22-491

In the United States Court of Appeals
FOR THE SECOND CIRCUIT

RESTAURANT LAW CENTER,
NEW YORK STATE RESTAURANT ASSOCIATION,
Plaintiffs - Appellants,

v.

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 L. Cote

BRIEF OF APPELLANTS & SPECIAL APPENDIX

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CORPORATE DISCLOSURE STATEMENT

In accordance with Federal Rule of Appellate Procedure 26.1 of the Federal Rules of Appellate Procedure, counsel for Restaurant Law Center and New York State Restaurant Association state that neither Appellant has a parent corporation, nor does any publicly held corporation own 10% or more of either Appellant.

Dated: June 22, 2022

s/ William R. Peterson
William R. Peterson

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INTRODUCTION

In the National Labor Relations Act ("NLRA"), Congress created the framework for unions to organize and collectively bargain with employers. An entire body of federal labor law has developed governing that process, favoring leaving the content of labor negotiations to the fair play of economic forces. Yet, unsatisfied with the results of Congress's favored free-market approach, the New York City Legislature, at the prompting of the Service Employees International United ("SEIU"), has upended the federal process by imposing draconian requirements abrogating at-will employment, including but not limited to a compelled arbitration mechanism and a presumption of guilt, for all terminations and reductions in hours for (some) fast-food workers in New York City. *See* NYCC §§ 20-1271 to 1275 (the "Just Cause Laws" or the "Laws"). Not only can the reasons behind every employment separation now be second-guessed, but so can the procedures. Employers must follow detailed requirements regarding progressive discipline, investigations, written justifications, record storage, reverse-seniority layoffs, and more.

Federal labor law forbids this kind of intrusive local regulation. *Machinists* preemption bars local governments from interfering in the bargaining process by enacting laws that intrude into traditional bargaining terms, create pressure to unionize, or otherwise restrict the use of economic weapons for bargaining. *Lodge*

76, Int'l Ass'n of Machinists v. Wis. Emp't Relations Comm'n, 427 U.S. 132, 140, 146 (1976). These New York City requirements are not, as the district court erroneously held, mere "minimum labor standards" that may survive NLRA preemption. They impose typical collective-bargaining terms on targeted fast-food employers despite no collective-bargaining agreement between those employers and an employee union. The resulting legislation is an unprecedented intrusion into the core of the employer-employee relationship designed to tip the scales in a manner no local or state government has ever done. The district court erred by leaving this entire framework in place, improperly analogizing to much less intrusive laws like minimum-wage requirements, and ignoring how the unprecedented and intrusive nature of the Just Cause Laws does not comply with this Court's case law. If these Laws are left in place, federal labor law and the Supreme Court's *Machinists* preemption doctrine will suffer serious blows.

The Just Cause Laws also violate the dormant Commerce Clause. The NYC Legislature was unwilling to impose the burdens of the Just Cause Laws on all fast-food restaurants in the City. Although they employ facially neutral criteria, the Just Cause Laws apply only to fast-food restaurants engaged in interstate commerce: national restaurant chains and franchisees of national restaurant chains. Purely intrastate restaurant chains (and franchisees of such chains) are unaffected. Even if federal labor law allowed the NYC Legislature to interfere with the employer-

employee relationship as here, it cannot do so in a manner that has a discriminatory effect on interstate commerce. *Hunt v. Washington State Apple Advert. Comm'n*, 432 U.S. 333, 350 (1977). The district court erred in relying solely on the Laws' facial neutrality to uphold them—effective discrimination likewise violates the dormant Commerce Clause under governing precedent.

In exercising *de novo* review of the district court's decision, this Court should reverse and hold that the Just Cause Laws are preempted under *Machinists* and violate the dormant Commerce Clause.

JURISDICTION

The district court had jurisdiction over this action under Section 1331 and Section 1343(a)(3)-(4) of Title 28 of the United States Code.

This appeal is from a final judgment disposing of all claims entered on February 11, 2022. SPA32. Appellants Restaurant Law Center and New York State Restaurant Association filed a timely notice of appeal on March 8, 2022. JA1797. This Court has jurisdiction over this appeal under Section 1291 of Title 28 of the United States Code.

ISSUES PRESENTED

The SEIU drafted—and the New York City Legislature enacted—a set of laws requiring targeted fast-food employers to adopt intrusive rules governing the employer-employee relationship, including regarding discipline, justifications for termination, hours reductions, layoffs, and rehiring. The requirements are drawn from collective bargaining agreements, and the Laws' sponsors concede their goal is to encourage unionization and provide "what a union provides" to certain fast-food workers. JA49-50 ¶¶ 20, 24. These laws are unprecedented.

In addition, the Laws impose their onerous requirements only on interstate chain restaurants, not on purely intrastate stores. JA448 ¶ 37.

The issues presented are:

1. Whether the district court erred in holding the Just Cause Laws are permissible "minimum labor standards" (such as minimum wage laws), rather than impermissible intrusions into the collective-bargaining process preempted by the NLRA under *Machinists*.

2. Whether the district court erred in holding the Just Cause Laws do not violate the dormant Commerce Clause, given that they discriminate against interstate commerce in their effect.

BACKGROUND

The SEIU Drafts the Just Cause Laws

On December 15, 2020, at the request of the SEIU, the New York City Council passed two bills, Int. No. 1396-A and Int. No. 1415-A, codified at NYCC §§ 20-1271 to 1275—the Just Cause Laws. These bills were drafted, at least in part, by the SEIU and are expressly intended to aid the SEIU's years-long, effort to unionize the fast-food industry.[1] Mayor Bill de Blasio signed the bills into law, and they largely took effect on July 4, 2021. JA46 ¶¶ 2-3.

SEIU representatives lobbied the City to advance its unionization efforts, and City Councilmember Brad Lander, sponsor of the Just Cause Laws, strategized with those representatives to further those efforts. "Strategy" emails between Lander and union representatives expressly acknowledge that the "principle of 'just cause' is the keystone of the collective bargaining agreement" and marks "a sharp dividing line between union and nonunion or at-will workers." JA49 ¶ 20. As Lander openly

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[1] *See* Steven Greenhouse, *'We're organizing to improve lives': New York fast-food workers push to unionize*, THE GUARDIAN (Sept. 30, 2019), https://www.theguardian.com/us-news/2019/sep/30/new-york-chipotle-mcdonalds-union-fight-for-15 (noting that Local 32BJ of the SEIU engaging in efforts to unionize fast-food workers in New York and "intent on unionizing"); Lela Nargi, *An Inside Look at Union Organizing in the Fast-Food Industry*, CIVIL EATS (Dec. 7, 2021), https://civileats.com/2021/12/07/an-inside-look-at-union-organizing-in-the-fast-food-industry/ (noting the SEIU "has been attempting to organize fast-food workers for the last few years").

admitted, the goal of these Laws was to get fast-food workers "part of what a union provides." JA50 ¶ 24.

Union representatives intended the laws to further the SEIU's "strategy for organizing fast food workers," JA155, and encourage fast-food employees to "organize together with other workers." JA50 ¶ 28. Union representatives "pitched" and assisted in drafting the legislation, JA48 ¶¶ 15-17, and City Council staff readily incorporated edits from union attorneys and strategic campaign coordinators throughout the process, *see* JA48-49 ¶¶ 12-22. The SEIU's involvement was so great as to raise objections from a City Council attorney regarding the SEIU staff's inclusion in meetings about the legislation, but Lander's staff "fought hard" to include him. JA48 ¶ 17. At one point, the union proposed new language on progressive discipline, and Lander approved it in just over two hours. JA86 (Lander approving an SEIU 32BJ representative's suggested new language to "deal with [a] progressive discipline issue"). Lander described the sponsors of the bill as himself, SEIU-affiliated "Fast Food Justice, SEIU 32-BJ, and Council Member Adrienne Adams." JA50 ¶ 24.

The Just Cause Laws

The resulting laws are, in effect, a collective bargaining agreement imposed by legislative fiat. At a high level, the Laws limit when certain fast-food employers can "discharge" (defined to a reduction in hours by more than 15%) or layoff their

employees. They also impose a set of detailed requirements for progressive discipline policies, rehiring policies, and post-separation dispute resolution, as outlined below.

Targeted Fast-Food Employers—The Just Cause Laws' requirements do not apply to all restaurants or even all fast-food restaurants. They govern "fast food employees," which "means any person employed or permitted to work at or for a fast food establishment by any employer that is located within the city." NYCC § 20-1201. The statute defines "fast food establishments" to mean:

> [A]ny establishment
>
> (i) that has as its primary purpose serving food or drink items;
>
> (ii) where patrons order or select items and pay before eating and such items may be consumed on the premises, taken out or delivered to the customer's location;
>
> (iii) that offers limited service;
>
> (iv) that is part of a chain; and
>
> (v) that is one of 30 or more establishments nationally, including
>
> > (A) an integrated enterprise that owns or operates 30 or more such establishments in the aggregate nationally or
> >
> > (B) an establishment operated pursuant to a franchise where the franchisor and the franchisees of such franchisor own or operate 30 or more such establishments in the aggregate nationally.

NYCC § 20-1201. This brief refers to these establishments as "Targeted Fast-Food Employers." Other fast-food establishments, no matter their size or profitability, are not subject to these rules. *Id.*

This definition includes numerous interstate restaurant chains. No party has identified any intrastate restaurant chain that would qualify as a "fast food establishment."

Discharge—Employees of Targeted Fast-Food Employers shall not be discharged or have their hours reduced more than 15% "except for just cause or for a bona fide economic reason." NYCC § 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.* § 20-1271 (emphasis added). The Laws provide five *nonexclusive* factors for a factfinder to consider whether a discharge was for just cause, including consideration of the employer's progressive discipline policy. SPA5. When someone is discharged, the employer must provide the employee with a written explanation of "the precise reasons for their discharge" within five days of discharge, and in any subsequent action alleging a violation of this provision, a factfinder is limited to consideration of the employer's written reasons it provided to the employee. SPA6.

Progressive Discipline—Targeted Fast-Food Employers must establish "progressive discipline" policies and provide training on those policies. NYCC § 20-1272(b), (c). The Just Cause Laws require that the policies' response to failure to "satisfactorily perform" job duties "provide[] a graduated range of reasonable

responses . . . from mild to severe, depending on the frequency and degree of the failure." *Id.* § 20-1271.

Before imposing any discipline, a Targeted Fast-Food Employer must conduct "a fair and objective investigation into the job performance or misconduct." *Id.* § 20-1272(b)(4). Employers have been given no guidance on what is required for such an investigation other than that the "scope of investigation depends on the circumstances." JA56 ¶ 51.

Targeted Fast-Food Employers can only terminate employees for "just cause" after utilizing this progressive discipline policy, unless an employee's misconduct represents an "egregious failure by the employee to perform their duties." NYCC § 20-1272(c). The New York City Department of Consumer and Worker Protection ("DCWP") has issued regulations regarding the Just Cause Laws, which limit "egregious" conduct to misconduct like "violence, theft, sexual harassment, race discrimination, or willful destruction of property," 6 N.Y.C. Rules § 7-627.

Layoffs—To lay off employees for non-disciplinary reasons, a Targeted Fast-Food Employer must have a "bona fide economic reason." NYCC § 20-1272(a). The statute requires business records showing "that the closing[] or technological or reorganizational changes are in response to a reduction in volume of production, sales, or profit." *Id.* § 20-1272(g).

Note that there must have been an actual "reduction" in production, sales, or profit before any layoffs. *Id.* A Targeted Fast-Food Employer cannot reorganize its business to earn additional profit (or make additional sales). Nor can it discharge employees (or reduce their hours) because it anticipates a future reduction in production, sales, or profit, or because its operations require more of a certain type of employee or less of another type of employee.

Discharges based on bona fide economic reasons also must be done in "reverse order of seniority . . . so that the employees with the greatest seniority shall be retained the longest." *Id.* § 20-1272(h). Targeted Fast-Food Employers may not consider any other factors when conducting layoffs, such as business need or employees' responsibilities, ability, or skill. *Id.*; *see* JA52 ¶ 33; JA56 ¶¶ 54-55. If a Targeted Fast-Food Employer rehires more employees after a layoff, they must hire back previously laid-off employees before hiring new ones, NYCC § 20-1272(h)—again, no matter what production, sales, or profit justifications may counsel in favor of hiring others.

Mandatory Arbitration & Employers' Presumption of Guilt—Discharged employees can ask their choice of tribunal to second-guess their employers' reasoning, the fairness of the required progressive discipline policies, and whether any investigations were "fair and objective." When an employee sues, the Targeted Fast-Food Employer is presumed guilty and bears the burden to prove "just cause"

or a "bona fide economic reason" by a preponderance of the evidence. NYCC § 20-1272(e).

