

**Police Benevolent Assn. of the City of N.Y., Inc. v City
of New York**

2021 NY Slip Op 34014(U)

June 22, 2021

Supreme Court, New York County

Docket Number: Index No. 653624/2020

Judge: Laurence L. Love

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. LAURENCE L. LOVE PART IAS MOTION 63M

Justice

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POLICE BENEVOLENT ASSOCIATION OF THE CITY OF NEW YORK, INC., SERGEANTS BENEVOLENT ASSOCIATION OF THE CITY OF NEW YORK, LIEUTENANTS BENEVOLENT ASSOCIATION OF THE CITY OF NEW YORK, CAPTAINS ENDOWMENT ASSOCIATION OF THE CITY OF NEW YORK, DETECTIVES' ENDOWMENT ASSOCIATION OF THE CITY OF NEW YORK, PORT AUTHORITY POLICE BENEVOLENT ASSOCIATION INC., PORT AUTHORITY DETECTIVES' ENDOWMENT ASSOCIATION, PORT AUTHORITY LIEUTENANTS BENEVOLENT ASSOCIATION, PORT AUTHORITY SERGEANTS BENEVOLENT ASSOCIATION, SUPREME COURT OFFICERS ASSOCIATION, NEW YORK STATE COURT OFFICERS ASSOCIATION, NEW YORK STATE POLICE INVESTIGATORS ASSOCIATION, LOCAL NO. 4 OF THE INTERNATIONAL UNION OF POLICE ASSOCIATIONS, AFL-CIO, BRIDGE AND TUNNEL OFFICERS BENEVOLENT ASSOCIATION, TRIBOROUGH BRIDGE AND TUNNEL AUTHORITY SUPERIOR OFFICERS BENEVOLENT ASSOCIATION, METROPOLITAN TRANSPORTATION AUTHORITY POLICE BENEVOLENT ASSOCIATION, POLICE BENEVOLENT ASSOCIATION OF NEW YORK STATE, NEW YORK CITY DETECTIVE INVESTIGATORS ASSOCIATION DISTRICT ATTORNEYS' OFFICE,

INDEX NO. 653624/2020
MOTION DATE N/A
MOTION SEQ. NO. 003

DECISION + ORDER ON MOTION

Plaintiff,

- v -

THE CITY OF NEW YORK,

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 003) 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 106, 109, 110, 111

were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER).

Upon the foregoing documents, defendant's motion for summary judgment and plaintiffs' cross-motion for summary judgment are decided as follows:

Plaintiffs, a group of unions representing various police officer units in and around the City of New York, commenced the instant action by the filing of a Summons and Complaint on August 5, 2020. As described in plaintiffs' Complaint, "this case challenges the City's enactment and prospective enforcement of Section 10-181 of the New York City Administrative Code ("Section 10-181"), passed by the City Council on June 18, 2020, and signed into law by Mayor Bill de Blasio on July 15, 2020. Section 10-181 criminalizes the use of any restraint 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.'"

On August 8, 2020, plaintiffs filed an Order to Show Cause seeking, pursuant to CPLR §§ 6301 and 6311, a preliminary injunction to enjoin Defendant from enforcing Section 10-181 of the New York City Administrative Code pending the hearing and determination of this action, arguing that (1) the section is preempted by Section 121.13-a of the New York State Penal Law and (2) that the section is unconstitutionally void for vagueness and as such violates due process. On September 17, 2020, a member of the New York City Council filed an Order to Show Cause seeking amicus curiae status and leave of the Court to file a brief in opposition to Plaintiffs' motion seeking a preliminary injunction to enjoin Defendant from enforcing Section 10-181 of the New York City Administrative Code pending the hearing and determination of this action. At oral argument of the Order to Show Cause, there were no objections and the proposed amicus brief was considered in opposition to plaintiffs' motion. In an Order dated September 30, 2020, this court denied Plaintiffs motion seeking a preliminary injunction.

Defendant now moves for an order pursuant to CPLR R. 3212, directing that summary judgment be entered in favor of the Defendant, dismissing the claims asserted by plaintiffs and

plaintiff's cross-move for an order pursuant to CPLR R. 3212, directing that summary judgment be entered in plaintiffs' favor, on all claims asserted by plaintiffs. This Court heard oral argument of both motions on April 22, 2021.

