue here. Rather, the question is whether the State's detailed arrest regulations, including Section 35.30 and the anti-chokehold law, occupy the field of arrests conduct by police.

B. Section 10-181 Is Conflict Preempted

Section 10-181 is also conflict preempted, because it criminalizes behavior that Section 35.30 expressly allows. Section 35.30 authorizes the reasonable physical force necessary to effect an arrest, and Section 121.13-a constrains that authority by prohibiting intentional chokeholds that cause serious injury or death.

Taken together, these two penal laws establish that officers may use any force reasonably necessary to effect an arrest, but may not intentionally asphyxiate an arrestee through a chokehold or similar obstruction that causes death or serious injury.

Section 10-181 specifically conflicts with these provisions by prohibiting reasonable uses of force by police that state law has specifically authorized. As discussed, Section 10-181 attempts to create a carve-out from these provisions for even accidental, momentary applications of force during an arrest. Section 10-181 is not a generally applicable assault provision, but rather a law specifically directed at "arrests." That creates a clear conflict with state law.

CONCLUSION

For the reasons explained, the judgment should be affirmed.

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Respectfully submitted,

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