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(of the bar of the District of Columbia)
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New York Supreme Court

Appellate Division—First Department

Appellate Case No.: 2020-02013

INTERNATIONAL FRANCHISE ASSOCIATION, RESTAURANT LAW CENTER and THE NEW YORK STATE RESTAURANT ASSOCIATION,

Plaintiffs-Appellants,

– against –

CITY OF NEW YORK, STEVE VIDAL, VIOLETA DAUZE, EDWIN CABRERA, SHADEI GORDON, RAYMOND ORTIZ and PRINCESS WRIGHT,

Defendants-Respondents.

BRIEF FOR PLAINTIFFS-APPELLANTS

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QUESTIONS PRESENTED ON APPEAL

1. Did the Supreme Court err by granting Respondents' Motion to Dismiss and denying Appellants' Cross-Motion for Summary Judgment, holding that the New York City Fair Workweek Law ("FWWL") is not preempted by State law, when the record evidence shows that the FWWL is in direct conflict with the State Labor Law and the Wage Order of the State Commissioner of Labor?

Yes.

2. Did the Supreme Court err by granting Respondents' Motion to Dismiss and Denying Appellants' Cross-Motion for Summary Judgment, and holding that the FWWL is not preempted by State law, when the State has preempted the field by creating a detailed statutory and regulatory scheme governing employee scheduling, hours of work, the payment of minimum wages and premium pay, and all aspects of employee work hours as related to the health and well-being of the people of New York?

Yes.

PRELIMINARY STATEMENT

New York City's Fair Workweek Law improperly encroaches on the exclusive authority of New York State to pass laws regarding employee scheduling and the payment of wage premiums. The New York Labor Law (the "Labor Law" or "NYLL") and its ancillary regulations provide a detailed and expansive scheme governing employee scheduling, hours of work, and minimum wage and premium pay obligations. Pursuant to Section 650 of the Labor Law, the Commissioner of the New York State Department of Labor (the "Commissioner") has created a detailed regulatory framework governing employee scheduling, hours of work, the payment of minimum wages and premium pay, and all aspects of employee work hours.

New York City, in passing, implementing and enforcing the FWWL, has restricted the right of fast food employers to rely on the State Labor Law and Wage Orders in scheduling their employees without being forced to pay wage premiums and penalties when employers modify schedules within a certain period of time. Accordingly, New York City lacked the authority to pass or enforce the unlawful provisions of the FWWL, and New York City's FWWL is preempted and must be invalidated.

The Court of Appeals and Appellate Divisions have consistently held that the comprehensive regulatory scheme embodied in the Labor Law, and the vesting of exclusive rule-making and enforcement authority in the Commissioner of Labor,

broadly preempts local ordinances in the areas covered by the Labor Law and Wage Orders, including specifically employee scheduling and premium pay. Indeed, *every* appellate court that has considered the breadth and comprehensive scheme of the Labor Law, in relation to preemption challenges of local ordinances, has held that preemption exists. *See Wholesale Laundry Bd. of Trade*, 17 A.D.2d 327, 329 (1st Dept. 1962), *aff'd*, 12 N.Y.2d 998 (1963) (invalidating a New York City minimum wage law that set a higher minimum wage than the State had mandated because "it is entirely clear that the State [Labor] law indicates a purpose to occupy the entire field…free from interference by local authorities"); *see also, ILC Data Device Corp. v. County of Suffolk,* 182 A.D.2d 293, 301 (2d Dept. 1992) (citing "the comprehensive regulatory scheme embodied in the Labor Law and the vesting of broad rule-making and enforcement authority in the Commissioner of Labor[,]" as invalidating a local law).

In his 2-page decision, Justice Arthur F. Engoron, the presiding judge in the New York State Supreme Court, New York County, characterized the FWWL as "interfere[ing] with freedom of contract; distort[ing] capitalism; and [] surprisingly complex, arguably unwieldly, and only problematically enforceable." A-6.[1] The judge nevertheless upheld the City's FWWL without analyzing or even mentioning the controlling precedent under the State Labor Law referenced above. The judge

[1] Numerical references refer to pages of Appellants' Appendix.

also ignored numerous direct conflicts with State Labor Law and Commissioner regulations which further establish that the FWWL must be preempted. Finally, the judge failed to address the comprehensive regulatory history underpinning the Commissioner's Hospitality Wage Order that makes it clear the State has occupied the field of employee scheduling and the payment of wage premiums, preempting the FWWL's attempt to regulate in the same field. Accordingly, Justice Engoron's decision should be reversed in its entirety, except for his holding that Appellants had standing to bring the underlying action, and the City's FWWL should be declared invalid.

STATEMENT OF FACTS

I. THE APPELLANTS

Appellant International Franchise Association ("IFA") is a membership organization of franchisors, franchisees, and suppliers. A-52. Founded in 1960, the IFA is the world's oldest and largest organization representing the use of the franchise business model. *Id*. The IFA has more than 15,810 members, including more than 1,350 franchisor companies and more than 12,000 franchisees nationwide, including in the State and City of New York. A-53. Many IFA members are "fast food employers" operating restaurants within New York City, with more than 30 establishments nationally, who are therefore subject to the FWWL. *Id*.

Appellant New York State Restaurant Association ("NYSRA") is a not-for-

profit employer association which represents food service establishments throughout New York State. A-48. Founded in 1935, NYSRA is the oldest and most comprehensive professional organization for restaurant management in New York. *Id*. The NYSRA represents a significant number of restaurant members in New York City. A-49. Many of those NYSRA restaurant members operate fast food restaurants within New York City, with more than 30 establishments nationally, who are therefore subject to the FWWL. *Id*.

Appellant Restaurant Law Center ("RLC") was created by the National Restaurant Association (the "NRA") for the purpose of providing the restaurant and foodservice industry's perspective on legal issues significantly impacting it. A-42. The NRA launched the RLC in 2015 for the purpose of representing the NRA and its members by providing the restaurant and foodservice industry's perspective and advocacy on legal issues significantly impacting NRA's members. *Id*. The RLC achieves this purpose both by informing the courts of the potential industry-wide consequences of federal, state, and/or local government actions and legislation, and by identifying and challenging specific harms from such legislation caused to NRA members represented by RLC, as it is doing in this litigation challenging the FWWL. A-42 to A-43. On behalf of the NRA, the RLC represents the interests of NRA members located in New York City, with more than 30 establishments nationally, who are therefore subject to the FWWL. A-43. Indeed, the overwhelming majority

of restaurant employers meeting the FWWL's coverage criteria are NRA members represented by the RLC. *Id*.