The language the Court used in its earlier decision related to the seeking of a Preliminary Injunction is as relevant now as it was then – the need to protect both police officers and the public is a vital and fundamental function of society and it is essential that sufficient safeguards exist to allow officers to safely perform their duties while ensuring the safety of the general public and individuals being taken into custody. Before addressing the merits of the competing summary judgement motions it is abundantly clear that the City of New York and The New York City Police Department have taken great pains to reduce the risks of chokehold related injuries and incidents by establishing new training procedures that place blanket restrictions on sitting, kneeling or standing on the chest or back of a individual regardless of the circumstances.

Summary Judgment should not be granted where there is any doubt as to the existence of a material issue of fact. *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562, 427 N.Y.S.2d 595 (1980). The function of the court when presented with a motion for Summary Judgment is one of issue finding, not issue determination. *Sillman v. Twentieth Century-Fox Film Corp.*, 3 N.Y.2d 395, 165 N.Y.S.2d 498 (1957); *Weiner v. Ga-Ro Die Cutting, Inc.*, 104 A.D.2d331, 479 N.Y.S.2d 35 (1st Dept., 1984) *aff'd* 65 N.Y.2d 732, 429 N.Y.S.2d 29 (1985). The proponent of a motion for summary judgment must tender sufficient evidence to show the absence of any material issue of fact and the right to entitlement to judgment as a matter of law. *Alvarez v. Prospect Hospital*, 68 N.Y.2d 320 (1986); *Winegrad v. New York University Medical Center*, 64 N.Y.2d 851 (1985). Summary judgment is a drastic remedy that deprives a litigant of his or her day in court. Therefore, the party opposing a motion for summary judgment is entitled to all favorable inferences that can

be drawn from the evidence submitted and the papers will be scrutinized carefully in a light most favorable to the non-moving party. *Assaf v. Ropog Cab Corp.*, 153 A.D.2d 520 (1st Dep't 1989). Summary judgment will only be granted if there are no material, triable issues of fact *Sillman v. Twentieth Century-Fox Film Corp.*, 3 N.Y.2d 395 (1957).

Plaintiffs contend that the Section 10-181 is pre-empted by State law and/or is a violation of plaintiffs' rights to due process.

Preemption

“Broadly speaking, State preemption occurs in one of two ways—first, when a local government adopts a law that directly conflicts with a State statute and second, when a local government legislates in a field for which the State Legislature has assumed full regulatory responsibility” (*DJL Rest. Corp. v. City of New York*, 96 N.Y.2d 91, 95 [2001]; *Eric M. Berman, P.C. v. City of New York*, 25 N.Y.3d 684, 693 [2015]). Here, plaintiffs contend that Section 10-181 is invalid under both doctrines “(1) because the State Legislature occupies the entire field of permissible force used by police officers effecting arrests, especially for restraints that obstruct breathing or blood circulation in carrying out an arrest; and (2) because Section 10-181 directly conflicts with the State Penal Law.”

Field Preemption

As discussed in *Vatore v. Comm'r of Consumer Affairs of City of New York*, 83 N.Y.2d 645, 649 (1994), “Where the State has preempted an entire field, a local law regulating the same subject matter is inconsistent with the State's interests if it either (1) prohibits conduct which the State law accepts or at least does not specifically proscribe (*see, New York State Club Assn. v. City of New York*, 69 N.Y.2d 211, 221, *affd.* 487 U.S. 1, 108 S.Ct. 2225, 101 L.Ed.2d 1; *Monroe—*

Livingston Sanitary Landfill v. Town of Caledonia, 51 N.Y.2d 679, 683), or (2) imposes restrictions beyond those imposed by the State law (*see, Robin v. Incorporated Vil. of Hempstead*, 30 N.Y.2d 347, 350–352).” The State’s intention to preempt an entire field need not be specified in a law as “preemptive intent, however, may be inferred from the nature of the subject matter being regulated and the purpose and scope of the State legislative scheme” *Vatore* at 649, (*see, Albany Area Bldrs. Assn. v. Town of Guilderland*, 74 N.Y.2d 372, 377; *Consolidated Edison Co. v. Town of Red Hook*, 60 N.Y.2d 99). Where such preemptive intent exists, the locality may not legislate “unless it has received ‘clear and explicit’ authority to the contrary.” *People v. De Jesus*, 54 N.Y.2d 465, 469 (1981). A “local law will not be preempted by implication unless the state has clearly shown a desire to preempt an entire field thereby precluding any further regulation.” *Patrolman’s Benevolent Assn. of the City of N.Y., Inc. v. City of N.Y.*, 142 A.D.3d 53, 58 (1st Dep’t 2016).

