UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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TRANSPORT WORKERS UNION OF GREATER NEW YORK, AFL-CIO, LOCAL 100, as the Representative of Bus Drivers Employed by the New York City Transit Authority, Manhattan and Bronx Surface Transit Operating System; and KATHRINE ANGOTTI, JENNINE GREGORY, WILLIAM GONZALEZ, ANGELO CRISPN, RAYMOND VEGA, and CHRISTOPHER MAGWOOD, as Class Representatives of All Bus Drivers Employed by the New York City Transit Authority, Manhattan and Bronx Surface Transit Operating System,

Plaintiffs,

–against–

BILL DE BLASIO, as MAYOR OF THE CITY OF NEW YORK; and THE CITY OF NEW YORK,

Defendants.

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CLASS ACTION COMPLAINT

Plaintiffs Transport Workers Union of Greater New York, AFL-CIO, Local 100 ("Local 100" or the "Union"), Katherine Angotti, Jennine Gregory, William Gonzalez, Angelo Crispin, Raymond Vega, and Christopher Magwood, for their complaint against Defendants Bill de Blasio, as Mayor of The City of New York ("de Blasio"), and The City of New York (the "City"), by and through their undersigned attorneys, complain as follows:

PRELIMINARY STATEMENT

1. Plaintiff Local 100 and the individually named Plaintiffs bring this representative and class action in order to challenge the validity of New York City Local Law Number 29 for the year 2014 ("Local Law 29" or "Vision Zero"), also known as §19-190 of the New York City Administrative Code, under the United States Constitution. Plaintiffs submit that:

a. the statute, which is applied only to motor vehicle operators, is so vague that it "does not give a person of ordinary intelligence a reasonable opportunity to know what is prohibited." Grayned v. City of Rockford, 408 U.S. 104 (1972);

b. the statute is "impermissibly vague in all of its applications." Village of Huffman Estates v. Flipside Hoffman Estates, Inc., 455 U.S. 489 (1982);

c. the statute is "permeated with vagueness and unlawfully includes no *mens rea* requirement." City of Chicago v. Morales, 527 .S. 431 (1999); U.S. v. Rybicki, 354 F.3d 124 (2d Cir. 2003);

d. the statute provides insufficient notice of what behavior is prohibited. Farrell v. Burke, 449 F.3d 470 (2d Cir. 2006); and that

e. the statute fails to provide explicit standards for those who apply the statute, effectively authorizing or even encouraging arbitrary and discriminatory enforcement. Hill v. Colorado, 530 U.S. 703 (2000); Kolender v. Lawson, 461 U.S. 352 (1983).

2. Through this action, Plaintiffs seek a Declaratory Judgment and Permanent Injunction under 28 U.S.C. §§ 2201, 2202, 42 U.S.C. §1983 and the Fifth and Fourteenth amendments; (i) declaring that the challenged provisions of Local Law 29 are unconstitutionally vague and violative of due process; and (ii) permanently enjoining Defendants from enforcing Local Law 29; or, in the alternative, (iii) declaring that a breach of due care is an element of the misdemeanor created by Local Law 29 distinct from the element of "failure to yield";
(iv) permanently enjoining the arrest of motorists absent probable cause to believe that such motorist has failed to behave as a reasonably prudent person would under the circumstances; and

2. (v) declaring that Bus Operators actively working on behalf of the New York City Transit Authority ("NYCTA"), "Manhattan and Bronx Surface Transit Operating Authority

("MABSTOA"), and the MTA Bus Company ("MTA Bus") are exempt from Local Law 29 under the plain meaning of the law.

JURISDICTION AND VENUE

3. This action arises under the Constitution and laws of the United States, including the Fifth and Fourteenth Amendments to the U.S. Constitution. Jurisdiction is conferred on this Court pursuant to 28 U.S.C. §§ 1331 and 1343, and 42 U.S.C. §1983.

4. This court has jurisdiction to issue the declaratory relief requested pursuant to the Declaratory Judgment Act, 28 U.S.C. §§2201-2202.

5. Venue is appropriate in the Eastern District of New York pursuant to 28 U.S.C. § 1391 (b).

PARTIES

6. Plaintiff Local 100 is an unincorporated labor organization of transit employees, which counts among its members, approximately twelve thousand persons employed as Bus Operators whose liberty and property interests are threatened by the enactment of and continued prosecution of §19-190 of the Administrative Code. Local 100's offices are located at 195 Montague Street, Brooklyn, New York. Local 100's standing to bring suit is predicated on the fact that its Bus Operator members are aggrieved and would have standing to sue in their own right, that the interests of its members to be free from arbitrary imprisonment arising from their employment are germane to Local 100's mission of advocacy for the rights of its members and the betterment of the conditions of their employment, and that neither the claims asserted nor the relief requested herein requires the participation of individual members. Furthermore, Plaintiff Local 100 has been injured and reasonably anticipates further injury as it has expended and will

continue expend significant amounts of money representing its members in criminal and disciplinary proceedings arising from arrest under the challenged law.

