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July 15, 2022

Lisa LeCours, Esq.
State of New York
Court of Appeals
Clerk's Office
20 Eagle Street
Albany, New York 12207-1095

Re: Police Benevolent Association v. City of New York
APL-2022-00078

Dear Ms. LeCours:

Plaintiffs-Appellants are unions representing 65,000 police officers in the New York City region who brought this action seeking a declaration that New York City Administrative Code Section 10-181 ("Section-10 181") is unconstitutional because it is void for vagueness and preempted by State law. We submit this letter as counsel for Plaintiffs-Appellants except the Police Benevolent Association of the City of New York, which is separately represented. This letter responds to the Court's June 28, 2022 letter that asks the parties to address "whether a substantial constitutional question is directly involved to support an appeal as of right" under CPLR 5601(b)(1).

Section 10-181 became law on July 15, 2020. Section 10-181 makes it a crime 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*." (emphasis added.) Penalties for violation include up to a year in jail. The direct involvement requirement of CPLR 5601(b)(1) is met because this appeal and the decisions by the Appellate Division and the trial court directly involve the Due Process provision of the New York Constitution, the Fourteenth Amendment of the United States Constitution, and the Home Rule provision of the New York Constitution. On summary judgment the trial court held that Section 10-181 was unconstitutionally vague "as the phrase 'compresses the diaphragm' cannot be adequately defined as written." The Appellate Division reversed, deciding that the language of Section 10-181 could fairly be interpreted to impose criminal liability so long as a police officer was exerting pressure "in the vicinity of the diaphragm," regardless of whether the diaphragm was compressed or even if no pressure was exerted on the diaphragm. *Police Benevolent Ass'n of the City of N.Y., Inc. v. City of N.Y.*, 205 A.D.3d 552, 554 (1st Dep't 2022); *see People v. Bright*, 71 N.Y.2d 376, 382-84 (1988) (a law violates Due Process if it does not give a person of ordinary intelligence fair notice of what is prohibited and does not provide

clear standards for prosecutors on enforcement, thereby permitting arbitrary enforcement.) Both courts also analyzed the Home Rule provision of the State Constitution and found that Section 10-181 was not preempted by State law governing police conduct during an arrest.

The dispute over the possible meaning of "in a manner that compresses the diaphragm" is substantial on its face, because the trial court as well as the Plaintiff-Appellants have substantial, clear, and compelling arguments why the Appellate Division's view is mistaken.

Moreover, the substantial constitutional questions requirement for appeal is met because (1) Section 10-181 imposes criminal penalties, including incarceration for up to a year, on police conduct during arrests and attempted arrests that is not fairly or reasonably identified either in Section 10-181 or the Appellate Division decision; (2) the conduct of police during arrests and attempted arrests is a subject of intense, widespread, and very substantial public concern; (3) the Appellate Division's decision, if allowed to stand, serves as precedent lowering and weakening the standard for constitutional Due Process and fair notice of when conduct is a crime; and (4) the Appellate Division decision in effect rewrites Section 10-181 and creates substantial preemption problems and conflicts with State law.

Incarceration for a year for conduct that no one has been able to identify in advance is by itself a substantial constitutional issue. This is substantial not only for the 65,000 police officers subject to Section 10-181's criminal penalties, but also for the district attorneys who must make decisions on when to prosecute for violations of Section 10-181, and for every member of the public that relies on the police for effective and fair protection from violent offenders. Court guidance on the constitutionality of Section 10-181 will be a prominent precedent on regulation of police conduct. Effecting an arrest is a fraught procedure. Clarity as to the proper use of legal force is necessary for the just application of criminal laws to an officer making arrest, or otherwise participating at the scene of arrest, and to a suspect. Clarity similarly is necessary to a prosecutor's decision as to when it is fair to bring a criminal proceeding.

The substantial public importance of this appeal is evident because of the almost daily news on the intense concern over what police are permitted to do to during an arrest to protect the public from deadly violence by those violating the law; what police can do during public protests where some protesters engage in unlawful conduct; the increasing early retirement of police officers; and widespread police frustration over lack of clear guidelines. Police conduct during arrests, and legislation regulating that conduct, are matters of substantial public importance.

The court and all parties have recognized the importance of issues relating to police conduct during arrests and of Section 10-181's regulation of that conduct. In its summary judgment ruling,

the trial court correctly 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." (Trial Ct. Op. at 3 [R9].) Those vital and fundamental functions require clarity in the law.