Fast-food employees can challenge their discharge or hours reduction by filing a complaint with the DCWP, filing a civil action in a court of competent jurisdiction, or bringing a private arbitration proceeding. *Id.* § 20-1272(f). If a fast-food employee decides to proceed with arbitration, including class arbitration, Targeted Fast-Food Employers are compelled to participate, despite having never consented to having their disputes resolved through private arbitration rather than in court. *See id.* § 20-1273. The DCWP determines the number of arbitrators who will sit on the panel. *Id.* § 20-1273(c). If a committee (which includes the parties) cannot select enough arbitrators, the DCWP then selects individuals to serve as arbitrators. *Id.* § 20-1273(d). Any of these dispute-resolution tribunals can impose onerous civil liability and administrative penalties if they find a violation. JA57-58 ¶¶ 65-68.

Appellants Sue the City

Appellant Restaurant Law Center is a public policy organization affiliated with the National Restaurant Association, the largest foodservice trade association in the world. It provides industry-specific guidance for owners, operators, and legal operators through webinars and through its Compliance Library, including providing industry-specific COVID-19 advice and guidance. JA60 ¶ 85 (citing JA97-134). Appellant New York State Restaurant Association is a not-for-profit employer

association that represents food service establishments throughout New York State. It provides a forum for restaurants to exchange ideas and information, participate in creative problem-solving, and receive education. JA60 ¶ 86 (citing JA96-96).

Many of Appellants' members operate fast-food restaurants within New York City, with more than 30 establishments nationwide, and are therefore directly affected and injured by the Laws. JA58-59 ¶¶ 70-78. Appellants' members have been forced to comply with the Just Cause Laws, including by creating new policies and training employees on new requirements. JA58 ¶ 70. Appellants themselves indisputably have diverted resources from their core activities to counsel members regarding their rights and obligations under the Just Cause Laws.[2]

Representing their own and their members' interests, Appellants filed a lawsuit against the City of New York and the Commissioner of the DCWP (collectively, "the City") in the Southern District of New York before the Laws took effect, on May 28, 2021. JA11-32. The case was assigned to Judge Denise Cote. The parties agreed to expedited summary judgment proceedings, without discovery. Dist. Ct. Dkt. 15.

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[2] *See* JA1726-28 ¶¶ 10-17 (RLC's diverted resources); JA1730-31 ¶¶ 5-8 (NYSRA's diverted resources). But for the Laws, both organizations would be spending time and money on other activities—such as assisting members in starting, developing, and growing their businesses through outreach efforts, educational meetings and seminars, and lobbying state and local governments. *See* JA1725-27 ¶¶ 4-8, 12-14; JA1730-31 ¶¶ 6-7.

Appellants' principal challenges to the Just Cause Laws in their motion for summary judgment were that the Laws are preempted by the NLRA under the *Machinists* doctrine, Dist. Ct. Dkt. 22 at 8-15, and that the Laws violate the dormant Commerce Clause, *id.* at 15-19. Appellants also challenged the mandatory arbitration provision and raised several challenges under state law. *Id.* at 19-25.

The City's cross-motion argued that Appellants' claims fail as a matter of law. Dist. Ct. Dkt. 41. The City also briefly argued that Appellants lacked standing, *id.* at 6-7, and that the court should not exercise supplemental jurisdiction over the state law claims if the federal claims were rejected, *id.* at 21.

The District Court Grants Summary Judgment for the City

Briefing on the cross-motions for summary judgment was completed on August 31, 2021. Dist. Ct. Dkt. 59. On February 10, 2022, the district court granted summary judgment in favor of the City. SPA1.

The district court began by correctly deciding that NYSRA had direct standing because it was undisputed that NYSRA had "devoted time, money, and effort to informing [its] members about the Laws' requirements, discussing its potential implications, and attempting to clarify compliance requirements," and this response diverted time from other advocacy and planned activities. SPA9-10. Because only one plaintiff needs to have standing, the district court ended its standing analysis there. SPA9-11.

Turning to the merits, the district court first addressed *Machinists* preemption. After a lengthy discussion of the background of *Machinists* preemption, SPA11-16, the district court reasoned that the Just Cause Laws were a "validly enacted minimum labor standard" because they apply to both unionized and non-unionized fast-food employees and are "aimed at promoting job stability for hourly employees in [that] particular sector." SPA16. The court rejected Appellants' argument that the Just Cause Laws were too invasive and detailed to be a minimum labor standard by reasoning that "the regulation of the process for termination of employment—even through a detailed law—is not the regulation of the collective bargaining process and is not preempted by the NLRA." SPA17.

In a footnote, the district court held that the legislative history is irrelevant to the *Machinists* preemption inquiry. SPA18 n.6. The district court also rejected the argument that the Just Cause Laws impermissibly bar employer lockouts, SPA18-20, and held that the limit of the Just Cause Laws—to a small subset of a single industry—was irrelevant to the *Machinists* preemption inquiry. SPA20-21.

The district court next rejected Appellants' dormant Commerce Clause challenge. SPA21-27. The opinion recognizes that the Just Cause Laws are not facially discriminatory (i.e., that they make no "express distinction" between in-state and interstate establishments) but never disputes that, in practice, the Laws do not apply to any in-state restaurants. SPA24.

The district court also held that because only "establishments operating within the City are impacted," it does not matter that the Laws affect only establishments that are part of a national chain or which do business with interstate brands. SPA24-25. As such, the court held that the Laws impose only an "incidental burden" at most and pass the *Pike* test based on the court's view that the costs of complying with the Laws "are not 'qualitatively or quantitatively different' for intrastate or interstate businesses." SPA27.

Finally, the district court rejected any challenge to the mandatory arbitration provision, SPA27-29, and declined to exercise supplemental jurisdiction over Appellants' state law claims. SPA29-30. The district court thus granted summary judgment in favor of the City and against Plaintiffs. SPA1; SPA 32.

This appeal followed.

SUMMARY OF ARGUMENT

The Just Cause Laws are preempted by federal labor law and violate the dormant Commerce Clause.

First, the Just Cause Laws are preempted by the NLRA under the *Machinists* doctrine. The Laws are an unprecedented interference in the employer-employee relationship, imposing conditions in areas that Congress intended to leave unregulated. They are a far cry from the "minimum labor standards"—such as a broadly applicable minimum wage law—that *Machinists* allows. The required procedures for progressive discipline, limited reasons for terminations and layoffs, and new processes for dispute resolution (including mandatory arbitration and shifting the burden of proof from the employee to the employer) are much more invasive than any law held permissible under the NLRA and regulate in a manner that this Court has recognized may be preempted. *See Concerned Home Care Providers, Inc. v. Cuomo*, 783 F.3d 77, 86 n.8 (2d Cir. 2015). The district court largely ignored these invasive requirements in erroneously treating the Laws as a minimum-wage requirement or other nonintrusive minimum labor standard.

The Just Cause Laws also pressure employers to favor unionization—which requires preemption under *Machinists*—by imposing these requirements without any quid pro quo for employers. For example, whenever a CBA includes an arbitration provision, there is a judicially recognized quid pro quo of a no-strike

provision. *See Boys Markets, Inc. v. Retail Clerks Union, Loc. 770*, 398 U.S. 235, 248 (1970). No such quid pro quo is found in the Just Cause Laws, and the district court disregarded the benefit this creates for employers that have agreed to CBAs compared to those that have not. Similarly, because the Laws provide no exception for employer lockouts, they limit the economic weapons fast-food employers may use to negotiate—an independent reason the Laws are preempted that the district court erroneously brushed aside. In short, in both purpose and effect, the Laws interfere with the labor-management relationship to provide certain employees exactly what a union provides. Such an unprecedented usurpation of the bargaining process is preempted.

Second, the Laws violate the dormant Commerce Clause. Although the Laws—which apply to fast-food restaurants that are part of a chain with 30 or more establishments nationally—are facially neutral, it is undisputed that, in practical effect, the Just Cause Laws apply only to interstate restaurants (and franchisees who do business with interstate franchisors). In practice, the Laws exempt intrastate restaurants from their onerous burdens and costs. Because the practical effect of the Laws is to burden interstate commerce, they face strict scrutiny, a burden that the City does not even attempt to meet.

The Eleventh Circuit has already held that a law targeting "formula restaurants" violated the dormant Commerce Clause because it "ha[d] the practical

effect of discriminating against interstate commerce." *Cachia v. Islamorada*, 542 F.3d 839, 843 (11th Cir. 2008). This Court would create a circuit split if it reached a contrary result.

STANDARD OF REVIEW

This Court reviews de novo the grant and denial of summary judgment. *B.C. v. Mount Vernon Sch. Dist.*, 837 F.3d 152, 157 (2d Cir. 2016). "When both sides have moved for summary judgment, each party's motion is examined on its own merits, and all reasonable inferences are drawn against the party whose motion is under consideration." *Chandok v. Klessig*, 632 F.3d 803, 812 (2d Cir. 2011).

A "court shall grant summary judgment if the movant shows that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 & n.4 (1986). In cases like this one without disputed facts, the court should review the legal questions and grant summary judgment if the challenged action violates the law. *Celotex*, 477 U.S. at 322.

ARGUMENT

I. The NLRA Preempts the Just Cause Laws.

Federal preemption principles arise from the Supremacy Clause of the U.S. Constitution, which provides that the "Laws of the United States . . . shall be the supreme Law of the Land." U.S. CONST. art. VI. Federal courts have long recognized a cause of action in equity to prohibit the enforcement of state and local law that runs afoul of the Supremacy Clause. *Friends of the E. Hampton Airport, Inc. v. Town of East Hampton*, 841 F.3d 133, 144 (2d Cir. 2016); *see also* 42 U.S.C. § 1983; *Ex parte Young*, 209 U.S. 123, 155-63 (1908). When local laws run counter to federal labor laws, federal law supersedes those conflicting local laws.

The NLRA preempts state and local laws regulating activities that Congress intended to be left unregulated and subject to the natural "balance of power between labor and management expressed in our national labor policy." *Machinists*, 427 U.S. at 140, 146. Where Congress intentionally left conduct to "the free play of economic forces," localities may not regulate. *Id.*

Laws dictating substantive terms of employment—thus upsetting the free-market relationship between labor and management—may survive *Machinists* preemption only if they impose "minimum labor standards" that do "not intrude upon the collective-bargaining process." *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 7 (1987).

A. The Just Cause Laws are not "minimum labor standards"—they interfere in employer-employee relations meant to be left to market forces.

The Just Cause Laws intrude on labor-management relations and the collective bargaining process by imposing requirements that Congress left open to the free play of economic forces—to achieving, if at all, only through negotiating a collective bargaining agreement ("CBA"). Eliminating at-will employment, requiring elaborate disciplinary procedures for hours reductions, terminations, and layoffs, and creating detailed post-separation dispute-resolution procedures self-evidently gives "workers the equivalent of the kind of benefit that unions typically seek." JA147. The explicit goal of the Just Cause Laws' sponsor was to provide "what a union provides" and impose typical CBA terms on Targeted Fast-Food Employers. JA50¶24.

The Laws' effects match their goal. The Laws go far beyond removing "economic weapons" from management or labor (itself preempted), *Golden State Transit Corp. v. City of Los Angeles*, 475 U.S. 608, 614 (1986); they predetermine the outcome of negotiations by imposing the key aspects of CBAs without any bargaining at all (and without any concessions that an employer typically would extract in exchange). "Issues of hiring and firing are often central to CBA negotiations," and the NLRA "intended to allow the parties to resolve [such] matters without the unsettling effect of state regulation." *Bassette v. Stone Container Corp.*, No. 89-33, 1992 WL 613289, at *3 (D. Mont. Oct. 9, 1992), *aff'd*, 25 F.3d 757 (9th Cir. 1994).

The Just Cause Laws, then, remove from the realm of bargaining issues that traditionally go to the heart of CBA negotiations—usurping the negotiation process altogether. That "frustrate[s] effective implementation of the [NLRA's] processes" and is preempted. *Golden State Transit*, 475 U.S. at 615; *id.* at 616 (the NLRA encourages the "practice and procedure of collective bargaining" and consciously established only a "framework" for negotiations, leaving the "terms and conditions of employment" and any "agreement" between a union and employer to the parties).

As the district court recognized (SPA15), the Just Cause Laws could survive *Machinists* preemption only if they are "minimum labor standards." Minimum labor standards are "minimal employment standard[s] not inconsistent with the general legislative goals of the NLRA," *Metro. Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 757 (1985), which "neither encourage nor discourage the collective-bargaining processes that are the subject of the NLRA" and do not "have any but the most indirect effect on the right of self-organization established in the Act," *id.* at 755.

But the district court misconceived what counts as a "minimum labor standard." *See* SPA15-17. A typical minimum labor standard would be a generally applicable minimum wage law, which simply mandates a base level of pay for employees. *Concerned Home Care Providers*, 783 F.3d at 85. Such "traditional" and "unexceptional exercise[s]" of state power are not preempted since they are "not incompatible" with the "general goals of the NLRA," *id.*, and they do not "have any

but the most indirect effect on the right of self-organization," *Metro. Life Ins.*, 471 U.S. at 755.

