To be Argued by:
ANTHONY P. COLES
(Time Requested: 15 Minutes)

New York Supreme Court

Appellate Division—First Department

Appellate Case No.: 2021-03041

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.

BRIEF FOR PLAINTIFFS-RESPONDENTS

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PRELIMINARY STATEMENT

In the summary judgment decision at issue on this appeal, Justice Love held that Section 10-181 of the New York City Administrative Code ("Section 10-181") was unconstitutionally vague and therefore void, and permanently enjoined its enforcement. (R23.) Section 10-181 regulates police conduct in the course of effecting or attempting to effect an arrest. A key part of Section 10-181 makes it a criminal offense for a police officer to effect or attempt to effect an arrest by "sitting, kneeling, or standing on the chest or back in a manner that compresses the diaphragm." (R8.) The fatal problem with Section 10-181 is that the phrase "in a manner that compresses the diaphragm" is unconstitutionally vague because it does not give a person of ordinary intelligence fair notice of what conduct is prohibited, and does not provide clear standards for enforcement, thereby unlawfully permitting arbitrary enforcement. *See People v. Bright*, 71 N.Y.2d 376, 382–383 (1988); *People v. Stuart*, 100 N.Y.2d 412, 420–21 (2003).

Justice Love recognized that "the need to protect both police officers and the public is a vital and fundamental function of society and it is essential that sufficient safeguards exist to allow officers to safely perform their duties while ensuring the safety of the general public and individuals being taken into custody." (R9.)

But as Justice Love found, the statute is vague on its face, and all of the evidence on the meaning of the key statutory phrase "in a manner that compresses

the diaphragm"—including all the evidence submitted by the City and the NYPD police training materials, as well as the evidence submitted by the plaintiff police unions—supports the conclusion that the phrase is too vague to give reasonable notice of what conduct is permitted and what is not permitted. (R8–9, 14–23.)

Section 10-181 was passed by the City Council on June 18, 2020, signed into law by Mayor Bill de Blasio on July 15, 2020, and promptly challenged as unconstitutionally vague by the Plaintiffs in this action brought August 5, 2020. (R8.) Justice Love denied the Plaintiffs' motion for a preliminary injunction, but recognized that the Plaintiffs' argument "clearly establishes a *prima facie* showing of a likelihood of ultimate success on the merits as the statute's wording appears unconstitutionally vague. The statute offers no guidance on how an officer is to determine whether his or her actions are causing a suspect's diaphragm to be compressed, especially in light of the lack of an injury requirement." (R16.)

On the subsequent cross-motions for summary judgment, Plaintiffs submitted evidence from medical experts, police officials, District Attorney statements, City Council member statements, and even statements by Mayor Bill de Blasio, demonstrating that Section 10-181 is too vague to provide fair notice of what conduct is permitted and what is barred. The Plaintiffs' evidence, which was unrebutted by the City, includes:

- Dr. Beno Oppenheimer, on the NYU School of Medicine faculty specializing in pulmonary critical care, testified that "the diaphragm is not a compressible muscle given its anatomical location within the chest cavity and the direction of its contractile displacement. It is my opinion that there is no way for police officers to determine, in the course of an arrest, whether sitting, kneeling, or standing on the chest or back is being done 'in a manner that compresses the diaphragm.'" (R423.) The diaphragm "contracts," "shortens," and "descends" every time someone normally breathes. (R425.)
- Dr. Oppenheimer also testified: "There are no practical ways during an arrest situation for police officers to diagnose whether or how diaphragm function is being affected." (R425.)
- Dr. Christopher Lettieri, Professor of Medicine, retired colonel and consultant to the Army Surgeon General, testified that "there is no way for police officers to determine, in the course of an arrest, whether they are violating § 10-181 by acting 'in a manner that compresses the diaphragm.'" (R382.)
- Patrick E. Kelleher, retired First Deputy Commissioner of the NYPD, testified: "The [NYPD] training materials simply avoid giving any training on the key words in the statute. The training materials pretend that the key words 'in a manner that compresses the diaphragm' are not in § 10-181, and simply instruct officers not to sit, kneel, or stand on a person in the course of arrest. But that is

not what § 10-181 prohibits. The training does nothing to clarify what the statute actually says. The training abandons the key words in the statute. The training shows that not even the NYPD knows what the statute really means." (R376.)

- John Monaghan, a retired Captain of the NYPD, testified that "[t]he words in § 10-181 necessarily mean that some forms of sitting, kneeling, or standing on the chest or back are permitted. But § 10-181 does not reasonably and clearly identify, and does not provide any means of reasonably and clearly identifying, what is permitted and what is not permitted." (R410.) Section 10-181 does not explain "[w]hat 'compressing' the diaphragm means, compared to the normal contraction or flattening," as the NYPD training materials state. (R411.) It does not explain "[h]ow anyone could tell during an arrest struggle whether or not the diaphragm was being 'compressed' during that struggle, to determine if § 10-181 is being violated." (*Id.*) It does not explain "[h]ow anyone could tell after an arrest struggle whether or not the diaphragm had been 'compressed' during that struggle, to determine if § 10-181 had been violated." (*Id.*)

The City submitted no contrary evidence. The City relied instead on NYPD training materials that quote Section 10-181. The City claimed the NYPD training materials cured any vagueness in Section 10-181 by giving instructions to officers on how to comply. But those materials do not actually explain what "compresses

the diaphragm" means or how to tell when sitting, kneeling, or standing on the chest or back compresses the diaphragm. The NYPD training materials admit that the diaphragm normally "contracts and flattens" when a person breathes. (R411.) The NYPD training materials do not consider the possible meaning of "in a manner that compresses the diaphragm" that Section 10-181 prohibits, and merely instruct police officers not to sit, kneel, or stand on the chest or back at all. This cannot solve the constitutional problem. It makes meaningless the statute's key limitation to sitting, kneeling or standing "in a manner that compresses the diaphragm." (*Id.*)

Justice Love recognized this problem with the City's defense of Section 10-181. He held that "[t]he NYPD appears to 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.) "While the submitted training materials recite the text of the statute and give guidance on the location and function of the diaphragm, none give any guidance on the meaning of 'compresses the diaphragm.' There is no substance and the issue itself is simply ignored." (R20–21.) "The inescapable conclusion is that the inclusion of the words 'in a manner that compresses the diaphragm' is a vague description of the prohibited act." (R21.)

On this appeal, the City argues that none of these problems and testimony matter, principally because essentially all anyone has to do is consult an ordinary dictionary. (Br. 29.) But no dictionary or other evidence cited by the City explains

how to distinguish what does and does not permissibly compress the diaphragm, which—as Dr. Oppenheimer testified—normally contracts and descends every time someone breathes. (R425.) All the problems pointed out by Justice Love, medical doctors, retired First Deputy Commissioner Kelleher, and others, remain unanswered.

Justice Love also properly rejected the City's suggestion that the court should rewrite Section 10-181 by severing its vague language. The vague language in Section 10-181 is a prominent limitation. Severing or re-writing "would result in a law the Legislature would not have intended." (R22 (quoting *White v. Cuomo*, 181 A.D.3d 76, 86 (3d Dep't 2020).)

With no material facts in dispute, Justice Love properly granted summary judgment in Plaintiffs' favor. Because the City's notice of appeal brings up all issues ruled on below, this Court should also rule in favor of the Plaintiffs based on their argument made to the trial court that Section 10-181 is preempted by State law.

QUESTIONS PRESENTED

1. Should summary judgment be granted holding N.Y.C. Administrative Code § 10-181 to be unconstitutionally vague because it does not give a person of ordinary intelligence fair notice of what conduct is prohibited, and does not provide clear standards for enforcement, when (a) the statute is vague on its face by prohibiting police from restraining suspects during an arrest while sitting, kneeling, or standing on the chest or back "in a manner that compresses the diaphragm"; and (b) all of the testimony and evidence submitted by medical experts and police officers on the meaning of the phrase "in a manner that compresses the diaphragm" supports the conclusion that the phrase does not describe any definite conduct and that no one can tell when the prohibited conduct occurs, and that evidence was unrebutted by any contrary testimony or evidence?

The trial court answered this question in the affirmative by granting summary judgment holding that § 10-181 was unconstitutionally vague and refusing to rewrite the statute.

2. In the alternative, should summary judgment be granted holding that (a) Section 10-181 is field preempted by the State Penal Law on use of force by police officers, including Penal Law § 121.13-a, which covers using "a chokehold or similar restraint," and Penal Law § 35.30, which authorizes reasonable physical force necessary to effect an arrest, and (b) Section 10-181 is conflict preempted

because it prohibits what is permissible under State law, or imposes additional restrictions on rights under State law, so as to inhibit the operation of Penal Law § 121.13-a and Penal Law § 35.30?

