22-491

United States Court of Appeals
for the Second Circuit

RESTAURANT LAW CENTER and NEW YORK STATE RESTAURANT ASSOCIATION,

Plaintiffs-Appellants,

against

CITY OF NEW YORK and LORELEI SALAS, IN HER OFFICIAL CAPACITY AS COMMISSIONER OF THE NEW YORK CITY DEPARTMENT OF CONSUMER AND WORKER PROTECTION,

Defendants-Appellees.

On Appeal from the United States District Court
for the Southern District of New York

BRIEF FOR APPELLEES

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PRELIMINARY STATEMENT

In 2020, the New York City Council amended the Fair Workweek Law to protect fast-food workers from arbitrary reductions in hours and terminations—two employment practices that have been linked to poverty, food insecurity, homelessness, and abuse of this category of low-wage workers. Representatives of fast-food employers vocally opposed the legislation—called the Wrongful Discharge Law—and once it was enacted, the plaintiffs here brought a facial challenge on various grounds. The U.S. District Court for the Southern District of New York (Cote, J.) granted summary judgment to the City.

This Court should affirm. Plaintiffs have abandoned all but their federal labor-law preemption and Dormant Commerce Clause claims, and neither of those claims has merit. The Wrongful Discharge Law is not preempted because it is a substantive minimum labor standard that does not regulate the process or mechanics of labor dispute resolution. And the law—which applies only to chains with 30 or more locations—does not violate the Dormant Commerce Clause because it is a regulation of an in-state labor market that does not discriminate against out-of-state commerce.

ISSUES PRESENTED FOR REVIEW

Did the district court correctly find that the Wrongful Discharge Law is consistent with (1) federal labor law and (2) the Commerce Clause, because it is a permissible minimum labor standard that confers significant local benefits on a category of the City's low-wage workers, whether unionized or not, and imposes minimal, if any, burdens on interstate commerce?

STATEMENT OF THE CASE[1]

A. The Wrongful Discharge Amendment to the Fair Workweek Law

The City enacted the Fair Workweek Law in 2017 to provide scheduling protections for employees working in the fast food industry (Joint Appendix ("JA") 47). N.Y.C. Admin. Code §§ 20-1201 to 20-1263. The Fair Workweek Law protects employees of fast-food establishments, which are defined as establishments that (i) have, as their primary purpose, serving food or drinks that are paid for before eating, (ii) offer

[1] The caption should be amended to substitute Vilda Bera Mayuga as the current Commissioner of the Department of Consumer and Worker Protection, instead of former Commissioner Lorelei Salas.

limited service, and (iii) are "part of a chain … of 30 or more establishments nationally." *Id.* § 20-1201.

The Fair Workweek Law took the definition of fast-food establishment, largely verbatim, from the rules of the New York State Department of Labor, which—in 2015, when increasing the minimum wage for fast-food workers—defined fast-food establishments as chains with 30 or more locations nationally. 12 NYCRR § 146-3.13; *see also* JA786-807. Both the NYS DOL and New York courts have confirmed that this definition encompasses both chains that are wholly intrastate and those that operate in multiple states. *See* NYS DOL Website, *Minimum Wage for Fast Food Workers Frequently Asked Questions*, https://perma.cc/2A5Y-E3SU ("There is no requirement that the chain have locations outside of New York State"); *Matter of Nat'l Rest. Ass'n v. Comm'r of Labor*, 141 A.D.3d 185, 193-94 (3d Dep't 2016) (rejecting Dormant Commerce Clause challenge to NYS DOL's fast-food establishment minimum wage order).

In December 2020, the City Council enacted two amendments to the Fair Workweek Law: (i) Proposed Int. No. 1396-A, a Local Law in relation to fast food employee layoffs, and (ii) Proposed Int. No. 1415-A,

a Local Law in relation to wrongful discharge of fast-food employees (collectively, the "Wrongful Discharge Law"), which went into effect on July 4, 2021 (JA348-49, 356, 1074, 1081). N.Y.C. Admin. Code §§ 20-1271 to 20-1275. The Wrongful Discharge Law limits when fast-food employers can discharge employees. *Id.* at § 20-1271. Discharge encompasses both termination and a reduction in hours of more than 15%. *Id.*

Employees cannot generally be discharged "except for just cause or for a bona fide economic reason." *Id.* at § 20-1272(a). "Just cause" means "the fast-food employee's failure to satisfactorily perform job duties or misconduct that is demonstrably and materially harmful to the fast-food employer's legitimate business interests." *Id.* at § 20-1271. Employers must establish "progressive discipline" policies that "provide for a graduated range of reasonable responses … from mild to severe, depending on the frequency and degree of the failure," and provide training on those policies. *Id.* at §§ 20-1271, 1272(b). The Department of Consumer and Worker Protection may investigate and take enforcement action to remedy violations of The Wrongful Discharge Law. *Id.* at §§ 20-1207; 20-1208. The Wrongful Discharge Law also creates a statutory

claim that can be brought in a private action or in an arbitration proceeding to enforce violations of the law. *Id.* at §§ 20-1211; 20-1273.

There is an exception to the just-cause requirement if a fast-food employer has a "bona fide economic reason" to lay off employees or reduce employees' hours by more than 15%. *Id.* at §§ 20-1271. The employer must establish this through business records showing that operational changes "are in response to a reduction in volume of production, sales, or profit." *Id.* at §§ 20-1271, 1272(e). Discharges based on bona fide economic reasons must be done in reverse order of seniority. *Id.* at § 20-1272(h).

The Wrongful Discharge Law was extensively debated, and proponents and opponents submitted written statements and testimony to the City Council. During a February 2020 committee hearing, the City Council received testimony from more than 100 public witnesses representing a range of interests, including union members, small business franchise owners, fast food workers, chambers of commerce, academics, unions, and organizations advocating for workers' rights (JA186-341). The testimony showed an immediate need for minimum

labor standards to protect fast food workers from arbitrary terminations and reduction of hours (JA290; 303-11).

As the Wrongful Discharge Law's proponents explained to City Council members, the bills were designed to protect some of the City's most vulnerable workers: "New York has approximately 3,000 fast food locations that employ nearly 67,000 people, with two-thirds of that being women and two-thirds being immigrants … and 88[%] of the workforce [being] are people of color." (JA191; *see also* JA290, 346-49). Research had shown that 90% of fast-food workers experience wage theft, 78% had been injured on the job, 73% had experienced burns, and 40% of women had experienced sexual harassment (JA290; *see also* JA1334).

The bills aimed to address the negative impact that a wide variety of abusive employment practices have on our communities (JA587). By protecting employees from unjustified discharge, the law complements other aspects of the City's labor laws, such as the Fair Workweek Law's advance-scheduling requirements. Workers who risk discharge are less willing to pursue their rights under those laws, with significant negative implications for workers and their families (JA290, 313).

Those scheduling provisions, in turn, enable hourly workers "to budget, go to school part-time, and arrange for child and elder care" (JA587). A study of restaurant workers in the City, conducted before the scheduling provisions were enacted, showed that over "40% experience[d] significant fluctuation in their hours from week to week," which led to workers and their families to experience "serious hardships … including falling behind on rent and mortgage payments, being unable to afford subway and bus fare, skipping meals because there's not enough money to buy food, and having trouble purchasing prescription medication or paying utility bills" (JA586-87). Another study demonstrated that "unpredictable or nonstandard schedules" of parents are linked "to negative behaviors and mental health in the children of workers with such schedules" including increased "depression, anxiety, withdrawal, and aggression." The negative effects of a lack of parental "predictability and stability … disproportionately impact workers who are people of color and immigrants and women" (JA587-88).

