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BY OVERNIGHT MAIL

Lisa LeCours
Chief Clerk and Legal Counsel to the Court
New York State Court of Appeals
20 Eagle Street
Albany, New York 12207

Re: *Police Benevolent Association of the City of New York, Inc. v. The City of New York*, APL-2022-00078; Appellate Division, First Department Docket No. 2021-03041; New York County Clerk's Index No. 653624/2020

Dear Ms. LeCours:

Respondent, the City of New York, respectfully submits this letter in response to the Court's June 28, 2022 request for comments on its jurisdiction to entertain these purported appeals as of right under CPLR 5601(b)(1). This Court should dismiss the appeals because no substantial constitutional question is directly involved.

The unions' pre-enforcement challenge is insubstantial. First, the challenged local law is not facially vague. Rather, its prohibition criminalizing police restraints that impair an arrestee's breathing by sitting, kneeling, or standing on the arrestee's chest or back, so as to compress the arrestee's diaphragm, has a readily understood meaning. The unions target the law's reference to compressing the diaphragm, but it is no mystery what the diaphragm is and how the forbidden police

restraints compress it and thereby impair its function in breathing. Indeed, the local law essentially codifies internal restrictions that have been found in NYPD's Patrol Guide for decades, and NYPD training materials teach officers how to perform arrests without using these types of dangerous restraints. The First Department was correct in unanimously rejecting the vagueness challenge.

Second, the Appellate Division also rightly made short work of plaintiffs' assertion that state law preempts the local law. Plaintiffs have identified no basis to conclude that the State Legislature intended to disable the City from regulating police use of force within its borders. The grab bag of disparate state-law provisions they cite show nothing of the kind. The Court should accordingly dismiss the notices of appeal.

Background

The City Council enacted New York City Administrative Code § 10-181 ("section 10-181") in June 2020 in response to the tragic deaths of Eric Garner and George Floyd at the hands of law enforcement. Section 10-181 defines two "[u]nlawful methods of restraint," making it a misdemeanor for any law enforcement officer to "restrain an individual in a manner that restricts the flow of air or blood by [(1)] compressing the windpipe or the carotid arteries on each side of the neck, or [(2)] sitting, kneeling, or standing on the chest or back in a manner that compresses the diaphragm, in the course of effecting or attempting to effect an arrest." N.Y.C. Admin. Code § 10-181(a).

The City Council intended the local law to improve deterrence by codifying in a criminal prohibition the NYPD's long-standing policies regarding dangerous forms of arrest restraint. For decades, the NYPD Patrol Guide has prohibited officer use of chokeholds, and has also long instructed officers to avoid sitting, kneeling, or standing on an arrestee's chest or back. Moreover, police departments—and courts—have long been aware that "applying pressure to [a person's] back" carries a "significant risk of positional asphyxiation." *Weigel v. Broad*, 544 F.3d 1143, 1155 (10th Cir. 2008). Despite this awareness, "compression asphyxia … appears with unfortunate frequency" in police excessive force

cases. *Drummond v. City of Anaheim*, 343 F.3d 1052, 1063 (9th Cir. 2003).

As the local law's key sponsor recognized, criminal liability under section 10-181 is cabined by the justification defense provided by Penal Law § 35.30(1), which is available in prosecutions for any "offense," *id.* § 35.00, a term that includes conduct prohibited by local law, *id.* § 10.00(1). *See* Affirm. of Rory I. Lancman, Sup. Ct. NYSCEF Docket No. 43, at ¶ 16. Under this defense, an officer would not be liable if they "reasonably believe[d]" that resort to a covered restraint was "necessary to effect the arrest, or to prevent the escape from custody, or in self-defense or to defend a third person from what he or she reasonably believes to be the use or imminent use of physical force." Penal Law § 35.30(1). The prosecutor would have to negate the defense beyond a reasonable doubt. *See, e.g.*, *People v. Steele*, 26 N.Y.2d 526, 528 (1970).

After the law's enactment, the plaintiff unions filed a pre-enforcement challenge alleging that (1) section 10-181's diaphragm compression ban is facially void for vagueness under the due process clause of the New York Constitution and (2) section 10-181 is preempted in its entirety by state law. While rejecting the preemption claim, Supreme Court held that the local law's ban on diaphragm compression was impermissibly vague. The court enjoined the entire law, even though plaintiffs have never claimed that the law's chokehold prohibition is vague.

