To be Argued by:
ANTHONY P. COLES
(Time Requested: 30 Minutes)

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Court of Appeals

of the

State of New York

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

(For Continuation of Caption See Inside Cover)

BRIEF FOR PLAINTIFFS-APPELLANTS

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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-Appellants,

– against –

THE CITY OF NEW YORK,

Defendant-Respondent.

Plaintiffs-Appellants 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

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 500.1(f) of the Rules of the Court of Appeals, Plaintiffs-Appellants 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, each advise the Court, through the undersigned counsel, that they have no corporate parents, subsidiaries or affiliates.

STATEMENT OF RELATED CASES

Pursuant to 22 N.Y.C.R.R. § 500.13(a), there are no related cases.

Dated: New York, New York
December 19, 2022

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PRELIMINARY STATEMENT

Plaintiffs-Appellants, which are New York City police unions representing some 65,000 officers, brought this action seeking a declaratory judgment that Section 10-181 of the New York City Administrative Code ("Section 10-181") is unconstitutionally vague and preempted by State law.

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.) It was signed into law July 15, 2020. Section 10-181 recognizes that some kinds of sitting, kneeling, or standing by a police officer on a person during an arrest may be appropriate or necessary, and bars that conduct only when it is done "in a manner that compresses the diaphragm."

But the key phrase "in a manner that compresses the diaphragm" is unconstitutionally vague on its face. That phrase is not defined or explained in the statute, and no common usage or meaning provides any way for a police officer or anyone else to know whether sitting, kneeling, or standing on the chest or back is or was being done "in a manner that compresses the diaphragm." A police officer has no way of telling during an arrest, or after, whether or not he or she is doing anything "in a manner that compresses the diaphragm," or what if anything is happening internally with the diaphragm. A District Attorney deciding whether to enforce Section 10-181 in any particular case has no way to determine this or what the phrase

means. Section 10-181 is therefore unconstitutionally vague, in violation of Due Process. *See People v. Bright*, 71 N.Y.2d 376, 382–383 (1988).

On cross-motions for summary judgment, the trial court held that Section 10-181 violated constitutional Due Process because the phrase "in a manner that compresses the diaphragm" was not sufficiently definite to give fair notice of what was prohibited. The Appellate Division reversed, holding that Section 10-181 was not unconstitutionally vague. On this appeal, Plaintiffs-Appellants seek judgment reversing the Appellate Division, declaring Section 10-181 to be void for vagueness, and enjoining its enforcement, for the following reasons:

All of the evidence submitted on the cross-motions for summary judgment supported the trial court's ruling. (R8–9, 14–23.) Plaintiffs-Appellants presented testimony from medical and police professionals about what, if anything, "in a manner that compresses the diaphragm" could mean in the statute. This evidence was proper because that phrase is not explained or defined in the statute, is not in common or general usage, and uses technical terms. *See, e.g., Ord. of Ry. Conductors of Am. v. Swan*, 329 U.S. 520, 525 (1947) (testimony about the meaning of the statutory phrase "yard-service employee" was properly considered because the phrase had "no statutory definition," was "not in common or general usage," and was "a technical term."). The following evidence was unrebutted by any contrary evidence from Defendant-Respondent the City of New York (the "City"):

- 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 that "[t]here 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 that "[t]he [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." (R376.) "The training abandons the key words in the statute," and "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 had been 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, asserting that those 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 determine when sitting, kneeling, or standing on the chest or back compresses the diaphragm. The NYPD training materials admit 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 approach 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 in the trial court recognized this problem with the City's defense. 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 Appellate Division refused to consider the testimony on the lack of meaning of the phrase "in a manner that compresses the diaphragm," asserting that the testimony was improper because it was about "the ultimate legal issue." (R554.) That makes no sense. No one disputes that the Court must decide the ultimate legal issue, but when faced with a technical term of art that is undefined and whose meaning

is not clear from common usage, the court properly hears evidence about the meaning—or lack of meaning—of a phrase that the statute does not define or explain, and that is not clear from common usage. *See Swan*, 329 U.S. at 525. It is especially proper to look to such evidence when neither the Appellate Division, nor the NYPD, nor the NYPD training materials, has been able to explain the phrase. Courts should not refuse to hear what responsible, knowledgeable people have to say about a real problem.