On the other hand, a law that "dictate[s] the details of particular contract negotiations," favors collective bargaining, or eliminates bargaining tools is not a minimum labor standard. *Concerned Home Care Providers*, 783 F.3d at 86 (citing *Rondout Elec., Inc. v. N.Y. Dep't of Labor*, 335 F.3d 162, 169 (2d Cir. 2003)). This Court has explained that although a minimum wage would be permissible, a law that prescribes "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" would be a "'much more invasive and detailed' interference with the collective-bargaining process." *Id.* at 86 n.8.

Additional examples—recognized by this Court—of "targeted invasion[s]" prohibited by *Machinists* include "detailed" conduct requirements (like requiring certain break practices) and "changes to the burden of proof" in employee-discharge lawsuits. *Id.* Where a law establishes "terms of employment that would be very difficult for any union to bargain for," it is "much more than a mere backdrop to negotiations;" it creates unequal bargaining power and "is incompatible with the NRLA" and is thus preempted. *Id.* (quoting *520 S. Mich. Ave. Assocs., Ltd. v. Shannon*, 549 F.3d 1119, 1127, 1134 (7th Cir. 2008)); *Shannon*, 549 F.3d at 1136-37.

Although it is true (as the City emphasized below) that *Machinists* does not preempt "*all* local regulation that touches or concerns" employment issues, *Metro. Life Ins.*, 471 U.S. at 82 (emphasis added), employment-related local regulations are preempted if they do not qualify as minimum labor standards. *See, e.g.*, *id.* at 81; *Ass'n of Car Wash Owners Inc. v. City of New York*, 911 F.3d 74, 82 (2d Cir. 2018) ("[E]ven a law that addresses such legitimate, non-preempted local concerns may not do so by creating significant pressure on employers to encourage unionization of their employees.").

To the extent that the district court held the Just Cause Laws were not preempted because they are "substantive labor standards" that do not directly regulate "the collective bargaining *process*," SPA17, it erred. The "crucial inquiry" is whether state action, whether it regulates the process of bargaining or the substance of employer-employee relationship, in effect "frustrate[s] effective implementation of the [NLRA's] processes." *Golden State Transit*, 475 U.S. at 615. As this Court has noted, "dictat[ing] the details of particular contract negotiations" may violate *Machinists* just the same as eliminating certain bargaining tools. *Concerned Home Care Providers*, 783 F.3d at 86; *see also R.I. Hospitality Ass'n v. City of Providence*, 667 F.3d 17, 32 (1st Cir. 2011) (noting that there is an "outer boundary beyond which a state law can no longer be deemed a 'minimum labor standard'"). If "substantive

labor standards" were never preempted, then New York City could take a collective bargaining agreement and, by statute, impose it wholesale on a particular industry.

This Court should easily reject the idea that, while imposing deadlines on parties' CBA negotiations is preempted by *Machinists* because it creates too much pressure on the employer to agree to union-friendly terms, *Golden State Transit*, 475 U.S. at 615-16, imposing the exact terms of a CBA on entire industries (what the district court's logic implies that the City may do) is permissible. That would undermine the NLRA's policy of merely "provid[ing] a framework for [good faith] negotiations" and not mandating results or encouraging the parties to come to any particular agreement. *Id.* at 616-17.

The Just Cause Laws check every box for a preempted regulation falling outside the category of "minimum labor standard" (and just one would suffice for preemption):

First, the Laws represent an unprecedented, detailed imposition of employment terms at the core of collective bargaining and collective-bargaining agreements and only for a subset of a single industry—forbidding altering by negotiation their rules on matters from terminations to reductions in hours, and progressive discipline to dispute resolution. These detailed conduct requirements include imposing cause-only termination, which has been negotiated and deployed in the United States only under labor agreements, placing economically irrational limitations on layoffs, imposing

mandatory arbitration, and shifting the burden of proof for employment disputes—types of requirements forbidden by *Machinists* case law. *See Concerned Home Care Providers*, 783 F.3d at 86 n.8; *Shannon*, 549 F.3d at 1135; *Chamber of Commerce v. Bragdon*, 64 F.3d 497, 502 (9th Cir. 1995). All this shows the district court was wrong to hold that the Laws have "no impact on the process by which collective bargaining occurs." SPA16.

Second, the Just Cause Laws also alter the balance in collective bargaining by imposing typical CBA obligations yet withholding corresponding quid pro quos that benefit employers—thereby putting the local government's thumb on the scale in the unions' favor when *Machinists* preemption mandates neutrality. The district court disregarded the pressure the Laws place on employers to favor unionization.

Third, the Just Cause Laws impermissibly restrict the economic weapons, including lockouts, available to employers in New York City.

In sum, the Laws are "substantially more targeted invasion[s] of the bargaining process," *Concerned Home Care Providers*, 783 F.3d at 86 n.8, than any regulation ever upheld against a *Machinists* challenge.

1. The Just Cause Laws create detailed conduct requirements that effectively impose a partial CBA on non-union employers despite employees choosing not to unionize and no collective bargaining having occurred.

The district court's opinion describes the Just Cause Laws at a high level of generality, characterizing them as "regulat[ing] the process through which fast food

employees may be lawfully terminated from their positions." SPA16. But the opinion does not grapple with the Laws' detailed and targeted intrusion into so many core aspects of labor-management relations in this industry. The Laws impose a comprehensive set of processes and procedures—like a partial CBA—governing the entire disciplinary process and job security between Targeted Fast-Food Employers and their employees. Here is a non-exhaustive list of the Laws' undisputed requirements:

- employers may only discharge or reduce hours of their employees if they can prove "just cause"—i.e., repeated, unsatisfactory job performance or materially harmful misconduct—under a vague multi-factor test. NYCC § 20-1271, 20-1272(b);
- the Laws restrict disciplinary look-back periods to one year, so that misconduct more than a year old may not be considered for termination;
- employers must give written notice of "the precise reasons for their discharge," and failure to include a reason in that notice will result in an inability to discharge, § 20-1272(d);
- employers must create and implement a progressive discipline policy including a "graduated range of reasonable responses" to unsatisfactory performance, ranging from "mild to severe, depending on the frequency and degree of the failure," § 20-1201;
- employers must provide additional training on new job duties and progressive discipline policies;
- the Laws permit immediate termination only in the most "egregious" circumstances, § 20-1272(c), which the City's regulations limit to misconduct like "violence, theft, sexual harassment, race discrimination, or willful destruction of property," 6 N.Y.C. Rule § 7-627;
- the Laws limit the permissible length for employers' probationary periods;

- the Laws require pay at termination (for the last-minute "schedule change");
- the Laws create new methods of dispute resolution, including mandatory arbitration at the option of the employee, which the employer cannot decline, NYCC § 20-1273(a);
- the burden of proof in post-discharge disputes is shifted to the employer to prove that the discharge was valid, § 20-1272(e);
- the DCWP may permit employees to bring arbitrations on behalf of "all members of a class," *id.*;
- employers may not lay off employees for any reason other than a "bona fide economic reason," which is defined as an already experienced economic loss;
- employers must lay off workers in reverse order of seniority, regardless of skill, business need, or other business factors;
- the Laws regulate what does or doesn't "break" seniority;
- employers must recall previous employees before hiring any additional employees after a layoff; and
- the Laws define a reduction of hours by 15% or more as a discharge requiring the exact same reasons and procedures as complete terminations.

See JA53-58 ¶¶ 39-68. In addition to these statutory requirements, the DCWP's FAQ lays out 16 pages of intricate requirements regarding these discharges, progressive discipline, and layoff procedures. JA47 ¶ 7 (citing JA97-134). And the new regulations include even more. *See* 6 N.Y.C. Rules ch. 7. These detailed requirements represent a comprehensive, targeted invasion of the employment relationship and are thus preempted.

Despite citing *Concerned Home Care Providers* multiple times, the district court failed to recognize that the minimum-wage law in that case survived only because it was *not* an "invasive and detailed" interference with the collective-bargaining process—unlike the laws held preempted in *Bragdon*, 64 F.3d 497, and *Shannon*, 549 F.3d 1119. This Court distinguished those decisions as factually distinct; it did not disagree with them (as the district erroneously suggested at 20):

> The ordinance in *Bragdon* 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 Providers, 783 F.3d at 86 n.8 (quoting *Bragdon*, 64 F.3d at 502). This Court similarly distinguished *Shannon*:

> As for *Shannon*, the law at issue in that decision "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. Such provisions represent a substantially more targeted invasion of the bargaining process than the Wage Parity Law's minimum compensation requirement. Moreover, by switching the burden of proof in retaliation cases, the ordinance in *Shannon* . . . went beyond prescribing minimum labor standards and arguably interfered with the collective-bargaining process.

Id. (quoting *Shannon*, 549 F.3d at 1134) (citing *Metro. Life*, 471 U.S. at 753).

The Just Cause Laws invade the bargaining process at least as much as the laws *Concerned Home Care Providers* recognized were preempted. Just like the

law in *Shannon*, the Just Cause Laws "change[] the burden of proof" by requiring Targeted Fast-Food Employers to prove that any discharge was done for "just cause" or a "bona fide economic reason." NYCC § 20-1272(e). The Laws require wholesale changes to Targeted Fast-Food Employers' procedures for layoffs, hours reductions, and terminations—including record-keeping, training, and progressive discipline, NYCC § 20-1272(b)-(c)—provide for mandatory arbitration at an employee's option, *id.* § 20-1273, and impose a host of other requirements, like seniority, recall requirements, and others, *id.* § 20-1272.

These disciplinary and grievance procedures are nothing like minimum-wage laws (paradigmatic minimum labor standards). They impose detailed, sweeping requirements (typical of CBAs)—in conflict with the NLRA's legislative goals and attendant employer and employee rights—much more like the laws addressed in *Bragdon* and *Shannon* that this Court held were "substantially more targeted invasion of the bargaining process." *Concerned Home Care Providers*, 783 F.3d at 86 n.8. In short, the Just Cause Laws are "so restrictive as to virtually [or actually] dictate the results of the contract," *Bragdon*, 64 F.3d at 501, and are more invasive than any law ever upheld as a minimum labor standard under *Machinists*. If this Court were to affirm the conclusion that the Just Cause Laws are not preempted, it would create a circuit split with the Seventh and Ninth Circuits—something the *Concerned Home Care Providers* panel declined to do.

If anything, the unprecedented requirements here, involving issues of discipline, hiring, and firing, go far beyond *Bragdon* and *Shannon* to regulate issues *more* "central to CBA negotiations" than the laws struck down in those cases. *See Barnes v. Stone Container Corp.*, 942 F.2d 689, 693 (9th Cir. 1991) (holding "[i]ssues of hiring and firing," including "just cause" requirements, are central to collective bargaining, and the NLRA "intended to allow the parties to resolve [those] matters without the unsettling effect of state regulation"). The features of the Just Cause Laws are the keystones of typical CBAs. *See, e.g.*, *id.*; *Three D, LLC*, 361 NLRB No. 31, at 9 n.9 (2014) (Member Miscimarra, dissenting in part) ("just cause" provisions "have been ubiquitous in collective-bargaining agreements throughout the [NLRA's] history") (citing examples of CBAs with just cause provisions); Elkouri & Elkouri, *How Arbitration Works* § 15.2.A.i (8th ed. 2016) (explaining that a just-cause limitation is read into every CBA but is irrelevant in non-union contexts); *Bassette*, 1992 WL 613289, at *3 (requiring a certain "job security standard and provid[ing] procedures and remedies for wrongful discharge" for employers in the midst of collective bargaining would "trivialize the very freedom of contract that is a fundamental policy of the NLRA").[3]

[3] Until now, "just cause" has developed near-solely in the context of collective bargaining. *See* Brand & Biren, Discipline & Discharge in Arbitration § 2 (3d ed. 2015) (most American jurisdictions adopted "the employment at-will doctrine in 1877 [and] [j]ust cause resurfaced in the 1930s when unions . . . began including just cause provisions in their collective bargaining agreements"). Further, "just cause"

The district court's opinion also misconstrues the importance of the Just Cause Laws' nonconsensual arbitration provisions. It is well-recognized that the arbitration of labor disputes is a keystone of negotiated collective bargaining agreements. *See, e.g.*, *United Parcel Service, Inc.*, 369 NLRB No. 1, at *4 (2019), *vacated in part on other grounds* (noting "[a] substantial body of Federal jurisprudence . . . supports the proposition that the establishment by parties to a collective-bargaining relationship of an autonomous system of industrial self-government through grievance arbitration is the culmination of the statutory scheme that Congress empowered the [NLRB] to uphold"). That the Just Cause Laws force such arrangements via *nonconsensual* arbitration provisions, without the prerequisite bargaining process, is exactly the kind of intrusion on labor-management bargaining that *Machinists* preemption forbids.

