

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

----- X
 DAVID FLOYD, et al., :

 Plaintiffs-Appellees, : Docket No. 13-3088

 -against- :

 CITY OF NEW YORK, et al., : **DECLARATION IN SUPPORT**

 Defendants-Appellants. :
 ----- X

I, **COURTNEY G. SALESKI**, hereby declare under penalty of perjury, pursuant to 28 U.S.C. § 1746, that the following is true and correct to the best of my knowledge, information and belief:

1. I am a partner in the law firm of DLA Piper LLP (US), counsel to movants Sergeants Benevolent Association (the “SBA”).
2. This declaration, the annexed memorandum of law, and the exhibit annexed hereto are submitted in support of the SBA’s motion to intervene in the above-captioned matter.
3. Annexed hereto as Exhibit A (without its own original exhibit) is the Affidavit of Edward D. Mullins, a full-time sergeant with the New York City Police Department and the President of the SBA, which was originally filed in support of the SBA’s memorandum of law in support of its motion to intervene in the proceedings below in this matter.

Dated this 12th day of November, 2013

/s/ Courtney G. Saleski
Courtney G. Saleski

EXHIBIT A

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

----- X
THE MAYOR OF THE CITY OF NEW YORK, :

Plaintiff,

-against-

THE COUNCIL OF THE CITY OF NEW YORK, :

Defendant.

INDEX NO. 451543/2013

AFFIDAVIT OF EDWARD D. MULLINS
IN SUPPORT OF THE SBA'S MOTION TO
INTERVENE AS A PARTY-PLAINTIFF

----- X
SERGEANTS BENEVOLENT ASSOCIATION, :

Intervenor-Plaintiff,

-against-

THE COUNCIL OF THE CITY OF NEW YORK, :

Defendant.

----- X

Edward D. Mullins, being sworn, states as follows:

1. I am currently a full-time sergeant with the New York City Police Department (“NYPD”), and the President of the Sergeants Benevolent Association (the “SBA”), the proposed-intervenor in this action. I have personal knowledge of the facts contained herein.

2. The SBA is an independent municipal police union whose membership consists of approximately 13,000 active and retired sergeants of the NYPD. It is the fifth-largest police union in the country, and the country’s largest superior officers union. The SBA is recognized by the City of New York as the sole and exclusive bargaining representative for all NYPD sergeants. The SBA’s central mission is to advocate for, and protect the interests of, its NYPD

police sergeant members. This affidavit is submitted in support of the SBA's Motion to Intervene as of right pursuant to New York Civil Practice Law and Rules ("CPLR") § 1012(a), or, alternatively, by permission pursuant to CPLR § 1013. The SBA is seeking a declaratory judgment that Local Law 71 of 2013 is invalid, without force or effect as constitutionally vague and pre-empted by the NYS Criminal Procedure Law.

3. Local Law 71 is a bill to amend a provision of the New York City Administrative Code that was enacted by Defendant, the Council of the City of New York over the veto of Plaintiff, Mayor Michael Bloomberg on August 22, 2013. The Local Law -- which was hurriedly debated and passed in the middle of the 2013 Mayoral Democratic primary campaign -- purports to amend the Code's existing prohibition on racial and ethnic profiling, including by seeking to impose liability on individual officers. But Local Law 71 sets forth rules for police officers to follow that are difficult to interpret and even more difficult to apply. For example, the law makes it illegal to use any of certain enumerated characteristics as the "determinative factor" in any law enforcement action, but does not set forth what makes a factor "determinative" or otherwise contemplate that numerous interconnected factors influence every law enforcement action, and that isolating any one as "determinative" is exceedingly difficult. The vagueness of the law in this regard is not only constitutionally impermissible, but will also have an immediate and practical negative effect on public safety. (A copy of the SBA's proposed complaint is attached as Exhibit A.)

4. I was appointed to the NYPD in January 1982. Prior to my election as SBA President on July 1, 2002, I served ten years on patrol in Manhattan, and was promoted to detective in 1992. In 1993, I was promoted to sergeant, and was assigned to the 19th Precinct, as well as the Detective Bureau in Brooklyn South, where I served in the 67th Precinct Detective

Squad, the Special Victims Squad, and the Kings County District Attorney's Office. As President of the SBA, I also am a Trustee of the New York City Police Pension Fund.

5. I received a Bachelor's degree from Concordia College while working full-time as a sergeant, and a Master's degree in organizational leadership from Mercy College.

6. I have reviewed the pleadings in this matter and believe that intervention by the SBA will be critical to the protection of the rights and interests of the SBA's members.

Sergeants are uniquely responsible for matters involving "stop, question and frisk" procedures, and they are required to both carry out and supervise these procedures.