The Appellate Division unanimously reversed as to plaintiffs' vagueness claim and declared the local law constitutional. The court explained that the diaphragm compression ban is sufficiently definite to give notice of the prohibited conduct and contains objective standards that preclude arbitrary or discriminatory enforcement. In particular, the only language in the local law that plaintiffs challenged—the phrase, "in a manner that compresses the diaphragm"—is "sufficiently definite 'when measured by common understanding and practices.'" App. Div. Decision at 3 (quoting *People v. Kozlow*, 8 N.Y.3d 554, 561 (2007)). Indeed, the word "compress" is readily comprehensible—the court noted that "plaintiffs have no difficulty understanding the meaning of the word 'compress[]' when used in the context of the accompanying chokehold

ban, which they do not challenge" as vague. *Id.* Further, law enforcement officers "can be (and are) trained on the location and function of the diaphragm." *Id.*

The court rejected plaintiffs' complaints about the purported difficulty of complying with the local law during an arrest. The court pointed to the various "statutory conditions of liability" that ensure an officer will not inadvertently run afoul of the diaphragm compression ban: most significantly, the officer must sit, kneel, or stand on a person's chest or back—a volitional act—and, in a criminal case, the prosecution must prove beyond a reasonable doubt that the officer's conduct compressed the diaphragm and thereby restricted the flow of air or blood and, where invoked, must also negate the justification defense. *See id.* at 3-4.

Moreover, while an officer effecting an arrest may not be able to precisely assess the arrestee's diaphragmic function, the officer should be able to tell when an arrestee is unable to breathe—"just as a driver should be able to tell when the amount of alcohol he consumed is making it unsafe for him or her to drive (a proxy for high blood alcohol content) and a layperson should be able to tell when he or she is being too loud (a proxy for ability to hear the noise from a specified distance)." *Id.* at 4 (citing *People v. Stephens*, 28 N.Y.3d 307, 314-15 (2016), *People v. Cruz*, 48 N.Y.2d 419, 427-28 (1979), and *United States v. Powell*, 423 U.S. 87, 93 (1975)).

At base, the court recognized, plaintiffs' objections to the diaphragm compression ban do not truly implicate vagueness concerns. Rather, "[w]hat renders a statute vague is … the indeterminacy of precisely what th[e incriminating] fact is"—and "not the possibility that it will sometimes be difficult to determine whether the incriminating fact it establishes has been proved." App. Div. Decision at 4 (quoting *United States v. Williams*, 553 U.S. 285, 306 (2008) (internal quotation marks omitted)). The requirement of proof beyond a reasonable doubt—and not the vagueness doctrine—addresses plaintiffs' concerns about the potential difficulty of borderline cases. *Id.* (citing *Williams*, 553 U.S. at 306).

On plaintiffs' preemption claim, the court found that while the local law is broader than the State's chokehold ban, Penal Law § 121.13-a, it did not conflict with that statute. The court further held that the assorted state laws cited by plaintiffs did not evince an intention on the part of the Legislature to preempt the field of police use of force regulation.

There is No Substantial Constitutional Question Directly Involved

Plaintiffs contend that their appeals involve the construction of the State Constitution, specifically article I, section 6's due process clause on the issue of vagueness, and article IX, section 2(c)'s "home rule" provision on the preemption issue.[1] While the case presents constitutional issues, that alone does not provide plaintiffs with an appeal as of right. Indeed, plaintiffs must also establish that the constitutional issues are substantial. Here, plaintiffs' appeals should be dismissed because the constitutional issues do not meet the standard of substantiality.

The jurisdictional requirement that constitutional questions be substantial provides a "safeguard" against overuse of the right to have constitutional questions heard by this Court, and this Court has "generally not hesitated to dismiss appeals for want of substantiality." Arthur Karger, The Powers of the New York Court of Appeals § 7:5 (3d ed. rev. 2005). This Court applies its judgment based on the facts of an individual case to determine if the constitutional issues are sufficiently substantial to warrant an appeal as of right. *Id.*

On their vagueness claim, plaintiffs fail to identify any meaningful lack of clarity in the local law, much less vagueness rising to the level of a constitutional infirmity sufficient to sustain their facial challenge. *See, e.g.*, *Kozlow*, 8 N.Y.3d at 561 (holding that "imprecise" language is not constitutionally vague if it provides "sufficiently definite" notice of what is prohibited (citation and quotation marks omitted)). By its plain terms,

[1] The Sergeants' Benevolent Association of the City of New York and other unions also contend, for the first time in their notice of appeal, that this case implicates articles 5 and 14 of the United States Constitution. However, these federal claims, which were not pleaded or raised below, are unpreserved.

section 10-181's diaphragm compression ban makes it unlawful for a law enforcement officer effecting an arrest to sit, kneel, or stand on the arrestee's chest or back if, as a result, the arrestee's diaphragm is compressed, restricting the ability to breathe. This language provides the requisite "sufficiently definite" notice. *See Kozlow*, 8 N.Y.3d at 561.

The words "diaphragm" and "compress" are not obscure in meaning. Plaintiffs have never suggested that officers are unable to understand what the diaphragm is or where it is located—indeed, NYPD officers have long been trained on those points. Nor can plaintiffs credibly claim confusion about the import of "compress" in this context. As the First Department noted, the local law's chokehold ban uses the same operative term, also in reference to an arrestee's internal organs or structures, without drawing any vagueness objection from plaintiffs.

Nor is there any reasonable basis for confusion about what conduct the local law targets. It was enacted in response to high-profile deaths at the hands of law enforcement and to address the widely understood problem of positional asphyxia. The local law also codifies longstanding restrictions in the NYPD Patrol Guide that plaintiffs have never contended are unclear. Indeed, officers can avoid liability simply by complying with the Patrol Guide, just as they were expected to do—and trained how to do—before the local law was enacted.

