*To be Argued by:*
MAURICE BASKIN, ESQ.
*(of the bar of the District of Columbia)*
*by permission of the Court*
*(Time Requested: 15 Minutes)*

# New York Supreme Court

## Appellate Division—First Department

**Appellate Case No.: 2020-02013**

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

*Plaintiffs-Appellants,*

– against –

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

*Defendants-Respondents.*

# REPLY BRIEF FOR PLAINTIFFS-APPELLANTS

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## PRELIMINARY STATEMENT

As argued in Appellants' opening brief, Justice Engoron failed to address *at all* the only two cases dealing with preemption under the New York Labor Law. *Wholesale Laundry Board of Trade, Inc. v. City of New York*, 17 A.D.2d 327 (1st Dep't 1962), *aff'd* 12 N.Y.2d 998 (1963), and *ILC Data Service Corp. v. County of Suffolk*, 182 A.D.2d 293 (2d Dep't 1992). Defendants' oppositions ignore the judge's omission and complain that Appellants repeatedly cite to these two cases. (City's Opp. at 37; Intervenor's Opp. at 36). But the question before this Court is whether the New York Labor Law preempts New York City's Fair Work Week Law ("FWWL"). Common sense and *stare decisis* required the court below to conform his decision to precedents dealing with the uniquely preemptive provisions of the Labor Law; and contrary to Defendants' oppositions, this Court should look primarily to the cases decided under the Labor Law to answer that question properly.

Defendants fail to defend the FWWL from invalidation under the doctrine of conflict preemption. There is indeed a conflict between the state and local laws, where the State law permits employers to arrange employee schedules in one manner, and the local law penalizes the employer for that very same arrangement. In attempting to avoid this obvious conflict, the Defendant-Intervenors (notably without support from the Defendant City) improperly conflate conflict analysis with questions of standing, which have been mooted by the Intervenors' failure to appeal

from the judge's finding that Appellants had standing to challenge the burdens imposed on them by the FWWL. In any event, conflicts preemption does not turn on who benefits from the laws in question – it turns on whether the operation of the local regulatory scheme conflicts with that of the State Labor Law. In this case, such conflict plainly exists, compelling preemption of the FWWL.

Even if there were no direct conflicts here, Defendants' oppositions fail to justify the Supreme Court's departure from what the First and Second Departments of the Appellate Division long ago established: the Labor Law occupies the field of labor legislation in New York State. This includes not only employee scheduling, but the broader areas of "hours of labor" and "payment of wages". Defendants' strained analogies to other areas of law, especially those in which the State has not enacted a law with such a comprehensive legislative purpose, or has expressly reserved a role for municipalities, only highlights the weakness of their defense under the broadly preemptive Labor Law.

Even before the current pandemic, but particularly so now, the burdens imposed by the City's FWWL on fast food employers have been substantial, and such burdens threaten the hoped for recovery of restaurant businesses, a statewide concern. For each of the reasons discussed below, Justice Engoron's decision should be reversed, and the FWWL should be found preempted under the State Labor Law.

## ARGUMENT

### I. DEFENDANTS HAVE FAILED TO REBUT APPELLANTS' SHOWING OF A DIRECT CONFLICT BETWEEN THE LABOR LAW AND THE FWWL.

Appellants' opening brief provided a detailed analysis of direct conflicts between statutory and regulatory provisions of the Labor Law on the one hand, and the FWWL on the other. *See* App. Br. at 26-31. As the *Wholesale Laundry* court held, preemption is "deduced from the restriction on any law that supersedes any provision of the labor law, which indicates a general state policy to make the provisions of that law free from interference by local authorities." 17 A.D.2d at 329. Justice Engoron largely ignored the direct conflicts identified in Appellants' motion for summary judgment. The Defendants' attempts to rewrite the plainly conflicting language of the Labor Law and the FWWL are similarly unavailing for the following reasons:

The State's call-in pay regulations (12 N.Y.C.R.R. § 146-1.5), which expressly permit employers to require employees to "report[] for duty on any day," clearly conflict with the various restrictions and penalties on employee scheduling in the FWWL (N.Y.C. Admin. Code §§ 20-1222(a)(5), 20-1221(b), 20-1241(a)). The Labor Law explicitly recognizes the right of employers to require employees to report for duty on any day, with no restrictive prerequisites. In direct conflict, the above-cited provisions of the FWWL impose restrictive requirements and penalties

in the form of wage premiums upon any employer who fails to adhere to the City's restrictive call-in scheme. In addition, contrary to Defendants' oppositions, the FWWL provides that "[a] fast food employee may decline to work or be available to work additional hours not included in the initial written work schedule." N.Y.C. Admin. Code § 20-1221(d). The need for employers to call their employees in to work at inherently unpredictable times, without penalties, wage premiums, or other restrictions, lies at the heart of the Labor Law and its governing regulations, in direct conflict with the expressed intent of the FWWL to discourage and outright prohibit this practice. As Appellants have previously argued, (App. Br. at 26-27), this Court's guidance in *Patrolmen's Benevolent Association* and related cases directs a finding of conflict preemption on this ground alone. 142 A.D.3d at 61-62 (finding conflict preemption "where local laws prohibit what would be permissible under State law, or impose prerequisite addition restrictions on rights under State law").

The State's spread-of-hours regulation (12 N.Y.C.R.R. § 146-1.6) similarly conflicts with the FWWL's clopening provision (N.Y.C. Admin. Code § 20-1231) because the former allows employers to schedule employee shifts longer than ten hours (with additional pay under the circumstances), while the latter tightly circumscribes an employer's ability to unilaterally schedule two consecutive shifts. The City argues that there is no conflict because while the FWWL clopening provision regulates the amount of time between shifts, Section 146-1.6 concerns

"only how long a single work shift may last." City's Opp. at 16-17. But under Section 146-1.6 a single shift may last as long as an employer decides, so long as it pays the additional wages owed under Section 146.1-6. Defendant-Intervenors, meanwhile argue that Section 146-1.6 "does not confer any right upon the employer of a fast food employee," Intervenors' Opp. at 16, but, by its silence, it plainly does. The Department of Labor dispels any doubt in its official FAQs:

> Q: How many hours can an employer ask an employee to work?
>
> A: There are no limits on:
>
> > The number of work hours per day (except for children under 18)

*See* https://www.labor.ny.gov/workerprotection/laborstandards/faq.shtm#7 (last accessed on Dec. 9, 2020). Again, the City's FWWL directly conflicts with established understanding of the State Labor Law by restricting conduct that the Labor Law and its regulations plainly permit.

The State's day-of-rest provision (NYLL § 161) conflicts with the FWWL's access-to-hours provision (N.Y.C. Admin. Code § 20-1241(b)) because the former requires that employers give each employee 24 consecutive hours off per week, while the latter requires employers to offer newly added hours to existing employees before hiring additional workers. The City's only defense is to admit a conflict in the scenario that Appellants pose in their opening brief, conceding that "the local

law would yield to state law in those circumstances." City Opp. at 20-21. Concession aside, preemption analysis does not provide a loophole for the type of savings clause upon which the City relies. Meanwhile, Defendants-Intervenors' reading of the Section 161 – "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," Intervenors' Opp. at 18 – is contrary to the State's own position, and is not joined by the City's Opposition. In its official FAQs, the Department of Labor makes clear that, in restaurants, "an employee must receive 24 hours of rest in each calendar week." *See* https://www.labor.ny.gov/ workerprotection/laborstandards/ faq.shtm#7 (last accessed on December 9, 2020).

To bolster their argument, Defendants take out of context decisions unrelated to labor law, while asking the Court to ignore the two that do relate to labor law. The City and Defendants-Intervenors rely heavily throughout their briefs upon *Jancyn Manufacturing Corp. v. Suffolk County*, 71 N.Y.2d 91 (1987), but that case was wholly unrelated to labor laws and regulations, and the Court of Appeals in *Jancyn* did not address conflict preemption at all. At the outset of its analysis, the *Jancyn* Court noted that the plaintiff was not arguing that the local law conflicted with the provisions of the relevant state law. *See id.* at 97.