The Appellate Division went on to compound the problem by effectively re-writing Section 10-181 to bar sitting, kneeling, or standing "in the vicinity of the diaphragm." (R553.) The Appellate Division ruled that Section 10-181 is clear because a "trained police officer will be able to tell when the pressure he is exerting on a person's chest or back, in the vicinity of the diaphragm, is making it hard for the person to breathe." (R553.) But the phrase "in the vicinity of the diaphragm" is not in Section 10-181. Adding words to a criminal statute is improper. *See Sexauer & Lemke v. Luke A. Burke & Sons Co.*, 228 N.Y. 341, 345 (1920) (Cardozo, J.) ("Freedom to construe is not freedom to amend."). Adding the word "vicinity" to Section 10-181 also increases its vagueness, because it is not clear what that might mean in this statute. And there was no evidence of any kind that a police officer could tell whether or not some internal action of the diaphragm—which the City admits normally contracts in normal breathing—was making it hard for a person to

breathe, or whether a difficulty in breathing was caused by something else entirely, such as restriction or compression of the airways in the lungs, or pressure on the intercostal muscles between the ribs that restricts expansion of the lungs. The Appellate Division's re-writing of Section 10-181 is based on unsupported speculation that is contradicted by the evidence: Dr. Oppenheimer testified that "[t]here are no practical ways during an arrest situation for police officers to diagnose whether or how diaphragm function is being affected." (R425.)

Finally, Plaintiffs-Appellants also contend that Section 10-181 is preempted by State law. State Penal Law § 121.13-a covers using "a chokehold or similar restraint." Penal Law § 35.30 authorizes reasonable physical force necessary to effect an arrest. Section 10-181 is 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.

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 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 Appellate Division incorrectly answered this question in the negative.

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 Appellate Division incorrectly answered this question in the negative.

STATEMENT OF FACTS AND PROCEEDINGS BELOW

A. The legislative history of Section 10-181 shows a continuing concern about the clarity, vagueness, and practical effect of its language

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, 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

[1] Int. No. 536-2018, as well as the other City Council materials related to Section 10-181, are publicly available at https://legistar.council.nyc.gov/LegislationDetail.aspx?ID=3343958&GUID=B782804F-680A-4156-9E64-8BF88CF7BBD8 (last accessed Dec. 19, 2022).

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 "[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

[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.

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 language, which would essentially criminalize a police officer's behavior . . . if they

[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.

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. In its final form, 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 injured or 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 a *mens rea* or injury requirement.

[8] *Id.* at 71:7–14.

[9] *Id.* at 71:15–20.

B. The language of Section 10-181 as it was enacted immediately created confusion about what it prohibited and meant

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 restrictions it places on police officers who we expect and need to respond to

[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 Dec. 19, 2022).

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. Prior to Section 10-181's enactment, New York State passed its own anti-chokehold legislation that overlaps with Section 10-181

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

[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 Dec. 19, 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 court proceedings below

Plaintiffs filed this lawsuit on August 5, 2020, seeking a declaratory judgment and an injunction enjoining enforcement of Section 10-181 because it was unconstitutionally vague, and because Section 10-181 is preempted by the New York State Penal Law. (R56.) Plaintiffs moved for a preliminary injunction against the City to enjoin the enforcement of Section 10-181. Justice Love of the Supreme Court found that Plaintiffs had made a *prima facie* showing that the statute was unconstitutionally vague, but declined to grant preliminary relief because there was insufficient showing of irreparable harm. (R16.)

The City filed its motion for summary judgment on November 20, 2020. (R24–257.) Plaintiffs filed their cross-motion for summary judgment on January 15, 2021. (R258–438.)

The trial court granted Plaintiffs' summary judgment motion on June 22, 2021, because Section 10-181 was unconstitutionally vague, and enjoined enforcement of Section 10-181. It rejected Plaintiffs' claim that Section 10-181 was

preempted by State law and granted summary judgment to the City on the preemption issue. (R7–23.) Notice of appeal was filed July 28, 2021. (R4–5.)

