Patrolmen's Benevolent Assoc. of the City of N.Y., Inc. v City of New York
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Supreme Court, New York County
Docket Number: 653550/13
Judge: Anil C. Singh
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 61

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THE PATROLMEN'S BENEVOLENT ASSOCIATION OF THE CITY OF NEW YORK, INC. and THE SERGEANTS BENEVOLENT ASSOCIATION,

Plaintiffs,

Index No. 653550/13

-against-

THE CITY OF NEW YORK and THE COUNCIL OF THE CITY OF NEW YORK

Defendants.

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HON. ANIL C. SINGH, J.:

The law enforcement procedure known as "stop, question and frisk" brings into tension the right of minorities in New York to travel and associate freely, the obligation of New York City police officers to protect the public, and the ability of police officers to perform their duty safely.

In 2013 the City Council stepped squarely into this debate when it enacted Local Law 71. (New York City, N.Y., Local Law No. 71 Int. No. 1080 [2013] ("Local Law 71")). The legislation prohibits police officers from engaging in "bias-based profiling." Local Law 71 provides the following definition:

> "Bias-based profiling" means an act of a member of the force of the police department or other law enforcement officer that relies on actual or perceived race, national origin, color, creed, age, alienage or citizenship status, gender, sexual orientation, disability, or housing status as the determinative factor in initiating law enforcement action

> against an individual, rather than an individual's behavior or other information or circumstances that links a person or persons to suspected unlawful activity.
>
> [Such "bias-based profiling" is established where:] one or more law enforcement officers have intentionally engaged in bias-based profiling of one or more individuals; and the law enforcement officer(s) against whom such action is brought fail(s) to prove that the law enforcement action at issue was justified by a factor(s) unrelated to unlawful discrimination.

An individual may file either an administrative complaint with the New York City Commission on Human Rights or a civil action in court. (Id.). In regards to damages, a plaintiff may receive injunctive and declaratory relief (id. § (d)(2)), and the court also "may allow a prevailing plaintiff reasonable attorney's fees as part of the costs, and may include expert fees as part of the attorney's fees." Id. § (d)(3). The law does not provide for a civil recovery of monetary damages.

Local Law 71 is not the City Council's first attempt to legislate in the arena of alleged bias-based police profiling practices. In 2004 the City Council passed the "Racial or Ethnic Profiling Prohibition Law" (New York City, N.Y., Local Law Report No. 30 Int. 142-B (2004) ("Local Law 30") with the support of Mayor Bloomberg and the New York City Police Department ("NYPD"). Local Law 30 prohibits law enforcement officers from engaging in profiling "that relies on race, ethnicity, religion or national origin as the determinative factor in initiating law enforcement action against an individual. . . ." (Id.).

The City Council had the same concerns in enacting Local Law 30 that it had when it enacted the law at issue here: namely, to prevent officers from targeting individuals based on their race and national origin in violation of the Equal Protection Clause of the Fourteenth Amendment. (See Tr. of the Minutes of the Comm. on Public Safety (Feb. 23, 2004) ("Hearing Tr. 2/23/04").

During the drafting of Local Law 30, the NYPD requested that the anti-profiling law utilize the phrase "the determinative factor" in the final legislation, in order to mirror the language used in the NYPD's existing internal anti-profiling policy.[1] (Hearing Tr. 2/23/04 at 10:6-8; 12:4-11; 27:12-16; Operations Order No. 11 [Mar. 2002]). The City Council adopted "the determinative factor" language whereby Mayor Bloomberg and the NYPD recommended approval of the bill. (Compare Intro. 0142-2004 Version (Feb. 4. 2004), with Intro. 0142-2004 Version B [Feb. 4, 2004]; Hearing Tr. 2/23/04 at 7:5-8:3; Tr. of the Minutes of the Comm.

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[1] The NYPD's policy regarding racial profiling, Operations Order Number 11, dated March 13, 2002 provides in relevant part, as follows:

"1. The New York City Police Department is committed . . . . to ensure all members of the service engage only in constitutionally sound policing practices, the Department prohibits the use of racial profiling in law enforcement actions. Racial profiling is defined as the use of race, color, ethnicity or national origin as the determinative factor for initiating police action.

2. ... Officers must be able to articulate the factors which led to them to take enforcement action, in particular those factors leading to reasonable suspicion for a stop and question or probable cause for an arrest, Officers are also reminded that the use of characteristics such as religion, age, gender, gender identity, or sexual orientation as the determinative factor for taking police actions is prohibited.

3. While performing their duties, members are reminded that this policy in no way precludes them from taking into account the reported race, color, ethnicity, national origin, religion, age, gender, gender identity, or sexual orientation of a specific suspect in the same way the member would use pedigree information, e.g., height, weight, age, etc. about specific suspects."

on Public Safety [June 22, 2004] at 19:22-24). On July 12, 2004, Mayor Bloomberg signed the Profiling Ban, Local Law 30 into law without any objection to its legality.

However, the Local Law 30 ban on profiling was apparently not sufficient to deter the practice. The City Council cited the sharp rise in stops by the police since the Local Law 30 ban was in effect, "[i]n 2002, the NYPD made approximately 97,000 stops. By 2010, the number of stops had increased to more than 601,000. Black and Latino New Yorkers face the brunt of this practice and consistently represent more than 80 percent of people stopped despite representing just over 50 percent of the city's population." (Local Law 71 §1). As a result, the City Council renewed its interest in legislating against racial and ethnic profiling.