The IFA, the RLC, and the NYSRA, each represent members located in New York City who: (i) are part of a franchise, brand or chain, (ii) maintain at least 30 establishments nationally or operate as part of a franchisor/franchisee relationship that owns or operates thirty or more such branded establishments nationally, (iii) have a primary purpose of serving food and drink, and (iv) operate a business where patrons order or select items and pay before eating, operate an establishment where the food and beverage purchased may be consumed on premises or taken out, or delivered to the customer's location. As described in greater detail below, the member organizations represented by the IFA, RLC, and NYSRA have suffered direct and continuing harm as a result of the FWWL, including incurring significant wage premiums, penalties and administrative costs.[2]

II. THE NEW YORK CITY FAIR WORKWEEK LAW

A. The Legislative History of the FWWL

On or about December 6, 2016, New York City Councilmembers Brad Lander and Corey Johnson introduced four bills designed to restrict the ability of fast food and retail employers to modify their employees' work hours. These bills, collectively

[2] Justice Engoron, in his underlying decision, held that Appellants had standing to bring the underlying action. A-6. Appellants do not challenge Justice Engoron's decision with respect to the standing of Appellants, which was plainly correct.

called the "Fair Workweek" legislative package, impose "wage premiums" on fast food employers who are forced to make schedule changes to accommodate employers' legitimate business and scheduling needs, or even because of employee-initiated requests to accept additional shifts. A-58 to A-59. The legislative history of the respective bills state an intended purpose to require fast food employers to, among other things, "pay a premium for schedule changes." A-37.

On May 30, 2017, Mayor De Blasio signed the bills into law, and the laws became effective on November 26, 2017. A-61. The specific legislation challenged by Appellants in this matter was codified as N.Y. Admin. Code Title 20 Part 12. On October 16, 2017 the New York City Department of Consumer Affairs Office of Labor Policy and Standards (the "DCA"), since re-named the "Department of Consumer and Worker Protection," published proposed rules to implement the Fair Workweek Law. *Id*. The DCA ultimately adopted Rules that were incorporated into the City Records on November 28, 2017. *Id*. The specific Rules challenged by Appellants in this matter were codified as Rules of the City of N.Y. §§ 7-600, *et seq*.

B. The FWWL's Requirements

The FWWL significantly restricts the ability of fast food and retail employers to modify their employees' schedules by imposing wage "premiums" on fast food employers who are forced to make schedule changes to accommodate their legitimate business and scheduling needs, or even because of employee initiated

requests to accept additional shifts. The requirements and prohibitions provided by the statute and its Rules are summarized below.

1. Good Faith Estimate

The FWWL requires fast food employers to provide employees with a "good faith estimate", in writing, of the number of hours the employee can expect to work per week for the duration of the employee's employment. The estimate must include the expected dates, times and locations for the scheduled work hours. If a long-term or indefinite change is made to the good-faith estimate, the fast food employer is required to update the estimate as soon as possible following the change. *See* NYC Admin. Code § 20-1221(a). The FWWL Rules define that a "long term or indefinite change occurs when (i) three work weeks out of six consecutive work weeks in which the number of actual hours worked differs by twenty percent from the good faith estimate during each of the three weeks; (ii) three work weeks out of six consecutive work weeks in which the days differ from the good faith estimate at least once per week; (iii) three work weeks out of six consecutive work weeks in which the start and end times of at least one shift per week differs from the good faith estimate by at least one hour and the total number of hours changed for the six week period is at least six hours; or (iv) three work weeks out of six consecutive work weeks in which the locations differ from the good faith estimate at least once per week." *See* Rules of the City of N.Y. § 7-603.

2. Written Schedule in Advance

The FWWL further requires fast food employers to provide a written work schedule to each fast food employee that identifies regular shifts and on-call shifts. The schedule must span a period of at least seven days. All schedules must be provided with at least 14 days' advanced notice. *See* NYC Admin. Code § 20-1221(b).

3. Written Consent for Schedule Changes

The FWWL and the Rules prohibit fast food employers from changing a fast food employee's schedule without first obtaining the fast food employee's written consent. *See* NYC Admin. Code § 20-1221(d). The FWWL provides fast food employees with the right to decline an offer to work additional hours or shifts that were not included in the initial written work schedule. *Id*. The FWWL further requires fast food employers to obtain the fast food employee's written consent to work shifts that were not identified on the initial work schedule at or before the start of the shift. *Id*. The FWWL Rules require that such written consent must be provided in reference to a specific schedule change and prohibit employees from agreeing to general or ongoing consent to work additional shifts. *See* Rules of the City of N.Y. § 7-606. Furthermore, the Rules define a shift change as any deviation of 15 minutes, or longer, from the initial work schedule. *See* Rules of the City of N.Y. § 7-606.

4. Premium Pay for Schedule Changes

The FWWL contains provisions requiring the payment of wage "premiums"

for fast food employers who modify shifts with less than 14 days' notice in accordance with the following schedule:

- $10 for each change to the work schedule provided with at least 7 but less 14 days' notice where: (i) additional hours or shifts are added to the schedule; or (ii) the date or start or end time of a regular shift or on-call shift is changed with no loss of hours;
- $20 for each change to the work schedule provided with at least 7 but less than 14 days' notice where: (i) hours are subtracted from a regular or on-call shift; or (ii) a regular or on-call shift is cancelled;
- $15 for each change to the work schedule provided with less than 7 days' notice where: (i) additional hours or shifts are added to the schedule; or (ii) the date or start or end time of a regular shift or on-call shift is changed with no loss of hours;
- $45 for each change to the work schedule provided with less than 7 days' notice but at least 24 hours' notice where: (i) hours are subtracted from a regular or on-call shift; or (ii) a regular or on-call shift is cancelled; and
- $75 for each change to the work schedule provided with less than 24 hours' notice where: (i) hours are subtracted from a regular or on-call shift; or (ii) a regular or on-call shift is cancelled.

See NYC Admin. Code § 20-1222(a).

5. Premium Pay for "Clopenings"

The FWWL also prohibits fast food employers from scheduling employees to work two shifts with fewer than 11 hours between the end of the first shift and the beginning of the second shift when the first shift ends the previous calendar day or spans two calendar days. Any employer who schedules employees to work this type of shift, referred to as a "clopening" (both closing and opening a restaurant), must first obtain the written consent from the affected employee and pay the affected employee a wage premium of $100. *See* NYC Admin. Code § 20-1231.

