SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

THE MAYOR OF THE CITY OF NEW YORK, Plaintiff, SERGEANTS BENEVOLENT ASSOCIATION, Intervenor-Plaintiff, -against- THE COUNCIL OF THE CITY OF NEW YORK, Defendant.	Index No. 451543/2013
THE PATROLMEN'S BENEVOLENT ASSOCIATION OF THE CITY OF NEW YORK, INC., Plaintiff, -against- THE CITY OF NEW YORK, and THE COUNCIL OF THE CITY OF NEW YORK, Defendants.	Index No. 653550/2013

BRIEF OF *AMICUS CURIAE* NEW YORK CIVIL LIBERTIES UNION IN SUPPORT OF COMMUNITY SAFETY ACT

Respectfully submitted,

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PRELIMINARY STATEMENT

Last summer, following careful study of the pervasiveness and impact of bias-based policing in New York City communities, a supermajority of the New York City Council enacted Local Law 71, commonly known as the Community Safety Act (CSA). Though adopted amidst considerable public controversy, the CSA is a routine anti-discrimination ordinance that closely resembles anti-discrimination prohibitions across the state and country. Simply put, it prohibits law-enforcement action based on enumerated and defined characteristics (such as race) of persons unless a legitimate reason justifies the law enforcement action. The ordinance imposes no criminal sanctions or damages liability on police officers but authorizes private civil suits for injunctive relief against officers who engage in intentional discrimination.

Amicus curiae New York Civil Liberties Union (NYCLU) submits this brief in response to the claim of two police unions that the Community Safety Act violates due process because it is unconstitutionally vague. The NYCLU long has been committed to vindicating due process rights, including the important requirement that statutes not be impermissibly vague. At the same time, the NYCLU strongly supports anti-discrimination statutes (and indeed played a central role in the drafting of the CSA). In some circumstances, these two interests might be in tension, but this case is not one of them. The CSA is a standard civil anti-discrimination ordinance that, for purposes of a vagueness challenge, is indistinguishable from hundreds if not thousands of federal and local anti-discrimination laws and regulations. To the extent there are ambiguities in the CSA, the courts can and will resolve those ambiguities in the normal course of statutory interpretation, but they present no basis for facially voiding the statute on vagueness grounds.

STATEMENT OF INTEREST OF *AMICUS CURIAE*

The New York Civil Liberties Union (NYCLU), the New York State affiliate of the American Civil Liberties Union, is a non-profit, non-partisan organization with tens of thousands of members. The NYCLU is committed to the defense and protection of civil rights and civil liberties. For over sixty years, the NYCLU has been involved in litigation and public policy on behalf of New Yorkers, fighting against discrimination and advocating for individual rights and government accountability. In particular, the NYCLU frequently engages in advocacy and litigation defending the right to be free from unlawful law-enforcement action. *See, e.g.*, *Ligon v. City of New York*, 925 F. Supp. 2d 478 (S.D.N.Y. 2013) (granting preliminary injunction in challenge to widespread practice of unlawful stops and searches of individuals at private apartment buildings by police officers). The NYCLU also played a central role in the drafting of the Community Safety Act and fully supported its enactment.

FACTS

Because the unions allege that the Community Safety Act is unconstitutionally vague on its face, the key fact for purposes of that argument is the text of the ordinance itself. The CSA amends section 14-151 of the New York City Administrative Code. That entire section, as amended, is appended to this brief, but the three most germane sections are as follows:

> § 14-151 (a) Definitions. As used in this section, the following terms have the following meanings:
> 1. "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.

§ 14-151(c) Private Right of Action

1. A claim of bias-based profiling is established under this section when an individual brings an action demonstrating that:

   . . .

   (ii) 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.

§ 14-151(d) Enforcement

. . .

2. The remedy in any civil action or administrative proceeding undertaken pursuant to this section shall be limited to injunctive and declaratory relief.

Significantly for purposes of the unions' vagueness claim, the Act imposes no criminal penalties or damages liability. Rather, it authorizes individuals to bring civil suits seeking injunctive and declaratory relief for acts of intentional discrimination.[1]

ARGUMENT

I. TO SUCCEED IN STRIKING AS VAGUE A STATUTE THAT IS NOT PENAL AND DOES NOT THREATEN TO DETER CONSTITUTIONALLY PROTECTED EXPRESSIVE ACTIVITY, THE CHALLENGERS MUST MEET THE EXCEPTIONALLY HIGH BURDEN OF SHOWING IT TO BE "NO RULE OR STANDARD AT ALL."