The City Council searched for a method in which "the city's existing prohibition on racial profiling [could] be enforced. The bill [preceding Local Law 71 was] designed by the sponsors to respond to these concerns." (Comm. Report [Aug. 22, 2013]). The NYCLU, a community-based group which participated in the legislative hearings, stated in a press release, "while racial profiling is currently banned, [in Local Law 30] it is a law with no teeth.... This law [Local Law 71] will actually hold the NYPD accountable when acts of discrimination happen." (See NYCLU Press Release [Apr. 24, 2013]). Moreover, the Council's stated

intent of Local Law 71 was "to ensure protection of the civil rights of all persons covered by the law." (Local Law 71 §1).

Local Law 71 thus amends the "Racial or Ethnic Profiling Prohibition Law," Local Law 30, to provide a private cause of action to persons subjected to either intentional bias-based profiling or policies, or practices that have a disparate impact on covered populations. (Id. at §2).

During the legislative process of Local Law 71, the Bloomberg Administration acknowledged that it did not object to Local Law 30 – which contained similar profiling restrictions as Local Law 71 – on preemption grounds. Nonetheless, the Counselor to Mayor Bloomberg argued that the New York City Criminal Procedure Law would preempt Intro 800 (the bill predecessor of Local Law 71). In addition, he posited that Local Law 30 may have been enacted by the City Council without valid authority, despite the Bloomberg Administration's approval for its legislation.

The Bloomberg Administration further argued that conflict preemption existed in Intro 800 through various clauses that were ultimately removed in the final version of Local Law 71. The clauses that were not enacted in the final rendition of the law included language prohibiting law enforcement from relying on any of the protected categories to any degree and language granting standing to

organizations to initiate a private cause of action. (See Hearing Tr. 10/10/12 at 79:9-19, 80:8-22, 119:5-9).

Taking into consideration the concerns of the Bloomberg Administration and various community-based groups, Intro. 800 was re-drafted and introduced as Intro. 1080, and passed by the City Council on June 26, 2013. In response, the Mayor vetoed Local Law 71 on July 23, 2013. However, on August 22, 2013, the Council overrode the Mayor's veto. Thus, by its terms, Local Law 71 became effective on November 20, 2013. (See Local Law 71 § 5).

After Local Law 71 went into effect, the NYPD on November 22, 2013, issued its "Finest Message" which was distributed to all police commands. (Finest Message Nov. 22, 2013 [hereinafter Finest Message]). The NYPD characterized the newly enacted Local Law 71 as "consistent with current department policy and training." (Id. at 1). The NYPD went on to state:

> It is important to note that Local Law 71 does not prohibit an officer from considering these demographic factors in deciding whether to initiate law enforcement action. The law prohibits their use as the 'determinative factor.' For example, if a radio run from a verified complainant describes a crime suspect by race, sex, clothing description and direction of travel, a person who has those physical characteristics and is traveling in the direction described may be the subject of law enforcement action. There is no violation of Local Law 71 in this circumstance because the suspect's race is not the determinative factor for the law enforcement action. It would be unlawful to stop or otherwise engage that individual if the deciding factor for doing so was that he/she matched only the race of the person described in the radio run.

(Id. at 1-2).

The NYPD also reassured its officers that those acting within the scope of their employment would be represented by the NYPD in actions stemming from Local Law 71. (Id. at 2).

Local Law 71 spawned a series of lawsuits. The Bloomberg Administration commenced legal action against City Council on September 3, 2013, seeking a declaratory judgment that Local Law 71 is invalid, without force and effect; and a permanent injunction enjoining the operation and implementation of Local Law 71.

On October 15, 2013, the Patrolmen's Benevolent Association of the City of New York ("PBA") brought the instant action against the City Council asserting three causes of action. The first cause of action asserts that Local Law 71 is illegal and invalid because it is preempted by the State Criminal Procedure Law.

The second cause of action asserts that Local Law 71 is void for vagueness under the Due Process Clause of the Fifth Amendment of the United States Constitution under the following grounds: (a) fails to provide police officers with objective or verifiable standards adequate to give them fair warning of the conduct it prohibits, (b) fails to provide courts and the Commission on Human Rights with the objective or verifiable standards for violation, and (c) fails to condition police officer liability with a culpable mental state. The third cause of action asserts that

Local Law 71 is also void for vagueness but under the Due Process Clause of the New York State Constitution, Article 1, §6.

By stipulation dated November 12, 2013, the parties agreed that the Sergeants Benevolent Association ("SBA") could intervene as a plaintiff.

Mayor Bill de Blasio was sworn in on January 1, 2014. Mayor de Blasio announced that his administration supported Local Law 71. Accordingly, the City discontinued its action and became a defendant here, aligning the de Blasio Administration with the City Council. By an order dated April 15, 2014, the SBA and PBA actions were consolidated. This Court heard oral argument on April 29, 2014.

The PBA, an independent union representing more than 22,000 NYPD officers, and the SBA, an independent union comprised of approximately 13,000 active and retired NYPD sergeants (collectively "the Unions") move pursuant to CPLR 6301 and 6311(1) for a preliminary injunction against enforcement of Local Law 71. The City Council and the City oppose the motion and cross-move to dismiss the PBA's second amended complaint and the SBA's complaint for lack of standing grounds and for failure to state a cause of action for preemption and unconstitutional vagueness. The Unions oppose the cross-motion.

I. Standing

Standing is an aspect of justiciability that is a threshold issue determining whether "a party seeking relief has a sufficiently cognizable stake in the outcome so as to present a court with a dispute that is capable of judicial resolution." (Sec. Pac. Nat. Bank v. Evans, 31 AD3d 278, 279 [1st Dept 2006]). Standing will only be denied where "there is a clear legislative intent negating review or lack of injury in fact. . . ." (Dairylea Coop., Inc. v. Walkley, 38 NY2d 6, 11 [1975]). Here, Local Law 71 does not contain a provision identifying the class of persons entitled to seek review thus the issue is whether the Unions have an injury in fact.

