To be argued by:
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New York Supreme Court
Appellate Division: First Department

INTERNATIONAL FRANCHISE ASSOCIATION, RESTAURANT LAW CENTER, and THE NEW YORK STATE RESTAURANT ASSOCIATION,	Case No. 2020-02013

Plaintiffs-Appellants,

against

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

Defendants-Respondents.

BRIEF FOR RESPONDENT CITY OF NEW YORK

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PRELIMINARY STATEMENT

In May 2017, the New York City Council enacted the Fair Workweek Law to limit unfair and unpredictable scheduling practices in the fast food and retail industries. The City Council found that such practices wreak havoc on the lives of the low-wage workers in these industries, who do not know when they will work in a given week or how much they will earn, with the result that they may not be able to plan for child or elder care, cover basic expenses, or go to school. As relevant here, the Law requires fast food employers to provide their employees with advance notice of their schedules and with access to newly available shifts, and to seek employee consent before assigning consecutive late-night and early-morning shifts.

Plaintiffs, a fast food trade association and its affiliates now bring this lawsuit, claiming that the Law is preempted by the New York Labor Law. Supreme Court, New York County (Engoron, J.), granted the City's motion to dismiss the complaint, and denied plaintiffs' cross-motion for summary judgment.

This Court should affirm because plaintiffs' theories of preemption lack merit. No state law or regulation even addresses the conduct regulated by the Fair Workweek Law, let alone is in direct conflict with it. Plaintiffs' contentions to the contrary rely on a mischaracterization of the very provisions they cite and of bedrock conflict preemption principles.

Similarly unavailing is plaintiffs' contention that the State Legislature has clearly evinced its intent to preempt the field of workplace scheduling. The disparate provisions they cite relate only tangentially to the conduct regulated by the Fair Workweek Law and, together or separately, do not constitute the type of comprehensive and detailed regulatory scheme necessary to find implied preemption. Plaintiffs' further contention that the Legislature has preempted the field of minimum wage regulation is beside the point. The Fair Workweek Law regulates unfair scheduling practices, not the minimum wage. This Court should, like Supreme Court, reject plaintiffs' meritless attacks on the Law, and affirm the order dismissing this lawsuit.

QUESTION PRESENTED

Have plaintiffs stated a preemption claim, where they fail to identify any state law or regulation that is in direct conflict with any provision of the Fair Workweek Law, and where the disparate legal provisions they cite are insufficiently comprehensive and detailed to occupy the relevant field of workplace scheduling?

STATEMENT OF THE CASE

A. The City Council's enactment of the Fair Workweek Law to combat unpredictable and unfair scheduling practices

In May 2017, the New York City Council enacted the Fair Workweek Law as part of a package of bills that aimed to improve the lives of low-wage workers in the City. The Fair Workweek Law encompasses a series of enactments regulating the retail and fast food industries, where low-wage jobs are the norm (Appendix ("A") 34). *See* N.Y.C. L.L. 99, 100, 106, 107 (2017), *codified at* Admin. Code §§ 20-1201–53. The Law does not regulate the hourly wages those vulnerable workers receive, but rather targets the distinct problems created by unfair scheduling practices, particularly opaque and unpredictable practices that leave workers not knowing when or how many total hours they will work in any

given week (A34, 225, 237). In adopting the Fair Workweek Law, the City joined a growing number of jurisdictions around the country to enact fair scheduling legislation.[1]

Prior to the Law's adoption, the City Council's Committee on Civil Service and Labor found that about 17 percent of the nation's workforce faces unstable work schedules, with the lowest-wage workers—and fast food and retail workers in particular—hit the hardest (A36, 225-26). Scheduling unpredictability has posed even greater challenges in recent decades with the rise of "just in time" technology, which enables employers to wait to schedule workers until just days or hours before the start of a given shift (A108). As a result of such practices, workers often do not know when they will be expected to work in a given week, or how much they can expect to earn from week to week (A34-36, 108, 225-26).

The lack of certainty is detrimental to workers' ability to plan their budgets and their lives (A34-36, 225-27). Low-wage

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[1] The state of Oregon and at least six municipalities—Chicago, Philadelphia, Seattle, San Francisco, Emeryville, and San Jose—have enacted fair scheduling laws (A115; *see also* "Predictive Scheduling Laws," HRDIVE, https://perma.cc/K88V-QADT (listing links to the laws)).

workers with unpredictable schedules are less likely to be able to cover basic expenses like housing costs, transportation, and food, or to maintain social benefits, for which eligibility is often based on meeting minimum-hours or -income requirements (A34-35, 226). The lack of scheduling predictability also prevents low-wage workers from planning for child or elder care; holding a crucial second job; and planning for their futures, either by budgeting for savings or improving their earning potential by going to school or a training program part-time (*id.*). Lack of predictability even strains family life, and has been linked to reduced cognition and physical health in workers themselves as well as depression, anxiety, withdrawal, aggression, and delayed social and cognitive development in their children (A36, 225-26).

