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

MEMORANDUM OF LAW IN OPPOSITION TO THE MOTIONS FOR A PRELIMINARY INJUNCTION OF THE SERGEANTS BENEVOLENT ASSOCIATION ("SBA") AND THE PATROLMEN'S BENEVOLENT ASSOCIATION OF THE CITY OF NEW YORK, INC. ("PBA") AND IN SUPPORT OF DEFENDANT CITY COUNCIL'S CROSS-MOTIONS TO DISMISS THE COMPLAINTS OF THE SBA AND THE PBA

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Defendant Council of the City of New York ("City Council" or "Council") submits this consolidated memorandum of law and the accompanying Affirmation of Andrew G. Celli, Jr., with exhibits thereto, in opposition to the motions for a preliminary injunction filed by the Intervenor-Plaintiff Sergeants Benevolent Association ("SBA") (Index No. 451543/2013) and Plaintiff The Patrolmen's Benevolent Association of the City of New York, Inc. ("PBA") (Index No. 653550/2013), and in support of the Council's cross-motions to dismiss the Complaint of the SBA (Index No. 451543/2013) and the Second Amended Complaint of the PBA (Index No. 653550/2013) pursuant to CPLR 3211(a)(7). The Council previously filed a motion to dismiss the Complaint of the Mayor of the City of New York (the "Mayor") on October 30, 2013 (Index No. 451543/2013) and that motion has been consolidated with these motions for purposes of argument.

PRELIMINARY STATEMENT

Local Law 71, an ordinance that creates a private cause of action for persons subjected to bias-based police practices, is the latest in a long line of legislative actions by the City of New York (the "City") in two areas that the State Constitution's home rule provision firmly commits to local control: civil rights and local police practices. In 1991, the City Council passed the New York City Human Rights Law, groundbreaking civil rights legislation that prohibits discrimination on the basis of race, sex, religion, and other categories in public accommodations, employment, housing, and other arenas. In 1993, the Council passed a law that prohibits bias-related harassment. Most critically, in 2004, with the full support of then-Mayor Bloomberg and the New York City Police Department ("NYPD"), the City Council passed an ordinance expressly banning racial and ethnic profiling by the NYPD (the "Profiling Ban"). The Profiling Ban codified the then-existing NYPD policy and Mayoral orders, and it

proscribed police activity that had long been recognized as violative of the state and federal constitutions.

The Profiling Ban did not end profiling, however. In the years since the ban's enactment, the Council has continued to investigate allegations that certain practices of the NYPD—including the aggressive use of "stop and frisk"—target and disproportionately impact racial, ethnic, and other minority groups protected by the City Human Rights Law. In August 2013, a federal court ruled that the NYPD's stop and frisk practices amount to "indirect racial profiling" in violation of the United States Constitution. In the wake of that finding, and after extensive and robust hearings on the matter, the Council enacted Local Law 71, an act aimed at strengthening the Profiling Ban and other civil rights laws already on the books. Much like the City Human Rights Law, Local Law 71 gives the victims of police profiling a private right of action enforceable either in court or through the filing of an administrative complaint with the New York City Human Rights Commission. Local Law 71 also expands the definition of impermissible police profiling to include profiling based on age, gender, sexual orientation, disability, or housing status. Victims who prove their claims—either by showing intentional discrimination or a disparate impact—can obtain injunctive and declaratory relief, but not money damages.

Shortly after the law went into effect, the NYPD issued a roll call message to all commands—known as a FINEST Message—concerning the scope and impact of Local Law 71. The FINEST message stated that Local Law 71 is entirely consistent with the NYPD's existing internal policies, including Operations Order 11 of 2002, which bans racial and ethnic profiling. The FINEST message also confirmed that Local Law 71 would effect no change in day-to-day

law enforcement operations, and that individual officers could expect defense and indemnification if sued under the law.

In this case, the SBA and PBA (collectively, the "Unions"), anticipating that the then-incoming Mayor, Bill de Blasio, might not pursue Mayor Bloomberg's challenge to Local Law 71, have brought suit alleging that Local Law 71 violates the State Constitution. First, the unions claim that, by enacting the New York Criminal Procedure Law ("NYCPL"), the State Legislature evinced its intent to "occupy the field" of police practices, and that Local Law 71 conflicts with the NYCPL, such that the local legislation is preempted. Second, they assert that Local Law 71 is unconstitutionally vague. The Unions are wrong on both points. Local Law 71, like the Profiling Ban and the New York City Human Rights Law ("HRL") before it, is not preempted because it falls far outside of the "field" in which the NYCPL operates, and neither prohibits activities permitted by the NYCPL nor permits activities that the NYCPL prohibits. Moreover, far from being unconstitutionally vague, Local Law 71 is substantively identical to provisions of the HRL, the NYPD's internal orders, and the Patrol Guide that have been operationalized by the NYPD and interpreted by the courts for at least a decade.

More fundamentally, the SBA and PBA lack standing even to mount this challenge, as their purported interests here do not constitute an injury-in-fact to any of their members. The core harms the Unions allege take the form of hearsay allegations of confusion and uncertainty among police officers, and a supposed "chilling effect" upon those officers' law enforcement activity. These allegations are speculative at best and do not constitute injury-in-fact. The FINEST Message's clear direction to the uniformed force that Local Law 71 is consistent with existing police practices and policies, and its confirmation that officers will be defended and indemnified in cases arising under it, put to rest any inchoate concerns in the ranks.

Nor can the Unions establish standing through allegations of a negative effect upon community safety. Even if such allegations could be proved, which they cannot, it is well-established that injuries to the public at large do not confer standing. For these reasons, the Unions' complaints must be dismissed. *See infra* Argument II.

On the merits, the Unions fare no better. *First*, there is nothing in the NYCPL that explicitly or implicitly preempts local civil rights laws or laws regulating local law enforcement. Aptly named the New York Criminal Procedure Law, the NYCPL "exclusively" governs the *procedure* that applies in *criminal* cases—i.e., what courts, police, and prosecutors must do to ensure that an arrest, prosecution, and sentencing of an individual for a crime in New York is proper and lawful—and other aspects of criminal *procedure* that may not be part of a particular case, such as grand jury empaneling and search warrants. N.Y. Crim. Proc. Law §§ 1.10(1)(a), (b). It does not touch upon matters of *civil* litigation—such as a private cause of action for injunctive or declaratory relief—at all. Thus, while NYCPL § 140.50 codifies the constitutional standard—reasonable suspicion—that must be met in order for a police officer to stop an individual when investigating conduct that could lead to an arrest for a crime, it says nothing about whether such an individual might later have a civil claim for false arrest or an improper stop, much less one for racial discrimination.

In this State, under our State's constitutional home-rule provisions, localities are afforded wide latitude to enact local civil rights protections and to regulate the activities of local police agencies and officers. This is why the City Council, the Mayor, and the NYPD itself have long supervised local police agencies through legislation, Mayoral Orders, NYPD orders, and the Patrol Guide, all without objection. Local Law 71 falls squarely within this tradition: it codifies federal and state civil rights law, provides for enforcement of the Profiling Ban through civil

litigation and an administrative process, and identifies additional impermissible bases for "stop and frisk" and other police activity. While the NYCPL seeks to ensure that the criminal justice system operates in a uniform manner statewide and conforms to federal and state constitutional norms, Local Law 71 does not address criminal matters *at all*. Neither the NYCPL's statutory scheme nor its legislative history evinces an intent on the part of the State to preempt the fields of civil rights or local police practices. *See infra* Argument III.A.

Second, Local Law 71 poses no conflict with the NYCPL because it does not alter the standards applicable to "stop and frisk" encounters under § 140.50. The constitutional touchstone for a lawful stop, as articulated in the statute and numerous federal and state cases, is "reasonable suspicion" that an individual is engaged in criminal activity, judged objectively by the totality of the circumstances. That standard remains in full force and effect. What Local Law 71 provides is a complement to the "reasonable suspicion" standard from the perspective of civil rights law—i.e., that "reasonable suspicion" is *not* met, and a stop is *un*lawful, when race, gender, age, national origin, or another protected factor is used as the "determinative factor" for the stop to the exclusion of a connection or link to suspected criminal activity. The Profiling Ban and the NYPD's internal anti-profiling policy already articulate this uncontroversial proposition. Read consistently with the NYCPL and these other long-extant provisions, Local Law 71 effects no substantive change in the applicable standard for stop encounters. And, as the FINEST message confirms, pedigree information, including race and other categories, may still be used in law enforcement activity for appropriate purposes. *See infra* Argument III.B.

Third, the PBA and SBA's facial challenge to the constitutionality of Local Law 71 on vagueness grounds fails at the first step because the Unions cannot show that Local Law 71 will be unconstitutional in *all* of its applications. The terms that the Unions assert are

"vague"—including the "determinative factor," "law enforcement activity," and even "unlawful discrimination"—are taken directly from the NYPD's internal policies and the HRL and have been employed and applied by working police officers, and by the courts, for years. Nor, as the Unions argue, does Local Law 71 create a risk of arbitrary and discriminatory application by allowing aggrieved individuals, rather than neutral officials, to file suit. If the mere existence of a private cause of action under a statute were enough to render a statute vague, no remedial legislation affording individuals a private cause of action could pass constitutional muster. *See infra* Argument IV.

Fourth, the Unions have not met the high standard necessary to obtain a preliminary injunction. For the same reasons they cannot establish standing, the Unions cannot show irreparable harm arising out of Local Law 71. Indeed, the facts as established in 2013 prove the opposite of what the Unions allege. It is undisputed that, as the NYPD's use of stop and frisk has decreased, so too have the rates for murder and other serious crimes. Further, in balancing the equities and weighing the public interest, the City Council's determination that the public interest would be served through Local Law 71 should be afforded greater weight than the two hearsay affidavits submitted by the SBA and PBA. The Council's extensive legislative hearings, which included testimony from all relevant stakeholders, is a far better articulation of the "public interest" than the conclusory, one-sided and partisan affidavits submitted by the Unions. *See* Argument V.

In passing Local Law 71, the City Council exercised its constitutionally-delegated authority to protect the individual rights of New Yorkers and to control and direct its police force to better serve the public. The City Council's motions to dismiss the complaints of the Unions

and Mayor Bloomberg must be granted, and the Unions' motions for a preliminary injunction must be denied.

FACTS

I. BACKGROUND AND LEGISLATIVE HISTORY OF LOCAL LAW 71

Local Law 71 is an amendment to Local Law 30 of 2004, the Profiling Ban, an ordinance passed by the City Council, signed by the Mayor, and supported by the leadership of the NYPD. *See* Local Law 71 of 2013 (enacted Aug. 22, 2013), Ex. A; Local Law 30 of 2004 (enacted July 12, 2004) ("Local Law 30"), Ex. B.[1] Accordingly, any discussion of Local Law 71, its creation of a private cause of action, and its expansion of the definition of "profiling" must begin with the Profiling Ban.

In a city where approximately 65% of the population is non-white, it should come as no surprise that City government has long been concerned with how the NYPD's practices and crime prevention strategies impact members of such minority groups.[2] In that context, in 2004, the City enacted Local Law 30, the Profiling Ban, which prohibits "racial and ethnic profiling" by law enforcement officers. *See* Local Law 30 § 1, Ex. B. Local Law 30 defines racial and ethnic profiling as any act that relies on "race, ethnicity, religion or national origin as *the determinative factor* in initiating law enforcement action" against a person, rather than the person's behavior or other information, or circumstances linking a person of a particular race,

[1] All exhibits are attached to the Affirmation of Andrew G. Celli, Jr., dated January 10, 2014. The City Council has contacted the Law Department for the City of New York, which represents not only the Mayor and the City of New York as parties in these cases, but also the NYPD employees that may have personal knowledge of facts relevant to the issues set forth in this case. The Law Department has been unable to provide the City Council with access to speak to members of the NYPD; therefore, the City Council reserves the right to request the Court's leave to file supplemental evidence regarding the factual issues raised by the Unions and in this memorandum of law.

[2] The background facts set forth here are principally drawn from the legislative history of the City Council's local laws. Courts routinely look to legislative history in considering a motion to dismiss, as well as to other undisputable evidence. *See infra* Argument I.B.

ethnicity, religion, or national origin to suspected unlawful activity. *Id.* (citing Admin. Code § 14-151(a)(1) (2004)) (emphasis added).

Arising from deep city-wide concern about significant disparities in the number of police stops of blacks and Latinos, as compared to whites—a concern that dated back at least to 1999, when the New York State Attorney General's Office documented these disparities in a lengthy report[3]—the 2004 Profiling ban was a product of collaboration and compromise among the Mayor, the Council, and the NYPD. Notably, the NYPD actually requested that the phrase "the determinative factor" be used in the final legislation, so that the statute would line up with the NYPD's internal anti-profiling policy, Operations Order No. 11 of March 2002. *See* Operations Order No. 11 of March 2002 ("Operations Order No. 11"), Ex. S; Tr. of the Minutes of the Comm. on Public Safety (Feb. 23, 2004) ("Hearing Tr. 2/23/04"), at 10:6-8; 12:4-11; 27:12-16, Ex. P.[4] The City Council accommodated that request. *Compare* Intro. 0142-2004 Version (*) (Feb. 4. 2004), Ex. E *with* Intro. 0142-2004 Version B (Feb. 4, 2004), Ex. F. The Mayor and the NYPD supported the final version of the legislation and recommended approval

[3] S*ee* N.Y. State Office of the Att'y Gen., The New York City Police Department's "Stop & Frisk" Practices, Executive Summary (Dec. 1999), Ex. C (available at http://www.oag.state.ny.us/sites/default/files/pdfs/bureaus/civil_rights/stp_frsk.pdf); City Council, Committee on Public Safety, Comm. Report on Int. No. 142 at 4-7 (Feb. 23, 2004) (the "2004 Committee Report"), Ex. D.

