22-491

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

RESTAURANT LAW CENTER, NEW YORK STATE RESTAURANT ASSOCIATION,

Plaintiffs-Appellants,

—against—

CITY OF NEW YORK, 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,
NO. 21-CV-4801 (HON. DENISE COTE)

BRIEF FOR AMICI CURIAE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER, RETAIL LITIGATION CENTER, INC., AND BUSINESS COUNCIL OF NEW YORK STATE, INC. IN SUPPORT OF PLAINTIFFS-APPELLANTS

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The Chamber of Commerce of the United States of America ("the Chamber") states that it is a non-profit, tax-exempt organization incorporated in the District of Columbia. The Chamber has no parent corporation, and no publicly held company has ten percent or greater ownership in the Chamber.

The National Federation of Independent Business Small Business Legal Center is a 501(c)(3) public interest law firm and is affiliated with the National Federation of Independent Business, a 501(c)(6) business association.

The Retail Litigation Center, Inc. has no parent corporation and no publicly held corporation owns ten percent or more of its stock.

The Business Council of New York State, Inc. is a non-profit business federation with no parents, subsidiaries, or affiliates. No publicly held company holds ten percent or greater ownership in the organization.

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INTEREST OF AMICI CURIAE[1]

The Chamber of Commerce of the United States of America ("the Chamber") is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files amicus curiae briefs in cases, like this one, that raise issues of concern to the nation's business community. *See, e.g.*, *Nat'l Pork Producers Council v. Ross*, No. 21-468, cert. granted (U.S. 2022); *Wash. Bankers Ass'n v. Washington*, No. 21-1066 (U.S. 2022); *Cal. Grocers Ass'n v. City of Los Angeles*, 254 P.3d 1019 (Cal. 2011).

The National Federation of Independent Business ("NFIB") is the nation's leading small business association. Its membership spans the spectrum of business operations, ranging from sole proprietor enterprises to firms with hundreds of employees. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB's

[1] Under Federal Rule of Appellate Procedure 29(a)(4)(E), amici certify that no counsel for any party authored this brief in whole or in part; and no person or entity, other than amici, their members, or their counsel, made a monetary contribution intended to fund the preparation or submission of this brief. Under Federal Rule of Appellate Procedure 29(a)(2), all parties to this appeal have been asked to consent to the filing of this brief, and all parties consent.

mission is to promote and protect the right of its members to own, operate, and grow their businesses. The NFIB Small Business Legal Center ("Legal Center") is a nonprofit, public interest law firm established to provide legal resources and be the voice for small businesses in the nation's courts through representation on issues of public interest affecting small businesses. To fulfill its role as the voice for small business, the Legal Center frequently files amicus briefs in cases that will impact small businesses.

The Retail Litigation Center, Inc. ("RLC") is the only public policy organization dedicated to representing the retail industry in the judiciary. The RLC's members include many of the country's largest and most innovative retailers. They employ millions of workers throughout the United States, provide goods and services to tens of millions of consumers, and account for tens of billions of dollars in annual sales. The RLC seeks to provide courts with retail-industry perspectives on important legal issues impacting its members, and to highlight the potential industry-wide consequences of significant pending cases.

The Business Council of New York State, Inc. ("the Council") is the leading business organization in New York State, representing the interests of large and small firms throughout the state. The Council's membership is made up of roughly 3,500 member companies, local chambers of commerce and professional and trade associations. Though 72 percent of the Council's members are small businesses, the

Council also represents some of the largest and most important corporations in the world. Combined, the Council's members employ more than 1.2 million New Yorkers. The Council serves as an advocate for employers in the state's political and policy-making arenas, working for a healthier business climate, economic growth, and jobs. The Council also provides important benefits to its members' employees with group insurance programs and serves as an information resource center for its members.

This appeal implicates two issues of considerable importance to amici and their members. First, amici have a strong interest in preserving the balance between labor and management that Congress struck in the National Labor Relations Act ("NLRA"). Properly understood, the *Machinists* preemption doctrine upholds that balance by protecting employer and employee alike from state and local laws that intrude on the collective bargaining process. Second, amici have a strong interest in preventing state and local discrimination against interstate commerce. Correctly interpreted, the Commerce Clause proscribes state and local laws that have discriminatory effects on interstate commerce. These issues are critical to amici's members, which include many businesses that engage in commerce nationwide.

INTRODUCTION AND SUMMARY OF ARGUMENT

The City of New York's Just Cause Law represents an extraordinary and novel intrusion into the relationship between employer and employee. Enacted in 2021, in

the wake of unsuccessful efforts to unionize the City's fast food restaurants, the Law imposes on certain fast food employers detailed employment requirements akin to a collective bargaining agreement. Those include new substantive terms of employment: targeted employers may not discharge or reduce an employee's hours more than 15% "except for just cause or for a bona fide economic reason." N.Y.C. Admin. Code § 20-1272(a). They include reticulated disciplinary procedures: targeted employers must establish "progressive discipline policies" providing a "graduated range of reasonable responses to a fast food employee's failure to satisfactorily perform such fast food employee's job duties." *Id.* §§ 20-1271, 1272(c). And they include novel remedial regimes: employees may challenge their discharge in a range of fora (including compelled private arbitration) and targeted employers "bear the burden of proving just cause or a bona fide economic reason." *Id.* § 20-1272(e). Taken together, the Just Cause Law's provisions fundamentally reshape the relationship between targeted fast food employers and their employees.