The City emphasizes a trio of cases while demonstrating an indifference to their totally different context. First, the City relies on *Garcia v. N.Y.C. Dep't of*

*Health & Mental Hygiene*, 31 N.Y.3d 601, 617 (2018), for the general proposition that reading conflict preemption too broadly "risks rendering the power of local governments illusory." City's Opp. at 18 (quoting *Garcia*, 31 N.Y.3d at 617). But in determining that the New York City Board of Health's vaccination rules for schoolchildren did not conflict with state law related to vaccination, the Court of Appeals noted that the state law directed the New York State Department of Health ("NYSDOH") to "develop and supervise the execution of a program of immunization, surveillance and testing, to raise to the highest reasonable level the immunity of the children of the state against communicable diseases," and that the NYSDOH, in turn, "expressed its recognition of the [City] Board's independent authority as recently as 2015." *Garcia*, 31 N.Y.3d at 618-19. No such relationship exists in this case between the Department of Labor and the New York City Department of Consumer Affairs, which is enforcing the FWWL in direct conflict with the State Labor Law.

The City also relies on *McDonald v. N.Y.C. Campaign Fin. Bd.*, 117 A.D.3d 540 (1st Dep't 2014), in which the First Department found that municipal campaign finance laws did not conflict with state campaign finance laws, arguing that "[t]his case presents an even easier question, as state law is entirely silent" on the core provisions of the FWWL. *See* City's Opp. at 20. But that distinction actually makes this case *unlike McDonald*. In *McDonald*, the First Department held that "[i]n light

of the Election Law's purpose of bolstering public confidence in the election process by restricting contributions, the City Campaign Finance Act's more restrictive contribution and source limits within the maximum set by Election Law § 14–114 are not inconsistent with any legislative objective of the Election Law." 117 A.D.3d at 541. The First Department's reasoning put *McDonald* in the same league as *Garcia*: The State sets a floor and encourages the (at least certain) municipalities to extend that same aim using the same sort of measures. Here, the State has declined to adopt the employee scheduling measures contained in the FWWL – the City therefore has no mandate.

Perhaps the City's least persuasive analogy is to *Hertz Corp. v. City of N.Y.*, 80 N.Y.2d 565 (1992). That case concerned a few provisions of Article 26 ("Miscellaneous") of the General Business Laws, outlawing specific abuses common in the rental car industry. The Court of Appeals found that the "statutes merely proscribe discriminatory practices against renters or the imposition of additional rental fees, such as fuel and airport surcharges or fees for transportation to the location where the rental vehicle will be delivered," and were not intended to preempt the operation of broader, anti-discrimination laws. *Id.* at 569. This is of a piece with the Court's decision in *New York State Club*. The City cannot find any refuge in cases that turn on the State's policy in favor of anti-discrimination laws.

Defendants-Intervenors also string together three cases that they contend "compel rejection of Plaintiffs' permits/does-not-permit argument for conflict preemption." Intervenors' Opp. at 22. For the first time on appeal, the Intervenors make the unsupported claim that "interest analysis" is necessary to determine conflict preemption, and that only the beneficiaries of a City law have standing to challenge that law on the basis of State preemption.[1] The cases relied on by the Intervenors do not support Justice Engoron's decision.

Thus, in *People v. Cook*, 34 N.Y.2d 100 (1974), a case wholly unrelated to labor laws and regulation, the Court of Appeals held that a local tax differential on cigarettes did not conflict with the State's own authority to tax cigarettes. The Court reasoned that, "since the Legislature granted to the city power to impose any tax 'such as the legislature has (the) authority to impose,' it follows from the statute that the city has power to impose a price-differential element." *Id.* at 112. Here, the Legislature has not granted the City any authority to impose labor regulations on

