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

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

Plaintiff,

-against-

THE COUNCIL OF THE CITY OF NEW YORK,

Defendant.

COMPLAINT

INDEX NO. _____

The Patrolmen's Benevolent Association of the City of New York, Inc. ("PBA"), by and through its undersigned counsel, for its complaint against the Council of the City of New York ("Council"), alleges as follows:

PRELIMINARY STATEMENT

1. By this action, the PBA challenges on behalf of the more than 22,000 police officers it represents the validity of a local law adopted by the Council over Mayor Michael Bloomberg's veto, Local Law 71 for the year 2013 ("Local Law 71"), as both preempted by the New York State Criminal Procedure Law and unconstitutionally vague under the Due Process Clauses of the United States and New York State Constitutions.

2. Local Law 71 unlawfully amends New York City Administrative Code § 14-151, which itself unlawfully and sweepingly prohibits all conduct by law enforcement officers, including members of the New York City Police Department ("Police Department" or "NYPD"), in initiating law enforcement actions against individuals whenever that conduct falls within § 14-151's broad and vague provisions, including, but not limited to, the definition of "[r]acial or ethnic profiling" (before Local Law 71) or "[b]ias-based profiling" (as amended by Local Law

71). Local Law 71 greatly expands the scope of the "profiling" prohibited by § 14-151. It creates new private rights of action against individual law enforcement officers. It also creates new "profiling" causes of action against the City and the NYPD, and purports to specify the burdens of proof and evidentiary requirements for these causes of action. It also allows courts to award attorneys' fees and expert fees to prevailing plaintiffs in profiling lawsuits, including plaintiffs who bring "profiling" lawsuits against individual police officers. Because it is preempted, Local Law 71 exceeds the bounds of permissible legislation by the Council. Because it is unconstitutionally vague, it is invalid under the Due Process Clauses of the United States and New York State Constitutions.

3. Local Law 71 is preempted by the New York State Criminal Procedure Law because (1) that comprehensive and detailed State regulatory scheme fully occupies the field of criminal procedure and bars local legislatures, including the Council, from legislating in this area, and (2) Local Law 71 conflicts with the New York State Criminal Procedure Law, which specifically authorizes and also accepts essential and lawful police conduct that Local Law 71 purports to prohibit. Local Law 71 also is invalid under Article 9, § 2(c) of the New York Constitution and § 10(1) of the Municipal Home Rule Law, which prohibit a local government from passing a law that is inconsistent with state law.

4. Local Law 71 is unconstitutionally vague under the Due Process Clauses of the United States and New York State Constitutions because, among other reasons, it necessarily leaves police officers to guess, on pain of civil and potential contempt liability, as to the meaning of several provisions of Local Law 71, including (but not limited to) whether they have engaged in prohibited "bias-based profiling," whether they have "initiat[ed] law enforcement action against an individual," whether such action "was justified by a factor(s) unrelated to unlawful

discrimination," and how "the determinative factor in initiating law enforcement action" is to be ascertained, when they deal with the public in a wide array of circumstances as they perform their vitally important official duties.

PARTIES

5. Plaintiff PBA is a lawfully incorporated not-for-profit corporation under the laws of the State of New York. The PBA is the designated collective bargaining agent for the more than 22,000 police officers employed by the NYPD. A core part of the PBA's mission and purpose is to advocate for, and protect the interests of, its members.

6. Defendant is the Council of the City of New York. The Council is the legislative body of the City. New York City Charter §§ 21, *et seq.*

JURISDICTION AND VENUE

7. This Court has jurisdiction over defendant pursuant to CPLR § 301.

8. Venue in New York County is proper pursuant to CPLR §§ 503(a) and 503(c).

FACTS

Local Law 71

9. On June 26, 2013, the Council passed Local Law 71, Intro. 1080 (now Local Law 71 of 2013).

10. As amended by Local Law 71, Administrative Code § 14-151 prohibits "biased-based profiling," which it purports to define as "an act of a member of the force of the police department or other law enforcement officer that relies on actual or perceived race, national origin, color, creed, age, alienage or citizenship status, gender, sexual orientation, disability, or housing status as the determinative factor in initiating law enforcement action against an individual, rather than an individual's behavior or other information or circumstances that links a

person or persons to suspected unlawful activity." Local Law 71, Section 2 (amending Admin. Code § 14-151(a)(1)).

11. Local Law 71 also amends Administrative Code § 14-151 to define "housing status" to include, among other things, "the character of an individual's residence or lack thereof," "an individual's actual or perceived homelessness," "an individual's use of publicly assisted housing," "an individual's use of the shelter system," an individual's "status of having or not having a fixed residence," or "ownership status" with regard to one's residence. *Id.* § (a)(4).