The Just Cause Law also imposes those burdens on a disproportionate basis. The Law applies only to fast food establishments that are (1) "part of a chain" with (2) "30 or more establishments nationally," including a franchise affiliated with such national chain. N.Y.C. Admin. Code § 20-1201. The City has not pointed to a single intrastate chain subject to the Law. In practical effect, then, the Law targets

interstate fast food establishments and the franchises affiliated with them, and leaves *intrastate* fast food establishments unregulated.

Federal law does not allow such an intrusive and targeted invasion of the free flow of interstate commerce. The NLRA preempts "state and municipal regulations of areas that Congress left to the free play of economic forces." *Cannon v. Edgar*, 33 F.3d 880, 885 (7th Cir. 1994). The *Machinists* preemption doctrine, named for the Supreme Court decision recognizing it, "is based on the premise that 'Congress struck a balance of protection, prohibition, and laissez-faire in respect to union organization, collective bargaining, and labor disputes.'" *Chamber of Commerce v. Brown*, 554 U.S. 60, 65 (2008) (quoting *Lodge 76, Int'l Ass'n of Machinists & Aerospace Workers v. Wisc. Emp. Relations Comm'n*, 427 U.S. 132, 140 n.4 (1976)). By imposing certain detailed terms of a collective bargaining arrangement on one particular subset of employers, the Just Cause Law violates that fundamental principle of labor law.

The City's Law also violates the Constitution. Through the Dormant Commerce Clause, the Constitution "limits the power of the States to erect barriers against interstate trade." *Maine v. Taylor*, 477 U.S. 131, 137 (1986) (citation omitted). When a state law "discriminate[s] against interstate commerce 'either on its face or *in practical effect*,'" it is subject to "demanding scrutiny." *Id.* at 138 (emphasis added and citation omitted). The City's Law has discriminatory effects

on interstate commerce. Its burdens fall exclusively on national, out-of-state chains; intrastate competitors are unaffected. The City can offer no justification for such disparate treatment of similarly situated establishments.

The district court's decision upholding the Law departed from these principles. In rejecting preemption, the court appeared to indicate that "substantive labor standards" are *never* preempted, because they do not "regulate the collective bargaining process." SPA17. That is incorrect. "In NLRA pre-emption cases, 'judicial concern has necessarily focused on the *nature of the activities* which the States have sought to regulate, rather than on the *method of regulation* adopted.'" *Brown*, 554 U.S. at 69 (emphasis added and citation omitted). There is little doubt that "invasive and detailed" employment requirements interfere "with the collective-bargaining processes." *Chamber of Commerce v. Bragdon*, 64 F.3d 497, 502 (9th Cir. 1995). The Just Cause Law is a prime example. By imposing contractual terms akin to a collective bargaining agreement in the wake of failed unionization efforts, the City directly interfered with the bargaining processes protected by Congress.

The district court made a similar error in finding no violation of the Commerce Clause. The court believed the Law's scope posed no constitutional concerns because affiliation with a national chain "is simply a neutral metric to describe the scale of the enterprise that must comply with the Law." SPA24. The Commerce Clause is not so easily circumvented. It protects against laws with a "discriminatory

impact on interstate commerce," regardless whether the law facially discriminates or reflects a discriminatory purpose. *Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 352 (1977) (emphasis added).

The district court's decision creates a blueprint for state and local governments to bypass the critical limits imposed by the NLRA and the Commerce Clause, at great costs to businesses across the nation. The Just Cause Law imposes significant burdens on employers, particularly franchise owners that operate under narrow profit margins. It also makes employment decisions much more costly at a time when businesses—particularly food establishments—face serious hurdles in staffing. This Court should reverse.

ARGUMENT

I. THE NLRA PREEMPTS THE JUST CAUSE LAW

A. *Machinists* Preemption Invalidates All Laws That Undermine The Collective Bargaining Process

In enacting the NLRA, "Congress implicitly mandated two types of pre-emption as necessary to implement federal labor policy." *Brown*, 554 U.S. at 65. *Machinists* preemption (at issue here) prevents States from regulating "conduct that Congress intended 'be unregulated because left to be controlled by the free play of economic forces.'" *Id.* (citation omitted). Underlying *Machinists* preemption is the recognition that "Congress struck a balance of protection, prohibition, and laissez-fair in respect to union organization, collective bargaining, and labor disputes."

Machinists, 427 U.S. at 140 n.4. Accordingly, state laws that regulate "within 'a zone protected and reserved for market freedom'" are preempted. *Brown*, 554 U.S. at 66 (citation omitted).

Machinists preemption applies to laws that directly regulate the mechanics of the collective bargaining process. Courts have thus held preempted state laws that "prohibit[] . . . economic weapons of self-help, such as strikes or lockouts." *Golden State Transit Corp. v. City of Los Angeles*, 475 U.S. 608, 614-15 (1986). Such intrusions into the collective bargaining process exert "considerable influence upon the substantive terms on which the parties contract," contrary to the balance Congress struck in the NLRA. *Machinists*, 427 U.S. at 143.