[4] The NYPD's Operations Order 11, issued on March 13, 2002, contains several provisions relevant to this litigation. First, Operations Order 11 prohibits "the use of racial profiling in law enforcement actions." *See* Operations Order 11, Ex. S. Racial profiling is defined as "the use of race, color, ethnicity or national origin as the determinative factor for initiating police action." *Id.* It goes on to clarify that

> All police-initiated enforcement action, including but not limited to arrest, stop and question, and motor vehicle stop, will be based on the standards required by the Fourth Amendment of the U.S. Constitution or other applicable law. Officers must be able to articulate the factors which led 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 action is prohibited.

Id. Finally, the Order reminds police officers that the profiling ban "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." *Id.*

of the bill. Hearing Tr. 2/23/04 at 7:5-8:3, Ex. P; Tr. of the Minutes of the Committee on Public Safety (June 22, 2004) at 19:22-24, Ex. H. Mayor Bloomberg signed the Profiling Ban into law on July 12, 2004 without objection or reservation.

Neither the Mayor nor the NYPD has ever suggested—during the legislative process in 2003-2004, or to this day—that the Profiling Ban is preempted by state law. This is not surprising since the Profiling Ban essentially codified Operations Order No. 11, which prohibited racial profiling by order of the Police Commissioner. *See* 2004 Committee Report at 3, Ex. D; Tr. of the Minutes of the Committee on Public Safety (June 2, 2004) ("Hearing Tr. 6/2/04") at 4:6-8, Ex. G. Operations Order No. 11 is one of the NYPD's many internal operational orders and directives, such as the Patrol Guide, that govern the conduct of its officers. The Mayor too exerts local control over the NYPD, including the power to set NYPD policy, hire the Police Commissioner, and prohibit certain types of interaction between police officers and individuals. *See, e.g.*, City Charter § 1-6; Executive Order No. 41 of 2003 (prohibiting police officers from asking individuals about their immigration status except in certain circumstances), Ex. T.

Because it seeks to protect minority groups from discriminatory practices, the Profiling Ban is part of the City's long tradition of legislating in the area of civil rights. In 1991, the City Council passed Local Law 39, amending the New York City Human Rights Law ("HRL") and prohibiting discrimination on the bases of race, color, creed, age, national origin, gender, disability, marital status, sexual orientation or citizenship status in employment, public accommodations, housing, and other areas. *See* Local Law 39 of 1991 § 1 (enacted June 18, 1991), Ex. I. Local Law 39 provides individuals with a private cause of action to redress

discrimination in housing, employment and public accommodations—just as Local Law 71 does, in the context of police misconduct. *Id.* § 2.[5]

A. Local Law 71's Amendments to the 2004 Profiling Ban

On August 22, 2013, the City Council enacted Local Law 71, Introduction ("Intro.") 1080. *See* PBA Compl. ¶¶ 23-24, Ex. U; SBA Compl. ¶¶ 28-29, Ex. V. Local Law 71's central feature is that it creates a limited private cause of action for individuals subjected to improper "bias-based" police profiling. In defining "bias-based profiling," the City Council identified certain factors—race, national origin, ethnicity, age, alienage or citizenship status, gender, sexual orientation, disability, and housing status—that would be impermissible for police to use as a "determinative factor" in initiating law enforcement activity against an individual. *See* Local Law 71 § 2 (amending Admin. Code § 14-151(a)(1)), Ex. A.[6] Local Law 71 fully incorporates the 2004 Profiling Ban's categories of impermissible factors, namely race, ethnicity, religion, and national origin.

Local Law 71 amends section 14-151 of the Administrative Code 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. An affected individual can file either an administrative complaint with the New York City Commission on Human Rights, or a civil action in state Supreme Court. Individual law enforcement officers and police agencies are

[5] Though Local Law 11 of 1993 exempts police officers from civil actions for acts of discriminatory harassment prohibited by the HRL, *see* Local Law 11 of 1993 § 11 (enacted Jan. 22, 1993), Ex. J, this exemption was created in recognition of the jurisdiction of the then-newly created Civilian Complaint Review Board to investigate such conduct. *See* Tr. of Public Hearing on Local Laws of Jan. 22, 1993 at 5:16-22, Ex. K. The exemption was a policy decision and was not due to a concern that the City lacked the power to apply the HRL to police officers. Indeed, this exemption is limited to allegations of discriminatory harassment under Chapter 6 of the HRL, and not to any other types of discrimination defined in Chapter 1. *See* Admin. Code § 8-502(e). Further, Local Law 71 expressly provides that this exemption in the HRL "in no way affect[s] rights or causes of action created by" Local Law 71. Local Law 71 § 3 (amending Admin. Code § 8-502(f)), Ex. A.

[6] Some of these terms, such as "national origin," "gender," "disability," "sexual orientation," and "alienage or citizenship status," use the same definitions as the ones provided in the City Human Rights Law. Local Law 71 § (a)(3), Ex. A.

both subject to the law. *Id.* § (d)(1). Local Law 71 does not create a civil claim for monetary relief; instead, its remedies are limited to injunctive and declaratory relief, attorneys' fees, and expert fees. *Id.* § (d)(2), (3).[7]

B. Legislative History of Local Law 71

Local Law 71 was enacted as part of a package of three oversight bills aimed at addressing concerns about the stop and frisk activities of the NYPD. The legislative process began in 2012 with the introduction of Intro. 800—the predecessor bill to Local Law 71. *See* Comm. on Public Safety of the N.Y.C. Council, Report on Intro. 799, Intro. 800, Intro. 801, and Intro 881 at 3 (Oct. 10, 2012) (hereinafter "2012 Committee Report"), Ex. L.[8]

Local Law 71 was designed to address the problem of bias-based profiling, while preserving the gains attained by proactive and law-abiding police officers. In Local Law 71's "Declaration of Legislative Intent and Findings," the Council found that bias-based policing "endangers New York City's long tradition of serving as a welcoming place for people of all backgrounds, . . . [that] the people of the City of New York are in great debt to the hard work and

[7] Importantly, Local Law 71 also sets forth the bases upon which individual police officers, or an entire police agency, may *defend* against claims of improper profiling, whether of the "intentional" kind or arising from a "disparate impact." A governmental body may defend against an intentional profiling claim by proving that the profiling was: (i) necessary to achieve a compelling governmental interest, and (ii) narrowly tailored to achieve that interest. Local Law 71 § (c)(1)(i), Ex. A. And an individual law enforcement officer may defend against an intentional profiling allegation by proving that the action was justified by a factor or factors unrelated to unlawful discrimination. *Id.* § (c)(1)(ii). As to disparate impact claims, which may be established when a policy or practice "regarding the initiation of law enforcement action" has a disparate impact on persons within protected classes such that the policy or practice has the *effect* of bias-based profiling, a police agency may blunt claims by proving 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." *Id.* § (c)(2)(ii). However, under Local Law 71, the police department's policy or practice would still be unlawful if the aggrieved individual "produces substantial evidence that an alternative policy or practice with a 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." *Id.* Local Law 71's disparate impact provisions are substantively identical to those contained in the City HRL. *See* Admin. Code 14-151(c)(2)(iii); NYCHRL 8-107(17).

[8] Even prior to 2012, as part of its Charter-mandated obligation to regularly review the activities of City agencies, *see* N.Y.C. City Charter at § 29(a)(2), the City Council held numerous hearings regarding the NYPD's activities and police practices, including hearings on the NYPD undercover and special operations training, internal and external monitoring of the NYPD, NYPD community policing policies and practices, and stop and frisk practices. *Id.* at 3 n.1.

dedication of police officers in their daily duties . . . [and that] the name and reputation of these officers should not be tarnished by the actions of those who would commit discriminatory practices." Local Law 71 at 1, Ex. A. The City Council expressed its "deep concern" regarding "the impact of NYPD practices on various communities in New York City," including the department's reliance on stop and frisk "tactics," noting that stops had drastically increased between 2002, when the NYPD made approximately 97,000 stops, and 2010, when the NYPD made more than 601,000 stops. *Id.*; 2012 Committee Report at 4, 12-13, Ex. L. The Council found that "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. Moreover, stop-and-frisk practices have not increased public safety, as year-after-year nearly 90 percent of individuals stopped are neither arrested nor issued a summons." Local Law 71 at 1-2, Ex. A; 2012 Committee Report at 13-14 (citing Public Safety Comm. of the N.Y.C. Council, *Oversight: Analysis of the New York City Police Department Stop and Frisk Encounters* (Apr. 30, 2009)), Ex. L. The City Council's intent in enacting Local Law 71 was to "create a safer city for all New Yorkers." Local Law 71 at 1, Ex. A. "Bias-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." *Id.* at 2.

Before passing what became Local Law 71, the City Council considered the views expressed in written and oral testimony at numerous hearings. *See* Intro. 800 Hearing Testimony (Oct. 10, 2012) ("Intro. 800 Written Testimony"), Ex. M; Tr. of the Minutes of the Committee on Public Safety (Oct. 10, 2012) ("Hearing Tr. 10/10/12"), Ex. N; Tr. of the Minutes

of the City Council Stated Meeting (June 26, 2013), Ex. O. At these hearings, community organizations, legal services providers, advocates, and individuals subjected to stop and frisk testified about the importance of local legislation.[9]

In live, public testimony, Michael Best, Counselor to the Mayor, presented the Bloomberg Administration's position in opposition to the bill. Mr. Best argued that "stop and frisk" is an effective law enforcement tool, that it is part of "the city's proactive policing policies," and that the proposed legislation would curtail its effective use. Hearing Tr. 10/10/12 at 34:24-35:3, 100:15-24, Ex. N; *accord id.* at 108:20-109:3. While Mr. Best claimed that the NYCPL would "preempt" Intro. 800, he also acknowledged that no preemption objection had been lodged to the Profiling Ban, which contained very similar restrictions and which had been supported and signed by Mayor Bloomberg in 2004. Intro. 800 Written Testimony at 3-4, Ex. M; Hearing Tr. 10/10/12 at 47:12-24, Ex. N. In response to questions, Mr. Best admitted that the Profiling Ban was "entirely consistent" with federal and state law prohibiting racial profiling. *Id.* at 49:13-50:2. The conflicts between Intro. 800 and the NYCPL identified by Mr. Best were all eliminated in the final version of the law that was enacted as Local Law 71. *See* Hearing Tr. 10/10/12 at 79:9-19, 80:8-22 (language prohibiting NYPD from relying on protected characteristics "to any degree," later eliminated by City Council); *id.* at 119:5-9 (language providing standing to organizations to initiate a private cause of action, later eliminated by City Council), Ex. N.

[9] For example, The Legal Aid Society ("LAS") testified that "people of color, lesbian, gay, bisexual, transgender or gender non-conforming communities are being aggressively stopped and frisked when they do such ordinary things as take out the garbage or go for a walk." Intro. 800 Written Testimony at 27, Ex. M. The NYPD's use of stop and frisk damaged "police-community relations in ways that undermine public safety," waste officers' time, and did not achieve the NYPD's purpose of keeping communities safe. Intro. 800 Written Testimony at 27, 67. The testimony urged passage of Intro. 800 as a way to curb abuses associated with the NYPD's manner of carrying out stop and frisk, such as strengthening the already-existing racial profiling law and including an enforcement mechanism. Intro. 800 Written Testimony at 67-72.

In 2013, Intro 800 was re-introduced as Intro. 1080, and passed by the City Council on June 26, 2013. On July 23, 2013, the Mayor vetoed the legislation. On August 22, 2013, the City Council enacted Local Law 71 into law over the Mayor's veto. Local Law 71 became effective on November 20, 2013. *See* Local Law 71 § 5, Ex. A.