Those challenging a statute as unconstitutional, as the Unions have, must first demonstrate that the alleged unconstitutional feature of Local Law 71 aggrieves a protected right constituting an actual or threatened injury. (See Murtha v. Monaghan, 1 AD2d 178, 188 [1st Dept 1956]). A plaintiff must then establish the injury will "fall within the zone of interests or concerns sought to be promoted or protected by the statutory provision. . . ." (New York State Ass'n of Nurse Anesthetists v. Novello, 2 NY3d 207, 211 [2004]). Plaintiffs, the SBA and PBA, as associations of law enforcement officers must additionally establish first, "whether one or more of its members would have standing to sue" through the above analysis. (Soc'y of Plastics Indus., Inc. v. Cnty. of Suffolk, 77 NY2d 761, 775, [1991]). Second, "that the interests [the association] asserts are germane to its

purposes," as an organization, and third, that "neither the asserted claim nor the appropriate relief requires the participation of the individual members." (Id.).

The Unions argue that they are now subject to Local Law 71 which is currently aggrieving their right to conduct their law enforcement duties constituting injury in fact. Their injuries are manifested in their: (1) uncertainty as to how to carry out their law enforcement activity which will result in improper law enforcement; (2) anticipation of civil liability, including failure of the City to provide defense and indemnification to sued officers; and (3) adverse impact upon reputation or career as a result of a lawsuit or administrative proceeding.

The City Council's argument that the injury is merely speculative is unavailing. New York City police officers have been subject to Local Law 71 since November 20, 2013. (Local Law 71 § 5). The law unequivocally subjects officers to potential injunctive and declarative relief in addition to the payment of reasonable attorney and expert fees which it had not prior to its enactment of this law. (Local Law 71 §§(d)(2-3). In fact, in the words of the City Council, the purpose of Local Law 71 was to provide a method in which, "the city's existing prohibition on racial profiling [could] be enforced." (Comm. Report [Aug. 22, 2013]). The chain of events that can lead to liability is immediate and not attenuated.

Defendants rely on Nurses Anesthetists, where the Court found that the plaintiff nurses had no specific future harm since the court interpreted the guidelines at issue as not having any effect on the nurses who were already required to have supervision by a physician prior to the enactment of the regulation. (See New York State Ass'n of Nurse Anesthetists v. Novello, 2 N.Y.3d 207, 213 [2004]). Here, unlike the plaintiffs in Nurses Anesthetists, police officers are currently subject to Local Law 71. (See Owner-Operator Indep. Drivers Ass'n, Inc. v. Fed. Motor Carrier Safety Admin., 656 F.3d 580, 586 [7th Cir. 2011] (finding injury where plaintiffs were subject of regulation)). Accordingly, the injury-in-fact requirement for standing has been met.

Whether the officers will be defended or indemnified by the City of New York pursuant to General Municipal Law §50-k is irrelevant since the individual officers may be named in a Local Law 71 lawsuit potentially making them individually liable for costs and fees.

Under a second theory of injury in fact, the officers individually face the harm to their reputation and career as a result of an allegation of bias based profiling under the local law. (See Alejandro Aff.; Mullins Aff.). The officers' reputation was one of the City Council's express considerations when enacting this law. (See Local Law 71 §1) (discussing officers' reputations being tarnished)). As

a matter of law, reputational harm is a cognizable injury in fact. (Meese v. Keene, 481 U.S. 465, 475 [1987]).

In regards to organizational standing, the core function of the Unions is to "protect and advance [the law enforcement officer's] rights and interests" thus their asserted interests in this matter are germane to the Unions' purpose. (See Alejandro Aff.). Since the Unions are seeking a declaratory judgment and a permanent injunction enjoining the implementation of Local Law 71, the participation of the individual members of the SBA and PBA is not necessary. Thus, organizational standing is granted.

Additionally, this "pre-enforcement facial challenge against a statute need not demonstrate to a certainty that it will be prosecuted under the statute ..., but only that it has 'an actual and well-founded fear that the law will be enforced against' it." (Pac. Capital Bank, N.A. v. Connecticut, 542 F.3d 341, 350 [2d Cir. 2008] (internal citation omitted). Accordingly, the Unions have standing to bring this suit.

At issue here is whether: 1) Local Law 71 is preempted by the Criminal Procedure Law of New York State ("CPL"); and 2) whether Local Law 71 is unconstitutionally vague. Under CPLR 3211(c), this Court is empowered to treat a CPLR 3211 motion as one for summary judgment without giving notice where

only issues of law are raised, fully acknowledged and briefed by the parties. [2] (See Wiesen v. New York University, 304 AD2d 459 [1st Dept. 2003]).

Such a procedural approach is consistent with recent precedent. In McDonald v. New York City Campaign Fin. Bd., a mayoral candidate brought a declaratory judgment action against New York City's campaign finance board. (40 Misc 3d 826 [Sup Ct, NY County 2013, Freed, J.]) Plaintiff moved for a preliminary injunction, enjoining defendants from enforcing a section of the city's Administrative Code. Defendants cross-moved for dismissal pursuant to CPLR 3211(a)(7). Finding that the challenged local law did not conflict with the state's Election Law, the Supreme Court denied plaintiff's motions for a declaratory judgment and for a preliminary injunction, and granted defendants' cross-motion to dismiss.

On appeal, the First Department unanimously modified, on the law, to deny defendants' motion, and to declare that the Administrative Code provision was not preempted by the state Election Law. (McDonald v. New York City Campaign Finance Board, 2014 WL 1924059 [1st Dept 2014]); see also DJL Restaurant Corp. v. City of New York, 96 NY2d 91, 93 [2001]).