Other scheduling practices by employers may cause similar harms. In one particularly abusive practice, called the "clopening," an employer requires an employee to close the establishment late one night and then open the establishment again early the next morning, preventing that employee from having sufficient time between shifts to commute to and from work, see their family, or

even sleep.[2] It is also common practice for employers to hire new employees for available shifts instead of first offering those shifts to their current employees, with the result that existing employees who wish to work more hours or go full-time receive few work hours on any given schedule.[3]

The provisions of the Law challenged in this lawsuit seek to address these unfair scheduling practices for unsalaried fast food employees who work at large fast food establishments—defined as restaurants that are part of a chain or group of franchises that operates 30 or more such establishments in the aggregate nationally.[4] Admin. Code § 20-1201. The Law first seeks to create scheduling predictability at the outset of employment by requiring fast food employers to provide new employees with a good-faith estimate of the number of hours they can expect to work each

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[2] *See* Report of the Comm. on Civil Service and Labor on Int. No. 1388 at 2-3 (Mar. 3, 2017), *available at* https://tinyurl.com/yyg5r2cp.

[3] *See* Report of the Comm. on Civil Service and Labor on Int. No. 1395 at 2-3 (May 22, 2017), *available at* https://tinyurl.com/yxvagr22.

[4] Plaintiffs have confirmed that they are challenging only the provisions of the Fair Workweek Law that apply to fast food workers. Sup. Ct. ECF No. 68 at 15 n.3. As a result, the City addresses only those provisions in its brief.

week, as well as the dates, times, and locations of those hours. *See id.* § 20-1221(a). On an ongoing basis, the Law requires fast food employers to give all employees written work schedules for each workweek at least fourteen days in advance. *See id.* § 20-1221(b).

Primarily to incentivize employers to stick to these schedules (A36-37), while also affording employers flexibility to respond to changing needs, the Law permits employers to change employees' schedules, as long as they pay employees certain premiums and, when adding hours, obtain employees' consent. *See* Admin. Code §§ 20-1221(d), 20-1222. The amount of the premium depends on how much advance notice employers offer and the type of scheduling change, and range from $10 for hours added to an employee's schedule with at least seven days' advance notice, up to $75 for shifts shortened or cancelled with less than 24 hours' notice. *See id.* § 20-1222(a). An employer is not required to pay premiums if (1) it is the employee who requested the change, or two employees voluntarily traded shifts, (2) the employer's operations cannot continue for certain reasons, including severe weather or a state of emergency, or (3) the employer is already

required to pay the employee overtime for the changed shift. *See id.* § 20-1221(c).

Next, to diminish employers' reliance on "clopenings," the Law provides that employers cannot require fast food employees to work shifts on consecutive days with fewer than 11 hours between the end of the first shift and the start of the second. *See* Admin. Code § 20-1231. Although an employer may ask an employee to agree to work such shifts, the employer must pay the employee a premium of $100 under those circumstances. *See id.*

Lastly, the Fair Workweek Law gives scheduling priority to current employees through an "access-to-hours" provision. *See* Admin. Code § 20-1241. When new shifts become available, an employer must notify its current employees, and offer them the shifts, before hiring new employees to fill those shifts. *See id.* § 20-1241(a), (b). The Law expressly states that a fast food employer is not required to distribute shifts in any manner that would require it to pay overtime, or to violate any local, state, or federal law. *See id.* § 20-1241(d), (i).

B. This lawsuit seeking a declaration that disparate state labor regulations preempt the Fair Workweek Law

Following the Fair Workweek Law's enactment, plaintiffs, a fast food trade association and its affiliates, filed this declaratory judgment action challenging the provisions of the Law that cover fast food employers (A17-28). Plaintiffs asserted a single cause of action alleging that these provisions were invalid based on two preemption theories: first, that the Law conflicts with certain state statutes and regulations, and second, that the Law regulates in fields occupied by state law (workplace scheduling and the minimum wage) (*id.*). To support these contentions, plaintiffs relied on a smattering of provisions located in various parts of the Labor Law, as well as two isolated rules adopted by the State Commissioner of Labor (A24-26). Plaintiffs did not point to any law or rule that addressed the particular scheduling practices and abuses addressed by the Fair Workweek Law.

After plaintiffs filed their complaint, six individual fast food workers sought leave to intervene as defendants, contending that they had a significant stake in the outcome of the case because

they had a strong interest in the proper enforcement of the Law (Sup. Ct. ECF No. 15; *id.* No. 36 at 2). Each had previously filed a complaint with the City's Department of Consumer and Worker Protection, alleging that their employers had violated the Law by requiring them to work shifts without advance notice, requiring them to work "clopenings" without consent, or failing to offer them new shifts before hiring new employees (*see id.* Nos. 17–35). Supreme Court granted the motion (A15).

After the parties agreed that the case could properly be resolved prior to discovery and as a matter of law (A77), the City and the intervenor defendants filed motions to dismiss the complaint (A29-39, 209-51). All defendants contended that the complaint did not state a cause of action for conflict preemption because it cited to no state law or regulation that granted fast food employers any specific right that the Fair Workweek Law took away, or denied them any specific right that the Law granted (Sup. Ct. ECF No. 47 at 19-21; *id.* No. 59 at 15-25). They further contended that the complaint did not state a cause of action for field preemption because the isolated laws and rules cited by

plaintiffs did not evince any intent by the State to occupy the field of workplace scheduling and because the Fair Workweek Law did not purport to regulate in the field of minimum wages (*id.* No. 47 at 8-19; *id.* No. 59 at 12-14).