The police unions claim that the Community Safety Act is impermissibly vague in violation of the New York State Constitution's due process clause. The Court of Appeals has incorporated federal constitutional vagueness law into corresponding state law, *see People v. Bright*, 71 N.Y.2d 376, 382 (1988) (citing Supreme Court cases for vagueness standard), and federal and state decisions make clear that the unions' vagueness challenge is without merit.

As a general rule, the constitutional requirements of precision in statutes vary depending upon the type of statute at issue. The void-for-vagueness doctrine typically is employed to strike

[1] In such civil suits, the plaintiff can recover attorney's fees and any expert costs, *see* Local Law 71, § 2, codified at Admin. Code § 14-151(d)(3), but NYPD officers are covered by New York law requiring the City to indemnify them and to pay for their legal defense, *see* N.Y. Gen. Mun. Law § 50-j; N.Y. Pub. Off. Law § 18.

down laws imposing criminal sanctions. *See, e.g.*, *Colautti v. Franklin,* 439 U.S. 379 (1979) (striking down statute imposing penalties against abortion providers who fail to comply with statutory requirements); *Bright*, 71 N.Y.2d at 380 (striking down loitering statute); *People v. Berck,* 32 N.Y.2d 567 (1973) (same). To satisfy due process, "a penal statute [must] define the criminal offense [1] with sufficient definiteness that ordinary people can understand what conduct is prohibited and [2] in a manner that does not encourage arbitrary and discriminatory enforcement." *Skilling v. United States*, 561 U.S. 358, 130 S. Ct. 2896, 2927-28 (2010) (alterations in original) (quoting *Kolender v. Lawson,* 461 U.S. 352, 357 (1983)). Where a criminal statute may "deter constitutionally protected and socially desirable conduct," courts apply a yet more exacting standard. *United States v. Nat'l Dairy Prods. Corp.,* 372 U.S. 29, 36 (1963) (citing cases); *see also Holder v. Humanitarian Law Project*, 561 U.S. 1, 130 S. Ct. 2705, 2719 (2010) ("[W]hen a statute interferes with the right of free speech or of association, a more stringent vagueness test should apply.").

By contrast, the due process clause demands less precision of civil statutes. *See Winters v. New York*, 333 U.S. 507, 515 (1948) ("The standards of certainty in statutes punishing for offenses is higher than in those depending primarily upon civil sanction for enforcement."). Thus, a civil statute is void only if it "so vague and indefinite as really to be no rule or standard at all." *Boutilier v. I.N.S.*, 387 U.S. 118, 123 (1967) (citation omitted; emphasis added).

Given the relaxed standard of precision applied to civil statutes, successful vagueness challenges to such statutes are exceedingly rare, almost to the point of nonexistence. Tellingly, in none of the cases cited by the unions did the Court of Appeals strike down a civil statute as void for vagueness. *See* Patrolmen's Benevolent Association Memorandum of Law at 22 (Nov. 26, 2013) ("PBA Brief"); Memorandum of Law in Support of Intervenor-Plaintiff Sergeants

Benevolent Association at 20 (Dec. 6, 2013) ("SBA Brief"). *Amicus*, too, searched New York precedents in vain to identify any such case, though it did find a number of state and federal court decisions, like the New York cases cited by the unions, rejecting vagueness challenges to civil statutes. *See, e.g.*, *Roberts v. U.S. Jaycees*, 468 U.S. 609 (1984) (Minnesota state anti-discrimination law); *Saratoga Water Servs., Inc. v. Saratoga Cnty. Water Auth.*, 83 N.Y.2d 205 (1994) (water supply statute); *41 Kew Gardens Rd. Associates v. Tyburski*, 70 N.Y.2d 325, 336 (1987) (Admin. Code § 11–208.1, a statute relating to real estate tax); *Groome Res. Ltd., L.L.C. v. Parish of Jefferson*, 234 F.3d 192, 217 (5th Cir. 2000) (Fair Housing Amendments Act); *Seniors Civil Liberties Ass'n v. Kemp,* 965 F.2d 1030, 1036 (11th Cir.1992) (same).

II. THE PBA AND THE SBA HAVE FAILED TO MEET THEIR HEIGHTENED BURDEN TO ESTABLISH THAT THE COMMUNITY SAFETY ACT IS VOID FOR VAGUENESS.

The unions argue that the Community Safety Act is unconstitutionally vague on its face because of asserted ambiguity in certain terms used in its anti-discrimination provision, in the defense it provides to officers, and in its allowance of private civil suits. Given the standards governing vagueness challenges to civil statutes, none of these arguments warrants voiding the ordinance.