[1]To the extent that Defendants-Intervenors' standing/interests theory raises a mixed question of law and fact, it must not be considered at all by this Court. *See* U.S. Bank N.A. v. DLJ Mtge. Capital, Inc., 146 A.D.3d 603, 603, 44 N.Y.S.3d 747 (1st Dep't 2017) (declining to consider party's new theory, raised for the first time on appeal, which was "not a purely legal argument"). Defendants-Intervenors did not raise this theory in their Opposition to Appellants' Motion for Summary Judgment below. To the extent that Defendants-Intervenors argue this theory is tied to their argument against Appellants' standing, Justice Engoron rejected that argument and Defendants-Intervenors did not file a cross-appeal on that (or any other) aspect of the decision.

employers. Indeed, the *Cook* decision supports a finding of preemption in this case. Citing *Wholesale Laundry*, the *Cook* Court wrote: "A different situation is presented when the State has acted upon a subject, and in so acting have evidenced a desire that its regulations should pre-empt the possibility of varying local regulations." *Id.* at 266-67. The *Cook* Court's citation of *Wholesale Laundry* makes clear that labor regulations are just such a subject.

Next, Defendants-Intervenors puzzlingly argue that *New York State Club Association, Inc. v. City of New York*, 69 N.Y.2d 211 (1987), "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' . . . conduct proscribed by the latter." Intervenors' Opp. at 21. It did no such thing. *New York State Club* concerned conduct about which the state anti-discrimination law was silent, but which the local anti-discrimination law prohibited. As with *Cook*, the Court's holding in *New York State Club* distinguished the subject at issue (civil rights) from subjects in which "the Legislature has 'evidenced a desire that its regulations should pre-empt the possibility of varying local regulations.'" 69 N.Y.2d at 221 (quoting *Consolidated Edison Co. v. Town of Red Hook*, 60 N.Y.2d 99, 107-08 (1983)).

Finally, Defendants-Intervenors try to contort the recent decision in *Center for Independence of the Disabled v. Metropolitan Transportation Authority*, 184

A.D.3d 197 (1st Dep't 2020) into its argument against conflict preemption in this case. *See* Intervenors' Opp. at 22-24. That case is inapposite to the conflict at issue in the present appeal. This Court made clear: "Here, it is important to the analysis that the Transportation Law and the NYCRHL address entirely different areas of legislative concern." *Id.* at 206. Not so with the Labor Law and FWWL, which both squarely concern labor generally, and regulate employee scheduling more specifically.

## II. THE LABOR LAW UNQUESTIONABLY OCCUPIES THE FIELD OF LABOR LEGISLATION

Even if no direct conflicts were present in this case, and they certainly are, the FWWL must be deemed preempted because the Labor Law preempts the field of labor legislation. Contrary to Defendants' oppositions, such field preemption is confirmed by unchallenged judicial precedent, the structure of the Labor Law and its accompanying regulations, and the power those laws and regulations invest in the Commissioner of the Department of Labor.

### A. The Labor Law's Field Preemption Is a Matter of Settled Law

Contrary to Defendants' interpretation, *Wholesale Laundry* is not limited to the preemption of local laws bearing on the minimum wage – that case gives preemptive force to the Labor Law in its entirety. The First Department wrote:

> Furthermore, it is entirely clear that the state law indicates a purpose to occupy the entire field. And where that is found, local laws are prohibited. This is not only to be

> deduced from the restriction on any law that supersedes any provision of the labor law, which indicates a general state policy to make the provisions of that law free from interference by local authorities. It is also, and more specifically, found in the State Minimum Wage Law itself.

*Wholesale Laundry*, 17 A.D.2d at 329 (internal citations omitted). This plan language offers no support for the Defendants' claims that *Wholesale Laundry*, "held that the Legislature had preempted far narrower fields than the Labor Law in total," City's Opp. at 37, or that it "did not sweep aside all local labor laws," Intervenors' Opp. at 38. *Wholesale Laundry* did exactly that.

In *Jancyn*, the Court of Appeals reaffirmed *Wholesale Laundry,* and distinguished the Labor Law from other circumstances in which the state law does not effect field preemption:

> Where it is determined that the State has preempted an entire field, a local law regulating the same subject matter is deemed inconsistent with the State's overriding interests because it either (1) prohibits conduct which the State law, although perhaps not expressly speaking to, considers acceptable or at least does not proscribe or (2) imposes additional restrictions on rights granted by State law.