In addition to opposing the motions to dismiss, plaintiffs cross-moved for summary judgment as against all defendants on their preemption claim (A40-208, 252-73). Plaintiffs generally relied on the same provisions cited in their complaint, but added the contention that the Fair Workweek Law was preempted by Labor Law provisions governing the employment of minors (Sup. Ct. ECF No. 68 at 8). They also relied on the fact that the Labor Commissioner had recently *declined* to adopt limited scheduling regulations in industries *other than* the fast food industry, due to concerns that the proposal advanced a one-size-fits-all approach across multiple industries, and might exceed the scope of the Commissioner's authority in this area (*id.* at 12-13).

Supreme Court granted defendants' motions to dismiss, denied plaintiffs' cross-motions for summary judgment, and held that none of the state laws or regulations cited by plaintiffs

preempted the Fair Workweek Law (A5-7). Concluding that this case is straightforward and that plaintiffs' challenge plainly "falls flat," the court reasoned that state regulation in this area is only "a little this (minimum wage regulation)" and "a little that (worker hours)," and that there is no evidence of legislative intent to preempt the field of predictable, advance scheduling or of a direct conflict with state law (A6). Instead, the court continued, the Law is narrowly tailored and regulates only a few discrete aspects of employer-employee relations that in no way infringe on the State's prerogatives (A6). The court also agreed with defendants that the Law does not regulate the minimum wage or require employers to violate any federal or state law (A6-7).

ARGUMENT

SUPREME COURT CORRECTLY HELD THAT STATE LABOR LAW DOES NOT PREEMPT THE FAIR WORKWEEK LAW

New York's constitution confers "broad police powers" upon local governments like the City of New York to provide for the welfare of their residents. *Jancyn Mfg. Corp. v. Cnty. of Suffolk,* 71 N.Y.2d 91, 96 (1987); *Patrolmen's Benevolent Ass'n of the City*

of N.Y., Inc. v. City of N.Y., 142 A.D.3d 53, 58 (1st Dep't 2016). Those powers include the authority to regulate businesses to protect the safety, health, and well-being of the persons in the locality. *See* N.Y. Const., Art. IX, § 2(c)(ii)(10); Mun. Home Rule L. § 10(1)(ii)(a)(12).

On appeal, plaintiffs do not seriously dispute that the Fair Workweek Law falls well within the scope of the home rule powers afforded by New York law. They nonetheless contend that the Law is not a valid exercise of that authority because it purportedly directly conflicts with disparate state laws and regulations, and because the State has purportedly preempted the fields of workplace scheduling and premium pay. But their contentions rely on mischaracterizations of the preemption doctrine, the state laws and regulations that they cite, and the Fair Workweek Law itself. As Supreme Court found (A6), this is instead a straightforward case. Plaintiffs have failed to state a claim under established preemption principles.

A. No provision of the Fair Workweek Law is in direct conflict with state law.

Contrary to plaintiffs' first preemption theory (Brief for Plaintiffs-Appellants ("App. Br.") 26-31), the Fair Workweek Law in no way conflicts with state labor law or regulations. A local law is invalid under conflict preemption principles only if it prohibits conduct that would be permissible under state law or imposes additional restrictions on rights afforded by state law, "so as to inhibit the operation of the State's general laws." *Patrolmen's Benevolent Ass'n*, 142 A.D.3d at 61-62 (quoting *Zakrzewska v. New Sch.*, 14 N.Y.3d 469, 480 (2010)). For there to be a conflict, then, it is not sufficient for a local law to prohibit something "that might generally be considered permissible by virtue of state law's silence on the issue." *Id.* at 62; *accord People v. Cook*, 34 N.Y.2d 100, 109 (1974). Instead, the local law must generally render illegal what state law "specifically" allows, *N.Y. State Club Ass'n v. City of N.Y.*, 69 N.Y.2d 211, 221-22 (1987); *Patrolmen's Benevolent Ass'n*, 142 A.D.3d at 62, or take away a benefit state law "expressly" gives, *Jancyn*, 71 N.Y.2d at 97-98.

Applying these principles here, no provision of the Fair Workweek Law even comes close to conflicting with the state law provisions plaintiffs cite (App. Br. 14-19, 27-29). In requiring predictive scheduling, prohibiting involuntary "clopenings," and requiring that current employees be given priority in scheduling, the Fair Workweek Law in no way inhibits the operation of the various state laws that plaintiffs invoke. Those laws concern the employment of minors, *see* Labor Law §§ 142–45; the number of hours in a workday or the requirements that workers be given one day's rest in seven and be afforded meal breaks, *id.* §§ 160-62; minimum wages, *id.* §§ 650-55; or the powers of the Labor Commissioner, *id.* §§ 21, 199, 652. None of these laws specifically permit conduct that the Fair Workweek Law prohibits, or expressly afford any rights that the Law takes away. In fact, none of the laws even address the conduct regulated by the Fair Workweek Law.