[2] PBA has acknowledged that its complaint raises only questions of law. (PBA Memorandum of Law in Opposition to Defendants' Motion to Dismiss the PBA Complaint, at 4). The PBA invites the Court to treat the cross-motion to dismiss as one for summary judgment and asks that the Unions be granted summary judgment. (Id.). Defendants although are on notice of this argument are silent on the issue.

At the outset, the Court holds that this consolidated lawsuit raises no disputed issues of fact. The legal issues have been briefed extensively by the parties. Accordingly, plaintiffs' motion for a preliminary injunction enjoining enforcement of Local Law 71 and defendant's cross-motion to dismiss on the ground that the complaint fails to state a cause of action on preemption and unconstitutional vagueness are both converted to summary judgment for declaratory relief.

II. Preemption

The "home rule provision" of the New York State Constitution confers broad authority upon local government to enact legislation that promotes the welfare of its citizens. (See N.Y. Const., art. IX, § 2; Inc. Vill. of Nyack v. Daytop Vill., Inc., 78 NY2d 500, 505 [1991]). However, "[t]he preemption doctrine represents a fundamental limitation on home rule powers." (Albany Area Builders Ass'n v. Town of Guilderland, 74 NY2d 372, 377 [1989]). The doctrine of preemption provides that local governments may adopt local legislation as long as it is not inconsistent with the state constitution or any general state law. (DJL Restaurant Corp, 96 NY2d at 94).

Preemption occurs where (i) a municipality legislates in a field where the State Legislature has taken full regulatory control; and (ii) express conflict exists between a local and a state statute. (Id.). "The presumption against preemption is

especially strong with regard to laws that affect the states' historic police powers over occupational health and safety issues." (Balbuena v. IDR Realty LLC, 6 NY3d 338, 356 [2006]).

Field preemption occurs if local laws "were they permitted to operate in a field preempted by State law, would tend to inhibit the operation of the State's general law and thereby thwart the operation of the State's overriding policy concerns." Jancyn Mfg. Corp. v. County of Suffolk, 71 NY2d 91, 97 [1987]. Courts will infer an intention to preempt local law if the state's regulatory scheme is so pervasive and comprehensive as to "occupy the field" in that area of law, i.e., to warrant an inference that the State Legislature did not intend the local government to supplement it. (Balbuena, 6 NY3d at 356.). However, the fact that local and state law "touch upon the same area is not sufficient to support a determination that the State has preempted the entire field of regulation in a given area." (Jancyn Mfg. Corp., 71 NY2d at 99. (internal citations omitted)).

The Unions contend that Local Law 71 is preempted by the state's Criminal Procedure Law. Relying on People v. Bell, 132 Misc 2d 573 (Sup Ct, NY County 1980) and People v. Douglas, 60 NY2d 194 (1983) the Unions argue that the CPL is "an integrated and comprehensive system of laws which was carefully designed to 'protect individual freedom, to safeguard the public and to promote respect for law and the legal process'" (Id. at 205) (internal citations omitted).

In addition, the Unions quote Bell, where Justice Altman wrote that the CPL was a "complete and comprehensive revision [that] resulted in detailed regulation by the state of all aspects of criminal procedure" and that it "reveal[ed] the state's intent to preempt the field of criminal procedure" (Bell, 132 Misc 2d at 574-75). As such, the Unions contend that the CPL occupies the entire field of criminal procedure, including enforcement authority of police officers, so that municipalities possess no authority whatsoever to enact legislation touching on police procedures.

The Unions argue that CPL 1.10(1) sets forth the Legislature's express intent to preempt the field it covers, a field that includes the subject of stop and question, stop and frisk, and arrest authority that the CPL confers on police officers. Emphasizing the word "exclusively," the Unions contend that, through CPL 1.10(1), the Legislature expressly manifested its intent that CPL sections 140.10 and 140.50 apply to the exclusion of all other laws.

Further, the Unions point to the language in CPL 1.10(1) that its provisions "apply exclusively to . . . [a]ll criminal actions and proceedings" commenced on or after its effective date. (CPL 1.10(1)(a)). In turn, the term "criminal proceeding" is defined to include any proceeding which "involves a criminal investigation" (CPL 1.20(18)). In the Unions' view, the exercise of the authority conferred by the

provisions of CPL 140.10 and 140.50 involves a criminal investigation, so these provisions apply to the exclusion of all other laws for this text-based reason.

The Unions note that CPL 1.10(b) applies to "[a]ll matters of criminal procedure prescribed in this chapter which do not constitute a part of any particular action or case . . . ." (CPL 1.10(b)). They argue that investigative stops such as the ones at issue here fall within the plain language of CPL 1.10.

Pointing to CPL 140.50(a)(1), (3) and (4), the Unions assert that the State Legislature restricts to itself the authority to regulate stop, question and frisk. In other words, preemption is based on a comprehensive and detailed statutory scheme. Such legislation proscribes the actions of police officers after a stop.

The State Legislature attempted and failed to enact bills prohibiting racial and ethnic profiling. The Unions contend that the Legislature's actions show that the City Council lacks the authority to enact such local legislation due to field preemption. The Unions assert that Local Law 71 expressly applies to all stops and targets a broad array of action that is granted to police officers by the CPL.

This Court disagrees. The CPL does not preempt Local Law 71 because the local law and the state statute occupy different fields. The City Council passed Local Law 71 to address a local concern relating to civil rights and police activities. The law does not prohibit or restrict the right of a police officer to make

a stop under CPL 140.50. Rather, it addresses the consequences of bias-based profiling by law-enforcement personnel.