Plaintiffs argue that Section 10-181 is field preempted by the newly enacted Section 121.13-a of the New York State Penal Law (same was signed into law on June 12, 2020), entitled “Aggravated strangulation” which provides that “A person is guilty of aggravated strangulation when, being a police officer as defined in subdivision thirty-four of section 1.20 of the criminal procedure law or a peace officer as defined in section 2.10 of the criminal procedure law, he or she commits the crime of criminal obstruction of breathing or blood circulation, as defined in section 121.11 of this article, or uses a chokehold or similar restraint, as described in paragraph b of subdivision one of section eight hundred thirty-seven-t of the executive law, and thereby causes serious physical injury or death to another person.”

Plaintiffs argue that even though there is no specific statutory language preempting localities from legislating on the subject of chokeholds that the legislative history and regulatory

text clearly indicate that the state intended to preempt such legislation. In support of same, plaintiffs submit a New York State Assembly Legislative Committee Report, dated March 6, 2019, which includes specific justifications for the passage of 2019 New York Assembly Bill No. 6144. Specifically, in 1993, the NYPD completely banned the use of chokeholds by its officers. Despite this ban, the legislature highlighted the deaths of Anthony Baez in 1994 and Eric Garner in 2014 as evidence that “it is obvious that the NYPD is either unable or unwilling to enforce its own employee manual. The use of chokeholds has resulted in too many deaths. Criminal sanctions must be established for those who continue to disregard this banned procedure.”

While plaintiffs have established that the state law was enacted as a result of several high profile deaths, which received national attention, and specifically highlights that the NYPD continues to face the unsolved issue related to the use of any chokeholds, there is nothing in the legislative history which indicates that the state legislature intended to preempt other legislative remedies. Where, as here, the State legislature has not indicated that it intends to preclude any “additional, not inconsistent legislation,” a local law that is consistent with the State’s legislative objective is not preempted. *McDonald v. N.Y. City Campaign Fin. Bd.*, 117, A.D.3d 540, 541 (1st Dep’t 2014) (holding that contribution limits in the State Election Law do not preempt the local Campaign Finance Act). As such, plaintiffs have failed to make a *prima facie* showing that the state intended to preempt all other chokehold legislation.

Conflict Preemption

A local law is “inconsistent” and therefore preempted by state law where 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 Co. of N.Y.*, 60 N.Y.2d at 108.

Plaintiffs argue that “Section 10-181 is conflict-preempted because it is inconsistent with and inhibits the operation of State Penal Law. The State law defines and criminalizes the obstruction of breathing or blood circulation by police officers, and necessarily encompasses use of such force in effecting or attempting to effect an arrest. Such obstruction, as defined in Section 121.11, includes application of ‘pressure on the throat or neck of such person’ or blocking ‘the nose or mouth of such person’ with ‘intent to impede the normal breathing or circulation of blood of another person.’ N.Y. Penal Law § 121.11. Additionally, Section 837-t(1)(b) of the New York State Executive Law requires conduct to be reported if 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 § 837t(1)(b).” Plaintiffs further argue that Section 10-181 criminalizes the same conduct but is preempted because it imposes different requirements on police officers as it lacks an intent and injury requirement present in the state law felony statute and as such, criminalizes conduct that would not be illegal under the state law. Defendants contend that the two laws work in tandem as Section 10-181 criminalizes similar conduct, but in the form of a misdemeanor, rather than a felony, barring the use of chokeholds and adding a prohibition against compression of the diaphragm and omitting the requirement of a serious injury. Defendant further highlights *Garcia v. New York City Dep’t of Health & Mental Hygiene*, 31 N.Y.3d 601, 617–18 (2018) where the Court of Appeals “cautioned that reading conflict preemption principles too broadly risks rendering the power of local governments illusory (see *New York State Club Assn. v City of New York*, 69 NY2d 211, 221 [1987], affd 487 US 1 [1988]). Thus, the ‘fact that both the [s]tate and local laws seek to regulate the same subject matter