In arguing the contrary, plaintiffs baldly mischaracterize the provisions they cite. Plaintiffs first assert that the Fair Workweek Law's advance scheduling provisions conflict with a call-in-pay

regulation promulgated by the Labor Commissioner pursuant to her authority to safeguard the minimum wage (App. Br. 27). According to plaintiffs, that provision 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" (*id.*). But the regulation simply does not say that. It instead states that an employee who is called in and reports to work must be paid for a certain number of work hours, regardless of whether the employee is ultimately assigned to work. *See* 12 N.Y.C.R.R. § 146-1.5(a)-(b). The regulation is entirely silent on advance scheduling requirements and worker consent, and on the other matters covered by the Fair Workweek Law.

Plaintiffs similarly assert that the Law's prohibition of involuntary "clopenings" conflicts with the Labor Commissioner's "spread of hours" regulation, which allegedly "permits employers to require employees to work shifts that exceed ten hours without requiring the employee's consent" (App. Br. 27). But again, there is no conflict. The Labor Commissioner's regulation concerns only

how long a single work shift may last, stating that, where an employee's work day starts more than 10 hours before it ends, the employer must pay the employee wages for one additional hour of labor. *See* 12 N.Y.C.R.R. § 146-1.6. In contrast, the Fair Workweek Law's "clopenings" provision says nothing about the permitted length of any work shift, but instead addresses the amount of time *between* work shifts. In particular, the provision requires that the employer pay a $100 premium when the employee agrees to work two shifts on consecutive days with fewer than 11 hours in between the end of one shift and the start of another. The Labor Commissioner's regulation is entirely silent on the issue of how much time must pass between shifts, as it is on all of the specific subjects addressed by the Law.

Indeed, despite purporting to recognize that the state and local law must be in "direct conflict" for conflict preemption (App. Br. 22), plaintiffs' theory appears to be that the Fair Workweek Law conflicts with state law simply because state law does not already prohibit the conduct prohibited by the Law, and thus, in some metaphysical sense, permits it (*see, e.g.*, *id.* 28 (relying on

the lack of regulation in a given area)). But both this Court and the Court of Appeals have repeatedly rejected such a broad reading of conflict preemption and held that state law's silence on a given issue is insufficient to give rise to conflict preemption. *See, e.g.*, *N.Y. State Club Ass'n*, 69 N.Y.2d at 221-22; *Patrolmen's Benevolent Ass'n*, 142 A.D.3d at 62. As the Court of Appeals recently reaffirmed, reading conflict preemption so broadly "risks rendering the power of local governments illusory." *Garcia v. N.Y.C. Dep't of Health & Mental Hygiene*, 31 N.Y.3d 601, 617 (2018); *see also Cook*, 34 N.Y.2d at 109. Municipal home rule would mean very little if localities could prohibit only conduct already prohibited by state law, or permit only conduct already permitted by state law.

It does not change the result that state law and the Fair Workweek Law both can be said to touch on the subject of work hours more broadly. The Court of Appeals has made crystal clear that "[t]he 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." *Jancyn*, 71 N.Y.2d at 97; *see also Garcia*, 31

N.Y.3d at 617. Instead, conflict preemption is generally found "only 'when the State specifically permits the conduct prohibited at the local level' or there is some other indication that deviation from state law is prohibited." *Garcia*, 31 N.Y.3d at 617-18 (quoting *N.Y. State Club Ass'n*, 69 N.Y.2d at 222).

Thus, the Court of Appeals found no conflict preemption where the State chose to prohibit certain types of discrimination in the area of car rental, but not others, and the City then chose to prohibit additional types of discrimination not prohibited by the State. *See Hertz Corp. v. City of N.Y.*, 80 N.Y.2d 565, 569 (1992). The Court similarly found no conflict preemption where state and local law set up overlapping regulatory schemes that required manufacturers of certain chemical additives to seek approval for their products, and the State's process resulted in approval of the plaintiff's product and the City's process did not. *See Jancyn*, 71 N.Y.2d at 93-95, 97. And this Court found no conflict preemption where both the City and State set campaign contribution limits, but the City's limits were more restrictive. *See McDonald v. N.Y.C. Campaign Fin. Bd.*, 117 A.D.3d 540, 540-41 (1st Dep't

2014). This case presents an even easier question, as state law is entirely silent in the specific areas covered by the Fair Workweek Law provisions at issue—predictable scheduling, "clopenings," and access to hours—all of which provide fast food employees with much-needed stability.

Having failed to identify any actual conflict between state and local law, plaintiffs propose two hypothetical circumstances where the application of state and local law to the same situation would purportedly result in a conflict: (1) if an employee is already scheduled to work six days in a week and requests yet another day under the Law's access-to-hours provisions, and (2) if a fourteen- or fifteen-year-old is already scheduled to work 18 hours a week and also requests additional hours (App. Br. 28-29). They insist the employer in these cases would be required to violate either the state laws requiring one day of rest in seven or setting a ceiling on the maximum number of hours that the minor may work, or the local law requiring that employers give them the shift (*id.*).

