UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

RESTAURANT LAW CENTER, and
NEW YORK STATE RESTAURANT
ASSOCIATION,

Plaintiffs,

v.

CITY OF NEW YORK, and
SANDRA ABELES, in her official capacity
as Commissioner of the NEW YORK
CITY DEPARTMENT OF CONSUMER
AND WORKER PROTECTION,

Defendants.

Case No. 1:21-cv-04801-DLC

Oral Argument Requested

RESPONSE TO AMICUS BRIEFS

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I. INTRODUCTION

The amicus briefs filed by the National Employment Law Project ("NELP") and the Professors of Labor Law ("Professors") have not articulated any reason why Plaintiffs' motion for summary judgment should not be granted. Indeed, neither amicus denies the key points underlying Plaintiffs' arguments:

- The Just Cause Laws (or the "Laws") are an unprecedented intrusion into the employer–employee relationship. No court has ever held such a detailed, targeted regulation—intended to provide "what a union provides" for a subset of a particular industry—constitutes a permissible "minimum labor standard" under *Machinists*.
- The Just Cause Laws discriminate against interstate commerce in their effect. Although their criteria are facially neutral and could, hypothetically, apply to intrastate restaurant chains, no such intrastate restaurants actually exist. The burdens of these laws fall entirely on entities engaged in interstate commerce.

These undisputed points render meaningless the remainder of the amici's arguments and rhetoric.

While the Professors try to mount a legal defense for the Just Cause Laws, they wrongly contend (at 17-25) that enforcing the Dormant Commerce Clause and preventing New York City from discriminating against interstate commerce would somehow hearken a "return to *Lochner*-era labor relation." But it is incoherent to suggest that by arguing that New York City must treat interstate and intrastate restaurants equally, Plaintiffs are somehow asking this Court to "substitut[e] its judgments about what [is] best for workers for those of democratically elected legislators." Professors Br. 22. For its part, the NELP brief consists almost entirely of policy arguments about the desirability of the Just Cause Laws (including, for example, NELP's beliefs about the racial identity of the laws' beneficiaries, NELP Br. 9). These arguments are irrelevant to the legal challenges raised by Plaintiffs, so NELP's brief can be largely disregarded.

Because the amici have not raised any supportable legal theory that counsels otherwise, Plaintiffs' motion for summary judgment should be granted for the reasons set forth in Plaintiffs'

motion and in their consolidated reply in support of their motion and response to the City's cross-motion.

II. ARGUMENT

A. The Amicus Briefs Do Not Alter the Conclusion that the NLRA Preempts the Just Cause Laws.

1. The Laws Are Not Minimum Labor Standards.

The Professors' brief correctly acknowledges that to avoid preemption under *Machinists*, the Just Cause Laws must "qualify as minimum labor standards." Professors Br. 3; *see also* Pls. Reply Supp. Mot. Summ. J. 9-14 ("Reply") (discussing and applying this standard). But like the City, in arguing that the Just Cause Laws are not preempted, the Professors mischaracterize their effect, describing the Just Cause Laws merely as "protections on termination." Professors Br. 3. Based on this gross mischaracterization, the Professors analogize the Laws to worker retention ordinances, which, for a very limited period of time (90 days), restricted the ability of new owners to terminate and replace employees after assuming control of operations. *See* Professors Br. 6 (discussing and relying on cases finding worker retention ordinances not preempted); *see also* Reply 17 (explaining why reliance on *R.I. Hosp. Ass'n v. City of Providence*, 667 F.3d 17 (1st Cir. 2011), is misplaced, as successorship retention rules do not regulate the new employer's operations in any way after the three-month period, unlike the Laws); Reply 16 (explaining why the simple, wrongful discharge statute in *St. Thomas–St. John Hotel & Tourism Ass'n, Inc. v. Gov't of U.S. Virgin Islands*, 218 F.3d 232 (3d Cir. 2000), says nothing about whether Just Cause Laws are preempted).