The trial court incorrectly answered this question in the negative.

STATEMENT OF THE CASE

I. The Parties

Plaintiffs-Respondents are duly certified collective bargaining representatives of various groups of police and peace officers who work in New York City and the State. Defendant-Appellant the City of New York (the "City") is a municipal corporation organized and existing under New York State law.

II. Background

A. Section 10-181's Enactment

The bill that became Section 10-181 was introduced in the New York City Council in February 2018 as Int. No. 536-2018. As drafted, Int. No. 536-2018 would have established as a misdemeanor the use of a "chokehold," defined as "wrap[ping] an arm around or grip[ping] the neck in a manner that limits or cuts off either the flow of air by compressing the windpipe, or the flow of blood through the carotid arteries on each side of the neck," while effecting or attempting to effect an arrest.[1] A subsequent amendment ("Int. No. 536-A") was proposed on or about June 9, 2020, seeking to establish as a misdemeanor offense the act of "restrain[ing] an individual in a manner that restricts the flow of air or blood by compressing the windpipe,

[1] Int. No. 536-2018, as well as the other City Council materials related to Section 10-181, are available at https://legistar.council.nyc.gov/LegislationDetail.aspx?ID=3343958&GUID=B782804F-680A-4156-9E64-8BF88CF7BBD8 (last accessed Mar. 23, 2022).

diaphragm, or the carotid arteries on each side of the neck in the course of effecting or attempting to effect an arrest."

At the hearing for Int. No. 536-A, multiple concerns were raised about its terms. Benjamin Tucker, First Deputy Commissioner of the NYPD, testified at a committee hearing that "[i]f the officer uses excessive force, the penal law already includes a statute criminalizing[] criminal obstruction of breathing and strangulation," noting that Int. No. 536-A would go further by "criminaliz[ing] violations of department policy that would not rise to the level of criminality."[2] Those concerns rested on a well-founded fear that Int. No. 536-A would expose police officers to criminal liability on vague and uncertain facts; as Commissioner Tucker noted with respect to Int. No. 536-A, "it is actually hard to imagine a scenario in which an officer would not open him or herself to criminal liability or discipline when effecting the arrest of a resisting subject."[3] As a cure for these defects, Commissioner Tucker suggested that City Council "[r]emove the word diaphragm and add the word intentional."[4]

These concerns were also raised by Oleg Chernyavsky, Assistant Deputy Commissioner for Legal Matters of the NYPD, who informed the committee that

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[2] Transcript of the Minutes of the Committee of Public Safety held on June 9, 2020, at 60:23–61:7.

[3] *Id.* at 61:20–24.

[4] *Id.* at 62:4–5.

"[w]hen you are in the middle of a struggle as a police officer, you sometimes don't even realize what's going on . . . [t]here is something to be said about an intentional chokehold."[5] He added: "why not clarify the bill. . . . We understand the bill is going to be passed but it doesn't make sense . . . ."[6]

City Council's subsequent amendment ("Int. No. 536-B") compounded rather than cured the statute's problems. Int. No. 536-B made a misdemeanor of the act of "restrain[ing] 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." Int. No. 535-B. At a June 18, 2020 hearing, Int. No. 536-B was introduced as a law that would "make it illegal for an arresting officer to use a restraint that restricts the flow of air or blood . . . or putting pressure on the back or the chest," wholly failing to grapple with when and to what extent criminal liability would arise with respect to conduct that "compresses the diaphragm."[7] Councilmember Chaim Deutsch, who indicated that he would vote in favor of the bill, raised his concerns: "While I strongly agree with . . . the intent of this bill, there are serious issues with some of the bill's

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5 *Id.* at 135:17–21.

6 *Id.* at 102:21–24.

7 *See* Transcript of the Minutes of the Stated Meeting held on June 18, 2020, at 25:6–10.

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."[8] He voiced "real problems with the consequences of the bill," asking "how we can we ask the NYPD officers to keep the peace and maintain law and order in this city" when "they have to also be afraid of being prosecuted for reasonable actions that they take in the course of their job[?]"[9]

City Council passed the bill on June 18, 2020, and it was signed into law by Mayor de Blasio on July 15, 2020. Section 10-181 states:

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 aggrieved by such violation.

N.Y.C. Admin. Code § 10-181. Section 10-181 does not cross-reference any other statute and does not contain either an injury or mens rea requirement.

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[8] *Id.* at 71:7–14.

[9] *Id.* at 71:15–20.

B. Section 10-181 Immediately Creates Confusion

Section 10-181 was met with widespread alarm and confusion. Within days after Section 10-181 was signed into law, Police Chiefs, Commissioners, and Sheriffs of neighboring counties issued directives prohibiting their officers from conducting enforcement activities in the City, given the risk of prosecution under a vague law that provides no guidance as to the meaning of "compresses the diaphragm." (R312–14.) Some municipalities even issued a ban preventing on-duty police officers from entering the City, only permitting entry after receiving express authorization by a superior officer. (R307, R314.)

Manhattan District Attorney Cyrus Vance forecasted that the law would be challenged because of its "ambiguity," observing that it was a "strict liability bill" lacking elements of intent.[10] He also stated that the bill "may well be preempted by State law" because of the "chokehold bill passed at the State level," *i.e.*, Section 121.13-a, and anticipated "legal challenges . . . that will be successful" and place Section 10-181 "at risk as a statute because of preemption by the State."

In a statement issued on July 24, 2020, Staten Island District Attorney Michael E. McMahon stated that Section 10-181 "actually defies common sense in the

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[10] *See* Spectrum News, *Manhattan District Attorney Cy Vance on the Recent Spike in Gun Violence* (July 7, 2020), https://www.ny1.com/nyc/all-boroughs/inside-city-hall-shows/2020/07/08/manhattan-district-attorney-cy-vance-on-the-recent-spike-in-gun-violence#, audio beginning at 17:00 (last accessed on Mar. 23, 2022).

restrictions it places on police officers who we expect and need to respond to dangerous and critical life and death situations." (R317.) He noted that "it is hard for me to imagine a case where an officer making a lawful arrest should be charged with the diaphragm contact section" of Section 10-181. (R318.) Most significantly, he observed that the law was already "causing law enforcement to question how they can do basic functions of their job like make an arrest safely in this City," and urged the City to "repeal or fix this law as soon as possible." (R317, 319.)

Donovan Richards, Chairman of the City Council's Public Safety Committee, was reported as stating that "part of the bill, the diaphragm portion of the bill, was left a little vague," and then-Mayor Bill de Blasio acknowledged the need for "some clarification on the issue of diaphragms." (R322.) Corey Johnson, then serving as City Council Speaker, observed that "[t]here was language that was put in [Section 10-181] related to the diaphragm and that, right now, seems subjective and it's not clear." (R325.) Then-Mayor Bill de Blasio also noted City Council's discussions about "clarification on the issue of diaphragms" (R325), commenting further that "there's a growing recognition that a better balance needs to be struck" with respect to "the exact wording of the diaphragm portion" of Section 10-181. (R330.) Current Mayor Eric Adams, speaking after Section 10-181 was stricken down by the trial court, described the law as "just not realistic," "a big mistake," and noted that the

bill did not benefit from "the proper steps that we should have taken to sit down with technical experts."[11]

To date, City Council has not amended Section 10-181, not even after the trial court held that the law was unconstitutionally vague.

C. New York State's Anti-Chokehold Legislation.

Immediately before the enactment of Section 10-181, the New York State legislature also addressed the same area of the law by enacting Penal Law § 121.13-a, which provides that an officer is guilty of aggravated strangulation, a class C felony, when he or she "causes serious physical injury or death to another person by (1) "commit[ting] the crime of criminal obstruction of breathing or blood circulation," as defined by N.Y. Penal Law § 121.11; or (2) "us[ing] a chokehold or similar restraint," as defined by N.Y. Executive Law § 837-t(1)(b). *See* N.Y. Penal Law § 121.13-a.

Section 121.11 criminalizes the "[c]riminal obstruction of breathing or blood circulation" if done "with intent to impede the normal breathing or circulation of the blood of another person." N.Y. Penal Law § 121.11. Section 121.11, which has an express intent requirement, is a class A misdemeanor. Section 837-t(1)(b) imposes

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[11] *See* Sam Raskin, *Eric Adams Blames City Council for 'Unconstitutionally Vague' Chokehold Bill*, N.Y. POST (June 24, 2021), https://nypost.com/2021/06/24/eric-adams-blames-city-council-for-chokehold-bill-ruling/ (last accessed Mar. 23, 2022).

use-of-force reporting requirements for every instance where an officer "uses a chokehold or similar restraint that applies 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).