But this contention fails at the outset because the local law would yield to state law in those circumstances. Even if the City

took enforcement action—something plaintiffs do not claim has ever occurred—an employer would have a clear defense rooted in the Labor Law. Indeed, the Fair Workweek Law expressly provides employers with just such a defense: the Law's access-to-hours provisions state that compliance is not required—and in fact is not permitted—to the extent there is a conflict with federal, state, or local law. *See* Admin. Code § 20-1241(d).[5]

Even setting this provision aside, plaintiffs' contentions fail. The Fair Workweek Law has been in effect for over three years, and plaintiffs do not claim that they, or any of their members, have ever actually faced this conflict. And because plaintiffs have brought this lawsuit as a facial challenge, the mere possibility of an isolated application where state and local law could conflict is

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[5] Although plaintiffs insist that this provision applies only to discrimination laws (App. Br. 30), they misread it. The provision instead states that an employer's distribution of shifts to employees may not violate any law, "including" laws that prohibit discrimination. *Id.* § 20-1241(d). The plain meaning of that language is that anti-discrimination laws are merely one example of the laws with which employers must comply. Indeed, plaintiffs' contrary reading would render the word "including" superfluous; if the City Council had intended this provision to apply solely to discrimination laws, there would have been no need to add "including." *See Matter of Mestecky v. City of N.Y.*, 30 N.Y.3d 239, 243 (2017) (statutes should be read so as to avoid rendering words or clauses superfluous).

insufficient to support the invalidation of the entire law. *See People v. Davis*, 13 N.Y.3d 17, 23 (2009) ("[A] party who asserts that a statute is facially unconstitutional must demonstrate beyond a reasonable doubt that the statute suffers from wholesale constitutional impairment." (internal quotation marks omitted)); *Rest. Law Ctr. v. City of N.Y.*, 360 F. Supp. 3d 192, 224 (S.D.N.Y. 2019) (applying this standard to reject facial preemption challenge predicated on hypothetical instances of conflict). Instead, the fundamental inquiry is whether the local regulation "inhibit[s] the operation of the State's general laws." *Patrolmen's Benevolent Ass'n*, 142 A.D.3d at 61-62. The Law plainly does not.

Even further from the mark, plaintiffs contend that there is a conflict simply because the Fair Workweek Law adds to the record-keeping requirements of state law (App. Br. 30-31). But plaintiffs overlook that many federal, state, and local laws impose record-keeping obligations on employers. None of these laws are in conflict simply because they require that employers keep different kinds of records. The only way such provisions could conceivably conflict is if one law instructed employers *not* to keep a record

expressly required by another law. But plaintiffs point to no such provision here, and the City is aware of none. Accordingly, there is simply no conflict between state and local law, and plaintiffs' first preemption theory fails.[6]

B. The State has not occupied the field of workplace scheduling regulation.

Plaintiffs' field preemption theory is equally meritless. Although the State can evince an intent to preclude all local regulation in a given field either expressly or impliedly, the State's intent in either event must be "clear." *Jancyn*, 71 N.Y.2d at 97; *Patrolmen's Benevolent Ass'n*, 142 A.D.3d at 58. In determining whether the State has impliedly preempted local regulation in a

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[6] Moreover, even if petitioners had shown any conflict between particular provisions of the Fair Workweek Law and the Labor Law (and they have not), severability principles would limit them to a ruling enjoining the offending provisions. New York has long favored severance. *See People ex rel. Alpha Portland Cement Co. v. Knapp*, 230 N.Y. 48, 62-63 (1920) (Cardozo, J.). Here, the City Council enacted the component parts of the Law as distinct local laws, codified in distinct sub-chapters, to target distinct scheduling practices. Severance is thus fully possible as a practical matter, and any remaining component part of the Law would effectuate the City Council's intent. *People v. On Sight Mobile Opticians*, 24 N.Y.3d 1107, 1110 (2014). At the very least, the provisions of the Law that address retail employees are plainly severable, *see* Admin. Code §§ 20-1251–53, as they address entirely distinct scheduling practices for a distinct industry.

given field, courts consider several factors: the existence of a comprehensive and detailed regulatory scheme; statements of legislative policy; the nature of the subject matter and the resulting need for state-wide uniformity; and the existence of detailed, state-mandated controls at the local level. *See DJL Rest. Corp. v. City of N.Y.*, 96 N.Y.2d 91, 95 (2001); *Garcia*, 31 N.Y.3d at 618. Here, plaintiffs focus almost exclusively on the first factor (the supposed existence of comprehensive schemes) and briefly touch on the second (statements of legislative policy).

On appeal, plaintiffs identify two fields that they contend the Legislature has occupied, with the result that Fair Workweek Law is preempted: "employee work hours" and "the payment of … premium pay" (App. Br. 32-33). Plaintiffs do not seriously contend that the State has expressly indicated its intent to occupy either field, instead relying on implied preemption (*id.*). Plaintiffs nonetheless fail to identify any evidence that the Legislature impliedly intended to occupy either field they propose, let alone the "clear" evidence courts require to establish field preemption.