6. "Access to Hours" Requirement for New and Additional Shifts

The FWWL prevents fast food employers from meeting immediate staffing needs by prohibiting them from hiring new employees until they have notified their existing employees of open and additional shifts for a period of at least three days. *See* NYC Admin. Code § 20-1241(b). This so-called "access to hours" requirement to offer shifts to a fast food employer's existing employees extends to employees who work at all fast food establishments owned by the same employer and is not limited to the employees at a single location. *See* NYC Admin Code § 20-1241(a). The FWWL also requires fast food employers to pay a schedule change premium to fast food employees who accept these additional shifts. *See* NYC Admin. Code § 20-1241(e).

7. Anti-Retaliation Provisions

The FWWL also contains anti-retaliation provisions that make it unlawful to take any adverse action against an employee who attempts to exercise her rights under the new law and provides employees with the right to file private causes of action against employers that allegedly violate the law. *See* NYC Admin. Code § 20-1204.

8. Enforcement by the Department of Consumer Affairs

The FWWL authorizes the DCA to enforce the FWWL. The DCA has begun enforcing the law by undertaking numerous audits against New York City members of the Appellant associations, and by assessing substantial penalties in a number of cases. In January 2019, the DCA issued a report stating that the DCA, through the close of 2018, engaged in more than 100 investigations and "obtained settlement agreements in a wide range of cases, securing a total of $252,135 in restitution for 1,270 workers and $69,140 in fines." A-65. The DCA's aggressive enforcement of the FWWL continued in 2019. In a press release dated November 26, 2019, the DCA announced it had, since the FWWL went into effect, "obtained resolutions requiring more than $1,330,000 combined fines and restitution for more than 2,900 workers."[3]

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[3] The press release is available on the following New York City government website address: *See* https://www1.nyc.gov/office-of-the-mayor/news/572-19/on-two-year-anniversary-the-fair-workweek-law-de-blasio-administration-settlement (last accessed August 3, 2020). Courts in New York routinely take judicial notice of official documents located on government websites. *See, e.g., Kingsbrook Jewish Med. Ctr. v. Allstate Ins. Co.*, 61 A.D.3d 13, 16 (2d Dept. 2009) (taking judicial notice of information available on website for United States Department of Health and

9. Burdens Imposed by the FWWL on Covered Employers

The FWWL imposes significant practical hardships on fast food employers. As Justice Engoron noted, the FWWL has divested fast food employers of the right to hire staff to meet expected demand. Instead, before hiring new staff, fast food employers have to undertake a byzantine and complex process of posting notices to all existing employees across New York City that: (i) identifies the number of shifts being offered; (ii) pinpoints the schedule of the shifts; (iii) explains whether the shifts will occur at the same time each week; (iv) estimates the length of time that the employer anticipates requiring coverage of the shifts; (v) stipulates the number of fast food employees needed to cover the shifts; (vi) explains the process, date and time by which fast food employees may notify such fast food employer of their desire to work the shifts; and (vii) describes the criteria such fast food employer will use to select among volunteers for the shift. N.Y.C. Admin. Code § 20-1241(b). This notice must be posted for three consecutive days, which is often impractical and ignores the reality of the fast paced demand often associated with the fast food industry. *Id*. Further compounding this issue is the fact that the FWWL prohibits fast food employers with multiple New York City locations from transferring employees

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Human Services); *Druyan v. Village Bd. Of Trustees of the Vill. of Cayuga Hgts.*, 33 Misc. 3d 1203(A), 2011 NY Slip Op 51772(U), at *7, n.5 (N.Y. Sup. Ct., Tompkins Cnty., Sept. 14, 2011) (taking judicial notice or publication obtained from the official website of the New York Department of Environmental Conservation); *see also Matter of Albano v. Kirby*, 36 N.Y.2d 526, 532 (1975) (taking judicial notice of Department of Civil Service memorandum).

from one location to another before going through the notice process described above. N.Y.C. Admin. Code § 20-1241(a).

Separately, but in a similar vein, the FWWL prohibits employers to adapt to unexpected and increased demand by asking employees to work additional shift or hours without incurring financial penalties. In these situations, fast employers are required to pay onerous premiums to employees even though the employee may consent and even welcome the opportunity to work additional hours and supplement his or her income. N.Y.C. Admin. Code § 20-1222.[4]

III. THE NEW YORK STATE LABOR LAW'S COMPREHENSIVE STATUTORY AND REGULATORY STRUCTURE REGULATING EMPLOYEE SCHEDULING, HOURS OF WORK, AND MINIMUM WAGE AND PREMIUM PAY OBLIGATIONS

The Labor Law and its ancillary regulations provide a detailed and expansive statutory and regulatory scheme governing employee scheduling, hours of work, and minimum wage and premium pay obligations. The Labor Law's provisions include:

- Section 160 of the Labor Law (titled "Hours to constitute a day's work"), governing the number of hours constituting a workday.

[4]The DCA on March 18, 2020, at the apex of the COVID-19 pandemic in New York City, released guidance to employers stating that it would *not* suspend advance scheduling requirements, recordkeeping requirements, or any of the other burdensome requirements of the FWWL. Instead, the DCA made threats of increased enforcement action against employers who could not comply with the FWWL's requirements due to circumstances entirely out of their hands—an immediate economic downturn caused by an unprecedented pandemic.

- Section 161 of the Labor Law (titled "One day rest in seven"), prohibiting the scheduling of employees for seven consecutive days and mandating a break of at least 1 out of every seven consecutive days.
- Section 162 of the Labor Law (titled "Time allowed for meals"), requiring the scheduling of meal breaks at specific times.
- Section 142 of the Labor Law governs the hours that minors fourteen and fifteen years of age can work, and Section 143 of the Labor Law governs the hours that minors sixteen and seventeen years of age can work.
- Section 144 of the Labor specifically requires employers of minors to draft and publish the schedules of minors. These provisions of the Labor Law cover employers of minors who work in the fast food industry within New York City.

See NYLL §§§ 142-145; 160-162.

In addition to the foregoing provisions expressly dealing with scheduling of employees, the Labor Law expansively defines "wages" to include both hourly wages, *e.g.*, the state-mandated minimum wage, as well as other benefits and premiums paid to employees. Specifically, Section 190(1) of the Labor Law defines "wages" as "the earnings of an employee for labor or services rendered, regardless of whether the amount of earnings is determined on a time, piece, commission or

other basis. The term 'wages' also includes benefits or wage supplements as defined in section [198-c] of this article, except for the purposes of sections one hundred ninety-one and one hundred ninety-two of this article." *See* NYLL § 190(1); *see also, In the Matter of Dean Witter Reynolds, Inc. v. Ross*, 75 A.D.2d 373, 381 (1st Dept. 1980) (referring to Labor Law Section 190's "broad" definition of "wages"). Section 198-c of the Labor Law (titled "Benefits or wage supplements") addresses the payment of certain "benefit or wage supplements," including, but not limited to "reimbursement for expenses; health, welfare and retirement benefits; and vacation, separation or holiday pay."