In a five-page opinion, the Appellate Division reversed the trial court's decision that Section 10-181 was unconstitutionally vague, and affirmed the trial court's decision that Section 10-181 was not preempted by State law. (R550–554.) Plaintiffs-Appellants timely filed their notice of appeal to this Court on June 9, 2022. (R543–44.) On October 18, 2022, this Court ended its preliminary jurisdictional inquiry and ordered briefing.

STATEMENT OF JURISDICTION

This Court has jurisdiction under CPLR 5601(b) because the appeal presents two substantial questions on constitutional Due Process. The first constitutional question is whether Section 10-181, which 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*," is unconstitutionally vague and violates Due Process. The second constitutional question is whether Section 10-181 is field or conflict preempted because of the State Penal Law's provisions on the use of force by police officers. (R10–14, 551.) All questions raised below were preserved for review.[12]

[12] R351–61 (due process argument in Supreme Court briefing) R493–501 (same); R361–70 (preemption argument in Supreme Court briefing); R501–03 (same);

These constitutional questions are substantial on their face. 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 itself or the Appellate Division decision below. The conduct of police during arrests and attempted arrests is a subject of intense, widespread, and substantial public concern. 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. The Appellate Division in effect rewrites Section 10-181. Comments by public officials confirm the broad concern over this statute. (*See, e.g.*, R317, 319, 322, 325.) This Court has previously heard appeals as of right when a party challenges a zoning regulation for public entertainment as void for vagueness, and statutes like Section 10-181 making police conduct a crime deserve similar attention 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 and First Amendment claims); *see also* Plaintiffs-Appellants letter to the Court on jurisdiction (July 15, 2022).

R654–73 (due process argument in Appellate Division briefing); R678–688 (preemption argument in Appellate Division briefing).

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. 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. Harriss*, 347 U.S. 612, 617 (1954)); *Hornstein v. Paramount Pictures*, 292 N.Y. 468, 472 (1944) ("[A]cts otherwise innocent and lawful, do not become crimes, unless there is a clear and positive expression of the legislative intent to make them criminal."). New York courts apply a two-pronged test to determine whether a statute is unconstitutionally vague. First, "the statute must provide sufficient notice of what conduct is prohibited," *Bright*, 71 N.Y.2d at 382, 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.

Section 10-181 fails both parts of this test. A police officer has no way of telling during an arrest, or after, whether or not he or she is doing anything "in a manner that compresses the diaphragm," or what—if anything—is happening internally with the diaphragm. A District Attorney deciding whether to enforce Section 10-181 in any particular case has no way to determine this or what the phrase means.

A. Section 10-181 is not sufficiently definite to give fair notice of what conduct is prohibited

By its terms, Section 10-181 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 such 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.

Section 10-181 does not define or explain what is meant by "in a manner that compresses the diaphragm," or how that can be determined by an officer effecting an arrest or a District Attorney considering a prosecution. No other statute explains what the phrase means. The legislative history does not contain a definition of the phrase. It is not a phrase in common usage. The phrase uses technical medical terms. The phrase does not have "an accepted meaning 'long recognized in law and life'" that prevents it from being "so vague and indefinite as to afford the defendant insufficient notice of what is prohibited or inadequate guidelines for adjudication." *People v. Cruz*, 48 N.Y.2d 419, 428 (1979).

In these circumstances—when a phrase is not explained or defined in the statute, is not in common or general usage, and uses technical terms not previously explained in case law—courts properly look at evidence to determine what is meant. For example, the United States Supreme Court in *Order of Railway Conductors of America v. Swan*, 329 U.S. 520 (1947), turned to witness testimony about the

meaning of the phrase "yard-service employee," which had "no statutory definition," was "not in common or general usage outside of the railroad world," and was "a technical term found only in railroad parlance." *Id.* at 525. Because of that, "[e]vidence as to the meaning attached to it by those who are familiar with such parlance therefore becomes relevant in determining the meaning of the term as used by Congress." *Id.* The Supreme Court therefore held that the trial court was justified in relying on witness testimony below when finding that "railroad usage has never included yardmasters and assistant yardmasters within the meaning of the term[] 'yard-service employees' or 'yardmen.'" *Id.* at 528.