7. The NYPD police sergeants are at the front line of police services in the City of New York generally. Among other things, a sergeant is responsible for supervising patrolmen and other subordinate officers, and for implementing policies of the NYPD on the street level. A sergeant is required to train, instruct, monitor, and advise subordinates in their duties, and is held directly responsible for the performance of those subordinates.

8. In addition to supervisory responsibilities, a sergeant also routinely performs field police work, which typically consists of relatively complex law enforcement activities with which only sergeants are entrusted.

9. A sergeant often spends the entire work day in the field patrolling streets in his or her precincts, either in uniform or in plain clothes conducting surveillance.

10. Sergeants also patrol in the field in cars, unmarked vans, on foot, and on horseback. They are directly dispatched to more difficult and complex calls, are expected to determine and verify probable cause in all arrests in their units, and are the only police officers authorized to use certain types of non-lethal weapons, such as Tasers.

11. Sergeants are also required to prepare various law enforcement reports and are

ultimately responsible for all paperwork in their units.

12. Because of their unique, dual role in the law enforcement process, sergeants are required to know and understand all applicable rules of criminal procedure, to follow those rules themselves, and to train and advise subordinates regarding what the rules require.

13. Sergeants are expected to be extremely well-versed in such matters and are the first officers consulted when difficult or complex questions arise.

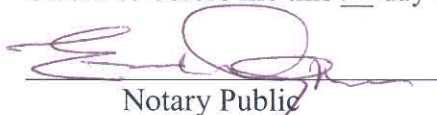
14. Historically, the NYPD has used racial and ethnic characteristics, among other characteristics and in conjunction with entirely race-neutral factors and information, to identify suspects and to stop, question, and frisk those suspects.

15. Members of the SBA have been directly involved with and responsible for administering practices that rely on such identification techniques, none of which were previously considered "profiling" under the ban on profiling set forth in § 14-151 of the New York City Administrative Code.



Ed Mullins

Sworn to before me this 10 day of October, 2013



Notary Public

ERROL OGMAN
NOTARY PUBLIC-STATE OF NEW YORK
No. 01OG6119243
Qualified in Richmond County
Commission Expires November 29, 2014

EXHIBIT A

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

----- X
THE MAYOR OF THE CITY OF NEW YORK, :
 :
 : INDEX NO. 451543/2013
 :
 Plaintiff, : COMPLAINT OF INTERVENOR
 : SERGEANTS BENEVOLENT
 -against- : ASSOCIATION
 :
 THE COUNCIL OF THE CITY OF NEW YORK, :
 :
 Defendant. :

----- X
SERGEANTS BENEVOLENT ASSOCIATION, :
 :
 :
 Intervenor-Plaintiff, :
 :
 -against- :
 :
 THE COUNCIL OF THE CITY OF NEW YORK, :
 :
 Defendant. :

----- X
Intervenor-Plaintiff Sergeants Benevolent Association (the “SBA”), for its Complaint against the Council of the City of New York (“Council”), alleges as follows:

PRELIMINARY STATEMENT

1. This action challenges the validity of a local law adopted by the Council over the veto of the Mayor of the City of New York (the “Mayor”), Local Law 71 for the year 2013 (“Local Law 71”), as preempted by the New York State Criminal Procedure Law, and as unconstitutionally vague.

2. Local Law 71 purports to amend Administrative Code § 14-151, the City of New York's (“City”) existing prohibition on racial and ethnic profiling by a law enforcement officer, including members of the force of the New York City Police Department (the “NYPD”). It

expands the definition of prohibited profiling; it extends the prohibition to not just individual law enforcement officers, but also the NYPD; it creates private rights of action for intentional and disparate impact profiling claims against law enforcement officers, the City, and the NYPD; it specifies the burdens of proof and evidentiary requirements for such rights of action; and it allows courts to award attorneys' fees and expert fees to prevailing plaintiffs in profiling lawsuits.

3. The Mayor vetoed Local Law 71 on the grounds that it is unlawful and harmful to the City.

4. Local Law 71 is unlawful because it is preempted by the State Criminal Procedure Law, which is a comprehensive and detailed State regulatory scheme that fully occupies the field of criminal procedure and bars local legislatures, including the Council, from legislating in this area. Because it is preempted, Local Law 71 exceeds the bounds of permissible legislation by the Council.

5. Local Law 71 also violates the New York State Constitution because it is too vague and police officers generally cannot reasonably determine what conduct is prohibited from the language of Local Law 71, and it fails to provide clear standards for city officials and courts to apply in enforcing the law.

PARTIES

6. The plaintiff is the Mayor of the City of New York. The Mayor is “the chief executive officer of the city” and exercises all the powers vested in the City, except as otherwise provided by law. Charter §§ 3, 8.

7. The Intervenor-Plaintiff is the SBA, an independent municipal police union whose membership consists of approximately 13,000 active and retired sergeants of the NYPD.

