To be Argued by:
JAMES REIF
(Time Requested: 15 Minutes)

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.

Appellate Case No.: 2020-02013

BRIEF FOR DEFENDANTS-RESPONDENTS STEVE VIDAL, VIOLETA DAUZE, EDWIN CABRERA, SHADEI GORDON, RAYMOND ORTIZ AND PRINCESS WRIGHT

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QUESTIONS PRESENTED ON APPEAL

1. Did the Supreme Court correctly grant the respective motions of Intervenor Defendants-Respondents and Defendant Respondent New York City to dismiss the complaint for failure to state a cause of action and deny Plaintiffs-Appellants' cross-motion for summary judgment insofar as the Court held that New York City's Fair Workweek Law ("FWWL") provisions regulating fast food employers do not conflict with New York State law within the meaning of the "conflict preemption" doctrine?

Yes.

2. Did the Supreme Court correctly grant Intervenor Defendants' and New York City's respective motions to dismiss the complaint for failure to state a cause of action and deny Plaintiffs' cross-motion for summary judgment insofar as it held that the FWWL provisions regulating fast food employers are not preempted by State law within the meaning of the "field preemption" doctrine?

Yes.

PRELIMINARY STATEMENT

Intervenor Defendants-Respondents Edwin Cabrera, Violeta Luis Dauze, Shadei Gordon, Raymond Ortiz, Steve Vidal and Princess Wright ("Intervenor Defendants" or "Intervenors") submit this brief in opposition to the appeal by International Franchise Association, Restaurant Law Center and The New York State Restaurant Association ("Plaintiffs") from the Order of the Supreme Court, New York County, dismissing their complaint challenging New York City's Fair Workweek Law, codified in New York City Administrative Code Title 20, Chapter 12, for failure to state a cause of action and denying Plaintiffs' cross-motion for summary judgment.

STATEMENT OF CASE

The bill that became the FWWL was passed by the City Council on May 24, 2017 and was signed into law by the Mayor on May 30, 2017. By law, the FWWL was to and did become effective on November 26, 2017. *See*, *e.g.*, Complaint ¶¶ 13-14. (A-16).[1] Plaintiffs did not file their complaint until December 3, 2018, more than a year after the FWWL took effect and more than 1 ½ years after it was enacted. Plaintiffs sought a judgment declaring unconstitutional that part of the FWWL regulating fast food employers on the ground that said part of the FWWL was preempted by New York State law.

[1] Numerical references are to pages of Plaintiffs-Appellants' Appendix.

On January 8, 2019, Cabrera, Dauze, Gordon, Ortiz, Vidal and Wright, fast food workers employed in various fast food establishments in New York City, jointly moved to intervene as defendants. (A-255). Over Plaintiffs' written objections and after oral argument, the Supreme Court (Hon. Arthur F. Engoron) granted the motion to intervene on or about April 23, 2019. *Id*.

The City of New York and, separately, Intervenor Defendants moved to dismiss the complaint, and Plaintiffs cross-moved for summary judgment. After full briefing by all parties and oral argument on the motions, the Court (Engoron, J.) granted the City's and Intervenors' motions to dismiss and denied Plaintiffs' cross-motion. *See* Decision And Order On Motion dated February 13, 2020. (A-6). Rejecting Plaintiffs' arguments to the contrary, the Court held that State law does not confer upon fast food employers a legal right to engage in conduct that the FWWL prohibits or otherwise discourages nor does it occupy the field that the FWWL regulates, to the exclusion of that FWWL regulation. The Court therefore held that there is neither "conflict preemption" nor "field preemption," and the FWWL is valid and enforceable.

For the reasons that follow, the Order of the Court below dismissing Plaintiffs' complaint and denying their cross-motion for summary judgment should be affirmed.

ARGUMENT

NEW YORK CITY'S FAIR WORKWEEK LAW IS NOT PREEMPTED BY NEW YORK STATE LAW.

A. The Fair Workweek Law

The FWWL was enacted in the wake of findings by Committees of the New York City Council that unstable work schedules of employees, particularly in the fast food industry where last minute changes in schedules were commonplace, adversely affected employees' lives outside of work and that affording employees predictable schedules would enable them to pursue educational and employment opportunities and thereby improve their quality of life. A March 3, 2017 Council Committee Report found that a significant percentage of workers was being "subjected to an unstable work shift schedule, with the lowest income workers (especially part-time hourly workers) facing the most unstable work schedules" and that subjecting employees to "unstable work shift schedule[s] has been linked to significantly greater work-family conflict (compared to those who work regular hours), and adverse effects on physical health and cognition." The Report noted that the FWWL had been introduced "to address the concerns of fast food workers, who are an especially vulnerable [group] when compared to workers in other industries," pointing out that a high percentage of such workers rely on public programs, lack health benefits and live "below the poverty line." The Report concluded that "a stable schedule would

allow fast food workers to pursue educational opportunities and other employment opportunities (i.e., an additional job), and plan for childcare arrangements. All would contribute to a better quality of life for fast food workers."[2] These findings were reiterated in a May 22, 2017 Council Committee Report.[3]

The hardships imposed on fast food employees when their employers make the all-too-common last minute changes to their work schedules are illustrated in affidavits filed below in support of intervention. Intervenor Steve Vidal was employed by Chipotle in a restaurant located at 185 Montague Street in downtown Brooklyn. Initially, he worked a basic schedule approximately 35 hours per week. Later, his basic schedule was reduced to approximately 22 hours per week.

> Both before and after this reduction in hours, my managers would frequently change my hours from what the scheduled hours were. Often times these changes were made at the last minute. While working at Chipotle, I was also serving as a youth pastor at Living Waters Fellowship, 265 Stanhope St., Brooklyn, New York. As a pastor, I was responsible for being at the Fellowship three afternoons a week. As a result,

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[2] Council of the City of New York, Committee Report of the Human Services Division and Committee on Civil Service and Labor, Int. No. 1396 at 3-4 (March 3, 2017) ("March 3, 2017 Report"). The parts of the Report quoted above are included in the Affidavit of Michael L. Winston filed February 26, 2019, para. 9 and Exh. C. The entire March 3, 2017 Report may be found at https://legistar.council.nyc.gov/LegislationDetail.aspx?ID=2900942&GUID=F6382D3F-7D70-4324-A083-65BD4E355E55.

[3] Council of the City of New York, Committee Report of the Human Services Division and Committee on Civil Service and Labor, Int. No. 1396 at 3 (May 22, 2017) ("May 22, 2017 Report"), included in Winston Affid., para. 10 and Exh. D. The entirety of this Report may also be found at the same website cited at n. 2 above that contains the March 3, 2017 Report.

> when changes were made to my schedule at Chipotle without reasonable notice, it often created a conflict with my duties as a youth pastor.