II. NYPD FINEST MESSAGE

On November 22, 2013, the NYPD issued a FINEST Message to all commands describing the scope and impact of Local Law 71. *See* NYPD, FINEST Message re: Local Law 71 "Bias-Based Profiling" Bill (Nov. 22, 2013) (the "FINEST Message"), Ex. W. The FINEST Message confirmed both that (1) Local Law 71, like the Profiling Ban long on the books, was consistent with existing NYPD policy and the NYPD Patrol Guide, and (2) Local Law 71's prohibition on certain demographic characteristics serving as "the determinative factor" in initiating law enforcement action was consistent with NYPD policy and training. *Id.* at 1, 3. The FINEST Message further directed officers to consider an individual's behavior or other information that links a person to suspected unlawful activity before initiating police enforcement action toward that individual. *Id.*

Of course, an officer may consider "demographic factors" in deciding whether to initiate law enforcement action consistent with Local Law 71, so long as such factors do not serve as the "determinative factor" in taking action. The FINEST Message reinforces this basic point. *Id.* It also recites that, to avoid or defeat claims that an enforcement action was taken on the basis of a protected characteristic, officers need only adhere to federal and state constitutional standards that require probable cause for an arrest or the issuance of a summons, or reasonable suspicion for a stop. *Id.* at 3. As an example, the FINEST Message states that, where a complainant describes a crime suspect by race, sex, clothing description, and direction of travel, an officer would not violate Local Law 71 by subjecting a person with these physical

characteristics and traveling in the same direction to law enforcement action, because the suspect's race would not serve as "the determinative factor." *Id.* at 1. In contrast, it would be unlawful under Local Law 71 to stop or otherwise initiate law enforcement action toward an individual if the "deciding factor" was that his or her race matched the race of the person described by the complainant. *Id.*

Finally, the FINEST Message assures officers that "an officer acting within the scope of his/her employment and the discharge of his/her duties will be represented in actions stemming from this law just as the officer would be in any other civil law suit." *Id.* at 2.[10]

III. NEW YORK CRIMINAL PROCEDURE LAW (THE "NYCPL")

The NYCPL governs the process by which the State investigates and prosecutes criminal cases. "Apply[ing] exclusively to . . . all criminal actions and proceedings commenced upon or after the effective date thereof and all appeals and other post-judgment proceedings relating or attaching thereto," N.Y. Crim. Proc. Law § 1.10(1)(a), the NYCPL is comprised of: Title A (title and definitions); Title B (the Criminal Courts); Title C (jurisdiction, speedy trials, double jeopardy, evidence, grants of immunity); Title D (rules of evidence, standards of proof); Titles H through K (preliminary proceedings and prosecutions in local criminal courts and superior courts); Title L (sentencing); Title M (post-judgment proceedings); Title P through S (securing attendance of defendants and witnesses, security testimony, evidence at trial); Title T (search warrants, surveillance, suppression of evidence); and Title U (special proceedings). N.Y. Crim. Proc. Law §§ 1.00-730.70.

[10] The NYPD is required to defend police officers in civil actions related to actions taken in the scope of their employment and to indemnify officers for settlements or judgments related to such cases. *See* N.Y. Gen. Mun. Law § 50-j(3), k(3); N.Y. Pub. Off. L. § 18(3). A recent empirical study showed that during the period studied (2006 to 2011), *no* New York City officer paid punitive damages and that in only 34 instances out of 6,113 cases were officers required to pay compensatory damages. Joanna Schwartz, Police Indemnification, 89 N.Y.U. L. Rev. __ (forthcoming) at 86, 90-91, *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2297534. In those cases where the officers paid compensatory damages, the officer was usually accused of egregious intentional misconduct such as sexual and physical assault or falsifying evidence. *Id*. at 88-89.

Section 140.50 of the NYCPL is located within Title H, which relates to preliminary proceedings in local criminal courts. In addition to addressing the commencement of actions in local criminal courts, Title H also covers warrants, summonses, arrests without a warrant, and other methods for issuing criminal charges against an individual. In this context, Section 140.50, which is entitled "Temporary questioning of persons in public places; search for weapons," states as follows: "*In addition to the authority provided by this article for making an arrest without a warrant*, a police officer may stop a person in a public place . . . when he reasonably suspects that such person is committing, has committed, or is about to commit" a felony or misdemeanor, and may ask the person's name, address and explanation of his conduct. N.Y. Crim. Proc. Law § 140.50(1) (emphasis added). Section 140.50 is a codification of the United States Supreme Court's constitutional ruling in *Terry v. Ohio*, 392 U.S. 1 (1968).

IV. THE COMPLAINTS

In a Complaint filed on September 3, 2013 (Index No. 451543/2013), then-Mayor Bloomberg alleged that Local Law 71 is preempted by the NYCPL. Mayor's Compl. ¶ 1, Dkt. 1. The Mayor's Complaint alleged that, as a comprehensive and detailed regulatory scheme that fully occupies the field of criminal procedure, the NYCPL preempts Local Law 71 because Local Law 71 impinges on the "field" occupied by the NYPCL. *Id.* at ¶ 2. The Complaint does not allege or identify any conflict between the provisions of Local Law 71 and the NYCPL. The Council filed a motion to dismiss the Mayor's Complaint on October 30, 2013, Dkt. 18, and that motion has been consolidated with the motions herein for purposes of argument, Dkt. 61.

The SBA moved to intervene as a plaintiff in the Mayor's action, and upon consent of the parties, the SBA's motion was granted on November 29, 2013. *See* Dkt. 43. The SBA thereafter filed its Complaint on December 3, 2013 (the "SBA Compl.") (Index No. 451543/2013, the same as the Mayor's Complaint), Ex. V. The SBA Complaint alleges that

Local Law 71 is preempted by the NYCPL both as a matter of field and conflict preemption. *Id.* ¶¶ 4, 56. The SBA Complaint also alleges that Local Law 71 violates the Due Process Clause of the New York State Constitution because it is unconstitutionally vague. *Id.* at ¶¶ 1, 5.

The PBA's Second Amended Complaint (the "PBA Compl.") (Index No. 653550/2013), filed on November 13, 2013, also asserts that Local Law 71 is preempted by the NYCPL under field and conflict preemption doctrines and that it is unconstitutionally vague. PBA Compl. ¶¶ 2, 4, Ex. U.

V. MOTIONS FOR A PRELIMINARY INJUNCTION

In November and December 2013 respectively, the PBA and the SBA filed motions for a preliminary injunction. In the PBA's memorandum of law ("PBA Mot."), Dkt. 25 in Index No. 653550/2013, and the SBA's memorandum of law ("SBA Mot."), Dkt. 46 in Index No. 451543/2013, in support of their preliminary injunction motions, the Unions contend that a preliminary injunction should be issued because of the high likelihood of success on the merits of their field and conflict preemption challenges and vagueness challenge to Local Law 71. In addition, the Unions assert that irreparable harm will occur if no injunction issues because of the "chilling effect" Local Law 71 will have upon police officers' activities, their reputation, and community safety, and that the balance of the equities favors an injunction. On December 17, 2013, then-Mayor Bloomberg filed a memorandum of law ("Mayor Br.") in support of the preliminary injunction motions on the sole issue of the likelihood of success on the merits of the field preemption challenge to Local Law 71. *See* Dkt. 44 in Index No. 653550/2013; Dkt. 60 in Index No. 451543/2013. The Court has requested Mayor de Blasio's position regarding the preliminary injunction motions; thus, the return date on the motions has been set for February 18, 2014.

ARGUMENT

The Complaints filed by the PBA and the SBA should be dismissed because Local Law 71 is neither preempted by the NYCPL nor is it unconstitutionally vague. For the same reasons, and more, the Unions' motions for a preliminary injunction must be denied.

I. STANDARDS OF REVIEW

A. Constitutional Challenge to Duly-Enacted Legislation

Like all duly-enacted legislation, Local Law 71 enjoys an "exceedingly strong presumption of constitutionality." *Lighthouse Shores, Inc. v. Town of Islip,* 41 N.Y.2d 7, 11 (1976); *Metro. Package Store Ass'n, Inc. v. Koch*, 89 A.D.2d 317, 324 (3d Dep't 1982) (same). In order to prevail, a plaintiff must show "beyond a reasonable doubt" that the statute violates constitutional norms, and, even then, "only as a last resort should courts strike down [the] legislation." *Lighthouse Shores*, 41 N.Y.2d at 11; *see also Metro. Package*, 89 A.D.2d at 324 ("heavy burden" to establish invalidity); *Council for Owner Occupied Hous., Inc. v. Koch*, 119 Misc. 2d 241, 243 (Sup. Ct. N.Y. Cnty. 1983), *aff'd,* 61 N.Y.2d 942 (1984) ("a court should strike down a statute only . . . where the invalidity of the statute is apparent on its face").

Local Law 71 must be evaluated in the context of the state constitutional home rule provision that confers "broad police power upon local government relating to the welfare of its citizens." *N.Y. State Club Ass'n v. City of New York,* 69 N.Y.2d 211, 217 (1987). The New York Constitution reserves to local governments broad powers to adopt laws that relate to the "government, protection, order, conduct, safety, health and well-being of persons or property therein" as well as the "powers, duties, qualifications, number, mode of selection and removal, terms of office, compensation, hours of work, protection, welfare and safety of its officers and employees." N.Y. Const. Art. IX §§ 2(c)(1), (10). To implement Article IX, the Legislature enacted the Municipal Home Rule Law, which provides municipalities the power to enact local

laws for the "government, protection, order, conduct, safety, health and well-being" of individuals. N.Y. Mun. Home Rule Law § 10(1)(ii)(a)(12); *see also DJL Rest. Corp. v. City of New York*, 96 N.Y.2d 91, 94 (2001). Where, as here, a municipality has been delegated police power by the State, "its ordinances are entitled to the same presumption of constitutionality as are those of the State itself." *People v. Judiz*, 38 N.Y.2d 529, 531 (1976).

B. Motion to Dismiss

Pursuant to CPLR 3211(a)(7), "[a] party may move for judgment dismissing one or more causes of action asserted against him on the ground that . . . the pleading fails to state a cause of action." When considering such a motion, the court generally deems the factual allegations of the complaint to be true, but such allegations "may properly be negated by affidavits and documentary evidence." *Wilhelmina Models, Inc. v. Fleisher*, 19 A.D.3d 267, 269, (1st Dep't 2005) (relying on the draft of a commitment letter); *Fenster v. Smith*, 39 A.D.3d 231, 231 (1st Dep't 2007) ("The court properly considered Smith's affidavit since factual allegations presumed to be true on a CPLR 3211 motion may properly be negated by affidavits and documentary evidence"). Courts also routinely look to legislative history in considering a motion to dismiss. *See, e.g., Goshen v. Mut. Life Ins. Co. of New York*, 98 N.Y.2d 314, 325 (2002); *Burns Jackson Miller Summit & Spitzer v. Lindner*, 59 N.Y.2d 314, 328 (1983).

"[F]actual claims flatly contradicted by the record are not entitled to any such consideration." *Riback v. Margulis*, 43 A.D.3d 1023, 1023 (2d Dep't 2007). A complaint must be dismissed where the plaintiff fails to allege facts that "fit within any cognizable legal theory," *Leon v. Martinez*, 84 N.Y.2d 83, 87-88 (1994), or if extrinsic evidence establishes "beyond substantial question" that the proponent of the pleading does not have a cause of action. *Biondi v. Beekman Hill House Apt. Corp.*, 257 A.D.2d 76, 81 (1st Dep't 1999) (citations omitted) (relying on settlement agreement and letter); *see also M & B Joint Venture, Inc. v. Laurus*

Master Fund, Ltd., 49 A.D.3d 258, 260 (1st Dep't 2008). Thus, on a CPLR 3211(a)(7) motion where evidence has been submitted, the question for the Court is "whether the proponent of the pleading *has* a cause of action, not whether he or she has stated one." *Thoubboron v. Convery*, 306 A.D.2d 521, 522 (2d Dep't 2003) (emphasis added).[11]

C. Motion for Preliminary Injunction

Preliminary injunctive relief should be granted "with great caution and only when required by imperative, urgent, or grave necessity, and upon the clearest evidence, as where the undisputed facts are such that without an injunction order a trial will be futile." *Xerox Corp. v. Neises*, 31 A.D.2d 195, 197 (1st Dep't 1968). A party seeking a preliminary injunction bears the heavy burden of proving (1) the likelihood of its ultimate success on the merits; (2) that it will suffer irreparable injury if the relief is not granted; and (3) that, on balance, the equities favor granting preliminary injunctive relief. *State of New York v. Fine*, 72 N.Y.2d 967, 967 (1988).

II. THE SBA AND PBA LACK STANDING TO CHALLENGE LOCAL LAW 71

Both the PBA and SBA lack standing to challenge Local Law 71 because they cannot demonstrate an "injury-in-fact" to any one of their members. Local legislation—the Profiling Ban—and internal NYPD Operations Order No. 11 and the Patrol Guide have long forbidden New York City police officers from engaging in racial and ethnic profiling; Local Law 71 is entirely consistent with these restrictions. More to the point, the Unions' assertions that (1) police officers are confused and uncertain of how to carry out their law enforcement activity; (2) fearful of the potential for civil liability; (3) concerned by the absence of defense or

[11] *Accord Zurich Depository Corp. v. Iron Mtn. Info. Mgt., Inc.*, 61 A.D.3d 750, 751 (2d Dep't 2009) ("If the documentary proof disproves an essential allegation of the complaint, dismissal pursuant to CPLR 3211(a)(7) is warranted even if the allegations, standing alone, could withstand a motion to dismiss for failure to state a cause of action.") (citation omitted); *Peter F. Gaito Architecture, LLC v. Simone Dev. Corp.*, 46 A.D.3d 530, 530 (2d Dep't 2007) (dismissing claims because an "unsigned draft agreement disproved the plaintiff's allegation that" the parties had reached an oral agreement).

indemnification protection for officers; and (4) fearful of an adverse impact upon reputation or career as a result of a lawsuit, are speculative at best. At worst, it is affirmatively disproved by the existence and dissemination of the FINEST Message, which directly contradicts the Unions' affidavits on each of these points. As for the Unions' generalized allegations of potential harm to the public or community at large, these cannot confer standing upon the Unions as a matter of law.

Standing is a threshold issue. *New York State Ass'n of Nurse Anesthesists v. Novello*, 2 N.Y.3d 207, 211 (2004). Before being allowed to prosecute a claim, a plaintiff must show that s/he suffered an "injury in fact," meaning that s/he will suffer *actual harm* as a result of the challenged governmental action. *Id.* The injury may not be merely speculative or conjectural. *Id.* It must be direct and individualized, i.e., an "injury that is in some way different from that of the public at large." *Soc'y of Plastics Indus., Inc. v. Cnty. of Suffolk*, 77 N.Y.2d 761, 774 (1991).[12] For constitutional challenges to statutes, a plaintiff must demonstrate "actual or threatened injury to a protected right," and that they have been "aggrieved by the unconstitutional feature of the statute." *Matter of Daniel C.*, 99 A.D.2d 35, 42 (2d Dep't 1984) (injury in fact required for constitutional challenges).