In passing Local Law 71, the City Council expressed its concern regarding the increased use of stop, question and frisk between 2002 and 2010. (Local Law 71 §1). Black and Latino New Yorkers are disproportionally stopped in relation to their population size. Ninety percent of the stops did not result in an arrest or the issuance of a summons. (Hearing Tr. 10/10/12 at 13-14). The City Council found that "[b]ias-based profiling by the police alienates communities from law enforcement, violates New Yorkers' rights and freedoms, and is a danger to public safety. It is the Council's intent that the provisions herein be construed broadly, consistent with the Local Civil Rights Restoration Act of 2005, to ensure protection of the civil rights of all persons covered by the law." (Local Law 71 §1).

Municipalities throughout New York State have enacted local civil rights legislation prohibiting discrimination on grounds of, inter alia, race, creed, color, gender, sexual orientation, national origin, age, marital status, socioeconomic status, disability and religion. (See New York City, N.Y., Admin. Code § 8-107 (2010), Buffalo, N.Y., City Code ch. 154 (2013), Ithaca, N.Y., Mun. Code § 215-3 (2013), Rochester, N.Y., City Code ch. 63 (2013), Westchester, N.Y., Loc. Law ch. 700 (2013)).

Furthermore, the State Constitution empowers local municipalities to regulate the powers and duties of their employees, which would necessarily include law enforcement agencies. (NY Const Art IX § 2(c)(1)). The City Council exercised this authority by regulating the interaction of law enforcement personnel with the public by passing the 2004 Profiling Ban with the approval of Mayor Bloomberg. Other instances of regulating law enforcement activities include Administrative Code provisions that require the police to produce arrestees before criminal court judges without delay and mandating that female police staff process women arrestees. (New York City, N.Y., Code § 14-132 (2013); New York City, N.Y., Code § 14-130 (2013)).

The regulation of law enforcement actions by a municipality is not unique to New York City. Westchester County and the City of Buffalo have addressed their local concerns by passing ordinances that prohibit racial profiling (Westchester, N.Y., Admin. Code § 43-12(30); Buffalo, N.Y. City Code § 154-11). In Rensselaer, a police officer is required to identify him or herself upon request (Rensselaer, N.Y. City Code § 43-120(30)).

In contrast to municipal regulations of police procedures, the CPL is a set of uniform laws that regulate the prosecution of criminal matters and sets forth the procedural rights of defendants throughout New York State. The CPL was promulgated in 1971 to modernize criminal procedure and to establish "the fairest

and most effective procedures for the treatment of persons charged with the commission of crimes, in order to protect individual freedoms, to safeguard the public and to promote respect for the law and the legal process." (Governor's Memorandum of Approval of L1970, cc. 996, 997 [May 20, 1970] 2 N.Y. Sess. Laws 3140 (McKinney's 1970)). In general, the various titles of the CPL establish the rules and procedures governing criminal court proceedings, including the rules of evidence, warrants and surveillance.

Article I of the CPL does not express the State Legislature's intent to preempt a civil rights lawsuit brought under Local Law 71. Section 1.10(1) provides in pertinent part, that "[t]he provisions of this chapter apply exclusively to: (a) [a]ll criminal actions and proceedings" and "(b) [a]ll matters of criminal procedure. . .which do not constitute a part of any particular action or case. . . ." (CPL 1.10(1)).

A "criminal action" is an action that commences by the filing of an accusatory instrument in criminal court. (CPL 1.20 (16)). A "criminal proceeding" is a proceeding which is (a) part of a criminal action, or (b) a proceeding that occurs in criminal court and is related to prospective, pending or completed criminal action or involves a criminal investigation. (CPL 1.20 (18)).

The Practice Commentaries to CPL 1.10(1) offer helpful guidance, stating in pertinent part:

> The purpose of subdivision one is to delineate the situations governed by the CPL as the exclusive governing body of law in (a) criminal actions and proceedings and (b) matters of criminal procedure, commenced after September 1, 1971. . . . Paragraph (b), a catch-all is designed to remove any doubt as to a possible gap with respect to a procedure specified in the CPL that may be construed as not coming within the defined terms 'criminal action' or 'criminal proceedings.' Possible examples would be provisions governing search warrants or empaneling a Grand Jury.

(See Preiser, Practice Commentary, McKinney's Cons Laws of NY, Book 11A, CPL 1.10, at 10). Article 1 clearly stipulates that the CPL is the exclusive law governing proceedings brought in criminal court. Investigative stops do not occur in Criminal Court and are not criminal proceedings or procedures within the meaning of CPL 1.10(1)(a) or (b). The CPL does not preempt a civil rights action or proceeding filed in state court or before an administrative body arising from a stop, question and frisk.

The Unions rely on Douglas, and Bell, for the proposition that the CPL occupies the entire field of criminal procedure, including police procedures such as stop, question and frisk. However, the breadth of these cases is overstated, as both relate to procedure within the context of a criminal proceeding. In People v. Douglas, the Court of Appeals held that the trial court lacked the authority to deviate from the CPL and dismiss a case for failure to prosecute or for the purpose of calendar control. (Douglass, 60 NY2d at 205.) In People v. Bell, the Court

found that the CPL preempted the Administrative Code as to the applicability of a statute of limitations. (Bell, 132 Misc 2d at 576).

Similarly, the Unions' reliance on Boreali v. Axelrod, 71 NY2d 1 [1987], to establish that the Legislature's unsuccessful attempts to enact legislation on bias-based profiling shows that the State has restricted the authority to legislate in this field to itself, is misplaced.