12. The terms "national origin," "gender," "disability," "sexual orientation," and "alienage or citizenship status" are given the same meaning as in Administrative Code § 8-102, the City Human Rights Law. *Id.* § (a)(3).

13. As amended by Local Law 71, Administrative Code § 14-151 provides that a claim of bias-based profiling is established where an individual brings an action demonstrating that:

> (i) the governmental body has engaged in intentional bias-based profiling of one or more individuals and the governmental body fails to prove that such bias-based profiling (A) is necessary to achieve a compelling governmental interest and (B) was narrowly tailored to achieve that compelling governmental interest; or
>
> (ii) one or more law enforcement officers have intentionally engaged in bias-based profiling of one or more individuals; and the law enforcement officer(s) against whom such action is brought fail(s) to prove that the law enforcement action at issue was justified by a factor(s) unrelated to unlawful discrimination.

Id. § (c)(1).

14. As amended by Local Law 71, Administrative Code § 14-151 purports to provide that a claim of bias-based profiling is established against the Police Department when "a policy or practice within the police department or a group of policies or practices within the police department regarding the initiation of law enforcement action has had a

disparate impact on the subjects of law enforcement action on the basis of characteristics delineated in paragraph 1 of subdivision a of this section, such that the policy or practice on the subjects of law enforcement action has the effect of bias-based profiling," *id.* § (c)(2)(i), and "[t]he police department fails to plead and prove as an affirmative defense that each such policy or practice bears a significant relationship to advancing a significant law enforcement objective or does not contribute to the disparate impact," *id.* § (c)(2)(ii), subject to additional potential conditions.

15. As amended by Local Law 71, Administrative Code § 14-151 further provides that:

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

Id. § (c)(2)(iii).

16. No provision of Administrative Code § 14-151 as amended by Local Law 71 states a coherent, objective or verifiable standard that permits those subject to its sweeping prohibitions to ascertain either how such a "disparate impact" or the "relevant pool for comparison" are to be determined, or what degree of "disparate impact" is actionable.

17. A plaintiff may assert any such bias-based profiling claim either in a civil action or before the New York City Commission on Human Rights (the "Commission on Human Rights"). *Id.* § (d)(1). The claim may be asserted against "any law enforcement officer who has engaged, is engaging, or continues to engage in bias-based profiling." In addition, such a claim may be asserted against "any governmental body that employs any law enforcement officer who

has engaged, is engaging, or continues to engage in bias-based profiling" and against the Police Department "where it has engaged, is engaging, or continues to engage in bias-based profiling or policies or practices that have the effect of bias-based profiling." *Id.*

18. As amended by Local Law 71, Administrative Code § 14-151 purports to provide for injunctive and declaratory relief against those subject to its sweeping prohibitions, including police officers. *Id.* § (d)(2). The court also "may allow a prevailing plaintiff reasonable attorney's fees as part of the costs, and may include expert fees as part of the attorney's fees." *Id.* § (d)(3).

19. Local Law 71 further provides that its provisions are to be "construed broadly, consistent with the Local Civil Rights Restoration Act of 2005." Local Law 71, Section 1.

The Mayor's Veto

20. On July 23, 2013, the Mayor vetoed Local Law 71 on the grounds that it is preempted by the State Criminal Procedure Law and would be harmful to the City.

The Council's Vote to Override the Mayor's Veto

21. On August 22, 2013, the Council overrode the Mayor's veto.

22. Accordingly, pursuant to its terms, Local Law 71 will go into effect 90 days after its enactment date of August 22, 2013. Local Law 71, Section 5.

The Criminal Procedure Law

23. The New York State Criminal Procedure Law ("CPL") governs the actions of law enforcement; it places limits and obligations on the actions of law enforcement officers, including the Police Department. As a comprehensive and detailed set of laws, it was intended to and does occupy the field of criminal procedure legislation in the State, which includes not only legislation concerning the procedures followed in courts of law, but also legislation concerning the authority conferred on law enforcement officers and the procedures and standards

law enforcement officers must apply and follow in performing their investigative and law enforcement work.

24. Aside from the CPL, law enforcement agencies and officers, including the NYPD and individual officers, are also subject to applicable federal and state constitutional requirements, laws, rules, and judicial precedents.

25. The State Legislature enacted the CPL in 1970, as a "comprehensive modernization of procedures for the administration of criminal justice." Bill Jacket for Chapter 997 of the Laws of 1970, Governor's Memorandum, dated May 20, 1970.