Merely using ordinary words does not guarantee that combining them leads to a comprehensible or plain meaning. Here, the combination of "manner," "compresses," and "diaphragm," has no plain meaning and provides no way of ascertaining when it occurs during an arrest. All of the evidence in the record supports the conclusion that the phrase "in a manner that compresses the diaphragm" has no definite meaning and that there is no way for an officer to tell when his conduct is barred by Section 10-181:

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, testified that "[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.) He said the phrase "compresses the diaphragm" is medically "vague and confusing." (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.)

Dr. Oppenheimer testified that police officers would have no 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." (R425.) "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.*)

Dr. Christopher Lettieri, a doctor board certified in, among other things, internal and pulmonary medicine, also testified 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 thus "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.*)

Captain John Monaghan testified about the problems in assessing the meaning of "compresses the diaphragm." 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.) He affirmed that from the perspective of a professional police officer "[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.)

Testimony was also provided by former 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 he understood 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.) From his perspective, 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 even attempt 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.*)

In Commissioner Kelleher's view, Section 10-181 thus "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.*)

None of this evidence was rebutted by any evidence from the City explaining what "in a manner that compresses the diaphragm" means or how to tell when it occurs. Instead, the City relied on the NYPD training materials and instructions to officers not to sit, kneel, or stand on the chest or back of the person being arrested at all. The instructions to officers and the training materials do not explain what "in a manner that compresses the diaphragm means" or how to determine when it occurs. They avoid dealing with what Section 10-181 requires.

As the trial court noted, the City's submission of training materials, while "laudable," reinforced "the inescapable conclusion . . . that the training materials fail to meaningfully address the legal definition of 'compresses the diaphragm.'" (R21.) 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." (R21, 92, 97.) This does not even address what Section 10-181 prohibits.

The NYPD training materials thus confirm that the NYPD does not know what Section 10-181 means by "in a manner that compresses the diaphragm."

Moreover, training materials could never cure the vagueness inherent in the statute. Neither the City below (*e.g.*, R756–57, 765–66) nor the Appellate Division (R552) identified a basis for the supposedly constitutionally curative powers of internal police training procedures. And that is because they do not have that power. This Court has emphasized that a criminal statute "must be informative on its face," *People v. Berck*, 32 N.Y.2d 567, 569 (1973), which forecloses the City's use of training materials as non-legislative remedies to vague legislative enactments. Moreover, police training materials do not carry the force of law and are therefore irrelevant here. *Cf. Christensen v. Harris Cnty.*, 529 U.S. 576, 587 (2000) (observing that "interpretations contained in policy statements, agency manuals, and enforcement guidelines, all . . . lack the force of law").

B. The Appellate Division wrongly refused to consider evidence that the phrase "in a manner that compresses the diaphragm" had no definite meaning, and wrongly held that words in Section 10-181 could be ignored or effectively rewritten

The Appellate Division refused to consider the testimony on the lack of meaning of the phrase "in a manner that compresses the diaphragm," asserting that the testimony was improper because it was about "the ultimate legal issue." (R554.) The court decides the ultimate legal issue under the legal standard explained in the caselaw cited above. When a court does not have the information about the meaning

of a phrase in a statute that the court needs to determine, it looks at and evaluates evidence on the meaning of the phrase. Courts cannot just refuse to give any meaning to the phrase or make up a meaning in disregard of what knowledgeable witnesses say. In that situation, a court properly hears evidence about the meaning—or lack of meaning—of a phrase that the statute does not define or explain, and that is not clear from common usage. *See Swan*, 329 U.S. at 525. It is especially proper to look to such evidence when neither the Appellate Division, nor the NYPD, nor the NYPD training materials, has been able to explain the phrase.

Under New York law, "[w]ords of technical or special meaning are construed according to their technical sense." N.Y. Stat. Law § 233 (McKinney). But where the law does not provide any answers to a novel legislative phrase, courts must look elsewhere when construing a statute's meaning. That is what Justice Love did in this case in the trial court. The Appellate Division erred by not considering the evidence on the meaning of the words at issue, and by ignoring the fact that all of that evidence supports Justice Love's conclusion that Section 10-181 is unconstitutionally vague.