*Jancyn Mfg. Corp. v. Suffolk Cty.*, 71 N.Y.2d 91 (1987) (citing *Wholesale Laundry*) (internal citations omitted). *Jancyn*'s statement of law recognizes that field preemption does not turn on whether the state law speaks to each provision of the challenged local law.

Five years after *Jancyn*, the Second Department's decision in *ILC Data* reinforced that, by operation of field preemption, the Labor Law preempts all local labor laws. Indeed, the court found that the Labor Law's few references to local laws were the exception that proved the rule:

> The County and the amicus curiae contend that, despite the comprehensive nature of the Labor Law, the State Legislature expressly contemplated local regulation of workplace safety by enacting Labor Law § 21(9), which provides that the Commissioner "[m]ay enforce any lawful municipal ordinance, by-law or regulation relating to *any place* affected by the provisions of this chapter, not in conflict with provisions of this chapter" (emphasis supplied). However, in view of its reference to "any place", we construe this provision to mean only that the Commissioner may enforce properly enacted local building, sanitation, and fire codes, etc., affecting the premises.

*ILC Data Device Corp. v. Cty. of Suffolk*, 182 A.D.2d 293, 303 (1992). In this case, the FWWL is not among the types of local regulation that may be enforced "despite the comprehensive nature of the Labor Law": "local building, sanitation, and fire codes, etc." *Id.* And, as explained in Appellants' opening brief, all of the statutory grants of authority to the Commissioner in respect of workplace safety identified in *ILC Data* are equally applicable in the field of employee scheduling. *See* App. Br. at 25.

It strains credulity to argue, as Defendants must under *ILC Data*, that the Labor Law more comprehensively regulates workplace safety than it does matters

related to hours worked and the payment of wages and premiums –which are indeed the matters regulated by the FWWL. Article 5 of the Labor Law, §§ 160-170, is dedicated to "Hours of Labor," and Article 6 of the Labor Law, §§ 190-199-a, is dedicated to "Payment of Wages."

In applying the holding of *ILC Data*, as it must, this Court should find that "[i]nasmuch as the Labor Law preempts the field of [employee scheduling – be it referred to as "hours of labor" or otherwise], it permits, by reason of its silence on the subject," the type of flexible scheduling by employers penalized by the FWWL. *See ILC Data*, 182 A.D.2d at 305.

### B. The State's Regulatory and Enforcement Authority Compels a Finding of Field Preemption

The City argues that "plaintiffs cannot substantiate that claim [of field preemption], and instead are forced to cobble together a collection of disparate laws and regulations." City's Opp. at 25. Defendants-Intervenors similarly fall back on the idea that "in order to occupy a field, the State must actually occupy that field," Intervenors' Opp. at 39. By this, both the City and the Defendants-Intervenors appear to mean that unless the Commissioner (or Legislature) has promulgated and enforced the exact provisions contained in the FWWL, the City's legislation cannot be preempted by the State Labor Law. The Defendants' arguments improperly conflate field preemption and conflict preemption, and cut directly against the Court of Appeals' rule that a state law is preempted if it "prohibits conduct which the State

law, although perhaps not expressly speaking to, consider acceptable or at least does not proscribe." *Jancyn Mfg. Corp.*, 71 N.Y.2d at 97.

Defendants fail to rebut Appellants' demonstration that the Commissioner of Labor's exercise of rule-making authority over scheduling issues in statewide labor and employment policy compels a finding of field preemption. *See* App. Br. at 16-19. In fact, Section 654 of the Labor Law makes clear that, "[i]n establishing minimum wages and regulations for any occupation pursuant to the [Minimum Wage Act], the wage board and the commissioner shall consider the amount sufficient to provide adequate maintenance and to protect health." N.Y. Lab. Law § 654. This authority was the basis for promulgating the split-shift and spread-of-hours regulations that Defendants attempt to distinguish as "unrelated" to employee scheduling. As the Chair of the Restaurant and Hotel Industry Wage Board (the predecessor to the Hospitality Industry Wage Board) noted in June 2009:

> As workers testified at the public hearings, working in service industries - like restaurants and hotels - is physically and mentally exhausting. And workers who are working a split shift often have trouble filling the break time between shifts productively. The intent of spread of hours regulations is to discourage employers from scheduling these extremely long shifts - whether or not punctuated by breaks within a shift - without adequate compensation.