The City Council was also aware of the Fair Workweek Law's impact on employers. The City's Office of Labor Policy & Standards reported that between 2010 and 2014, profits in the fast-food industry

increased by 15% and that in the same period, "real wages for New York State fast food workers declined by 3.6%" (JA588-89). The bills' opponents submitted statements explaining that the restrictions would hurt their businesses (*e.g.,* JA431, 1360-1423). Among other opponents, a representative of the New York State Restaurant Association—a plaintiff here—submitted a written statement and testified extensively against the law before the City Council (JA1236, 1152-62), as did a representative of the Manhattan Chamber of Commerce (JA1158, 1148-52, 1234), and a representative of the National Restaurant Association (JA1241).

The Commissioner of the Department of Consumer and Worker Protection, when asked how these bills would impact unionization, explained that the Wrongful Discharge Law is a "basic minimal protection," similar to the paid-sick-leave and $15-minimum-wage laws that already apply to the fast-food industry, which means "it's a floor and unions can always negotiate above that floor" (JA224).

B. This lawsuit challenging the Wrongful Discharge Law under federal and state law, which the district court resolved in the City's favor

Plaintiffs—two trade associations, the Restaurant Law Center and the New York State Restaurant Association—brought this facial challenge to the Wrongful Discharge Law under federal and state law, arguing that the law is preempted by the National Labor Relations Act (NLRA) and the Federal Arbitration Act, and violates the Dormant Commerce Clause, the State Constitution, and state law (JA11-31). The parties cross-moved for summary judgment.

The U.S. District Court for the Southern District of New York (Cote, J.) denied plaintiffs' motion, granted the City's motion on plaintiffs' federal claims, and declined to exercise supplemental jurisdiction over plaintiffs' state-law claims. As a threshold matter, the court found that at least one of the plaintiffs has standing to pursue claims under 42 U.S.C. § 1983 because it diverted resources to train its members on their compliance obligations (Special Appendix ("SPA") 9-11).

On the merits, as relevant here,[2] the district court rejected the plaintiffs' argument that the Wrongful Discharge Law is preempted by the NLRA under the *Machinists*-preemption doctrine. The court reasoned that the doctrine bars the City from intruding upon the labor-management bargaining process but does not prohibit it from imposing minimum labor standards, which is all that the Wrongful Discharge Law does (SPA11-21). The court also rejected petitioners' Dormant Commerce Clause claim because the law does not discriminate against out-of-state commerce (SPA21-27). This appeal follows.

SUMMARY OF ARGUMENT AND STANDARD OF REVIEW

On a *de novo* review of cross-motions for summary judgment, *see Vugo, Inc. v. City of N.Y.*, 931 F.3d 42, 48 (2d Cir. 2019), this Court should affirm the district court's thorough and well-reasoned opinion, which correctly rejects plaintiffs' arguments under the National Labor Relations Act and the Dormant Commerce Clause.

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[2] The Plaintiffs also asserted that the Wrongful Discharge Law was preempted by the Federal Arbitration Act and violated state and local law (R26-28), but they have abandoned those arguments, and appeal only with respect to their NLRA-preemption and Dormant Commerce Clause arguments.

First, the NLRA does not preempt the Wrongful Discharge Law. It is well settled that state or local regulations that set minimum labor standards—that is, a floor below which the terms of employment cannot fall—are permissible under federal labor law. On its face, the Wrongful Discharge Law is such a regulation. It grants a benefit to all qualified fast-food workers, whether unionized or not: protection from arbitrary termination or reduction of hours. It was enacted under the City's police powers to protect a class of workers who have historically been subject to high rates of wage theft, unpredictable reductions in hours, and arbitrary terminations that have pushed many fast-food workers into poverty.

The implied preemption doctrine on which plaintiffs rely—*Machinists* preemption, named after the Supreme Court's decision in *International Association of Machinists and Aerospace Workers v. Wisconsin Employment Relations Commission*, 427 U.S. 132 (1976)—does not apply. This doctrine preempts only state and local regulations that interfere with the balance of power between labor and management when it comes to the choice of whether to unionize and negotiations over collective-bargaining agreements. But as a mandated minimum labor standard, akin to a minimum wage or benefit law, the Wrongful

Discharge Law merely forms part of the legal background against which unions and employers interact. It neither puts pressure on management or labor to support or oppose unionization, nor interferes with labor's or management's use of lawful economic weapons in the course of labor-management disputes.

Second, the Wrongful Discharge Law does not violate the Dormant Commerce Clause. It does not discriminate against interstate commerce on its face, in its purpose, or in its effect. On its face, the law applies equally to the local branches of all similarly sized fast-food establishments, regardless of whether their other locations are found entirely within New York State or in other states. Its purpose and effect are to protect workers, not to confer benefits on local fast-food establishments to the detriment of interstate competitors.

Apart from their mistaken contention that the Wrongful Discharge Law discriminates against interstate commerce, plaintiffs have not pressed any claim that the Wrongful Discharge Law has incidental impacts on interstate commerce sufficient to trigger constitutional scrutiny. But if the claim were not forfeited, and if such scrutiny were called for here, the Wrongful Discharge Law would easily survive review,

as its local benefits—felt by workers, their families, and their communities—far exceed the burden placed on interstate commerce.

ARGUMENT

POINT I

THE NLRA DOES NOT PREEMPT THE WRONGFUL DISCHARGE LAW, WHICH IS A QUINTESSENTIAL STATUTORY MINIMUM LABOR STANDARD

The district court correctly recognized that the Wrongful Discharge Law sets a generally applicable minimum labor standard of the type that courts regularly uphold against *Machinists* preemption challenges. It is like countless other state and local laws that coexist alongside federal labor law, requiring employers to pay minimum wages and benefits; to fund and participate in complex unemployment and workers' compensation schemes; and to protect against workplace hazards, discrimination, and retaliatory terminations. None of plaintiffs' arguments to the contrary has merit.

A. *Machinists* preemption does not bar the Wrongful Discharge Law.

Although the NLRA does not contain an express preemption provision, the Supreme Court has found that Congress intended two

forms of implied preemption—called *Machinists* and *Garmon* preemption. *Chamber of Commerce v. Brown*, 554 U.S. 60, 65 (2008). Plaintiffs mistakenly contend that the Wrongful Discharge Law is preempted under *Machinists* preemption.

In the NLRA, Congress endorsed a free-market approach to the processes for resolving disputes between management and labor. Congress was "concerned primarily with establishing an equitable *process* for determining terms and conditions of employment, and not with particular *substantive terms* of the bargain that is struck when the parties are negotiating from relatively equal positions." *Ass'n of Car Wash Owners Inc. v. City of N.Y.*, 911 F.3d 74, 81 (2d Cir. 2018) (quoting *Metro. Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 753 (1985) (emphasis added)).

Machinists preemption protects the freedom of choice that undergirds national labor policy from state and local interference. *Machinists*, 427 U.S. at 153-54; *see also Golden State Trans. Corp. v. City of Los Angeles*, 475 U.S. 608, 615 (1986). It is premised on the assumption that Congress determined the full extent of restrictions that can be placed on legitimate "economic weapons of self-help," such as lockouts,

hiring replacements, and union strikes, and preempted any further regulation of those strategies that can be used by labor or management to place pressure on the other during the labor-dispute-resolution process. *Golden State Trans. Corp.*, 475 U.S. at 614-15; *Concerned Home Care Providers, Inc. v. Cuomo*, 783 F.3d 77, 86 (2d Cir. 2015). Thus, the doctrine displaces local laws that regulate traditional strategies used in labor disputes—strikes or lockouts, to take two examples—in a manner that impairs the "free play of economic forces." *Golden State*, 475 U.S. at 614-15 (quotation marks omitted).