26. Prior to the CPL, the State's law of criminal procedure was largely embodied in the Code of Criminal Procedure ("Code"), originally enacted in 1881. By 1961, the State Legislature recognized that the Code needed a comprehensive and thorough review. Through piecemeal amendments over many years, the Code had become a patchwork of confusing procedures and inconsistent and anachronistic terms. Bill Jacket for Chapter 346 of the Laws of 1961, Program Bill Memorandum.

27. Accordingly, in 1961 the State created a Temporary Commission on Revision of the Penal Law and Criminal Code ("Commission"). *See* L. 1961, c. 346. The Commission was given a mandate to perform an "overall redrafting" of the law of criminal procedure, with a view to "simplification of language" and "streamlining of procedures." Bill Jacket for Chapter 346 of the Laws of 1961, Program Bill Memorandum.

28. As a matter of policy, the Commission determined that it should completely reframe the law of criminal procedure embodied in the Code of Criminal Procedure. This policy was "unanimously favored upon the theory that, when an ancient and outmoded house has a rotten foundation and structure, demolition and reconstruction, rather than repair, constitute the

only satisfactory remedy." Proposed New York Criminal Procedure Law, Temporary Comm'n on Revision of Penal Law and Criminal Code, Comm'n Foreword, at XI [Sept. 1967].

29. The Commission also sought to create uniformity across the State. For example, it brought "within the ambit of the proposed Criminal Procedure Law," the New York City Criminal Court, previously governed largely by the New York City Criminal Court Act rather than the Code. Bill Jacket for Chapter 997 of the Laws of 1970, Memorandum in Support and Explanation of Proposed Criminal Procedure Law, Prepared by the Temporary Comm'n on Revision of the Penal Law and Criminal Code.

30. As enacted and as thereafter amended, the Criminal Procedure Law is a detailed and complete set of laws that the Legislature intended to govern all matters of criminal procedure in the State of New York, from the investigations performed by police officers and departments through post-trial matters.

31. For example, CPL Article 690 governs the issuance and execution of search warrants, and CPL Article 700 governs warrants for wiretaps and video surveillance.

32. In addition, CPL § 140.50(1) expressly and specifically authorizes a police officer to "stop a person in a public place located within the geographical area of such officer's employment when he reasonably suspects that such person is committing, has committed or is about to commit either (a) a felony or (b) a misdemeanor defined in the penal law, and may demand of him his name, address and an explanation of his conduct."

33. Further, CPL § 140.50(3) expressly and specifically authorizes a police officer to "search [a] person for a deadly weapon or any instrument, article or substance readily capable of causing serious physical injury and of a sort not ordinarily carried in public places by law-

abiding persons" whenever an officer has stopped the person "under circumstances prescribed in subdivision[] one" and the officer "reasonably suspects that he is in danger of physical injury."

34. Other provisions of the CPL govern arrests, fingerprinting, and all other aspects of criminal procedure.

35. The CPL expressly states that it is the sole source of procedure for criminal actions, proceedings, and matters. It unambiguously provides that the CPL applies "exclusively" to "[a]ll criminal actions and proceedings" and to "[*a*]*ll* matters of criminal procedure . . . which do not constitute a part of any particular action or case, occurring upon or after [its] effective date." CPL § 1.10(1) (emphasis added).

36. As the State Legislature recognized in enacting the CPL in 1970, a comprehensive and uniform set of criminal procedures is beneficial to the State and its people. It ensures that people throughout the State are subject to the same laws and standards and avoids the confusion and unequal treatment that would result if different jurisdictions had different procedural rules.

37. No provision of New York State law grants any authority, general or specific, to local governments to legislate on the subject of actions by police officers in conducting, pursuant to the specific authority conferred on police officers by the provisions of subdivisions one and three of CPL § 140.50, stops and frisks of persons reasonably suspected of criminal conduct, or in otherwise initiating law enforcement action by approaching or asking questions of individuals in the performance of their official duties.

38. Pursuant to section 1 of chapter 176 of the Laws of 2010, the Legislature enacted subdivision four of CPL § 140.50 to regulate in New York City alone what the Legislature perceived to be a matter of public concern. According to the New York State Senate's Sponsor's Memorandum in support of the bill, S.7945A, which became chapter 176, "New York City

police routinely stop, question, and frisk New Yorkers at alarmingly high rates"; "[m]ost of those stopped are completely innocent of wrongdoing"; "[a]nd of the hundreds of thousands of law-abiding New Yorkers stopped every year, the vast majority are black and Latino."