(Affidavit of Steve Vidal dated Jan. 7, 2019, para. 1).

Raymond Ortiz was employed at a Cosi restaurant located at 498 Seventh Avenue, New York, New York, until the restaurant closed in December, 2018. Ortiz stated:

> My work schedule at Cosi was constantly changing. I was scheduled to work as many as 40 hours and as few as 16 hours in a week.... [The] changes in my work schedule at Cosi were being made at the last minute without providing me with enough notice so I could try to rearrange the remainder of my schedule.

(Affidavit of Raymond Ortiz dated Jan. 3, 2019, paras. 1-2, 4).

Similarly, Princess Wright was employed at a McDonald's restaurant located at 840 Atlantic Avenue in Brooklyn. Wright stated:

> The number of hours I work each week has varied between 30 and 44 hours per week. Most weeks, my hours worked are closer to 30. I also attend college fulltime, so when my employer changes my schedule, it often conflicts with my class schedule or my work study requirement.

(Affidavit of Princess Wright dated Jan. 3, 2019, paras. 1-2).

A principal purpose of the FWWL is to reduce the instability in the lives of fast food employees that results from the last-minute changes in their work schedules. As the New York City Department of Consumer Affairs has explained:

> On November 26, 2017, NYC's Fair Workweek law went into effect. The law provides fast food . . . workers protection against abusive scheduling practices that have become rampant in these industries as large chains have capitalized on "just in time" scheduling technology that has wreaked havoc on workers' lives and budgets. In response to the common problem of these workers often not knowing when or how much they might work from day to day, the law helps provide . . . fast food workers with transparency and stability in scheduling and, for fast food workers, offers more control over scheduling and pathways to full-time work.

N.Y.C. Department of Consumer Affairs, "Advances and Setbacks in Turbulent Times: Second Annual Report on the State of Workers' Rights in NYC" (Jan. 2019), p. 26.[4]

The FWWL imposes obligations on businesses which employ fast food employees in a fast food establishment that is part of a chain of 30 or more such establishments and those which employ retail employees in a retail business. *See* N.Y.C. Admin. Code Title 20, Chapter 12, Subchapters 2-4 (governing fast food employers) and Subchapter 5 (governing retail employers). Plaintiffs do not challenge those parts of the FWWL applicable to retail employers. Moreover, they do not claim to represent any retail employers and, hence, would lack standing to make such a challenge. For these reasons, Intervenors address only those provisions in the FWWL applicable to fast food employers.

[4] This report can be found at https://www1.nyc.gov/assets/dca/downloads/pdf/workers/StateofWorkersRights-Report-2019.pdf.

B. The Arguments Advanced By Plaintiffs In Challenging The Validity Of The FWWL Are Without Merit.

In challenging the validity of the FWWL provisions regulating fast food employers, Plaintiffs argue that the FWWL conflicts with New York State law. *See* Brief For Plaintiffs-Appellants ("Pls. Br.") at 22-23, 26-31. Alternatively, they contend New York law comprehensively occupies the field of regulation to which the FWWL is directed and this implies that the Legislature intended state regulation of that field to be exclusive. *See id*. at 23-25, 31-38. Each of these arguments is inconsistent with the constitutional and statutory guarantees of New York City's home rule authority to enact and enforce the FWWL.

1. New York City's Home Rule Authority

Article IX, § 2(c) of the New York Constitution provides in pertinent part:

> In addition to powers granted in the statute of local governments or in any other law * * * (ii) every local government shall have power to adopt and amend local laws not inconsistent with the provisions of this constitution or any general law relating to the following subjects, whether or not they relate to the property, affairs or government of such local government, except to the extent that the legislature shall restrict the adoption of such a local law relating to other than the property, affairs or government of such local government:
>
> * * *
>
> (10) The government, protection, order, conduct, safety, health and well-being of persons or property therein.

This constitutional home rule guarantee "confers broad police power upon local government relating to the welfare of its citizens." *New York State Club Ass'n, Inc. v. City of New York*, 69 N.Y.2d 211, 217, *aff'd on other grounds*, 487 U.S. 1 (1988). "To implement article IX, the Legislature enacted the Municipal Home Rule Law." *DJL Restaurant Corp. v. City of New York*, 96 N.Y.2d 91, 94 (2001). By Municipal Home Rule Law § 10(1)(ii)(a)(12), which largely tracks the provisions of the constitutional provision, "local governments have been given broad authority to adopt ordinances governing the safety, health and well-being of those within their jurisdictions…" *People v. New York Trap Rock Corp*., 57 N.Y.2d 371, 377 (1982). Both the constitutional and statutory home rule guarantees "shall be liberally construed." (Article IX, § 3(c) of the Constitution and Mun. Home Rule Law § 51.)

The express terms of the constitutional and statutory home rule provisions make clear that New York City had ample authority to enact the FWWL unless that local law was "inconsistent with" the New York Constitution or a general State law relating to the "protection, order, conduct, safety, health [or] well-being of" fast food employees or the adoption of that law was "restricted" by the New York Legislature. (Article IX, § 2(c)(ii)(10) and Mun. Home Rule Law § 10(1)(ii)(a)(12)). *Center for Independence of the Disabled v. Metropolitan Transp. Auth.*, 184 A.D.3d 197, 202-203 (1st Dept. 2020). Plaintiffs do not contend that

the FWWL is "inconsistent with" the New York Constitution. They do assert that this local law is inconsistent with the New York Labor Law ("NYLL") or regulations promulgated thereunder and that the Legislature has otherwise restricted adoption of the FWWL. These contentions are without merit.

2. The FWWL Does Not Conflict With New York Law Within The Meaning Of The Conflict Preemption Doctrine.

Ordinarily, conflict preemption is found only when a State law specifically permits conduct prohibited by a local law or the latter imposes restrictions on rights under the former, so as to inhibit the operation of the State's general laws. *Garcia v. N.Y.C. Dept. of Health and Mental Hygiene*, 81 N.Y.3d 827, 840 (2018), quoting *New York State Club Ass'n.*, 69 N.Y.2d at 222, and *Eric M. Berman, P.C. v. City of New York*, 25 N.Y.3d 684, 690 (2015).

Plaintiffs contend the NYLL and/or regulations promulgated thereunder create in fast food employers an affirmative legal right to engage in conduct that is prohibited or discouraged by certain provisions in the FWWL. This contention is incorrect for the simple reason that the labor law provisions on which Plaintiffs would rely do not create any rights in the *employers* Plaintiffs purport to represent but only in their *employees*. Alternatively, they argue that even if State law does not create such a right in employers to engage in such conduct, it at least "permits" such conduct and such permission is sufficient to demonstrate a conflict

with the FWWL for purposes of the conflict preemption doctrine. Plaintiffs use the term "permit" to mean that State law does not prohibit conduct, that is, it is silent concerning that conduct. As the Court of Appeals has made abundantly clear, however, the mere failure of state law to prohibit particular conduct does not create a conflict with a local law that does prohibit that same conduct.

a. New York Law Does Not Create in Fast Food Employers an Affirmative Legal Right to Engage in Conduct Prohibited or Otherwise Discouraged by the FWWL.