In other words, the *Machinists* preemption doctrine prohibits state and local regulations that interfere with the balance of power between labor and management, when choosing whether to unionize and negotiating substantive collective-bargaining agreements, *id.*, by shielding the "mechanics of labor dispute resolution" from regulation, *Concerned Home Care Providers*, 783 F.3d at 86. Thus, *Machinists* preemption would bar a law prohibiting employees from striking or conditioning access to a benefit on settling a strike, because doing so would interfere with the utility of a legitimate economic weapon. *See*

Golden State, 475 U.S. at 614-15 (preempting law conditioning taxicab franchise renewal on settlement of strike).

But *Machinists* preemption is unconcerned with local regulations of specific terms of employment, so long as they do not put a thumb on the scale of either labor or management in the mechanics of the bargaining process. *Rondout Elec., Inc. v. N.Y. State Dep't of Labor*, 335 F.3d 162, 167 (2d Cir. 2003). Thus, it is well settled that the doctrine does not prohibit valid exercises of local police power that establish minimum labor standards, such as mandated minimum wages, benefits, or workplace protections to address societal ills. *Metro. Life Ins.*, 471 U.S. at 755-56. Even though such laws impact labor-management relations by setting a floor below which negotiated terms cannot fall, and may even impact labor or management unequally, they are not preempted under *Machinists* because they do not "regulate the mechanics of labor dispute resolution." *Concerned Home Care Providers*, 783 F.3d at 86.

In *Metropolitan Life*, the Supreme Court defined "minimum state labor standards" as regulations mandating benefits that "affect union and nonunion employees equally," "neither encourage nor discourage the collective-bargaining processes that are the subject of the NLRA," and

"have [only] the most indirect effect on the right of self-organization." 471 U.S. at 755. Minimum labor standards "are not laws designed to encourage or discourage employees in the promotion of their interests collectively," but rather "to give specific minimum protections to *individual* workers and to ensure that *each* employee covered by the Act would receive the mandated [benefit]." *Id.* at 755 (quotation marks omitted, emphasis in original).

Applying these principles, the Supreme Court in *Metropolitan Life* rejected a *Machinists*-preemption challenge to a minimum labor standard—a mandated-benefits law that required mental-health coverage be included in health-insurance plans offered by employers. 471 U.S. at 754-55. On the same reasoning, the Court rejected a challenge to a severance-pay law that required employers to give payouts to laid-off employees when closing a plant. *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 22 (1987); *see also N.Y. Tel. Co. v. New York Dep't of Labor*, 440 U.S. 519, 535 (1979) (finding that unemployment compensation law that is makes unemployment benefits available to striking workers is not preempted by the NLRA). As this Court has observed, "[t]he Supreme Court has never applied *Machinists* preemption to a state law that does

not regulate the mechanics of labor dispute resolution." *Concerned Home Care Providers*, 783 F.3d at 86.

This Court, too, has rejected *Machinists* preemption challenges to a wide variety of regulations, holding that they permissibly imposed minimum labor standards. For instance, this Court has upheld a wage-parity law for home healthcare aides, *id.* at 86, and a regulation requiring contractors to pay supplemental benefits such as health, welfare, non-occupational disability, retirement, vacation benefits, holiday pay, life insurance, and apprenticeship training, or supplemental wages, *Rondout Elec.*, 335 F.3d at 163-64. This Court has also found that the NLRA would not preempt a local law requiring car-wash operators employing non-unionized workers to post a larger surety bond than unionized workplaces to improve, among other things, compliance with minimum wage laws, provided that, as a practical matter, this different treatment did not place significant pressure on operators to support unionization. *Ass'n of Car Wash Owners*, 911 F.3d at 82-83. Minimum labor standards can thus encompass a broad range of mandated benefits, worker protections, and workplace regulations.

The Third Circuit's decision in *St. Thomas-St. John Hotel & Tourism Association v. Virgin Islands*, 218 F.3d 232, 244 (3d Cir. 2000), is directly on point. There, the Third Circuit court rejected a *Machinists* preemption challenge to the Virgin Islands' Wrongful Discharge Act, a just-cause statute that—much like the Wrongful Discharge Law at issue here—established limited grounds for lawful discharge. The Third Circuit held that a just-cause law "neither regulates the process of bargaining nor upsets the balance of power of management on one side and labor on the other that is established by the NLRA." *Id.* at 244.

The First Circuit has likewise upheld a local ordinance that prohibits purchasers of hospitability businesses from firing their predecessor's employees, except for good cause, for three months after the purchase of the business. *R.I. Hospitality Ass'n v. City of Providence*, 667 F.3d 17, 35 (1st Cir. 2011). The First Circuit explained that the worker-retention ordinance, as "a restriction on the ability of an employer to discharge certain employees," is a minimum labor standard not subject to *Machinists* preemption. *Id.*; *see also Peabody Galion v. Dollar*, 666 F.2d 1309, 1316 (10th Cir. 1981) (upholding a statutory prohibition on discharging workers in retaliation for pursuing workers'-compensation

claims "because it has nothing whatsoever to do with union organization or collective bargaining").

Here, as the district court rightly found, the Wrongful Discharge Law easily survives scrutiny under the *Machinists* doctrine (SPA16-21). It is a statutory minimum-benefit requirement, akin to those upheld by this Court and others, that mandates a baseline benefit for all fast-food workers at covered establishments—whether unionized or not—by placing limits on permissible terminations or shift-reductions.

By ensuring stable wages, the Wrongful Discharge Law protects the welfare of individual workers, just as laws imposing minimum wages and other benefits and protections do. Thus, like the mandated mental-health benefit law at issue in *Metropolitan Life* or the comprehensive benefits requirements challenged in *Rondout Electric*, the Wrongful Discharge Law "give[s] specific minimum protections to *individual* workers" to ensure that every covered fast-food worker, whether a union member or not, receives benefits—including just-cause termination, progressive discipline, and access to a process to challenge unfair discharge. *Metro. Life Ins.*, 471 U.S. at 755. These protections are plainly substantive, and do not interfere with the collective-bargaining *process*.

And, like the laws at issue in *St. Thomas-St. John Hotel & Tourism Association* and *Rhode Island Hospitality Association*, the Wrongful Discharge Law is a generally applicable worker protection that shields a set of vulnerable employees—across-the-board—from unjust termination. The law does not distinguish between workers who are members of a union and those who are not; nor does it treat employers differently depending on whether they employ a unionized workforce. Thus, it does not put pressure on employers to support or oppose unionization.

As the district court emphasized, federal labor law does not preempt a local minimum labor standard of general applicability that promotes job stability for hourly employees without reference to union status and without an impact on collective bargaining (SPA16). Because the Wrongful Discharge Law does "not regulate the mechanics of labor dispute resolution," *Concerned Home Care Providers*, 783 F.3d at 86, and does not place any "pressure on employers to encourage unionization of their employees," *Ass'n of Car Wash Owners*, 911 F.3d at 82, it is not preempted.

B. Plaintiffs' many arguments are meritless.

Plaintiffs mistakenly argue that the Wrongful Discharge Law is preempted—in its entirety, in all possible applications—under the *Machinists* preemption doctrine. But "pre-emption should not be lightly inferred in this area, since the establishment of labor standards falls within the traditional police power of the State." *Fort Halifax Packing Co.*, 482 U.S. at 21. The district court correctly rejected plaintiffs' arguments.

1. A minimum labor standard is not preempted because it is detailed and comprehensive.

Plaintiffs and their amici argue that the Wrongful Discharge Law is too detailed and comprehensive to be a minimum labor standard (Appellants Br. ("App. Br.") at 27-37; Brief for Amici Chamber of Commerce et al. ("Chamber Br.") at 8-12). But they are wrong. As explained above, *supra* Point I.A., the Wrongful Discharge Law is a local law of general applicability that sets a floor—a set of minimum benefits and worker protections. It was squarely within the City's police powers to craft a political solution to a well-documented problem facing low-wage, hourly fast-food workers in the City by protecting these vulnerable

workers from indiscriminate terminations and reductions in hours. And doing so was fully consistent with federal labor policy.