a. Francisco DeJesus ("DeJesus") is a Local 100 member and NYCTA bus operator. Mr. DeJesus was arrested in Kings County on or about February 13, 2015 for the purported violation of §19-190 of the City Administrative Code and thereby suffered a deprivation of his liberty interest. Member DeJesus is alleged to have struck a pedestrian at the corner of Union Avenue and Grand Street while making a left turn required by the Q59 route. As a matter of policy and practice, Mr. DeJesus' employer, NYCTA, seeks discipline up to and including termination of employment upon receipt of notification of arrest and treats the contents of police reports and charging documents as prima facie evidence of the allegations therein.

b. Reginald Prescott ("Prescott") is a Local 100 member and NYCTA bus operator. Prescott was arrested in Kings County on or about December 23, 2014 for the purported violation of §19-190 of the City Administrative Code and thereby suffered a deprivation of his liberty interest. Member Prescott is alleged to have struck a pedestrian at the corner of Farragut Road and New York Avenue while making a left turn required by the B44 route. As a matter of policy and practice, Mr. DeJesus' employer, NYCTA, seeks discipline up to and including termination upon receipt of notification of arrest and treats the contents of police reports and charging documents as prima facie evidence of the allegations therein.

c. Oswald Villafane ("Villafane") is a Local 100 member and NYCTA bus operator. Mr. Villafane was arrested in Kings County on or about October 30, 2014 for the purported violation of §19-190 of the City Administrative Code and thereby suffered a deprivation of his liberty interest. Member Villafane is alleged to have struck a pedestrian at the corner of Palmetto Avenue and Myrtle Avenue while making a right turn required by the Q58

route. As a matter of policy and practice, Mr. Villafane's employer, NYCTA, seeks discipline up to and including termination of employment upon receipt of notification of arrest and treats the contents of police reports and charging documents as prima facie evidence of the allegations therein.

7. Plaintiff Katherine Angotti is currently in the employ of NYCTA as a Bus Operator and is subject to the same disciplinary scheme and conditions of employment as members DeJesus, Prescott and Villafane. She is required by her employer to operate immense vehicles, often weighing in excess of forty thousand pounds. She is required to follow prescribed routes through densely populated areas and to make turns in areas of heavy pedestrian traffic under time constraints. Plaintiff Angotti now labors under an ever present threat of arbitrary criminal prosecution under the challenged law.

8. Plaintiff Jennine Gregory is currently in the employ of NYCTA as a Bus Operator and is subject to the same disciplinary scheme and conditions of employment as members DeJesus, Prescott and Villafane. She is required by her employer to operate immense vehicles, often weighing in excess of forty thousand pounds. She is required to follow prescribed routes through densely populated areas and to make turns in areas of heavy pedestrian traffic under time constraints. Plaintiff Gregory now labors under an ever present threat of arbitrary criminal prosecution under the challenged law.

9. Plaintiff William Gonzalez is currently in the employ of NYCTA as a Bus Operator and is subject to the same disciplinary scheme and conditions of employment as members DeJesus, Prescott and Villafane. He is required by his employer to operate immense vehicles, often weighing in excess of forty thousand pounds. He is required to follow prescribed routes through densely populated areas and to make turns in areas of heavy pedestrian traffic

under time constraints. Plaintiff Gonzalez now labors under an ever present threat of arbitrary criminal prosecution under the challenged law.

10. Plaintiff Angelo Crispin is currently in the employ of NYCTA as a Bus Operator and is subject to the same disciplinary scheme and conditions of employment as members DeJesus, Prescott and Villafane. He is required by his employer to operate immense vehicles, often weighing in excess of forty thousand pounds. He is required to follow prescribed routes through densely populated areas and to make turns in areas of heavy pedestrian traffic under time constraints. Plaintiff Crispin now labors under an ever present threat of arbitrary criminal prosecution under the challenged law.

11. Plaintiff Raymond Vega is currently in the employ of NYCTA as a Bus Operator and is subject to the same disciplinary scheme and conditions of employment as members DeJesus, Prescott and Villafane. He is required by his employer to operate immense vehicles, often weighing in excess of forty thousand pounds. He is required to follow prescribed routes through densely populated areas and to make turns in areas of heavy pedestrian traffic under time constraints. Plaintiff Vega now labors under an ever present threat of arbitrary criminal prosecution under the challenged law.

12. Plaintiff Christopher Magwood is currently in the employ of NYCTA as a Bus Operator and is subject to the same disciplinary scheme and conditions of employment as members DeJesus, Prescott and Villafane. He is required by his employer to operate immense vehicles, often weighing in excess of forty thousand pounds. He is required to follow prescribed routes through densely populated areas and to make turns in areas of heavy pedestrian traffic under time constraints. Plaintiff Magwood now labors under an ever present threat of arbitrary criminal prosecution under the challenged law.