does not in and of itself give rise to an express conflict’ (*Jancyn Mfg. Corp. v County of Suffolk*, 71 NY2d 91, 97 [1987]; see *People v Judiz*, 38 NY2d 529, 531 [1976]), and conflict preemption is generally found only “when the State specifically permits the conduct prohibited at the local level” or there is some other indication that deviation from state law is prohibited (*New York State Club Assn.*, 69 NY2d at 222).

Plaintiffs have made neither a showing that Section 10-181 prohibits conduct that is permissible under State law nor that same creates additional restrictions on rights under State law as police officers do not appear to have a right to engage in the prohibited conduct under State law. As such, plaintiffs have failed to establish that Section 10-181 conflicts with State law.

Due Process

As discussed in *People v. Mojica*, 62 A.D.3d 100, 108 (2nd Dep’t 2009), “it is a fundamental requirement of due process that a criminal statute must be stated in terms which are reasonably definite so that a person of ordinary intelligence will know what the law prohibits or commands” (*People v. Cruz*, 48 N.Y.2d 419, 423–424; see *People v. Stuart*, 100 N.Y.2d 412, 418–419. The purpose of the requirement is twofold: (1) provide the defendant with “adequate warning of what the law requires so that he may act lawfully,” and (2) “prevent arbitrary and discriminatory enforcement by requiring boundaries sufficiently distinct for police, Judges and juries to fairly administer the law” (*People v. Cruz*, 48 N.Y.2d at 424 [internal quotation marks omitted]). Thus, A law is impermissibly vague and therefore violates constitutional due process if it does not give a person of ordinary intelligence fair notice of what is prohibited, and does not provide clear enough standards for enforcement, thereby permitting arbitrary enforcement. *People v. Stuart*, 100 N.Y.2d 412, 420-21 (2003). As discussed in *Copeland v. Vance*, 893 F.3d 101, 110–11 (2d Cir.

2018), “A facial challenge is ‘the most difficult challenge to mount successfully’ because, as a general matter, ‘the challenger must establish that no set of circumstances exists under which the Act would be valid.’ *United States v. Salerno*, 481 U.S. 739, 745, 107 S.Ct. 2095, 95 L.Ed.2d 697 (1987); accord *Hoffman Estates v. Flipside*, 455 U.S. 489, 495, 102 S.Ct. 1186, 71 L.Ed.2d 362 (1982) (explaining that an ordinary facial challenge will succeed “only if the enactment is impermissibly vague in all of its applications”).” As statute will not be invalidated if it “clearly delineates specific conduct easily avoided by the innocent-minded” See, *People v. Nelson*, 69 N.Y.2d 302, 307, (1987).

Plaintiffs contend that Section 10-181 is void for vagueness because an ordinary police officer will be unable to discern whether an arrestee’s diaphragm is being compressed as the diaphragm is an internal muscle that contracts when air fills the lungs. Plaintiffs further argue that “the strict liability nature of the offense aggravates the due process problem by increasing both uncertainty from the officer’s perspective and the risk of inconsistent and arbitrary enforcement by the legal system. See *Colautti v. Franklin*, 439 U.S. 379, 395 (1979), overruled on other grounds, *United States v. Cook*, 970 F.3d 866 (7th Cir. 2020) (absence of scienter requirement rendered statute “little more than ‘a trap for those who act in good faith’”) (citation omitted); see also *Morissette v. United States*, 342 U.S. 246, 250-52 (1952) (intent considered “so inherent in the idea of” a criminal offense “that it required no statutory affirmation”). Plaintiffs argue that “In light of the lack of mens rea and injury requirements, unintentional violations of the law in effecting or attempting to effect an arrest—and uses of restraints consistent with department policies and State law—will expose officers to criminal liability” The Court notes that neither is a requirement to pass a due process challenge, see. Penal Law § 15.10., (“The minimal requirement for criminal liability is the performance by a person of conduct which includes a voluntary act or

the omission to perform an act which he is physically capable of performing.”). It cannot be disputed that the use of a chokehold and the act of sitting, kneeling, or standing on a subject’s chest or back are voluntary acts as described in § 15.10 and as such, the lack of a mens rea requirement is not an issue. The Court further notes that none of plaintiffs’ arguments even suggest that the portion of Section 10-181 banning chokeholds is in any way vague and that plaintiffs’ arguments relate solely to the portion banning compression of the diaphragm which is clearly problematic.