In arguing for conflict preemption, Plaintiffs complain of three components of the FWWL. First and foremost, they object to that part of the FWWL which encourages fast food employers to provide their employees with advance notice of changes in their work schedules. Such changes include, for example, moving up or back the start or end time of a scheduled shift, adding a shift to a scheduled day off or eliminating a scheduled shift. The FWWL encourages employers to provide meaningful notice of any such changes by establishing a general standard of 14 days advance notice. As an alternative to providing that standard notice, the FWWL allows a fast food employer to pay a "schedule change premium" to an employee in addition to his/her wages. The amount of such a premium depends upon the number of days the employer falls short of satisfying the 14-day standard. *See* N.Y.C. Admin. Code §§ 20-1221(b)

and 20-1222(a)(1)-(5).[5] In essence, the FWWL does not prohibit a change in a work schedule absent the 14-day notice; it provides that a change in a work schedule without such notice is allowed if accompanied by payment of the applicable premium.

Second, Plaintiffs complain of the FWWL's so-called "clopening" provision, § 20-1231, wherein the FWWL provides that absent a written employee request or consent, a fast food employer may not require a fast food employee to work two shifts with fewer than 11 hours between the end of the first and the beginning of the second, when the first shift ends on the previous calendar day or spans two calendar days. Third, Plaintiffs object to the section of the FWWL which provides that "[b]efore hiring" a new employee to work a regular or on-call shift, a fast food employer must offer the shift to existing employees. *See* § 20-1241(a).

Plaintiffs argue that the FWWL advance notice provisions conflict with 12 NYCRR § 146-1.5. However, that regulation provides only that a hospitality employee who reports for duty pursuant to the request or permission of the employer must receive payment at the applicable wage rate for a specified

[5] The FWWL expressly creates several exceptions to the obligation to provide 14 days' notice or make a premium payment. *See* N.Y.C. Admin. Code § 20-1222(c)(1)-(4).

minimum number of hours.[6] The pay to which the employee is entitled under the regulation is wholly unrelated to notice of a change in schedule that an employee does or does not receive. Section 146-1.5 simply provides to an employee a minimum level of compensation when an employee is required to report for duty outside a regularly-scheduled assignment, regardless of advance notice or lack thereof.

Plaintiffs assert that § 146-1.5 "*states* that employees may be called in to work with no advance notice as needed, without their consent, … provided only that the employer must provide three hours of actual work once the employee is called in." (Pls. Br. at 27 (emphasis added)). *See also id.* at 17. In other words, according to Plaintiffs, § 146-1.5 confers upon hospitality *employers* a legal right to call employees in to work without any advance notice. As the Supreme Court once observed in an analogous context, the gloss Plaintiffs would place upon § 146-1.5 constitutes performance of "a remarkable job of plastic surgery upon the face of" that regulation. *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 153 (1969). The plain language of § 146-1.5 shows it does *not* state that a hospitality employer is empowered to, or may, do *anything*. To the contrary, as written, it imposes a legal *obligation* on such employers. Thus, not only does § 146-1.5 not

[6] For example, for one shift, an employee reporting for duty must be paid for at least 3 hours or the number of hours in the regularly scheduled shift, whichever is less, even if the employee is not required to perform work for the full 3 hours. (§ 146-1.5(a)(1)).

confer upon such employers a legal right to compel employees to report for work, it does not confer *any* legal right upon them. The regulation confers a legal right on, and only on, hospitality *employees*.

A word concerning Plaintiffs' allegation that "the FWWL prohibits calling employees in [to work] at all without their express, written consent," citing N.Y.C. Admin. Code § 20-1222(a)(5)(a) (Pls. Br. at 27) is also warranted. Not only does § 20-1222(a)(5)(a) *not* "prohibit" fast food employers from calling employees in to work "at all" without their express, written consent, nothing in *any* of the FWWL's advance notice provisions "prohibits" such an employer from engaging in such conduct. As explained at pages 11-12 above, §§ 20-1221(a) and 20-1222 do not "prohibit" a fast food employer from calling an employee in to work; they merely encourage a fast food employer to provide an employee with advance notice of a change in schedule, including a change consisting of the addition of a previously unscheduled assignment.

Plaintiffs further insist that § 146-1.5 conflicts with N.Y.C. Admin. Code § 20-1241(a), which provides that "[b]efore hiring" an additional worker to perform work, an employer must offer that work to current employees. *See* Pls. Br. at 27. The FWWL provision at issue creates a legal right in fast food *employees*, not in their *employers*. Thus § 20-1241(a) could not be in conflict with § 146-1.5 which, as noted above, creates a right in hospitality employees, not in

their employers. Section 146-1.5 says nothing about, and does not concern, the identity of a person to whom an employer may offer work. It provides only that if and when a hospitality employer requires an employee to report for work, the employer must pay the employee a minimum level of compensation. Parenthetically, the argument by Plaintiffs that § 20-1241(a) conflicts with § 146-1.5 is built upon an assumption that "call-in pay" under the latter should be equated with an "on call shift" as that term is used in the former. This is incorrect. "Call-in pay" is a *payment* of a minimum level of compensation for "*report[ing] for duty on any day*" (§ 146-1.5 (emphasis added)), whereas an "on call shift" is a "*time period* other than an employee's regular shift when the employer requires the employee to be available to work, regardless of whether the employee actually works and *regardless of whether the employer requires the employee to report to a work location*." (§ 20-1201 (emphasis added)).

Plaintiffs' argument based on § 20-1241(a) also ignores § 20-1241(d). The latter expressly provides that a fast food employer's obligation under § 20-1241(a) to offer work to current employees before hiring an additional worker to perform that work is subject to "any federal, state or local law, including laws that prohibit discrimination." In short, by its own terms, the FWWL renders § 20-1241(a) inoperative if and when, and to the extent, it would be inconsistent with § 146-1.5. Plaintiffs' insistence that the quoted caveat in § 20-1241(d) is limited to

violations of discrimination laws, *see* Pls. Br. at 29-30, is contrary to that section's plain language. If that had been the City Council's intention, that Council would simply have provided that an employer's allocation of shifts "shall not violate any federal, state or local [discrimination] laws."