Plaintiffs and amici misread *Concerned Home Care Providers* to suggest that *Machinists* preemption bars local labor laws that are too detailed or protective—suggesting that a minimum labor standard can offer only *minimal* levels of protection and cannot be comprehensive or specific (App. Br. 28-32; Chamber Br. 11-12). But as the district court correctly found, the Wrongful Discharge Law is a permissible statutory worker protection from termination that imposes substantive labor standards; that the law is detailed does not change this fundamental fact (SPA17).

To be sure, this Court in *Concerned Home Care Providers* allowed for the possibility that there might be some hypothetical law that would be so detailed, so sweeping, and so targeted that it would effectively impose a collective-bargaining agreement on a particular industry, and so might be preempted by the NLRA. *Concerned Home Care Providers*, 783 F.3d at 87 n.8; *see also Chamber of Commerce of the United States v. Bragdon*, 64 F.3d 497, 501 (9th Cir. 1995) ("Viewed in the extreme, the substantive requirements could be so restrictive as to virtually dictate

the results of the contract."). This Court posited a hypothetical law that essentially codified a collective-bargaining agreement, *Concerned Home Care Providers*, 783 F.3d at 87 n.8—perhaps, one that did not just set minimum wages, hours, protections, and benefits, but imposed formulas for promotions and bonuses above the floor or provided for when strikes and lockouts might be utilized.

But neither this Court, nor the Supreme Court has ever invalidated a statutory minimum labor standard under *Machinists* preemption on the theory that it is not a *minimal* protection. The best binding precedent that plaintiffs and amici can muster—*Metropolitan Life*, 471 U.S. at 755—*upheld* a minimum labor standard.

Instead, plaintiffs and their amici are forced to rely on two out-of-circuit cases, *Bragdon*, 64 F.3d at 501, and *520 South Michigan Avenue Associates v. Shannon*, 549 F.3d 1119 (7th Cir. 2008). But those cases do not advance plaintiffs' cause here. To begin, plaintiffs and amici ignore that this Court has expressed considerable doubt about whether *Bragdon* and *Shannon* were correctly decided or remain good law. *See Concerned Home Care Providers*, 783 F.3d at 87 n.8 ("Even assuming, *arguendo*, that these cases were correctly decided, they are readily

distinguishable…."); *Rondout*, 335 F.3d at 169 ("Having distinguished *Bragdon*, we have no need to decide whether *Bragdon* was correctly decided on its own facts.").

Moreover, neither decision addressed a law similar to the Wrongful Discharge Law. In *Bragdon*, the Ninth Circuit invalidated a law that imposed prevailing-wage standards that would be set by a local agency using a formula that would average "wages and benefits for each craft pursuant to collective-bargaining agreements applicable in each labor market." 64 F.3d at 502.[3] By effectively imposing bargained-for terms across the industry, including on non-union employment, the law "affect[ed] the bargaining process in a much more invasive and detailed fashion than the isolated statutory provisions of general application approved in *Metropolitan Life* and *Fort Halifax*." *Id.* at 502-03. The problem was not, as plaintiffs and amici suggest, that the law offered

[3] Similar laws have since been upheld in the Ninth Circuit and by this Court. *See e.g., Associated Builders & Contractors of S. Cal. v. Nunn*, 356 F.3d 979, 981 (9th Cir. 2004) (upholding California's regulations that established prevailing wage and benefit formula applied to public and private construction projects for state-registered apprentices); *Concerned Home Care Providers*, 783 F.3d at 87 (upholding Wage Parity Law's use of the largest collective bargaining agreement to set a fixed prevailing rate of total compensation); *Rondout Elec., Inc. v. N.Y. State DOL*, 335 F.3d 162, 164 (2d Cir. 2003) (upholding New York prevailing wage and benefit formula that impacted benefits on private construction).

more than "*minimal*" protection or was too detailed, but that it had an invasive impact on the bargaining process because it took its wage and benefit formula directly from collective-bargaining agreements and codified it across the industry. *Id.*; *Am. Hotel & Lodging Ass'n v. City of L.A.*, 834 F.3d 958, 965 n.5 (9th Cir. 2016) (explaining that the law in *Bragdon* was preempted because it "effectively forc[ed] nonunion employers to pay what amounted to a union wage.").

In sharp contrast, the Wrongful Discharge Law sets general requirements about unlawful termination that were crafted as part of the legislative process. There is no basis from which to conclude that the listed grounds for termination are taken from the collective-bargaining agreement of unionized fast-food establishments and imposed on all fast-food employers. Rather, the law's specifics are matters of legislative judgment that do not depend on the terms agreed to in any particular labor-management negotiation.

Shannon is even less supportive of plaintiffs' and amici's theory that *Machinists* preemption reaches any law that is more than minimal. In *Shannon*, the Seventh Circuit, relying on *Bragdon*, concluded that an Illinois statute governing rest breaks and meal periods for Cook County

hotel attendants that was enacted *during a work stoppage* was preempted because it was not "a law of general application" since it applied "to one occupation, in one industry, in one county." *Id.* at 1132-34. The law at issue in *Shannon* was preempted because it directly interfered with an existing and ongoing labor dispute between Cook County hotel attendants and their employers, and granted those workers engaged in a work stoppage—and only those workers—benefits that they had been unable to obtain through bargaining and economic tactics.[4] *Shannon* does not hold that statutory terms that are detailed, comprehensive, or generous—*i.e.*, more than minimal—are preempted, but rather endorses the principle that a local law cannot be crafted to resolve an existing labor dispute covered by the NLRA.

At most, these nonprecedential decisions suggest that *Machinists* preemption may apply to a law that effectively imposes an industry-wide collective-bargaining agreement or intercedes in an ongoing labor dispute. But the Wrongful Discharge Law comes nowhere near those

[4] The hypothetical law posited by amici, which "enacts one side's final offer" as a labor standard in a newspaper's labor negotiation (Chamber Br. 19), might face a similar fate under *Machinists*. But that says nothing about the validity of a law that, like this one, imposes generally applicable substantive employment standards .

hypothetical lines. This distance is evident when the local law is considered in light of the goal of federal labor law: to allow state and local governments to exercise broad police powers to protect workers, while prohibiting local interference with the lawful economic weapons used by labor or management to exert power over the other during the unionization and substantive collective-bargaining processes. *Ass'n of Car Wash Owners*, 911 F.3d at 81; *Concerned Home Care Providers*, 783 F.3d at 84, 86.

A typical collective-bargaining agreement covers myriad terms, while the Wrongful Discharge Law imposes a protection for hourly employees against only terminations and significant reductions in hours, except for just cause or bona fide economic reasons, and creates rules and enforcement mechanisms to give the law teeth. It is not a comprehensive, sweeping set of terms covering the full gambit of employment conditions, like a collectively bargained-for agreement. The clearest proof of this is that fast-food workers across the City have continued to fight for unions, even after the law's passage.[5]

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[5] *See* Nargi, Lela, *An Inside Look at Union Organizing in the Fast-Food Industry*, EATER (Dec. 10, 2021), https://perma.cc/G9NS-6QFW (recounting union SEIU 32BJ's efforts to unionize fast-food workers even after the Wrongful Discharge Law).