In Boreali, the Court of Appeals held that the Public Health Council ("Health Council") went beyond its lawfully delegated authority when it promulgated regulations prohibiting smoking in a wide variety of indoor areas open to the public. The Court reasoned that the regulations were invalid because the Health Council "stretched th[e] [Public Health Law] beyond its constitutionally valid reach when it . . . draft[ed] a code embodying its own assessment of what public policy ought to be." (Boreali, 71 NY2d at 9]). A factor considered by the Court of Appeals was "legislative inaction as evidence that the Legislature has so far been unable to reach agreement on the goals and methods that should govern in resolving a society-wide health problem." (Boreali, 71 NY2d at 13). In contrast, here the City Council promulgated Local Law 71 under the home rule provision of the state constitution, which confers broad police powers upon local government concerning the welfare of the residents of New York City.

The CPL addresses criminal procedures and what may result from a stop, question and frisk (CPL 140.50), an arrest without a warrant (CPL 140.01-140.55) and an arrest (CPL 160.20). CPL 140.50 establishes a uniform statewide constitutional standard for a stop, question and frisk and the admissibility of evidence obtained during an investigative stop in a criminal prosecution. Evidence obtained in a valid stop may be introduced at the criminal trial. (See, e.g., People v. Sharrieff, 117 AD2d 635 [2d Dept 1986]). Conversely, an improper stop under CPL 140.50 may lead to suppression of evidence in a trial brought against a criminal defendant. (See e.g., People v. Greene, 135 AD2d 449 [1st Dept 1987]).

There is no question that Local Law 71 touches upon police procedures in the limited area of a stop, question and frisk. However, Local Law 71 does not regulate the field of criminal procedure. Rather, Local Law 71 was passed by City Council as a civil rights law to create a private right of action for bias-based profiling after a stop, question and frisk. Accordingly, the infringement is, at best, incidental and is not a basis to find field preemption. (See Jancyn Mfg. Corp., 71 NY2d at 99); see also DJL Restaurant Corp, 96 NY2d at 97 (2001) (finding separate levels of oversight can coexist when the impact is tangential).

Next, the Unions contend that, even if Local Law 71 were not invalid under the field preemption doctrine, it is nonetheless preempted because it directly conflicts with the CPL.

A "local law is inconsistent where local laws prohibit what would be permissible under State law, or impose prerequisite additional restrictions on rights under State law, so as to inhibit the operation of the State's general laws." (Zakrzewska v. New Sch., 14 NY3d 469, 480 [2010] (internal citations omitted)). In other words, direct preemption occurs when compliance with both state and local laws is impossible or when local law stands as an obstacle to an individual exercising his or her state law rights. (Id.)

The Unions note that key terms – including "probable cause," "reasonable suspicion," "totality of the circumstances," "seizure," "arrest," "stop," "frisk," "founded suspicion," "request for information," "objective, credible reason," and "common-law right of inquiry" – governing the broad array of police encounters are wholly absent from the text of Local Law 71. Likewise, a key term of Local Law 71 – the "determinative factor" – does not appear in any Appellate Division decision assessing the lawfulness of such encounters. The Unions note that under well-established and controlling precedents, the legality of a stop is determined by the totality of its circumstances, and no bright-line rule or neat set of legal rules applies. The CPL requires the officer to have the requisite factual predicate to constitute reasonable suspicion that the individual is committing, has committed, or is about to commit either a felony or a misdemeanor under the totality of the circumstances. (CPL 140.50; Terry v. Ohio, 392 U.S. 1, 30, [1968]).

The Unions assert that there is an inconsistency between Local Law 71's "determinative factor" test and CPL 140.10 (arrest without a warrant) and CPL 140.50 (a Terry stop). Pointing out that the lawfulness of a search is based on the totality of the circumstances on the particular facts based on a police officer's experience and training, the Unions contend that Local Law 71's prohibition on police officers from using any one of the proscribed categories as the determinative factor in making their law enforcement action is a rigid and more constricting standard than one that looks at the totality of the circumstances under the CPL. Therefore, a police officer's action can be valid under CPL 140.50, and a breach of Local Law 71 exposing an officer to potential civil liability. Thus their state law rights are effectively diminished under Local Law 71, constituting a direct conflict preemption.

A review of the CPL 140.50 and the common law to a stop, question and frisk is helpful to see whether a conflict exists between the local law and state law. The practice of briefly stopping an individual for questioning, and possibly patting him or her down for weapons, commonly referred to as "frisking," was officially recognized by the Supreme Court of the United States in 1968 as an exception to the requirement that police officers must have "probable cause" to seize and search a person or his or her effects. In its seminal decision Terry v. Ohio, the Court recognized that the Fourth Amendment's "right of the people to be secure in their

persons, houses, papers, and effects, against unreasonable searches and seizures . . . belongs as much to the citizen on the streets of our cities as to the homeowner closeted in his study," but also allowed that in the interest of "effective crime prevention and detection," a police officer may "approach a person for purposes of investigating possibly criminal behavior even though there is no probable cause to make an arrest." (392 U.S. at 1-22.).

In the ensuing years, many cases have expanded upon the legal standard established by the Terry decision. The leading case in New York is People v. De Bour. (40 NY2d 210 [1976]). De Bour cautioned that police officers must be particularly careful when carrying out the duty of crime prevention, as this area is "highly susceptible to subconsitutional abuses," and thus "will be subject to the greatest scrutiny." (Id. at 7). Thus, the court devised a four-tier methodology to analyze criminal law enforcement duties "in public places and directly correlates the degree of objectively credible belief with the permissible scope of interference. (Id. at 9, 220) (distinguishing law enforcement duties from public service duties, where for example a police officer would have much broader reign to stop individuals to find parents of a lost child).