Plaintiffs also allege a conflict between the "clopening" provision of the FWWL and 12 NYCRR § 146-1.6, another NYDOL regulation concerning hospitality employees/employers. *See* Pls. Br. at 27-28. Section 146-1.6(a) provides that on each workday on which a hospitality employee's spread of hours exceeds 10 hours, that employee shall receive one additional hour of pay at the basic minimum hourly rate.[7] Section 146-1.6, like § 146-1.5, does not confer any right upon the employer of a fast food employee. Thus, like § 146-1.5, it cannot conflict with a right conferred upon such an employee by the FWWL clopening provision.

To the extent Plaintiffs argue that the clopening provision interferes with the rights of hospitality *employees* under § 146-1.6, *see id*., Plaintiffs lack standing to make such an argument as they do not purport to represent fast food employees. This is particularly so where, as here, Plaintiffs purport to represent fast food employers which are seeking to invalidate a local law enacted for the

[7] A "spread of hours" is the length of the interval between the beginning and the conclusion of an employee's workday irrespective of time off for meals or intervals where the employee is off duty. *See* § 146-1.6.

benefit of their employees. To establish standing a plaintiff must do more than show it has suffered an injury-in-fact. It must also demonstrate that it falls within the zone of interests protected by the statute or regulation on which it would rely. *Utica Ins. Co. v. RJR Maintenance Group, Inc.*, 90 A.D.3d 554, 555 (1st Dept. 2011). The purposes of this requirement is to "assure[ ] that groups where interests are only marginally related to, or even inconsistent with, the purposes of [a regulation] cannot use the courts to further their own purposes at the expense of the [regulation's purposes]." *Society of Plastics Indus. v. County of Suffolk*, 77 N.Y.2d 761, 774 (1991). Plaintiffs' interests and those of its purported members are not within the zone of interests protected by § 146-1.6.

Apart from Plaintiffs' lack of standing, any argument that the exercise of employee rights under § 20-1231 would interfere with employee rights under § 146-1.6 does not withstand analysis. The DOL's regulation does not purport to guarantee a hospitality employee a right to a spread of hours of more than 10 hours. It merely provides that *if* an employee's spread of hours exceeds 10 hours, (s)he is entitled to an additional hour of pay at the applicable minimum wage rate. Therefore, even indulging the improbable assumption that compliance with the clopening provision could conceivably operate to prevent a fast food employee's spread of hours from exceeding 10 hours, that provision would not interfere with that employee's rights under § 146-1.6.

Plaintiffs fare no better with their contention that § 20-1241(a) conflicts with NYLL Section 161(1). (Pls. Br. at 28-29). The statute merely provides in pertinent part that an employer operating a restaurant shall "allow" an employee working in the restaurant 24 consecutive hours of rest in any calendar week. While an employee thus has a right to such hours of rest, Section 161(1) does not prohibit an employee from voluntarily foregoing such right. Thus, if a fast food employee were offered additional work in the circumstances contemplated by § 20-1241(a), (s)he would be free to accept or reject that work and there would be no conflict with § 161(1). Also, Plaintiffs again ignore the § 20-1241(d) caveat: assuming *arguendo* there were a conflict between § 20-1241(a) and Section 161(1), the former would yield to the latter. *See* pages 15-16 above. Plaintiffs also lack standing to complain of an alleged violation of Section 161(1), because their interests and those of the employers they would represent are not within the zone of interests protected by this statute. *See* pages 16-17 above.

Referring to the purported "conflict" between § 20-1241(a) and Section 161(1), Plaintiffs say: "Similar circumstances 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." (Pls. Br. at 29). Plaintiffs' one-sentence assertion that § 20-1241(a) and Section 142 "conflict" fails

for the same reasons that their argument as to the supposed § 20-1241(a)/Section 161(1) "conflict" fails. *See* preceding paragraph.

Plaintiffs also conjure a conflict between recordkeeping obligations imposed upon a hospitality employer by 12 NYCRR §§ 146-2.1, 146-2.2 and 146-2.3, and recordkeeping obligations imposed by the FWWL, N.Y.C. Admin. Code § 20-1206. *See* Pls. Br. at 30-31. There is no need to discuss the individual records which Plaintiffs say the FWWL requires fast food employers to maintain. Plaintiffs are unable to cite anything in the State regulations on which they would rely which would *prohibit* the recordkeeping obligations Plaintiffs say are created by the FWWL. Plaintiffs' argument boils down to their objection to the circumstance that the FWWL imposes "additional" recordkeeping obligations beyond those in the regulations. Such a circumstance does not suffice to create a conflict between the State regulations and the FWWL. *Garcia*, 81 N.Y.3d at 840 (quoting *Jancyn Mfg. Corp. v. County of Suffolk*, 71 N.Y.2d 91, 97 (1987) ("The fact that both the State and local laws seek to regulate the same subject matter does not in and of itself give rise to an express conflict."); *People v. Judiz*, 38 N.Y.2d 529, 531 (1976).

b. Where, As Here, State Law Does Not Affirmatively Protect Specific Employer Conduct, There Is No Conflict With the FWWL Which Prohibits or At Least Discourages That Employer Conduct.

As noted above, Plaintiffs argue that even if State law does not confer upon fast food employers an affirmative right to engage in conduct which the FWWL prohibits or otherwise discourages, that law "permits"/"allows" such conduct in the sense that it does not prohibit that conduct, and this suffices to create a conflict with the FWWL for purposes of the conflict preemption doctrine. *See*, *e.g.*, Pls. Br. at 17, 26, 27, 28, 30, 31. In other words, if a State law is silent concerning specified conduct, it conflicts with any local law that prohibits (or merely discourages) that conduct. Plaintiffs' argument has been squarely rejected by the Court of Appeals. No wonder: if accepted, such an argument would effectively destroy the home rule authority conferred upon local governments by the New York Constitution and the Municipal Home Rule Law.

In *People v. Cook*, 34 N.Y.2d 100 (1974), the defendant was charged with violation of a provision of the N.Y.C. Administrative Code that required retailers to maintain a difference in price between brands that had a higher tar and nicotine content and those that had a lower such content. The defendant argued that enforcement of the City law was barred because it was inconsistent with State law. The alleged inconsistency arose from the fact that the State law permitted cigarette sales without such price differentials, in the sense only that it did not

prohibit such sales. Rejecting the defendant's contention, the Court of Appeals held:

> [Defendant] argues that a locality may not "enact a local law which prohibits conduct which is permitted by State law." This statement of the law is much too broad. If this were the rule, the power of local governments to regulate would be illusory. Any time that State law is silent on a subject, the likelihood is that a local law regulating that subject will prohibit something permitted elsewhere in the State. That is the essence of home rule.

Id. at 109.