13. Defendant City of New York (“City”) is a municipal entity created and authorized under the laws of the State of New York. At all times relevant hereto, the City has been responsible for adopting and will be responsible for enforcing the legislation challenged in this case. Defendant City is authorized under the laws of the State of New York to maintain a police department, the NYPD, which acts as its agent in the area of law enforcement and for which it is ultimately responsible.

14. Defendant Bill de Blasio (“de Blasio”) is and was, at all times relevant herein, the Mayor of the City of New York and the chief administrative and executive official for the City and its departments including the NYPD. He is sued solely in his official capacity.

CLASS ACTION ALLEGATIONS

15. The individual plaintiffs bring their causes of action on behalf of a class of similarly situated employees, to wit, bus drivers employed by the NYCTA and its subsidiary, MABSTOA, and the MTA Bus Company.

a. The class is so numerous that joinder of all members is impracticable.

b. There are questions of law or fact common to the class.

c. The claims or defenses of the representative party are typical of the claims or defenses of the class.

d. The representative party will fairly and adequately protect the interests of the class.

e. The presentation of separate actions by individual class members would create a risk of inconsistent or varying adjudications with respect to individual members of the class that would establish incompatible standards of conduct for the party opposing the class.

f. The party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole.

FACTS RELEVANT TO ALL CLAIMS

16. On June 23, 2014, the City enacted local law No. 29 of the 2014 legislative session ("No. 29").[1] No. 29 was one of a raft of eleven bills and six resolutions passed which

[1] See Local Laws of the City of New York for the year 2014 " To amend the administrative code of the city of New York, in relation to the right of way of pedestrians and bicyclists"(taking effect August 22, 2014, adding section 19-190 to the NYC Administrative Code) *infra*:

> "Section 1. Subchapter 3 of chapter 1 of title 19 of the administrative code of the city of New York is amended by adding a new section 19-190 to read as follows:
>
> §19-190 Right of way. a. Except as provided in subdivision b of this section, any driver of a motor vehicle who fails to yield to a pedestrian or person riding a bicycle when such pedestrian or person has the right of way shall be guilty of a traffic infraction, which shall be punishable by a fine of not more than fifty dollars or imprisonment for not more than fifteen days or both such fine and imprisonment. In addition to or as an alternative to such penalty, such driver shall be subject to a civil penalty of not more than one hundred dollars which may be recovered in a proceeding before the environmental control board. For purposes of this section, "motor vehicle" shall have the same meaning as in section one hundred twenty-five of the vehicle and traffic law.
>
> b. Except as provided in subdivision c of this section, any driver of a motor vehicle who violates subdivision a of this section and whose motor vehicle causes contact with a pedestrian or person riding a bicycle and thereby causes physical injury, shall be guilty of a misdemeanor, which shall be punishable by a fine of not more than two hundred fifty dollars, or imprisonment for not more than thirty days or both such fine and imprisonment. In addition to or as an alternative to such penalty, such driver shall also be subject to a civil penalty of not more than two hundred fifty dollars which may be recovered in a proceeding before the environmental control board. For purposes of this section, "physical injury" shall have the same meaning as in section 10.00 of the penal law.
>
> c. It shall not be a violation of this section if the failure to yield and/or physical injury was not caused by the driver's failure to exercise due care.
>
> d. This section shall not apply to persons, teams, motor vehicles, and other equipment working on behalf of the city of New York, the state of New York, or the federal government while actively engaged in work requiring the presence of a motor vehicle in a location that interferes with the right of way of a pedestrian or person riding a bicycle. Such persons, teams , motor vehicles, and other equipment shall proceed at all times during all phases of such work exercising due regard for the safety of all persons and consistent with all applicable laws, rules, and regulations. Nothing in this section shall relieve such persons or teams or such operators of motor vehicles or other equipment from the consequences of failure to exercise due care or the consequences of their reckless disregard for the safety of others.
>
> §2. This local law shall take effect sixty days following enactment into law."

were collectively known as the "Vision Zero" legislation, a legislative program with the admirable goal of reducing traffic fatalities in New York City.

17. The enactments followed Defendant de Blasio's presentation of the Vision Zero Action Plan,[2] public comment, hearings, and debate over the several drafts of the legislation considered by the New York City Council.

18. The Vision Zero Action Plan proposed, inter alia, increased enforcement against dangerous moving violations such as "failure to yield" as well as a "sweeping legislative agenda to increase penalties for dangerous drivers"[3] in an effort to, "ensure that New Yorkers are able to realize lives of health and opportunity without catastrophic interruption by careless and preventable traffic incidents."[4]

19. The Vision Zero Action Plan also called for an effort to work with the New York State Legislature to expand, the traffic violation of failure to exercise due care and to increase, " the penalties associated with carelessly harming a pedestrian or bicyclist."[5]

20. The Action Plan's reference to the traffic violation of failure to exercise due care was an explicit reference to the New York State legislature's 2010 enactment of Haley and Diego's Law which amended §1146, Art. 26 of the Vehicle and Traffic Law to establish a traffic infraction for drivers who injure a pedestrian or bicyclist due to a motorist's failure to exercise due care in operating a motor vehicle.