The Just Cause Laws' sponsor understood all this: the goal was to get fast-food workers "part of what a union provides," a "protection that has otherwise been available only to union members." JA50 ¶ 24. From the beginning, Lander understood that the "principle of 'just cause' is the keystone of the collective

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has been administered by third-party arbitrators under CBAs and is governed in that context by the well-developed "seven tests" of just cause, *see, e.g.*, *Paperworkers v. Misco, Inc.*, 484 U.S. 29, 34 n. 5 (1987)—part of a growing body of "common law" of "management and labor under collective bargaining agreements." Elkouri & Elkouri § 15.2.A.ii. But this standard is irrelevant to nonunion employees in at-will states. *Id.* § 15.2.A.i.

bargaining agreement" and marks "a sharp dividing line between union and nonunion or at-will workers." JA49 ¶ 20. Neutral observers likewise have recognized that the Laws "giv[e] workers the equivalent of the kind of benefit that unions typically seek." JA147. Because they fail to provide any quid pro quo for the employer[4] and are economically irrational,[5] the terms of the Just Cause Laws would be "very difficult" for any union to negotiate, *Concerned Home Care Providers*, 783 F.3d at 86 n.8 (quoting *Shannon*, 549 F.3d at 1134)—another reason the Laws are not minimum labor standards, a reason not addressed by the district court.

Moreover, these detailed and intrusive requirements are preempted for another reason, as well: they apply only to a subset of workers in a particular industry.[6] *See* NYCC §§ 20-1201, 20-1272. When laws target workers within a particular industry despite their purported justification applying more broadly, they are unlikely to constitute minimum labor standards. *See Shannon*, 549 F.3d at 1139 (concluding that a law "is not a law of general application" because it "applies to

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[4] Indeed, the City below was unable to point to any CBA that provides for just-cause only termination (or mandatory arbitration) without including any quid pro quo from the union.

[5] It is absurd to suggest that any employer would agree to fire or rehire employees without regard to job duty or need or would agree to forgo the right to discharge employees based on anticipated future losses.

[6] A subset that the SEIU has diligently been seeking to organize for some time.

one occupation, in one industry, in one county"). When a law applies to a targeted subset of one industry, it becomes more likely that the "narrow application equates more to a benefit for a bargaining unit than an individual protection." *Id.* at 1133; *see Bldg. Owners & Managers Ass'n of Chi. v. City of Chi.*, No. 19-7212, 2021 WL 168966, at *2 (N.D. Ill. Jan. 19, 2021) (contrasting narrowly targeted law focused on one industry, which was not a minimum labor standard, with a permissible law that applied to all employees in seven industries where the reason for the law was present).

The Just Cause Laws clearly are under-inclusive. They apply only to fast-food chains that have at least 30 locations nationwide. That is a small subset (large national chains) of a subset (fast-food chains) of a subset (fast-food restaurants) of a single industry (restaurants). The Laws' sponsor publicly claimed that their purpose is protecting the jobs of "essential" workers who have worked through pandemic shutdowns and shouldered extra tasks, such as sanitation. JA150. But fast-food employees in national fast-food chains are hardly the only "essential" workers who worked during the pandemic and who are subject to at-will employment. This same rationale would apply to hotel, retail, healthcare, and (of course) other restaurant and fast-food employees. The City never showed any evidence that fast-food workers are more prone to termination than members of these other industries. The Just Cause Laws, however, only provide specific benefits for a specific bargaining unit—

large national chain fast-food workers. The supposed justifications for the Laws do not match their scope.

The district court rejected this targeting as a basis for preemption, SPA20-21, but narrow targeting is undeniably relevant to *Machinists* preemption. Both *Shannon* and *Bragdon* relied on unjustified targeting *coupled with* the invasions of the employment relationship to find a law preempted.

In rejecting the argument (never made by Appellants) that a law's narrow tailoring, alone, mandates preemption under *Machinists*, the district court rejected *Bragdon*[7] and *Shannon* wholesale. As a result, the district court never grappled with the portions of those cases holding preempted regulations that are "invasive and detailed" (just like the Just Cause Laws here). *See id.*

As the district court noted (SPA20-21), this Court has upheld some laws applying to one industry when the justification for the law is unique to that industry, *Rondout Elec.*, 335 F.3d at 164 (law specific to public works projects to match compensation with private sector), and the laws do not otherwise represent detailed

[7] The district court claimed a subsequent Ninth Circuit case "narrowed" *Bragdon*, Op. 20, but that case merely clarified that a law's application to one industry is not sufficient *in itself* to require preemption. *See Assoc. Builders & Contractors of S. California, Inc. v. Nunn*, 356 F.3d 979, 990 (9th Cir. 2004), *amended*, No. 02-56735, 2004 WL 292128 (9th Cir. Feb. 17, 2004). Indeed, *Nunn* held that the law there was permissible because it was not "as restrictive" as the ordinance in *Bragdon*. *Id.* As already explained, the Just Cause Laws are *more* restrictive than both laws.

intrusions into the employment relationship. *But see Ass'n of Car Wash Owners*, 911 F.3d at 84 (not upholding the law but simply denying summary judgment in favor of more discovery). Here, the narrow targeting *reinforces* that the intentional, unprecedented, and detailed intrusion into core bargaining matters for a particular industry is preempted by the NLRA.

2. The Just Cause Laws alter the balance in collective bargaining and undermine governmental neutrality with both unionization and collective bargaining.

Local laws that "encourage or discourage the collective-bargaining processes that are the subject of the NLRA" are not minimum labor standards and are thus preempted. *Metro. Life Ins.*, 471 U.S. at 755. This Court has recognized that "even a law that addresses . . . legitimate, non-preempted local concerns may not do so by creating significant pressure on employers to encourage unionization of their employees." *Ass'n of Car Wash Owners*, 911 F.3d at 82.

Negotiation under the NLRA, for unionized workforces, is a give-and-take process. It is not one-sided, and local governments have no role to play in our federal system to tip the balance in favor of one party over another. The resolution of bargaining was something Congress left to the parties' relative bargaining strength. *Golden State Transit*, 475 U.S. at 616 (*citing H.K. Porter Co. v. NLRB*, 397 U.S. 99, 103-04 (1970) (the government may not "step in [and] become a party to [labor]

negotiations," nor mandate the terms of an agreement)). The Laws upset this delicate balance that has existed for many decades.

For example, in typical CBAs, when employers agree to arbitration, there is a (judicially recognized) quid pro quo that the union and employees agree not to strike or impose a work stoppage regarding an arbitrable dispute. *See, e.g.*, *Boys Markets*, 398 U.S. at 248 ("a no-strike obligation, express or implied, is the quid pro quo for an undertaking by the employer to submit grievance disputes to the process of arbitration"); *Will Poultry, Inc. v. Teamsters Loc. 264*, No. 13-1135, 2013 WL 6837547, at *4 (W.D.N.Y. Dec. 23, 2013) ("a strike to settle a dispute which a [CBA] provides shall be settled exclusively and finally by compulsory arbitration constitutes a violation of the agreement" even without a no-strike clause). Here, the Just Cause Laws require Targeted Fast-Food Employers to submit to arbitration at an employee's option, but they do not impose a corresponding no-strike obligation. Employers that have agreed to arbitration in a CBA are thus in a better position than employers that are required to arbitrate by the Just Cause Laws.

This imbalance violates *Machinists* because it pressures employers to enter CBAs, interfering with "the NLRA's plan to leave certain areas unregulated," *Healthcare Ass'n of N.Y. State, Inc. v. Pataki*, 471 F.3d 87, 94 (2d Cir. 2006). Both Lander and SEIU leadership have admitted that the Laws are meant to unionize fast-food workers. JA50 ¶ 24 ("[W]hen fast-food workers started the Fight for $15, their

demand was '$15 and a union,'" and now that they have $15 minimum wage, the Just Cause Laws provide conditions previously "available only to union members."); JA154-55 (SEIU leadership conceding the Laws are part of the SEIU's "strategy for organizing fast food workers"). In purpose and effect, the Just Cause Laws "alte[r] incentives to negotiate" by placing more pressure on employers to favor unionization. *Bassette*, 1992 WL 613289, at *3.

The district court rejected this argument for two reasons. SPA17-18. First, with respect to the quid pro quo that employees may not strike if the employer agrees to arbitrate disputes, the court stated that "[w]hether the absence of this quid pro quo favors unions is debatable." SPA18. Not so. A quid pro quo, by definition, is giving something valuable to one party in exchange for receiving something valuable by the other. "Quid pro quo," BLACK'S LAW DICTIONARY. A strike obviously damages an employer's business, and courts repeatedly have recognized that a "no-strike obligation" is a benefit to an employer in exchange for "undertaking . . . to submit grievance[s]" to arbitration. *E.g.*, *Boys Markets*, 398 U.S. at 248. There is no rational way to conclude that employers benefit from the absence of a no-strike clause.

Second, the district court side-stepped the entire issue of pressure to unionize by stating "union and nonunion employees are affected by the same law in equal ways" because they all can request arbitration under the Just Cause Laws. SPA18.

But that observation focuses solely on the employees; it ignores that not all *employers* are protected by a no-strike obligation—only those who agree to CBAs are. So, the situation is not "equal" for all employers. It puts employers with CBAs in a better position than those without.

Neither the City nor the district court below provided any reason to doubt that these requirements put pressure on employers to favor unionization or collective bargaining. And the SEIU has publicly stated the opposite—that that pressure is part of its "strategy for organizing fast food workers." JA155. Laws whose impact will be more onerous on employers not covered by CBAs than on employers who are covered by CBAs create "significant pressure on employers to encourage unionization of their employees," *Ass'n of Car Wash Owners*, 911 F.3d at 82, and thus fall in the heart of *Machinists* preemption. The Just Cause Laws do just that.

3. The Just Cause Laws regulate the use of economic weapons in bargaining, including lockouts.

The District Court also disregarded how the Just Cause Laws "impact . . . the process" of bargaining. SPA16. One part of *Machinists* is that local governments may not regulate the use of "economic weapons of self-help" that are protected under the NLRA (including "strikes or lockouts"). *Golden State Transit*, 475 U.S. at 614-15; SPA14. The Just Cause Laws impose exactly such a restriction: they prohibit an

employer from locking out workers because a lockout would involve reducing work hours in violation of the Laws. *See* NYCC § 20-1272(a)-(c), (g).[8]

The district court simply asserted that the Laws do not prevent "employers from engaging in lockouts." SPA18; SPA19 (stating no "liability" for locking out employees due to a "dispute with its employees"). The reasoning behind this statement is unclear. To the extent that the district court interpreted the Just Cause Laws not to apply to lockouts, it was wrong. The Just Cause Laws provide no exception for lockouts and govern *all* reductions in hours of 15% or more. *See* NYCC § 20-1271. There is no dispute that they would apply to a lockout.

The district court then shifted to a non-sequitur, noting that some local laws ban termination based on racial discrimination or retaliation. SPA19-20. But such anti-discrimination and anti-retaliation laws do not affect lockouts, which (by definition) do not involve discrimination or retaliation but are "refusal[s] by an employer to permit his employees to work *as a result of a dispute*" over work

[8] A lockout is a complete reduction in offered hours—for all employees in a bargaining unit—sometimes referred to as a "temporary layoff" that typically is intended to pressure the union to agree to the employer's bargaining demands and is a valid economic weapon in bargaining. *Am. Ship Bldg. Co. v. N.L.R.B.*, 380 U.S. 300, 301, 306-10 (1965); N.Y.C. Admin. Code § 22-501 (lockout is a "refusal by an employer to permit his employees to work as a result of a dispute with such employees that affects wages, hours and other terms and conditions of employment of said employees").

conditions. N.Y.C. Admin. Code § 22-501 (emphasis added). The Just Cause Laws—unlike discrimination laws—bar employers from utilizing lockouts.

The Just Cause Laws thus limit the "economic weapons" available to employers and upset the balance of power for resolving labor disputes. *Golden State Transit*, 475 U.S. at 614; *see also Hotel Emps. & Rest. Emps. Union, Local 57 v. Sage Hosp. Res., LLC*, 390 F.3d 206, 212 (3d Cir. 2004) (Under *Machinists*, "states are prohibited from imposing additional restrictions on economic weapons of self-help, such as strikes or lockouts[.]"); *Rondout*, 335 F.3d at 167 (same); *Cannon v. Edgar*, 33 F.3d 880, 885 (7th Cir. 1994) (same); *see also Brown*, 554 U.S. at 68 (laws are preempted that upset the balance of power for resolving "labor disputes"). For this reason, as well, the Laws are preempted.

B. The district court's other reasons for rejecting *Machinists* preemption are incorrect.

In addition to the errors discussed above, the opinion below also made two other errors in analyzing preemption.