In addition, *Machinists* preemption invalidates substantive labor standards that intrude on the collective bargaining process. As multiple courts of appeals have recognized, "stringent" substantive labor standards undercut the "goals of the NLRA" by effectively substituting the state for the bargaining representative. *520 S. Mich. Ave. Assocs. v. Shannon*, 549 F.3d 1119, 1136 (7th Cir. 2008); *see also Bragdon*, 64 F.3d at 502-04. Detailed "substantive requirements could be so restrictive as to virtually dictate the results of the contract," *Bragdon*, 64 F.3d at 501, contravening "the very freedom of contract that is a fundamental policy of the NLRA," *Derrico v. Sheehan Emergency Hosp.*, 844 F.2d 22, 29 (2nd Cir. 1988). Put simply, "the objective of allowing the bargaining process to be controlled by the

free-play of economic forces can be frustrated by the imposition of substantive requirements." *Bragdon*, 64 F.3d at 501.

Take *Shannon*, for example. There, the Illinois Legislature enacted a law that gave certain hotel employees in Cook County mandatory rest days and breaks, created remedies for violations (including attorney's fees and costs), and shifted the burden of proof in administrative proceedings. 549 F.3d at 1121-22. At the time, certain hotel employees were engaged in a work stoppage as part of collective bargaining negotiations. The Seventh Circuit held the law preempted under *Machinists*, reasoning that it effectively "overrode the local bargaining process by imposing confining requirements on one occupation, in one industry, in one county." *Id.* at 1134. The invasion of collective bargaining was no different than if the Illinois legislature had curtailed one side's bargaining weapons in order to procure the same substantive outcome through negotiations—an outcome which "would be very difficult for any union to bargain for" under market conditions. *Id.* at 1134.

The Ninth Circuit's decision in *Bragdon* is similar. In that case, the court held preempted a state law establishing a "prevailing wage" on certain "private construction projects" because it undermined the collective bargaining process. 64 F.3d at 498.

A substantive labor standard is saved from preemption only if it qualifies as a "*minimum* substantive labor standard[]" that is "consistent with the legislative goals

of the NLRA." *Rondout Elec., Inc. v. NYS Dep't of Labor*, 335 F.3d 162, 167 (2d Cir. 2003) (emphasis added). Minimum labor standards are not preempted because they (1) "affect union and nonunion employees equally," (2) do not "discourage the collective-bargaining processes that are the subject of the NLRA," and (3) do not have "any but the most indirect effect on the right of self-organization established in the [Act]." *Metro. Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 755 (1985). This Court, for example, held non-preempted a state law requiring that home care aides be paid minimum wage, as a condition of eligibility for Medicaid reimbursement. *See Concerned Home Care Providers, Inc. v. Cuomo*, 783 F.3d 77, 86 (2d Cir. 2015); *see also Metro. Life*, 471 U.S. at 755 (state law requiring certain health insurance plans to cover mental health care non-preempted minimum labor standard).

But when a state or local law "intrudes on the collective bargaining process," it is preempted. *Shannon*, 549 F.3d at 1134. "[I]nvasive and detailed" state laws imposing "terms of employment that would be very difficult for any union to bargain for" interfere with "the collective bargaining process." *Concerned Home Care*, 783 F.3d at 86 n.8 (citation omitted). Employment standards that target a particular industry or geographical area are particularly suspect, because they encourage "employers or unions to focus on lobbying at the state capital instead of negotiating at the bargaining table." *Shannon*, 549 F.3d at 1132-33. In the end, it is not the role

of a state or local government to "substitute[] itself as the bargaining representative," *id.* at 1136, no matter its view about the proper outcome of a labor dispute.

B. The Just Cause Law Is Preempted Under *Machinists*

1. The Just Cause Law Is Preempted

The City's Just Cause Law is preempted under *Machinists* because it impermissibly intrudes on the collective bargaining process. It imposes stringent and detailed standards on one subset of employers within one specific industry. In doing so, it subverts the bargaining process by decreeing a mandatory set of contractual terms similar to those found in a collective bargaining agreement and by reshaping the parties' underlying incentives to pursue bargaining in the first place. The Law is thus preempted because it (1) mandates strict and detailed labor standards, (2) on a specific subset of employers within one industry, and (3) distorts the parties' approach toward collective bargaining.

First, the Law's requirements are "invasive and detailed"—not minimal. *Concerned Home Care*, 783 F.3d at 86 n.8. The Just Cause Law affects nearly every aspect of the employer-employee relationship. Most obviously, it establishes new terms on which employees can be discharged or have their hours reduced by 15% or more—requiring that employers establish "just cause" or a "bona fide economic

reason." N.Y.C. Admin. Code § 20-1272(a).[2] That overrides the longstanding "legal presumption that workers and employers may freely terminate their employment relationships 'at will.'" David H. Autor et al., *Do Employment Protections Reduce Productivity? Evidence From U.S. States* 3 (Nat'l Bureau of Econ. Rsch., Working Paper No. 12860, 2007), https://bit.ly/3npqFrc.