Article 121 of the Penal Law codifies three other strangulation-related crimes. Criminal Obstruction of Breathing or Blood Circulation (§ 121.11), Strangulation in the Second Degree (§ 121.12), and Strangulation in the First Degree (§ 121.13). But Section 121.13-a was codified with the express purpose of addressing the use of force by a "police officer" (N.Y. Crim. Proc. Law § 1.20(34)) or "peace officer" (N.Y. Crim. Proc. Law § 2.10). Section 121.13-a shows a legislative intent to address the restriction of breathing or blood circulation, or the use of chokeholds or similar restraints, by a police officer. The State's purpose is also revealed by Section 121.13-a's legislative history, which states that "[i]t 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." (R333.) The State legislature tailored Section 121.13-a to New York City itself.

Section 121.13-a was enacted as a way to modify the scope of permissible uses of force by the police. Section 35.30 of the New York State Penal Law allows officers, "in the course of effecting or attempting to effect an arrest," to "use physical force when and to the extent he or she reasonably believes such to be necessary to

effect the arrest, or to prevent the escape from custody, or in self-defense or to defend a third person." N.Y. Penal Law § 35.30; *see also* N.Y. Penal Law § 35.05 (permitting the use of force where "[s]uch conduct is necessary as an emergency measure to avoid an imminent public or private injury").

D. The Proceedings Below

Plaintiffs filed this lawsuit on August 5, 2020, seeking to enjoin the enforcement of Section 10-181 as well as requesting declaratory relief that Section 10-181 is preempted by the New York State Penal Law and violates the Due Process Clause of the New York Constitution. (R56.) Plaintiffs moved for a preliminary injunction against the City to enjoin the enforcement of Section 10-181, finding Plaintiffs had established a prima facie showing that the statute was unconstitutionally vague but declining to grant preliminary relief after finding a lack of irreparable harm. (R16.)

The City filed its motion for summary judgment on November 20, 2020, supported by the affidavit of Inspector Gregory Sheehan of the NYPD. (R24–222.) Inspector Sheehan's affidavit contended that officers are "instructed that, pursuant to [Section] 10-181, that they may [1] Not sit, kneel, or stand on the chest or back of a subject; [2] Place a subject in a prone position and sit or kneel on the subject's legs; or [3] Not place a subject in a chokehold." (R74–75.) Together with Inspector Sheehan's affidavit, the City submitted their training materials for the NYPD. (R76–

222.) None defined what it meant to "compress[] the diaphragm" or how to discern when or whether such compression has occurred.

Plaintiffs filed their cross-motion for summary judgment on January 15, 2021, supported by the affidavits of former Commissioner Patrick E. Kelleher, retired Captain John Monaghan, Dr. Christopher Lettieri, and Dr. Beno Oppenheimer, each detailing the law's many real-world problems. (R223–438.) Captain Monaghan explained that there was no "clear and well-understood way of telling, either during an arrest struggle or after, when a person's diaphragm is unlawfully 'compressed,' or even exactly what that means in this context." (R410.) Commissioner Kelleher explained that the City's training materials did "nothing to clarify what the statute actually says" and showed that "not even the NYPD knows what the statute really means." (R375–76.) Dr. Lettieri stated that officers would have no way to determine "what effect . . . external compression of the thoracic cage" would have during an arrest, particularly as "there are numerous reasons why a person may become short of breath" in such circumstances. (R387.) And Dr. Oppenheimer explained that the diaphragm "is not a compressible muscle given its anatomical location within the chest cavity and the direction of its contractile displacement," a fact that would make it impossible for officers to know "whether or how diaphragm function is being affected." (R423–425.) Dr. Oppenheimer testified that the terms "diaphragmatic compression" or "compression of the diaphragm" are not "generally used or widely

accepted in medicine to describe a mechanism with potential for impeding or limiting diaphragmatic function." (R425.) None of this evidence was rebutted by any evidence submitted by the City.

The trial court granted Plaintiffs' motion on June 22, 2021, because Section 10-181 was unconstitutionally vague, while simultaneously denying the City's motion on the same issue. (R23.) Justice Love found that while Section 10-181 does prohibit "restraining an individual in a manner that restricts the flow of air," that did not provide enough notice about its meaning. (R20.) The City's submission of training materials, while "laudable," reinforces "the inescapable conclusion . . . that the training materials fail to meaningfully address the legal definition of 'compresses the diaphragm.'" (R21.) Relying on Plaintiffs' affidavits from police officers and medical professionals, the trial court found that "in a manner that compresses the diaphragm" was "a vague description of the prohibited act," and declined to rewrite the statute. (R21, 23.)

With respect to Plaintiffs' preemption arguments, the trial court focused on the legislative history of N.Y. Penal Law § 121.13-a, holding that there was no field preemption because "there is nothing in the legislative history which indicates that the state legislature intended to preempt other legislative remedies." (R12.) The trial court also found that Section 10-181 was not in conflict with Section 121.13-a because it does not "prohibit[] conduct that is permissible under State law" or

"create[] additional restrictions on rights under State law." (R14.) The trial court accordingly granted the City's motion for summary judgment on these issues, while denying the Plaintiffs' cross motion on the same. (R23.) The City filed its notice of appeal on July 28, 2021. (R4–5.)

STANDARD OF REVIEW

This Court reviews a grant of summary judgment under the same standard applied by the trial court. *See Merritt Hill Vineyards Inc. v. Windy Heights Vineyard, Inc.*, 61 N.Y.2d 106, 110–112 (1984); *see also Tower Nat'l Ins. Co. v. Lugo*, 199 A.D.3d 502, 502–03 (1st Dep't 2021).

"[T]he proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact." *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986). Once a party makes this showing, "the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action." *Id.*; *see also* CPLR 3212(b). Where the issues raised on such a motion concern only issues of law, "the case is ripe for summary judgment." *Am. Express Bank Ltd. v. Uniroyal, Inc.*, 164 A.D.2d 275, 277 (1st Dep't 1990). If a party does not oppose facts presented by the opposing party, those facts are "deemed to be admitted." *Kuehne & Nagel, Inc. v. Baiden*, 36 N.Y.2d 539, 544 (1975).

ARGUMENT

I. The Trial Court Properly Found that Section 10-181 Is Unconstitutionally Vague.

The New York Constitution's guarantee of due process ensures "that no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed." *People v. Bright*, 71 N.Y.2d 376, 382 (1988) (quoting *United States v. Harris*, 347 U.S. 612 (1954)). New York courts apply a two-pronged test for vagueness. First, "the statute must provide sufficient notice of what conduct is prohibited," *id.*, so that "men of common intelligence" are not "forced to guess at the meaning of the criminal law." *Smith v. Goguen*, 415 U.S. 566, 574 (1974) (citing *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926)). Second, "the statute must not be written in such a manner as to permit or encourage arbitrary and discriminatory enforcement." *Bright*, 71 N.Y.2d at 382.

Applying these principles, the trial court properly held that "Section 10-181 is unconstitutionally vague as the phrase 'compresses the diaphragm' cannot be adequately defined as written." (R23.) The plain text of Section 10-181 and the unrebutted evidence show that there are no "ascertainable standards governing arrest and conviction under the statute," rendering "fair, even-handed administration of the law a virtual impossibility." *People v. Berck*, 32 N.Y.2d 567, 571–72 (1973). Section 10-181 does not give fair notice of what it purports to prohibit, nor does it

provide any guidelines that would prevent arbitrary enforcement. The trial court's decision that Section 10-181 is unconstitutionally vague should be affirmed.

A. Section 10-181 fails to put persons of ordinary intelligence on notice as to the conduct it prohibits

Section 10-181 fails to provide fair notice of what conduct is prohibited or when it occurs. The text of Section 10-181 provides no guidance on what actually constitutes sitting, kneeling, or standing on the chest or back "in a manner that compresses the diaphragm" while making an arrest. The unrebutted evidence submitted by Plaintiffs below demonstrates that no one, including police officers and even medical professionals, understand what Section 10-181 purports to prohibit.

1. The plain text of Section 10-181 fails to describe what it prohibits.

The "starting point in any case of interpretation must always be the language itself, giving effect to the plain meaning thereof." *Chauca v. Abraham*, 30 N.Y.3d 325, 330–31 (2017) (citation omitted). Section 10-181 states, in pertinent part:

> 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.

N.Y.C. Admin. Code § 10-181.