1. The Just Cause Laws are unprecedented.

The district court apparently accepted the City's argument that laws governing termination like the Just Cause Laws have been upheld against an NLRA preemption challenge. *See* SPA16-17. That is incorrect. No municipality or State has ever, anywhere in the country, attempted to impose such a detailed, intrusive regulation

of the employer-employee relationship. Nor has any court ever upheld such a law against the challenges here.

Below, the City argued that two cases affirmed laws similar to the Just Cause Laws, and the district court relied on those cases. SPA17. But neither decision is remotely on point.

The Virgin Islands law at issue in *St. Thomas-St. John Hotel & Tourism Ass'n, Inc. v. Gov't of U.S. Virgin Islands*, 218 F.3d 232, 244 (3d Cir. 2000), is not similar to the Laws here. *St. Thomas* involved a simple wrongful discharge statute, which applied to all employees in the territory and which enumerated nine "broad" reasons why employees may be terminated. *Id.* (describing list of reasons for firing as a "comprehensive list, covering all or almost all legitimate reasons for discharge").

Unlike the Just Cause Laws, the Virgin Islands law at issue did not require progressive discipline or the creation of any written discipline policy; did not allow second-guessing of employers' investigation process; did not cover reductions of hours; did not require layoffs in order of seniority; did not require recalling laid off employees if business picks up; did not provide for mandatory arbitration at the employee's choice; did not target a particular industry; and, critically, did not shift the burden of proof regarding the discharge onto the employer. *See id.* at 235-36; V.I. Code Ann. tit. 24, §§ 76-78. The Third Circuit's holding says nothing about whether the much more detailed and intrusive Just Cause Laws are preempted.

Rhode Island Hospitality Ass'n v. City of Providence, 667 F.3d 17 (1st Cir. 2011), is even further afield. It dealt with a rule that when a new employer assumes operations from a previous employer, new ownership must wait three months before firing the old employees and replacing them with new employees (with exceptions, including good cause). *Id.* at 23-24. Such successorship retention rules do not regulate the new employer's operations in any way after the three-month hold period, and the law actually allowed the new employer to downsize (*i.e.*, conduct layoffs) within the first three months. *Id.* at 24. And even during the three-month period, the law imposed none of the Just Cause Laws' procedural rules—like progressive discipline, mandatory arbitration, or shifting burdens of proof. The case's reasoning dealt with the "successorship doctrine" alone, *id.* at 28, which is inapplicable to this case.

The brief, minimal restrictions on termination that retention statutes provide are nothing like the indefinite (and far more onerous) regulations imposed by the Just Cause Laws. No authority supports the holding that the detailed regulation of the employer-employee relationship and intrusion into the collective bargaining process found in the Just Cause Laws qualifies as a "minimum labor standard" outside the scope of *Machinists* preemption.

There is no "plethora of valid state and local laws" like the Just Cause Laws. SPA16. There are **no** such laws. The district court's inability to identify a single

case upholding a law even remotely like the Just Cause Laws only confirms what Appellants demonstrated above: the Just Cause Laws are unprecedented, impermissible, and preempted under *Machinists*.

Minimum labor standards are "unexceptional exercises" of states' "traditional" police powers—such as stabilizing wages or providing basic health benefits. *Metro. Life Ins.*, 471 U.S. at 755; *Concerned Home Care Providers*, 783 F.3d at 85. The unprecedented nature of the Laws confirms that they are exceptional and novel—and thus are preempted.

2. The district court erred by ignoring legislative history.

The district court also erred by refusing to consider the legislative history (which the court conceded was "extensive[]"). SPA18 n.6. This Court repeatedly has held that legislative history is both relevant and "important" in the preemption context. *See Entergy Nuclear Vermont Yankee, LLC v. Shumlin*, 733 F.3d 393, 419 (2d Cir. 2013) ("[L]egislative history is an important source of determining whether a particular statute was motivated by an impermissible motive in the preemption context[.]"); *Loyal Tire & Auto Center, Inc. v. Town of Woodbury*, 445 F.3d 136, 146 (2d Cir. 2006) (in preemption case, holding that court "must review . . . the extant legislative history" to determine "motivate[ion] for law"); *Scott v. City of New York*, 592 F. Supp. 2d 386, 398 (S.D.N.Y. 2008) (statements from "key legislative

drafters and sponsors" are valued over statements from others in the hierarchy of legislative history).

The district court ignored these cases and instead cited an inapposite statutory interpretation case, which noted the noncontroversial proposition that when interpreting a statute, legislative history may not be consulted if the "plain meaning of the text is clear." SPA18 n.6 (quoting *Jingrong v. Chinese Anti-Cult World All. Inc.*, 16 F.4th 47, 57 (2d Cir. 2021)). But this is not a statutory interpretation case. It is a preemption case, and one relevant inquiry is whether the laws are "designed to encourage" collective bargaining. *Concerned Home Care Providers*, 783 F.3d at 85.

The legislative history provides ample and unrefuted evidence that the goal (the *design*) of the Just Cause Laws is to provide what a union provides to workers—just cause requirements with intricate progressive discipline policies that are "the keystone of the collective bargaining agreement." *See, e.g.*, JA49-50 ¶¶ 20, 24. And providing what a union provides represents a targeted invasion of the bargaining process as relevant to Section I.A.1 above. The City never disputed that the SEIU played an important role in drafting the legislation and, legislative history confirms, intended the laws to further the SEIU's "strategy for organizing fast food workers," JA155, and encourage fast-food employees to "organize together with other workers." JA50 ¶ 28.

The SEIU created the strategy for and helped draft the Laws to encourage and impose unionization on fast-food workers through legislation. JA48 ¶¶ 15-17 (showing that the SEIU "pitched" and assisted in drafting the legislation in 2018 and 2019); JA49 ¶ 21 (City Council staff readily incorporated edits from SEIU local chapter 32BJ's attorney Katchen Locke and Strategic Campaign Coordinator David Cohen). In one exchange, SEIU personnel proposed new language on progressive discipline, and Lander approved it within hours. JA49 ¶ 21. The SEIU's involvement was so great as to raise objections from a N.Y. City Council attorney regarding SEIU staff's inclusion in meetings about the legislation, but Lander's staff "fought hard" to include him. JA48 ¶ 17. Lander described the sponsors of the bill as himself, SEIU-affiliated "Fast Food Justice, SEIU 32-BJ, and Council Member Adrienne Adams." JA50 ¶ 24.

This evidence should have been considered; and it reflects that the Laws are a targeted fulfillment of the union's wish list explicitly to aid unionization efforts. The Just Cause Laws plainly are "designed to encourage" collective bargaining—as relevant to Section I.A.2 above—and laws with such a design are preempted. *Concerned Home Care Providers*, 783 F.3d at 85. The SEIU's involvement confirms that the legislation was enacted for the improper purpose of creating pressure to unionize.

The district court erred by failing to consider the legislative history, which confirms Appellants' argument that the Just Cause Laws are a targeted invasion into the bargaining process designed to pressure employers to favor unionization.

* * *

The Laws interfere in the employer-employee relationship in much more invasive ways than any law ever held permissible under the NLRA. They are nothing like "minimum labor standards," and instead dictate typical collective bargaining terms in a manner inconsistent with *Machinists*. In purpose and effect, the Laws usurp the bargaining process designed by Congress and are preempted.

II. The Just Cause Laws Violate the Dormant Commerce Clause.

Even if the NLRA permitted the City to enact this intrusive regulation of the employer-employee relationship, the dormant Commerce Clause requires the City to regulate evenhandedly among interstate and intrastate businesses. *Hunt*, 432 U.S. at 350.

"[O]nce a state law is shown to discriminate against interstate commerce 'either on its face or in practical effect,' 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." *Maine v. Taylor*, 477 U.S. 131, 138 (1986) (quoting *Hughes v. Oklahoma*, 441 U.S. 322, 336 (1979)).

The uncontroverted evidence demonstrates that despite applying facially neutral criteria, in practice, the burden of these Laws falls entirely on interstate restaurant chains and on franchisees who do business with interstate franchisors. Because they discriminate against interstate commerce in practical effect, the Just Cause Laws must be reviewed under strict scrutiny, a standard that the City has never argued it can meet.

A. The dormant Commerce Clause preempts laws with the "practical effect" of discriminating against interstate commerce.

The Supreme Court has long held that the Commerce Clause contains a "negative implication" intended to prevent "'economic protectionism[,] that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors.'" *Dep't of Revenue of Ky. v. Davis*, 553 U.S. 328, 337-38 (2008) (quoting *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 273-74 (1988)). Regardless of its motive, a state or municipal legislature may not enact legislation that has a discriminatory impact on interstate commerce. *Hunt*, 432 U.S. at 353.

In determining whether a law discriminates in effect, "merely noting a law's facial neutrality is insufficient." *Colon Health Centers of Am., LLC v. Hazel*, 733 F.3d 535, 543 (4th Cir. 2013). "The principal focus of inquiry must be the practical operation of the statute, since the validity of state laws must be judged chiefly in terms of their probable effects." *Lewis v. BT Inv. Managers, Inc.*, 447 U.S. 27, 37 (1980). "[T]he critical consideration is the overall effect of the statute on both local

and interstate activity." *Brown-Forman Distillers Corp. v. New York State Liquor Auth.*, 476 U.S. 573, 579 (1986).

This is a "factual" inquiry, which "necessarily requires looking behind the statutory text to the actual operation of the law." *Colon Health Centers*, 733 F.3d at 544; *see also Waste Mgmt. Holdings, Inc. v. Gilmore*, 252 F.3d 316, 335 (4th Cir. 2001) ("The obvious focus of the practical effect inquiry is upon the discernable practical effect that a challenged statutory provision has or would have upon interstate commerce as opposed to intrastate commerce."). The Supreme Court has "eschewed formalism for a sensitive, case-by-case analysis of purposes and effects." *W. Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 201 (1994).

In conducting this inquiry, this Court "is not bound by '[t]he name, description or characterization given it by the legislature or the courts of the State,' but will determine for itself the practical impact of the law." *Hughes*, 441 U.S. at 336 (quoting *Lacoste v. Louisiana Dept. of Conservation*, 263 U.S. 545, 550 (1924)) (alteration in original).

A law need not be an absolute prohibition on interstate commerce to discriminate. A statute discriminates when, in practice, it:

- imposes "differential burdens" on interstate and intrastate commerce, *Colon Health Centers*, 733 F.3d at 546;
- "place[s] added costs upon" interstate goods or companies, *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 126 (1978);

- "rais[es] the costs of doing business" for interstate businesses while leaving local counterparts unaffected, *Hunt*, 432 U.S. at 351; or
- "eliminate[s] a competitive advantage enjoyed by out-of-state" businesses, *Cloverland-Green Spring Dairies, Inc. v. Pennsylvania Milk Mktg. Bd.*, 298 F.3d 201, 212 (3d Cir. 2002).

Nor must a law discriminate against **all** interstate businesses or in favor of **all** intrastate businesses to discriminate in effect against interstate commerce. *See C & A Carbone, Inc. v. Town of Clarkstown, N.Y.*, 511 U.S. 383, 391 (1994) ("The ordinance is no less discriminatory because in-state or in-town processors are also covered by the prohibition."); *Walgreen Co. v. Rullan*, 405 F.3d 50, 59 (1st Cir. 2005) ("While a few out-of-Commonwealth pharmacies benefit from the Act, the vast majority of favored pharmacies are local concerns."); *Nat'l Revenue Corp. v. Violet*, 807 F.2d 285, 290 (1st Cir. 1986) (involving an economic benefit conferred "upon a class largely composed of Rhode Island citizens").

B. The Just Cause Laws, in practice, discriminate against interstate commerce.

Applying these principles to the undisputed facts of this case is straightforward.

1. The Just Cause Laws impose significant costs and litigation risk on regulated establishments.

As detailed above (*supra* pp. 7-12, 28-29), the Just Cause Laws impose burdensome and expensive regulations on Targeted Fast-Food Employers. The Laws force employers to retain employees who violate their work rules; require

employers to defend themselves in lawsuits (or nonconsensual arbitration) in which they are presumed guilty; deprive employers of the opportunity to earn additional profits (or avoid losses) by adjusting employees' schedules; and mandate economically irrational decisions, including terminating and retaining employees based solely on seniority, without regard to job title, skill, or need.[9] The district court identified no other laws from any American jurisdiction that involve such detailed and onerous regulation of the employer-employee relationship.

The uncontroverted evidence demonstrates that establishments subject to these laws bear significant burden and expense. *See* JA62-64.

2. The Just Cause Laws apply, in practice, to restaurants owned or operated by interstate enterprises and not to restaurants owned by operated by intrastate enterprises.

It is equally undisputed that in practice, the burdens of these laws fall entirely on establishments engaged in interstate commerce. No intrastate restaurant is subject to the Just Cause Laws.