Sections 650 to 655 of the Labor Law vest in the Commissioner of Labor and New York State the **exclusive** authority to promulgate statewide labor and employment policies, including scheduling regulations. NYLL § 650. Article 19 of the Labor Law establishes a comprehensive and detailed regulatory structure by which the Commissioner may promulgate regulations. The Commissioner is empowered, through the provisions of Article 19, to convene "wage boards" consisting of industry and employee representatives. Once convened, the wage boards are directed to conduct public hearings and solicit comments, and to issue a report to the Commissioner including the wage board's "recommendations as to minimum wages and regulations for the employees in such occupation or

occupations." NYLL § 655(4).[5] The recommendations of the wage board are not limited to industry-specific hourly minimum wage increases: "In addition to recommendations for minimum wages, the wage board may **recommend such regulations as it deems appropriate to carry out the purposes of this article and to safeguard minimum wages**." NYLL § 655(5)(b) (emphasis added). Such recommended regulations may include regulations governing, among other things, "wage rate provisions governing split shift, **excessive spread of hours** and weekly guarantees." NYLL § 655(b) (emphasis added).

The Commissioner has exercised her exclusive authority to issue industry-specific regulations, promulgating the Wage Order for the Hospitality Industry, 12 N.Y.C.R.R. 146, *et seq.* (the "Hospitality Industry Wage Order"), which includes within its coverage fast food restaurants. At the outset, Section 146-1.5 of the Hospitality Wage Order contains a "call-in pay" provision, which expressly allows employers to call in employees on any, **with no advance notice**, and **with no premium pay**, so long as the employer provides a specified number of hours of work that day. *See* 12 N.Y.C.R.R. 146-1.5. Similarly, Section 145-1.6 of the Hospitality Industry Wage Order contains a "spread of hours" provision that requires payment of a premium to employees whose workdays extend over a ten hour period.

[5] The Commissioner also has the independent authority to promulgate regulations, without convening a wage board, pursuant to the New York Labor Law. *See* NYLL § 21(11); *see also* NYLL § 659(2).

See 12 N.Y.C.R.R. 146-1.6. The Commissioner, when promulgating the call-in pay and spread of hours regulations in the Hospitality Wage Order, solicited statements from employee advocate groups and explicitly considered the very same employee scheduling concerns addressed by the FWWL, but imposed a regulatory outcome significantly different from the FWWL.

In addition, New York State has convened a Wage Board to address issues specific to the New York State fast food industry, an industry specifically targeted by the FWWL. On May 7, 2015, Governor Andrew M. Cuomo instructed Acting State Labor Commissioner Mario J. Musolino to empanel a Wage Board to investigate and make recommendations on an increase in the minimum wage in the fast food industry. On September 10, 2015, the Acting Commissioner of Labor adopted the recommendations of the Wage Board and issued increases to the minimum wages of fast food employees across New York State. Importantly, though comments were filed asking this wage board to make changes to scheduling requirements similar to what was eventually adopted in the FWWL, the Commissioner deliberately chose not any further changes to scheduling or wage premium requirements in the fast food industry.

The Commissioner of Labor has also exercised her exclusive authority to issue regulations applicable to non-hospitality and retail employers, contained in the Miscellaneous Industries and Occupations Minimum Wage Order, 12 N.Y.C.R.R.

142, *et seq.* (the "Miscellaneous Wage Order"). As with the Hospitality Wage Order, the Commissioner exercised her authority to convene a wage board and to issue rules and regulations that govern employee scheduling, including a "call-in pay" provision, and a "spread of hours" provision. *See* 12 N.Y.C.R.R. 142-2.4; 2.18. In that instance, the Commissioner on November 26, 2017 actually proposed regulatory amendments to the Miscellaneous Wage Order that would require payment of premiums to employees who: (i) report to work for less than 4 hours, (ii) are assigned an unscheduled shift with less than 14 days advanced notice, (iii) have a shift cancelled with less than 72 hours' notice, (iv) are scheduled to be "on-call," and (v) are required to call their supervisor with less than 72 hours' notice to see if they have to work. But on March 1, 2019, the New York State Department of Labor (the "NYSDOL") announced that it was letting the proposed regulatory amendments to the Miscellaneous Wage Order expire. Specifically, the NYSDOL stated:

> Following a series of public hearings in late 2017, the Department of Labor issued proposed regulations to address what is commonly identified as "just-in-time," "call-in" or "on-call" scheduling.
>
> Based on extensive feedback in the subsequent comment period, it was clear the Department's initial intent to support workers while being fair to businesses was viewed as a one-size-fits-all approach that was not appropriate for every industry. Comments on the revised rules, issued in late 2018, indicated that significant issues remained, and the revisions did not achieve the balance of certainty and flexibility for either workers or businesses.

See https://www.labor.ny.gov/workerprotection/laborstandards/scheduling-regulations.shtm (last accessed August 3, 2020).

PROCEDURAL HISTORY OF THIS APPEAL

On December 3, 2018, Appellants commenced the underlying action by filing a Complaint in New York County Supreme Court pursuant to New York Civil Practice Law and Rules §§ 3001 and 3017(b), seeking a declaratory judgement that the FWWL is preempted by New York State law and therefore violates the State Constitution and Municipal Home Rule Law. A-16 to A-28. On December 14, 2018, the New York City Law Department, Office of Corporation Counsel, appeared on behalf of Defendant The City of New York. Counsel for Appellants and the City agreed on December 14, 2018 to a briefing schedule whereby the parties would forego discovery and instead proceed to dispositive motions. A-57 to A-58. In that vein, the parties agreed the City would file its motion to dismiss the Complaint on or before February 8, 2019, and the Appellants would oppose the City's motion and cross-move for summary judgment on or before March 8, 2019. A-73 to A-74. The City would oppose Appellant's cross-motion on or before March 29, 2019, and Appellants would file its reply brief in further support of its cross-motion for summary judgment on April 12, 2019. *Id*.