The fact that a minimum labor standard is governed by a detailed regulatory scheme is not an indication that the law conflicts with federal labor law. To the contrary, many well-recognized, quintessential minimum labor standards arise from highly detailed and complex regulations, such as New York's workers-compensation and minimum-wage schemes, which include extensive regulations about minimum requirements, enforcement, penalties, administrative processes and appeals, and recordkeeping. *See* N.Y. Workers Comp. Law § 1, *et seq.*; N.Y. Labor Law art. 19.

2. A minimum labor standard is not preempted because it is specific and tailored.

Plaintiffs' and amici's related contention that the Wrongful Discharge Law is too narrowly targeted likewise misses the mark (App. Br. 34-36; Commerce Br. 14-15). Indeed, not only has this Court never struck down a law on this theory, in *Concerned Home Care Providers*, this Court *rejected* a claim that a detailed wage-parity regulation that applied to a small subset of workers in the health-care industry was preempted because it was too specific and targeted. 783 F.3d at 86-87.

The Court explained that, "[e]ven assuming, *arguendo*, that there may be labor standards that are so finely targeted that they impermissibly intrude upon the collective-bargaining process," a law setting a minimum rate of compensation for home-care aides who provide Medicaid-covered care in New York City and the surrounding counties "is no such law." *Id.* Thus, *Concerned Home Care Providers* does not support plaintiffs' theory that tailored minimum labor standards are impermissible.

In service of this argument, plaintiffs also misplace their reliance on a footnote in *Concerned Home Care Providers* to suggest that this Court has endorsed reasoning adopted in the Ninth and Seventh Circuits in *Bragdon*, 64 F.3d 497, and *Shannon*, 549 F.3d 1119 (App. Br. 27 (citing *Concerned Home Care Providers*, 783 F.3d at 87 n.8)). But as discussed above, in that very footnote the Court in fact questioned whether both cases had been correctly decided. *See Concerned Home Care Providers*, 783 F.3d at 87 n.8.

Indeed, there was good reason for the Court's skepticism. The Ninth Circuit has retreated from *Bragdon*'s expansive view of *Machinists* preemption, explaining that *Bragdon* was premised, in part, on a

mistaken belief that a law that targets a narrow subset of the labor market—leading to different minimum standards for workers in different industries—intrudes onto industry-specific collective bargaining. *Associated Builders & Contractors of S. Cal. v. Nunn*, 356 F.3d 979, 990 (9th Cir. 2004). The Ninth Circuit recognized that "[i]t is now clear … that state substantive labor standards … are not invalid simply because they apply to particular trades, professions, or job classifications rather than to the entire labor market." *Id.*; *see also Concerned Home Care Providers*, 783 F.3d at 86 ("*Machinists* preemption does not … eliminate state authority to craft minimum labor standards for particular regions or areas of the labor market.").

The part of *Shannon*, 549 F.3d at 1139, on which plaintiffs rely (App. Br. 34-35)—which this Court distinguished in *Concerned Home Care Providers*, 783 F.3d at 87 n.8—likewise lends no support to plaintiffs' position. As explained above, there, the law directly interfered with an ongoing labor dispute. That the Cook County hotel attendant ordinance was narrowly tailored to the location and industry was meaningful on those facts.

To the extent the Seventh Circuit relied on the industry-specific reasoning of *Bragdon*, that aspect of the decision has never been accepted by this Court, which has instead upheld laws that provide minimum standards for single occupations, in narrowly defined industries, in small geographic areas, *see, e.g.*, *Concerned Home Care Providers*, 783 F.3d at 86-87. For this reason, there is no merit to plaintiffs' argument that by protecting only New York City fast-food workers employed by chains with 30 or more locations, the Wrongful Discharge Law is too narrow, and not a minimum labor standard of general applicability.[6]

What's more, here, unlike in *Shannon*, plaintiffs have brought a facial challenge, and there is no evidence in the record that there is any active dispute between labor and management with which the Wrongful Discharge Law interferes. Amici contend, without any specific proof and without pointing to anything in the record, that there have been unsuccessful attempts to unionize some fast-food workers (Chamber Br.

[6] In this context, "generally applicable" merely means that a law affects union and nonunion employees equally and neither encourages nor discourages bargaining. *Metro. Life*, 471 U.S. at 755. Thus, this Circuit has repeatedly upheld laws that target a particular industry or subset of workers. *See, e.g., Ass'n of Car Wash Owners*, 911 F.3d at 84 (car wash employees); *Concerned Home Care Providers*, 783 F.3d at 85-86 (home health care aides in the City and surrounding Counties).

6, 15). But they conflate the enactment of minimum labor standards following general attempts to form a union—a background fact that likely exists in every industry and predates the enactment of every minimum labor standard—with the different situation where a legislature resolves a specific dispute during a live collective-bargaining negotiation. Only the latter is problematic under *Machinists*.

Like amici's reliance on general unionization efforts in the industry, plaintiffs' speculations about some possible future dispute are insufficient to raise even the specter of *Machinists* preemption. Plaintiffs argue that the law might hypothetically impair fast-food employers' use of lockouts—a management strategy that reduces unionized employees' hours if a union contract has expired and bargaining has hit an impasse (App. Br. 40-42).[7] No state court has construed the law to apply in that scenario—indeed, the law has not been construed yet at all by a New York court. But if the law were held to apply to lockouts (or strikes), an affected employer could bring a targeted as-applied *Machinists* challenge at that time. Plaintiffs' creative thinking does not move the ball on their

[7] Combs, Robert, *Union Employers Have No Lockout Card to Play … For Now*, BLOOMBERG LAW (Oct. 13, 2020), https://perma.cc/3ACT-D7TG. Plaintiffs have not identified a single lockout ever deployed by a fast-food employer in New York City.

facial challenge, which requires showing that the law "is invalid in all applications," not in one unprecedented scenario they've thought up. *Copeland v. Vance*, 893 F.3d 101, 107 (2d Cir. 2018).

3. A minimum labor standard is not preempted because it is novel.

Plaintiffs' and amici's argument that the Wrongful Discharge Law is too "exceptional and novel" to be permissible, again, loses sight of the purpose behind *Machinists* preemption (App. Br. 45; Commerce Br. 13-14). As explained above, the purpose of the *Machinists* doctrine is to keep the government from adopting measures that favor labor or management in the unionization or collective-bargaining process. The novelty of a law is not relevant, let alone determinative; laws setting a minimum wage and mandating health benefits were novel when they were first passed too. For instance, a novel paid-sick-leave law was enacted in Connecticut in 2011, and now such measures represent a well-recognized statutory benefit required in over a dozen states and many local jurisdictions.[8]

[8] National Conference of State Legislatures, *Paid Sick Leave* (July 21, 2020), https://perma.cc/955U-8UCH.

Regardless of whether it is novel, the Wrongful Discharge Law is not preempted because it does not regulate "substantive aspects of the bargaining process to an extent Congress has not countenanced." *Machinists*, 427 U.S. at 149 (quotations omitted). And what's more, the Wrongful Discharge Law is not even novel; the State of Montana has had a statewide wrongful discharge law imposing a good-cause standard for over two decades. Mont. Code Ann. § 39-2-904 (added 2001). Philadelphia adopted a similar protection for parking lot attendants, effective in 2019. Phil. Code § 9-4702. And, as noted, the Virgin Islands has a just-cause protection too, and has had it since 1986. V.I. Code tit. 24, § 76 (2019). And many states have wrongful-discharge laws that prohibit terminating employees on limited grounds, for instance, "for an unlawful reason or purpose that contravenes public policy" such as discriminatory and retaliatory reasons. N.C. Gen. Stat. § 143-422.2. The Wrongful Discharge Law is in line with such measures.