39. The Legislature's response to this concern was a narrow one: pursuant to subdivision four of CPL § 140.50, "[i]n cities with a population of one million or more, information that establishes the personal identity of an individual who has been stopped, questioned and/or frisked by a police officer or peace officer, such as the name, address or social security number of such person, shall not be recorded in a computerized or electronic database if that individual is released without further legal action; provided, however, that this subdivision shall not prohibit police officers or peace officers from including in a computerized or electronic database generic characteristics of an individual, such as race and gender, who has been stopped, questioned and/or frisked by a police officer or peace officer."

40. Thus, fully aware of the issues that Local Law 71 purports to address, the Legislature regulated in a limited manner by proscribing a specific action by the NYPD *after* police officers stop, question and frisk individuals. The Legislature also limited the scope of that exercise of its plenary authority to only those individuals released without further legal action.

41. No provision of CPL § 140.50(4) purports to grant any authority, let alone any specific authority, to the Council of the City of New York or any other local legislative body to regulate the conduct of police officers or peace officers either in stopping, questioning and frisking individuals or in initiating any other form of law enforcement activity with respect to individuals. Accordingly, CPL § 140.50(4) further manifests the Legislature's intent to occupy the field of the regulation of the authority and conduct of police officers and peace officers in initiating all forms of law enforcement activity with respect to individuals.

Local Law 71 Lacks Clear and Ascertainable Standards

42. Local Law 71 provides no standards, let alone objective or verifiable standards, to guide a court or the Commission on Human Rights in deciding, among other things, how to ascertain "*the* determinative factor" the police officer allegedly "relie[d] on" "in initiating law enforcement action." The term "law enforcement action" is not even defined in Local Law 71. Rather, all police officers, like the courts and the Commission on Human Rights, are left to guess, at their peril, what those standards and definitions may be.

43. Similarly, Local Law 71 purports to enable a police officer to defend against such a charge of bias-based profiling if he or she "prove[s] that the law enforcement action at issue was justified by a factor(s) unrelated to unlawful discrimination," but Local Law 71 provides no standards, let alone objective or verifiable standards, by which a police officer could determine what "factor(s) unrelated to unlawful discrimination" may be sufficient to "justif[y]" his or her conduct that is authorized by the CPL. Nor does Local Law 71 define "unlawful discrimination" or identify any relationship between that term and the term "bias-based profiling." Rather, all police officers are left to guess, at their peril, what "factor(s)" may justify initiating law enforcement action.

The Effect of Local Law 71 on the PBA and Its Members

44. In addition to the civil liability to which police officers will be subject for not conforming their vitally important policing conduct to Local Law 71's nebulous requirements, all police officers who are found to have engaged in "bias-based profiling" will likely be stigmatized by such findings, and could also be subject to discipline by the Police Department. Moreover, police officers in general will be stigmatized by such findings, thereby both impairing public confidence in police officers and undermining their effectiveness in protecting public safety.

45. Furthermore, all police officers who are found to have engaged in "bias-based profiling" under Local Law 71's nebulous requirements may be subject to injunctions ordering them not to again fail to satisfy those requirements. Accordingly, in addition to being subject to the stigma of recidivism, a police officer who is found for a second time to have failed to satisfy those nebulous requirements faces the prospect of contempt sanctions. Such an officer could be subject to contempt sanctions even though (1) his or her conduct in "initiating law enforcement action against an individual" is specifically authorized or permitted by the CPL, and (2) the plaintiff has been convicted as a result of the officer's conduct that was specifically authorized or permitted by the CPL.

46. Regardless of whether Local Law 71's nebulous requirements are designed to deter police officers from engaging in the vitally important policing conduct specifically authorized and permitted by the CPL, the effect of Local Law 71's nebulous requirements can only be to chill the willingness of police officers to engage in that very conduct. Local Law 71 thus directly threatens public safety.

47. Local Law 71 would further impair public safety as police officers are taken off patrol and placed into courtrooms and the offices of their attorneys as they seek to defend themselves against charges of "bias-based profiling."

48. Similarly, Local Law 71 directly threatens the lives and safety of police officers because it chills their willingness to undertake law enforcement action necessary to protect their safety, including lawful frisks of lawfully stopped individuals that are explicitly permitted by CPL § 140.50(3).

49. Thus, if Local Law 71 is permitted to take effect, police officers undoubtedly will reasonably conclude that individuals who are frisked will be more likely than others against

whom "law enforcement action" is initiated to bring charges of "bias-based profiling." Thus, when police officers lawfully stop individuals "under circumstances prescribed in subdivision[] one [of CPL § 140.50]," Local Law 71 will have a chilling effect on the exercise of their authority, expressly and specifically conferred by CPL § 140.50(3), to "search [a] person for a deadly weapon or any instrument, article or substance readily capable of causing serious physical injury and of a sort not ordinarily carried in public places by law-abiding persons."