21. The purpose of the proposed legislative change described the Vision Zero Action Plan was to facilitate the arrest and prosecution of motorists:

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[2] http://www.nyc.gov/html/visionzero/pdf/nyc-vision-zero-action-plan.pdf *accessed* 3/26/2015

[3] Id. at 7

[4] Id. at 8

[5] Id at 22

> "By making this a crime rather than a traffic infraction, the law would explicitly allow a police officer to issue a summons to a person who failed to exercise due care and seriously injured or killed a pedestrian or bicyclist, based upon probable cause, even if the officer was not present to witness the crash"[6]

22. Previously, the operation of New York Criminal Procedure Law ("CPL") §140.10 and public policy required that a police officer be present at the scene of a traffic infraction in order to effectuate a warrantless arrest unless he or she possessed "special expertise" in crash investigation.

23. Indeed, it was the clear import of New York City Council Resolution 0144-2014 to invite the State Legislature to amend §1146, Art. 26 of the Vehicle and Traffic Law ("VTL") to empower police with no such expertise, who were not present at the scene of a traffic accident to make arrests.

24. It is similarly clear that the New York State Legislature has repeatedly declined Defendants' request to amend the VTL and undermine protections for the accused enshrined in N.Y. CPL. LAW §140.10 (1)(b).[7]

25. Bill S3644-2013 was introduced in consecutive legislative sessions in the New York State Senate to amend VTL §1146 to provide for warrantless arrest without the reclassification of the traffic violation as a misdemeanor, but, has not been enacted.

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[6] Id.

[7] N.Y. CPL. LAW §140.10 (1)(b) provides in pertinent part,

> " 1. Subject to the provisions of subdivision two, a police officer may arrest a person for:(a) Any offense when he has reasonable cause to believe that such person has committed such offense in his presence; and (b) A crime when he has reasonable cause to believe that such person has committed such crime, whether in his presence or otherwise."

26. Indeed, Local Law 29 was an end-run around the New York State Legislature's failure to amend VTL §1146 at the behest of Defendants.

27. In Local Law 29, the City Council created a parallel criminal statute with elements similar to VTL §1146, but recast the offense as a misdemeanor so as not to require the presence of a police officer to effectuate arrest under N.Y. CPL. LAW §140.10 (1)(b).

28. Defendants have thus provided fewer safeguards for the accused by re-branding a traffic violation as a crime.

29. With a tailwind of ubiquitous support for safer city streets, Local Law No. 29 was enacted with great fanfare and overwhelming support by the City Council and signed by Mayor de Blasio.

30. Significantly, it appears that the unanimous support Local Law 29 received within the City Council was fueled, in part, by the ambiguous treatment of "due care" within the text of the legislation and a similarly unclear exemption for individuals working on behalf of the City, State and Federal governments.

31. When Defendants enact law that gives rise to criminal liability, they owe their constituents a heightened duty to ensure that a person of ordinary intelligence is able to decipher what is prohibited and to give unambiguous direction to law enforcement and the courts to avoid discriminatory and arbitrary application of the law. Defendants fell well short of that duty in their articulation of the operation, import and meaning of "due care" within Local Law No. 29 and the identification of those persons intended to be exempt from the law.

32. Local Law No. 29, as written and enacted, is unconstitutionally vague as its ambiguous treatment of "due care" fails to put a person of ordinary intelligence on notice of the elements of the offense, fails to provide law enforcement with clear direction of the elements of

the offense sufficient for the formation of reasonable cause, and threatens disparate and arbitrary enforcement by police, prosecutors, and courts who may determine in one case that a breach of a duty of care or, "negligence" is an element of the crime and in another, merely an affirmative defense available to a crime of strict liability.

33. The Plaintiffs here, collectively both as a union and a class, are particularly aggrieved by the ambiguities of Local Law No. 29. Local 100 is a labor organization that represents bus operators: employees working on behalf of subsidiaries of the Metropolitan Transportation Authority who are required, in the course of their employment, to operate immense vehicles with built-in blind spots, on heavily populated New York City streets, that are governed by traffic control systems that, among other shortcomings, irresponsibly encourage motorists to make left turns and pedestrians to proceed at the same time.

34. Unlike other motorists, Plaintiff Local 100's represented bus operators, and members of Individual Plaintiffs' class, are required to make such turns in the course of their employment based on the routes they are assigned, and do so frequently, day in and day out. As a result, Local 100's members now find that conditions of their employment include an ever-present threat of arrest and incarceration for innocent conduct under an unclear law.