1. Plaintiffs identify no evidence of legislative intent to occupy the field of "employee work hours."

In support of their assertion that the State has impliedly preempted the field they dub "employee work hours"—a category that plaintiffs apparently assume includes scheduling—plaintiffs contend that the Legislature's intent can be inferred from its purportedly "detailed statutory and regulatory scheme" governing "all aspects of employee work hours as related to the health and well-being of the people of New York" (App. Br. 1). But plaintiffs cannot substantiate that claim, and instead are forced to cobble together a collection of disparate laws and regulations: Labor Law §§ 142–45, 160–62, 650–55, and 12 N.Y.C.R.R. §§ 146-1.5–1.6.

Far from constituting a detailed and comprehensive scheme, the isolated provisions plaintiffs cite were adopted at different times for different reasons. The Legislature adopted the provisions that would become Labor Law §§ 142–45 and §§ 160–62 in the early twentieth century, at a time when there were minimal protections for labor. The former provisions protect children by regulating the employment of minors, and the latter establish

baseline labor protections by capping the length of the workday, requiring one day of rest in seven, and requiring that workers be afforded meal breaks. Next, the Legislature adopted the provisions that ultimately became Labor Law §§ 650–55 over the following decades to establish a minimum wage. And the Labor Commissioner adopted 12 N.Y.C.R.R. §§ 146-1.5 and 146-1.6, which require employers to pay employees who are called into work for a certain number of hours at the minimum wage and limit the length of time between the start and end of a shift, in more recent decades as part of her authority to safeguard the minimum wage.

Separately or together, then, these few provisions hardly constitute a detailed and comprehensive scheme regulating the field of workplace scheduling specifically, let alone "employee work hours" more broadly. The mere fact that the State has passed laws in a given area is insufficient to establish preemption. *See, e.g.*, *Hertz*, 80 N.Y.2d at 569 (that State passed broad anti-discrimination laws, and more specific anti-discrimination laws regarding the car rental business, was insufficient to support

implied preemption theory as to discrimination in the area of car rental). Instead, as plaintiffs' own cases show (App. Br. 35-36), courts have required much more to find implied legislative intent to occupy a given field. *See generally, e.g.*, *Albany Area Builders Ass'n v. Guilderland*, 74 N.Y.2d 372, 377-79 (1989) (State had enacted an "elaborate" scheme for highway budgeting and limited local deviation from that scheme); *Consol. Edison Co. v. Town of Red Hook*, 60 N.Y.2d 99, 105-07 (1983) (State had enacted a comprehensive scheme for siting of steam electric-generating facilities throughout the State, with the express purpose of consolidating the process under State control).

Plaintiffs' reliance on the Labor Commissioner's regulatory authority is equally unavailing. Although plaintiffs repeatedly assert that the Legislature chose to vest "sole" or "exclusive" authority to regulate "employee scheduling" in the Commissioner (*e.g.*, App. Br. 16, 17, 18, 32), the single provision they cite in support of that contention, Labor Law § 650, contains no such grant of authority. That provision instead merely sets forth the Legislature's findings in adopting the minimum wage. *See id.* It

says nothing at all about the powers of the Commissioner or employee scheduling, let alone declares the need for a unified state policy in the field of workplace scheduling or hours. And none of the other statutes plaintiffs cite (App. Br. 16)—including other provisions of the Minimum Wage Act, Labor Law §§ 651–55—vest exclusive power in the Commissioner in these fields.

Likely for that very reason, plaintiffs are unable to point to any comprehensive regulatory scheme actually adopted by the Commissioner in the area of workplace scheduling. Instead, they rely on the same two isolated rules that they cited in support of their conflict preemption argument (*see supra* at 16-17), and that the Commissioner adopted pursuant to her authority to safeguard the minimum wage: the call-in-pay rule, 12 N.Y.C.R.R. § 146-1.5, and the spread-of-hours rule, *id.* § 146-1.6. But these two rules are not a comprehensive and detailed regulatory scheme.

Plaintiffs also insist that the Legislature impliedly occupied the field of workplace scheduling regulation based on a proposed set of regulations that the Labor Commissioner chose *not* to adopt, and that would *not* have applied to fast food employers and

employees (App. Br. 18-19). But a mere decision not to regulate, without more, is hardly clear evidence of an intent to preempt the field. And the mere fact that the Commissioner has authority to regulate in a given area is not evidence that the authority is exclusive. *See Jancyn*, 71 N.Y.2d at 99 (that Commissioner of Environmental Protection could regulate in a given area, and had regulated in the area, was "insufficient to support a determination that the State has preempted the entire field of regulation").

In any event, plaintiffs' own description of the reasons why the Commissioner did not adopt the cited regulations undercuts their theory. Far from stating that there should be no regulation in the area, the Commissioner expressed doubts about the wisdom of imposing one-size-fits-all regulation across industries (App. Br. 19)—something the Fair Workweek Law does not do. And plaintiffs conveniently omit the portion of the Commissioner's notice that included her final reason for not adopting the regulations: she doubted the scope of her regulatory authority.[7]

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[7] Dep't of Labor, "Employee Scheduling Regulations," https://perma.cc/VX9W-9AC4.