To the extent Plaintiffs would rely upon *Wholesale Laundry Board of Trade, Inc. v. City of New York*, 17 A.D.2d 327 (1st Dept. 1962), *aff'd on opinion below*, 12 N.Y.2d 998 (1963), for its conflict preemption argument, such reliance is unavailing. In that case, decided prior to *Cook*, the Court of Appeals held that the New York State Minimum Wage Act preempted a New York City ordinance establishing a minimum wage rate higher than that set forth in the State Act on the basis of field preemption, not conflict preemption. Subsequently, the Court of Appeals explicitly rejected the notion that *Wholesale Laundry* supports the argument that the Labor Law preempts enforcement of a local law simply because the State law "permits," that is, does not prohibit, conduct proscribed by the latter:

> [P]laintiff goes too far when it asserts, relying on *Wholesale Laundry* . . . that [New York City's Human Rights Law] is inconsistent with [the New York State Human Rights Law] because activity which would be permitted under [the State Law] is prohibited by the local

> law. . . . Rather, the general principle set forth in *Wholesale Laundry* applies only when the Legislature has "evidenced a desire that its regulations should preempt the possibility of varying local regulations."

New York State Club Ass'n, 69 N.Y.2d at 221; *accord*: *Jancyn*, 71 N.Y.2d at 100 ("plaintiff's argument that local law prohibits what State law would allow and is therefore invalid is meritless"). *Cook*, *New York State Club* and *Jancyn* compel rejection of Plaintiffs' permits/does-not-prohibit argument for conflict preemption.

Plaintiffs would co-opt two cases that refer to "permissible" conduct when talking about conflict preemption, *see* Pls. Br. at 26, 28, but they ignore that the courts in those cases did not use such terminology for support of the argument Plaintiffs attempt to make here. Those courts were using "permissible" when referring to state laws that created an affirmative right to engage in conduct. Indeed, to use that terminology as would Plaintiffs here would have been inconsistent with *Cook* and its progeny. As the Court of Appeals pointed out in *Cook*, to adopt the meaning of "permissible" advanced by Plaintiffs would essentially abolish home rule authority of local governments, for whenever a State law were silent on particular conduct, it would operate to bar any regulation of that conduct by any local law.

This Court's recent opinion in *Center for Independence*, *supra*, illustrates the legal insufficiency of a conflict preemption argument based on a State law that merely permits certain conduct in the sense that it does not prohibit it

(as distinguished from a State law that affirmatively creates a legal right to engage in the conduct). In their complaint, filed in 2017, the plaintiffs claimed the New York City subway system's lack of accessibility to persons with certain disabilities in 360 of 427 stations violated the New York City Human Rights Law, N.Y.C. Admin. Code § 8-101 *et seq*. The New York Transportation Law § 15-b required 100 designated subway stations be made accessible by July 2020, but was silent as to accessibility at other stations. Defendants argued that the Transportation Law conflicted with the NYCHRL so as to render the local law unenforceable.

This Court unanimously rejected that conflict preemption argument. Insofar as the Transportation Law required accessibility at the 100 designated stations, it obviously did not conflict with the NYCHRL, which allegedly required the same accessibility at those same stations. The State law was silent as to accessibility at additional stations, meaning that it neither prohibited nor required accessibility at those stations. 184 A.D.3d at 205. This Court held that the Transportation Law's failure to prohibit such accessibility did not serve to create a conflict with the NYCHRL which, allegedly, did require accessibility at additional stations. *Id*.

Center for Independence is, in essence, a reiteration of the basic rule set forth in *Cook* and reaffirmed by the Court of Appeals in *New York State Club Ass'n* and *Jancyn*: where, as here, a State law neither prohibits nor affirmatively

protects specific conduct, that law does not conflict with a local law prohibiting such conduct for purposes of the conflict preemption doctrine.

Finally, we note that several of Plaintiffs' contentions related to conflict preemption are predicated on the hypothetical existence of a narrow set of circumstances unlikely to occur. But even if a narrow set of circumstances hypothesized by Plaintiffs actually came to pass and, further, even if those circumstances gave rise to a conflict within the scope of the conflict preemption, that would only warrant a conclusion that the FWWL was invalid as applied to that narrow set of circumstances. It would not justify a conclusion that the FWWL was invalid on its face.

3. New York State Labor Law Does Not Occupy The Fields of Predictive Scheduling of Employees' Work Or Clopening In The Fast Food Industry.

Field preemption may be found only where the "State has *clearly* evinced a desire to preempt an entire field thereby precluding any further local regulation" in the area involved, *see Jancyn*, 71 N.Y.2d at 96-97 (emphasis added). *See also New York Trap Rock Corp*., 57 N.Y.2d at 378.

Such State intent may be "inferred from a declaration of State policy by the Legislature or from the legislative enactment of a comprehensive and detailed regulatory scheme in a particular area." *See New York State Club Ass'n*, 69 N.Y.2d at 217. *See also DJL Restaurant Corp.*, 96 N.Y.2d at 95; *Eric M.*

Berman, P.C., 25 N.Y.3d at 690. Neither of these situations exist here and thus Plaintiffs' field preemption claim "falls flat," *see* A-6 (lower court opinion).

a. The Absence of a Legislative Declaration of State Policy of Labor Law Preemption

The NYLL contains no legislative declaration of policy that suggests that this law was designed to occupy the field of predictive scheduling for fast food employees or insuring adequate time between such employees' shifts ("clopening"), the matters that Plaintiffs insist are not subject to local regulation. *See* A-6 (Opinion below noting State law "does not include an overarching statement of intent to cover the waterfront"). And Plaintiffs do not – and cannot – point to any legislative statement that supports their claim that the NYLL and/or regulations promulgated thereunder were intended to occupy this field so as to bar enforcement of the relevant provisions in the FWWL. In short, no field preemption can be "inferred from a declaration of State policy by the Legislature . . . ." *See New York State Club Ass'n*, 69 N.Y.2d at 217

b. The Absence of a Comprehensive Regulatory Scheme

Field preemption may also exist where the legislature has enacted a comprehensive and detailed legislative design "in a particular area," *see New York State Club Ass'n*, 69 N.Y.2d at 217, such that a "local law regulating the same subject matter" as the State law, if "'permitted to operate,'" would "'tend to inhibit

the operation of the State's general law and thereby thwart the operation of the State's overriding policy concerns,'" *Incorporated Village of Nyack v. Daytop Village*, 78 N.Y.2d 500, 505 (1991), quoting *Jancyn*, 71 N.Y.2d at 97.

Here, Plaintiffs attempt to build a field preemption claim by citing to a handful of NYLL provisions – Sections 142-144, 160-162 and 650-655 – as well as two Labor Law regulations, *see* Pl. Br. at 14-17. However, a review of these State statutory and regulatory provisions – which follows immediately below – shows that these provisions (a) do not amount to anything resembling a comprehensive and detailed regulatory scheme, and (b) more importantly, have little, if anything, to do with the "particular area[s]" addressed by the FWWL, *see New York State Club Ass'n*, 69 N.Y.2d at 217, that Plaintiffs allege are within the State's exclusive authority, namely, "scheduling notices" and "clopenings." As a result, these State provisions do not preempt the FWWL. *See also* A-6 (Opinion below observing that State law provisions cited by Plaintiffs provide only a "little this . . . [and] a little that").