(A-158). Far from being "unrelated," then, the State's existing scheduling regulations address the same concerns that the City seeks to address with its FWWL,

such as the terms on which employees can be "called in" and their permissible hours of work. These aspects of the State Labor Law and regulations are certainly not "unrelated"; they are different means to the same end, and as such, the State law must preempt the local law.

Defendants' attempts to place employee scheduling in a category of its own are belied by the State's regulatory record under the Labor Law, whereby the Department of Labor has considered and rejected provisions substantively identical to the FWWL. As described in Appellants' brief, the Department of Labor in 2017 considered a proposed rule whose subject was "Employee Scheduling (Call-In Pay)," and the text of the proposed rules would have amended the Miscellaneous Industries Wage Order to produce the same type of scheduling regulation effected by the FWWL:

> The proposed regulation amends the Wage Order's Call-in pay regulations (12 NYCRR §§ 142-2.3 & 142-3.3) to strengthen the protections for employees who report to work, who report for unscheduled shifts, who have shifts cancelled at the last minute, who are required to be on-call, and who are required to call-in to be scheduled for work.

(A-203).

Contrary to Defendants' oppositions, that the Commissioner's predictive scheduling regulation would not have applied to the Hospitality Industry Wage Order – and that it was not ultimately adopted for any industry – proves that the State has chosen to affirmatively permit what the FWWL now penalizes. In the

Commissioner's statement regarding its decision not to approve these employee scheduling regulations, the Department of Labor stated it would re-evaluate the regulations in the future, "likely in concert with the Legislature, which would have a broader authority and better legal standing than Department of Labor regulations alone to balance the various needs of workers, businesses and industries." *See* https://www.labor.ny.gov/workerprotection/laborstandards/scheduling-regulations.shtm. There could hardly be a clearer statement of intention for the State to occupy the field with respect to employee scheduling.

The City's opposition mischaracterizes the Commissioner's statement as casting "doubt" on "the scope of her regulatory authority." City's Opp. at 29. To the contrary, the Commissioner's deference to future regulatory action, "likely in concert with the Legislature," can in no way be read to support the City's claim that a municipal agency somehow has greater authority than the Department of Labor to legislate or regulate employee scheduling.

In this context, the Defendants' oppositions fail to support Justice Engoron's opinion, in which he wrote that New York City's "government could have concluded that its citizens needed 'predictive scheduling' even though the State government has not concluded that all citizens do." (A-6). Under settled principles of Labor Law preemption, where the State government has concluded that its citizens do *not* need predictive scheduling, the City is preempted from deciding for itself that State

citizens who happen to do business in the City can be compelled to suffer the burdens of predictive scheduling.

Justice Engoron's reasoning is also at odds with legislative reality because the State is fully capable of enacting labor laws and regulations pertaining specifically to New York City, if it has determined that City-specific regulations are needed. Such was the case with respect to the minimum wage rate increases for fast-food employees in New York City, which were higher than for that class of employee outside of New York City, and higher than other workers situated within New York City (until December 31, 2018). *See* 12 N.Y.C.R.R. § 146-1.2.

The City's reasoning suffers from a similar infirmity when it notes that Appellants "make no argument that predictable scheduling requires state-wide uniformity." City's Opp. at 30. Just as the State decided that the minimum wage rate should not be uniform, so it could also decide that only some parts of the state – including New York City, or not – should be subject to additional employee scheduling regulations. When the Department of Labor declined to adopt employee scheduling regulations, it could have instead enacted such regulations specifically for New York City. It did not, and that decision also has preemptive effect.