On January 8, 2019, Respondents Steve Vidal, Violeta Luis Dauze, Edwin Cabrera, Shadei Gordon, Raymond Ortiz and Princess Wright moved to intervene in

the underlying action as Defendants. A-255. Justice Engoron granted the motion to intervene on or around April 23, 2019. *Id*. The parties subsequently agreed to two modified briefing schedules, providing that the Intervenor Defendants would file their own motion to dismiss the Complaint, which Appellants would oppose and cross-move for summary judgment, followed by respective reply and opposition briefs. The City and Intervenor Defendants' respective motions to dismiss, and the Appellants cross-motions for summary judgment, were fully briefed and submitted on June 14, 2020.

Oral argument was held before Justice Engoron on January 28, 2020, and Justice Engoron issued his Decision and Order on February 18, 2020. Justice Engoron, in his Decision and Order, denied Appellants' cross-motions for summary judgment, and granted the City and Intervenor Defendants' motions to dismiss, except to deny the City and Intervenor Defendants' arguments that Appellants lacked standing to bring the underlying action. A-5 to A-10. For the reasons discussed herein, Justice Engoron's decision was erroneous and should be reversed, except for his holding that Appellants had standing to bring the underlying action.

ARGUMENT

I. THE FWWL VIOLATES THE NEW YORK STATE CONSTITUTION AND MUNICIPAL HOME RULE LAW AND IS PREEMPTED BY THE STATE LABOR LAW

A. The Judge Applied An Improper Standard Of Review By Failing To Acknowledge The Broad Preemptive Scope of the Labor Law.

The New York State Constitution vests city and county governments throughout New York State with the authority to pass local laws. *See* NY CLS Const. Art. IX, § 2. The specific grant of power to localities is conferred and codified in the "Municipal Home Rule Law." *See* NY CLS Mun. H. R. § 10. But there are important limitations to this power. Cities and local governments within New York State cannot pass laws that conflict with or otherwise limit state laws. *See* NY CLS Const. Art. IX § 2; NY CLS Mun. H. R. § 11(f); *see also, Matter of Council of City of N.Y. v. Bloomberg,* 6 N.Y.3d 380, 393 (2006) ("But this grant of power to municipalities is expressly made subject to contrary state legislation. The Constitution and the [Municipal Home Rule] statute say that municipalities may adopt laws of the kind described in the language we have quoted except to the extent that the legislature shall restrict the adoption of such a local law").

Two types of state law preemption have been recognized by the courts. The first is "direct conflict" preemption, which occurs when the local government attempts to restrict or prohibit conduct that the state expressly permits. *See Patrolmen's Benevolent Assn. of the City of N.Y., Inc. v. City of New York*, 142

A.D.3d 53, 61-62 (1st Dept. 2016) ("Conflict preemption occurs where local laws prohibit what would be permissible under State law, or impose prerequisite additional restrictions on rights under State law, so as to inhibit the operation of the State's general laws").

Likewise, a city is prohibited from enacting local legislation if New York State has enacted legislation that preempts the "field," even in the absence of a direct conflict. *See, e.g., Albany Area Builders Ass'n v. Town of Guilderland,* 74 N.Y.2d 372, 377 (1989) ("Where the State has preempted the field, a local law regulating the same subject matter is deemed inconsistent with the State's transcendent interest, whether or not the terms of the local law actually conflict with a State-wide statute"); *Lansdown Entm't Corp. v. N.Y.C Dept. of Consumer Affairs*, 74 N.Y.2d 761, 765 (1989) ("Where a State law indicates a purpose to occupy an entire field of regulation . . . local regulations are preempted regardless of whether their terms conflict with provisions of the State statute or only duplicate them.").

The Labor Law and its ancillary regulations have been deemed to create a particularly comprehensive and detailed statutory regulatory scheme regarding employee scheduling, minimum wages and wage premiums. The only two appellate cases that have considered preemption in the Labor Law context have both held that the State Labor Law should be broadly construed, resulting in preemption of local laws intruding in and/or conflicting with the State's regulation of the workplace. The

two seminal appellate court decisions in this regard are *Wholesale Laundry Bd. of Trade, Inc. v. City of New York*, 17 A.D.2d 327 (1st Dept. 1962), *aff'd*, 12 N.Y.2d 998 (1963), and *ILC Data Device Corp. v. County of Suffolk,* 182 A.D.2d 293 (2d Dept. 1992). Inexplicably, the judge failed to address either of these cases.

In *Wholesale Laundry*, the First Department invalidated a New York City minimum wage law that set a higher minimum wage than the State had mandated. 17 A.D.2d at 329. The First Department provided two reasons for finding such preemption: First, the court held legislative intent to preempt the entire field could be "deduced from the restriction on any law that supersedes any provision of the Labor Law, which indicates a general state policy to make the provisions of that law free from interference by local authorities." *Id*. Second, the First Department found even more specific legislative intent to occupy the entire field in the Minimum Wage Law itself, noting that "provisions for amendment of the wage fixed formulate an elaborate machinery for the determination of an adequate wage in any occupation and in any locality." *Id*. at 329.

Similarly, in *ILC Data Device Corp.,* the local law at issue required employers with twenty or more video display terminals (VDTs) to meet certain standards for light, noise levels, and seating comfort for the health and safety of their employees who were VDT operators. 182 A.D.2d at 296. While there was no state regulation of VDTs with which the local law expressly conflicted, the Second Department ruled

that the Labor Law preempted the local law because it was inconsistent with "the comprehensive regulatory scheme embodied in the Labor Law and the vesting of broad rule-making and enforcement authority in the Commissioner of Labor." *Id.* at 301.

In finding the entire field of health and safety of workers preempted by the Labor Law, the appellate court in *ILC Data Device Corp*. cited three specific statutory grants of authority to the Commissioner, all of which are equally applicable in the field of employee scheduling: First, her authority "to engage in inspections, investigations, and enforcement,"—authority which is equally expansive in the context employee scheduling—particularly with respect to on-call scheduling. Second, the Commissioner of Labor in *ILC Data Device Corp.* was authorized to pursue voluntary compliance programs and encourage efforts to reduce hazards from working conditions and stimulating new programs. *Id*., at 301. Again the Commissioner has similar authority in the present case. *See* NYLL Section 196(1)(a) of the New York Labor Law. Third, the Commissioner in *ILC Data Device Corp.* was authorized to adopt standards in order to determine whether certain occupations contain special elements of danger requiring licenses, and to "promulgate such regulations as he shall consider necessary and proper to effectuate the purposes and provisions of this section." *Id*., at 302.

In the present appeal, Appellants contend that the FWWL is both "in direct

conflict” with the Labor Law and Hospitality Wage Order, and is subject to the broad “field preemption” of the Labor Law and Wage Order. Each type of state preemption will be addressed more fully in the next sections of this brief.