Plaintiffs addressed worker retention ordinances in their Reply (at 17). The brief, minimal restrictions on termination that these statutes provide are nothing like the indefinite (and far more onerous) regulations imposed by the Just Cause Laws. The basic worker retention laws addressed

in the Professors' cases do not require progressive discipline or the creation of any written discipline policy; do not allow second-guessing of employers' investigation process; do not cover reductions of hours; do not require layoffs in order of seniority; do not require recalling laid off employees if business picks up; do not provide for mandatory arbitration at the employee's choice; do not target a particular industry; and do not shift the burden of proof regarding the discharge onto the employer. The Professors do not argue—much less cite any authority for the proposition—that such detailed regulation of the employer–employee relationship qualifies as a "minimum labor standard" outside the scope of *Machinists* preemption.

The Professors also do nothing to refute the fact that the Laws deprive employers of the tool of lockouts, a self-help measure that the City concedes is protected by the federal labor laws. *See* Reply 14-15. For this reason alone, the Just Cause Laws upset the balance of power for resolving labor disputes. The Professors' brief has no defense.

2. The Regulated Industry Is A Relevant Consideration.

It cannot credibly be disputed that the targeted industry of and the backers of the Laws are relevant to the Court's analysis. First, in their arguments about the Just Cause Laws targeting a particular industry, the Professors address a strawman. To be clear, Plaintiffs do not contend that minimum labor standards are preempted "simply because they are applicable only to particular workers in a particular industry." Professors' Br. 8 (quoting *Associated Builders & Contractors of S. Ca. v. Nunn*, 356 F.3d 979, 990 (9th Cir. 2004)). Instead, as Plaintiffs have repeatedly explained, "the narrow tailoring, *coupled with* all the other indicators of encouraging unionization and targeted invasions of the employment relationship, reveal that the substantive requirements here are *not* 'minimum labor standards' but are particular procedural obligations applicable to a particular subset of one industry which the SEIU has been campaigning to unionize." Reply 9

(citing Mot. Summ. J. 9–15). The Professors have no response to Plaintiffs' actual argument, and indeed, concede that under the Second Circuit's precedent, whether a law is targeted or generally applicable is relevant to preemption. *See* Professors' Br. 8 (acknowledging that the Second Circuit found preempted "a state law that established comprehensive terms and conditions for one occupation, within one industry, and within just one city particular subset of one industry which the SEIU has been campaigning to unionize").

Second, when addressing the Union's role in drafting the Just Cause Laws, the Professors incorrectly describe unions as merely "support[ing] the Just Cause legislation." Professors' Br. 9. To the contrary, the SEIU played an important role in drafting the legislation and, legislative history confirms, intended the laws to further SEIU's "strategy for organizing fast food workers," Pl. SOUF ¶ 38 (Battaglia Decl. Ex. 10), and encourage fast-food employees to "organize together with other workers." *Id.* ¶ 28. This is not simply First Amendment advocacy—it confirms that the legislation was enacted for the improper purpose of creating pressure to unionize. Reply 21.

Relying on a passing statement from a Seventh Circuit decision (unsupported by any citation), the Professors ask this Court to ignore the legislative history of the Just Cause Laws. *See* Professors' Br. 10 (quoting *N. Ill. Chapter of Associated Builders & Contractors, Inc. v. Lavin*, 431 F.3d 1004, 1007 (7th Cir. 2005)). Even if the Seventh Circuit requires courts to ignore legislative history, the Second Circuit squarely disagrees: "[L]egislative history is an important source for determining whether a particular statute was motivated by an impermissible motive in the preemption context[.]" *Entergy Nuclear Vt. Yankee, LLC v. Shumlin*, 733 F.3d 393, 419 (2d Cir. 2013); *see also Loyal Tire & Auto Ctr., Inc. v. Town of Woodbury*, 445 F.3d 136, 146 (2d Cir. 2006); *Scott v. City of N.Y.*, 592 F. Supp. 2d 386, 398 (S.D.N.Y. 2008) (statements from "key legislative drafters and sponsors" are valued over statements from others in the hierarchy of

legislative history). Legislative history is highly relevant in confirming that the law is preempted by *Machinists*.