NYLL Sections 142-144. Sections 142 and 143 set maximum hours of employment for minors. The FWWL does not concern itself with maximum employment hours for minors.

Section 144 requires an employer to post a minor's work schedule "setting forth the hours of beginning and stopping and the time allowed for meals."

S*ee* Section 144(1). This requirement does not overlap with any employer FWWL obligations as this City ordinance does not require posting of employee schedules (including those of minors). *See also* page 19 above (no conflict between FWWL and State Labor Law record keeping requirements).

NYLL Sections 160-162: The only part of Section 160 applicable to fast food employers is Section 160(3). This provision merely provides that eight hours shall constitute "a legal day's work," while permitting agreements to work more than eight hours a day at increased compensation. Section 161 obligates an employer to provide its employees with "at least twenty-four consecutive hours of rest in any calendar week." The subsections of Section 162 applicable to restaurant employees, *see* Section 162(2), (3) and (4), require an employer to provide employees with meal breaks (the minimum length and time of the breaks are dependent on the length and time of the work shift). None of these sections have anything to do with the FWWL subjects Plaintiffs say are subject to field preemption. In addition, nothing in the FWWL addresses or tries to alter the State requirements regarding, (1) the eight-hour working cap; (2) the 24-hour rest period; or (3) meal breaks.

NYLL Sections 650-655. Sections 650-655 of the Labor Law were enacted in 1960 as the Minimum Wage Act. That Act establishes a minimum

wage rate for private sector employees and the procedures for increasing that rate. *See* Sections 652 and 653-659.

Notwithstanding Plaintiffs' assertion to the contrary, *see* Pls. Br. At 16-18, 23, 32-37, the Minimum Wage Act does not preempt the FWWL because they serve different purposes. *See Myerson v. Lentini Bros. Moving & Storage Co.*, 33 N.Y.2d 250, 255 (1973); *see also DJL Restaurant*, 96 N.Y.2d. at 96-97 (even though State law was "comprehensive[]" in scope, there was no field preemption because the State and local laws were directed at "distinct activities" and had different objectives). The Minimum Wage Act is designed to maintain a minimum wage rate and raise wages that are "insufficient to provide adequate maintenance for [employees] and their families." *See* NYLL Section 650. The FWWL, on the other hand, is aimed at affording fast food employees more stable lives, as by requiring employers to provide notice of scheduling changes and ensuring sufficient rest between clopening shifts, *whatever employees' wage rates may be*. *See* pages 4-7, 11-12 above.

The Minimum Wage Act also does not preempt the FWWL because the Act has nothing to do with the FWWL subjects of "predictive scheduling" and "clopenings." Plaintiffs' attempt to draw a link between the Minimum Wage Act and the FWWL fails.

According to Plaintiffs, the FWWL premiums somehow constitute wages (the subject of the Minimum Wage Act) which (for minimum wage workers) cause an increase in the State minimum wage rate. *See* Pls. Br. at 2, 7, 15-16, 32, 37 (repeatedly mislabeling FWWL premiums as "wage premiums"); A-24 & 27, Complaint, ¶¶ 30, 41 (FWWL allegedly hinders State law "scheme for … minimum compensation").

Wages and FWWL premiums, however, are defined differently, *contra* Pl. Br. at 37. Wages are earnings of an employee "for labor or services rendered" by an employee. *See*, *e.g.*, NYLL Sections 190(1) & 198-c, and *contra* Pl. Br. at 15-16 (Plaintiffs claiming without any support that State statutory definition of wages includes "premiums paid to employees"). The FWWL, in contrast, defines a premium under the FWWL as "money that an employer pays to an employee as compensation for changes the employer makes to the employee's work schedule" when the employer fails to provide to the employee the advance notice of such changes as required by the FWWL. *See* NYC Admin. Code § 20-1201. In other words "premiums" are *not* payments for work performed. Indeed, the FWWL explicitly states that an FWWL premium "is not wages earned for work performed by that employee but rather is in addition to wages." *See* NYC Admin. Code § 20-1201; *id.* § 20-1222(a). Further, § 20-1222(b) provides that "premiums" under the FWWL shall be paid "at such time as the employer pays an

employee wages." This directive would be unnecessary were "premiums" actually "wages." *See also Truelove v. Northeast Capital & Advisory, Inc.*, 95 N.Y.2d 220, 224 (2000) ("the Legislature elected not to define [the term 'wages'] so expansively as to cover all forms of employee remuneration"); *see also* A-22-23, Complaint ¶¶18-20 (characterizing FWWL premium payment as "penalties," not as wages).

The cases cited by Plaintiffs, *see* Pls. Br. at 16, 37, do not support the idea that FWWL premiums are wages. For example, in *Matter of Dean Witter Reynolds, Inc. v. Ross*, 75 A.D.2d 373, 381 (1st Dept.1980), this Court determined that the incentive compensation involved did *not* fall within the definition of "wages" in Labor Law Section 190(1). In *Metchick v. Bidermann Industr. Corp.*, No. 91 Civ. 2329, 1993 WL 106139 at *4 (S.D.N.Y. Apr. 7, 1993), the court held that "separation pay" is "within the scope of the term 'wages' . . . ." Given that separation pay is specifically included within the definition of wages in NYLL Section 190(1), while premiums like those in the FWWL are not, *Metchick* provides no support for Plaintiffs' argument here.

The distinction between wages and premiums is also demonstrated by the different bases used by the Minimum Wage Act and the FWWL for making payments. Labor Law Section 652 requires the payment of wages at a minimum rate "for each hour worked." The FWWL, in contrast, requires an employer to pay

a premium to fast food employees if the employer fails to comply with FWWL notice requirements – regardless of the number of hours worked by the employee and even if the employees' base wage rates are above the State minimum wage rate.

An example illustrates this difference between the wages and FWWL premiums. Suppose A and B, fast food workers employed by the same employer in New York City, (1) were paid at the State minimum wage rate; (2) worked the same number of hours in week X and in weeks thereafter; and, (3) in week X, B worked the same schedule as A, but did so only because the employer changed B's work schedule without providing the required FWWL advance notice. In this example, because of the FWWL, B (but not A) would be entitled to a premium payment under the FWWL and, as a result, receive more money in week X than A. Further suppose that after week X, the employer of A and B was not required to pay any further FWWL premiums.