"Fast food establishments" include "integrated enterprise[s] that ow[n] or operat[e] 30 or more . . . establishments in the aggregate nationally." NYCC § 20-1201(v)(A). Under this definition, establishments owned or operated by numerous national, interstate restaurant chains would be subject to the Just Cause

[9] As noted above, a Targeted Fast-Food Employer also is prohibited from *anticipating* a change in sales and must, instead, demonstrate an actual "reduction" in production, sales, or profit before any layoffs.

Laws. JA64. **No establishments** owned or operated by any **intrastate** enterprises qualify as "fast food establishments." *Id.*

Thus, although the Just Cause Laws apply facially neutral criteria, in practice they apply only to interstate enterprises. It is irrelevant that the Just Cause Laws would, hypothetically, apply to an establishment owned or operated by a 30-restaurant intrastate chain. No such chain exists. *Cf. Davrod Corp. v. Coates*, 971 F.2d 778, 789 (1st Cir. 1992) (rejecting a dormant Commerce Clause challenge to a vessel length limitation because "Massachusetts fishing vessels longer than ninety feet greatly outnumber out-of-state vessels").

The facially neutral, practically discriminatory criteria of the Just Cause Laws exemplify what it means to "discriminate in effect" against interstate commerce. The Just Cause Laws impose "differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." *Or. Waste Sys., Inc. v. Dep't of Envtl. Quality*, 511 U.S. 93, 99 (1994). Because interstate enterprises operating restaurants in New York City bear burdens and suffer costs that intrastate enterprises operating otherwise identical restaurants do not, the Just Cause Laws discriminate in effect and are forbidden by the dormant Commerce Clause.

Nor is the practical discriminatory effect of the Laws an accident. Their sponsor made clear that local protectionism was part of the goal for the criteria, assuring constituents that the Laws would apply to "only fast-food chains" and "not

your neighborhood restaurant." JA448 ¶ 37. That is exactly how the Laws apply—only to interstate chains and not to intrastate "neighborhood" restaurants.

3. The Just Cause Laws apply, in practice, to franchisees of interstate franchisors and not to franchisees of intrastate franchisors.

The Just Cause Laws are discriminatory in another way as well: they penalize interstate franchisors compared to intrastate franchisors.

"Fast food establishments" also include "establishment[s] operated pursuant to a franchise where the franchisor and the franchisees of such franchisor own or operate 30 or more such establishments in the aggregate nationally." NYCC § 20-1201. Again, the evidence demonstrates that there are numerous interstate chains (franchisors) that fall within this definition. JA64. And again, the evidence demonstrates that there are **no intrastate chains** (franchisors) that are "fast food establishments" under this definition. *Id.*

To be clear, the burden of the laws does not fall directly on the franchisors—the Just Cause Laws instead punish the local franchisees who have chosen to do business with the interstate franchisors that fall within the definition.

A party considering entering into a franchise agreement to open a fast-food restaurant in New York City has two options, either (1) contract with a franchisor that causes the restaurant to be subject to the Just Cause Laws; or (2) contract with a franchisor that allows the restaurant to avoid the Laws' onerous requirements.

Only interstate franchisors fall within the first category, and all intrastate franchisors fall within the second. The effect, unsurprisingly, is to put (interstate) franchisors whose franchisees will be subject to the laws at a significant disadvantage compared to intrastate franchisors:

> Based on my experience and conversations with restaurant operators and NYSRA employees, and the NYSRA Government Affairs employees' conversations with restaurant chains, an individual considering opening a restaurant in New York City would be less likely to enter a franchise agreement with a national chain because such a franchise would be subject to the Just Cause Laws.

JA64.

In terms of the practical effect on interstate commerce, imposing a cost on local residents who deal with interstate businesses is no different from imposing a cost on the businesses themselves. If a state cannot impose a discriminatory tax on milk produced out-of-state, *W. Lynn Creamery*, 512 U.S. at 200, it also cannot impose a special tax on local residents and businesses who purchase milk produced out-of-state. The effect on commerce is the same.

The dormant Commerce Clause cannot be evaded "by the form by which a State erects barriers to commerce." *Id.* at 201. "The commerce clause forbids discrimination, whether forthright or ingenious." *Id.*

The Just Cause Laws apply only to local franchisees of interstate franchisors. No local franchisees of intrastate franchisors bear these burdens. Because they

disadvantage interstate franchisors compared to intrastate franchisors, the Just Cause Laws violate the dormant Commerce Clause.

C. The district court erred in rejecting the argument.

The district court rejected Appellants' argument that the Just Cause Laws are discriminatory in effect in two paragraphs. *See* SPA24-25.

The reasoning of the first paragraph appears to rely on the statement: "Only those establishments operating within the City are impacted by the Law." SPA25. This is true but irrelevant. The problem with the Laws is that **not all** establishments operating within the City are impacted. Only those establishments owned or operated by interstate chains (or franchisees of interstate chains) are subject to the Just Cause Laws.

The opinion's next paragraph relies on a single case, *VIZIO, Inc. v. Klee*, 886 F.3d 249 (2d Cir. 2018). Here is the full analysis:

> In *VIZIO*, the Second Circuit declined to find a regulation discriminatory where it referred to national market share in deciding which in-state firms would be governed by the local regulation. *VIZIO*, 886 F.3d 249 at 255. Reference to national market share had "not before been acknowledged in [the Second Circuit's] dormant Commerce Clause jurisprudence," and the court declined to do so for the first time in *VIZIO*. *Id.* This principle applies with equal force here.

SPA25. This case was not cited by any party (or either amicus), and the district court misread it.

VIZIO involved recycling fees charged by Connecticut based on national market share. 886 F.3d at 255. Connecticut "impose[d] a fee on VIZIO in order to finance an electronics recycling program." *Id.* at 258. This Court did not analyze whether the recycle fees were "discriminatory in effect" but instead evaluated them under the *Pike* balancing test. *Id.* at 258.

Crucially, every manufacturer had to pay these recycling fees, and there was no allegation of "the actual—or potential—existence of any in-state manufacturer that is less negatively affected by the national market approach." *Id.* at 260.

Appellants are unable to identify what "principle" the district court drew from this case (SPA25) or how that principle might apply. Unlike the recycling fees—which applied to interstate and local entities alike—the Just Cause Laws apply only to interstate restaurants (and their franchisees). Local restaurants are wholly excepted.

And unlike in *VIZIO*, there is no question that there are actual intrastate restaurants (and franchisors) that are less negatively affected by the Just Cause Laws than the interstate restaurants (and franchisors) subject to them.

D. This Court should follow the Eleventh Circuit's decision in *Cachia v. Islamorada*.

The Eleventh Circuit has already held that a law with an application indistinguishable from the Laws here discriminates in effect against interstate commerce and violates the dormant Commerce Clause.

The targeting of interstate chain restaurants in the Just Clause Laws closely resembles the "formula restaurant" prohibition discussed in *Cachia v. Islamorada*, 542 F.3d 839, 843 (11th Cir. 2008). There, a local ordinance prohibited "formula restaurants," defined as:

> [A]n eating place that is one of a chain or group of three (3) or more existing establishments and which satisfies at least two of the following three descriptions: (1) has the same or similar name, tradename, or trademark as others in the chain or group; (2) offers any of the following characteristics in a style which is distinctive to and standardized among the chain or group . . . ; or (3) is a fast food restaurant.

Id. at 841. The Eleventh Circuit readily concluded that this ordinance had the practical effect of discriminating against interstate commerce:

> While the ordinance does not facially discriminate between in-state and out-of-state interests, 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. The ordinance's prohibition therefore imposes more than an indirect burden on interstate restaurant operations, and has the practical effect of discriminating against interstate commerce.

Id. at 843.

The Eleventh Circuit correctly held that the prohibition was "not evenhanded in effect" and "disproportionately target[ed] restaurants operating in interstate commerce." *Id.* Precisely the same is true of the Just Cause Laws: they are not evenhanded in their effect and disproportionately target restaurants operating in interstate commerce.

The district court distinguished *Cachia* on the ground that it involved a prohibition rather than a burden. SPA25. But this distinction is legally irrelevant: The Supreme Court has made clear that the discrimination prohibited by the dormant Commerce Clause is not limited to "prohibit[ing] the flow of interstate goods" but also includes "plac[ing] added costs upon them" and "distinguish[ing] between in-state and out-of-state companies." *Exxon*, 437 U.S. at 126.

There is no principled distinction between this case and *Cachia*, and affirming the judgment below—holding that the dormant Commerce Clause allows the Just Cause Laws' disproportionate effect on restaurants operating in interstate commerce—would create a split between this Court and the Eleventh Circuit.

E. The Just Cause Laws cannot survive strict scrutiny.

Because the Just Cause Laws have the practical effect of discriminating against interstate commerce, they are subject to what amounts to strict scrutiny. *Legato Vapors, LLC v. Cook*, 847 F.3d 825, 830 (7th Cir. 2017) (citing *Maine*, 477 U.S. at 138). "[O]nce a state law is shown to discriminate against interstate commerce either on its face or in practical effect, 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." *Maine*, 477 U.S. at 138.

The City cannot satisfy this strict standard. The purpose of the statute would apply equally to workers employed by all fast-food restaurants in the City, and a generally applicable law would serve the same purpose through nondiscriminatory means. There is no justification for applying these onerous rules disproportionately to interstate chains.

The City appears to recognize that the burdens of the Just Cause Laws are far too onerous to impose on local restaurants. But it cannot impose these burdens only on interstate chains (and their franchisees) while exempting local chains (and their franchisees) from their reach, even when it accomplishes this result through facially neutral criteria.

CONCLUSION

For these reasons, the Court should reverse and hold the Just Cause Laws preempted under the NLRA. In the alternative, this Court should reverse and hold that the Just Cause Laws violate the dormant Commerce Clause.

Dated: June 22, 2022

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Local Rule 32.1(a)(4)(A) because it contains 13,179 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f).

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionally spaced typeface, Times New Roman 14-point font.

Dated: June 22, 2022

s/ William R. Peterson
William R. Peterson

SPECIAL APPENDIX

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

RESTAURANT LAW CENTER, et al.,		
Plaintiffs,	:	21cv4801 (DLC)
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CITY OF NEW YORK, et al.,	:	
Defendants.	:	

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DENISE COTE, District Judge:

In 2021, the City of New York ("City") enacted a law prohibiting the wrongful discharge of fast food restaurant employees and expanding private enforcement avenues available to them (the "Wrongful Discharge Law" or the "Law"). The Restaurant Law Center ("RLC") and the New York State Restaurant Association ("NYSRA"; together, "Plaintiffs") seek a declaration of the Law's invalidity under the U.S. Constitution and State law. They have moved for summary judgment on all claims. The City has cross-moved for summary judgment, and urges the Court to refrain from exercising supplemental jurisdiction over the Plaintiffs' State law claims. For the reasons set forth below, the City's motion for summary judgment on the federal claims is granted. The Court declines to exercise supplemental jurisdiction over the State law claims.

Background

This litigation addresses a 2021 amendment to the City's Fair Workweek Law. The City enacted the Fair Workweek Law in 2017 to expand wage and hour protections for employees working at fast food businesses. N.Y.C. Admin. Code §§ 20-1201 to 20-1263.

The Fair Workweek Law governs employers operating a fast food establishment that is part of a chain with thirty or more establishments, measured nationally. It defines a fast food establishment as

> [a]ny establishment (i) that has as its primary purpose serving food or drink items; (ii) where patrons order or select items and pay before eating and such items may be consumed on the premises, taken out or delivered to the customer's location; (iii) that offers limited service; (iv) that is part of a chain;[1] and (v) that is one of 30 or more establishments nationally, including . . . an establishment operated pursuant to a franchise where the franchisor and the franchisees of such franchisor own or operate 30 or more such establishments in the aggregate nationally.

N.Y.C. Admin. Code § 20-1201 (emphasis added). A "fast food employee . . . does not include any employee who is salaried." Id.

[1] "The term 'chain' means a set of establishments that share a common brand or that are characterized by standardized options for decor, marketing, packaging, products and services." N.Y.C. Admin. Code § 20-1201.

On December 17, 2020, the City Council amended the Fair Workweek Law by enacting the Wrongful Discharge Law at issue in this case. The Wrongful Discharge Law was signed by the Mayor and the provisions at issue here went into effect on July 4, 2021. N.Y.C. Admin. Code §§ 20-1271 to 20-1275.

The Wrongful Discharge Law prohibits the employers governed by the Fair Workweek Law from firing hourly wage employees without notice or reason in the absence of egregious misconduct, and provides those employees with the option to arbitrate claims of alleged violations of the Law. Provisions of the Wrongful Discharge Law that are significant to the discussion that follows include the following.

I. The Just Cause Provision

The Just Cause Provision states that a "fast food employer shall not discharge a fast food employee who has completed such employer's probation period[2] except for just cause or for a bona fide economic reason."[3] Id. § 20-1272(a). Section 20-1271 provides definitions of the operative terms in the Provision.