Before the Fourth Amendment or the CPL is even triggered, the first tier of analysis begins with a request for information which is permissible when "there is some objective credible reason for that interference not necessarily indicative of

criminality." (Id. at 223.). The second tier is the common law right to inquire which is valid if there is "a founded suspicion that criminal activity is afoot." (Id.). Only when the law-enforcement initiated action constitutes a stop at the third tier is the CPL or the Fourth Amendment implicated. Almost 20 years after De Bour, the Court of Appeals reaffirmed stating, "we still believe that police encounters that are not seizures or arrests for constitutional purposes should be evaluated under the De Bour test." People v. Hollman, 79 NY2d 181, 195 (1992).

The New York stop, question and frisk statute is the codification of the "stop and frisk" doctrine established in Terry v. Ohio. (392 U.S. 1 [1968]) Pursuant to Section 140.50 of the CPL and Terry, a police officer who has a "reasonable" suspicion that criminal behavior is occurring may briefly stop an individual pursuant to the Fourth Amendment. (Terry, 392 U.S. at 22; CPL 140.50(1)). The Court stressed that "inarticulate hunches" are not enough to warrant a stop, but that instead an officer making the stop must be able to "point to specific and articulable facts" that led to the stop. (Terry, 392 U.S. at 21). The factual predicate that a police officer has for the basis for a stop must be reasonable suspicion of "legal wrongdoing" and the "likelihood of criminal activity." (United States v. Arvizu, 534 U.S. 266, 273-74 [2002]). An individual's immutable characteristic can never serve as the sole factor substantiating the stop under the CPL or the Fourth Amendment. (See United States v. Brignoni-Ponce, 422 U.S.

873, 886 [1975]) (holding ethnic identity cannot alone indicate likelihood of criminality).

Following such a temporary stop, a police officer is permitted to conduct a limited search (or "frisk") where in the interest of officer safety, the officer may conduct a "reasonable search for weapons," or "any instrument, article or substance readily capable of causing serious physical injury." (Terry, 392 U.S. at 27; CPL 140.50(3)). This frisk is valid only if the officer "has reason to believe that he is dealing with an armed and dangerous individual." (Terry, 392 U.S. at 27).

Here, there is no conflict between Local Law 71 and the CPL. Local Law 71 does not place additional restrictions on the authority conferred to police officers under state law. It does not prevent a police officer from making a stop under CPL 140.50. Nor does it change the legal standard of reasonable suspicion. The local law does not prohibit a police officer from considering race, for example, as one of many factors in making a stop. It requires only that a police officer consider "an individual's behavior or other information or circumstances that links a person or persons to suspected unlawful activity." (Local Law 71 §2).

However, use of race as the determinative factor – without considering other information and circumstances – is not permissible under Local Law 71. This is

consistent with state law. A stop where the determinative factor is race is not a valid Terry stop as there is no reasonable suspicion. Nor would it meet the De Bour's requirement of founded suspicion. Rather, the only articulated basis for the stop would be race, which is not permitted under state and federal law.

People v. Johnson illustrates these points. (102 A.D.2d 616 [4th Dept 1984]). At issue in Johnson was whether an investigative stop of defendant's vehicle on a public highway was valid where the only description the arresting sergeant received was a "police radio call 'of a robbery at the Stop and Go, Dewey-Latta by a black male.'" (Id. at 617). However, before going on duty the sergeant had learned that there had been two convenience store robberies the prior night. The suspect in both cases was a black male driving a large, dark colored vehicle.

After receiving the radio call regarding the robbery at the Stop and Go, the sergeant drove to a specific location on the highway where he believed he could intercept the suspect. (Id.). He shined his spot light in some vehicles and let them pass because they did not arouse his suspicions. (Id.). He then shined his light into a large vehicle driven by a black male who appeared startled and looked shocked. (Id.). The sergeant followed the vehicle for a short distance and then decided to stop it. (Id.). The driver was later identified as the defendant. (Id.).

The Appellate Division concluded, "that the stop of defendant's vehicle was based on reasonable suspicion and that the sergeant had a particularized and objective basis for suspecting that the defendant was the perpetrator of the robbery which had occurred only minutes before." (Id. at 625). Race was one of many factors that aided the police in their investigation of the robbery and may be considered as a means of identification. However, the color of one's skin cannot be the sole basis for reasonable suspicion because "[a] person's racial status is neither an unusual circumstance nor probative of propensity to commit crime, and it does not provide a basis to conclude that crime is afoot." (Id. at 622).

The result would be the same in Johnson under Local Law 71. The determinative factor of the stop is not the defendant's race. Rather, race is pedigree information that identifies an individual and can be considered along with other factors. It is the individual's behavior, the "other information and circumstances," namely, use of a vehicle in the other two convenience store robberies, the belief that the robberies were connected and that the suspect may try to escape by a large, dark vehicle, the likely escape route, and the suspicious behavior exhibited by the defendant prior to the stop, that linked him to the robbery at the convenience store. (Local Law 71 §2).

The outcome would be different if the stop had been made without other information or circumstances to link the individual to the robbery at the

convenience store. Race under those facts would have been the determinative factor for the stop. Again, this result is consistent with state law because Local Law 71 does not set a standard that is higher than what is required for a police officer to make a stop based on reasonable suspicion.

The fact that the CPL utilizes an objective standard to analyze law enforcement initiated action and Local Law 71 uses a subjective standard does not result in a conflict. Irrespective of what standard is considered, where there is the requisite factual predicate for the stop, there will be no liability under Local Law 71 because the police officer will have undoubtedly taken into consideration the totality of the circumstances or other information and circumstances in initiating the investigative stop.