Further, for organizational or associational standing, the plaintiff organization must establish that (1) one or more of its members has standing to sue; (2) the interests it asserts are germane to its purposes in order to satisfy the court that it is an appropriate representative of those interests; and (3) neither the asserted claim nor the appropriate relief requires the

[12] A plaintiff must also show that the asserted injury falls within "the zone of interests or concerns sought to be promoted or protected by the statutory provision under which the agency has acted." *Novello*, 2 N.Y.3d at 211; *see also Colella v. Bd. of Assessors of Cnty. of Nassau*, 95 N.Y.2d 401, 409-10 (2000). The zone of interests requirement ensures that a group or individual's interests that are "only marginally related to, or even inconsistent with the purposes of the statute cannot use the courts to further their own purposes at the expense of the statutory purposes." *Transactive Corp. v. N.Y. State Dep't of Social Svcs.*, 92 N.Y.2d 579, 587 (1998).

participation of its individual members. *See Soc'y of Plastics Industry*, 77 N.Y.2d at 775. The party seeking review bears the burden of establishing standing to raise its claim. *Id.* at 769.

The SBA and PBA lack standing to challenge Local Law 71 because neither organization can establish the first element of organizational standing, *i.e.*, that at least one of its members individually has standing to sue based on an "injury-in-fact." Courts routinely reject standing based upon allegations—like the ones advanced by the Unions here—of future harm, which are necessarily speculative and entirely contingent on events that may never occur. This is particularly the case as to claims involving the future application of new rules of conduct. In *Novello*, the Court of Appeals rejected an organization's standing on behalf of nurse anesthetists to use "speculation about the future course the Guidelines might take" as the basis for an injury in fact. 2 N.Y.3d at 214. The alleged harm—that the nurses would effectively be prohibited from performing anesthesia—required "two layers of speculation": that the guidelines would be rigorously enforced and that, as such, they would effectively harm the nurses. *Id.* at 212-13; *see also Matter of Niagara Cnty. v. Power Auth. of State of N.Y.*, 82 A.D.3d 1597, 1599 (4th Dep't 2011) (rejecting plaintiff residents' challenge to power authority's payments to state on basis because hypothesized harm—future electricity rate increase—was "mere possibility" insufficient to establish standing); *Caruso v. State of New York*, 188 A.D.2d 874, 875 (3d Dep't 1992) (organization lacked standing to challenge statute providing for award program for volunteer firefighters where none of its members had adopted an award program that could cause an injury in fact); *Uhlfelder v. Weinshall*, 10 Misc.3d 151, 166 (Sup. Ct. N.Y. Cnty. 2005) (organization lacked standing to challenge provision of local law imposing fees on new licensees of newsstands on behalf of members who were "merely considering" applications for new licenses, as any harm posed by law was "speculative" as to those members).

To be sure, the Unions here *allege* a myriad of harms—but, at the outset, none are supported by competent evidence. The PBA and SBA claim that Local Law 71 has led to "confusion and uncertainty" among officers, causing them "to limit or cease" their use of stop and frisk and automobile searches. PBA Mot. 8, 28-29. Based on this alleged confusion and uncertainty, the Unions assert, officer safety may be threatened due to officers "second-guessing themselves" before or during a stop-and-frisk or an automobile search, or because fewer stops "will leave guns and other deadly instruments in the hands of criminals." PBA Mot., Alejandro Aff. ¶¶ 41, 42 (Dkt. 24, Index No. 653550/2013); SBA Mot., Mullins Aff. ¶¶ 28, 29 (Dkt. 48, Index No. 451543/2013). These allegations are premised solely upon on the affidavits of Joseph Alejandro and Edward Mullins, two union officials. Neither cites their own concerns, nor could they, since neither is actively engaged in day-to-day patrol activities. While Officer Alejandro's sole basis of "knowledge" is an unspecified number of "conversations" with an unspecified number of unnamed officers, Alejandro Aff. ¶¶ 37-40, Sergeant Mullins offers no basis for his assertions at all. Neither affidavit addresses the content or impact of the FINEST Message. Far from serving as "competent admissible non-speculative evidence," the affidavits actually confirm that the Unions' application rests upon "mere assertions" of harm and "potential injuries," not an injury-in-fact. *See Long Island Gasoline Retailers Ass'n, Inc. v. Paterson*, 27 Misc.3d 914, 919 (Sup. Ct. Nassau Cnty. 2010).

More to the point, given the clarity of the FINEST Message, *i.e.*, that Local Law 71 is entirely consistent with existing NYPD policy and the Patrol Guide, and that NYPD officers will be defended and indemnified in any action, as they routinely are now, there is simply no basis to believe that the existence of Local Law 71 will alter the behavior of the 34,000 uniformed officers of the NYPD in a manner that threatens their personal safety, or that

fear of injunctive lawsuits will causes officers to stop doing their job. The hearsay affidavits of Union officials cannot fill this yawning evidentiary gap. The PBA's claim that individual police officers will be reluctant to *frisk* individuals who may be carrying weapons because officers will "reasonably conclude that individuals who are frisked will be more likely than others" to file suit under Local Law 71 is a wild overreach. PBA Compl. ¶¶ 50, 51, Ex. U. Allegations regarding which types of individuals are more or less likely to file suit under Local Law 71 are mere conjecture, particularly in absence of an empirical survey to support the claim. *See N.Y. State Ass'n of Criminal Defense Lawyers v. Kaye*, 269 A.D.2d 14, 17 (3d Dep't 2000) (survey suggesting that pool of attorneys qualified to handle capital cases *might* be diminished by reduced compensation rates was not only self-serving, but also failed to provide empirical evidence establishing more than simply a tenuous and ephemeral harm). More practically, the suggestion that officers would rather risk facing an armed individual than frisk someone and face a potential lawsuit is preposterous.

Second, the Unions' claims that the City will not provide defense or indemnification to officers sued, and that the result will be the issuance of an injunction and contempt sanctions for failing to comply with that injunction, all rest upon layers of speculation. PBA Mot. 8, 29-30. In order for these harms to constitute injury-in-fact, this court must assume, *first*, that an individual stopped will both have a cognizable claim and will find and retain counsel and sue under Local Law 71; *second*, that an officer will be found to have engaged in intentional bias-based profiling; *third*, that an injunction will be issued against the officer; *fourth*, that the officer will be found to have violated the injunction; and *fifth*, that a court will impose sanctions upon an officer. *See Novello*, 2 N.Y.3d at 213; *Police Benevolent Ass'n of N.Y. State Troopers, Inc. v. Div. of N.Y. State Police*, 43 A.D.3d 125, 130-32 (3d Dep't 2007) (alleged

injury in fact arising from several layers of speculation that future events would occur, none of which were imminent and reasonably certain, insufficient to establish standing). This potential chain of possible events is simply too attenuated to support standing. It is well-settled that the possibility of pecuniary harm resulting from sanctions does not constitute injury-in-fact because it is a "remote and consequential result" rather than a direct adverse impact. *See Waldbaum, Inc. v. Fin. Adm'r of City of New York*, 74 N.Y.2d 128, 133 (1989). Here, the "risk" to officers is more remote still: numerous intervening events stand between the existence of Local Law 71 and the "harm" that the Unions say they fear.

Moreover, if the "risk" identified is one of suit and liability, the FINEST Message dispenses with that risk, making absolutely clear to the uniformed rank and file that police officers will be defended and indemnified for lawsuits under Local Law 71, just as they are today for claims under other statutes. In addition, as the FINEST Message confirms, compliance with Local Law 71 is functionally the same as compliance with existing NYPD policy banning profiling. If a police officer complies with NYPD policy, it is likely that the police officer will comply with Local Law 71, and the City will not have the necessary grounds—*i.e.*, a violation of NYPD policy—to decline defense and indemnification. *See* N.Y. Gen. Mun. Law §§ 50-k(2), (3) (providing for defense and indemnification in a civil action arising out of any alleged act or omission which occurred when a city employee was acting within the scope of his public employment, in the discharge of his duties, and was not in violation of any rule or regulation of his agency). Any pecuniary harm to officers from a lack of defense and indemnification is, at this time, a "remote and consequential result." *Waldbaum*, 74 N.Y.2d at 133.

Third, since no police officer has yet been found to engage in bias-based profiling, any "attendant stigmatization" and "permanent[] damage [to] an officer's professional

and personal reputation" through a mere "allegation" of bias-based profiling is purely "ephemeral." *See* PBA Mot. 9-10; *Soc'y of Plastics Industry*, 77 N.Y.2d at 777. Further, although the PBA characterizes officers' employment and potential for promotion as "certain" to be adversely affected by such an allegation, PBA Mot. at 31, Officer Alejandro states only that the impact upon *promotion* is "likely" and cites no examples. *See* Alejandro Aff. ¶ 55. Reputational harm, like any other harm, must be actual, not speculative, in order for it to constitute an injury-in-fact. *See New York State Psychiatric Ass'n, Inc. v. Mills*, 29 A.D.3d 1058, 1059 (3d Dep't 2006). Here, there is no proof that such harm would occur, much less that it already has.

Finally, the Unions cannot establish standing based on the assertion that "the City and its citizens will be injured by Local Law 71." PBA Mot. 6; PBA Compl. ¶¶ 48, 49, Ex. U; SBA Compl. ¶ 44, Ex. V. First, allegations of injury to the public at large are *per se* insufficient to confer standing upon the Unions to challenge Local Law 71. *See Colella*, 95 N.Y.2d at 410 (injury in fact must consist of "special damage, different in kind and degree from community generally"); *Soc'y of Plastics Industry*, 77 N.Y.2d at 786; *Transactive Corp. v. N.Y. State Dep't of Social Svcs.*, 92 N.Y.2d 579, 587 (1998). Second, as discussed above, any supposed "chilling effect" upon individual officer's actions is conjectural and speculative in any event, especially given the FINEST Message. The FINEST Message specifically provides that a physical description of a suspect can be taken into account in deciding whether to initiate law enforcement activity, as long an impermissible factor *alone* does not serve as "the determinative factor."[13] Third, neither the SBA nor the PBA has so much alleged that the NYPD's deployment

[13] The Unions' "parade of horribles" they claim would occur under Local Law 71 dissipates under scrutiny. Officers would still be allowed to approach homeless individuals during cold weather and escort them to shelters as it is hard to see how such activity would serve as "law enforcement activity" subject to Local Law 71. As for approaching children who appear to be engaging in illegal or illicit activity, age would not serve as "the determinative factor,"

or tactical policies among the boroughs, and within particular neighborhoods, has been changed because of Local Law 71, and how such changes, if any, would harm the community. Indeed, NYPD data shows that, even as stop and frisks declined as much as 80% in 2013, so too has the homicide rate and the overall crime rate.[14] Local Law 71's supposed deleterious effects upon community safety are "ephemeral allegations of harm" insufficient to establish an actual injury. *Soc'y of Plastics Industry*, 77 N.Y.2d at 777. Third, matters of "public concern," such as the alleged harm to policing activity and community cannot confer standing upon the SBA and PBA. *See id.* at 769 ("That an issue may be one of 'vital public concern' does not entitle a party to standing.").

Ultimately, the Unions' complaints about Local Law 71 amount to policy disagreements with the City Council about the degree to which civilians should be allowed to enforce civil rights protections privately, in the courts or an administrative process, against police officers and agencies. Such disagreements are not the stuff of standing. In *Rudder v. Pataki*, 93 N.Y.2d 273 (1999), the Court of Appeals rejected the standing of a social services organization whose claimed interest—that the delivery of social work services would be more effective if an administrative rule was amended—as insufficient to allege an "injury in fact." *Id.* at 280. The court recognized the plaintiff's "assertions are little more than an attempt to legislate through the courts." *Id.* Here too, the SBA's and PBA's lawsuits are founded upon claims that public safety would be better served without Local Law 71's private cause of action. Such a

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given that the children are, according to this example, also engaging in illegal activity that draws the attention of a police officer.

[14] *See* Colleen Long, *NYC Police Stop-And-Frisk Numbers Down Sharply*, Associated Press (Nov. 18, 2013); Tamer El-Ghobashy & Michael Howard Saul, *New York Police Use of Stop-and-Frisk Drops*, Wall Street Journal (May 6, 2013).

grievance is "generalized to the degree" that it constitutes a "broad policy complaint[] . . . best left to the elected branches." *Id.*

Finally, even by the Unions' own lights, if they have any standing at all, it is derivative of the standing of their members—individual police officers. Plainly, they have no standing to challenge the portions of Local Law 71 that apply exclusively to the New York City Police Department itself, or to the City of New York. It is well-settled that litigants are prohibited from raising the legal rights of another, *Soc'y of Plastics Industry*, 77 N.Y.2d at 774, and that standing to raise some claims does not mean that a litigant has standing to raise all claims. *See Matter of Schulz v. N.Y. State Exec.*, 92 N.Y.2d 1, 11 (1998) (although voters had standing to challenge constitutionality of a bond act under one provision of State Constitution, they lacked standing under a different provision of Constitution that was intended to address deficiencies in Legislature's awareness of an act). "Constitutional litigants are not ordinarily entitled to raise the unconstitutionality of a statute as it is applied to others." *Matter of Daniel C.*, 99 A.D.2d at 42. Because the PBA and SBA cannot prosecute the rights on behalf of the NYPD or the City itself, the Unions have no standing to challenge Local Law 71's private right of action against a "governmental body" or "police department," *see* Admin. Code. §§ 14-151(c)(1), (d)(1)(i), (d)(1)(iii), including those based upon the "disparate impact" of the police department's policies and practices, *see* Admin. Code § 14-151(c)(2). This distinction is significant because Local Law 71 contains a severability provision stating that, even if a provision of the bill is held to be invalid, the remainder of the law shall be separately and fully effective. *See* Local Law 71 § 4, Ex. A; *see also* Admin. Code § 1-105 (general severability provision).