B. The FWWL Directly Conflicts With The State Labor Law And Hospitality Wage Order

The FWWL expressly conflicts with the State Labor Law and its ancillary regulations, and is preempted for this reason. As noted above, conflict preemption occurs both when a municipal law permits an act that is prohibited by state law, and also when a municipal law prohibits or otherwise restricts an act that is permitted by state law. *See Patrolmen's Benevolent Assn. of the City of N.Y., Inc.*, 142 A.D.3d at 61-62 (“Conflict preemption occurs where local laws prohibit what would be permissible under State law, or impose prerequisite additional restrictions on rights under State law, so as to inhibit the operation of the State's general laws”); *see also, Lansdown Entm’t Corp. v. N.Y.C Dept. of Consumer Affairs*, 74 N.Y.2d 761, 764 (1989) (“the direct consequences of a local ordinance should be examined to ensure that it does not render illegal what is specifically allowed by State law”); under the doctrine of conflict preemption, a “local government . . . may not exercise its police power by adopting a local law inconsistent with constitutional or general law"); *Matter of Norse Energy Corp. USA v. Town of Dryden*, 108 A.D.3d 25, 37 (3d Dept. 2013) (*citing New York State Club Assn. v City of New York*, 69 N.Y.2d 211, 217 (1987)); *see also, Town of Ellery v. N.Y.S. Dept. of Envtl. Conservation*, 54 Misc. 3d

482, 493 (Sup. Ct., Chautauqua Cnty., Oct. 20, 2016), *aff'd* 2018 N.Y. App. Div. LEXIS 1933 (4th Dept., Mar. 23, 2018) (finding local law's restrictions preempted because such restrictions on activity permitted by state law rendered compliance "practically impossible)".

The FWWL is preempted because it conflicts with the Labor Law and its regulations in a number of ways. First and foremost, the FWWL conflicts with the Hospitality Wage Order's "call-in" provision, which states that employees may be called into work with no advance notice as needed, without their consent, written or otherwise, provided only that the employer must provide three hours of actual work once the employee is called in. No wage premiums are required by the state Wage Order for call-ins.12 N.Y.C.R.R. § 146-1.5. In direct conflict, the FWWL prohibits calling employees in at all without their express, written consent. N.Y.C. Admin. Code § 20-1222(a)(5)(a). Even with such consent, wage premiums in specified amounts are required if the call-in occurs inside a certain number of days, or if the shift is cut short. *Id*. at § 20-1221(b). Finally, the FWWL disallows any call-ins of new workers unless the employer first canvasses the entire work force for volunteers, a time-consuming and wasteful process. *Id*. at § 20-1241(a).

Another direct conflict arises under the Hospitality Wage Order, because that order permits employers to require employees to work shifts that exceed ten hours without requiring the employee's consent. *See* 12 N.Y.C.R.R. § 146-1.6. Again a

direct conflict exists, because the FWWL prohibits fast food employers from scheduling employees to work two shifts with fewer than 11 hours between the end of the first shift and the beginning of the second shift when the first shift ends the previous calendar day or spans two calendar days. Under the FWWL (but not under the Labor Law), such a "clopening" requires the written consent of the employee and payment of a wage premium of $100. NYC Admin. Code § 20-1231.

The Commissioner of Labor, as described above, engaged in a comprehensive regulatory process that led to the promulgation of the current call-in pay and spread of hours regulations. The Wage Board received comments and testimony from employee groups that noted issues related to changes in employee scheduling, and indeed, the Wage Board noted these issues in its Report. A-178 to A-189. Despite this, the Wage Board and Commissioner did *not* impose consent requirements for changes in employee scheduling, and thus permitted the practice. The FWWL's consent requirement "prohibits that which is permissible under state law and has been permitted pursuant to state law" and should be struck down accordingly. *See Town of Ellery*, 53 Misc. 3d at 493, *aff'd* 159 A.D.3d 1516.

Similarly, the FWWL's "access to hours" requirement conflicts with the Labor Law's "one day rest in seven" requirement, which prohibits the scheduling of employees for seven consecutive days and mandating a break of at least one out of every seven consecutive days. *See* NYLL § 161. As a non-exhaustive example,

assume that a fast food employee in New York City is regularly scheduled to work six days a week, but receives notice, as required under the FWWL's "access to hours" provision, of a new shift available on the seventh day of the workweek. If this employee is the only employee who accepts this new shift, then the FWWL requires the employer to provide it to the employee, even though doing so would violate the Labor Law's "one days rest in seven" requirement. The employer in the foregoing example would be placed in the untenable circumstance of violating the FWWL (and risking significant fines, a civil lawsuit, and enforcement action from the DCA), or violating the Labor Law (and risking penalties, a civil lawsuit, enforcement action from the NYSDOL, and even potential "prosecution as provided by law"). *See* NYLL § 161(6). Similar conflicts arise with respect to the requirement to offer minors additional shifts to perform work that may exceed the state maximum of 18 hours per week. *See* NYLL § 142.

Justice Engoron, in his Decision, held that there was no conflict preemption because "the FWWL specifically exempts form coverage situations that would violate any other law, such as those governing underage workers or imposing restrictions on workers' hours." A-7. But the FWWL does no such thing. Rather, the last sentence of Section 20-1241(d) of the FWWL provides, in the paragraph addressing the criteria for assigning new shifts for employees based on their qualifications, "A fast food employer's system for the distribution of shifts shall not

violate any federal, state or local law, *including laws that prohibit discrimination*." *Id*. (emphasis added). This provision clearly is intended to prevent an employer from distributing new shifts, pursuant to the FWWL's "Access to Hours" requirement, in a discriminatory manner—*e.g.*, only providing new shifts to male or female employees. This language does not excuse the FWWL's "Access to Hours" requirement, which as described here, places employers in the untenable circumstance of violating the FWWL (and risking significant fines, a civil lawsuit, and enforcement action from the DCA), or violating the Labor Law (and risking penalties, a civil lawsuit, enforcement action from the NYSDOL, and even potential "prosecution as provided by law"). *See* NYLL § 161(6).