4. A minimum labor standard is not preempted because it provides a benefit that might otherwise be bargained for.

Plaintiffs also contend that even if the Wrongful Discharge Law is a minimum labor standard, it is still preempted because it hinders

employers from obtaining concessions during collective bargaining in exchange for protections granted by the law (App. Br. 22-34, 38-39). To be sure, by raising the floor, the Wrongful Discharge Law gives employees "something for which they otherwise might have to bargain." *Fort Halifax Packing*, 482 U.S. at 21-22. "That is true, however, with regard to any state law that substantively regulates employment conditions." *Id.* As the Supreme Court has explained, "[b]oth employers and employees come to the bargaining table with rights under state law that form a 'backdrop' for their negotiations." *Id.* (quotation marks omitted). But laws are not preempted merely because, as part of the statutory backdrop, they affect matters that are potential subjects of bargaining. *Machinists* preemption is only concerned with whether a regulation interferes with the *mechanics* of bargaining. *Id.*; *see also Rondout Elec.*, 335 F.3d at 168; *Malone v. White Motor Corp.*, 435 U.S. 497, 504-05 (1978) (explaining that the NLRA does not preempt "all state regulatory power with respect to those issues … that may be the subject of collective bargaining").

Plaintiffs declare—without a coherent explanation or any evidence—that the Wrongful Discharge Law impermissibly pressures

employers to welcome unionization by creating a right to arbitrate without extracting a supposedly corresponding no-strike promise from employees (App. Br. 38-40). But this pressure theory is flawed. The arbitration provision in the Wrongful Discharge Law, N.Y.C. Admin. Code § 20-1273(a), is a narrow enforcement provision that allows for arbitration of alleged violations of the just-cause-discharge requirement. It is markedly different and less robust than the multi-step grievance procedures included in typical collective-bargaining agreements, to which plaintiffs attempt to compare it (App. Br. 38).

For this reason, amici's contention that any binding arbitration requirement requires a no-strike concession is misplaced (Commerce Br. 15-16). Workers' compensation and unemployment schemes have options for non-judicial resolution too, but they—like the arbitration option in the Wrongful Discharge Law—are a far cry from the comprehensive multi-step protections in a typical collective bargaining agreement that can resolve a broad variety of disputes between labor and management.

Amici's reliance on *Boys Markets, Inc. v. Retail Clerk's Union*, 398 U.S. 235, 247-49 (1970)—which concerns enforcement of a no-strike clause where an agreement to arbitrate "provide[s] a mechanism for the

expeditious settlement of industrial disputes without resort to strikes, lockouts, or other self-help measures"—is misplaced (Chamber Br. 16). There is simply no support for plaintiffs' and amici's assertion that the narrow arbitration right in the Wrongful Discharge Law—which allows employees to arbitrate whether they were improperly terminated under the law's provisions, but does not reach collective objections to the terms or conditions of employment—would typically form part of a "quid pro quo" given in exchange for a no-strike commitment from workers (App. Br. 39).

In any event, plaintiff's theory that the Wrongful Discharge Law pressures employers to welcome unions by giving employees a benefit that can be obtained through bargaining fails on the law. As the district court noted, it applies equally to unionized and non-unionized employees and regulates substance, not process (SPA17). It is well settled that "*Machinists* preemption is not a license for courts to close political routes to workplace protections simply because those protections may also be the subject of collective bargaining." *Concerned Home Care Providers*, 783 F.3d at 87.

5. A minimum labor standard is not preempted because its enactment was supported by unions.

Nor is there any merit to plaintiffs' contention that the law is preempted because the legislative history shows that pro-labor groups lobbied for its passage (App. Br. 45-48). The preemption inquiry "evaluates what legislation *does*, not why legislators voted for it or what political coalition led to its enactment." *Bldg. Indus. Elec. Contrs. Ass'n v. City of N.Y.*, 678 F.3d 184, 191 (2d Cir. 2012) (quotation marks omitted, emphasis in original). The question under *Machinists* preemption is whether the law *actually* interferes with the collective-bargaining process—and it does not—regardless of the subjective desires of some of the bill's supporters.

What's more, plaintiffs' view of the legislative history is off base. Abundant evidence shows that the Wrongful Discharge Law was not enacted to promote unionization, but to protect a vulnerable class of workers—whether unionized or not—from arbitrary discharges that have historically pushed those workers into poverty. And the legislative record establishes the critical need for this legislation in the City. Fast-food workers reported extensive abuse at the hands of their employers,

ranging from wage theft to physical injury (R308). Workers reported that they were financially unable or unwilling to seek self-protection because, as low-wage workers, they could not afford to lose their jobs or face reduced hours (R307). The legislative record also showed that arbitrary terminations and reductions in hours are linked to significant and devastating impacts on the financial wellbeing, educational opportunities, and mental health of workers and their families. The law, on its face, as confirmed by the legislative record, is squarely addressed to a societal ill within the City's police powers to remedy through regulation of minimum labor standards.

POINT II

THE WRONGFUL DISCHARGE LAW DOES NOT VIOLATE THE DORMANT COMMERCE CLAUSE

The district court also correctly rejected plaintiffs' Dormant Commerce Clause challenge (SPA21-24). The Supreme Court has read a negative implication into the Commerce Clause, commonly called the Dormant Commerce Clause, that limits state and local laws "aimed at giving a competitive advantage to in-state businesses." *Tenn. Wine & Spirits Retailers Ass'n v. Thomas*, 139 S. Ct. 2449, 2459-62 (2019). The

Dormant Commerce Clause "prohibits economic protectionism—that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors." *New Energy Co. of Ind. v. Limbach,* 486 U.S. 269, 273-74 (1988).

There are two frameworks that apply in Dormant Commerce Clause cases. A law that "clearly discriminates against interstate commerce," on its face, by its intent, or through its effects, is *per se* invalid unless the government has "no other means to advance a legitimate local purpose." *United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 338-39 (2007). But a law that only incidentally burdens interstate commerce is subject to a more permissive balancing test set out in *Pike v. Bruce Church, Inc.,* 397 U.S. 137 (1970). Under *Pike*, a law will only be struck down if the burden it imposes on interstate commerce "clearly exceeds the putative local gains." *Town of Southold v. Town of E. Hampton,* 477 F.3d 38, 47 (2d Cir. 2007).

The threshold burden falls on the law's challenger—here, plaintiffs—to demonstrate that the challenged law either (i) "clearly discriminates against interstate commerce," meaning that it treats in-state and out-of-state economic interests differently in a manner that

benefits the former and burdens the latter, and is "virtually invalid per se," or (ii) "only incidentally burdens interstate commerce," and is subject to *Pike* balancing. *Id.* at 47, 50. If the plaintiff makes that showing, the burden shifts to the government to supply a sufficient justification. Here, plaintiffs failed to make a threshold showing on the first ground. They do not assert the second, and the Wrongful Discharge Law would, in any event, survive such scrutiny.

A. The Wrongful Discharge Law does not discriminate against out-of-state economic interests.

As the district court correctly determined (SPA23-24), the Wrongful Discharge Law does not "clearly discriminate" against out-of-state businesses, on its face, in its purpose, or by its effect. *Southold*, 477 F.3d at 48.

First, the Wrongful Discharge Law plainly does not discriminate against out-of-state businesses on its face. It applies to all fast-food chains with thirty or more locations nationally, regardless of whether those locations are all in New York or not. The definition of fast-food establishments was taken, nearly verbatim, from regulations promulgated by the New York State Department of Labor, which

explains on its website that "local chains that only have locations within New York State are covered as long as they have at least 30 locations," and "[t]here is no requirement that the chain have locations outside of New York State."[9] The Wrongful Discharge Law thus "appl[ies] equally to in-state and out-of-state [fast-food establishments] working in New York; so there is no disparate impact and no economic protectionism." *Bus. for a Better N.Y. v. Angello*, 341 F. App'x 701, 704-05 (2d Cir. 2009).