The Professors' citation (at 10) to *Restaurant Law Center v. City of New York*, 360 F. Supp. 3d 192 (S.D.N.Y. 2019), is erroneous. That decision was vacated by the Second Circuit when the case became moot on appeal, and the law expired without ever being enforced. *See id.*, Mandate of USCA, No. 1:17-cv-09128-PGG, (S.D.N.Y. June 3, 2020) ECF No. 106 (mandate from Second Circuit vacating opinion). The vacated decision should not be cited and provides no support for the Professors' argument.

* * * * *

If anything, the Professors' amicus brief merely confirms that the Just Cause Laws are unprecedented and are preempted. The fact that these Professors, purported experts in the field, cannot identify a single case in which a court has ever upheld a similar intrusion in the employer–employee relationship conclusively demonstrates that the Just Cause Laws are unprecedented, impermissible, and preempted under *Machinists*.

B. The Amicus Briefs Do Not Affect the Conclusion that the Just Cause Laws Violate the Dormant Commerce Clause.

The Professors' discussion of the Dormant Commerce Clause is equally flawed. Like the City, the Professors do not deny the key premise of Plaintiffs' argument. In practice, the Just Cause Laws apply only to entities engaged in interstate commerce: (1) interstate restaurant chains doing business in New York City or (2) franchisees of interstate restaurant chains. There are no intrastate restaurants, intrastate restaurant chains, or franchisees of intrastate restaurants that would be subject to these laws.

The Professors rely heavily on the fact that the 30-location requirement is *facially* neutral. *See* Professors Br. 18 ("the law treats all chains with 30 or more establishments the same"). But

their argument ignores the fact that the Dormant Commerce Clause prohibits both laws that facially discriminate against interstate commerce and laws that have the "practical effect" of doing so. *Maine v. Taylor*, 477 U.S. 131, 138 (1986). The Just Cause Laws' facial neutrality (which Plaintiffs concede, Reply 18) is no answer to Plaintiffs' argument that 30-location requirement, in practical effect, discriminates against interstate commerce.

Like the City, the Professors erroneously rely on *National Restaurant Association v. Commissioner of Labor*, 34 N.Y.S.3d 232 (N.Y. App. Div. 2016), which considered only whether the law at issue was "facially non-discriminatory," *id.* at 240, and did not address whether the law at issue had a practical effect of discriminating against interstate commerce. The case provides no answer to Plaintiffs' argument that the Just Cause Laws discriminate in practical effect.

The Professors' attempt to distinguish *Cachia v. Islamorada*, 542 F.3d 839 (11th Cir. 2008), also fails. The only difference between *Cachia* and this case is that *Cachia* involved a complete prohibition, and the Just Cause Laws merely impose onerous obligations. Professors' Br. 18–19. Despite the difference in the degree of burden imposed, there is no question that under the reasoning of *Cachia*, the Just Cause Laws have the practical effect of discriminating against interstate commerce. Like the Just Cause Laws, the ordinance at issue in *Cachia* "d[id] not facially discriminate between in-state and out-of-state interests" but "[wa]s not evenhanded *in effect*, and disproportionately target[ed] restaurants operating in interstate commerce." 542 F.3d at 843 (emphasis added). This analysis applies directly to the Just Cause Laws. In the same way that targeting "formula restaurants" in *Cachia* had the practical effect of discriminating against interstate commerce, the Just Cause Laws targeting interstate restaurant and franchisees has the practical effect of discriminating against interstate commerce. Whether that discrimination takes the form of complete prohibition or increased costs (through regulation and litigation) is irrelevant.

Like the City, the Professors fail to offer any justification for the City's discrimination against interstate restaurants. Their justification for the law – "providing frontline workers with job security in the event of a global pandemic," Professors' Br. 2 – would apply equally to intrastate and interstate restaurants alike. And they make no attempt to show that any benefits of the law could not equally be served without discriminating against entities engaged in interstate commerce.

NELP briefly attempts to justify Just Cause Laws' targeting of interstate commerce, asserting that "[the City] reasonably concluded that larger firms in the industry would be best positioned to comply with the new standards." NELP Br. 8–9. But NELP fails to provide any citation for this statement, and it has no support in the legislative history. Indeed, there was no finding by the City that franchisees of restaurants involving more than 30 locations were better able to bear these onerous burdens than other restaurants.