In this Court’s prior decision denying plaintiff’s motion for a preliminary injunction, the Court held that “The Plaintiffs’ due process argument clearly establishes a *prima facie* showing of a likelihood of ultimate success on the merits as the statute’s wording appears unconstitutionally vague. The statute offers no guidance on how an officer is to determine whether his or her actions are causing a suspect’s diaphragm to be compressed, especially in light of the lack of an injury requirement.” All parties have now had the opportunity to submit additional proofs on said issue.

In support of its motion, defendants submit the affidavit of Gregory Sheehan, the Executive Officer of the NYPD Police Academy ("Police Academy"), within the Training Bureau, together with copies of various training materials issued by the NYPD in response to Administrative Code § 10-181. Said training materials were distributed by the NYPD at "Team Tactics Refresher (TTR)" courses, attendance at which is mandatory for all Uniformed Members of Service (“UMOS”) in the ranks of Police Officer, Sergeant, Lieutenant and Detective. At the TTR Training Course, and in other written and audiovisual materials that have been distributed throughout the NYPD, UMOS are instructed that, pursuant to Administrative Code § 10-181, they may “Not sit, kneel, or stand on the chest or back of a subject.” UMOS are specifically instructed that “the diaphragm, located below the lungs, is the major muscle of respiration that contracts rhythmically and continually, and most of the time, involuntarily. UMOS are instructed when a person inhales

the diaphragm contracts and flattens and the chest cavity enlarges, which creates a vacuum that pulls air into the lungs; upon exhalation, the diaphragm relaxes and air is forced out of the lungs.”

In support of plaintiffs’ cross-motion and in opposition to defendant’s motion, plaintiffs submit the affidavits of Patrick E. Kelleher, a retired First Deputy Commissioner of the New York City Police Department and John Monaghan, a retired Captain of the New York City Police Department and the expert medical affidavits of Christopher Lettieri, MD and Beno Oppenheimer, MD.

The Kelleher affidavit states that “New York City Administrative Code 10-181 provides, in the part relevant to this litigation, that no person shall restrain an individual by "sitting, kneeling, or standing on the chest or back in a manner compresses the diaphragm, in the course of effecting or attempting to effect an arrest." The words in the statute, however, do not provide police officers or anyone else any clear direction about what actually is permitted and what is prohibited, or how to determine when some act in an arrest struggle is prohibited. 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." But § 10-181 does not explain what that means or how to tell when it is happening. Because § 10-181 is itself unclear and confusing, it is also impossible to design and implement any training for police officers to comply with § 10-181.” The affidavit further states that “The police training materials submitted to the Court by the City in this action confirm that the NYPD does not itself know what the key limiting words in § 10-181 mean, or how to determine when conduct actually results in what § 10-181 prohibits. The 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.”

The Monaghan affidavit states “New York City Administrative Code 10-181 does not prohibit a police officer from effecting or attempting to effect an arrest by ‘sitting, kneeling, or standing on the chest or back,’ but only prohibits sitting, kneeling, or standing on the chest or back when it is done ‘in a manner that compresses the diaphragm.’ The 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. Section 10-181 does not explain what that ‘in a manner that compresses the diaphragm’ is, or how to tell when it is occurring.” The affidavit further states in opposition to the Sheehan affidavit that “The NYPD training quotes but then simply ignores the limiting words ‘in a manner that compresses the diaphragm.’ It pretends that these words in § 10-181 do not have any meaning at all. The NYPD training is for some imaginary statute that is fundamentally different from § 10-181. The NYPD training essentially acknowledges and confirms that it is impossible to train police officers on what those key limiting terms in § 10-181 mean for police conduct.”

The Lettieri affidavit states 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.’” Dr. Lettieri specifically states that “It is possible to compress the chest or back, but 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.”