The City also argues – in a footnote, tellingly – that the State's recent enactment of a new sick leave law, Labor Law § 196-b, proves the Labor Law's lack of preemptive effect, because "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." City's Opp. at 34 n.8. However, the fact that the State Legislature felt it necessary to explicitly carve out permission for the City to enact its own paid sick leave ordinance proves the presumptive rule is exactly as described by Appellants, i.e., that the Labor Law is presumed to preempt the field. Indeed, had the Labor Law not expressly permitted the City's paid sick leave legislation, the City's legislation would have been preempted under *ILC Data*, since it does not fall within the narrow category of "local building, sanitation, and fire codes, etc." that the Labor Law impliedly exempts from preemption.

In an attempt to make their case on legislative intent, Defendants-Intervenors challenge that "Plaintiffs point to nothing . . . that shows that the FWWL contains any statement indicating an intent to supersede State law." Opp. at 27. While field preemption analysis requires no such statement by the enactors of the local law in question, Appellants can nonetheless meet Defendants' challenge. In her March 3, 2017 testimony before the New York City Council Committee on Civil Service and Labor, the Department of Consumer Affairs Commissioner stated: "Addressing the pernicious scheduling practices in an industry that already pays low wages, leaving New Yorkers financially unstable, is therefore a top priority for our agency." (A-34). At that same hearing, the Deputy Commissioner, Office of Labor Policy and

Standards, testified: "Intros. 1388 and 1396, which together constitute the Mayor's 'Fair Workweek' proposal, are a critical next step for cities like ours that are leading the way in establishing important new minimum labor standards." (A-36). Both of these official statements, by the officials empowered to enforce the then-proposed FWWL, are clear statements that the FWWL was intended to supersede the minimum labor standards set by the State.

Finally, Defendants try unsuccessfully to remove the FWWL's premiums from the ambit of "wages" under the Labor Law. The City's line of attack against the State's preemptive power with respect to wages seemingly concedes that the definition of "wages" under Labor Law § 190(1) is broad enough to encompass the FWWL premiums. But the City wrongly declares that preemption of "wages" in Labor Law § 651(7), is limited to "the article that addresses minimum wages – the field that has actually been held to be preempted." *See* City's Opp. at 33. To the contrary, as the Appellate Division held in *Wholesale Laundry* and *ILC Data*, the preemptive effect of the Labor Law is comprehensive, and not limited to the Minimum Wage Act.

Defendants-Intervenors, meanwhile, engage in a lengthy argument for why the premiums mandated by the FWWL should not be considered "wages," and therefore not fall within the Commissioner's purview. *See* Intervenors' Opp. at 29-32. First, as explained above, the Commissioner's regulatory purview is not limited

to wages, but extends to labor regulations generally. Second, Defendants self-servingly distinguish "wages" as defined by the Labor Law from "premiums" as defined by the FWWL, ignoring the definition in the Labor Law itself: "'Wages' means the earnings of an employee for labor or services rendered, regardless of whether the amount of earnings is determined on a time, piece, commission or other basis." Labor Law § 190(1). The premiums an employee receives under the FWWL for reporting to work under circumstances prescribed by the FWWL are clearly earnings determined on the basis of "unpredictable" scheduling.

It is beyond doubt that the Department of Labor would classify FWWL premiums as "wages," if it were to impose those premiums in the first place. The Department of Labor's official FAQ guidance on unpaid/withheld wages and wage supplements states, with respect to circumstances in which employees may report withheld non-wage items: "Your employer failed to provide the required meal period, day of rest, pay stub, notice of pay, timely payment of wages, or took a negative action against you for making a complaint related to the Labor Law." *See* https://www.labor.ny.gov/workerprotection/laborstandards/workprot/lshmpg.shtm. If "non-wage items" means essentially any non-payment owed to an employee for his labor, then "wages" must mean any payment owed to an employee for his labor.

## CONCLUSION

For the foregoing reasons, and those stated in Appellants' opening brief, the Order appealed from should be reversed in its entirety, except for Justice Engoron's holding that Appellants had standing to bring the underlying action.

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## PRINTING SPECIFICATIONS STATEMENT

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