The Appellate Division also erred by analogizing the phrase "in a manner that compresses the diaphragm" to statutes prohibiting drunk driving and noise ordinances. (R553.) These analogies are inapposite and misleading. "Intoxication is not an unfamiliar concept" and "[i]t is intelligible to the average person." *Cruz*,

48 N.Y.2d at 427. The "concept of intoxication does not require expert opinion," and "[a] layman . . . should be able to determine whether the . . . consumption of alcohol has rendered him incapable of operating a motor vehicle." *Id.* at 428. That is not the case with Section 10-181: as explained by medical and police professionals in the trial court proceedings below, the effects of external pressure by a police officer during an arrest on an internal organ are not matters of everyday knowledge. The cases relied on by the Appellate Division involved objective, testable facts that prevented a law from being vague. As this Court noted in *Cruz*, the statute at issue there provided that "a reading of more than .07 but less than .10 of 1% of alcohol in the blood is prima facie evidence that a defendant's ability to operate a vehicle was impaired." *Id.* at 425. Similarly, the noise ordinance at issue in *People v. Stephens*, 28 N.Y.3d 307 (2016), also cited by the Appellate Division below (R553), prohibited the "operation or playing of any radio, television, phonograph, drum, musical instrument, sound amplifier or similar device which produces, reproduces or amplifies sound . . . [i]n such a manner as to create unnecessary noise at fifty (50) feet from such device." *Id.* at 310–311. These statutes imposed concrete limits—namely, blood-alcohol content levels and measurable distances—on topics of everyday knowledge. By contrast, there are no tests for assessing whether 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 testimony.

Section 10-181 also cannot be saved by asserting that the problem is merely that there may be "close" cases. Section 10-181 is not vague because there might be close cases—it is vague because police officers have no way of knowing what Section 10-181 prohibits and what it allows.

Nor can Section 10-181 be saved by re-writing it, which is effectively what the Appellate Division tried to do. The Appellate Division effectively rewrote the statute by holding that "[a] trained police officer will be able to tell when the pressure he is exerting on a person's chest or back, in the vicinity of the diaphragm, is making it hard for the person to breathe." (R553.) But the phrase "in the vicinity of the diaphragm" is not in Section 10-181. Adding words to a criminal statute is improper. *See Sexauer & Lemke v. Luke A. Burke & Sons Co.*, 228 N.Y. 341, 345 (1920) (Cardozo, J.) ("Freedom to construe is not freedom to amend."). Adding the word "vicinity" to Section 10-181 also increases its vagueness, because it is not clear what that might mean in this statute. And there was no evidence of any kind that a police officer could tell whether or not some internal action of the diaphragm—which the City admits normally contracts in normal breathing—was making it hard for a person to breathe, or whether a difficulty in breathing was caused by something else entirely, such as restriction or compression of the airways in the lungs, or pressure on the

intercostal muscles between the ribs that restricts expansion of the lungs. The Appellate Division's re-writing of Section 10-181 is based on unsupported speculation that is contradicted by the evidence: Dr. Oppenheimer testified that "[t]here are no practical ways during an arrest situation for police officers to diagnose whether or how diaphragm function is being affected." (R425.)

It is also improper to simply strike or sever the phrase "in a manner that compresses the diaphragm." As Justice Love found at the trial court below, "the City Council specifically included in [Section 10-181] phrasing related to the diaphragm which the Court cannot ignore." (R23.) 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." To rewrite the statute would "usurp the role of the New York City Council." (R23.) Removing "in a manner that compresses the diaphragm" from Section 10-181 renders an element of the offense 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, 581 (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.").[13]

Finally, it is also relevant that Section 10-181 does not have an injury requirement or a *mens rea* requirement. Although *mens rea* and injury are not required for a statute to satisfy due process, those requirements are pervasive in the criminal law because they help ensure the law gives fair notice of what is prohibited and does not subject individuals to criminal prosecution for unintentional or ultimately harmless conduct.