The Oppenheimer affidavit states that “the statement in Section 10-181 referring to ‘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,' is vague and confusing." Based upon said vagueness, the affidavit states that "the terms 'diaphragmatic compression' or 'compression of the diaphragm' are not generally used or widely accepted in medicine to describe a mechanism with potential for impeding or limiting diaphragmatic function. Dr. Oppenheimer further opines that without specialized equipment, there is no way for a police officer to determine what may be happening to the diaphragm.

The Court notes that plaintiffs' citations to *Richmond Med. Cetr. for Women v. Gilmore*, 11 F. Supp. 2d 795 (E.D. Va. 1998) and *Planned Parenthood of Cent. New Jersey v. Verniero*, 41 F. Supp. 2d 478 (D. N.J. 1998), both of which concern statutes directed at physicians attempting to ban so-called "partial birth abortions" are not only entirely inapposite but arguably inappropriate. The Court further notes that plaintiffs do not argue that the section's prohibition on restricting the flow of air or blood by compressing the windpipe or the carotid arteries on each side of the neck is unconstitutionally vague. This is so because law enforcement officers, as part of their job duties, can be and are trained on the dangers of restricting air or blood circulation.

Plaintiffs further argue that the NYPD training materials cited by defendants confirm that Section 10-181 is confusing and lacks meaning. Specifically, plaintiffs argue and the Monaghan affidavit outlines "neither the statute nor the NYPD training explains: (1) When or how an officer's actions are compressing the diaphragm; (2) What level of pressure applied will compress the diaphragm; (3) What "compressing" the diaphragm means, compared to the normal contraction or flattening that is explained in the training materials; (4) How anyone could tell during an arrest struggle whether or not the diaphragm was being "compressed" during that struggle, to determine whether Section 10-181 is being violated; and (5) How anyone could tell after an arrest struggle

whether or not the diaphragm had been “compressed” during that struggle, to determine if Section 10-181 had been violated.”

As discussed *supra*, the prohibited conduct is restraining an individual in a manner that restricts the flow of air. However, plaintiffs are correct in their argument that the submitted training materials do not meaningfully explain what is meant by “compresses the diaphragm.” The 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. The TTR Instructor Manual includes a paragraph entitled “Prohibited Methods of Restraint” which follows the wording of the statute outlawing “sitting, kneeling, or standing on the chest or back of a subject in a manner that compresses the diaphragm, thereby reducing the subject's ability to breathe” and includes a paragraph entitled “a note on human anatomy” which states “the diaphragm, located below the lungs, is the major muscle of respiration. It is a large, dome-shaped muscle that contracts rhythmically and continually, and most of the time, involuntarily. Upon inhalation, the diaphragm contracts and flattens and the chest cavity enlarges. This contraction creates a vacuum, which pulls air into the lungs. Upon exhalation, the diaphragm relaxes and returns to its domelike shape, and air is forced out of the lungs. Retrieved from <https://medlineplus.gov/ency/imagepages/19380.htm> on 07.10.2020.” The TTR PowerPoint contains the same slide entitled “Prohibited Methods of Restraint” The TTR Executive Course Guide on page 11 states “It further makes it a misdemeanor to sit, kneel, or stand on the chest or back of a subject in a manner that compresses the diaphragm.” The submitted NYPD Finest Messages, NYPD Operations Order, and NYPD Police Academy Memo all contain similar explanations. 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. As such, plaintiffs have established that the words “compresses the diaphragm” are impermissibly vague. As discussed *supra*, Plaintiffs are required to establish that the law’s prohibition on sitting, kneeling or standing on the chest or back in a manner that compresses the diaphragm is so indefinite that it “proscribes no comprehensible course of conduct at all,” *Copeland*, 893 F.3d at 110. The inescapable conclusion is that the inclusion of the words “in a manner that compresses the diaphragm” is a vague description of the prohibited act.