By its terms, Section 10-181 prohibits officers effecting or attempting to effect an arrest from restraining an individual in a manner that restricts the flow of air or blood by "sitting, kneeling, or standing on the chest or back in a manner that

compresses the diaphragm." *Id.* Section 10-181 thus does not criminalize all restraints of suspects that restrict the flow of air or blood by sitting, kneeling, or standing on the chest or back. Criminal liability is imposed only when the sitting, kneeling, or standing is done "in a manner that compresses the diaphragm." The meaning of this phrase is essential to determining the scope of criminal liability under Section 10-181.[12]

Justice Love found that "the words 'compresses the diaphragm' are indeed vague." (R22.) Section 10-181 fails to provide any indication of "precisely what the fact is" that results in criminal liability. *United States v. Williams*, 553 U.S. 285, 306 (2008). The lack of fair notice of what is prohibited is made even worse by Section 10-181's lack of injury and mens rea elements. Although injury and mens rea are not required for a statute to satisfy due process, those requirements are pervasive in the criminal law precisely because they ensure the law gives fair notice of what is prohibited so that "men of common intelligence" are not "forced to guess at the meaning of the criminal law." *Smith*, 415 U.S. at 574.

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[12] The City is inaccurate and misleading when it asserts that "the vagueness test should not be stringently applied." (Br. 26). That is not the law. New York has long recognized that "acts otherwise innocent and lawful, do not become crimes, unless there is a clear and positive expression of the legislative intent to make them criminal." *Hornstein v. Paramount Pictures*, 292 N.Y. 468, 471 (1944). Section 10-181 is unconstitutionally vague under any standard of vagueness review for a criminal law.

Because Section 10-181 does not require showing an injury or refer to any other objective metric to determine whether it has been violated, it leaves officers, as well as prosecutors, jurors, and judges, in the dark about when or whether the diaphragm has been "compressed." That places Section 10-181 in stark contrast to penal statutes where a physical injury requirement safeguards against arbitrary enforcement. *See People v. Cortez*, 143 A.D.2d 464, 464–465 (3d Dep't 1988) (finding that term "physical injury" in assault law was not vague because the prosecution would need to proffer proof of injury as defined by N.Y. Penal Law § 10.00). The absence of an injury requirement is particularly problematic in the context of police effecting an arrest. Although police officers are authorized to use reasonable force as part of their jobs and must, from time to time, use such force to protect themselves or others, *see* N.Y. Penal Law § 35.30, Section 10-181 nonetheless criminalizes defined and otherwise permissible conduct incidental to an arrest insofar as it "compresses the diaphragm." The statute thus "criminalize[s] conduct that is inherently innocent" and does not "fairly inform the ordinary citizen that an otherwise innocent act is illegal." *Bright*, 71 N.Y.2d at 383.

Nor does Section 10-181 contain a mens rea requirement, another ubiquitous feature of the criminal law. Although ignorance of the law is, of course, no excuse, a police officer must be able to "know the facts that make his conduct fit the definition of the offense." *Elonis v. United States*, 575 U.S. 723, 735 (2015) (quoting

Staples v. United States, 511 U.S. 600, 608 n.3 (1994)). Because "the absence of a scienter requirement" often creates "a trap for those who act in good faith," Section 10-181, as a strict liability offense, provides no way for officers to conform their conduct by reference to even a subjective standard. *Colautti v. Franklin*, 439 U.S. 379, 395 (1979) ("[T]he constitutionality of a vague statutory standard is closely related to whether that standard incorporates a requirement of *mens rea*." (citation omitted)); *see also Morissette v. United States*, 342 U.S. 246, 250 (1952) ("The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion."); *People v. Munoz*, 9 N.Y.2d 51, 57–60 (1961) (finding that municipal law's lack of intent requirement exacerbated vagueness problems).

The City also contends that "compresses the diaphragm" is "far more definite and specific" than other language found in the law. (*See* Br. 31–32.) But the cases cited by the City do not help it. The present case does not involve a challenge to a long-settled legal term of art like "untrustworthiness" or "for cause." Each one of those phrases has had a long life in the law. *See Chauca*, 30 N.Y.3d at 330–31 ("[I]t is a well-established principle of statutory construction that words of technical or special meaning are used by the legislature, 'not loosely, but with regard for their established legal significance.'") (quoting *People v. Wainwright*, 237 N.Y. 407, 412 (1924)). For example, and as the Court of Appeals recognized in *Friedman v. State*,

24 N.Y.2d 528 (1969) (cited at Br. 31), "'[f]or cause' has been defined in several cases involving the removal of judicial officers and they provide a reasonable person with a competent definition of this phrase." *Id.* at 540. That is because the legal term of art "for cause" does not give rise to any "indeterminacy of precisely what the fact is." *Williams*, 553 U.S. at 306. Any visit to a law library would quickly apprise someone of the meaning of "for cause." By contrast, the phrase "compresses the diaphragm" does not have any developed meaning in the law.

Nor can the meaning of "compresses the diaphragm" be divined by reference to a statutory definition, making *Kaur v. New York State Urban Development Corp.*, 15 N.Y.3d 235 (2010) inapposite. (*See* Br. 31.) That case involved a challenge to a statute regulating "substandard or insanitary area[s]," terms that were explicitly defined by a statute and thus readily resolved. 15 N.Y.3d at 254 (citing N.Y. Unconsol. Law § 6253(12)). Here, by contrast, City Council provided no definition for the term "compresses the diaphragm"; officers seeking to conform their conduct with the statute must resort to their best guess as to what it means. And as the City has proven through its submission of training materials at summary judgment, its best effort at explaining the meaning of "compresses the diaphragm" is to treat this language as a nullity, which the trial court rightly found "ignored" the text of the statute. (R20–21.)

The City misapprehends what is vague about Section 10-181 when it refers to the problem as merely one where there are close cases. The statute is not vague because it could give rise to close cases. It is vague because there is no way to determine what facts could result in liability under the statute.

The City's repeated analogy to intoxication statutes misses the problem with Section 10-181. (*See, e.g.*, Br. 44, 47–50.) As the City notes, a law is not vague when members of the public "have no practical way to assess whether they are over the proscribed blood-alcohol limit." (Br. 44.) But as the City admits, that is because there is "a proscribed . . . limit" in those statutes. (*Id.* (citing *Bohannon v. State*, 497 S.E.2d 552, 555 (Ga. 1998) (rejecting vagueness challenge to law making it "illegal to drive while having a blood-alcohol level of .10 or greater")).)[13] Unlike Section 10-181, intoxication statutes have limits set by law, whether it be the fact of drunkenness or the fact of blood alcohol exceeding a defined level. There are recognized and long-accepted tests applied for intoxication. There are no tests for

[13] Similar or identical limits were imposed by the statutes challenged in the other cases cited by the City (Br. 44). *See Sereika v. State*, 955 P.2d 175, 177 (1998) (challenging statute as vague that makes it unlawful for any person "found by measurement within 2 hours after driving . . . to have 0.10 or more by weight of alcohol in his blood . . . ."); *Burg v. Mun. Ct.*, 673 P.2d 732, 739 (1983) (addressing "analogous 0.10 percent statutes"); *Fuenning v. Superior Ct. In & For Maricopa Cnty.*, 139 Ariz. 590, 596 (1983) (same).

when the conduct addressed in Section 10-181 is done "in a manner that compresses the diaphragm." Nor could there be, as Dr. Oppenheimer and Dr. Lettieri explained in their unrebutted testimony in the trial court.

The same problem arises with respect to the other cases cited by the City (Br. 41–42) in support of its argument. *Kolbe v. Hogan*, 849 F.3d 114 (4th Cir. 2017) involved "the internal components" of firearms. *Id.* at 149. *United States v. Paull*, 551 F.3d 516 (6th Cir. 2009) involved the possession of child pornography. *Id.* at 526. *Henderson v. McMurray*, 987 F.3d 997 (11th Cir. 2021) involved a law governing amplified sound that could be "clearly heard inside . . . a nearby building" through the use of "normal hearing faculties." *Id.* at 1004. And *People v. Stephens*, 28 N.Y.3d 307 (2016) involved a noise ordinance barring music that "can be heard over 50 feet from such person's car on a public road." *Id.* at 315. Each of these cases involved laws regulating identifiable facts—a gun's parts, the possession of child pornography, loud noises defined by proscribed limits—as opposed to undefined conduct.

No such limits exist with respect to Section 10-181. What facts would trigger liability under such statutes are clear; the question for conviction under such a statute is whether those facts can be proved. But with Section 10-181, there is no standard—the facts that could give rise to liability are shrouded in uncertainty, necessarily making the enforcement of the statute a guessing game. As Justice Love recognized

below, these deficiencies are borne out by undisputed, real-world guidance from law enforcement and medical professionals.