35. Not only have several of Local 100's members and members of the Individual Plaintiffs' class already suffered arrest and actual deprivation of liberty under the color of this law and are threatened with further imminent deprivation, but a second facially ambiguous subsection of the statute, which would seem to explicitly exclude city bus operators from its ambit, has been repeatedly ignored by some law enforcement officers, who include bus operators to their material detriment.

36. Upon information and belief, since August 22, 2014 at least seventeen motorists have been arrested for misdemeanor failure to yield under §19-190 of New York City's Administrative Code, the section of the code enacted by Local Law 29. Those arrested motorists have been deprived of a significant and cognizable liberty interest by virtue of such arrest.

37. Upon information and belief, enforcement of §19-190 has disproportionately fallen upon the NYCTA, MABSTOA, and MTA Bus bus operators; at least six of the arrested motorists are employed as bus operators for NYCTA and MABSTOA, including the three discussed, supra, in ¶ 6(a), (b), and (c).

38. In enacting Local Law No. 29, Defendants amended subchapter 3 of chapter 1 of title 19 of the Administrative Code of the City of New York to add § 19-190 Right of Way. The challenged code has four subsections (a)–(d) set forth fully hereinabove in footnote 1.

39. § 19-190 (a), in pertinent part, first creates a caveat "Except as provided in subdivision b of this section" and proceeds to create a traffic infraction under the administrative code should the driver of a motor vehicle fail to yield to a pedestrian or bicyclist when the latter has the right of way. § 19-190 (a) includes a range of penalties such as fines, imprisonment, and civil penalty. The subsection explicitly invokes § 125 of the Vehicle and Traffic Code and incorporates the definition of "motor vehicle" found therein.

40. § 19-190 (b), begins with the notable caveat, "Except as provided in subdivision c…," and proceeds to create a misdemeanor under the administrative code if, "in addition to the failure to yield described in section (a), a motorist's vehicle also causes contact with a pedestrian or a bicyclist and such contact causes physical injury. Such misdemeanor may be punishable by fines, up to thirty days of imprisonment and civil penalty." The subsection explicitly invokes §10.00 of the Penal law and incorporates the definition of "physical injury" found therein.

41. § 19-190 (c), invoked in the preceding subsection, states, "**It shall not be a violation of this section if the failure to yield and/or physical injury was not caused by the driver's failure to exercise due care.**" (Emphasis added.)

42. § 19-190 (d) purports to exempt, "certain persons, teams, motor vehicles and other equipment" working on behalf of the city, state or federal government, "**while actively engaged in work requiring the presence of a motor vehicle in a location that interferes with the right of way of a pedestrian or person riding a bicycle**" from the instant section. (Emphasis added.)

43. On or about March 26, 2014 an initial version of the challenged law was introduced into the New York City Council and referred to committee.

44. As originally introduced on March 26, 2014, § 19-190 (c) stated solely, "It shall be a defense to subdivision b of this section that the actions or inactions of the driver of such motorized vehicle were not a proximate cause of the contact that occurred." This version of the law contained no subsection (d) and did not otherwise purport to exempt any person.

45. On or about April 30, 2014 a committee of Defendant City Council proposed an amendment to the law such that§ 19-190 (c) would solely state, "In any proceeding for a violation of this section, **it shall be a defense** that the interference with the right of way of a pedestrian was caused by actions or circumstances that were fully outside the control of the driver of such vehicle, including but not limited to when such contact was initiated by such pedestrian." (Emphasis added.)

46. On or about April 30, 2014, Defendant City Council conducted a hearing on the proposed legislation and solicited comment from the public and members of the de Blasio Administration.

47. Erhan Tuncel, Managing Director of the League of Mutual Taxi Owners offered the following written testimony:

> "When an incident occurs where a vehicle comes into contact with another vehicle or a bicycle or a pedestrian, it is referred to as an accident. The reason is that it is accidental not intentional, I hope that it is not the intention of this Council to declare someone a criminal and imprison them for being involved in a traffic accident. I ask that you reconsider this section of the amendment, as it is written."

48. Polly Trottenberg, New York City's Commissioner of Transportation, testifying on behalf of Defendant de Blasio, made reference to the "special responsibility" of motorists, stating:

> "In particular, I am eager to work with the Council and NYPD on Intro 238 to address the issue of vehicles failing to yield to a pedestrian or a cyclist in the right of way. As we state in the Vision Zero Action Plan, those vehicles in a dense, pedestrian-filled city like New York have a special responsibility to take care when driving"

49. Attorney Steve Vaccaro, a personal injury lawyer representing bicycle crash victims and pedestrians hit by vehicles, also offered written testimony wherein he emphasized a motorist's burden to disprove fault under the statute as it was then written:

> "Some may say this bill is too harsh because it turns every accident into a crime. That's untrue. Drivers are given a full opportunity to show that any collision with a pedestrian or cycles was not their fault, it's written right into the legislation. But it will be their burden to disprove fault. We will not simply accept the claim, "I didn't see them". We will insist that the driver explain why it was not his or her fault they didn't seem [sic] them"

50. Amy Tam Liao and His-Pei Liao, founding members of Families for Safe Streets offered written testimony in favor of the legislation, construing the legislation to create a criminal misdemeanor penalty for "reckless drivers," referring to "recklessness" seven times during the course of their testimony.