Another direct conflict is that the Hospitality Wage Order contains an exhaustive list of records that fast food employers are required to maintain. *See* 12 N.Y.C.R.R. § 146-2.1, 2.2, and 2.3.[6] The FWWL purports to add to these recordkeeping requirements by forcing employers to create and preserve additional records that New York State does not require employers to maintain. The judge mistakenly held that "[T]he record-keeping provisions of State and City law do not conflict, even if they may overlap somewhat." A-7. To the contrary, the Rules

[6] These records include payroll records showing the employee's name and address, social security number, occupation classification, the number of weekly hours worked on a daily and weekly basis, regular and overtime hourly wage rates, the amount of gross wages, the amount of net wages, tip credit, meal and lodging credits, student classification, written notice of pay rates, tip credits and pay days, and pay stubs. Written schedules are not included on this list.

interpreting the FWWL require fast food employers to keep records such as schedules that are published with at least 14 days' advanced notice, good faith estimates, and written consents to schedule changes. *See* e.g., N.Y.C. Admin. Code § 20-1206(a), Rules of the City of N.Y. § 7-609. These record keeping requirements plainly conflict with and impose additional restrictions on obligations already provided under New York State law, and are therefore preempted.

The non-exhaustive examples described in this Section highlight only a few of the situations where the FWWL and Labor Law and its ancillary provisions conflict. Indeed, the burdensome, confusing and onerous requirements imposed by the FWWL, when coupled with the detailed and comprehensive statutory and regulatory requirements of the Labor Law, will ensure that these scenarios (and others) frequently occur, leaving fast food employers in the untenable position of either violating the Labor Law and its ancillary regulations or violating the FWWL. It is clear that the FWWL both allows what is impermissible under state law and also prohibits what is permissible under state law. Accordingly, the Court should invalidate the FWWL under the doctrine of conflict preemption.

C. The Labor Law and Wage Orders Also Preempt The Field Of Employee Scheduling Wage Orders.

Even if there were no direct conflict presented between the FWWL and the specific provisions of the Labor Law and Wage Orders, as clearly does exist, the judge must be found to have erred in failing to apply the "field preemption"

principles of *Wholesale Laundry* and *ILC Data* described above. As previously set forth, the courts have given the broadest possible preemptive effect to the state Labor Law and its regulations. *Wholesale Laundry*, 17 A.D.2d at 329; *ILC Data Device Corp.,* 182 A.D.2d 293.

As described above, the Labor Law and Wage Order(s) have established an expansive regulatory scheme governing, among other things, the right of employers to call-in employees on short notice, and to employ them for shorter than full shifts as necessary, without payment of wage premiums or penalties, and to employ such workers in shifts exceeding ten hours providing the employers comply with the spread of hours requirements of the State. *See, e.g.,* 12 N.Y.C.R.R. 145-1.5 (providing for call-in pay); 1.6 (providing for spread of hours pay). Moreover, the Legislature itself has enacted a detailed legislative scheme governing the hours that minors can work (NYLL §§ 13-145), the hours that constitute a work day (NYLL § 160); prohibiting scheduling of employees for seven consecutive days and mandating a break of at least one out of seven days (NYLL § 161), and requiring the scheduling of meal breaks at specific times (NYLL § 162).

As part of this comprehensive scheme, the Legislature chose to centralize its oversight of employee scheduling, work hours, and the payment of minimum wage and premium pay, at the State level. The Commissioner of Labor, through the authority vested to her by the Labor Law, has the sole authority to promulgate

regulations regarding employee scheduling, as well as minimum wage and premium pay across all areas of New York State. As evidence of the State's exclusive purview in these areas, the applicable statutory framework, the Labor Law, provides no designation for municipalities to step into the field in these areas, and courts have previously struck down attempts by local municipalities to do so. By enacting this comprehensive statutory and regulatory scheme expressing a policy of centralized oversight, the Legislature implicitly demonstrated an intent to preempt the field of regulation of employees' work hours, schedules, and minimum wage and premium pay compensation.

Contrary to Justice Engoron's reasoning, these comprehensive statutory requirements, especially when viewed in conjunction with the even more comprehensive regulatory requirements, are not "a little this (minimum wage regulation) [and] a little that (worker hours)", but instead comprehensively govern the hours an employee may work, and the wage premiums, if any, that must be paid for such hours worked. A-6.

D. While Ignoring The Two Controlling Precedents Finding Labor Law Preemption, Justice Engoron Relied On Inapposite Case Law.

Notwithstanding the broad preemptive scope of the state Labor Law, discussed above and in the only appellate cases to have considered the question, Justice Engoron in his Decision completely ignored the controlling precedent of *Wholesale Laundry* and *ILC Data*, in and of itself constituting grounds for reversal.

Instead, the judge relied on cases having little similarity to the present facts to reach his conclusion that the FWWL is not preempted by state law. First, the judge cited *DJL Rest. Corp. v. City of New York*, 96 NY2d 91, 94 (2001), a non-Labor Law case in which the Court of Appeals found a state law promoting temperance did not preempt a city law dealing with zoning, a "completely distinct activity." That case is completely distinguishable, first because it did not address the broad preemptive effect of the Labor Law, but also because it dealt with completely distinct activities (temperance and zoning). Here, by contrast, the Labor Law and Wage Orders specifically address employee scheduling and wage premiums, preempting the FWWL's attempt to impose new requirements on the same activities, all of which are within the preempted field of workplace health, safety, and employment conditions.

Likewise, the judge's reliance on the non-Labor Law case of *Garcia v. N.Y.C. Dept. of Health & Mental Hygiene*, 31 N.Y.3d 601, 620 (2018), was misplaced. In that case the Court of Appeals held State law did not preempt New York City's flu vaccine rules, even though the State had a "relatively comprehensive statutory scheme for school vaccinations…" *Garcia*, 31 N.Y.3d at 620. But there, unlike here, the Court recognized that the State legislature had "long recognized the [New York City Board of Health] as a pioneer of mandatory immunizations of children" and indeed, had modeled the State Public Health Law on the pre-existing New York City

Health Code. *Id*. In fact, the Court noted, the State Department of Health as recently as 2015 "expressed its recognition of the [New York City Board of Health]'s independent authority[,]" thus rebutting any indication the State had fully occupied the field. *Id*. No such circumstances exist here. Indeed, there is no indication whatsoever the State has "recognized the City of New York" as an authority—let alone a "pioneer authority"—in the field of employee scheduling or wage premiums. To the contrary, the State's laws and regulations in the field of employee scheduling and premium pay long precede the City's.

In the present case, as described above, the State Labor Law has been found to be broad and comprehensive in its coverage of wages and hours of work, including specifically scheduling. The Legislature has vested authority within the Commissioner of Labor to promulgate regulations in these areas, and she has in fact promulgated regulations regarding employee scheduling, including payment of call-in pay (ignored by the judge) and spread of hours pay. Both the comprehensive structure of the statutes and ancillary regulations and the State's policy of consolidating power within the Commissioner of Labor, establish the Legislature's "purpose and design is to preempt the subject of" employee work hours, schedules, minimum wages and premium pay.