But the Law goes even further. Fast food employers must establish written "progressive discipline" policies providing "a graduated range of reasonable responses to a fast food employee's failure to satisfactorily perform such fast food employee's job duties." N.Y.C. Admin. Code §§ 20-1271, 1272(c). Employers have five days to provide "a written explanation to the fast food employee of the precise reasons for their discharge" and, in a subsequent proceeding concerning the discharge, the "fact-finder" must limit their evaluation of the discharge to that "written explanation." *Id.* § 20-1272(d). Moreover, discharges or hours reductions for a "bona fide economic reason" must be "done in reverse order of seniority" and "employees with the greatest seniority shall be retained the longest and reinstated or restored hours first." *Id.* § 20-1272(h).

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[2] The Law defines these terms narrowly. "Just cause means the 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." N.Y.C. Admin. Code § 20-1271. And "bona fide economic reason" is defined as "the full or partial closing of operations or technological or organizational changes to the business in response to the reduction in volume of production, sales, or profit." *Id.*

The Just Cause Law also imposes a novel and intrusive remedial regime. It gives employees three routes for disputing their discharge: an administrative complaint in New York City's Department of Consumer and Worker Protection; a civil lawsuit in court; or a City-designed arbitration process. *See id.* §§ 20-1207, 1211, 1273. If the employee chooses arbitration, the employer is compelled to participate, *id.* § 20-1273(i), notwithstanding the "fundamental principle that 'arbitration is a matter of consent,'" *Viking River Cruises, Inc. v. Moriana*, No. 20-1573, slip op. at 18 (U.S. June 15, 2022) (citation omitted). And the Just Cause Law authorizes *class* arbitration, even though the Supreme Court has recognized that class arbitration is so fundamentally different from ordinary bilateral arbitration that even a party who has consented to arbitration cannot be obligated to participate in class arbitration absent further consent. *Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407, 1416 (2019); N.Y.C. Admin. Code § 20-1273(a). There is more: the Law also authorizes an award of attorney's fees and costs. *Id.* And, finally, it shifts the burden of proof, requiring the employer to "prov[e] just cause or a bona fide economic reason" supporting the discharge or hours reduction. *Id.* § 20-1272(e).

Any one of these provisions is the kind of "stringent" and "detailed" labor standard that implicates *Machinists*; collectively, they mark a serious intrusion into the collective bargaining process preempted by the NLRA. These provisions are *more* invasive than the laws found preempted in *Shannon* and *Bragdon*. *Shannon*

addressed a law that required meal and rest breaks for hotel employees; the law did not completely overhaul the terms of hiring and firing, impose detailed disciplinary policies, or compel arbitration. As for *Bragdon*, the law there established a "prevailing wage" on "private construction projects"; it contained few of the intrusive features at issue here.

The provisions are also far more intrusive than what this Court upheld in *Concerned Home Care*. The law there simply "set[] the minimum amount of total compensation that employers must pay home care aides" to receive "Medicaid reimbursements." 783 F.3d at 80. The Just Cause Law, by contrast, reshapes the employer-employee relationship by severely restricting the terms on which employees can be discharged, imposing detailed disciplinary policies, authorizing novel (and nonconsensual) arbitral proceedings, and creating new remedial regimes. In this Court's words, the Law "establish[es] terms of employment that would be very difficult for any union to bargain for"—a "much more invasive and detailed interference with the collective bargaining process" than a minimum-wage requirement. *Id.* at 86 n.8.

Second, the Law "targets particular workers in a particular industry." *Shannon*, 549 F.3d at 1130, 1133. Indeed, it goes beyond that—not only does the Just Cause Law target fast food restaurants, it applies only to a subset of employers (those with 30 or more establishments nationally) within that industry. N.Y.C.

Admin. Code § 20-1201. While such narrow targeting does not call for preemption standing alone, *Concerned Home Care*, 783 F.3d at 86, it does indicate that the law may not "constitute a genuine minimum labor standard" exempted from preemption, *Shannon*, 549 F.3d at 1130; *cf. Metro. Life* 471 U.S. at 753 (discussing "state laws of general application"). Especially when detailed and invasive, targeted labor standards interfere with the bargaining process by allowing the state to "effectively substitute[] itself as the bargaining representative." *Shannon*, 549 F.3d at 1136.

That is precisely what happened here. After unsuccessful efforts to unionize the fast food industry, the City decided to impose certain terms typically found in a collective bargaining agreement as a matter of law. *See* Opening Br. 6-8 & n.1. In so doing, the City directly interfered with the bargaining processes protected by the NLRA. The City's imposition of these substantive terms in the aftermath of failed bargaining is no different than if the City had restricted one side's bargaining tools in an effort to "impos[e] a contract on the parties, a notion that has always been anathema to the NLRA." *Derrico*, 844 F.2d at 29.