Would the FWWL premium payment constitute wages that would increase the minimum wage, as Plaintiffs contend? The answer is surely "no". Minimum wage rates do not oscillate from week to week and any minimum rate requirement would apply across-the-board to all employees of a particular fast food employer, *see, e.g.,* 12 NYCRR § 146-1.2. In the foregoing example, however, B did not receive an ongoing wage increase: following week X, the amount of

money (s)he received would drop (as (s)he no longer was paid an FWWL premium). Nor could it be said that any FWWL premium payment to B resulted in an across-the-board wage increase to all employees of a fast food employer; indeed, A did not receive an increase in compensation in week X, even though A worked the same number of hours as B and the two worked for the same employer. *See also* A-6 (lower court opinion stating that: FWWL premium payments "are to compensate for a particular harm, and to deter it, not to increase somebody's hourly wage.").

If anything, the one-time FWWL premium payment to B – rather than resembling wages – is similar to the situation where an employee receives a liquidated damages payment because the employee's employer failed to pay minimum wages or overtime compensation that was due the employee under the NYLL Section 663(1) or the Fair Labor Standards Act ("FLSA"); 29 U.S.C. § 260. Such liquidated damage payments do not constitute wages and do not increase an employee's wage rate.[8]

[8] Employers do not treat a liquidated damages payment as wages. Instead, they report such payments to the IRS on a 1099 form, not on a W-2 form. *See* I.R.S. Tech. Adv. Mem. 2009-035, at 15 (Oct. 22, 2008), available at: https://www.irs.gov/pub/lanoa/pmta2009-035.pdf.

In short, no basis exists for Plaintiffs' claim that the Minimum Wage Act preempts the FWWL. *See also* discussion at pages 36-38 below (*Wholesale Laundry* also does not support plaintiffs' preemption claim).

Plaintiffs also attempt at Pls. Br. At 32 to manufacture preemption by citing to two "Hospitality Industry Wage Order" regulations that cover restaurant employees, among others, in the hospitality industry: (1) 12 NYCRR § 146-1.5, which requires an employer to pay an employee a minimum level of compensation if the employee is required to report to work, and (2) 12 NYCRR § 146-1.6, which requires an employer to pay an employee "one additional hour of pay at the basic minimum hourly rate" if the employee's workday ("spread of hours") exceeds 10 hours. *See* pages 12-14, 16-17 above.

These two regulations, even when tacked onto the Labor Law provisions cited by Plaintiffs, do not create a comprehensive legal regime, particularly given that these Wage Order regulations – like the statutes reviewed above – have nothing to do with the FWWL field that Plaintiffs contend is fully occupied by State law. *See also* A-6 (lower court decision, stating: "Mandating extra compensation for a workday of more than 10 hours [under State spread of hours regulation] has nothing to do with 'predictive scheduling,' other than they can both be labelled 'scheduling.'").

Moreover, the State regulations and the FWWL serve different purposes. *See* page 28 above (no field preemption where State and local laws have different purposes). The Hospitality Wage Order provisions – unlike the FWWL, *see* pages 4-7, 11-12 above -- "carry out the purposes of [the Minimum Wage Act]," meaning that this Order's regulations are intended to "safeguard minimum wages," which in turn provide employees with compensation sufficient "to provide adequate maintenance for themselves and their families." *See* NYLL Sections 650, 655 (5)(a), (b).

Briefly put, there is no comprehensive State law scheme that preempts the FWWL. Indeed, the courts have repeatedly rejected field preemption claims where a State law regulated areas addressed by a local law far more extensively than the NYLL could be said to regulate the areas covered by the FWWL. For example, both the New York State Human Rights Law, N.Y. Executive Law § 290 *et seq.* and NYCHRL, NYC Admin. Code § 8-101 *et seq.*, prohibit discrimination in employment on a wide variety of bases that largely overlap. Nevertheless, this Court held that the NYSHRL "was not intended to preempt the field of antidiscrimination legislation," and thus does not preempt the NYCHRL. *See Bracker v. Cohen*, 204 A.D.2d 115, 116 (1st Dept. 1994) (citing *New York State Club Ass'n*, 69 N.Y.2d at 218-22.

So too, in *Garcia*, the Court of Appeals found that a State law creating a "relatively comprehensive scheme for school vaccinations" did not bar a local rule requiring flu vaccines for day-care children. 31 N.Y.3d at 620. *See* A-7 (lower court opinion, *citing* and *quoting Garcia*, 31 N.Y.3d at 620: "[T]he mere fact that the [State] Legislature has enacted specific legislation in a particular field does not necessarily lead to the conclusion that broader [local] agency regulation of the same field is foreclosed."). *See also Jancyn*, 71 N.Y.2d at 99 (although State legislators provided statement of "expansive" reach of State law governing cesspool cleaners and additives, State law did not preclude local regulation of additional additives); *Village of Nyack*, 78 N.Y.2d at 505 (no preemption of local law regulating location of substance abuse treatment center, even though State law represented "a sweeping effort to address . . . the scourge of substance abuse in this State"); *McDonald v. N.Y.C. Campaign Finance Bd.*, 117 A.D.3d 540 (1st Dept. 2014) (even though State law applied "to all contributions to candidates for election to any public office . . . [i]t is not evident that additional, not inconsistent, legislation regarding contributions is precluded").

And, even if the FWWL somehow "'touche[s] upon'" some of the same areas as those regulated by the State – and it does not – that would "'not render the local law invalid." *Judiz*, 38 N.Y.2d at 531-532. Field preemption occurs "'only when the state has evidenced a desire or design to occupy an entire

field,'" *id.* (citation omitted) and the local law would "tend to inhibit" and "thwart" the State law and underlying policies, *see* pages 25-26 above. *See also* A-7 (lower court opinion quoting *DJL Rest. Corp.*, 96 N.Y.2d at 94: Local laws "will not be preempted if their enforcement only incidentally infringes on a preempted field.").[9]

Here, there is no evidence of a Legislative "desire or design" to occupy the entire Labor Law field, particularly the areas regulated by the FWWL; nor is there any indication that the FWWL – which has been in effect for approximately three years – inhibits or thwarts the operation of the State Labor Law or its policies.

c. *Wholesale Laundry* and *ILC Data* Do Not Support Field Preemption.

To try to prop up their preemption claim, Plaintiffs repeatedly cite to two cases: *Wholesale Laundry Board of Trade, supra,* and *ILC Data Service Corp. v. County of Suffolk*, 182 A.D.2d 293 (2d Dept. 1992), *see* Pl. Br. at 3, 24-25, 32-33, 35. However, neither case supports Plaintiffs' position and neither states that State Labor Law provisions and regulations "preempt[] local ordinances in the areas [of] . . . employee scheduling and premium pay," *contra* Pl. Br. at 2-3, 23-24.