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[2] The Wrongful Discharge Law defines the probation period as "a defined period of time, not to exceed 30 days from the first date of work of a fast food employee, within which fast food employers and fast food employees are not subject to the prohibition on wrongful discharge set forth in section 20-1272." N.Y.C. Admin. Code § 20-1271.

[3] The term "bona fide economic reason" is defined as "the full or partial closing of operations or technological or organizational

A discharge is defined as "any cessation of employment, including layoff, termination, constructive discharge, reduction in hours and indefinite suspension." Id. § 20-1271. A reduction in hours "means a reduction in a fast food employee's hours of work totaling at least 15 percent of the employee's regular schedule or 15 percent of any weekly work schedule." Id.

"Just cause" is defined as "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. There are five nonexclusive factors that a fact-finder must consider when determining whether a just cause discharge occurred. Id. §§ 20-1271, 20-1272(b).

The factors include consideration of the employer's utilization of a "progressive discipline" policy. "Progressive discipline" means

> a disciplinary system that provides for a graduated range of reasonable responses to a fast food employee's failure to satisfactorily perform such fast food employee's job duties, with the disciplinary measures ranging from mild to severe, depending on the frequency and degree of the failure.

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changes to the business in response to the reduction in volume of production, sales, or profit." N.Y.C. Admin. Code § 20-1271.

Id. § 20-1201. Except for an employee's egregious misconduct, a termination is not for just cause unless the employer utilized progressive discipline. Id. § 20-1272(c).

Finally, an employer must supply the former employee with a written explanation containing "the precise reasons for their discharge" within five days of discharge. Id. § 20-1272(d). In any subsequent action alleging a violation of the Just Cause Provision, the employer bears the burden of establishing that the discharge was valid, and a fact-finder is limited to consideration of the employer's written reasons it provided to the employee. Id. § 20-1272(d)-(e).

II. The Arbitration Provision

The Wrongful Discharge Law also amended the Fair Workweek Law by giving employees a right to arbitrate a claim of wrongful discharge (the "Arbitration Provision"). Id. § 20-1273. Previously, the Fair Workweek Law provided two avenues for enforcement: administrative enforcement by the New York City Department of Consumer and Worker Protection ("DCWP") upon an employee's complaint, id. § 20-1207, or direct private action in court by an employee, id. § 20-1211.

The Arbitration Provision adds that "any person or organization representing persons alleging a violation" of the Wrongful Discharge Law may bring an arbitration proceeding. Id.

§ 20-1273(a). An employee who prevails in arbitration is entitled to attorneys' fees and costs, reinstatement or restoration of hours, and "all other appropriate equitable relief," including "such other compensatory damages or injunctive relief as may be appropriate." Id. The DCWP may "provide by rule for persons bringing such a proceeding to serve as a representative party on behalf of all members of a class." Id.

Once an employee selects arbitration to pursue a claim, it "shall be the exclusive remedy for the wrongful discharge dispute." Id. § 20-1273(i). The parties may petition for judicial review of the outcome of any arbitration proceeding. Id. § 20-1273(j).

III. Procedural History

Plaintiff RLC is a public policy organization based in Washington, D.C. that is affiliated with the National Restaurant Association, a food service trade association. Plaintiff NYSRA is a not-for-profit hospitality association with over 10,000 food service members in the State, including approximately 1,000 members in New York City. Some of those member food service establishments are fast food restaurants.

The RLC and NYSRA initiated this action on May 28, 2021. They challenge the City's authority to enact the Wrongful

Discharge Law and seek declaratory and injunctive relief. They bring this action under 42 U.S.C. § 1983 and assert that the Wrongful Discharge Law violates the dormant Commerce Clause and Supremacy Clause of the U.S. Constitution, in addition to raising claims under New York State law.[4] The parties have agreed to litigate these claims through cross-motions for summary judgment.

An Order of February 1, 2022 granted two motions by amicus curiae for leave to file briefs in support of the City. The amici are Professor Kate Andrias and other Professors of Labor Law, and a group of organizations including the National Employment Law Project, Make the Road New York, the Center for Popular Democracy, A Better Balance, the CUNY Urban Food Policy Institute, the New York Taxi Workers Alliance, Community Voices Heard, and the Workers Justice Project.

Discussion

The City challenges the Plaintiffs' standing to bring these claims. Finding that at least the NYSRA has standing, this Opinion will address the Plaintiffs' challenges to the Wrongful

[4] The Plaintiffs claim that the Just Cause Provision is preempted by New York State's at-will employment common law and violates the New York Constitution's home rule clause, and that the Arbitration Provision violates the Plaintiffs' right to a trial by jury and invades the jurisdiction of the New York Supreme Court.

Discharge Law as preempted by the National Labor Relations Act ("NLRA"), 29 U.S.C. § 151 et seq., and then as a violation of the dormant Commerce Clause. Next, the Opinion addresses the Plaintiffs' claim that the Arbitration Provision is preempted by the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1 et seq. Having concluded that the City Law survives these challenges, the Opinion will address whether to exercise supplemental jurisdiction.

I. Standing

As a threshold matter, the City challenges the Plaintiffs' standing to bring this action. The case-or-controversy requirement of Article III encompasses "the requirement that the plaintiff establish standing to sue." Stagg, P.C. v. U.S. Dep't of State, 983 F.3d 589, 601 (2d Cir. 2020). "A plaintiff must demonstrate standing for each claim and form of relief sought." Carver v. City of New York, 621 F.3d 221, 225 (2d Cir. 2010) (citation omitted).

An organization does not have standing "to assert the rights of its members in a case brought under 42 U.S.C. § 1983." Nnebe v. Daus, 644 F.3d 147, 156 (2d Cir. 2011). An organization may nonetheless bring a § 1983 suit on its own behalf "so long as it can independently satisfy the requirements of Article III standing." Connecticut Citizens Def. League,

Inc. v. Lamont, 6 F.4th 439, 447 (2d Cir. 2021) (citation omitted). To meet those requirements, a plaintiff must have "(1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." Melito v. Experian Marketing Solutions, Inc., 923 F.3d 85, 92 (2d Cir. 2019) (citation omitted). The "injury in fact" must be "concrete and particularized" and "actual or imminent, not conjectural or hypothetical." Liberian Cmty. Ass'n of Connecticut v. Lamont, 970 F.3d 174, 184 (2d Cir. 2020) (quoting Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992)). Where an organization "diverts its resources away from its current activities, it has suffered an injury that is independently sufficient to confer organizational standing." Connecticut Citizens Def. League, 6 F.4th at 477 (citation omitted). The presence of one party with standing "is sufficient" to satisfy Article III's case-or-controversy requirement. Centro de la Comunidad Hispana de Locust Valley v. Town of Oyster Bay, 868 F.3d 104, 109 (2d Cir. 2017) (citation omitted).

The NYSRA has standing to pursue its federal claims. The NYSRA has "devoted time, money, and effort to informing our members about the Laws' requirements, discussing its potential

implications, and attempting to clarify compliance requirements." These efforts have included hosting a February 2021 webinar on the Wrongful Discharge Law. NYSRA's response to the Law has diverted time that would have otherwise been spent on "advocacy on behalf of restaurants and preparation of training classes," as well as on "working to lift COVID-19 restrictions on restaurants and obtain funding in the State's budget to provide restaurants financial relief from the economic harm caused by those restrictions." This showing is sufficient to establish injury in fact under a theory of diverted resources.

II. Federal Law Claims

A. NLRA Preemption

The Plaintiffs principally contend that the Wrongful Discharge Law is preempted by the federal NLRA. "A fundamental principle of the Constitution is that Congress has the power to preempt state law." Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 372 (2000).

> In general, three types of preemption exist: (1) express preemption, where Congress has expressly preempted local law; (2) field preemption, where Congress has legislated so comprehensively that federal law occupies an entire field of regulation and leaves no room for state law; and (3) conflict preemption, where local law conflicts with federal law such that it is impossible for a party to comply with both or the local law is an obstacle to the achievement of federal objectives.

New York SMSA Ltd. Partnership v. Town of Clarkstown, 612 F.3d 97, 104 (2d Cir. 2010) (citation omitted). Both field and conflict preemption "are usually found based on implied manifestations of congressional intent." Id. Preemption analysis "begins with the assumption that the historic police powers of the States are not to be superseded by federal law unless that is the clear and manifest purpose of Congress." Figueroa v. Foster, 864 F.3d 222, 232 (2d Cir. 2017) (citation omitted).

The NLRA does not contain an express preemption provision. The doctrine of labor law preemption, therefore, "concerns the extent to which Congress has placed implicit limits on the permissible scope of state regulation of activity touching upon labor-management relations." Ass'n of Car Wash Owners Inc. v. City of New York, 911 F.3d 74, 80 (2d Cir. 2018) ("Car Wash") (quoting N.Y. Tel. Co. v. N.Y. State Dep't of Labor, 440 U.S. 519, 527 (1979)).

The Supreme Court has established two implied preemption doctrines under the NLRA. Id. The first, Garmon preemption, is named after the Supreme Court's decision in San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236 (1959). Under Garmon preemption, the NLRA "preempts state regulation that either prohibits conduct subject to the regulatory jurisdiction of the

National Labor Relations Board under section 8 of the NLRA or facilitates conduct prohibited by section 7 of the NLRA." Car Wash, 911 F.3d at 80. Section 7 of the NLRA "guarantee[s] employees the right to organize and engage in other forms of protected concerted action," and § 8 identifies "forms of unfair labor practices." Id. at 81 (citation omitted). The Plaintiffs do not argue that Garmon preemption exists here.[5]

The second form of NLRA preemption, known as Machinists preemption after the Supreme Court's decision in Lodge 76 Int'l Ass'n of Machinists & Aerospace Workers, AFL-CIO v. Wis. Emp't Relations Comm'n, 427 U.S. 132 (1976), preempts "state law and state causes of action concerning conduct that Congress intended to be unregulated." Metro. Life Ins. Co. v. Massachusetts, 471 U.S. 724, 749 (1985) ("Metropolitan Life"). Machinists preemption "forbids states and localities from intruding upon the labor-management bargaining process." Car Wash, 911 F.3d at 81 (citation omitted). The doctrine relies

> on the understanding that in providing in the NLRA a framework for self-organization and collective bargaining, Congress determined both how much the conduct of unions and employers should be regulated,

[5] In their complaint of May 28, 2021, the Plaintiffs alleged that the Wrongful Discharge Law is invalid under Garmon, but do not pursue this argument in their motion for summary judgment. Accordingly, the Plaintiffs' Garmon claim is deemed abandoned. See Kovaco v. Rockbestos-Surprenant Cable Corp., 834 F.3d 128, 143 (2d Cir. 2016).

> and how much it should be left unregulated. Under this theory of NLRA preemption, the crucial inquiry is whether Congress intended that the conduct involved be unregulated because such conduct was left to be controlled by the free play of economic forces.

Id. (citation omitted). In other words, "even regulation that does not actually or arguably conflict with the provisions of sections 7 or 8 of the NLRA may interfere with the open space created by the NLRA." Id. (citation omitted).

The critical inquiry under Machinists preemption is whether state or local regulation "frustrates effective implementation of the NLRA's processes." Id. at 82 (citation omitted). "States are therefore prohibited from imposing additional restrictions on economic weapons of self-help, such as strikes or lockouts, unless such restrictions presumably were contemplated by Congress." Golden State Transit Corp. v. City of Los Angeles, 475 U.S. 608, 614-15 (1986) (citation omitted). In Machinists, for example, the Supreme Court held that Wisconsin could not prohibit a union's members from refusing to work overtime as a collective bargaining tactic without frustrating the NLRA's comprehensive regulatory scheme governing labor relations. 427 U.S. at 148-51.

The NLRA is concerned 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." Metropolitan Life, 471 U.S. at 753. States and localities therefore remain free to set minimum labor standards that "affect union and nonunion employees equally, and neither encourage nor discourage the collective-bargaining processes that are the subject of the NLRA." Car Wash, 911 F.3d at 81 (quoting Metropolitan Life, 471 U.S. at 755). Minimum labor standards enacted by states under their traditional police powers appropriately "set a baseline for employment negotiations." Id. at 82 (citation omitted). Thus in Metropolitan Life, the Supreme Court held that the NLRA did not preempt a Massachusetts law requiring employers to provide mental health benefits, including for employees covered by collective bargaining agreements, because the State law contained "minimum standards independent of the collective-bargaining process that devolve on employees as individual workers, not as members of a collective organization." 471 U.S. at 755 (citation omitted).

The Second Circuit in Concerned Home Care relied on these principles to hold that the NLRA did not preempt New York's Wage Parity Law, which fixed minimum rates of compensation for home care aides working in New York City and surrounding counties. Concerned Home Care Providers, Inc. v. Cuomo, 783 F.3d 77, 85

(2d Cir. 2015). Those fixed rates could be superseded by rates in the largest collective bargaining agreement covering home care aides. Id. at 85-87. The court reasoned that the State's "unexceptional exercise" of its traditional power to stabilize minimum wages in a particular industry was not "designed to encourage or discourage employees in the promotion of their interests collectively," and "neither distinguishe[d] between unionized and non-unionized aides, nor treat[ed] employers differently based on whether they employ unionized workers." Id. at 85 (quoting Metropolitan Life, 471 U.S. at 755).