Third, the Just Cause Law undermines the bargaining process by distorting the decision-making protected by the NLRA. On the one hand, the law pressures employers to agree to collective bargaining. The Supreme Court has long recognized that an employer's agreement to submit to binding arbitration in a collective bargaining agreement creates an implied "no-strike obligation" on the part

of the employees. *Boys Mkts., Inc. v. Retails Clerks Union, Local 770*, 398 U.S. 235, 247-48 (1962). The Just Cause Law, in contrast, imposes mandatory arbitration on employers without a corresponding no-strike obligation on employees (*i.e.*, without any *quid pro quo*). That puts pressure on employers to pursue collective bargaining agreements to obtain the no-strike benefit—a kind of pressure directly analogous to that imposed by laws restricting economic weapons during the bargaining process. *See, e.g.*, *Golden State*, 475 U.S. at 617-18; *Machinists*, 427 U.S. at 149-50. This would yield differential treatment of union and non-union employees: Union employees would be subject to the no-strike obligation; non-union employees would be exempt. *Cf. Metro. Life*, 471 U.S. at 755 (non-preempted "[m]inimum state labor standards affect union and nonunion employees equally").

On the other hand, the Just Cause Law discourages bargaining on the part of employees. The cornerstone of a collective bargaining agreement "is the requirement that there be 'just cause' for discipline." Roger I. Abrams & Dennis R. Nolan, *Toward A Theory Of 'Just Cause' In Employee Discipline Cases*, 1985 Duke L.J. 594, 595 (1985). By mandating "just cause" for any discharge or hours reduction, the City has withdrawn one of the primary drivers for employees to unionize and pursue collective bargaining. Why would an employee agree to a collective bargaining agreement when doing so would *diminish* his rights by limiting his ability to strike during arbitration?

Because the Just Cause Law both "encourage[s]" and "discourage[s] the collective bargaining processes that are the subject of the NLRA," it is not a minimum labor standard exempt from preemption. *Metro. Life*, 471 U.S. at 755.

2. The District Court's Decision To The Contrary Is Flawed

The district court declined to find the Just Cause Law preempted on the apparent view that substantive labor standards *never* contravene the NLRA. It did not deny that the substantive labor standards here are detailed, intrusive, and targeted. Nor did it deny that the Law would be preempted in the Seventh and Ninth Circuits, under *Shannon* and *Bragdon*, respectively. The court rested instead on the mistaken belief that *Concerned Home Care* required a different result. SPA20-21.

This Court has never disagreed that stringent substantive labor standards that interfere with the bargaining process, as with direct restrictions of bargaining, are preempted under *Machinists*. And it has never squarely addressed the reasoning in *Shannon* and *Bragdon*. *Concerned Home Care* merely distinguished those decisions *on their facts*. Regarding *Bragdon*, this Court noted that the law there

> not only prescribed a particular level of total compensation, but also dictated "the division of the total package that is paid in hourly wages directly to the worker and the amount paid by the employer in health, pension, and welfare benefits for the worker"—a "much more invasive and detailed" interference with the collective-bargaining process than the Wage Parity Law's minimum total compensation requirement.

Concerned Home Care, 783 F.3d at 86 n.8 (quoting *Bragdon*, 64 F.3d at 502). As for *Shannon*, this Court explained that the law there "'establish[ed] terms of

employment that would be very difficult for any union to bargain for,' including detailed break requirements and changes to the burden of proof and to damages calculations in retaliation lawsuits"—a "substantially more targeted invasion of the bargaining process than the Wage Parity Law's minimum compensation requirement." *Id.* (quoting *Shannon*, 549 F.3d at 1134). And as a further distinction, the Court emphasized that the law in *Concerned Home Care* applied only to Medicaid-reimbursed care, raising fewer concerns about active state interference in the labor process. The Court thus left open whether there are "labor standards that are so finely targeted that they impermissibly intrude upon the collective bargaining process." *Id.* at 86.

This appeal presents that open question because the Just Cause Law imposes precisely such intrusive and targeted standards. It resembles the law in *Shannon*, which this Court recognized interferes with collective bargaining, in that it imposes "stringent" labor standards and changes "the burden of proof." 549 F.3d at 1134-35. And it resembles the law in *Bragdon* in that it imposes "detailed" mandatory terms on specific workers in a specific industry. *See* 64 F.3d at 502.

Indeed, as discussed, it is *more* intrusive than the laws in *Shannon* and *Bragdon*—reshaping nearly every aspect of the employer-employee relationship. As such, the Law is not a "minimum employment standard" with nothing "but the most indirect effect on the right of self-organization established in the Act." *Metro. Life*,

471 U.S. at 755. The Law interferes with collective bargaining by imposing employment terms akin to a collective bargaining agreement, interfering with "the very freedom of contract that is a fundamental policy of the NLRA." *Derrico*, 844 F.2d at 29. To hold otherwise would create a clear and unnecessary split with the Seventh and Ninth Circuits.

C. The District Court's Ruling Creates A Blueprint For Cities And States To Impede The Employer-Employee Relationship

The district court's decision, if upheld, will have considerable implications for businesses and employers. The court appeared to believe that *no* substantive labor standards are preempted under *Machinists*. If accepted, that view will enable local and state governments to dictate the results of labor and employment disputes by codifying one side's bargaining position into law. Take the facts of this case: the City took the novel step of enacting key terms of a collective bargaining agreement at the behest of a union and as part of a union's effort to pressure employers to favor unionization. *See* Opening Br. 46-48. But it is not hard to think of others.