That explanation only undercuts plaintiffs' contentions on yet another level: the Commissioner herself is apparently unsure whether she has the authority to issue broad rules on employee scheduling, much less exclusive regulatory authority in this area.

Plaintiffs do not cite any other evidence of legislative intent to occupy the field of predictable scheduling, or of work hours more broadly. They have thus disclaimed any contention based on the remaining two factors relevant to field preemption. They make no argument that predictable scheduling requires state-wide uniformity. *Compare People v. Diack*, 24 N.Y.3d 674, 686 (2015) (underlining need for statewide uniformity in sex-offender residential placement); *Consol. Edison*, 60 N.Y.2d at 490 (same, with respect to siting of steam electric-generating facilities). They also make no argument that the State has established detailed local controls for predictive scheduling, such as local boards with further regulatory authority. *Compare People v. De Jesus*, 54 N.Y.2d 465, 469 (1981) (underlining that State had established local alcoholic beverage control boards as an additional level of regulation in the area). But in any event, neither factor is present

here, and plaintiffs' claims that the Legislature has preempted the field of "employee work hours" are meritless.

2. The Law regulates workplace scheduling, not the minimum wage.

Failing to identify any evidence of the State's intent to occupy the field of workplace scheduling, plaintiffs also assert that the Fair Workweek Law is preempted because the Legislature has purportedly preempted the field of "minimum wage and premium pay" (App. Br. 32-33). But that contention also misses its mark.

The Court of Appeals held long ago that the State has preempted the field of setting minimum wage rates. *See Wholesale Laundry Bd. of Trade, Inc. v. City of N.Y.,* 12 N.Y.2d 998 (1963), *aff'g on op. below*, 17 A.D.2d 327 (1st Dep't 1963). But that decision has no bearing on whether the Fair Workweek Law is preempted. In *Wholesale Laundry*, the Court held that the City had acted contrary to the intent of the State by setting a different minimum wage rate than that set by the State. *See* 17 A.D.2d at 329. But the Fair Workweek Law does not similarly interfere with the amount of the minimum wage, or even seek to affect its

application. As its language, purposes, and legislative history make clear, the Law instead protects workers from unfair and abusive scheduling practices.

To be sure, the Law achieves its goals in part by requiring employers to pay premiums to engage in certain scheduling practices. But those premiums primarily seek to discourage employers from engaging in those practices at all (A36-37). And regardless of their purpose, they do not affect the minimum hourly rate a given employee is paid for their labor, which is the function of the minimum wage. The Law's scale of premiums is instead tied to how much advance notice the employer has given the employee and the type of scheduling change. *See* Admin. Code § 20-1222(a). Indeed, plaintiffs themselves refer to the premiums as "penalties" (App. Br. 14). And the Law specifically provides that "scheduling change premiums" are "not wages earned for work performed" but are rather payments "in addition to wages." *See id.* § 20-1201. It also requires that they be separately reported from wages on pay stubs. *See id.* § 20-1222(b).

On appeal, plaintiffs do not seriously contend that the Fair Workweek Law is a minimum wage regulation. Nonetheless, they appear to assert that it is preempted because, in addition to preempting the field of minimum wage regulation, the Legislature has also purportedly preempted the field of "premiums" (App. Br. 32-33). But they again cite absolutely no authority to support that claim. The State's Minimum Wage Act defines "wage" narrowly to include, in addition to the hourly wage itself, only "allowances" for gratuities and for services like meals, lodging, and apparel. *See* Labor Law § 651(7). The premiums required by the Law are not encompassed within that definition, and do not fall into the relatively narrow preempted field of minimum wage regulation.

Although it is not altogether clear, plaintiffs appear to invoke a somewhat broader definition of wages in a different article of the Labor Law that addresses how wages are paid (App. Br. 15-16, 37-38). But as Supreme Court correctly held (A6), that definition is irrelevant. The Legislature supplied a different, more specific definition in the article that addresses minimum wages—the field that has actually been held to be preempted. And to the

extent plaintiffs would imply that the Legislature has also preempted the field of "wages" more broadly, they offer no support for that contention. The mere existence of a somewhat broader definition of "wages" elsewhere in the Labor Law evidences no intent to preempt any regulation in some way touching on wages.[8]

In any event, that definition of wages—as "earnings of an employee for labor or services rendered," including "benefits or wages supplements" like retirement benefits and vacation pay, Labor Law §§ 190(1), 198-c—still does not include the premiums required under the Fair Workweek Law. The premiums primarily seek to disincentivize an employer from engaging in unfair and unpredictable scheduling practices, and to the extent they also

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[8] Recent legislative action in the area of wages and benefits supports the conclusion that the Legislature does not intend to preempt all regulation in these fields. Earlier this year, the Legislature enacted a law requiring most employers in the State to afford employees sick leave. *See* L. 2020, ch. 56, § 1, *codified at* Labor Law § 196-b. But even though the City had already enacted its own law requiring most employers in the City to provide employees with sick leave seven years before, *see* N.Y.C. Local Law 46 (2013), *codified at* Admin. Code § 20-911, *et seq.*, the Legislature did not state that the City's law was preempted in enacting its own law in precisely the same field. To the contrary, the Legislature explicitly provided that nothing in its law should be construed to prevent the City from enacting a paid sick leave ordinance that meets or exceeds the standards it sets forth, or as diminishing the benefits already afforded under the City's law. *See* Labor Law § 196-b(12).

compensate employees for the inconvenience of a schedule change, they are still distinct from wages.