III. LOCAL LAW 71 IS NOT PREEMPTED BY THE NYCPL

Local Law 71 is not preempted by the NYCPL, under either variant of the relevant doctrine: field preemption or conflict preemption. Field preemption occurs when a local government seeks to legislate in a "field" for which the Legislature has assumed full regulatory authority, while conflict preemption occurs when a local government adopts a law that conflicts with a State statute. *DJL Rest. Corp.*, 96 N.Y.2d at 95. Here, there can be no "field preemption" of Local Law 71, because NYCPL and Local Law 71 do not operate in the same "field." Whereas NYCPL focuses narrowly and "exclusively" on ensuring the existence of uniform procedures in the state criminal court system and by which individuals can be arrested and prosecuted for crimes statewide, Local Law 71 involves the protection of civil rights and the regulation of local law enforcement agencies and officers—subject areas long committed to local authority by the State Constitution. Accordingly, Local Law 71 is not preempted.

Likewise, "conflict preemption" cannot invalidate Local Law 71 because Local Law 71 and the NYCPL do not conflict; they are in fact consistent and complementary. Although both touch upon one particular type of law enforcement activity—stop and frisk—Local Law 71 does not prohibit what the NYCPL allows, nor allow what the NYCPL prohibits. The NYCPL requires that "reasonable suspicion" serve as the basis of a lawful stop, and Local Law 71 articulates what the NYCPL leaves unsaid, but what is undisputedly true: that race, national origin, or other factors unrelated in themselves to criminal activity cannot, consistent with the Constitution and relevant law, constitute "reasonable suspicion," and thus cannot lawfully be used as "the determinative factor" for making a stop.

A. The NYCPL Does Not Occupy the Field of Civil Rights or Regulation of Local Law Enforcement

1. Field Preemption Is Rare

"State preemption" applies when "a local government legislates in a field for which the State Legislature has assumed full regulatory responsibility," and has "articulate[d] its intent to occupy" to the exclusion of other sovereigns. *DJL Rest. Corp.*, 96 N.Y.2d at 95. Field preemption is strictly limited to "situations where the [State Legislature's] intention is *clearly* to preclude the enactment of varying local laws" in a particular subject area. *Judiz*, 38 N.Y.2d at 532 (emphasis added). Merely having "some connection with a subject upon which a State statute exists" is not sufficient. *People v. N.Y. Trap Rock Corp.*, 57 N.Y.2d 371, 378 (1982); *see also Monroe-Livingston Sanitary Landfill, Inc. v. Town of Caledonia*, 51 N.Y.2d 679, 683 (1980) ("the mere fact that the State deals with a subject" does not "automatically pre-empt[]" local legislation). Only where the State's purpose is "to *exclude the possibility* of varying local legislation" can a local law "be said to be inconsistent with a State law because it prohibits something which the State law would consider acceptable." *Monroe-Livingston*, 51 N.Y.2d at 683 (emphasis added). Any broader interpretation of preemption principles would render the "the power of local governments to regulate . . . . illusory." *Judiz*, 38 N.Y.2d at 532 (internal quotations omitted).

The burden of demonstrating the State's "unmistakable desire" to preclude local legislation in a particular arena rests with those who challenge the local legislation, here the Police Unions. *New York Trap Rock Corp.*, 57 N.Y.2d at 378. The touchstone for the State's intent is found in "the legislative history of the statute as well as the existing regulatory machinery of the State." *Council for Owner Occupied Hous.*, 119 Misc. 2d at 244.

The Unions assert that, by enacting the NYCPL as a "comprehensive and detailed regulatory scheme," the State Legislature evinced its intent to preempt the field of criminal procedure, of which, they claim, Local Law 71 is a part. SBA Compl. ¶ 4, Ex. V; PBA Compl. ¶ 3, Ex. U; *see DJL Rest. Corp.*, 96 N.Y.2d at 95. Courts, however, have construed field preemption narrowly: the mere fact that state law touches upon a particular issue in the context of a comprehensive statutory scheme does not demonstrate an intent to preclude a municipality from exercising its home rule power and addressing that issue. *See Zorn v. Howe*, 276 A.D.2d 51, 54 (3d Dep't 2000); *see also Jancyn Mfg. Corp. v. Suffolk Cnty.*, 71 N.Y.2d 91, 99 (1987). And, even where a field has been preempted by a statutory scheme, local laws of general application and laws aimed at a local government's legitimate concerns will not be preempted if they "only incidentally infringe[]" on the relevant field. *DJL Rest. Corp.*, 96 N.Y.2d at 97.

2. The NYCPL Does Not Occupy the Field of Civil Rights or Regulation of Local Police Conduct

The NYCPL does not express the State's "unmistakable desire" to preclude legislation such as Local Law 71, because Local Law 71 is concerned with "fields" quite different than, and separate from, criminal procedure law. Whereas the NYCPL establishes uniform rules for "criminal proceedings," Local Law 71 concerns civil rights and local police matters, both subject areas historically regulated by localities.

As a threshold matter, it is well settled that localities have the power to enact local legislation to protect the civil rights of their inhabitants. From New York City's expansive Human Right Law, to the many local laws around the state that provide similar protections, local governments routinely and appropriately legislate to protect the civil rights of those within their borders, all without objection or controversy. *See* Buffalo City Code Ch. 154 (2013) (protecting individuals from bias and discrimination on the basis of their race, creed, color, national origin,

gender, disability, age, or sexual orientation); Ithaca Mun. Code § 215-3 (2013) (prohibiting discrimination on basis of age, creed, color, disability, ethnicity, familial status, gender, height, immigration or citizenship status, marital status, national origin, race, religion, sex, sexual orientation, socioeconomic status, or weight); Rochester City Code Ch. 63 (2013) (prohibiting discrimination on bases of age, race, creed, color, national origin, gender, sexual orientation, disability or marital status); Westchester Local Laws Ch. 700 (2013) (prohibiting discrimination on basis of race, color, religion, ethnicity, creed, age, national origin, alienage or citizenship status, familial status, gender, marital status, sexual orientation, and disability).

Indeed, preemption objections to these types of statutes are unheard of, and appropriately so; the Court of Appeals has long recognized the peculiarly *local* interest in an expansive definition of civil rights. *See N.Y. State Club Ass'n v. City of New York*, 69 N.Y.2d 211, 219 (1987) (noting lack of legislative design to preempt area of local antidiscrimination legislation). In New York City, that right is embedded in the City Charter itself: Section 28(b) affords the City Council the express power to provide private causes of action to enforce the civil rights recognized under local law. *See* N.Y.C. City Charter § 28(b). Local Law 71, like the Human Rights Law and the Profiling Ban before it, is just the latest manifestation of this long and robust tradition.

Likewise, in New York State, there is a long and unbroken tradition of local government control over law enforcement officers and agencies. Consistent with their authority under the State Constitution to fix the "power [and] duties . . . of [their] officers and employees," municipalities across New York State have enacted a variety of laws relating to the procedures used by police when interacting with individuals. *See* N.Y. Const. Art. IX § 2(c)(1); N.Y. Mun. Home Rule Law § 10(1)(ii)(a)(1); *see also* Jamestown City Code § 65-2 (1962)

(provides City Council power to order the Chief of Police and his force to perform acts or services contrary to regulations established by the Chief of Police); Norwich City Charter, Title VIII §155 (1914) (empowers Common Council to enact, adopt, modify, and repeal rules and regulations for the management of police officers); Port Jervis City Charter § C7-14 (1974) (allows Common Council to make bylaws, rules, and regulations that govern the police force).

New York City is no exception. Many local laws regulate the practices of the NYPD, and none have faced preemption challenges. Former Mayor Bloomberg signed into law the Profiling Ban, the 2004 City Council bill outlawing racial and ethnic profiling by the police, *see* Admin. Code § 14-151 (2004), and there are local ordinances requiring police to convey arrestees before criminal court judges "without delay," Admin. Code § 14-130, and requiring women arrestees to be processed by female NYPD staff members, Admin. Code § 14-132. In addition, NYPD internal orders, such as the one banning racial profiling, and Mayoral orders, such as the one limiting the ability of police officers to inquire about immigration status, have long governed the conduct of the NYPD and its officers, again without controversy. *See* 2004 Committee Report at 3-7, Ex. D; Hearing Tr. 6/2/04 at 4:6-8, Ex. G; Hearing Tr. 2/23/04 at 28:24-29:6, Ex. P. The City Council routinely reviews NYPD activity as part of its Charter-mandated obligation. *See supra* n.8 (describing oversight hearings of NYPD activities).

New York City is not alone in managing its police through local legislation; many municipalities across the state do the same, all without controversy. Westchester County and the City of Buffalo have both enacted local laws prohibiting police profiling on the basis of race and other characteristics. *See* Westchester County Admin. Code § 273.02 (2001); Buffalo City Code §154-11 (1999, amended 2002). In the City of Rensselaer, police officers are required to identify themselves when requested. *See* Rensselaer City Code § 43-12(30) (1976). Rensselaer police

are also subject to local laws regulating the use of force and weapons. *See* Rensselaer City Code §§ 43-20 to §43-22 (1990).

On the other side of the equation, as its name suggests, the NYCPL is explicitly limited to *criminal procedure* law, *i.e.*, the procedures that must be followed in order to arrest, prosecute, and sentence an individual for a crime in New York. The NYCPL's own statement of applicability could not be more clear: the statute "appl[ies] *exclusively* to . . . all criminal actions and proceedings commenced upon or after the effective date thereof and all appeals and other post-judgment proceedings relating or attaching thereto" and other "matters of criminal *procedure*" not connected to a particular case. N.Y. Crim. Proc. Law §§ 1.10(1)(a), (b) (emphasis added). While the Unions and the Mayor argue that the word "exclusively" signifies the Legislature's express intent to preempt local law, that word serves a different purpose. By using the word "exclusively," the State Legislature clearly conveyed that the NYCPL does not apply to, or preempt, civil or special proceedings that may touch on *related*—even closely related—issues. For example, certain special proceedings in the CPLR, such as habeas corpus, mandamus, and prohibition, "intimately affect criminal actions, proceedings and procedure," but nevertheless they are governed by the CPLR, and not the NYCPL. *See* Preiser, Practice Commentary, McKinney's Cons. Laws of N.Y., Book 11A, Crim. Proc. Law § 1.10 (2013). And by stating that the NYCPL applies to "matters of criminal procedure" not constituting a particular action or case, the Legislature had in mind matters such as search warrants and grand jury empaneling. *Id.* The NYCPL makes no mention at all of local regulation of police practices, let alone local anti-discrimination law, and Section 140.50 contains no exclusion for local articulation of related concepts. N.Y. Crim. Proc. Law § 140.50.

Given the foregoing, it is clear that, in regulating the field of criminal procedure, the State Legislature did not intend to preempt the quite-different fields of civil rights and local law enforcement. The origins of the NYCPL make this plainer still. In New York, the law of arrest and prosecution was initially codified in 1849, added to the Code of Criminal Procedure in 1881, and remained unchanged until 1958. *See People v. Roach*, 44 Misc.2d 40, 44 (Sup. Ct. Kings Cnty. 1964) *aff'd*, 26 A.D.2d 561 (1966). In 1961, the State Legislature created the Temporary Commission on the Revision of the Penal Law and Criminal Code (the "Commission"), whose charge was to propound "a code of rules and procedures relating to criminal and quasi-criminal actions and proceedings in or connected with the courts, departments and institutions of the state." *See* L. 1961, c. 346, Ex. X.[15] In 1970, in a shift away from the "distinctly archaic Code of Criminal Procedure," the Commission proposed the NYCPL, as a workable body of procedure accommodated to modern times. Memorandum of the Commission on Revision of the Penal Law and Criminal Code, New York State Legislative Annual 1970 (N.Y. Legis. Svc. 1970), Ex. Q. In approving the bill, the Governor noted that the NYCPL represented the State's "first comprehensive modernization of the *procedures* for the administration of criminal justice," and was aimed at creating "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 on Approval of L.1970, cc. 996, 997 (May 20, 1970), 2 N.Y. Sess. Laws 3140-41 (McKinney's 1970), Ex. R (emphasis added).

[15] Specifically, the Commission was concerned with making changes to "simplify and improve court procedure" in order to shorten the time spent between arrest and disposition in criminal cases, to "facilitate the processes of arraignment, indictment, trial and/or sentence," to "establish greater uniformity of procedure in the various criminal courts in the state," and to improve "existing trial procedures" regarding the determination of guilt, mental competency, and defenses. L. 1961, c. 346, Ex. X.