2. Unrebutted evidence below confirms that an ordinary police officer lacks fair notice as to the meaning of Section 10-181.

Unrebutted evidence from police officers submitted on the motion below confirm the vagueness in the meaning of Section 10-181. Their testimony is central because police officers are tasked with enforcing Section 10-181 and are also subject to its prohibitions.

In reaching its decision, the trial court relied on the unrebutted testimony of Captain John Monaghan about the real-world implications of Section 10-181. (R19.) Captain Monaghan is a twenty-year veteran of the NYPD with a Master's Degree in Public Administration from Harvard, extensive experience interacting with violent felons, and many years of police trainings under his belt. (R407–09.) As he affirmed below, "[t]here is no clear and well-understood meaning of what is referred to by the words 'in a manner that compresses the diaphragm,'" nor is there a "clear and well-understood way of telling, either during an arrest struggle or after, when a person's diaphragm is unlawfully 'compressed,' or even exactly what that means in this context." (R410.) Neither Section 10-181 nor NYPD training provided any guidance on:

- When or how an officer's actions are compressing the diaphragm;
- What level of pressure applied will compress the diaphragm;
- Where on the chest or back the pressure will compress the diaphragm;

- What ‘compressing’ the diaphragm means, compared to the normal contraction or flattening that is explained in the training materials . . . ;
- How anyone could tell during an arrest struggle whether or not the diaphragm was being ‘compressed’ during that struggle, to determine if § 10-181 is being violated; or
- How anyone could tell after an arrest struggle whether or not the diaphragm had been ‘compressed’ during that struggle, to determine if § 10-181 had been violated[.]

(R410–11.) Despite the trial court’s explicit reliance on the deficiencies identified by Captain Monaghan (R19–20), the City fails to grapple with the problems he identifies.

Nor does the City deal with the unrebutted testimony of Commissioner Patrick E. Kelleher, a 31-year veteran of the NYPD whose career started with patrol in Brooklyn and includes service as Chief of Detectives, Chief of Internal Affairs, and First Deputy Commissioner, the second-highest position in the NYPD. (R372–73.) Commissioner Kelleher testified that “Section 10-181 permits some kinds of sitting, kneeling, or standing, but bars it when it is done ‘in a manner that compresses the diaphragm.’” (R375.) But it is “impossible to design and implement any training for police officers to comply with § 10-181. There is no way to determine what training would be appropriate, when the statute itself is obscure.” (*Id.*)

Commissioner Kelleher testified that Section 10-181 “does not identify what level of pressure, on what part of the chest or back, will ‘compress’ the diaphragm,” and found that it “is not even clear what ‘compresses’ means, compared to what the police training materials describe as the normal flattening or contracting of the

diaphragm." (R375.) "Section 10-181 does not identify any external action or signal that reasonably tells an officer what is going on inside a person being arrested, whether what is happening internally is 'compressing' the diaphragm, or whether what is happening internally is normal flattening or contracting of the diaphragm." (*Id.*) For an officer to make these determinations, he or she "would in effect need an x-ray machine to reliably determine if the suspect's diaphragm, an internal muscle located underneath the rib cage, was being affected and how it was affected." (*Id.*)

Section 10-181 "places an impossible burden on a police officer making an arrest of a resisting suspect." (R376.) This is so because "[a]lthough it is rightfully the department's goal to de-escalate any situation, it is inevitable that officers will from time to time be required to arrest subjects who forcibly resist." (*Id.*) Consequently, "when a suspect resists, an officer may incidentally sit, kneel, or stand on the suspect's chest or back as part of a struggle to take the suspect into custody, or may be required to do so to gain control over the suspect." (*Id.*) Rather than providing guidance for police officers, Section 10-181 "creates confusion and uncertainty about when this can be done." (*Id.*) Section 10-181 "places a heavy burden on a district attorney who, in conducting a 'post-incident' review," must "make the difficult determination whether 10-181 has been violated and prosecution rendered appropriate or not." (*Id.*) The City did not rebut Commissioner Kelleher's testimony with any contrary evidence.

3. Unrebutted evidence below confirms that Section 10-181's reference to "compresses the diaphragm" is vague and confusing from a medical perspective.

Unrebutted testimony by medical professionals also confirms the vagueness of the phrase "in a manner that compresses the diaphragm." *See McKendry v. Thornberry*, 23 Misc. 3d 707, 712 (Sup. Ct. Rensselaer Cnty. 2009) (observing that a court "may take medical definitions into account," including whether there is "a clear definition within the medical community," when construing a statute).

Dr. Christopher Lettieri, a doctor who is board certified in, among other things, internal and pulmonary medicine, found that "compresses the diaphragm" was "confusing and vague." (R386.) While "[i]t is possible to compress the chest or back, . . . without some way of observing what is happening internally it is impossible to tell what effect that chest compression or pressure on the chest or back may be having on the diaphragm and movement of the diaphragm, or whether there is any significant disruption of the diaphragm's normal movement and function." (R387.) "During a struggle while attempting to make an arrest, an officer will not be able to know what effect that external compression of the thoracic cage may be having on breathing," as "there are numerous reasons why a person may become short of breath" in such circumstances." (*Id.*) There is "no reasonable way for a police officer to determine whether or not sitting, kneeling, or standing on the chest or back is violating § 10-181 at the time of an arrest struggle." (*Id.*)

Dr. Beno Oppenheimer, a professor at NYU School of Medicine at the Division of Pulmonary Critical Care Medicine and Sleep at the NYU Langone Medical Center, similarly found the phrase "compresses the diaphragm" to be "vague and confusing." (R423.) As he observed, "[i]n a strict sense, the diaphragm is not a compressible muscle given its anatomical location within the chest cavity and the direction of its contractile displacement." (R423.) Because of their "vagueness and ambiguity," the terms "diaphragmatic compression" or "compression of the diaphragm" are "not generally used or widely accepted in medicine to describe a mechanism with potential for impeding or limiting diaphragmatic function." (R425.) As Dr. Oppenheimer explained, the very notion of a "compresse[d]" diaphragm is vague from a medical perspective.

Indeed, Dr. Oppenheimer explained that police officers would have no real way to know whether their conduct was, in fact, compressing the diaphragm. "Diaphragmatic function can be evaluated by sonographic imaging which requires specialized personnel and equipment" or the use of "[r]adiographic techniques such as Fluroscopy." (*Id.*) "But without using such techniques and equipment, there is no way for a police officer to see what is happening internally and to tell what may be happening with the diaphragm." (*Id.*) From a medical perspective, "[t]here are no practical ways during an arrest situation for police officers to diagnose whether

or how diaphragm function is being affected." (*Id.*) The diaphragm "contracts," "shortens," and "descends" every time someone normally breathes. (*Id.*)

The City's primary response to this unrebutted testimony is to claim that Section 10-181 can easily be understood from ordinary dictionaries. The City argues that "a person 'compresses the diaphragm' by pressing or squeezing the anatomical structure located between the chest and abdomen, which can interfere with breathing." (Br. 29.) But this simply ignores the problem by in effect re-writing Section 10-181 so that it prohibits "pressing or squeezing" the "chest or abdomen," which is not what Section 10-181 says at all. When even medical experts do not understand what it means to "compress[] the diaphragm" or how someone can discern whether the diaphragm has been compressed, it follows that a person of ordinary intelligence, here officers in the field, cannot do so either. Section 10-181 sets standards impossible to discern or follow.

The City also contends that any uncertainty surrounding the meaning of "compresses the diaphragm" is a question that should be submitted to a jury, reasoning that "[s]uch factual questions are relevant to the requirement of proof beyond a reasonable doubt for any criminal conviction." (Br. 45–46 (citing *Williams*, 553 U.S. at 306; *Copeland*, 893 F.3d at 118).) But the problem with vagueness is that it gives no direction to a jury or a prosecutor, as well as no direction to police officers. When a statute is as vague as Section 10-181, enforcement by a

jury or prosecutor becomes arbitrary. "What 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." *Williams*, 553 U.S. at 306. Section 10-181's indeterminacy does not present a question of whether a defendant has the requisite mens rea, such as with respect to illegal pornographic material, *Williams*, 553 U.S. at 306, or whether a defendant has met the requisite actus reus, such as the possession of certain illegal weapons, *see Copeland*, 893 F.3d at 101. Rather, Section 10-181's indeterminacy is a product of the statute providing no clear guidance to anyone—jury, prosecutor, police officers, arrestees, the public—as to what it actually prohibits. Section 10-181 fails to give fair notice of the conduct it prohibits, and it is therefore unconstitutional.