Starting with the CSA's threshold prohibition, the unions focus on the language prohibiting law-enforcement action where a prohibited characteristic (such as race) is "the determinative factor." *See* PBA Brief at 22; SBA Brief at 20-21. Yet the unions fail to cite a single case suggesting, much less holding, that such language is impermissibly vague, which is no surprise since this formulation actually is more precise than the language routinely used in anti-discrimination statutes. *See* Civil Rights Act of April 9, 1866, 14 Stat. 27, 18 U.S.C. § 242 ("on account of"); Title VI of the Civil Rights Act of 1964, Pub. L. 88-352, 78 Stat. 252, 42

U.S.C. § 2000d ("on the ground of"); New York State Human Rights Law, N.Y. Exec. Law § 296 ("because of"); the New York City Human Rights Law, Admin. Code § 8-107 ("because of").[2]

Moreover, the meaning of this formulation is self-evident. If a police officer stops a person because he is black while not stopping a similarly situated white person, race is "the determinative factor" that is impermissible unless there is a nondiscriminatory justification (such as a suspect description that rules out the white person because the suspect is described as black). This is standard anti-discrimination language.[3]

Next, the unions argue that the defense provided to officers sued for acts of intentional discrimination is impermissibly vague. *See* PBA Brief at 23; SBA Brief at 21. That provision negates any cause of action if "the law enforcement action at issue was justified by a factor(s) unrelated to unlawful discrimination." Labor Law 71, § 2, codified at 14-151(c)(1)(ii). This familiar burden-shifting framework is common to anti-discrimination statutes, and New York courts apply it under the State Human Rights Law, the City Human Rights Law, and federal anti-

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[2] Indeed, even if the CSA contained criminal sanctions, this language would pose no impermissible vagueness issues. *See Screws v. United States*, 325 U.S. 91, 98 (1945) (plurality opinion) (rejecting vagueness challenge to 18 U.S.C. § 242 ("Whoever, under color of any law . . . willfully subjects any person . . . to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States . . . on account of such person being an alien, or by reason of his color, or race . . . shall be fined under this title or imprisoned . . . ."). The *Screws* Court acknowledged the statute was extremely open-ended but construed it to require a culpable mental state, thus obviating any due process concerns. *Screws*, 325 U.S. at 101-104. Unlike that statute, the CSA needs no saving judicial construction, as it contains an explicit intentionality requirement. Local Law 71, § 2, codified at 14-151(c)(1)(ii).

[3] The unions also wrench the commonly understood term "law enforcement action" from its context to claim that it, too, is vague. PBA Brief at 22-23; SBA Brief at 20. The PBA claims that the CSA "appears to impose liability" on an officer who "offer[s] to escort an individual sleeping outdoors to a homeless shelter." PBA Brief at 23. This outrageous-sounding interpretation directly conflicts with the plain text of the statute, which only covers "law enforcement action *against* an individual." Local Law 71, § 2 (emphasis added).

discrimination statutes such as the Fair Housing Act. *See, e.g.*, *Hirschmann v. Hassapoyannes*, 859 N.Y.S.2d 150, 152 (1st Dep't. 2008) (holding, under all three laws, that once plaintiff "had established a prima facie case of discrimination[,] [t]he burden then shifted to the [defendant] to offer a legitimate, nondiscriminatory reason" for the conduct at issue); *see also New York Urban League, Inc. v. State of N.Y.*, 71 F.3d 1031, 1036 (2d Cir. 1995) (holding, under Title VI, as under Title VII, that once plaintiff makes *prima facie* showing, burden shifts to defendant "to demonstrate the existence of a substantial legitimate justification for allegedly discriminatory practice") (internal quotation omitted). Again, the unions identify no cases that so much as suggest that this formulation is unconstitutionally vague. Moreover, the meaning of this formulation is straightforward. Taking the stop hypothesized above, a valid suspect description would make the law-enforcement action "justified by a factor(s) unrelated to unlawful discrimination."

Finally, the unions claim that Local Law 71 creates "[t]he potential for arbitrary and discriminatory enforcement," PBA Brief at 25, SBA at 21, because the decision to commence an action rests with putatively aggrieved individuals. This complaint confuses commencing an action—something private litigants do under myriad anti-discrimination statutes, none of which the unions cite as having been struck as vague—with *enforcing* a statute, a role the PBA ultimately acknowledges lies with "the courts and the Commission on Human Rights [as] the final arbiters." PBA Brief at 26. And neither union identifies any case holding or suggesting that the ability of plaintiffs to bring suit renders an anti-discrimination provision unconstitutionally vague.