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

JURISDICTION AND VENUE

6. This Court has jurisdiction over defendant pursuant to CPLR 301.

7. Venue in New York County is proper pursuant to CPLR 503(a).

FACTS

Local Law 71

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

9. Local Law 71 prohibits “biased-based profiling,” which it defines as an act by a 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.” Local Law 71, Section 2 (amending Ad. Code § 14-151), at § (a)(1), (b).

10. The Law defines “housing status” to include, among other things, being homeless or having a home, living in public housing, or owning or renting a home. 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), (a)(4).

11. Local Law 71 creates two ways for a plaintiff to establish a claim of biased-based profiling. First, it provides that a claim for intentional 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).

12. Second, it provides that a claim is established when “a policy or practice . . . or a group of policies or practices within the police department regarding the initiation of law enforcement action has had a disparate impact....” *Id.* § (c)(2)(i). It provides that a claim is established where:

(i) a policy or practice within the police department or a group of policies or practices within the police department regarding the initiation of law enforcement action has had a disparate impact on the subjects of law enforcement action on the basis of characteristics delineated in paragraph 1 of subdivision a of this section, such that the policy or practice on the subjects of law enforcement action has the effect of bias-based profiling; and

(ii) The police department fails to plead and prove as an affirmative defense that each such policy or practice bears a significant relationship to advancing a significant law enforcement objective or does not contribute to the disparate impact; provided, however, that if such person who may bring an action demonstrates that a group of policies or practices results in a disparate impact, such person shall not be required to demonstrate

which specific policies or practices within the group results in such disparate impact; provided further, that a policy or practice or group of policies or practices demonstrated to result in a disparate impact shall be unlawful where such person who may bring an action produces substantial evidence that an alternative policy or practice with less disparate impact is available and the police department fails to prove that such alternative policy or practice would not serve the law enforcement objective as well.

Id. § (c)(2).

13. Local Law 71 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 of 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).

14. A plaintiff may assert intentional and/or disparate impact biased-based profiling claims either in a civil action or before the New York City Commission on Human Rights. *Id.* § (d)(1). The claim may be asserted against “any governmental body that employs any law enforcement officer,” an officer, and the NYPD. *Id.*

15. Local Law 71 provides for injunctive and declaratory relief. The court may also “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)(2), (d)(3).

16. Local Law 71 further provides that its terms should be “construed broadly, consistent with the Local Civil Rights Restoration Act of 2005.” Local Law 71, Section 1.

The Criminal Procedure Law

17. 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 NYPD. 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 procedures and standards law enforcement officers must apply and follow in performing their investigative and law enforcement work.

18. Aside from the CPL, law enforcement agencies and officers, including the NYPD and individual officers, are also subject to applicable federal and state constitutions, laws, rules, and judicial orders.

19. 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 Memoranda, dated May 20, 1970.

20. 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.

21. Accordingly, 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 procedure.” Bill Jacket for Chapter 346 of the Laws of 1961, Program Bill Memorandum.

22. 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 Commission on Revision of the Penal Law and Criminal Code.

23. The resulting Criminal Procedure Law is a detailed and complete set of laws that was 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.

24. For example, CPL Article 690 governs the issuance and execution of search warrants, and CPL Article 700 governs warrants for wiretaps and video surveillance. CPL § 140.50 governs the stopping and questioning of persons by police officers and specifies the conditions under which a stop may lawfully be made and the conditions when an officer may lawfully search a person. Other provisions of the CPL govern arrests, fingerprinting, and all other aspects of criminal procedure.

25. The CPL expressly states that it is the sole source of procedure for criminal actions, proceedings, and matters. It provides that the CPL applies “exclusively” to “all 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).

26. As the State Legislature recognized 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.

The Mayor's Veto

27. On July 23, 2013, the Mayor vetoed Local Law 71 on the ground 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

28. On August 22, 2013, the Council voted to override the Mayor's veto.

29. Accordingly, pursuant to its terms, Local Law 71 will go into effect 90 days after its effective date. Local Law 71, Section 5.

The SBA

30. The SBA is a an independent municipal police union whose membership consists of approximately 13,000 active and retired sergeants of the NYPD.

31. The SBA's central mission is to advocate for, and protect the interests of, its NYPD police sergeant members.

32. NYPD sergeants are at the front line of police services in the City.

33. Among other things, a sergeant is responsible for supervising patrolmen and other subordinate officers, implementing policies of the NYPD on the street level.

34. A sergeant is required to train, instruct, monitor, and advise subordinates in their duties, and is held directly responsible for the performance of those subordinates.

35. A sergeant is the front-line supervisor responsible for carrying out the mission of the NYPD during thousands of street-level encounters.