Imagine a newspaper's management finds itself in a protracted labor dispute with its employees, leading to a work stoppage. The City wants the news printed, so it enacts one side's final offer through legislation, labeling it a "minimum labor standard." Under the district court's rationale, the law may well survive *Machinists*. But it interferes with the labor process just as much as if the City had outlawed the work stoppage or required the newspaper to reach an agreement. *Cf. Golden State*,

475 U.S. at 617-18 (holding preempted local law conditioning renewal of taxicab franchise on settlement of labor dispute). It does not matter if the City is motivated by a purported concern about "the economic weakness of the affected party"; it cannot "attempt to introduce" its own "standard of properly balanced bargaining power." *Machinists*, 427 U.S. at 149-50 (citations omitted).

Allowing state and local governments to legislate the terms of collective bargaining agreements upsets the balance Congress struck and intrudes into "a zone protected and reserved for market freedom." *Brown*, 554 U.S. at 66 (citation omitted). Properly construed, *Machinists* preemption preserves these principles and protects employers and employees alike from efforts to undermine the collective bargaining process.

II. THE COMMERCE CLAUSE BARS THE JUST CAUSE LAW

A. The Commerce Clause Requires Demanding Scrutiny Of Laws With Discriminatory Effects On Interstate Commerce

The Commerce Clause grants Congress the power "[t]o regulate Commerce with foreign Nations and among the several States, and with Indian Tribes." U.S. Const. art. I, § 8, cl. 3. While phrased in terms of authority conferred on Congress, the clause has long been understood to "prohibit[] state laws that unduly restrict interstate commerce." *Tenn. Wine & Spirits Retailers Ass'n v. Thomas*, 139 S. Ct. 2449, 2459 (2019). Underlying the Dormant Commerce Clause is the Framers' view "that in order to succeed, the new Union would have to avoid the tendencies toward

economic Balkanization that had plagued relations among the Colonies and later among the States under the Articles of Confederation." *Id.* at 2461. Consistent with that history, the Commerce Clause "prevents the States from adopting protectionist measures and thus preserves a national market for goods and services." *Id.* at 2459 (citation omitted).

As "the primary safeguard against state protectionism," *id.* at 2461, the Commerce Clause is naturally concerned not just with overt discrimination against interstate commerce, but also with state laws that have the effect of discriminating against interstate commerce. After all, the Framers were not worried about eradicating some abstract harm that might flow from the bare act of drawing distinctions between in- and out-of-state goods, services, or suppliers; they were concerned with eradicating barriers to interstate trade. *See, e.g.*, The Federalist No. 7, at 62-63 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

Consistent with those commonsense principles, the Supreme Court has held that a state law is virtually *per se* invalid if it discriminates against interstate commerce "*either* on its face *or* in practical effect." *Taylor*, 477 U.S. at 138 (emphasis added); *see also Chem. Waste Mgmt., Inc. v. Hunt*, 504 U.S. 334, 344 n.6 (1992) ("legislation constitutes economic protectionism" if it has "either discriminatory purpose . . . or discriminatory effect"). The Court has not hesitated

to invalidate "facial[ly] neutral[]" state laws that have real-world "discriminatory impact[s] on interstate commerce." *Hunt*, 432 U.S. at 352-53.

In *Hunt*, for example, the Court considered a North Carolina law that required apples sold in the State to bear "either the applicable USDA grade" for quality "or none at all." 432 U.S. at 337. The law was facially neutral: It did not expressly treat out-of-state apples any differently than in-state apples. But it had "disparate effect[s]" on apples shipped from Washington, which had its own unique grading system (*e.g.*, fancy, extra fancy) to appeal to consumers. *Id.* at 351. The Court held the law invalid under the Commerce Clause because it had "the practical effect" of "discriminating against" interstate commerce. *Id.* at 350. In particular, the statute "raise[d] the costs of doing business in the North Carolina market for Washington apple growers and dealers, while leaving those of their North Carolina counterparts unaffected." *Id.* at 351.

Courts of appeals have likewise recognized that facially neutral laws with discriminatory effects are subject to heightened scrutiny under the Commerce Clause. In *Cachia v. Islamorada*, the Eleventh Circuit invalidated a local law prohibiting "formula restaurants." 542 F.3d 839, 842 (11th Cir. 2008). "While the ordinance does not facially discriminate between in-state and out-of-state interests," the court explained, "its prohibition of restaurants operating under the same name, trademark, menu, or style is not evenhanded in effect, and disproportionately targets

restaurants operating in interstate commerce." *Id.* at 843; *see also Cherry Hill Vineyards, LLC v. Lilly*, 553 F.3d 423, 432-33 (6th Cir. 2008) (holding that state law requiring small wineries to affiliate with wholesalers was subject to heightened scrutiny because it "makes it economically and logistically infeasible for most consumers to purchase wine from out-of-state small farm wineries").