The law unreasonably exposes Plaintiff-Appellant members to criminal liability based on a vaguely worded standard that no one has been able to clearly explain. The problem with Section 10-181 cannot be solved by waiting for trials and decisions on what has been proved—the problem with Section 10-181 is that no one, including prosecutors, can fairly determine what would count as "in a manner that compresses the diaphragm." All the evidence about the meaning of these terms presented to the trial court was that the key phrase had no definite meaning and there was no way to determine when that vague and confusing condition was present.

Indeed, concern about Section 10-181's constitutionality was expressed by the very drafters of the law. Donovan Richards, Chair of the City Council's Public Safety Committee, stated that "part of the bill, the diaphragm portion of the bill, was left a little vague." (R322.) Then Mayor DeBlasio noted the need for "some clarification on the issue of diaphragms." (*Id.*) Then City Council Speaker Corey Johnson observed that "[t]here was language that was put in related to the diaphragm and that, right now, seems subjective and it's not clear." (R325.) Additionally, Staten Island District Attorney Michael McMahon stated that the law was "causing law enforcement to question how they can do basic functions of their job like make an arrest safely in this City." (R317, 319.) Then Manhattan District Attorney Cyrus Vance forecasted that the law would be challenged because of its "ambiguity." (Unions' First Dep't Br., at 13.)

To protect vital and fundamental functions of society, this Court should hear this appeal. Dismissing this appeal will signal that vague criminal statutes regulating police conduct will be tolerated, even when a statute leaves police and prosecutors in the dark about what conduct is actually prohibited. This Court has heard appeals as of right when a party claims a zoning regulation for public entertainment is void for vagueness under Due Process standards, and statutes like Section 10-181 making police conduct a crime deserves similar attention by this Court as a substantial constitutional matter. See *Town of Delaware v. Leifer*, 34 N.Y.3d 234, 239, 247-48 (2019) (appeal as of right under CPLR 5601(b)(1) on void-for-vagueness Due Process claims and First Amendment claims).

The Appellate Division decision on Section 10-181, if allowed to stand, serves as precedent for diminishing the Due Process standard for fair notice of when conduct is a crime. As the trial court found, Section 10-181 permits some kinds of sitting, kneeling, or standing, but makes it a

crime when it is done "in a manner that compresses the diaphragm." But the terms of Section 10-181 do not explain what that means or provide any way police, prosecutors, those arrested, or the public can tell when it is happening. (Trial Ct. Op. at p. 11 [R17].) 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, or how a district attorney can determine whether conduct occurred warranting prosecution. (Id. at p. 10 [R16].) The Appellate Division wrongly ruled that Section 10-181 could be interpreted to mean, and police officers could be trained to understand it to mean, that officers are barred from sitting, kneeling, or standing "in the vicinity of the diaphragm." (App. Div. Op. 4.) This unlawfully rewrites the statute to avoid what it says, and even as rewritten it is too vague to give fair notice. "Freedom to construe is not freedom to amend." *Sexauer & Lemke v. Luke A. Burke & Sons Co.*, 228 N.Y. 341, 345 (1920) (Cardozo, *J.*).

In addition, the constitutional preemption issues are also substantial and of high public importance on this appeal. Apart from Due Process concerns with vagueness, Section 10-181 is also unconstitutional because it is preempted by State law, violating the Home Rule provision of the New York Constitution, Art. 9 § 2(c). Section 10-181 is field preempted by the State Penal Law on the 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. 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. These preemption issues are substantial because of the concerns explained above about regulation of police conduct in a time of intense public concern and debate about that conduct.

Very truly yours,

DLA Piper LLP (US)

Anthony Paul Coles

APC:rm

cc: Claude S. Platton, Esq.
Steven A. Engel, Esq.

STATE OF NEW YORK)		**CERTIFICATE OF**
)	ss.:	**SERVICE VIA U.S.P.S.**
COUNTY OF NEW YORK)		

I, Athenais Alcibar-Zucker, residing at 28 Brookside Place, New Rochelle, New York 10801, being duly sworn, certify and say that I am not a party to the action and that I am over 18 years of age.

I CERTIFY THAT On July 15, 2022 I served the within: Jurisdictional Response upon the below parties at the address(es) designated by said attorney(s) for that purpose by sending 1 true copy(ies) of same, enclosed in a properly addressed wrapper via U.S.P.S. mail, under the exclusive custody and care of the United States Postal Service, within the State of New York.:

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Dated July 15, 2022

/s/ *Athenais Alcibar-Zucker*