Thus, in enacting the NYCPL, the State Legislature's intent was to "update and modernize" the law of criminal procedure, and to create uniform rules around the prosecution of criminal cases; it was not intended to displace local regulation of civil rights or police practice. The NYCPL is "directed at a completely distinct activit[y]" from what Local 71 seeks to address, and as such was never intended to supplant the power of localities to regulate local law enforcement and to pass laws designed to combat discrimination. *DJL Restaurant Corp.*, 96 N.Y.2d at 96. Indeed, had the Legislature expressed an intent to limit local authority in these areas—which it did not—it would have run squarely into both the constitutional home rule provision, which gives localities power over their police, and more than 25 years of civil rights legislation at the local level. The cases cited by the Unions and the Mayor for the proposition that the NYCPL preempts the field of criminal procedure are exactly that—support for the proposition that the NYCPL may preempt local laws or court decisions that deal with the *procedures* applicable to criminal proceedings against individuals. *See People v. Douglass*, 60 N.Y.2d 194, 204 (1983) (courts could not dismiss misdemeanor complaint for "failure to prosecute" or "calendar control" where neither ground was listed in NYCPL 170.30's provisions on the dismissal of misdemeanor complaints); *People v. Beaudoin*, 102 A.D.2d 359, 366 (3d Dep't 1984) (grand juries possess no independent power to investigate criminal matters); *People v. Bell*, 132 Misc.2d 573, 575 (Sup. Ct. N.Y. Cnty. 1986) (NYCPL preempted local laws regarding statute of limitations applicable to misdemeanors). Local Law 71 is not such a law.

Even in cases where the Legislature has created a "comprehensive" statutory scheme, the Court of Appeals has interpreted the field preemption doctrine narrowly, and refused to find preemption where the local legislation impinged on the preempted field only incidentally, or merely touched upon related fields. In *DJL Restaurant Corp.*, the Court of Appeals

considered whether the State Alcoholic Beverage Control Law, which clearly preempts the field of sale and distribution of alcohol, would preclude a New York City zoning resolution that required adult establishments serving alcohol to be confined to particular zones. 96 N.Y.2d at 95-97. While acknowledging that the zoning ordinance starkly restricted the siting of establishments that sold alcoholic beverages, the Court of Appeals found that the ABC law did not preempt the ordinance because "enforcement [of the zoning law] only incidentally infringes on a preempted field." *Id.* at 97. Here too the NYCPL, while admittedly preempting laws relating to criminal procedure, cannot be said to preempt a civil rights law such as Local Law 71; the overlap between the two—with Local Law 71 establishing a private cause of action for violations of the "reasonable suspicion" standard that are grounded in discrimination—is only incidental, and only relates to "stops," a tiny aspect of the NYCPL's sweeping coverage.

Judiz presented even a closer case than *DJL Restaurant Corp.*, but came to the same conclusion. In *Judiz*, the Court of Appeals rejected a challenge to local law criminalizing the sale, possession, or use of a toy gun that imitated a real gun. The challengers claimed that the Legislature's extensive revision of the Penal Law—which occurred simultaneously with the enactment of the NYCPL—evinced an intent to occupy the field of crimes related to intentional, unlawful weapon possession. The Penal Law criminalized possession of weapons, including imitation guns, but additionally required, as an element of the crime, proof of intent to use the imitation gun. 38 N.Y.2d at 531. While noting that "State law evinces intent to cover, quite broadly, most of the possible categories of weapons" possessed with illegal intent, the Court upheld the local ordinance because it was aimed at a different category of conduct: the possession of imitation guns regardless of illegal intent. *Id.* at 532. The Court reached this conclusion based upon its concern that a capacious application of preemption doctrine would

swallow local authority whole. Preemption, the Court held, is limited to "situations where the intention is *clearly* to preclude the enactment of varying local laws," since otherwise the "power of local governments to regulate would be illusory." *Id.* (emphasis added).

Similarly, in *Jancyn Manufacturing Corp.*, 71 N.Y.2d at 91, the Court of Appeals addressed a field preemption challenge to a Suffolk County civil ordinance prohibiting the sale of certain sewage system cleaning additives. The plaintiffs argued that the Environmental Conservation Law ("ECL"), which also prohibited the sale and use of sewage cleaning system additives, preempted the local law because the Legislature "impliedly evinced its desire to preclude the possibility of local regulation of sewage system cleaners." *Id.* at 98. The Court rejected this claim, finding that, notwithstanding the Legislature's "quite expansive" legislative declaration of the state's policy to prevent pollution of water resources by regulating sewage system cleaners, "entirely absent is any desire for across-the-board uniformity for the protection of the Long Island water supply." *Id.* The mere fact that "State and local laws touch upon the same area," the court held, "is insufficient to support a determination that the State has preempted the entire field of regulation in a given area." *Id.* at 99.

The Unions and the Mayor describe the NYCPL as a "comprehensive and detailed set of laws" that include "not only legislation concerning the procedures followed in courts of law, but also . . . the procedures and standards law enforcement officers must apply and follow in performing their investigative and law enforcement work," SBA Compl. ¶ 17, Ex. V; PBA Compl. ¶ 25, Ex. U; Mayor Br. at 6-8. Just so: the NYCPL certainly regulates the procedures applicable in the criminal courts of this State, and the manner in which police behavior will affect whether and how a criminal case is prosecuted (e.g., whether evidence will be suppressed in a criminal proceeding because the police procedure used to obtain such evidence was

inconsistent with constitutional norms). But the NYCPL does not capture every aspect of police practice, or the implications of such practices for individuals' civil rights. Under the Unions' capacious theory of field preemption, the NYPD's internal Operations Order No. 11, the Mayor's executive orders governing the police interaction with individuals, and even the NYPD's own Patrol Guide, which sets forth rules on "the standards and procedures" of investigatory police work, all would be preempted, and no municipality could ban racial profiling. This overbroad concept of field preemption would dismantle both the unbroken tradition of local control of police, and a decade's worth of local laws banning racial profiling. Such an expansion of the preemption doctrine would be unprecedented, and violative of the principle of municipal home rule.

Just as the case law will not permit a finding of *express* legislative preemption on these facts, there is no support for the claim that the statutory and regulatory scheme imposed by the NYCPL evince an *implied* legislative intent to preempt civil rights laws or local control of police activities. The key point here is found in the very different purposes that the NYCPL and Local Law 71 were intended to serve. In the NYCPL, the Legislature sought to modernize substantive criminal procedure law by ensuring that accused individuals received uniform treatment in criminal proceedings statewide. Local Law 71, on the other hand, seeks to address a particular local condition—the perception that members of the NYPD engage in unlawful profiling—and Local Law 71 applies only in private civil cases for injunctive relief, not criminal cases brought by the State. While both the NYCPL and Local Law 71 confirm the constitutional standard of reasonable suspicion, they do so from entirely different perspectives, and with entirely different goals in mind. The Criminal Procedural Law concerns itself with uniform, constitutionally proper criminal proceedings; Local Law 71 aims to ensure that individuals in

New York City who encounter the police are treated fairly and in a non-discriminatory way, and that affected communities do not lose trust in the police.

In this sense, Local Law 71 and the NYCPL are complementary, rather than in conflict. A local law that neither supplants nor conflicts with a state law, but simply supplements it, will not be preempted. In *Zorn v. Howe*, the Appellate Division, Third Department acknowledged that the New York Real Property Actions and Proceedings Law is a comprehensive statutory scheme that, among many other things, establishes the permissible bases for evicting a tenant. 276 A.D.2d at 53. Nevertheless, the court held that a local law setting forth non-conflicting *additional* bases for eviction was not preempted. *Id.* at 53-54. Local Law 71 likewise poses no conflict with state law: while NYCPL § 140.50 sets forth the proper *affirmative* basis for a stop, for instance—"reasonable suspicion"—Local Law 71 articulates the necessarily *improper* bases for such enforcement activity—namely, the race, ethnicity, etc. of the affected person without more. Such "supplementary legislation" is wholly permissible and not preempted. *See People v. Ortiz*, 125 Misc.2d 318, 330 (Crim. Ct. Bx. Cnty. June 5, 1984) (though Penal Law's list of prohibited weapons is "comprehensive," Penal Law drafters "did not intend to prevent municipalities from enacting reasonable supplementary legislation"); *N.Y. State Club Ass'n*, 69 N.Y.2d at 221-22 (State Human Rights Law did not preempt City law providing definition of term left undefined in state law); *Council for Owner Occupied Hous.*, 119 Misc.2d at 245 (State laws regulating sale of real estate securities do not evidence Legislature's intent to occupy "entire multifaceted field of conversions").

Finally, courts refuse to apply preemption principles where a statutory scheme is "detailed," but not sufficiently detailed as to exclude the possibility of local legislation in the same arena. In *Hertz Corp. v. City of New York*, 80 N.Y.2d 565, 569 (1992), for example, the

Court of Appeals held that State laws regulating rental cars and motor vehicles were not "so broad in scope or so detailed" as to preempt local legislation that outlawed discriminatory rental car pricing based on the renter's residence. In *Jancyn*, the Court of Appeals found that the ECL was not so broad in scope or so detailed of a statutory scheme as to prevent local regulation of chemical materials. 71 N.Y.2d at 99. Specifically, the Court noted the absence of either exclusive jurisdiction over matters relating to chemical materials, or express state-mandated controls as to what local environmental boards could prohibit or restrict. *Id.*

These principles apply here. Insofar as it relates to "stop and frisk" activity at all—which is only slightly—the NYCPL is far from "detailed" or "comprehensive;" it merely recites the general constitutional standard from the landmark Supreme Court case *Terry v. Ohio*, 392 U.S. 1 (1968). It says nothing at all about the impermissible bases for a stop (*i.e.*, race alone), much less does it address the civil consequences of an impermissible stop.[16]

The Unions and the Mayor misapply field preemption doctrine when they contend that the Legislature's enactment in 2010 of subdivision four to NYCPL 140.50, which applies "in New York City alone," evinces an intent to "occupy the field of the regulation of the authority and conduct of police officers." PBA Mot. 15-16; Mayor Br. at 8-9. NYCPL 140.50[4] demonstrates the opposite. First, subdivision four, by its very terms, applies only to "cities with a population of one million or more" and prohibits those municipalities from recording and maintaining identifying information about an individual who has been stopped and frisked in a database if the individual is released without further legal action. NYCPL 140.50[4]; Ex. D to Mayor Br. at 8-9 (legislative debate confirming that subdivision four was tailored to respond

[16] *Chwick v. Mulvey*, 81 A.D.3d 161 (2d Dep't 2010), cited by the SBA, SBA Mot. 14, is distinguishable because the field there—licensing of firearms within the state—is an area traditionally reserved to the state, and was thoroughly and completely governed by numerous regulations in the Penal Law regulating eligibility, types and forms of licenses, application and investigation process, validity of licenses, and exhibiting and displaying of licenses. *Id.* at 172.

specifically to New York City and no other city in the state). Subdivision four supports the proposition that localities can, and do, have different substantive policies regarding individuals' interactions with police officers. In addition, neither the statute itself nor the legislative history suggests that the Legislature intended to preempt the Council's local legislation regarding local police conduct.

Desperate for some support for state exclusivity in this area, the Unions and the Mayor point to the Legislature's failure to enact two bills prohibiting racial and ethnic profiling, and a stray floor comment in the Assembly suggesting that the Legislature may one day choose to reform the NYPD's stop and frisk practices. PBA Mot. 16; SBA Mot. 15; Mayor Br. 9. Drawing conclusions about legislative intent from bills that do *not* pass is "dangerous ground" that this court should not traverse. *Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Engineers*, 531 U.S. 159, 170 (2001). Failed legislative proposals without a legislative record do not support preemption because "the court would be forced to speculate as to the reasons for their disposition . . . an exercise beyond the authority" of the court. *Council for Owner Occupied Hous. v. Koch*, 119 Misc.2d 241, 246 (Sup. Ct. N.Y. Cnty. 1983). In addition, the possibility of legislative action in an area does not preclude local legislatures from acting in that area in the meantime.

Boreali v. Axelrod, 71 N.Y.2d 1 (1987), the only case cited by the PBA in support of this argument, is inapposite. In *Boreali*, the action challenged was not that of a legislative body, but of an administrative body. *Id.* 6, 14. In that context, the court found the Legislature's failure to act in the area of anti-smoking regulation was legally significant to its analysis of the question of whether the Public Health Council had usurped its delegated administrative powers in adopting such regulations. *Id.* at 13. Notably, however, *Boreali* did not involve preemption

doctrine at all. And, here, unlike *Boreali*, the key issue is not whether an executive agency has exceeded its authority under specific legislation. This is a case about two sovereigns—the City and the State—and their respective powers under the principles of constitutional home rule. *Boreali* has nothing to teach us on that subject.

In sum, the core of the NYCPL is the uniform conduct of criminal proceedings in New York. The inclusion of stop and frisk in NYCPL § 140.50 merely codifies the federal and state law standards for a proper stop, such that evidence and an arrest proceeding from such encounter can properly be used in a subsequent criminal prosecution. Neither NYCPL § 140.50 nor the NYCPL more generally is intended to displace further articulation of the permissible and impermissible standards for police conduct—which can also be characterized as the civil rights of individuals—by courts or legislatures such as the City Council. If anything, Local Law 71 will *further* the goals of NYCPL § 140.50 by ensuring that individuals are stopped and frisked based on reasonable suspicion that they are committing a crime, rather than based on race, national origin, color, or other impermissible factors.