B. The Just Cause Law Violates The Commerce Clause

1. The Just Cause Law Is Invalid Under The Commerce Clause

The Just Cause Law has a "discriminatory effect" on interstate commerce and thus is subject to a "virtually per se rule of invalidity." *Chem. Waste*, 504 U.S. at 344 n.6 (citation omitted). The Law applies only to restaurants that are (1) "part of a chain" with (2) "30 or more establishments nationally," including a franchise that chooses to affiliate with such a chain. N.Y.C. Admin. Code § 20-1201. Although facially neutral as to state residence, those criteria yield clear discriminatory effects on interstate commerce. Neither the district court nor the City could identify a *single* covered employer with only in-state establishments. As a practical matter, then, the coverage formula limits the Just Cause Law *exclusively* to interstate restaurant chains and franchises doing business with interstate restaurant chains. Like the apple regulation at issue in *Hunt*, the Law "rais[es] the costs of doing business" in New York City for interstate chains, "while leaving" their intrastate "counterparts unaffected." 432 U.S. at 351.

A simple example underscores the discriminatory effects. A national chain with only one restaurant in New York City and twenty-nine restaurants outside of New York is subject to the Law's stringent requirements; yet a chain with twenty-nine restaurants in New York City and none in other States is exempt. The disparate treatment is just as clear for franchisees, who face the prospect of burdensome compliance with the Just Cause Law if they choose to affiliate with a national chain, but would be exempt if they remain independent or affiliate with a smaller local chain. Despite being similarly situated competitors, local establishments receive preferential treatment vis-à-vis establishments affiliated with national chains. That is unquestionably discriminatory in effect and, as such, subject to heightened scrutiny under the Commerce Clause.

The Just Cause Law fails such scrutiny. When a law discriminates against interstate commerce, "the burden falls on the State to demonstrate both that the statute 'serves a legitimate local purpose,' and that this purpose could not be served as well by available nondiscriminatory means." *Taylor*, 477 U.S. at 138 (citations omitted). The City has not meaningfully attempted to satisfy that burden. Nor could it do so given the legion of nondiscriminatory means available to further any interest in modifying the working conditions of employees in the fast food industry.

2. The District Court's Decision To The Contrary Is Flawed

The district court's decision essentially negates the Dormant Commerce Clause's effects test. The court seemed to think the Law posed no Commerce Clause problem because it was not facially or purposefully discriminatory. *See, e.g.*, SPA24 (noting that the Law "makes no *express* distinction between national fast food chains and chains with more than thirty locations that are located solely within New York State" (emphasis added)). According to the district court, the Just Cause Law "simply [uses] a neutral metric to describe the scale of the enterprise that must comply with the law." *Id.* If that were the governing rule, the effects test would be a dead letter—the universe of facially neutral laws that have the effect of discriminating against interstate commerce would be a null set. That would, in turn, limit the Commerce Clause to policing only the easiest kind of discrimination for States to avoid, while doing nothing to preclude more subtle means to accomplish the ends with which the Commerce Clause is concerned.

The district court did briefly acknowledge the Law's discriminatory effects, noting "the City's inability to identify any intrastate restaurant brand or franchise that is governed by the law." SPA24. But notwithstanding that recognition, the court inexplicably concluded that "the Law does not benefit in-state restaurant chains 'at the expense of out-of-state competitors.'" *Id.* (citation omitted). That is exactly what the Just Cause Law does. It imposes one set of rules for in-state

restaurant chains (no Just Cause Law) and a different set for out-of-state restaurant chains (the Just Cause Law).

Nor could the district court offer any persuasive distinction between this case and the Eleventh Circuit's decision in *Cachia*. As the court recognized, *Cachia* held that a law excluding "'formula restaurants' had the 'practical effect of discriminating against interstate restaurants.'" SPA25 (quoting *Cachia*, 542 F.3d at 843). The court did not deny that the Just Cause Law drew a similar distinction, with a similar discriminatory impact. The court instead reasoned that the law in *Cachia* "prohibited national chain restaurants from entering local commerce," whereas the Just Cause Law merely regulates the "'methods of operation'" for fast food restaurants. *Id.* (citation omitted). But a law need not "prohibit" interstate commerce to have discriminatory effects. As *Hunt* explained, a law that "rais[es] the costs of doing business" for out-of-state businesses is discriminatory. 432 U.S. at 351. Just so here: the Just Cause Law raises the costs for fast food establishments affiliated with interstate chains, but not for those that are independent or local.

Finally, the district court referenced this Court's decision in *Vizio, Inc. v. Klee*, 886 F.3d 249 (2d Cir. 2018). *See* SPA25. *Vizio* involved a challenge to a television recycling fee calculated based on the seller's "national market share." 886 F.3d at 253. In upholding the law against a Commerce Clause challenge, the Court explained that the law's reference to "national market share" in calculating fees did

not "regulate[]—thereby placing a burden on—interstate commerce." *Id.* at 255. But *Vizio* does not stand for the principle that distinctions based on national market share (or number of establishments nationally) with discriminatory effects are immune from Commerce Clause scrutiny. To the contrary, the Court explained that Vizio had not "alleged the actual—or potential—existence of any in-state manufacturer that is less negatively affected by the national market share approach." *Id.* at 260. Here, there is clear evidence that local or in-state chains are treated better than out-of-state chains. *Vizio* does not require the Court to ignore those discriminatory effects simply because they result from a coverage formula drawn in part based on national data.