To the contrary, the only apparent justification in the legislative history is local protectionism, ensuring that "neighborhood restaurant[s]" would not suffer from the economic burdens imposed by the laws. *See* Def. SOUF ¶ 37 (Lander expressing "deep sympathy for our neighborhood small businesses" that "bring so much life to our neighborhoods" and noting that the Laws apply to "only fast-food chains" and "not your neighborhood restaurant").

And even if NELP were correct, because the practical effect of the Just Cause Laws is to discriminate against interstate commerce, they could survive only if no non-discriminatory means would have served the City's purposes. Neither NELP nor the City argues that targeting interstate restaurants and franchisees was the only means of accomplishing the City's goals.

C. The Professors' Invocation of *Lochner* Is Meritless and NELP's Policy Arguments Are Irrelevant.

Unable to answer Plaintiffs' arguments on the merits, the Professors turn instead to

hyperbole, arguing that Plaintiffs' arguments "represent an effort to revive a discredited and anachronistic approach to state and local workplace legislation" and "cal[l] on the courts to second guess the New York City Council's reasoned judgments about workplace protections." Professors' Br. 21–25.

Nothing could be further from the truth. The Professors do not quote a single sentence in which Plaintiffs state—or even imply—that this Court should "substitute[] its judgmen[t] about what was best for workers for those of democratically elected legislators at the local, state, and federal level." Professors' Br. 22.

The Professors do not support their characterizations of Plaintiffs' arguments because they are baseless. Plaintiffs' arguments do not—in any way—turn on the wisdom of the Just Cause Laws or whether these laws are "what [i]s best for workers." Plaintiffs simply ask this Court to enforce federal law (which the Professors apparently do not dispute): (1) federal labor law, which (under *Machinists*) permits "minimum labor standards" but preempts states laws that inappropriately intrude upon or interfere with the collective bargaining process; and (2) the Dormant Commerce Clause, which forbids States (and municipalities) to enact laws that have the practical effect of discriminating against interstate commerce.

Indeed, if any brief commits the sin of *Lochner*, it is the brief submitted by NELP. The vast majority of NELP's brief is devoted to the proposition that the Just Cause Laws are desirable as a policy matter. *See* NELP Br. 5–7, 9–12. NELP's belief that the Just Cause Laws are desirable and good policy cannot justify upholding them despite their violations of *Machinists* and the Dormant Commerce Clause. These arguments are irrelevant to the legal challenges raised by Plaintiffs, so NELP's brief can be largely disregarded.

D. The Amicus Briefs Do Not Affect the Conclusion that Just Cause Laws Violate New York Law Establishing At-Will Employment.

Plaintiffs raised a straightforward preemption argument under New York State common law: "New York law as it now stands" grants employers the right to terminate employees at will absent an illegal discriminatory purpose, a specific contract of fixed duration, or a statewide legislative enactment. *Horn v. N.Y. Times*, 790 N.E.2d 753, 756 (N.Y. 2003). Any abrogation of the state's at-will employment policy would be a "significant change in [that] law" that requires action from the State Legislature. *Murphy v. Am. Home Prods. Corp.*, 448 N.E.2d 86, 89 (N.Y. 1983).

In response to this argument, the Professors provide a survey of employment law across a variety of jurisdictions, including countries like Sweden and Australia. Professors' Br. 11. It may, perhaps, be true that many legislatures "have created statutory regimes that move away from past rules of 'freedom of contract' and prohibit employee terminations for harmful reasons." Professors' Br. 12 (citing Cynthia L. Estlund, *Wrongful Discharge Protections in an At-Will World*, 74 Tex. L. Rev. 1655, 1657–62 (1996)); *see also* Professors' Br. 12–15 (discussing various state common–law and statutory limitations on at–will employment). But while academically interesting, this comparative study of labor law across different states and countries has nothing to do with Plaintiffs' arguments. And the law in other states has no bearing on the meaning of at-will employment under New York common law.