51. Written testimony was offered on behalf of New York City Police Commissioner William Bratton, which included, in pertinent part:

> "Finally, Intro. 238-A is consistent with our mutual goal of holding drivers accountable for failure to yield to pedestrians and bicyclists, and to create higher penalties when the failure to yield results in physical injury. **We look forward to further discussions with the Council to clarify provisions of the bill, especially in regard to enforcement, so that it may provide a new level of protection against failure to yield by motorists.**" (Emphasis added.)

52. Despite the overture to clarify enforcement issues, no subsequent on record discussion was had regarding the police commissioner's desire to clarify enforcement provisions of the bill.

53. Another advocate of the legislation, Transportation Alternatives, offered the following testimony, "By simply changing the penalty to a misdemeanor, the Council empowers an officer to cite drivers who are **obviously reckless**." (Emphasis added.)

54. On or about May 29, 2014 the City Council published a Committee Report that contained the final adopted language of Local Law 29; the bill removed all affirmative defense language from subsection (c) and created the statutory exemption in subsection (d).

55. The Committee Report cited the testimony at the public hearing as the cause of those amendments, but offered no other explanation of the final language.

56. No further guidance as to the meaning of the challenged sections is available in the legislative record.

57. On or about May 29, 2014, the City Council issued a press release regarding the challenged legislation that stated, in pertinent part, that the law:

> "…creates penalties for drivers who fail to yield to pedestrians or bicyclists who have the right of way. Under this legislation, any driver who fails to yield to pedestrian or bicyclist would be subject to a fine of not more than $50 and/or imprisonment of not more

> than 15 days. If a driver causes contact with a pedestrian or bicyclist as a result of failure to yield, or otherwise interfering with the right of way, and that contact results in physical injury to the pedestrian or bicyclist, the driver would be guilty of a misdemeanor. The misdemeanor would be punishable by a fine of not more than $250, and/or imprisonment for not more than thirty days, with an additional civil penalty of up to $250 permitted."

58. The press release provided no information about the operation of subsections (c) or (d) of the challenged law and discussed only the concept embedded in Sections (a) and (b).

59. It is settled law that a criminal statute is unconstitutionally vague if there is uncertainty in regard to the applicable test to ascertain guilt or there is uncertainty with regard to the persons properly within the scope of the legislation. The challenged provisions of §19-190 (a) and (b) have the ignominious distinction of being unconstitutionally vague in both respects.

60. §19-190 (b) and (c), read together, fail to give authorities sufficient guidance over the import and operation of the duty of "due care" or the standard of "negligence" historically defined in our jurisprudence by the breach of that duty. Specifically, § 19-190 (b) would seem to define the elements of the crime created without reference to a *mens rea* requirement save for the invocation of §19-190 (c) which provides, in a tortured double negative, that it shall not be a violation if the failure to yield or injury was not caused by a breach of the drivers duty of "due care."

61. It is fatally unclear, even upon examination of the legislative history, whether this section was intended to render circumstance specific negligence an element of the crime that must necessarily be articulated by an arresting officer, upon reasonable cause, or proven by the prosecution, or if the City Council intended, as in previous drafts, to place upon prospective defendants the burden of establishing "due care" as an affirmative defense.

62. While the language is a muddle, and the legislative intent unclear, it is clear that if Defendants had intended to articulate a rebuttable presumption of negligence whenever it was

evident that a motorist failed to yield, they had a responsibility to convey that legislative intent unambiguously so that a layperson of ordinary intelligence might be put on notice that defendant Council had promulgated a crime of strict liability.

63. Still more importantly, Defendants had a responsibility to articulate the elements of a criminal statute in a manner which would guide law enforcement in the statute's consistent application.

64. Profound disagreement among parties intimately involved in the law's passage underscore the ongoing controversy regarding the interpretation of the law and the challenged law's enforcement.

65. With regard to the arrest of NYCTA bus drivers discussed in paragraph 6 above, Queens City Council Member I. Daneek Miller was quoted in the press as saying, "This misinterpretation of this piece of legislation is what caused this problem" "There is a difference in failing to yield and being negligent."

66. Council Member Rory Lancman was also quoted in the press voicing his concern over arbitrary enforcement and indicating that a breach of due care should be treated by law enforcement officers as a necessary element of the misdemeanor enacted by the Council:

> "If the council had wanted to pass the law making it a crime to fail to yield, we would have done that; but we didn't … We added also the qualification that the driver needs to fail to exercise due care."