* * *

Contrary to the City's arguments, Section 10-181's problems run far deeper than dictionary definitions, as confirmed by Commissioner Kelleher, Captain Monaghan, Dr. Lettieri, Dr. Oppenheimer, and the trial court's own review of the summary judgment record. It is impossible to discern whether placing pressure on a suspect's back or chest from sitting, kneeling, or standing has moved from non-criminal conduct (*i.e.*, if it is not "in a manner that compresses the diaphragm") to criminal conduct (*i.e.*, if it is "in a manner that compresses the diaphragm"). Section

10-181 "fails to distinguish between conduct calculated to cause harm and conduct that is essentially innocent," and therefore "fail[s] to give adequate notice of what conduct is prohibited." *Bright*, 71 N.Y.2d at 383–84.

B. Section 10-181 lacks intelligible guidelines and invites arbitrary enforcement, as evinced by the City's own training materials

Section 10-181 is also unconstitutionally vague because it lacks even "minimal guidelines to govern law enforcement," creating "a standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections." *Kolender v. Lawson*, 461 U.S. 352, 358 (1983) (citations omitted). "[T]he absence of any ascertainable standards governing arrest and conviction under the statute renders fair, even-handed administration of the law a virtual impossibility." *Berck*, 32 N.Y.2d at 571–72. This is "perhaps, the more important aspect of the vagueness doctrine," *Bright*, 71 N.Y.2d at 383, because "if a criminal statute is impermissibly vague, the police will be guided not by clear language but by whim." *Stuart*, 100 N.Y.2d at 421.

The police training materials do not solve any problems with regard to the vagueness of the statute. As Commissioner Kelleher observed, "[n]o one can tell how to train for something that is itself essentially unclear and confusing," a problem that makes it "impossible for the NYPD to assure that [Section 10-181] is fairly applied." (R377.) Captain Monaghan testified that Section 10-181's use of the word "compresses" was "actually made even worse by the NYPD training." (R411.)

Those training materials provide no guidance on "how anyone could compress the diaphragm or what that would look like," and do not provide any indication for "how it could even be possible for an officer to determine when this is happening, because the diaphragm is an internal muscle that an arresting officer cannot even see." (*Id.*) These difficulties are further compounded by the fact, as Dr. Lettieri noted below, that "there are numerous reasons why a person may become short of breath" during a struggle, with the result that "there is no reasonable way for a police officer to determine whether or not sitting, kneeling, or standing on the chest or back is violating § 10-181 at the time of an arrest struggle." (R387; *see also* R423 (Dr. Oppenheimer noting that "there is no way for police officers to determine, in the course of an arrest, whether sitting, kneeling, or standing on the chest or back is being done 'in a manner that compresses the diaphragm'").)

Justice Love recognized that the City's own training materials confirm the vagueness problem with Section 10-181. In the training materials (R71–222), "officers are instructed simply never to sit, kneel or stand on the subject's torso" in order to avoid criminal liability under the statute. (R21.) The training materials tell police "REMEMBER . . . DO NOT sit, kneel, or stand on the chest or back," instruct them to "[n]ever sit, kneel, or stand on the subject's torso," and suggest as a substitution that "[y]ou may still place a subject in a prone position and sit or kneel on the subject's legs." (R92, 97.) Justice Love rightly held that "[t]he NYPD

appears to 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). The "inescapable conclusion is that the training materials fail to meaningfully address the legal definition of 'compresses the diaphragm.'" (R21.)

Ignoring key language for an element of the offense created by Section 10-181 would render "in a manner that compresses the diaphragm" meaningless surplusage, and would therefore "violate[] the cardinal rule of statutory interpretation that no provision should be construed to be entirely redundant." *Kungys v. United States*, 485 U.S. 759, 778 (1988); *see also Briar Hill Lanes, Inc. v. Town of Ossining Zoning Bd. of Appeals*, 142 A.D.2d 578, 580 (2d Dep't 1988) ("The task in interpreting a statute or ordinance is to give effect to the intent of the body which adopted it, construing words by giving them their natural and ordinary meaning and construing the various parts of the statute or ordinance in a manner seeking to harmonize the whole and avoid rendering any part surplusage" (cleaned up)); *cf. United States v. Butler*, 297 U.S. 1, 65 (1936) ("These words cannot be meaningless, else they would not have been used.").

Because "compresses the diaphragm" must serve some purpose or else it would be meaningless surplusage, the City is therefore wrong that "an officer need not assess diaphragm compression to ensure compliance" with Section 10-181. (Br. 46.) The statute explicitly imposes that requirement. The NYPD training materials

do not solve the problem, and could not. A legislature may not abdicate its duty to draft comprehensible laws in the hope that some other, unelected member of the government might do that job instead. *See, e.g.*, *Sessions v. Dimaya*, 138 S. Ct. 1204, 1228 (2018) (Gorsuch, J., concurring) ("Vague laws . . . threaten to transfer legislative power to police and prosecutors, leaving them to the job of shaping a vague statute's contours through their enforcement decisions."). Accordingly, Section 10-181 lacks any guidelines to ensure that an officer "will know what the law prohibits or commands." *Cruz*, 48 N.Y.2d at 423–24.

The statutes cited by the City in its brief (Br. 15 n.36) drive home that Section 10-181 is vague. Not one of the anti-chokehold or anti-asphyxiation statutes cited by the City uses the phrase "compresses the diaphragm." Section 18-1-707 of the Colorado Criminal Code, for example, criminalizes the use of chokeholds "by which a person applies sufficient pressure to a person to make breathing difficult or impossible." Colo. Rev. Stat. § 18-1-707; *see also* Nev. Rev. Stat. Ann. § 193.305(1), (4) (defining "choke hold" with materially identical language). That statute's use of "sufficient," "difficult," and "impossible" contrast with Section 10-181, which lacks any such limitations. Delaware's aggravated strangulation statute contains an express mens rea requirement providing that a law-enforcement officer may only be liable if he or she "knowingly or intentionally uses a chokehold on another person." Del. Code Ann. tit. 11, § 607A(b). New York State's law, of

course, also has such a requirement. *See* N.Y. Penal Law §§ 121.11; 121.13-a. Not so for Section 10-181.

California's law contemplates both a "substantial risk" as well as a reasonableness inquiry in prohibiting similar restraints. Cal. Gov. Code § 7286.5(a)–(b). Connecticut's statute permits such restraints "only when [an officer] reasonably believes such use to be necessary"; Illinois's statute contemplates a "risk" of asphyxiation; Vermont's statute is anchored on whether a chokehold results in "serious bodily injury." *See* Conn. Gen. Stat. Ann. § 53a-22(d); 720 Ill. Comp. Stat. Ann. 5/7-5.5(a); Vt. Stat. Ann. tit. 13, § 1032. Each statute has textual limitations not found in Section 10-181.

C. The City's reliance on legislative history confirms Section 10-181's vagueness

Finally, the City suggests that Section 10-181's indeterminacy can be rescued by recourse to legislative history and the supposed intentions of City Council in enacting the statute. (*See* Br. 34–39.) The argument fails, for at least two reasons.

First, the City is mistaken that City Council's unwritten intentions about the meaning of Section 10-181 should inform whether the statute is "sufficiently definite by its terms so as 'to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute.'" *Bright*, 71 N.Y.2d at 382–83 (citation omitted). An officer of ordinary intelligence is fairly assumed to be aware of the text of a statute and thus be on notice as to what it requires of him or her. But

that "necessary fiction descends to needless farce when the public is charged even with knowledge of Committee Reports." *United States v. R.L.C.*, 503 U.S. 291, 308–09 (1992) (Scalia, J., concurring). The City's reliance on legislative history to grasp at the meaning of City Council's words only goes to show that Section 10-181 is vague.

Second, the legislative history here does not explain the meaning of "compresses the diaphragm." In over five pages of briefing dedicated to this topic, the City fails to identify any legislative history shedding light on the meaning of "compresses the diaphragm," instead casting about for training videos from 1994 and pointing to "widespread protests against improper police uses of force, and in particular the murder of George Floyd by a police officer." (*See* Br. 36–38.) But no one contests that Section 10-181 was enacted in response to justified concerns about police violence; the question here is whether this purpose sheds any light on the meaning of "compresses the diaphragm."

Moreover, members of City Council and other government officials have already admitted the law is vague. Chairman Richards stated "the diaphragm portion of the bill, was left a little vague." R322. Speaker Johnson described the reference to a diaphragm as "subjective" and "not clear." (R325.) Councilmember Deutsch observed "there are serious issues with some of the bill's language."[14]

[14] *See supra* n.8; (R345.)