36. In addition to supervisory responsibilities, however, a sergeant also routinely performs field police work, which typically consists of relatively complex law enforcement activities with which only sergeants are entrusted.

37. Because of their unique, dual role in the law enforcement process, sergeants are required to know and understand all applicable rules of criminal procedure, to follow those rules themselves, and to train and advise subordinates regarding what the rules require.

38. Sergeants are expected to be extremely well-versed in such matters and are the first officers consulted when difficult or complex questions arise.

39. Historically, the NYPD has used racial and ethnic characteristics, among other characteristics and in conjunction with entirely race-neutral factors and information, to identify suspects and to stop, question, and frisk those suspects.

40. Members of the SBA have been directly involved with and responsible for administering practices that rely on such identification techniques, none of which were previously considered “profiling” under the ban on profiling set forth in § 14-151 of the Code.

The Challenges of Compliance with Local Law 71

41. Local Law 71 makes unlawful any “bias-based profiling,” a term that is defined as using certain characteristics of an individual as the “determinative factor in initiating law enforcement action against an individual.”

42. The law contains no standard for what makes a factor the “determinative factor,” and makes no allowance for the fact that nearly all police action is based on a wide variety of factors, no one of which is determinative.

43. On its face, therefore, Local Law 71 unfairly requires police officers, including SBA members, to identify a single “determinative factor” in every law enforcement action to ensure that the “determinative factor” was not any of the actual or perceived characteristics enumerated in the law.

44. The result will be a chilling of law enforcement activity in areas where low-income or subsidized housing exists, areas that also tend to have high crime rates and thus are more in need of law enforcement than other areas may be. Police officers will be unable to be sure that patrols and other activity conducted in such areas will not be alleged to be based on “housing status” within the meaning of Local Law 71.

45. Moreover, Local Law 71 uses the vague term “housing status” to refer to various vague housing-related characteristics, such as “ownership status[,] . . . not having a fixed residence[,] . . . use of publicly assisted housing[,] . . . use of the shelter system[,] . . . and actual or perceived homelessness.”.

46. Such provisions do not give police officers, and particularly SBA members, fair notice of what conduct is prohibited under Local Law 71.

47. By setting ambiguous standards of conduct for police officers, Local Law 71 threatens to subject them to personal liability, with no assurance of defense and indemnification by the City, for acts that they could not reasonably predict were prohibited by the law. That is because, under the New York State General Municipal Law, the City has broad discretion to deny defense and indemnification of City employees when it determines that a City employee-defendant was acting outside the scope of his or her employment or in violation of a rule or regulation. *See* Gen. Mun. L. § 50-k.

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

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

49. 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 irrespective of whether the local law is consistent or inconsistent with State law.

50. 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.

51. The CPL is a comprehensive and detailed regulatory scheme that imposes burdens, limitations and obligations on law enforcement, including the NYPD and individual officers, and determines the procedures that law enforcement must follow in performing their work, from investigations through post-trial proceedings. 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 local legislatures, including the Council, from passing local laws in this area, regardless of whether those local laws are consistent or inconsistent with the CPL.

52. The Criminal Procedure Law expressly states that it is the sole source of procedure for criminal actions, proceedings, and matters. According to the CPL, it applies “exclusively” to “all 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).

53. Law enforcement, including the NYPD and individual law enforcement officers, are subject to applicable federal and state constitutions, laws, rules, and judicial orders.

54. By legislating what is or is not an unlawful enforcement action, and creating enforcement mechanisms for same, Local Law 71 seeks to regulate criminal procedure—an area

that is preempted by the CPL which, as set forth above, occupies the entire field of State criminal procedure legislation, including the procedures that govern law enforcement actions.

55. The CPL contains no prohibition on law enforcement activity that entails identifying characteristics of suspects and using such information to locate suspects.

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

WHEREFORE, the SBA respectfully requests a declaratory judgment that Local Law 71 is invalid, without 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.

SECOND CAUSE OF ACTION
(Unconstitutional Vagueness)

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

58. The SBA and its members are aggrieved by the operation of Local Law 71, and its members' personal rights are affected by its operation.

59. Local Law 71 employs ambiguous words and phrases such as "determinative factor."

60. Local Law 71 purports to require police officers to avoid from using "housing status," whether "actual or perceived," as the "determinative factor" in any law enforcement action, when areas of the City in which individuals with protected "housing status" reside also are often high-crime areas in need of law enforcement.

61. Accordingly, Local Law 71 is not sufficiently definite to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute.

62. Local Law 71 does not set forth clear standards for enforcement.

63. Accordingly, Local Law 71 is unconstitutionally vague.

WHEREFORE, the SBA respectfully requests a declaratory judgment that Local Law 71 is invalid, without 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.
September _____, 2013

Respectfully submitted,

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By: _____
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