FIRST CAUSE OF ACTION
(Preemption — The Criminal Procedure Law)

50. Plaintiff repeats and realleges the above allegations 1 through 49 with the same force and effect as if fully set forth herein.

51. Local Law 71 is illegal and invalid because it is preempted by the State Criminal Procedure Law. When the State Legislature has preempted a field, local legislation in that area is invalid.

52. The State Legislature may expressly articulate its intent to occupy a field or it may occupy a field by implication. An implied intent to preempt may be found in a declaration of State policy by the Legislature or from the fact that the Legislature enacted a comprehensive and detailed regulatory scheme in a particular area.

53. The CPL is a comprehensive and detailed regulatory scheme that, from investigations through post-trial proceedings, grants authority to and imposes limitations and obligations on, law enforcement officers and entities, including police officers and the Police Department, in performing their mission of protecting public safety. It is intended to be a uniform and complete set of laws for the entire State. As such, the CPL preempts the field of criminal procedure legislation and prevents all local governments from enacting local laws in any of these areas.

54. The CPL expressly states that it is the sole source of procedure for criminal actions, proceedings, and matters. It applies "exclusively" to "[a]ll criminal actions and proceedings" and "all matters of criminal procedure . . . which do not constitute a part of any particular action or case." CPL § 1.10(1).

55. By prohibiting "bias-based profiling" and creating civil liability and enforcement mechanisms for that prohibition, Local Law 71 seeks to regulate the authority and conduct of police officers, authority and conduct that is expressly conferred and permitted by the CPL, which occupies the entire field of State criminal procedure law, including the field of law enforcement actions in which police officers are prohibited from engaging, and actions in which they are expressly authorized and permitted by the CPL to engage. Accordingly, Local Law 71 is preempted by the CPL and exceeds the bounds of permissible legislation by the Council. In addition, Local Law 71 is invalid under Article 9, § 2(c) of the New York State Constitution and § 10(1) of the Municipal Home Rule Law, because it conflicts with the CPL, which specifically authorizes and also accepts essential and lawful police conduct that Local Law 71 purports to prohibit.

56. Local Law 71 is preempted by State law and should be declared invalid.

SECOND CAUSE OF ACTION
(Due Process Clause of the United States Constitution)

57. Plaintiff repeats and realleges the above allegations 1 through 56 with the same force and effect as if fully set forth herein.

58. Local Law 71 is void for vagueness under the Due Process Clause of the Fifth Amendment to the United States Constitution, as incorporated against the states and their subdivisions under the Fourteenth Amendment to the United States Constitution, because its nebulous and sweeping ban on "bias-based profiling" fails to provide police officers with

objective or verifiable standards adequate to give them fair warning of the conduct it prohibits, and fails to provide courts and the Commission on Human Rights with objective or verifiable standards to determine whether that ban has been violated.

59. The unconstitutional vagueness of Local Law 71 is exacerbated by its failure to condition the liability of a police officer charged with "bias-based profiling" on a finding that the officer acted with a culpable mental state.

60. Local Law 71 violates the right of police officers to due process under the Constitution of the United States.

THIRD CAUSE OF ACTION
(Due Process Clause of the New York State Constitution)

61. Plaintiff repeats and realleges the above allegations 1 through 60 with the same force and effect as if fully set forth herein.

62. Local Law 71 is void for vagueness under the Due Process Clause of the New York State Constitution, Article 1 § 6, because its nebulous and sweeping ban on "bias-based profiling" fails to provide police officers with objective or verifiable standards adequate to give them fair warning of the conduct it prohibits, and fails to provide courts and the Commission on Human Rights with objective or verifiable standards to determine whether that ban has been violated.

63. The unconstitutional vagueness of Local Law 71 is exacerbated by its failure to condition the liability of a police officer charged with "bias-based profiling" on a finding that the officer acted with a culpable mental state.

64. Local Law 71 violates the right of police officers to due process under the Constitution of the State of New York.

WHEREFORE, the PBA respectfully requests a declaratory judgment that Local Law 71 is invalid and without legal force or effect; a permanent injunction enjoining the operation and implementation of Local Law 71; and such other relief as the Court deems just and proper.

Dated: New York, New York
October 15, 2013

Edward A. McDonald
James M. McGuire
Steven A. Engel
DECHERT LLP
1095 Avenue of the Americas
New York, New York 10036
212-698-3500
james.mcguire@dechert.com
Attorneys for Plaintiff