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

[13] Not only would severance here relieve City Council of its duty to draft constitutional laws, but 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 Section 10-181 would directly conflict with the scope of criminal liability already imposed by Section § 121.13-a of the State Penal Law.

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.

Section 10-181's unfairness is also exacerbated because it does not include a *mens rea* requirement. 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 Appellate Division recognized that Section 10-181 lacked a *mens rea* element but concluded this was "not dispositive" here because it was mitigated by the requirement that criminal liability only attaches to voluntary acts. (R552 (citing *People v. Carlo*, 46 A.D.2d 764, 764 (1st Dep't 1974) (noting that a defendant who had involuntarily taken a hallucinogenic drug could assert that argument as a defense)); Penal Law § 15.10.) Yet this wrongly conflates a guilty mind with a mindless act. Even if someone had involuntarily taken a hallucinogenic drug, as the defendant asserted in *Carlo*, such a question of involuntariness would not inform the "the indeterminacy of precisely what [the] fact is" that Section 10-181 prohibits. *United States v. Williams*, 553 U.S. 285, 306 (2008). Whether someone voluntarily or involuntarily "compresses the diaphragm" does not answer what Section 10-181 prohibits, because attaching an adverb to the phrase does not make the phrase any clearer. For similar reasons, the Appellate Division's emphasis on the availability of a justification defense (R552) is also irrelevant here. Although Penal Law § 35.30 provides a defense to police officers "to the extent he or she reasonably believes such

to be necessary to effect the arrest," an officer's "reasonable belief" in using force to effect an arrest does not shed any light on what *facts* constitute criminal conduct under Section 10-181.

C. Section 10-181 invites arbitrary enforcement because it is vague, unclear, and lacks intelligible guidelines for enforcement and adjudication

Section 10-181 also fails the second prong of this Court's vagueness test. *See Bright*, 71 N.Y.2d at 382. The statute 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.

Because an element of the offense proscribed by Section 10-181—"in a manner that compresses the diaphragm"—is undefined and cannot be explained, and a police officer or District Attorney cannot determine when or whether it occurred, it requires "men of common intelligence . . . to guess at the meaning of the criminal law." *Goguen*, 415 U.S. at 574. For all of the reasons explained in Sections I.A and

I.B above, a District Attorney is not provided with even minimal guidelines for making prosecution decisions. This Court should hold that Section 10-181 is unconstitutionally vague because its vagueness necessarily results in arbitrary enforcement.

II. SECTION 10-181 IS PREEMPTED BY STATE LAW

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 v. Mulvey*, 81 A.D.3d 161, 170–71 (2d Dep't 2010) (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").

The Appellate Division erred in concluding that New York law does not "clearly evince a desire to preempt the field." (R551.) 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 frustrated 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, but Section 10-181 broadens this by criminalizing the same conduct without 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). 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 by imposing an additional requirement that police officers not "in a manner that compresses 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 named the "Eric Garner anti-chokehold act," in recognition of his tragic death in the City in

2014.[14] 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. Section 10-181is therefore field preempted.

B. Section 10-181 is conflict preempted

Section 10-181 is also 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." *Consolidated 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

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

2003) (citation omitted). Conflict preemption also occurs when "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 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 or circulation of another person" for the offense of "criminal obstruction of breathing or blood circulation." And it also requires 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 *mens rea* 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 argued below (R615), Section 10-181's reference to "compresses the diaphragm" is severed from the statute. As the trial court 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 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. But an officer could spend a year in prison 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 balance the State has made 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. Therefore Section 10-181 is preempted.

CONCLUSION

The Appellate Division decision granting summary judgment to the City should be reversed and judgment should be entered in favor of Plaintiffs-Appellants declaring that Section 10-181 is void, and enjoining its enforcement.

Dated: New York, New York
December 19, 2022

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CERTIFICATE OF WORD COUNT

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December 19, 2022

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STATE OF NEW YORK	)		**AFFIDAVIT OF SERVICE**
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I, Tyrone Heath, 2179 Washington Avenue, Apt. 19, Bronx, New York 10457, being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age and resides at the address shown above or at

On December 16, 2022

deponent served the within: **BRIEF FOR PLAINTIFFS-APPELLANTS 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**

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Mariana Braylovskiy

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