As established by the Sheehan affidavit and supporting materials, officers are instructed simply never to sit, kneel or stand on the subject’s torso. The Instructor Manual further describes “prohibited methods of restraint” as including “sitting, kneeling, or standing on the chest or back of a subject in a manner that compresses the diaphragm, thereby reducing the subject’s ability to breathe.” Said training materials repeatedly remind officers “REMEMBER ... DO NOT sit, kneel, or stand on the chest or back. You may still place a subject in a prone position and sit or kneel on the subject’s legs.” The Training Booklet states that officers should “[n]ever sit, kneel, or stand on the subject’s torso – including the back, the chest, or the abdomen,” and describes the prohibited conduct as including “sitting, kneeling, or standing on the chest or back of a subject in a manner that compresses the diaphragm, thereby reducing the subject’s ability to breathe.” Sheehan Exhibit 7 at p. 5. The Training Booklet notes, significantly, that Department policy already requires that a subject be positioned so as to promote free breathing. While an officer who adheres to the above training, which correctly recognizes that the purpose of the statute is effecting an arrest while not compromising the subject’s ability to breathe will never run afoul of Section 10-181, and while this Court recognizes that the NYPD’s policy of training officers in the above tactics are laudable, the inescapable conclusion is that the training materials fail to meaningfully address the legal definition of “compresses the diaphragm.”

Plaintiffs also point to news articles and public comments made by the Mayor and various City Council members who expressed misgivings and acknowledgment of the statute's vague language, nonetheless that is how the statute was written and signed into law making such comments irrelevant.

As discussed *supra* the words “compresses the diaphragm” are indeed vague. Defendant argues that said vagueness can be remedied by striking the offending words from the statute, *See, Bronx Gas & Electric Co. v. Maltbie*, 268 N.Y. 278, 292 (N.Y. 1935). As discussed in *People ex rel. Alpha Portland Cement Co. v. Knapp*, 230 N.Y. 48, 60(1920) “The principle of division is not a principle of form. It is a principle of function. The question is in every case whether the legislature, if partial invalidity had been foreseen, would have wished the statute to be enforced with the invalid part excised, or rejected altogether. The answer must be reached pragmatically, by the exercise of good sense and sound judgment, by considering how the statutory rule will function if the knife is laid to the branch instead of at the roots.” In opposition, plaintiffs argue “Where, however, ‘any attempt to sever the offending portion’ of a statute ‘would result in a ‘misshapen fragment of the original,’ it is an ‘impermissible use of a legislative pen.’ *People v. Taylor*, 9 N.Y.3d 129, 154 (2007) (declining to sever unconstitutional statute). ‘If removing particular provisions while leaving the remainder intact would result in a law the Legislature would not have intended, the entire statute must be stricken.’ *White v. Cuomo*, 181 A.D.3d 76, 86 (3d Dep’t 2020). Plaintiffs’ argument continues “If the Court severs the phrase ‘in a manner that compresses the diaphragm,’ per the defendant’s proposal, the rewritten statute would criminalize any instance in which, in effecting or attempt to effect an arrest, an officer sits, kneels, or stands on a suspect’s chest or back, regardless of: (1) the amount of pressure placed on the individual; (2) the amount of time such pressure is placed; and (3) whether doing so has affected the individual’s

breathing in any way.” If that was the intent of the legislature, then so be it, however the City Council specifically included in the statute phrasing related to the diaphragm which the Court cannot ignore. This Court declines to usurp the role of the New York City Council and will not simply sever the offending clause from the statute as there is insufficient evidence presented of the intentions of the New York City Council.

As such, plaintiffs have demonstrated that Section 10-181 is unconstitutionally vague as the phrase “compresses the diaphragm” cannot be adequately defined as written. It is this Court’s sincere hope that the New York City Council will revisit this issue to address this vital matter. Accordingly, it is

ORDERED that plaintiffs’ motion is GRANTED to the extent that the words “in a manner that compresses the diaphragm” renders Administrative Code § 10-181 unconstitutionally vague and as such, the section is void in its entirety and enforcement of said section is permanently enjoined; and it is further

ORDERED that defendant’s motion is GRANTED to the extent that plaintiffs’ first and second causes of action seeking to declare New York City Administrative Code § 10-181(a) preempted by New York State law are dismissed.

6/22/2021
DATE


LAURENCE L. LOVE, J.S.C.

CHECK ONE:	<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	NON-FINAL DISPOSITION
	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	GRANTED IN PART
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	OTHER
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT
			<input type="checkbox"/>	REFERENCE