3. The District Court's Decision Allows State And Local Governments To Use Facially Neutral Proxies To Discriminate Against Interstate Commerce

The district court's ruling threatens to upend the principle at the heart of the Dormant Commerce Clause—that *all* state laws that discriminate against interstate commerce, whether facially neutral or not, warrant heightened scrutiny. If ready-made proxies for discrimination like association with a national chain suffice to render a law's actual effects on interstate commerce irrelevant, then interstate businesses will become easy targets for protectionist measures. For when "the burden of state regulation falls on interests outside the state," the pressure to impose that burden "is unlikely to be alleviated by the operation of those political restraints

normally exerted when interests within the state are affected." *S. Pac. Co. v. State of Ariz. ex rel. Sullivan*, 325 U.S. 761, 767 n.2 (1945) (citations omitted). The Dormant Commerce Clause guards against that impulse, ensuring that protectionist measures are not allowed to undermine the "national market for goods and services" envisioned by the Constitution. *Tenn. Wine*, 139 S. Ct. at 2459 (citation omitted). By weakening, if not outright eliminating, the discriminatory effects test, the decision below declares open season for the kinds of protectionist laws the Commerce Clause forbids.

III. THE JUST CAUSE LAW IMPOSES SIGNIFICANT COSTS ON BUSINESSES

The Just Cause Law's infringement of federal law is not just a matter of abstract principles—its intrusion on the employer-employee relationship and disparate treatment of interstate businesses will impose significant costs on fast food establishments in New York City. Evidence suggests that employee discharge protections may be detrimental to productivity by distorting employers' hiring and firing decisions. *See* Autor, *supra*, at 24 (analyzing effects of judicially implied wrongful discharge protections). That concern is especially acute here, where the Just Cause Law strictly limits the reasons for discharge and mandates the accompanying procedures. *See supra* at 12-13. For covered fast food employers, discharging any one employee raises the prospect of lengthy and protracted litigation, including mandatory class arbitration and attorney's fees.

The costs are especially significant because they target an industry with narrow profit margins and significant staffing challenges. Given their constraints, food establishments are likely to retain workers who perform poorly or behave inappropriately out of concern for future litigation. *See* Billy Binion, *NYC Bill Would Outlaw Unfair Terminations in the Fast Food Industry*, Reason (Mar. 14, 2019), https://bit.ly/3u5P5cP. The costs are particularly burdensome for local franchises, whose businesses face increased harms from major changes in employment regulations. Emp. Policies Inst., *What's in a (Brand) Name?* (Jan. 2016), https://bit.ly/3yqvRkQ. Some evidence shows that such distortions of employment decisions can lead to increased unemployment, among other economic costs. *See* Stewart J. Schwab et al., *The Costs of Wrongful Discharge Laws*, 88 Rev. of Econ. & Stats. 211, 211 (May 2006).

Now is not the time to impose such intrusive and disproportionate burdens on the food industry. Fast food restaurants, like the restaurant industry as a whole, are facing an "acute staffing shortage." Aaron Gregg & Hamza Shaban, *Fast-Food customers are back, but workers are not. It's triggering major change.*, Wash. Post (Sept. 17, 2021), https://wapo.st/3a3NL3G; *see also* Stephanie Ferguson, *Understanding America's Labor Shortage: The Most Impacted Industries*, U.S. Chamber of Commerce (June 3, 2022), https://bit.ly/3ORqYXh. By making personnel decisions substantially more complicated and expensive, the

Just Cause Law threatens to exacerbate the existing crisis. And it does so during a time when the protections it affords are least necessary, as employees have more employment options than ever. *See* Jeff Cox, *There are now a record 5 million more job openings than unemployed people in the U.S.*, CNBC (Mar. 29, 2022), https://cnb.cx/3ylTVV1.

Those costs are all the more reason to give the Just Cause Law the careful scrutiny required by federal law. Though from different sources and for different reasons, the NLRA and the Commerce Clause each ensures the free flow of interstate commerce. *See Machinists*, 427 U.S. at 132, 140 (protecting conduct Congress intended "to be controlled by the free play of economic forces"); *Tenn. Wine*, 139 S. Ct. at 2460 (preserving "free trade among the States"). The Just Cause Law contravenes those protections.

CONCLUSION

The judgment of the district court should be reversed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify, pursuant to Federal Rules of Appellate Procedure 29(a)(4)(G) and 32(g), that this brief complies with the type-volume limitation of Circuit Rules 29.1(c) and 32.1(a)(4) because, excluding the portions of the brief exempted by Federal Rule of Appellate Procedure 32(f), the brief contains 6963 words, as counted by Microsoft Word.

I further certify that this brief complies with the typeface and type style requirements of Federal Rule of Appellate Procedure 32(a)(5) and (a)(6) because it has been prepared using Microsoft Word 2016 in a proportionally spaced typeface (Times New Roman, 14 point).

/s/ Melissa Arbus Sherry
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Dated: June 29, 2022