Second, the Wrongful Discharge Law does not discriminate in its purposes. The record is clear that it was not intended to disadvantage out-of-state fast-food businesses for the purpose of giving in-state competitors an economic advantage. *United Haulers*, 550 U.S. at 338. Indeed, it *only* applies to fast-food establishments that are located in the City, and it applies equally to businesses headquartered here as it does to those headquartered elsewhere—clear proof that its purpose was not economic protectionism. For instance, the law applies with equal force—and perhaps greater impact—to Golden Krust, Shake Shack, and Nathan's Famous, all of which were founded in the City and are

[9] https://perma.cc/2A5Y-E3SU.

concentrated here, as it does to the two New York City locations of the Oklahoma-based Sonic Drive-in.[10]

The law's express purpose is not any form of economic protectionism, but rather to protect vulnerable workers in the City. As explained above, the legislative history demonstrates that the City Council's purpose was to protect the City's nearly 67,000 low-wage fast-food workers, most of whom are women, immigrants, and people of color, who have reported that arbitrary termination and reductions in hours have had substantial and widespread negative impacts on them and their families (JA191, JA290, 586-88). The City Council was addressing the particular problem of arbitrary discharges and reductions in hours, which have historically compromised the ability of workers to hold second jobs, pursue their educations, and afford housing, utilities, and transportation; caused food insecurity; and impaired the mental health of workers' children (JA191, JA290, 586-88). The purpose of the Wrongful

[10] Golden Krust Website, *Our Story*, https://perma.cc/9TVM-73SG; Sheldon, Andrew, *The Untold Truth of Shake Shack,* MASHED (OCT. 18, 2021), https://perma.cc/TU5Z-ZW8M; Nathan's Famous Website, *Our History*, https://perma.cc/LK9L-3KWW; Sonic Drive-In Website, *Locations*, https://perma.cc/HF7A-ZSA8.

Discharge Law is not the economic protection of in-state fast-food chains, but the protection of fast-food workers and their families.

The reason that the law applies only to chains with 30 or more locations is not related to impermissible economic protectionism, but is a neutral metric that calibrates the regulatory burden based on the size of the regulated entity—a common feature in everything from labor regulations to tax laws. *See, e.g.*, IR-2018-108, April 27, 2018 (Small Business Health Care Tax Credit). It does not turn on the in-state or out-of-state character of fast-food establishments, but the size of the business.

As discussed, the City copied this 30-or-more-locations cutoff from state regulations setting a minimum wage for fast-food workers. As the State Department of Labor explained, raising wages was warranted for all fast-food workers "but, because of documented concerns that smaller employers would face greater financial challenges in dealing with an increase, [the board] recommended limiting the increase to employees working for establishments affiliated with large chains" that were better equipped to handle additional costs. *Matter of Nat'l Rest. Ass'n v. Comm'r of Labor*, 141 A.D.3d 185, 194 (3d Dep't 2016). Increasing wages would

not help employees "if it imperiled the employee's job by financially crippling his or her employer." *Id.* In other words, workers will benefit only if their employers can afford the cost of compliance, and the State found that 30 or more locations was a reasonable line to draw between employers that could absorb the cost of higher wages and ones that might not, which would ultimately do more harm than good to workers (JA803).

Because the State had already made that calculation, it was reasonable for the City to conclude that fast food employers with 30 or more locations would likewise be able to capture efficiencies of scale to absorb any compliance costs of the Wrongful Discharge Law. As the State explained, chain establishments generally have the benefit of franchising agreements, which "give[] significant advantages to a business owner by allowing him or her to benefit from an established brand name and customer base, use information and expertise not available to other small businesses, and exploit increased purchasing and borrowing power created by the pooling of resources within the franchise system." *Id.* at 241; *see also* JA803-04.

The City Council testimony here likewise confirms that the drafters of the Wrongful Discharge Law were not trying to protect local fast-food

chains from competition, but were concerned that the compliance costs would be too burdensome for small, independent businesses. This concern animated the decision to use the 30-locations-or-more definition of fast-food establishment. The drafters explained that large chains "have the wherewithal to more than sustain the legislation" (JA376). This makes sense, given that economies of scale would enable chains to spread the initial cost of compliance—which would primarily consist of putting protocols in place to train management—across multiple locations. The statute is intended to protect workers and their employers, not to burden interstate businesses to benefit their intrastate competitors.

What's more, using the same definition as the State eases compliance burdens on covered businesses. Keeping thresholds for multiple regulatory obligations consist for regulated entities enhances regulatory clarity and facilitates compliance with state and local labor laws.

Third, the Wrongful Discharge Law does not discriminate in its effects either. Plaintiffs complain that the law has a discriminatory impact on interstate commerce because there are no fast-food chains with 30 or more locations that operate wholly within the state (App. Br. 52-

53). But this assertion, if accurate, leads to the opposite conclusion: there is no local comparator operating under the same business model being given a benefit at an interstate competitor's expense.

As the district court recognized, 30 or more locations is a neutral metric of scale (SPA24). Assuming there are no wholly intra-City, or intrastate fast-food chain of this size, that is because it is only natural that a business of that scale that has successfully operated in New York City would expand at least into the tri-state area and likely into other major metropolitan areas as well. Moreover, the law does not apply to all interstate businesses operating in New York City, but only those above the size threshold.

In any event, the Supreme Court has made clear that the "fact that the burden of a state regulation falls on some interstate companies does not, by itself, establish a claim of discrimination against interstate commerce." *Exxon Corp. v. Governor of Md.*, 437 U.S. 117, 126 (1978); *see also N.Y. Pet Welfare Ass'n v. City of N.Y.*, 850 F.3d 79, 91 (2d Cir. 2017) ("[T]he Supreme Court has considered and rejected the argument that a statute is discriminatory because it will apply most often to out-of-state entities in a market that has more out-of-state than in-state participants"

(quotation marks omitted)). Plaintiffs have failed to identify a benefit running to intrastate fast-food establishments at the expense of their interstate competitors, *Southold*, 477 F.3d at 50, and plaintiffs' Dormant Commerce Clause challenge "can be rejected on that basis alone." *Bus. for a Better N.Y.*, 341 F. App'x at 704-05.

B. Plaintiffs' arguments to the contrary are meritless.

Plaintiffs mistakenly contend that it is *per se* discrimination for a local government to distinguish between franchises and other business models (App. Br. 57-59), relying on an Eleventh Circuit case that invalidated a "complete prohibition of chain restaurants," which "serve[d] to exclude national chain restaurants from competition in the local market." *Cachia v. Islamorada*, 542 F.3d 839, 843 (11th Cir. 2008). But the law at issue in *Cachia* was a far cry from the Wrongful Discharge Law; it effectively prohibited chain "formula" restaurants from operating in the State of Florida, with the effect of closing a local market to national businesses with the specific purpose of benefiting local competitors. It was protectionist in its purpose and its effect. By contrast, the Wrongful Discharge Law does not insulate local fast-food establishments from

competition, but merely achieves substantial worker protections while also managing regulatory burdens, as many worker protections do.

What's more, to the extent *Cachia* rests on the notion that the Dormant Commerce Clause prohibits a policy that favors small businesses over franchises, it is inconsistent with clear Supreme Court precedent and the decisions of other courts. In *Exxon Corp.,* the Supreme Court upheld a law that prohibited oil refiners from operating retail gas stations in Maryland, noting that the Dormant Commerce Clause does not protect "the particular structure or methods of operation in a retail market" or "particular interstate firms," but rather protects competition among comparable in-state and out-of-state businesses. *Exxon Corp.*, 437 U.S. at 127.