Commissioner Tucker, testifying at a hearing for Int. No. 536-A, stated it was "actually hard to imagine a scenario in which an officer would not open him or herself to criminal liability" and expressly recommended removing the words "diaphragm" and adding the word "intentional."[15] Deputy Commissioner Chernyavsky said the bill "doesn't make sense."[16] Then-Mayor de Blasio repeated doubts about the statute shortly after its enactment (R330), and current Mayor Adams later railed against the law as "just not realistic," "a big mistake," and noted that the bill "did not have the proper steps that we should have taken to sit down with technical experts."[17]

The only conclusion to draw from Section 10-181's legislative history, to the extent it is relevant at all, is that it does not repudiate but rather confirms that Section 10-181 is vague.

D. Because Section 10-181 is vague, Justice Love rightly refused to rewrite the statute

"If removing particular provisions while leaving the remainder intact would result in a law the Legislature would not have intended, the entire statute must be stricken." *White v. Cuomo*, 181 A.D.3d 76, 86 (3d Dep't 2020) (citation omitted). As Justice Love found, "the City Council specifically included in [Section 10-181]

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[15] *See supra* n.3; (R344.)

[16] *See supra* n.6; (R344.)

[17] *See supra* n.11.

phrasing related to the diaphragm which the Court cannot ignore." (R23.) Section 10-181's prohibition on restraint by "sitting, kneeling, or standing on the chest or back in a manner that compresses the diaphragm" must be stricken because "compresses the diaphragm" imposes a vague but material limitation on the scope of criminal liability under the statute. There is no evidence to suggest that the City sought to criminalize the act of "sitting, kneeling, or standing on the chest or back" without doing so "in a manner that compresses the diaphragm." As the trial court held, to conclude otherwise would "usurp the role of the New York City Council." (R23.) Justice Love was correct in deciding not to usurp the legislature's role by rewriting the statute, for the reasons explained in his decision. (R22–23.)

On appeal, the City advances a new argument that it did not raise below. In the proceedings below, the City argued that the trial court should "excise the word 'diaphragm' or the phrase 'compress the diaphragm' from the statute, and allow the remainder of the law to stand." (R484.) Justice Love rightly rejected this argument because it would re-write Section 10-181 by removing a material limitation on criminal liability for an element of the offense. (R23.) But now the City argues for a different "abridged version of the local law" (Br. 56), contending that the entirety of "or sitting, kneeling, or standing on the chest or back in a manner that compresses the diaphragm" should be severed instead. The City's new severance argument should be rejected for three reasons.

First, the City's new proposed severance should be rejected for the same reasons Justice Love rejected severance below. The Court should not take over the legislature's role to rewrite the statute.

Second, because this argument was not raised below, it is waived. *See, e.g.*, *Liere v. State*, 123 A.D.3d 1323, 1323–24 (3d Dep't 2014) (refusing to hear arguments on grounds that they were "unpreserved as they are being raised for the first time on appeal"); *J.P. Morgan Chase Bank, N.A. v. Cortes*, 96 A.D.3d 803, 804 (2d Dep't 2012) (same).

Third, even if the City had argued for this construction of the statute below, it should be rejected now because it would raise State law preemption problems even more serious than those already affecting Section 10-181 (as argued below in Part II). City Council drafted Section 10-181 in the context of State law that had already criminalized chokeholds causing "serious physical injury or death to another person." *See* N.Y. Penal Law § 121.13-a. Rewriting the statute to be even closer to Penal Law Section 121.13-a would be inappropriate because it would be preempted by State law. *See infra* § II. The proposed rewriting of Section 10-181 would directly conflict with the scope of criminal liability already imposed by Section § 121.13-a of the State Penal Law. This Court should accordingly affirm the trial court's decision and order.

II. Section 10-181 is Preempted by State Law.

As an alternative basis for affirmance, this Court should affirm the trial court's judgment because Section 10-181 is preempted by New York law. Although the trial court declined to rule in Plaintiffs' favor on this issue, affirmance on preemption grounds is also appropriate. *See Hartley v. Eagle Ins. Co. of London, Eng.*, 222 N.Y. 178, 182 (1918) (noting that for an appeal on a question of law, "the court is not limited to the grounds urged or adopted in the courts below"); *Menorah Nursing Home, Inc. v. Zukov*, 153 A.D.2d 13, 19 (2d Dep't 1989) ("[T]he general rule is that an appellate court may affirm an order which is itself correct, if any of the grounds advanced in the court of original instance in fact support the relief granted in the order, irrespective of whether the reasoning expressed by the court in its decision was correct.").

The City Council's authority to legislate derives from article 9, section 2(c) of the New York Constitution and section 10(1) of the Municipal Home Rule Law. The "home rule provision" of the New York Constitution confers powers upon local governments to make local laws "not inconsistent with the provisions of [the] constitution or any general law." N.Y. Const. art. IX, § 2(c). That power is strictly limited by the doctrine of preemption. *See Kamhi v. Town of Yorktown*, 74 N.Y.2d 423, 429 (1989); *see also In re Chwick v. Mulvey*, 81 A.D.3d 161, 167 (2d Dep't 2010) (noting that the "home rule provision" is "subject to a fundamental limitation

by the preemption doctrine"). "[T]he overriding limitation of the preemption doctrine embodies the 'untrammeled primacy of the Legislature to act . . . with respect to matters of State concern.'" *Albany Area Builders Ass'n v. Town of Guilderland*, 74 N.Y.2d 372, 377 (1989) (citation omitted).

There are two forms of state preemption of municipal law. The first, field preemption, arises "when a local government legislates in a field for which the State Legislature has assumed full regulatory responsibility." *Chwick*, 81 A.D.3d at 167 (citation omitted). The other, conflict preemption, arises "when a local government adopts a law that directly conflicts with a State statute." *Id.* at 167–68 (citation omitted). Both forms of preemption are present here. Section 10-181 is preempted because (1) the State Legislature occupies the entire field of permissible force used by police officers effecting arrests, including restraints that obstruct breathing or blood circulation; and (2) Section-10-181 directly conflicts with the State Penal Law. Section 10-181 therefore exceeds the bounds of permissible City legislation and is invalid.

A. Section 10-181 is field preempted

Section 10-181 encroaches upon a field occupied by New York State Penal Law and is field preempted. A local government, including the City of New York, is precluded from legislating in a certain field, and implicitly field preempted, where the state has enacted a "comprehensive and detailed regulatory scheme" that

demonstrates "its intent to pre-empt the field." *Consol. Edison Co. of N.Y. v. Town of Red Hook*, 60 N.Y.2d 99, 105 (1983); *see, e.g.*, *Chwick*, 81 A.D.3d at 170–71 (finding local handgun statute was implicitly field preempted by Penal Law provision that "contain[ed] detailed provisions" regarding firearm licensing and thereby "evince[d] the Legislature's intent to preempt the field of firearm regulation"); *People v. Diack*, 24 N.Y.3d 674, 680, 682 (2015) (finding the State's "foray into sex offender management" through the enactment of a statute and its "various amendments over the years" provided "clear evidence of the State's intention to occupy the field").

"Where the State has preempted the field, a local law regulating the same subject matter is deemed inconsistent with the State's transcendent interest, whether or not the terms of the local law actually conflict with a State-wide statute." *Albany Area Builders*, 74 N.Y.2d at 377. If implicit intent exists, a local government cannot legislate on the same subject matter "unless it has received 'clear and explicit' authority to the contrary." *People v. De Jesus*, 54 N.Y.2d 465, 469 (1981) (citation omitted). Thus, absent explicit authority to the contrary, local encroachment into a field completely occupied by the State is invalid—particularly when the field encroached upon is a matter of statewide, and not purely local, concern. *See, e.g.*, *Cohen v. Bd. of Appeals*, 100 N.Y.2d 395, 401–02 (2003) (finding that state law bringing "statewide consistency" to variance review process preempted the field);

Dougal v. Cnty. of Suffolk, 102 A.D.2d 531, 534 (2d Dep't 1984) (finding that "State objective of totally banning 'drug-related paraphernalia' carries with it a preemption against local legislation").