67. While testifying before the State Legislature on or about February 25, 2015 Defendant de Blasio was asked, in light of the arrests of city bus drivers, when arrest is appropriate under the challenged law. He stated:

> "What the law dictates is, if there is serious injury or fatality and if the officers on the scene determine that it was an avoidable injury or fatality, they are obligated to pursue an arrest. If the officers determine that it was unavoidable, meaning something happened that no driver could have possibly foreseen or responded to in time,

> they have the option of giving a summons. So this is a law – a new law with a clear standard."

68. With due respect to Defendant de Blasio, neither the measurement of "serious of injury," nor the obligation of arrest, nor the standard of total unavoidability, nor the option of giving a summons is apparent on the face of the law.

69. Defendant de Blasio's interpretation of Local Law 29 delegates determination of "due care" to the discretion of the responding officer and misstates the settled and familiar definition of due care[8] – the behavior of a reasonably prudent driver.

70. As chief executive of the NYPD, Defendant de Blasio's articulation of a standard of "total unavoidability" obligates police officers to make an arrests in accordance with a standard not reasonably derived from the words of the statute.

71. Transportation Alternatives, an interest group that, upon information and belief, has actively participated in the Vision Zero initiative from its inception, published the following interpretation of the law on their web page evincing a belief that the law's due care section continues to be an expression of an affirmative defense:

> "If the NYPD finds, based on probable cause, that a driver has failed to yield to a pedestrian or bicyclist with the right of way and caused physical injury or fatality, that driver may be charged and arrested at the scene of the crash".[9] "If the officer finds probable cause to believe the driver violated the victim's right of way, the officer could press charges. The burden of proof would then shift to the driver to show that the crash occurred even though he or she used all due care."[10]

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[8] "Due care is that care which is exercised by reasonably prudent drivers." *Russell v. Adduci*, 140 A.D.2d 844, 528 N.Y.S.2d 232, 234 (3d Dep't 1988)

[9] http://transalt.org/issues/vision-zero/right-of-way#sthash.Vo5RQskF.dpuf

[10] http://transalt.org/issues/vision-zero/right-of-way#testimonial

72. Despite the challenged law's amendment prior to passage, Transportation Alternatives continues to construe the language as requiring a determination of probable cause by the arresting officer of the elements of failure to yield, causation and physical injury and characterizes the statutes due care provision as establishing an available affirmative defense.

73. On or about April 7, 2015, Plaintiff Local 100 learned during the course of its criminal representation of a member under the challenged law, that at least one prosecuting attorney in the Brooklyn DA's office has taken the position that the challenged section continues to create an affirmative defense of due care.

FACTS AND ALLEGATIONS IN SUPPORT OF ALTERNATIVE RELIEF

74. Plaintiffs plead in the alternative requesting a declaratory judgment giving the challenged law the only meaning to which the plain language is susceptible, and which is Constitutionally sound: that a breach of the duty of care is an element of the misdemeanor created.

75. In support of Plaintiffs' alternative claim for relief, Plaintiffs urge that their reading of the statute relies on the legislative history which makes clear that the City Council twice rejected explicit affirmative defense formulations in prior drafts of the challenged law.

76. Plaintiffs submit that absent the willfully excluded language, the only acceptable interpretation of the statute renders a motorist's breach of a duty of due care as a necessary and material element of the misdemeanor created.

77. The legislative record available is replete with characterizations of the object motorists as "reckless" and other indicia of *mens rea* and thus militates against a construction of a strict liability offense.

78. Indeed, the statute, as enacted, includes no language that would support the contention that the City Council ultimately intended to promulgate a strict liability crime with a rebuttable presumption of negligence.

79. In the absence of textual support for such rebuttable presumption, the court would need to accept the implicit argument that a failure to yield renders a lack of due care obvious and presume that City Council intended the due care provision and failure to yield provisions to be duplicative and redundant.

80. Furthermore, in New York, a crime of strict liability, enacted in derogation of the common law requirement of *mens rea*, requires a clear expression of legislative intent.[11] If the law is amenable to interpretation as both a strict liability crime and a crime of specific intent, the court should require a showing of intent under the plain terms of §15.15 of the Penal Code.

81. Also, as the rule of lenity requires the court to construe an ambiguous statute in favor of the accused, Plaintiffs submit that such consideration should be afforded to Plaintiffs in light of the ongoing controversy and risk of imminent deprivation of their liberty.

82. Finally, Plaintiffs urge the court to find that NYCTA, MABSTOA, and MTA Bus bus operators categorically fall within the exclusion of the challenged law under the plain meaning of subsection (d). Plaintiffs are persons operating motor vehicles on behalf of city and state governments, whose occupations, routinely, and under prevailing traffic conditions unavoidably, "require the presence of a motor vehicle in a location that interferes with the right of way of a pedestrian or person riding a bicycle."