When the Professors finally turn to New York, they correctly recognize that the New York State Legislature has created several exemptions to the common–law rule of at–will employment. Professors' Br. 15 (citing N.Y. Exec. Law § 296(a)). This only proves Plaintiffs' point. Changes to the common-law rule of at-will employment in New York State can (and must) come from the State Legislature. Similarly, there is no question that Congress can alter federal common law by

statute. But in the same way that states cannot override federal common law, New York municipalities (like the City) cannot override New York State common law. *See* Reply Br. 23.

Ultimately, the Professors' brief offers no legal argument in response to Plaintiffs' explanation of the relationship between state common law and municipal ordinances, much less any case holding that the City can overturn the state common law of at-will employment.

E. The Amicus Briefs Do Not Affect the Conclusion that the Just Cause Laws' Mandatory Arbitration Provision Is Illegal.

NELP, like the City, argues that the compulsory, non-consensual arbitration provisions of the Just Cause laws are consistent with the Federal Arbitration Act; also like the City, NELP fails to address their inconsistency with federal law labor. Reply Br. Pl. Br. 26–27 (discussing the inconsistency with federal labor law). Whether a law could compel arbitration of a "Lemon Law" dispute between a customer and car dealer (NELP Br. 14) is beside the point because it does not involve a labor dispute. Plaintiffs' point is that the Supreme Court has held that the NLRA does not permit a State to compel arbitration of labor disputes. Here, in violation of federal law, New York City seeks to compel arbitration of disputes about whether an employee has been fired for "just cause," an issue that goes to the heart of collectively bargained contracts and their (consensual) labor arbitration process.

With respect to the right of a jury trial, the Just Cause Laws are not a "new caus[e] of action that did not exist at common law." NELP Br. 15. These laws, in effect, impose additional contract terms on agreements between employers and employees, and "[a] cause of action seeking money damages for breach of contract is quintessentially an action at law." *Hudson View II Assocs. v. Gooden*, 664 N.Y.S.2d 512, 516 (N.Y. App. Div. 1996). There is no question that if an employer and employee had agreed to these terms, any suit to recover damages for their breach would be an action at law, with a corresponding right to a jury trial. No different result should occur because

these contractual terms are imposed by the City.

NELP erroneously invokes New York State's Human Rights Law in arguing that the Just Cause Laws do not alter the proceedings of the New York courts. NELP Br. 20–21. The New York City Commission on Human Rights, which adjudicates some discrimination claims, is empowered by state law. *See* N.Y. Gen. Mun. Law § 239-s ("[W]ith respect to [its] powers, the jurisdiction of the New York city commission on human rights in relation to matters within the city of New York shall be deemed to be concurrent with the jurisdiction of the New York state division of human rights."). As a result, adjudications by the New York City Commission on Human Rights fit squarely within the powers of the New York *State* Legislature "to alter and regulate the jurisdiction and proceedings in law and in equity." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State*, 550 N.E.2d 919, 923 (N.Y. 1990) (discussing N.Y. CONST, art. VI, § 30). But New York City could not, on its own power, deprive the courts of jurisdiction to adjudicate claims under the Human Rights Law in the first instance and relegate the courts to reviewing decisions of a City administrative tribunal (or a private arbitrator).

Like the City, NELP simply misreads *Motor Vehicles Manufacturers* as depending only on the fact that the case involved a new cause of action. NELP Br. 10–20. If this reading were correct, then there would have been no need for the opinion to discuss the Legislature's power over proceedings in the Supreme Court. But the decision rests, at least in part, on the fact that "Supreme Court has lost no jurisdiction" because the "type of adjudication differs," 550 N.E.2d at 923-24, a result permissible only because of the power of the State Legislature to alter and regulate proceedings of the Supreme Court. *Id.* The New York City Council has no similar power.

III. CONCLUSION

Neither amicus brief materially advances the City's arguments, and neither justifies upholding the Just Cause Laws. For the reasons discussed in Plaintiffs' motion for summary

judgment and their reply, the Just Cause Laws violate federal and/or state law. This Court should grant Plaintiffs' motion for summary judgment and deny Defendants' cross-motion, declare the laws invalid, and enjoin their enforcement.

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Respectfully submitted,

/s/ Leni D. Battaglia

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