CONCLUSION

For all the foregoing reasons and for the reasons set out in the New York City Council's brief, *amicus curiae* New York Civil Liberties Union urges the Court to reject the due process challenge to the Community Safety Act.

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APPENDIX

§ 14–151 **Bias-based Profiling Prohibited.**

a. Definitions. As used in this section, the following terms have the following meanings:

1. "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.
2. "Law enforcement officer" means (i) a peace officer or police officer as defined in the Criminal Procedure Law who is employed by the city of New York; or (ii) a special patrolman appointed by the police commissioner pursuant to section 14–106 of the administrative code.
3. The terms "national origin," "gender," "disability," "sexual orientation," and "alienage or citizenship status" shall have the same meaning as in section 8–102 of the administrative code.
4. "Housing status" means the character of an individual's residence or lack thereof, whether publicly or privately owned, whether on a temporary or permanent basis, and shall include but not be limited to:
   (i) an individual's ownership status with regard to the individual's residence;
   (ii) the status of having or not having a fixed residence;
   (iii) an individual's use of publicly assisted housing;
   (iv) an individual's use of the shelter system; and
   (v) an individual's actual or perceived homelessness.

b. Prohibition.

1. Every member of the police department or other law enforcement officer shall be prohibited from engaging in bias-based profiling.
2. The department shall be prohibited from engaging in bias-based profiling.

c. Private Right of Action

1. A claim of bias-based profiling is established under this section when an individual brings an action demonstrating that:
   (i) the governmental body has engaged in intentional bias-based profiling of one or more individuals and the governmental body fails to prove that such bias-based profiling (A) is necessary to achieve a compelling governmental interest and (B) was narrowly tailored to achieve that compelling governmental interest; or
   (ii) 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.
2. A claim of bias-based profiling is also established under this section when:
   (i) a policy or practice within the police department or a group of policies or practices within the police department regarding the initiation of law enforcement action has had a disparate impact on the subjects of law enforcement action on the

basis of characteristics delineated in paragraph 1 of subdivision a of this section, such that the policy or practice on the subjects of law enforcement action has the effect of bias-based profiling; and

(ii) The police department fails to plead and prove as an affirmative defense that each such policy or practice bears a significant relationship to advancing a significant law enforcement objective or does not contribute to the disparate impact; provided, however, that if such person who may bring an action demonstrates that a group of policies or practices results in a disparate impact, such person shall not be required to demonstrate which specific policies or practices within the group results in such disparate impact; provided further, that a policy or practice or group of policies or practices demonstrated to result in a disparate impact shall be unlawful where such person who may bring an action produces substantial evidence that an alternative policy or practice with less disparate impact is available and the police department fails to prove that such alternative policy or practice would not serve the law enforcement objective as well.

(iii) For purposes of claims brought pursuant to this paragraph, the mere existence of a statistical imbalance between the demographic composition of the subjects of the challenged law enforcement action and the general population is not alone sufficient to establish a prima facie case of disparate impact violation unless the general population is shown to be the relevant pool for comparison, the imbalance is shown to be statistically significant and there is an identifiable policy or practice or group of policies or practices that allegedly causes the imbalance.

d. Enforcement

1. An individual subject to bias-based profiling as defined in paragraph 1 of subdivision a of this section may file a complaint with the New York City Commission on Human Rights, pursuant to Title 8 of the Administrative Code of the City of New York, or may bring a civil action against (i) any governmental body that employs any law enforcement officer who has engaged, is engaging, or continues to engage in bias-based profiling, (ii) any law enforcement officer who has engaged, is engaging, or continues to engage in bias-based profiling, and (iii) the police department where it has engaged, is engaging, or continues to engage in bias-based profiling or policies or practices that have the effect of bias-based profiling.
2. The remedy in any civil action or administrative proceeding undertaken pursuant to this section shall be limited to injunctive and declaratory relief.
3. In any action or proceeding to enforce this section, the court 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.

e. Preservation of rights. This section shall be in addition to all rights, procedures, and remedies available under the United States Constitution, Section 1983 of Title 42 of the United States Code, the Constitution of the State of New York and all other federal law, state law, law of the City of New York or the New York City Administrative Code, and all pre-existing civil remedies, including monetary damages, created by statute, ordinance, regulation or common law.