The Unions further argue that the burden shifting provision of Local Law 71 conflicts with that of CPL 140.50 which does not have the same provision. However, such burden shifting is consistent with civil rights statutes and the Council's stated intent of Local Law 71 "to ensure protection of the civil rights of all persons covered by the law." (Local Law 71 §1). As a civil rights law, not a criminal procedure law, Local Law 71 uses the standards traditionally used within its field. (See Zakrzewska v. New Sch., 14 NY3d 469, 480 [2010] (finding no preemption when City law imposed strict liability versus State law which imposed a *Faragher-Ellerth* standard)).

III. Vagueness

The Unions contend that the "determinative factor" language of Local Law 71 is unconstitutionally vague. They point out that the terminology is not defined by the law. They argue that the law lacks objective standards (People v. Bright, 71 NY2d 376 (1988); nor is it clear and unambiguous (People v. Berck, 32 NY2d 567 (1973). It does not give guidance or warning as to what is proscribed or allowed when, for example, an officer engaging in a police encounter with an individual who falls within the law's enumerated categories of "race, ethnicity, religion, or national origin, color, creed, age, alienage or citizenship status, gender, sexual orientation, disability, or housing status. . . ." (Local Law 71 §1). The Unions contend that the law does not set a standard for a police officer to determine when his or her actions may be "justified by a factor(s) unrelated to unlawful discrimination." (Id. at §2).

The Unions maintain that liability under Local Law 71 is without limits. The lack of clear standards for enforcement will result in arbitrary and discriminatory enforcement as individuals need only claim that their behavior or other information or circumstances does not link them to suspected unlawful activity. Suits can be brought by individuals who are arrested, charged or convicted of crimes. The incentive for such suits is an award of attorney fees and expert fees.

The First Department in Amazon.com, LLC v. N.Y. State Dep't of Taxation & Finance, summarized a facial challenge to constitutionality of a law on grounds of vagueness, as follows:

> Initially, as was recently reiterated by the Supreme Court in *Washington State Grange v. Washington State Republican Party,* facial challenges to a statute's constitutionality are disfavored. "[A] plaintiff can only succeed in a facial challenge by 'establish[ing] that no set of circumstances exists under which the Act would be valid', *i.e.*, that the law is unconstitutional in all of its applications." Since "[l]egislative enactments enjoy a strong presumption of constitutionality ... parties challenging a duly enacted statute face the initial burden of demonstrating the statute's invalidity 'beyond a reasonable doubt'. "Moreover, courts must avoid, if possible, interpreting a presumptively valid statute in a way that will needlessly render it unconstitutional".

81 AD3d 183, 194 (2010) (internal citations omitted).

In this Court's view, there may be some circumstances where application of the law is in a grey area because terms such as "determinative factor," "initiating law enforcement action against an individual or "factor(s) unrelated to unlawful discrimination" have not been defined by the Local Law 71.[3] However, the Unions arguments and hypotheticals do not establish that Local Law 71 is unconstitutionally vague in all its applications. As court cases and administrative proceedings are brought, a body of law will develop as defining these terms within the context of civil rights law and Fourth and Fourteenth amendment case law.

[3] The word "determinative" is defined as, "tending, able, or serving to determine." (American Heritage Dictionary 1248 [3d ed.2000]; see Fleming v. Graham, 10 NY3d 296, 301 [2008] (using the American Heritage Dictionary as an accepted authority for the plain and ordinary meaning of words for statutory construction). The word "determine" is defined as "[t]o cause [someone] to come to a conclusion or resolution." (American Heritage Dictionary supra.)

New York City police officers have fair warning of what conduct is prohibited and what is permitted. The genesis of the "determinative factor" test in Local Law 71 is the NYPD's own internal anti-profiling policy that commits the NYPD to "the impartial enforcement of law and the protection of Constitutional rights" and prohibits racial profiling. (Operations Order No. 11 [Mar. 2002]).

Police officers are on notice that they are prohibited from using characteristics such as "race, color, ethnicity or national origin as the determinative factor for initiating police action." (Id. at §1). In other words, race (or one of the other above characteristics) may not be the only factor in the law enforcement action taken against an individual. However, the order permits police officers to take into "account the reported race, color, ethnicity, national origin, religion, age, gender, gender identity, sexual orientation of a specific suspect in the same way the member would use pedigree information, e.g., height, weight, age, etc. about specific suspects." (Id. at §3). The Finest Message reiterates that Local Law 71 is in keeping with the NYPD's policy and training on police initiated stops. (See Finest Message).

This Court recognizes that police officers must make split-second decisions when engaging in investigative stops. The decisions they make affect the safety of themselves, their fellow officers, and all New Yorkers. Local Law 71 does not prevent police officers from continuing to stop, question, and frisk while utilizing

their training and experience. The law only seeks to deter the use of attributes such as race as the sole basis for an investigatory stop which is antithetical to our constitution and our values.

Accordingly, it is

ORDERED that the defendants' cross-motion to dismiss for lack of standing is denied; and it further

ADJUDGED and DECLARED that Local Law 71 is not preempted by the New York Criminal Procedure Law; and it is further

ADJUDGED and DECLARED that Local Law 71 is not void for vagueness under the Due Process Clause of the United States Constitution or the New York State Constitution; and it is further

ORDERED that the plaintiff's motion for a permanent injunction enjoining the operation of Local Law 71 is denied as moot.

The foregoing constitutes the decision and order of the court.

Date: June 18, 2014
New York, New York

Anil C. Singh

HON. ANIL C. SINGH
SUPREME COURT JUSTICE

JUN 18 2014