As a result, the City lacked authority to adopt the FWWL's provisions governing these same areas. *See Wholesale Laundry, supra*, and *ISL Data, supra*;

See also, Consol. Edison Co. v. Town of Red Hook, 60 N.Y.2d 99, 106 (1983) (finding that the field of power plant generation was preempted because "the Legislature has enacted a comprehensive and detailed regulatory scheme"); *People v. De Jesus*, 54 N.Y.2d 465, 469 (1981) (holding that the State Alcoholic Beverage Control Law preempted local action because "the regulatory system it installed is both comprehensive and detailed"); *see also, Albany Builders Assn.*, 74 N.Y.2d at 377 (holding a local law to regulate building permits was preempted where "the State Legislature has enacted a comprehensive and detailed regulatory scheme in the field of highway funding, preempting local legislation on that subject").

Justice Engoron concluded, in conclusory manner, that the FWWL is "narrowly tailored" to "a few discreet facts of employer-employee relations (mainly 'predictive scheduling') and does not infringe on State prerogatives." A-6. Justice Engoron's characterization of the FWWL as "narrowly tailored" is, of course, inconsistent with his characterization of the FWWL in the same Opinion as "interfere[ing] with freedom of contract; distort[ing] capitalism; and [] surprisingly complex, arguably unwieldly, and only problematically enforceable." *Id*. Nevertheless, regardless of how the FWWL is characterized, the regulatory history implementing the State Labor Law, ignored by Justice Engoron, makes clear that the call-in pay and spread of hours pay regulations in the Hospitality Wage Order were the result of, and part of, a comprehensive regulatory scheme to address employee

scheduling concerns, preempting the field.

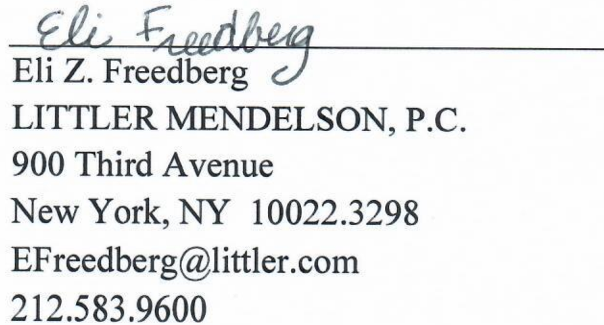
In addition, the schedule change premiums as provided in the FWWL constitute "wages" under the Labor Law, given that term's broad definition and courts' expansive interpretation thereof. The Labor Law broadly defines wages to include not just hourly minimum wages, but also "benefits or wage supplements." *See* NYLL § 190(1). Thus, the premiums as provided by the FWWL are "wages," as courts have read the New York Labor Law's expansive definition of wages to include payments not tied to services rendered, including for example, severance pay, spread of hours premiums and call-in pay premiums. *See, e.g., Metchick v. Biderman Indus. Corp*., No. 91-CV-2329, 1993 U.S. Dist. LEXIS 4278, *14-*15 (S.D.N.Y. Apr. 7, 1993) ("Despite defendants' suggestion that the intended scope of the term 'wages' in the statute only encompasses the hourly payments to low-level workers, I conclude that the clear language of §§ 190(1) and 198-c(2) indicates that the payments sought by [plaintiff], which compromise separation pay based on his previous salary payments, are within the scope of the term 'wages' as used in § 198(1-a)"); *Gregory v. Stewart's Shops Corp.*, No. 7:14-CV-00033, 2015 U.S. Dist. LEXIS 24412, *19 (N.D.N.Y. Mar. 1, 2015) (referring to call-in premium as "statutorily required wage amount"); *Pavia v. Around the Clock Grocery, Inc.*, No. 03-CV-6465, 2005 U.S. Dist. LEXIS 43229, *8 (E.D.N.Y. Nov. 15, 2005) (referring to "spread of hours wages").

Even assuming the schedule change premiums provided in the FWWL are not "wages" under the Labor Law, this Court should still find preemption, as the Labor Law provides a detailed mechanism for the Commissioner to promulgate regulations regarding premium payments, and indeed, she has exercised such authority, promulgating the call-in pay and spread of hours regulations in the Hospitality Wage Order, which specifically address employee scheduling concerns.

CONCLUSION

Justice Engoron incorrectly concluded that the FWWL is not preempted by State law and regulations. As a result, the Order appealed from should be reversed in its entirety, except for Justice Engoron's holding that Appellants had standing to bring the underlying action.

Date: August 7, 2020
New York, New York



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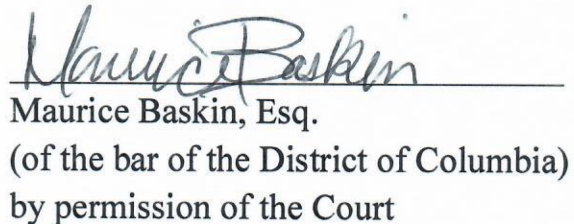

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by permission of the Court

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PRINTING SPECIFICATIONS STATEMENT

Pursuant to 22 NYCRR 1250.8(j) the foregoing brief was prepared on a computer using Microsoft Word.

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STATEMENT PURSUANT TO CPLR § 5531

New York Supreme Court

Appellate Division—First Department

INTERNATIONAL FRANCHISE ASSOCIATION, RESTAURANT LAW CENTER and THE NEW YORK STATE RESTAURANT ASSOCIATION,

Plaintiffs-Appellants,

– against –

CITY OF NEW YORK, STEVE VIDAL, VIOLETA DAUZE, EDWIN CABRERA, SHADEI GORDON, RAYMOND ORTIZ and PRINCESS WRIGHT,

Defendants-Respondents.

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1. The index number of the case in the court below is 655987/18.

2. The full names of the parties are as set forth above. An Order of the Honorable Arthur F. Engoron, dated April 16, 2019, granted to add Intervenors as parties along with the original Defendant.

3. The action was commenced in Supreme Court, New York County.

4. The action was commenced on or about December 3, 2018 by filing of a Summons and Complaint. Defendants filed a Motion to Dismiss on or about February 26, 2019.

5. The nature and object of the action is relating to Labor Laws.

6. This appeal is from an Order by the Honorable Arthur F. Engoron, dated February 13, 2020, which granted Defendants' Motions to Dismiss and denied Plaintiffs' Cross-Motions for Summary Judgment.

7. This appeal is produced on the Appendix method.

5531