[9] That there is no "need for uniform State-wide control of" predictive scheduling or clopenings – and Plaintiffs have not explained why there would be – underscores that there is "no implied general preemptive effect" by the State Labor Laws here. *See Vatore v. Commissioner of Consumer Affairs of the City of New York*, 83 N.Y.2d 645, 650 (1994). *See also Jancyn*, 71 N.Y.2d at 97.

In *Wholesale Laundry*, this Court held that the State Minimum Wage Act preempted a New York City ordinance setting a minimum wage rate higher than the one in the State law. As Plaintiffs would have it, the determination in *Wholesale Laundry* went far beyond that holding and decided that there is "broad 'field preemption' by the State Labor Law." *See* Pls. Br. at 3, 25, 32. Plaintiffs offer such a conclusion based on (i) this Court's statement that Minimum Wage Act preemption of the City's minimum wage ordinance can be "'deduced from the restrictions on any law that supersedes any provision of the Labor Law,'" and (ii) the Act's "'elaborate machinery for the determination of an adequate wage.'" Pls. Br. at 24, quoting *Wholesale Laundry*, 17 A.D.2d at 329. Neither of these statements by this Court support a "broad preemption" doctrine.

First, even if the City minimum wage ordinance superseded the Minimum Wage Act, *see* 17 A.D.2d at 330, the FWWL certainly does not. Plaintiffs point to nothing – nor could they – that shows that the FWWL contains any statement indicating an intent to supersede State law nor that the City, in enacting the FWWL, substantially complied with the procedures under Municipal Home Rule Law § 22 that must be met to supersede a State statute. As a result, "supersession [can] not be found." *See ILC Data Service,* 182 A.D.2d at 299.

Second, this Court in *Wholesale Laundry* was concerned with local minimum wage laws – not all local labor laws – that could interfere with the

"elaborate machinery" in the Minimum Wage Act for fixing the minimum wage rate, *see* 17 A.D.2d at 329-30 and *contra* Pls. Br. at 24; *see also* NYLL Sections 653-659. Simply put, *Wholesale Laundry* did not sweep aside all local labor laws. Moreover, as shown at pages 29-32 above, (1) the FWWL does not attempt to change the State minimum wage rate and does not interfere with the Minimum Wage Act, and (2) the State Labor Law – including the Minimum Wage Act – does *not* contain "an elaborate machinery" that must be followed by an employer when it is changing an employee's work schedule or issuing a clopening schedule. There thus is no basis for concluding that the State minimum wage "elaborate machinery" preempts the FWWL or that the FWWL would "interfere[]" with this State machinery, *see also* A-6 (lower court opinion stating that "the obvious goal, and effect, of the 'premiums' under the FWWL is to encourage 'predictive scheduling,' not to interfere with State minimum wage law.").

In *ILC Data Service*, both the local law and the State law provisions were directed at reducing employee hazards in the workplace, 182 A.D.2d at 304-05, and enforcement of the local law 'would tend to inhibit the operation of the State's general law and thereby thwart the operation of the State's overriding policy concerns,'" *id.* at 305, quoting *Jancyn*, 71 N.Y.2d at 97. *ILC Data Service* is wholly unlike the instant case where both the respective subjects and purposes of the FWWL and State law provisions plainly differ.

d. Where the State Possesses But Does Not Exercise Regulatory Authority, the Argument for Field Preemption Is Baseless.

Plaintiffs' additional argument here for preemption combines, (1) a baseless claim that the State Commissioner of Labor has "exclusive authority to promulgate . . . scheduling regulations" and regulations concerning "premium pay," with (2) a sweeping theory of preemption, namely that field preemption exists wherever the State legislature and agencies have authority to regulate the areas covered by the local ordinance, *even if they have not exercised that authority*. *See* Pls. Br. at 16-18, 32-33, 35, citing NYLL Section 655. *See also* Pls. Br. at 18-19 (arguing that preemption exists here based on regulations that were proposed, ***but rejected***, by the Commissioner – for industries *other than* the hospitality industry). This approach for preemption is without merit.

First, nothing in the NYLL cited by Plaintiffs – including Sections 650 and 655 – provides that the Commissioner has "exclusive" authority to promulgate regulations regarding predictive scheduling or shift change premiums.

Second, Plaintiffs' breathtaking theory of field preemption – that it exists so long as the State would have authority to act, even if it has not – is contrary to the court decisions that have repeatedly stated that field preemption occurs only when "the [New York] legislative *enact[s]* … a comprehensive and detailed regulatory scheme *in a particular area*," *New York State Club Ass'n*, 69

N.Y.2d at 217 (emphasis added); *accord*: *Eric M. Berman, P.C.*, 25 N.Y.3d at 690; *DJL Restaurant Corp*., 96 N.Y.2d at 95; *Jancyn*, 71 N.Y.2d at 99. To put the matter succinctly, in order to occupy a field, the State must actually occupy that field. Here, that means the State Legislature and/or the NYDOL acting pursuant to State law must develop a comprehensive scheme governing predictive scheduling and clopenings for fast food employers and employees, not simply possess authority to make a proposal that was never adopted.

Plaintiffs' theory of preemption is also contrary to the New York Constitution. Under Article III thereof, the State Legislature is vested with power to enact all manner of legislation. If possession of this legislative power alone, unaccompanied by its exercise, would operate to preempt any local law concerning any matter subject to potential State regulation, this would effectively reduce to a nullity the Constitution's broad grant to local governments of home rule authority pursuant to Article IX, § 2(c) of the Constitution. *See* pages 20-21 above; *see also Cook*, 34 N.Y.2d at 109 ("the power of local governments to regulate would be illusory" were the rule that State law silence on a subject prohibits local regulation of that subject).

In sum, Plaintiffs must do more than repeatedly recite the words "comprehensive," "detailed" and "broad," *see* Pl. Br. 2, 4, 23, 32-38, to show that the FWWL is preempted. Under the applicable precedents, they must show that

the "State has *clearly* evinced a desire to preempt" the areas regulated by the FWWL. *See Jancyn*, 71 N.Y.2d at 96-97 (emphasis added). Plaintiffs have failed to make such a showing.

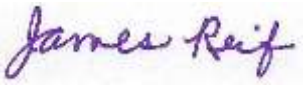
CONCLUSION

For the foregoing reasons, the Order of the court below granting dismissal of Plaintiffs' complaint and denying the cross-motion for summary judgment should be affirmed.

Dated: November 19, 2020

Respectfully submitted,

GLADSTEIN, REIF & MEGINNISS, LLP

By: 

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Point size: 14-Point
Line spacing: Double

Word Count. The total number of words in this brief, inclusive of point headings and footnotes and exclusive of pages containing the table of contents, table of citations, proof of service and this Statement is 9,628.

Dated: November 19, 2020