B. There Is No Conflict Between Local Law 71 and the NYCPL

1. Conflict Preemption Is Narrow

The New York Constitution and Municipal Home Rule law specifically empower localities to adopt "local laws not inconsistent with . . . any general law relating to" various policy areas. *See* N.Y. Const. art. IX, § 2(c); *see also* Mun. Home Rule Law §§ 10(1)(ii)(a)(1)-(12). The fact that both a State and a municipality regulate a particular activity does not in itself create an inconsistency. *Council for Owner Occupied Hous. v. Koch*, 119 Misc.2d 241, 245 (Sup. Ct. N.Y. Cnty. 1983). "Conflict preemption" only arises where the local prohibits "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." *Zakrzewska v. New*

School, 14 N.Y.3d 469, 480 (2010). Local laws that provide "details of a topic on which the State statutes remained silent, wherein the local ordinance supplements, rather than supplants, the State legislation," are not preempted. *Zorn v. Howe*, 276 A.D.2d 51, 55 (3d Dep't 2000) (citing cases).

2. Local Law 71 Is Consistent With the Obligations Already Imposed on Police Officers by the Federal and State Constitutions and the NYCPL

The Unions identify two purported conflicts between Local Law 71 and the NYCPL. Neither supports preemption, however, because neither prohibits conduct by police officers that would be permissible under the State statute, nor imposes additional restrictions on police conduct that would inhibit the operation of the NYCPL.[17]

First, Local Law 71 does not interfere with lawful police activity: police officers retain full authority to conduct stops and weapons searches under the standards of NYCPL § 140.50, without violating Local Law 71. Section 140.50[1] requires that an officer have "reasonable suspicion" that an individual has committed or is about to commit a crime prior to engaging in a "stop" of that individual. A direct conflict between Local Law 71 and the NYCPL would exist if Local Law 71 imposed a standard *more* demanding than "reasonable suspicion" for an officer to make a stop. Neither is the case. All that Local Law71 does is articulate what is left unsaid by § 140.50's requirement of "reasonable suspicion" for a stop—that the reasonable suspicion standard is *not* met if the "determinative factor" for a stop is race, national origin, color, creed, age, alienage or citizenship status, gender, sexual orientation, disability or housing status, rather than, as § 140.50 requires, a belief that an individual has committed or is about to

[17] The second form of conflict preemption—the imposition of "additional restrictions on rights under State Law" that inhibit the operation of general laws—is inapplicable here. *See Zakrzewska*, 14 N.Y.3d at 480. NYCPL § 140.50 articulates the federal and state constitutional standard that must be met in order for a police officer to engage in a lawful stop and a lawful search incident to a stop, but does not vest an officer with a "right" to engage in such activity.

commit a crime. In this sense, Local Law 71 supplements, rather than supplants, § 140.50 by articulating, for the purposes of a civil rights action, the categories that may *not* serve as the basis for "reasonable suspicion" by themselves. *See N.Y. State Club Ass'n*, 69 N.Y.2d at 219; *People v. Cook*, 34 N.Y.2d 100, 109 (1974); *Zorn*, 276 A.D.2d at 55-56.

That Local Law 71 articulates the factors that *cannot* permissibly serve, in and of themselves, as the basis for a stop, while the NYCPL articulates the standard that *must* serve as the basis for a lawful stop, may be a "difference" between the two laws, but it is not an "inconsistency." *Town of Clifton Park v. C. P. Enterprises*, 45 A.D.2d 96, 98 (3d Dep't 1974); *see also Council for Owner Occupied Hous.*, 119 Misc.2d at 245. "To define the word 'inconsistent' narrowly as meaning merely "different" would vitiate the flexibility of home rule as enunciated by the Legislature and the executive branch in enacting the Municipal Home Rule Law." *Town of Clifton Park*, 45 A.D.2d at 98. The NYPD acknowledges that Local Law 71 is consistent with its internal policies and Patrol Guide, which both incorporate the requirements of § 140.50, federal law, and state law, *and* prohibit race or ethnicity from being used as a "determinative factor" for law enforcement activity, rather than an individual's behavior or other information that links a person to suspected unlawful activity. FINEST Message at 1, Ex. W. The FINEST Message expressly provides that race (and other pedigree factors) may be taken into consideration as long as none of them, alone, serves as the "determinative factor;" it even provides an example to illustrate how this may be done. *Id.*[18]

[18] The PBA concocts a hypothetical, but flawed, scenario to illustrate the purported arbitrariness and contradictions posed by Local Law 71. PBA Mot. at 20 n.8. In stopping a suspect identified by a particular race, age, and gender upon a report of a robbery, assault, rape, other crime, felony, or misdemeanor, a police officer is using the report of criminal activity as one of the factors in making the stop, not simply the individual's race, age, or gender by themselves. The SBA's hypothetical "conflict" is even less persuasive. SBA Mot. at 19. Contrary to the SBA's characterization, if a police officer were to stop, question, and frisk a suspect in an area near low-income housing that also happens to have a high crime rate, the officer would neither be in compliance with the NYCPL or the U.S. Constitution since an individual's presence in an area of expected criminal activity cannot serve, in itself, as reasonable suspicion. *See Illinois v. Wardlow*, 528 U.S. 119, 124 (2000). What Local Law 71 does is to prevent

With that as background, the first "conflict" articulated by the Unions is that Local Law 71's "determinative factor" language conflicts with the "totality of the circumstances" test adopted by the Supreme Court to determine the lawfulness of a stop-and-frisk. PBA Mot. 19-20; SBA Compl. ¶ 55, Ex. V. This argument flatly misstates the meaning of Local Law 71. In the first place, Local Law 71 incorporates the "reasonable suspicion" standard, and in turn, the "totality of circumstances" analysis: 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); *Florida v. Harris*, 133 S.Ct. 1050, 1055 (2013) (probable cause for search depends on belief that "contraband or evidence of a crime is present"); *Terry v. Ohio*, 392 U.S. 1, 30 (1968); *People v. Benjamin*, 51 N.Y.2d 267, 270 (1980) (reasonable suspicion connected with belief that "particular person has committed or is about to commit a crime"). Nothing in Local Law 71 restricts an officer's obligation or authority to consider the "totality of the circumstances" s/he faces, including pedigree information about a suspect—race, age, or other characteristics—in conducting the "reasonable suspicion" analysis. Indeed, Local Law 71 explicitly allows pedigree characteristics to be considered so long as "other information or circumstances" also links a person or persons to suspected unlawful activity. Local Law 71 § 2 (amending Admin. Code § 14-151(a)(1)), Ex. A.

What Local Law 71 proscribes is the use of certain, protected characteristics as the "determinative factor" in a stop. Isolating a particular factor as the sole basis for a stop is hardly an unusual inquiry. The Supreme Court has often engaged in a "determinative factor" analysis—whether a particular factor, in itself, was the basis for a stop or other law enforcement activity—in rejecting certain stops as unlawful. *See, e.g.*, *Illinois v. Wardlow*, 528 U.S. 119, 124

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race, age, gender, or housing status, in and of themselves, from being used as a proxy for suspected criminality—a proposition that should be, on its face, entirely obvious and noncontroversial to law enforcement officers.

(2000) (emphasis added) ("An individual's presence in an area of expected criminal activity, *standing alone*, is not enough to support a reasonable, particularized suspicion that the person is committing a crime."); *Brown v. Texas*, 443 U.S. 47, 52 (1979) (that an individual "looked suspicious" was, by itself, insufficient to establish reasonable suspicion). The "determinative factor" analysis is fully consistent with the Court's instruction that "reasonable suspicion" be based upon an "assertion of illegality," not simply upon information that has a "tendency to identify a *determinate* person," *Florida v. J.L.*, 529 U.S. 266, 272 (2000) (emphasis added), and that the totality of the circumstances be used to assess the legality of a stop and frisk.

The second "conflict" articulated by the Unions is equally illusory. The Unions argue that Local Law 71 provides no guidance to police officers or courts on how to determine whether an officer relied on a protected characteristic as the "determinative factor." PBA Mot. 20; SBA Mot. 18. According to the PBA, "only two possibilities exist": either a subjective inquiry into the officers' state of mind, or inquiry into what a "reasonable officer" would have done. PBA Mot. 20. After setting out these two possibilities, the Unions assert that Local Law 71 must fail because the Court of Appeals rejected both such approaches in *People v. Robinson*, 97 N.Y.2d 341 (2001).

This argument is a straw man, and the "conflict" the Unions assert exists simply does not. First principles first: as a matter of federal and state constitutional law, a police officer's law enforcement activity may be entirely unobjectionable under the objective standard for evaluating probable cause and reasonable suspicion under the Fourth Amendment of the U.S. Constitution and Article 1, section 12 of the New York State Constitution, while at the same time, be violative of the Equal Protection Clause of the U.S. Constitution and its state analogue because of the officer's discriminatory intent and motivation in carrying out the law enforcement

activity. *Robinson* acknowledges as much by both adopting the objective standard of *Whren v. United States*, 517 U.S. 806 (1996), as applicable to the state constitutional analogue to the Fourth Amendment, and by noting that selective and discriminatory police conduct may be challenged under the Equal Protection Clause of the federal constitution and its state analogue. *Robinson*, 97 N.Y.2d at 351-53.

Matter of Council of N.Y. v. Bloomberg, 6 N.Y.3d 380, 391 (2006), cited by the PBA, does not compel a different conclusion. There, a local law required public contractors to provide benefits to domestic partners of their employees. The court held that the local law conflicted with the General Municipal Law requiring that public contracts be awarded to the lowest bidder: by removing from consideration those contractors who did not provide equal benefits, the local law impermissibly precluded companies that otherwise would have won city contracts. *Id.* The impact of Local Law 71 could hardly be more different. Whereas the domestic partnership law at issue in *Matter of Council of N.Y. v. Bloomberg* created a preclusion for certain contractors, Local Law 71 imposes no conflicting restrictions upon police officers beyond those contained in the NYCPL. Here, unlike in *Matter of Council of N.Y. v. Bloomberg*, the local and state statutes are congruent.

Local Law 71 and § 140.50 contain different, but complementary, articulations of the standard needed to stop or conduct a weapons search of an individual because they are guided by different purposes. Local Law 71 is a civil rights law, intended to protect individuals from discrimination when police officers carry out law enforcement activity; its enforcement mechanism is a private *civil* cause of action. Section 140.50, in contrast, codifies the constitutional standard and standard under New York law necessary for a stop and weapons search; the enforcement mechanism for its violation is dismissal of a charge or suppression of

evidence within the context of a *criminal* proceeding. Just as the local law in *Judiz*, 38 N.Y.2d at 532, was "aimed at the prevention of a particular type of abuse" compared to the Penal Law, Local Law 71 identifies and creates a civil cause of action for categories that cannot, on their own, support "reasonable suspicion." That Local Law 71 and the NYCPL impose different penalties, upon different actors, in different types of proceedings, for a violation of their respective provisions, is entirely in line with their respective purposes. *See Zakrzeska v. New School*, 14 N.Y.3d 469, 480-81 (2010) (rejection of conflict preemption challenge to City Human Rights law's imposition of strict liability upon supervisors for discrimination versus state Human Rights Law's *Faragher-Ellerth* standard).

More to the point, Local Law 71 prohibition of intentional profiling is consistent with and codifies much of federal and state constitutional law that bans police profiling on the basis of race, sex, and other categories protected under the constitution. *See, e.g.*, *Whren*, 517 U.S. at 813 (Equal Protection Clause prohibits selective enforcement of the law based on considerations such as race); *Pers. Adm'r of Massachusetts v. Feeney*, 442 U.S. 256, 273 (1979) (Equal Protection Clause requires heightened scrutiny of state action that discriminates on basis of gender); *Brown v. State of New York*, 89 N.Y.2d 172 (1996) (Equal Protection Clause of State Constitution provides cause of action for damages arising out of police conduct that targets individuals based on race); *Floyd v. City of New York*, No. 08 Civ. 1034(SAS), 2013 WL 4046209, *72-74 (S.D.N.Y. Aug. 12, 2013) (holding that NYPD had policy of carrying out stop and frisks in a manner that amounted to indirect racial profiling, in violation of the Fourth and Fourteenth Amendments). Michael Best, Counsel to the Mayor, conceded as much when he testified in opposition to the legislation, and, notably, conflict preemption is not a basis for the Mayor's challenge to Local Law 71. *See* Hearing Tr. 10/10/12 at 49:13-50:2, Ex. N. The

FINEST Message again confirms that Local Law 71 is consistent with the NYPD's policy and Patrol Guide provisions banning racial and ethnic profiling. *See* FINEST Message at 1, Ex. W.

Third, the "profound inconsistency" identified by the Unions—the possibility that individuals who are charged with or convicted of crimes may bring actions under Local Law 71—is irrelevant to the preemption analysis. PBA Mot. 21-22. First, the NYCPL is silent on whether an individual who is charged with or convicted of a crime may file a lawsuit against a police officer; thus, Local Law 71 can in no way conflict with the NYCPL in this regard. Second, any individual, believing herself to be falsely stopped or arrested or the victim of racial profiling, may already seek redress against an officer pursuant to 42 U.S.C. § 1983. In that sense, Local Law adds no new "exposure" to the equation. Third, even if, as a matter of federal constitutional law, an individual convicted of a crime may not bring a Section 1983 false arrest claim against police officers for the arrest leading to her conviction, this rule would not preempt Local Law 71. The U.S. Constitution, as interpreted by the Supreme Court, acts as a floor for rights of citizens, and localities are free to provide greater rights for their citizens through their constitutions, statutes, or rule-making authority. *See Cooper v. Morin*, 49 N.Y.2d 69, 79 (1979). The Council intended that Local Law 71 be "construed broadly, consistent with the Local Civil Rights Act Restoration Act of 2005, to ensure protection of the civil rights of all persons covered by law." Local Law 71 § 1, Ex. A. The Restoration Act has established a "one-way ratchet" by which interpretations of state and federal civil rights acts are a floor below which the City's Human Rights Law cannot fall. *Mihalik v. Credit Agricole Cheuvreux N. Am., Inc.*, 715 F.3d 102, 109 (2d Cir. 2013). Thus, should Local Law 71 be interpreted as giving individuals greater rights than those afforded by the federal constitution, this would be entirely appropriate.