But even if the Fair Workweek Law in some way affected the field of wages, and even if that field were preempted, that still would be insufficient for preemption here. As the Court of Appeals has held, "[s]tate statutes do not necessarily preempt local laws having only tangential impact on the State's interests." *DJL Rest. Corp.*, 96 N.Y.2d at 97. Thus, there is no preemption if the alleged infringement on a preempted field is merely "incidental," *id.*; instead, preemption applies where there is a "head-on collision" between the local regulation and the preempted field, *Lansdown Entm't Corp. v. N.Y.C. Dep't of Consumer Affairs*, 74 N.Y.2d 761, 764 (1989).

In *DJL Restaurant Corp. v. City of New York*, for example, the Court of Appeals held that the mere fact that both state and local law expressly regulated nudity in adult establishments as well as the distance between adult establishments—the State through the Alcohol and Beverage Control (ABC) Law and the City through its Zoning Resolution—did not warrant preemption

of the local law, despite the fact that the Court had already held that the ABC Law preempted the field. *See* 96 N.Y.2d at 96-97. Instead, because the City and State were regulating in different fields with different goals, the local regulation was at most an incidental infringement. *See id.*; *see also Patrolmen's Benevolent Ass'n*, 142 A.D.3d at 59-60 (although state and local law both regulated the propriety of stop and frisks, and although state law preempted its field, the City's law not directly affecting that field was not preempted).

The same result would obtain here. In targeting unfair and unpredictable scheduling practices, the Fair Workweek Law serves different goals than, and regulates in a different field from, state laws on wages. Any incidental overlap would be insufficient for preemption. But at bottom, plaintiffs' arguments fail because the only preempted field at issue is the field of minimum wage regulation, and the Law is indisputably not such a regulation.

C. Plaintiffs have cited no precedent supporting a contrary result.

Faced with the failure of their preemption theories under long-established preemption principles, plaintiffs fall back on the contention that the result is somehow different because the Labor Law is at issue (App. Br. 23-26, 35-36). But the only two cases they cite in fact undercut that assertion. Both cases instead held that the Legislature had preempted far narrower fields than the Labor Law in total: minimum wage rates, *see Wholesale Laundry*, 17 A.D.2d at 330, and workplace safety, *see ILC Data Device Corp. v. County of Suffolk*, 182 A.D.2d 293, 301 (2d Dep't 1992). And neither held, as plaintiffs claim, that the Labor Law is "broad and comprehensive in its coverage of work hours and wages, including specifically scheduling" (App. Br. 35; *see also id.* at 23). Plaintiffs have zero support for that wishful claim.

These decisions little avail plaintiffs for yet further reasons. First, although the holding of *Wholesale Laundry* as to the field of minimum wages is still good law, its reasoning is anachronistic and has been specifically limited by the Court of Appeals on multiple occasions. *See, e.g.*, *N.Y. State Club Ass'n*, 69 N.Y.2d at

221 (repudiating plaintiffs' argument, made based on *Wholesale Laundry*, that preemption occurs when "activity which arguably would be permitted under State decisional law is prohibited by the local law"); *Cook*, 34 N.Y.2d at 109 (same). Moreover, plaintiffs' argument fails even under the reasoning of *Wholesale Laundry*, where the Court held that the Legislature had impliedly evinced its purpose to preempt minimum wage regulation by establishing "elaborate machinery for the determination of an adequate wage in any occupation and in any locality." 17 A.D.2d at 330. The Legislature has not established such elaborate machinery in the areas regulated by the Fair Workweek Law.

Next, in *ILC Data Device Corp.*, the Second Department began its analysis by *rejecting* the proposition that the Legislature had preempted the field of labor regulation as a general matter. *See* 182 A.D.2d at 298-99. In holding that the Legislature had nonetheless evinced its intent to preempt the field of workplace safety regulation, the court emphasized that the Legislature had established a comprehensive regulatory scheme in that field and afforded the Labor Commissioner broad authority in the area of

health and safety regulation in particular. *See id.* at 300-02.[9] Contrary to plaintiffs' assertion (App. Br. 25), there are no comparable provisions in the field of workplace scheduling. Plaintiffs have thus adduced no evidence of the Legislature's intent to preempt the field. Instead, this Court, like Supreme Court, should uphold the Fair Workweek Law, which seeks to protect vulnerable fast food employees from unpredictable and unfair scheduling practices that work substantial detriment on their ability to plan their lives.

[9] The Court of Appeals did not review the Second Department's decision in *ILC Data Device Corp.*, as the defendant did not timely appeal. *See ILC Data Device Corp. v. County of Suffolk*, 81 N.Y.2d 952 (1993).

CONCLUSION

This Court should affirm Supreme Court's order dismissing the complaint for failure to state a cause of action, and denying plaintiffs' cross-motion for summary judgment.

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