The Penal Law evinces a clear intent to occupy the field on which Section 10-181 has encroached. First, Section 35.30 of the Penal Law manifests a clear intent to legislate uses of force by officers effecting or attempting to effect an arrest. Under Section 35.30, an officer, in the course of effecting or attempting to effect an arrest, "may use physical force when and to the extent he or she reasonable believes such to be 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." N.Y. Penal Law § 35.30. Section 35.30 permits even the use of deadly force in defined circumstances, such as in response to kidnapping or arson, provided that the officer has a "reasonabl[e] belie[f]" as to the commission of the offense. *Id.*

Section 10-181 intrudes on the operation of Section 35.30 by shifting an officer's use-of-force determination from what "he or she reasonably believes . . . to be necessary to effect the arrest" to the uncertainties of whether the reasonable use of force also does not "compress[] the diaphragm" in some "manner." The safe harbor provided by Section 35.30's justification defense—a vital and fundamental protection for law enforcement officers—is thus undermined by a municipality-

specific exception that removes a category of conduct from what would otherwise be a question of whether an officer has complied with Section 35.30. Any officer in New York engaging in the reasonable use of force would have to consider whether such force nonetheless triggered the prohibitions of Section 10-181, even though Section 10-181 lacks any such restrictions on reasonableness and, by its terms, contemplates a strict liability offense premised on indecipherable conduct. There is no reason to think the legislature intended for the protections of Section 35.30 to be limited by municipal amendments.

State law also already governs the offense enacted by the City to regulate police officers. Immediately before the City enacted Section 10-181, the State enacted its own prohibition on chokeholds and other restraints restricting air flow and blood circulation. Under Section 121.13-a, an officer will be guilty of aggravated strangulation, a class C felony, when he or she causes "serious physical injury or death to another person" by (1) committing the crime of obstruction of breathing or blood circulation, as defined by N.Y. Penal Law § 121.11, or (2) using a chokehold or similar restraint, as defined by N.Y. Executive Law § 837-t(1)(b). *See* N.Y. Penal Law § 121.13-a. The State thus has already prohibited what Section 10-181 purports to prohibit, a problem made even worse if the City's argument for severability were adopted (Br. 55), because Section 10-181 would criminalize the same conduct without imposing either a mens rea or injury requirement.

The State Penal Law balances the reasonable use of force while simultaneously forbidding officers from using methods of restraint that result in "serious bodily injury." N.Y. Penal Law § 121.13-a; N.Y. Executive Law § 837-t(1)(f). That balance was recognized by Justice Love as well, who recognized that "it is essential that sufficient safeguards exist to allow officers to safely perform their duties while ensuring the safety of the general public and individuals being taken into custody." (R9.) In creating this framework for police officers, the legislature explicitly relied on both scienter and injury requirements, as both Section 121.13-a itself and the statutes it cross-references make clear. *See* N.Y. Penal Law § 121.11 (requiring "intent to impede the normal breathing or circulation of the blood of another person"). This balance is comprehensive; it has specific carve-outs for conduct stemming from "a valid medical or dental purpose." N.Y. Penal Law § 121.14. There are other exceptions for the use of force where "necessary as an emergency measure." N.Y. Penal Law § 35.05. And this scheme is buttressed by Section 140.10 of the Criminal Procedure Law, which confers on officers of any local jurisdiction the authority to effect arrests throughout the State. *See* N.Y. Crim. Proc. Law § 140.10(3). Given the breadth and scope of this legislation, the City is prevented from charting its own path by dispensing of the scienter and injury requirements imposed by State law, let alone imposing an additional requirement that police officers do not "compress[] the diaphragm."

The State legislature's intention to clear the field of competing legislation is also evidenced by the legislative history of Section 121.13-a. That history shows that the law was enacted to specifically ban the use of "chokeholds" and other such restraints by officers, especially officers in the City—indeed, the statute is expressly named the "Eric Garner anti-chokehold act," in recognition of his tragic death in the City in 2014.[18] As the trial court recognized, the law was enacted out of concern that "the NYPD is either unable or unwilling to enforce its own employee manual." (R12.) The State legislature was therefore seeking to remedy an issue distinctly present in the City and to regulate the conduct of New York City officers when it crafted its statewide ban on chokeholds. (R332–33.) There is no reason to believe that the legislature intended to allow the City to devise a locality-specific version of the statewide law, particularly as Section 10-181 would chill officers from using reasonable force in appropriate situations by forcing them to also consider whether their conduct conforms with the vague requirements of Section 10-181.

The trial court therefore erred insofar as it concluded that Section 10-181 was not field preempted. By focusing on the legislative history for Section 121.13-a, the trial court's field preemption analysis was far too blinkered, wrongly ignoring the breadth of State legislation in this area. It failed to recognize that the Penal Law,

[18] *See* 2019 New York Assembly Bill No. 6144-B, N.Y. 243rd Legislative Session (June 12, 2020).

which both criminalizes chokeholds that result in serious bodily injury while providing a justification defense in Section 35.30 and elsewhere, manifests an intent to strike a balance in law enforcement activities. (R11–12.) Section 10-181 presents a classic case of field preemption. This Court should therefore affirm the trial court's judgment on the alternative grounds that Section 10-181 is field preempted.

B. Section 10-181 is conflict preempted

In addition to being field preempted, Section 10-181 is conflict preempted. A local law will be considered "inconsistent" and thus preempted by state law when it "prohibit[s] what would be permissible under State law . . . or impose[s] prerequisite additional restrictions on rights under State law . . . so as to inhibit the operation of the State's general laws." *Consol. Edison*, 60 N.Y.2d at 107–08 (cleaned up). There "need not be an express conflict between State and local laws to render a local law invalid." *N.Y.C. Health & Hosps. Corp. v. Council of N.Y.*, 303 A.D.2d 69, 77 (1st Dep't 2003) (citation omitted). Conflict preemption turns not only on the language of the statute, "but also [on] whether the direct consequences of a local ordinance 'render illegal what is specifically allowed by State law.'" *Sunrise Check Cashing & Payroll Servs., Inc. v. Town of Hempstead*, 91 A.D.3d 126, 134 (2d Dep't 2011) (citation omitted).

As noted above, Section 10-181 is in conflict with Section 121.13-a. Though vague, Section 10-181 criminalizes parallel conduct while imposing additional

constraints on officers that inhibit the operation of State law. Specifically, Section 121.13-a does not address conduct that "compresses the diaphragm." It has a scienter element, requiring the "intent to impede the normal breathing of circulation of another person" for the offense of "criminal obstruction of breathing or blood circulation." And it has an element of injury, requiring that criminal conduct result in "physical injury or death to another person." *See* N.Y. Penal Law §§ 121.13-a; 121.11.

Section 10-181 goes far beyond these proscriptions by removing both the scienter and injury requirements from the crime while adding an indecipherable "compresses the diaphragm" requirement to the crime, upsetting the balance struck by the State legislature through its enactment of Section 121.13-a. And this conflict only becomes more dramatic if, as the City argues, Section 10-181's reference to "compresses the diaphragm" is severed from the statute. As Justice Love recognized, "City Council specifically included in the statute phrasing related to the diaphragm which the Court cannot ignore." (R23.) Without that language changing the scope of criminal liability, Section 10-181 criminalizes the same conduct covered by Section 121.13-a, except without either a mens rea or injury requirement. This is much more restrictive of police conduct than what State law allows. Under Section 121.13-a, an unintentional or non-injurious use of force cannot create criminal

liability, even if not justified under Section 35.30. By contrast, an officer could spend a year in jail if prosecuted under Section 10-181.

This conflict becomes clearer still when considering that Section 121.13-a operates as a limitation on an officer's reasonable use of force under Section 35.30. Under the Penal Law's legislative scheme, an officer is authorized to use reasonable force up to and until it crosses the line into criminal conduct, such as conduct proscribed by Section 121.13-a. That reflects the balancing act the State has drawn between ensuring that officers are able to effectively enforce the law and protect others while also subject to laws that rightfully protect individuals from impermissible police conduct. Section 10-181 upsets this balance by adding an additional consideration to the legislative scheme. Officers in the City must not only consider whether their conduct conforms with the criminal proscriptions of Section 121.13-a and other state statutes, and whether their use of force is reasonable under the circumstances under Section 35.30, but now also whether even unintentional, non-injurious conduct during an arrest somehow "compresses the diaphragm" and thus exposes them to criminal liability.

By expanding the scope of criminal liability codified in Section 121.13-a and by upsetting the State's careful legislative scheme, Section 10-181 thus "render[s] illegal what is specifically allowed by State law." *Sunrise Check Cashing*, 91 A.D.3d at 134. The trial court therefore erred by holding that Section 10-181 does

not prohibit conduct that is permissible under state law. (R14.) The Court should therefore affirm the trial court's judgment on these alternative grounds.

CONCLUSION

For the reasons set forth above, the trial court's judgment should be affirmed.

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