The last consideration for "conflict preemption" analysis has to be a practical one: since at least 2002, New York City police officers have operated under Operations Order 11, which bans race and ethnicity from being used as the "determinative factor" in initiating law enforcement action." Operations Order 11 has never been deemed to "conflict" with NYCPL § 140.50. And Local Law 71 uses precisely the same language as Operations Order 11. *Compare* Local Law 71 § 2, Ex. A *with* Operations Order No. 11, Ex. S. Given that Local Law 71 merely codifies the impermissible factors contained in Operations Order 11, in identical language, adding a few additional factors that pose no additional restrictions, it in no way interferes with officers' ability to conduct lawful stops and weapons searches authorized by NYCPL § 140.50.

IV. LOCAL LAW 71 IS NOT UNCONSTITUTIONALLY VAGUE

The Unions challenge several terms in Local Law 71 as "hopelessly vague" and contend that these terms invalidate the entire statute under the void-for-vagueness doctrine. This approach fails because plaintiffs do not meet the stringent test imposed for facial challenges on vagueness grounds.[19]

"[F]acial challenges to a statute's constitutionality are disfavored." *Amazon.com, LLC v. N.Y. State Dep't of Taxation & Fin.*, 81 A.D.3d 183, 194 (1st Dep't 2010), *aff'd sub nom, Overstock.com, Inc. v. N.Y. State Dep't of Taxation & Fin.*, 20 N.Y.3d 586 (2013) (citing *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442 (2008)). To succeed on a facial challenge to Local Law 71, the Unions would have to establish "beyond a reasonable doubt" "that the law is unconstitutional in all of its applications." *Id.* (quotations omitted) (emphasizing that "legislative enactments enjoy a strong presumption of constitutionality . . . [and] courts must

[19] Made prior to the enactment of any implementing regulations and any enforcement or application, the SBA and PBA's claims must be construed as facial challenges because, were they as applied challenges, they would not be ripe. *See N.Y. Coal. of Recycling Enters., Inc. v. City of New York*, 158 Misc. 2d 1, 9-10 (Sup. Ct. N.Y. Cnty. 1992) (holding "as applied" challenge unripe because "[s]uch claims are all dependent on the regulations to be adopted, which are not before the court and are purely a matter of speculation.").

avoid, if possible, interpreting a presumptively valid statute in a way that will needlessly render it unconstitutional"). In addition, a facial challenge based on vagueness "is only implicated when First Amendment rights are at issue." *Id.* at 200; *see also Cook*, 34 N.Y.2d 100, 115 (1974) ("This rule is especially applicable where, as here, we are judging the vagueness of economic regulations with no first amendment overtones.").

The Unions do not allege that Local Law 71 implicates their First Amendment rights, nor do they seek to demonstrate that Local Law 71 is invalid in *all* circumstances. As Court of Appeals precedent makes clear, the mere allegation that the application of *some* of the law's terms may be unclear in *some* situations is not sufficient to plead that the statute is void for vagueness. Thus, in *People v. Cook*, the Court of Appeals held that a City regulation on the price of cigarettes was not unconstitutionally vague, even though "it is true that the application of the price differential is not clear in all situations, and is definitely puzzling in some," because "it is also true that in a great many cases there is no ambiguity whatsoever." 34 N.Y.2d at 113-15. And in *Town of Concord v. Duwe*, the Court of Appeals rejected a facial vagueness challenge to a local recycling ordinance, holding that "the local ordinance was not so vague as to permit or encourage arbitrary or discriminatory enforcement *in every case*." 4 N.Y.3d 870, 874-75 (2005) (emphasis added). Because the Unions do not plead, and could never prove, that Local Law 71 is unconstitutional in all its applications, their facial challenge fails.

Even if the Unions' challenges were to be evaluated on the merits, they are not sufficient to invalidate Local Law 71. The Unions contend that the terms "the determinative factor," "law enforcement action," and "unlawful discrimination" are left undefined in Local Law 71, leaving police officers to guess at what "factor(s) unrelated to lawful discrimination" may "justify" his or her conduct. PBA Mot. 22-23. The argument is makeweight: these terms

and standards are fully familiar to police officers and to courts in this City, and have been for years. Operations Order 11 has, since 2002, imposed upon police officers a duty not to use race or ethnicity as the "determinative factor" for "law enforcement actions." *See* Operations Order No. 11, Ex. S. The FINEST Message provides officers guidance for how to use race, gender, and other characteristics protected by Local Law 71 in their day-to-day activity without running afoul of Local Law 71. *See* FINEST Message at 1, Ex. W. And Local Law 71 itself provides several carefully-drawn examples of how and why "housing status" cannot serve as a "determinative factor."

Courts routinely interpret and apply general terms such as "discrimination," *see, e.g.*, NYCHRL § 8-107, and the law's requirement that officers prove that their actions were justified by factors unrelated to discrimination is simply a burden-shifting test that courts consistently apply without obstacle. *See, e.g.*, *Forrest v. Jewish Guild for the Blind*, 3 N.Y.3d 295, 305 (2004) (applying burden-shifting framework in race discrimination case where employer must rebut presumption of discrimination through introduction of nondiscriminatory reasons to support its employment decision). Similarly, there is nothing vague about the phrase "disparate impact." The New York Court of Appeals has construed the City Human Rights Law provision that creates a cause of action for "an unlawful discriminatory practice based upon disparate impact" without problem. *See, e.g.*, *Levin v. Yeshiva Univ.*, 96 N.Y.2d 484, 492-96 (2001) (construing NYCHRL§ 8-107(17)). Courts should face no problem applying a "disparate impact" standard to lawsuits filed under Local Law 71, since Local Law 71's disparate impact provisions are substantively identical to those in the City's Human Rights Law. *Compare* Admin. Code § 14-151(c)(2)(iii) *with* NYCHRL § 8-107(17). Inasmuch as portions of Local Law 71 are not more specific, that is no infirmity: "statutes, of necessity, must speak in

generalities, leaving application as to each specific case to the reasonableness and discretion of executive, administrative, and judicial officers." *New York Horse & Carriage Ass'n v. City of New York, Dep't of Consumer Affairs*, 144 Misc. 2d 883, 887 (Sup. Ct. N.Y. Cnty. 1989).

Finally, the Unions' argument that Local Law 71 creates a "potential for arbitrary and discriminatory enforcement" because it leaves the "decision to commence enforcement proceedings [to] those who believe themselves aggrieved, not neutral officials" sweeps too broadly to have any force. PBA Mot. 25. If the Unions' argument is taken to its logical conclusion, then *no* statute providing individuals with a private cause of action could survive a vagueness challenge. Hundreds of federal, state, and city antidiscrimination laws, environmental laws, consumer protection and fraud statutes, and a host of other remedial legislation, many of which also have provisions awarding attorneys' fees, contain or allow private enforcement in the civil courts. Under the Unions' view of the law, all of them would be invalidated as amenable to "arbitrary and discriminatory enforcement" simply because private individuals are able to file suit against wrongdoers. What protects individuals from arbitrary outcomes in private lawsuits is the consistency and procedural protections afforded by the courts. Moreover, to the extent that Local Law 71 provides additional rights and remedies to individuals beyond what is mandated by state or federal laws, there is nothing "arbitrary" or "discriminatory" about that. To be sure, more individuals may take advantage of the law's protection. But that does not provide a potential for arbitrary and discriminatory enforcement. The success of Local Law 71 in redressing unlawful discrimination should not serve as a basis for its unconstitutionality.

V. THE SBA AND PBA DO NOT MEET THE HIGH STANDARD NECESSARY FOR THE ISSUANCE OF A PRELIMINARY INJUNCTION

The SBA and PBA cannot meet the high standard necessary to obtain a preliminary injunction preventing Local Law 71 from operating. First, for all the reasons set

forth in Argument II-IV, *supra*, the SBA and PBA cannot prevail in their challenges to Local Law 71, and thus have no likelihood of success on the merits.

Second, the Unions fail to establish that they will be irreparably harmed absent the grant of injunctive relief. Bald allegations of a deprivation of constitutional rights are insufficient to establish irreparable harm; further inquiry and proof of concrete impact is required. *See Schweizer v. Town of Smithtown*, 19 A.D.3d 682, 683 (2d Dep't 2005) (no irreparable harm shown in vagueness challenge to local ordinance); *Pub. Employees Fed'n, AFL-CIO v. Cuomo*, 96 A.D.2d 1118, 1119 (3d Dep't 1983) (finding no irreparable harm even where constitutional deprivation alleged); *Grumet v. Cuomo*, 162 Misc. 2d 913, 930 (Sup. Ct. Albany Cnty. 1994) (same). In this case, the Unions cannot satisfy this high burden. As set forth in Argument II, *supra*, the Unions offer no evidentiary basis for a finding of irreparable harm: hearsay statements and the affidavits of two Union officials simply will not do. Moreover, any "threats" to the physical safety of police officers that the Unions claim are posed by Local Law 71 are speculative in the extreme. The FINEST message conclusively responds to any claims that Local Law 71 cannot be squared with NYPD policy and operations, any concerns about the availability of defense and indemnification of officers for suits filed under Local Law 71, and any alleged "confusion" on the part of individual officers as to the effect of Local Law 71 on their law enforcement activities.

Next, the Unions claim that irreparable injury to officers' professional reputations would arise from an individual's allegations of bias alone. As one court has noted in the context of administrative proceedings, "[e]very individual who is the subject of a disciplinary or other administrative proceeding necessarily faces the possibility of reputational harm, at least temporarily, if the charges are sustained. However, if administrative proceedings were routinely

interrupted and enjoined based on the mere potential of reputational harm that might flow from defects in the administrative proceedings, the administrative process as a whole would be completely undermined." *Martinez 2001 v. N.Y.C. Campaign Fin. Bd.*, 36 A.D.3d 544, 551 (1st Dep't 2007). A lawsuit filed against a police officer, whether under Local Law 71 or another law, bears the potential for a negative effect upon his or her reputation depending on the allegations. It is no reason to prevent these lawsuits from being filed. "[P]ublic policy mandates free access to the courts," and the Unions' attempt to close the courthouse doors to plaintiffs should be rejected. *Sassower v. Signorelli*, 99 A.D.2d 358, 359, (2d Dep't 1984).

Finally, the balance of the equities favors the City Council. In balancing the equities, a court is required to "weigh the interest of the general public." *Metro. Transp. Auth. v. Vill. of Tuckahoe*, 67 Misc. 2d 895, 901 (Sup. Ct. Westchester Co. 1971) *aff'd*, 38 A.D.2d 570 (2d Dep't 1972); *see also DePina v. Educ. Testing Serv.*, 31 A.D.2d 744, 745 (2d Dep't 1969). Courts are reluctant to "interfere with the legislative determination" of whether the public interest is affected such as the one made here by City Council. *Metro. Transp. Auth.*, 67 Misc.2d at 901. The City Council considered the interests of the general public in passing the original Profiling Ban in 2004 and in passing Local Law 71, both of which were preceded by numerous hearings, written and oral public testimony, and revisions based on comments of the Mayor and the NYPD. Further, the Council found that the increasing reliance by the NYPD on stop and frisk tactics harmed police-community relations, created fear and resentment in the community, and posed a danger to public safety. *See supra* Facts I.B. In essence, the City Council, the PBA, and the SBA agree that allegations of police bias harm community relationships, render individuals less likely to communicate with the police, and diminish safety. Alejandro Aff. ¶ 56; Mullins Aff. ¶ 37. The City Council chose to redress this problem and serve the public interest

by strengthening legislation that would air and remedy those grievances through enforcement; the PBA and SBA would suppress these complaints entirely without solving them. The City Council's determination of the public interest should be adopted given the careful, thorough, and public process that generated Local Law 71.

On the other side of the equation, the PBA and SBA's claims that Local Law 71 would harm public safety through a chilling effect are pure speculation. *See supra* Argument II. The FINEST Message dispels any confusion held by police officers by confirming that their conduct need not change, since Local Law 71 is consistent with the NYPD antiprofiling policy that has been in effect since 2002. It further states that officers will be defended and indemnified for any lawsuits brought pursuant to Local Law 71, thus allaying the fear that police officers will be cut loose.

Ultimately, allowing Local Law 71 to remain in effect would keep in place essentially the same restrictions already imposed by Operations Order 11 since 2002, the Profiling Ban since 2004, and the FINEST Message, and would not alter the status quo as to the laws, rules, and regulations applicable to police conduct.

CONCLUSION

For the foregoing reasons, the City Council respectfully requests that the SBA's and PBA's motions for a preliminary injunction be denied and that the City Council's cross-motions to dismiss the SBA's Complaint and the PBA's Second Amended Complaint be granted.

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Respectfully Submitted,

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