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[11] §15.15 of the Penal code states in pertinent part, "..A statute defining a crime, unless clearly indicating a legislative intent to impose strict liability, should be construed as defining a crime of mental culpability. **This subdivision applies to offenses defined both in and outside this chapter."** (Emphasis added.)

83. Plaintiffs repeat, reallege, and incorporate by reference all of the allegations set forth above as though restated in each cause of action set out below.

AS AND FOR A FIRST CAUSE OF ACTION

(42 U.S.C. § 1983 Violation of the Due Process Clause)
(Void for Vagueness)

84. As demonstrated hereinabove, Local Law 29 is unconstitutionally void for vagueness. It fails to give fair notice of its elements, standards of proof, and the scope of individuals governed and further fails to give law enforcement unambiguous direction regarding its implementation.

85. The ambiguity that inheres in the Local Law 29 is apparent on the face of the law and further evidenced by the widely differing interpretations ascribed to the law by Defendants, members of Defendant's Executive Branch, and interested members of the public.

86. This ambiguity has given rise to an actual and justiciable controversy between the individual plaintiffs and their class, Local 100, and Defendants over whether the criminal statute created by Local Law 29 has sufficiently articulated applicable tests of guilt, and explicit standards to prevent arbitrary enforcement. Such arbitrary enforcement has already led to the arrest of Local 100 members, places Plaintiffs, Plaintiffs' class, and Local 100 members in imminent peril of like treatment and will cause financial injury to Local 100 (which will expend money to protect its members).

87. Unless Local Law 29 is voided, Plaintiffs and the class they represent and Local 100 members will be forced to risk incarceration and prosecution for innocent conduct each day they report to work. Local 100 will continue to expend resources providing criminal defense legal services and will further suffer the material detriment of lost members as well as a concomitant loss of membership dues.

AS AND FOR A SECOND CAUSE OF ACTION

(Due Process – Failure to Provide Explicit Standards for Enforcement)

88. As set forth more fully hereinabove, differing and varied interpretations of the challenged statute have created a real and justiciable controversy and have presented an ongoing and imminent threat to constitutionally protected rights of Plaintiffs and the members of Local 100.

89. Though unsupported by the plain meaning of the text or the legislative history of the statute, Defendants and their agents have espoused the view that Local Law 29 provides for a rebuttable presumption of negligence, a misinterpretation that places an onerous burden on Plaintiff bus drivers and their class, and strips Local 100's members of their due process right to have the elements of a charged offense proven beyond a reasonable doubt. It also gives broad discretion to the arresting officer.

90. As cited hereinabove, Defendant de Blasio has also articulated a policy governing arrests under Local Law 29 that provides for a markedly different standard than that stated on the face of the statute.

91. Upon information and belief, the NYPD has and will continue to effectuate arrests in accordance with Defendant de Blasio's policy.

92. If the statute is not properly construed to require reasonable suspicion of a breach of due care upon arrest, Plaintiffs will incur unconstitutional deprivations of liberty unwarranted under the governing law.

93. If a showing of due care is only available to Plaintiff bus drivers, their class and members of Local 100, and similarly situated members of the public, as an affirmative defense, the arresting officer will be accorded far more discretion than the Fifth and Fourteenth

Amendments permit, and a strict liability statute will in effect have been created, without the requisite attention of the City Council.

AS AND FOR A THIRD CAUSE OF ACTION

(Overbroad Application of Statute)

94. As set forth more fully hereinabove, Plaintiff Local 100's members and members of the individual plaintiffs' class have been arrested and detained under Local Law Number 29 in the course of their duties on behalf of the city and state governments despite their explicit exemption from the law. This consequence arises out of the overbroad and vague language in the statute.

IRREPARABLE INJURY

95. Unless the declaratory and injunctive relief requested herein is granted, the individual plaintiffs, members of the Individual Plaintiffs' class, and the bus drivers represented by Local 100 will suffer irreparable injury.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff respectfully demands that judgment be entered in favor of Plaintiffs and against Defendants as follows:

i. Declaring that Local Law 29 is vague, void and invalid, without force and effect, and that affected motorists are not required to abide by its terms.

ii. Permanently enjoining Defendants' operation, implementation and enforcement of Local Law 29.

iii. In the alternative, declaring breach of due care to be an element of the misdemeanor created by Local Law 29 such that reasonable suspicion of the breach of such duty be required prior to arrest and further defining due care to comport with its settled meaning.

iv. In the alternative, declaring that Bus Operators actively working on behalf of the City, State, or Federal Governments to be categorically exempt from Local Law Number 29 under the plain meaning of the law.

v. An award of reasonable attorneys' fees and costs to the extent permitted by law, including but not limited to that available under 42 U.S.C. §1988.

vi. Such other and further relief as the Court deems just and proper.

Dated: Brooklyn, New York
April 17, 2015

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