Plaintiffs have offered no meaningful response on any of these points. They have instead pivoted to citing statements of various public officials criticizing the local law. But neither the political nor policy dynamics surrounding the law are any gauge of its legal validity. The affidavits of plaintiffs' hired experts are likewise unavailing, as "[e]xpert testimony is not properly utilized … to supplant the judicial function" by resolving questions of law. *Chunhye Kang-Kim v. City of N.Y.*, 29 A.D.3d 57, 60 (1st Dep't 2006). Indeed, we are not aware of any case in which a court's vagueness analysis was premised on expert opinion.

Instead of identifying uncertainty about the law's sweep, plaintiffs assert that the law is infirm because an officer may be unable to assess diaphragm compression while effecting an arrest. The Appellate Division rightly rejected this argument as a basis to find the local law vague. As

the court recognized, when a law sets a clear legal standard, the possibility of uncertainty as to whether the law has been violated does not present a vagueness concern. *See Williams*, 553 U.S. at 306. Such fact questions are addressed "not by the doctrine of vagueness, but by the requirement of proof beyond a reasonable doubt" in a criminal prosecution. *Id.* Thus, plaintiffs' various objections to the law's potential application present no substantial question under vagueness doctrine.

Moreover, the potential for factual uncertainty that plaintiffs complain of is hardly unique in the criminal law. For example, as the Appellate Division noted, a driver who has imbibed alcohol faces uncertainty when considering whether to get behind the wheel of a car because it is often impossible to assess one's own blood-alcohol level with precision. But a drunk-driving law defined in terms of blood-alcohol level is not unconstitutionally vague as a result. *Cf. Cruz*, 48 N.Y.2d 419 (upholding New York's drunk-driving laws against an as-applied void for vagueness challenge). The legal standard for driving while intoxicated is clear, and a driver may avoid liability simply by erring on the side of caution and calling a cab. So too here, an officer's uncertainty whether diaphragm compression is occurring does not render the statute vague, and an officer may steer clear of liability by not sitting, kneeling, or standing on an arrestee's chest or back.

The local law, like the NYPD Patrol Guide and NYPD's training materials, recognizes that officers generally do not need to use the covered dangerous restraints to do their jobs. But if use of the restraints should ever prove necessary to effect an arrest or prevent injury to the officer or others, a safety valve is present in the form of the justification defense established by state law, which the prosecution would have to negate beyond a reasonable doubt. *See* Penal Law §§ 10.00(1), 35.00, 35.30(1). At bottom, plaintiffs' purported vagueness challenge really amounts to a policy disagreement with the City Council's decision to put criminal penalties behind a regulation of police use of force. It does not state any credible constitutional challenge.

Plaintiffs' preemption claim, meanwhile, is far-fetched: they contend that the Legislature, by enacting provisions touching on police officers' uses of force, has somehow silently disabled the City from

regulating dangerous uses of force within local borders. In support of their field preemption argument, plaintiffs point only to scattered provisions enacted at different times and in different contexts, rather than any detailed or comprehensive legislative scheme regulating police use of force. Some of the provisions plaintiffs cite—like an affirmative defense to strangulation laws for medical or dental reasons, and a Penal Law general justification defense—have no particular relevance to law enforcement officers in the first place. Plaintiffs have shown no evidence of any legislative intent to preclude local use-of-force regulations.

Plaintiffs' conflict preemption argument is equally meritless: there is no conflict between the recently enacted state law banning chokeholds and the local law, and an officer would have no difficulty complying with both. Indeed, this Court has consistently recognized that localities may adopt laws that are more exacting than their state-law counterparts. *See, e.g.*, *Garcia v. N.Y.C. Dep't of Health & Mental Hygiene*, 31 N.Y.3d 601, 617-20 (2018); *Hertz Corp. v. City of N.Y.*, 80 N.Y.2d 565, 569 (1992); *Jancyn Mfg. Corp. v. County of Suffolk*, 71 N.Y.2d 91, 96-98 (1987). Additionally, the state-law provisions addressing justification only serve to confirm that local use-of-force regulations are *not* preempted, given that the state provisions are expressly made applicable to offenses defined in local law. Plaintiffs thus raise no credible claims of preemption.

We thus respectfully maintain that this Court should dismiss the appeals on the ground that no substantial constitutional question is directly involved.

Respectfully submitted,

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APL-2022-00078

Court of Appeals
State of New York

POLICE BENEVOLENT ASSOCIATION OF THE CITY OF NEW YORK, INC., et al.,

Appellants,

against

THE CITY OF NEW YORK,

Respondent.

AFFIRMATION OF SERVICE

AMY MCCAMPHILL, an attorney admitted to practice in the courts of this state, affirms under the penalties of perjury that: on July 14, 2022, I served one copy of the accompanying jurisdictional response letter on the parties listed below, by dispatching the memorandum to the parties by overnight delivery service at the address designated by them for that purpose, pursuant to CPLR 2103(b)(6):

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Dated: New York, New York
July 14, 2022

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