Under *Exxon Corp.*, a local government can regulate specific business models, whether fast-food establishments in the City that are part of a chain with 30 or more locations, or oil refiners operating retail gas stations. So long as interstate firms can enter the market to the same extent as local businesses, the Dormant Commerce Clause is not implicated. Relying on *Exxon*, courts have repeatedly upheld regulations of franchises. *See Int'l Franchise Ass'n v. City of Seattle*, 803 F.3d 389,

404 n.7 (9th Cir. 2015) (collecting cases); *Wine & Spirits Retailers, Inc. v. Rhode Island*, 481 F.3d 1, 14 (1st Cir. 2007) (upholding a "prohibition on franchise and chain-store arrangements" that did not have "a debilitating or unfair impact either on competition in general or … out-of-state enterprises"); *see also A&P v. Town of E. Hampton*, 997 F. Supp. 340, 351 (E.D.N.Y. 1998) (upholding a "Superstore Law" that was intended to favor small retailers over large retailers, because "that preference does not implicate interstate commerce where both intrastate and out-of-state large retailers are equally affected").

Indeed, the state minimum-wage regulation that applies to this exact subset of business—fast-food establishments with 30 or more locations—has already survived Dormant Commerce Clause scrutiny. *Matter of Nat'l Rest. Ass'n*, 141 A.D.3d at 194. The National Restaurant Association challenged, on Dormant Commerce Clause grounds, the State Department of Labor's 2015 minimum-wage order from which the City Council took the definition of fast-food establishment, which it used in both New York City's 2017 Fair Workweek Law and the Wrongful Discharge Law. The New York Appellate Division, Third Department first rejected the National Restaurant Association's claim that the

minimum-wage order for fast-food workers was discriminatory, reasoning that the wage order cannot "be read to exclude chains with locations solely in New York" and "also lacks any mechanism to assist chains with 30 establishments within New York at the expense of similarly sized chains with establishments located outside of it." *Id.* Thus, the court concluded that there is no differential treatment, no economic protectionism, and no Dormant Commerce Clause violation. *Id.*

There is no merit to plaintiffs' suggestion (App. Br. 57-58) that the Dormant Commerce Clause—a limitation that multiple Supreme Court Justices have treated with skepticism, *see, e.g., South Dakota v. Wayfair, Inc.,* 138 S. Ct. 2080, 2100 (2018) (Thomas, J., dissenting); *id.* at 2101 (Gorsuch, J., dissenting)—should be read expansively to prevent any differential treatment of small businesses and large franchises. Indeed, as the district court noted (SPA25), this Court has already held that there are legitimate reasons for a state to consider national, as opposed to local, market share—there, when calculating a manufacturer's recycling fees. *Vizio, Inc. v. Klee*, 886 F.3d 249, 254-56 (2d Cir. 2018).[11] Here, fast-food

[11] Plaintiffs misread *Vizio* in attempting to distinguish it (App. Br. 56-57). They mistakenly state that the law at issue in *Vizio* is different from the Wrongful

(cont'd on next page)

establishments with 30 or more locations have the resources to comply with the Wrongful Discharge Law without jeopardizing the very jobs that the law aims to protect.

Holding that state and local governments cannot distinguish between large and small businesses when imposing industry-specific minimum labor standards would eviscerate large swaths of state and local labor laws nationwide. Many workplace protections apply only to businesses employing more than a certain number of employees, like New York State's paid-sick-leave requirement, which applies to businesses with more than five employees, and which requires employers with over 100 employees to provide their employees with 16 more paid sick hours per year than employers with more than five but less than 99

Discharge Law because "[u]nlike the recycling fees—which applied to interstate and local entities alike—the Just Cause Laws apply only to interstate restaurants (and their franchisees)." But the recycling fees applied to all covered entities operating in the jurisdiction—that is, manufacturers of televisions sold in Connecticut—just like the Wrongful Discharge Law applies to all fast-food establishments of a certain size in the City, without regard for whether they are inter- or intra-state operations. There, the formula for recycling fees was tied to national market share; here the application of local labor laws is tied to national size. The district court correctly understood that *Vizio* supports the use of national market share as a metric for deciding the reach of a particular regulation.

employees.[12] Nothing in Dormant Commerce Clause doctrine casts doubt on this sort of line drawing.

Nor is there any merit to amici's suggestion that the Wrongful Discharge Law has a discriminatory effect because—like the law regulating labelling of out-of-state apples shipped to North Carolina in *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333 (1977)—it allegedly raises the cost of doing business for out-of-state businesses (Commerce Br. 23-27). To the extent the Wrongful Discharge Law raises the cost of doing business, it does so for all fast-food businesses operating in the City that are part of a chain over a certain size, regardless of where the other 29+ affiliated establishments are located. Comparing a business that is part of a chain with 30 or more locations—whether wholly in the City or spread across the country—to a business with one or a few locations is like comparing apples to oranges. For this reason, there is no merit to amici's repeated claim that the law improperly treats in-state and out-of-state fast-food establishments differently, which is premised on the mistaken belief that national chains

[12] NYS Website, *New York Paid Sick Leave*, https://perma.cc/7N6P-ZU8E.

with more than 30 locations are similarly situated to local chains with fewer than 30 locations (Commerce Br. 25-27).

C. The Wrongful Discharge Law easily survives the *Pike*-balancing test.

Plaintiffs do not address *Pike* balancing in their brief, likely because they cannot overcome the high hurdle it sets. The Wrongful Discharge Law does not impact interstate commerce, so does not trigger *Pike* balancing at all. But if it did, it easily passes muster under *Pike*, as the district court correctly determined (SPA26-27).

At the outset, plaintiffs have not even identified an incidental burden on interstate commerce. This Court has "recognized three types of 'incidental' burdens: regulations that have a disparate impact on in- versus out-of-state entities, laws that regulate beyond the state's borders, and laws that create regulatory inconsistencies between states." *N.Y. Pet Welfare Ass'n*, 850 F.3d at 91 (finding no need for *Pike* balancing where an animal welfare law merely increased the cost of selling pets in the City). As discussed, plaintiffs do not identify any in-state comparators. Nor could they point to any extraterritorial effects or regulatory conflicts,

particularly given that the law applies only to the branches of an interstate business that are located within New York City.

And if plaintiffs had identified an incidental burden on interstate commerce, the Wrongful Discharge Law would easily survive scrutiny under *Pike* for the same reasons that the Third Department rejected the National Restaurant Association's *Pike*-based challenge to the state's fast-food-worker wage order. *Nat'l Rest. Ass'n*, 141 A.D.3d at 194. The law's "effect on interstate commerce [does not] outweigh the substantial local benefits that will flow from the desired objective of granting fast-food workers a wage enabling them to escape the bonds of public assistance and spend more money in the local economy." *Id.*

The burden on interstate commerce, in the form of possibly reduced profits felt by local fast-food establishments when first implementing new employee-termination and reduction-in-hours protocols (*see* JA321), does not *clearly* exceed the substantial local benefits to fast-food workers and their families. *See Bus. for a Better N.Y.*, 341 F. App'x at 704-05 (concluding that costs of scaffold laws did not "clearly exceed" the local gains of "either protection of construction workers or compensation in the event of injury"). Protection from arbitrary discharge provides stable

employment and empowers low-wage, hourly fast-food workers to seek legal redress, under the Fair Workweek Law or other measures, if their employers harm them through wage theft, discrimination, violence, unsafe conditions, and violations of other labor laws. The law thus protects workers not just from terminations or reductions of hours, but from the many illegal and unethical practices that City Council sought to address. As the district court correctly found, the law is not preempted by the NLRA and is entirely consistent with the Dormant Commerce Clause.

CONCLUSION

This Court should affirm.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief was prepared using Microsoft Word 2010, and according to that software, it contains 10,774 words, not including the table of contents, table of authorities, this certificate, and the cover.

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