For the same reasons, the City's Wrongful Discharge Law is a validly enacted minimum labor standard. The Law is one of general applicability aimed at promoting job stability for hourly employees in a particular sector -- the fast food restaurant industry. The Just Cause Provision makes no distinction between fast food employees who are unionized and those who are not. It regulates the process through which fast food employees may be lawfully terminated from their positions and has no impact on the process by which collective bargaining occurs. The Law joins a plethora of valid state and local laws "that form a backdrop" of rights against which both "employers and employees come to the bargaining table." Fort Halifax Packing Co. v. Coyne, 482 U.S. 1, 21 (1987) (citation omitted);

see also, e.g., Rhode Island Hosp. Ass'n v. City of Providence ex rel. Lombardi, 667 F.3d 17, 33 (1st Cir. 2011) (rejecting an NLRA preemption challenge to a worker retention ordinance); St. Thomas--St. John Hotel & Tourism Ass'n, Inc. v. Gov't of U.S. Virgin Islands, 218 F.3d 232, 243-44 (3d Cir. 2000) (rejecting an NLRA preemption challenge to a wrongful discharge statute).

The Plaintiffs argue that the Wrongful Discharge Law invades the collective bargaining process. They assert that the Law's protections against the arbitrary termination of employment are too detailed and improperly tread on an area that unions typically address during collective bargaining. While states may not regulate the collective bargaining process, they retain broad authority to regulate substantive labor standards. Car Wash, 911 F.3d at 82. Preemption may not be lightly inferred, and the regulation of the process for termination of employment -- even through a detailed law -- is not the regulation of the collective bargaining process and is not preempted by the NLRA.

The Plaintiffs next contend that the Wrongful Discharge Law is preempted by the NLRA because its Arbitration Provision favors unions. They reason that employers and unions typically negotiate a no-strike agreement in exchange for an agreement to arbitrate. Because of the Law, employers must submit to

arbitration at an employee's request but can't prevent a strike. Whether the absence of this quid pro quo favors unions is debatable. But, for purposes of a preemption analysis, the creation of the duty to arbitrate is not fatal. Both union and nonunion employees are affected by the same Law in equal ways: they may request and enforce a request to arbitrate covered disputes.[6]

The Plaintiffs next argue that the Wrongful Discharge Law invades the collective bargaining process by denying employers the NLRA-protected right to wield lockouts as an "economic weapon" during labor disputes. They are wrong; the Wrongful Discharge Law does not prevent covered employers from engaging in lockouts.

"A lockout occurs when an employer temporarily shuts down its business and advises employees that they will not be allowed

[6] To further support their arguments, the Plaintiffs cite extensively to the legislative history of the Wrongful Discharge Law, including public statements by sitting Councilmembers. When examining the preemptive effect of a federal statute, a court looks to "the text and context of the law in question and [is] guided by the traditional tools of statutory interpretation." Virginia Uranium, Inc. v. Warren, 139 S. Ct. 1894, 1901 (2019). "Where the plain meaning of the text is clear, [the] inquiry generally ends there." Jingrong v. Chinese Anti-Cult World All. Inc., 16 F.4th 47, 57 (2d Cir. 2021) (citation omitted). The plain meaning of the Wrongful Discharge Law is not disputed, and no construction of the text necessitating reference to the legislative history is called for in this case.

to work until contract agreement is reached between the employer and the union." Labor-Management Relations: Strikes, Lockouts and Boycotts, ch. 9, § 9:1 (2d ed., 2021-2022). In connection with a law that bars the hiring of strike-breakers, the City's administrative code defines a lockout as

> [a] refusal by an employer to permit his employees to work as a result of a dispute with such employees that affects wages, hours and other terms and conditions of employment of said employees, provided, however, that a lockout shall not include a termination of employment for reasons deemed proper under New York state and federal law.

N.Y.C. Admin. Code § 22-501 (emphasis added).

The Wrongful Discharge Law protects individual employees who are "discharged," which includes a reduction of 15% or more in hours, by defining a process for the discharge of that individual from employment. It does not impose liability on employers who have locked out all employees due to a dispute with its employees over the terms of employment.[7] The Plaintiffs do not suggest that the NLRA as a general matter preempts the City from adopting regulations that impact the termination of employment. After all, it is common for state and local authorities to regulate the terms on which private employers may terminate employees. For instance, local laws ban termination

[7] It is noteworthy that the Plaintiffs bring a facial challenge to the Wrongful Discharge Law, and not an as-applied challenge.

of employment for discriminatory or retaliatory reasons. See, e.g., N.Y. Exec. L. § 290 et seq.; N.Y.C. Admin. Code §§ 8-101 et seq. Other local laws prevent the termination of employment when a business changes hands. See, e.g., Rhode Island Hosp. Ass'n, 667 F.3d at 33.

Finally, the Plaintiffs point to two decisions from the Ninth and Seventh Circuits, Chamber of Commerce v. Bragdon, 64 F.3d 497 (9th Cir. 1995), and 520 South Michigan Avenue Associates v. Shannon, 549 F.3d 1119 (7th Cir. 2008), to argue that the Law is preempted because it targets employers within a particular industry. These decisions have not been followed in this Circuit. See Concerned Home Care, 783 F.3d at 86 n.8; see also Rondout, 335 F.3d at 169 (distinguishing Bragdon). Moreover, the Ninth Circuit has narrowed its decision in Bragdon, finding that "the NLRA does not authorize us to pre-empt minimum labor standards simply because they are applicable only to particular workers in a particular industry." Associated Builders & Contractors of S. California, Inc. v. Nunn, 356 F.3d 979, 990 (9th Cir. 2004), as amended, No. 02-56735, 2004 WL 292128 (9th Cir. Feb. 17, 2004)). Shannon, which relied on Bragdon, has similarly lost its persuasive authority. See Shannon, 549 F.3d at 1136. More significantly, this Circuit has upheld laws affecting the conditions of employment of

workers in a particular industry against challenges that they were preempted by the NLRA. See, e.g., Car Wash, 911 F.3d at 84 (reduced surety bond for a business license to operate a car wash if the employer was party to a collective bargaining agreement); Concerned Home Care, 783 F.3d at 85-86 (setting minimum wage rates for home care aides); Rondout Elec., Inc. v. N.Y. State Dep't of Labor, 335 F.3d 162, 168-70 (2d Cir. 2003) (setting minimum benefits for employees on public works projects).

For the reasons explained, the Wrongful Discharge Law does not "frustrate effective implementation of the [NLRA's] processes." Machinists, 427 U.S. at 148 (quoting R.R. Trainmen v. Jacksonville Terminal Co., 394 U.S. 369, 380 (1969)). The City's cross-motion for summary judgment on the claim that the Wrongful Discharge Law is preempted by the NLRA is therefore granted.

B. Dormant Commerce Clause

The Plaintiffs allege that the Wrongful Discharge Law is unconstitutional under the Commerce Clause of the U.S. Constitution, which empowers Congress "to regulate Commerce . . . among the several States." U.S. Const. art. I, § 8, cl. 3. The Commerce Clause also carries a "corresponding 'negative' or 'dormant' aspect that limits the power of local

governments to enact laws affecting interstate commerce." New York Pet Welfare Ass'n, Inc. v. City of New York, 850 F.3d 79, 89 (2d Cir. 2017) ("NYPWA") (citation omitted). The Supreme Court has explained that "[o]ur dormant Commerce Clause jurisprudence . . . is driven by a concern about economic protectionism -- that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors." McBurney v. Young, 569 U.S. 221, 235 (2013) (quoting New Energy Co. of Ind. v. Limbach, 486 U.S. 269 (1988)). "Analysis of state and local laws under the dormant Commerce Clause treads a well-worn path. A court must first assess whether the challenged law discriminates against interstate commerce, or regulates evenhandedly with only incidental effects on interstate commerce." VIZIO, Inc. v. Klee, 886 F.3d 249, 254 (2d Cir. 2018) (citation omitted). Discrimination "means differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." NYPWA, 850 F.3d at 89.

"The Supreme Court has recognized three modes of discrimination against interstate commerce: a law may discriminate on its face, harbor a discriminatory purpose, or discriminate in its effect." Id. at 90. A discriminatory law is subject to heightened scrutiny and is permissible "only if

the state shows [the law is] demonstrably justified by a valid factor unrelated to economic protectionism." Id. at 89-90 (quoting Wyoming v. Oklahoma, 502 U.S. 437, 454 (1992)). "This justification must show a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives." Id. at 90 (quoting Dep't of Revenue of Ky. v. Davis, 553 U.S. 328, 338 (2008)).

By contrast, a nondiscriminatory law that only imposes "incidental burdens on interstate commerce" is analyzed under the more forgiving balancing test set out in Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970). See VIZIO, 886 F.3d at 254 (citation omitted). Under the Pike test, a nondiscriminatory law will be upheld "unless the challenger shows that the burden imposed on interstate commerce is clearly excessive in relation to the putative local benefits." NYPWA, 850 F.3d at 90 (quoting Pike, 397 U.S. at 142).

1. Discriminatory Effect

The Plaintiffs contend that the Wrongful Discharge Law has a discriminatory effect on interstate commerce since it restricts its applications to those businesses with thirty or more locations within the United States and to franchisees that do business with national brands. They argue that this jurisdictional limitation puts interstate businesses at a

competitive disadvantage when compared to businesses located exclusively within New York State. The Wrongful Discharge Law does not violate the dormant Commerce Clause.

The Wrongful Discharge Law does not control out-of-state commerce or require out-of-state commerce to be conducted in a manner consistent with the Law. Moreover, it makes no express distinction between national fast food chains and chains with more than thirty locations that are located solely within New York State. The Law does not target chains because they are related to out-of-state brands. The provision of the Law on which the Plaintiffs focus this argument is simply a neutral metric to describe the scale of the enterprise that must comply with the Law. Indeed, the metric is part of the City's Fair Workweek Law, which the Wrongful Discharge Law amended. N.Y.C. Admin. Code § 20-1201.

The Plaintiffs insist that, its facial neutrality notwithstanding, the City's inability to identify any intrastate restaurant brand or franchise that is governed by the Law is fatal to the Law's constitutionality. Even without an example of a purely intrastate business of a qualifying size, the Law does not benefit in-state restaurant chains "at the expense of out-of-state competitors." Grand River Enters. Six Nations, Ltd. v. Pryor, 425 F.3d 158, 169 (2d Cir. 2005) (citation

omitted). Only those establishments operating within the City are impacted by the Law.

In VIZIO, the Second Circuit declined to find a regulation discriminatory where it referred to national market share in deciding which in-state firms would be governed by the local regulation. VIZIO, 886 F.3d 249 at 255. Reference to national market share had "not before been acknowledged in [the Second Circuit's] dormant Commerce Clause jurisprudence," and the court declined to do so for the first time in VIZIO. Id. This principle applies with equal force here.

The Plaintiffs rely on the Eleventh Circuit's decision in Cachia v. Islamorada, 542 F.3d 839 (11th Cir. 2008), to support their claim that the Wrongful Discharge Law is discriminatory. Cachia held that a locality's zoning law that excluded "formula restaurants" had the "practical effect of discriminating against interstate restaurants." Id. at 843. Cachia is not instructive in this case. The zoning law at issue in Cachia prohibited national chain restaurants from entering local commerce, while the Wrongful Discharge Law regulates the "methods of operation" for fast food restaurants and only to the extent that they employ hourly wage employees in the City. See id. The Law, accordingly, imposes no more "than an indirect burden on interstate restaurant operations." Id.

2. The Pike Test

Because the Wrongful Discharge Law imposes no more than an incidental burden on the interstate market for fast food restaurants, the Pike test must be applied to determine whether the burdens imposed by the Wrongful Discharge Laws are "clearly excessive" in relation to its local benefits. Pike, 397 U.S. at 142. "The Pike test is often directed at differentiating 'protectionist measures' from those that 'can fairly be viewed as . . . directed to legitimate local concerns.'" VIZIO, 886 F.3d at 259 (quoting Philadelphia v. New Jersey, 437 U.S. 617, 624 (1978)). A state may validly impose incidental burdens on interstate commerce "to promote safety or general welfare." Id. To violate the Commerce Clause, at minimum, the burden imposed on interstate commerce must be shown to be "qualitatively or quantitatively different from that imposed on intrastate commerce." Town of Southold v. Town of E. Hampton, 477 F.3d 38, 50 (2d Cir. 2007) (citation omitted). "Burdens supportive of an unconstitutional finding have been recognized in the following situations: 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." VIZIO, 886 F.3d at 259 (citation omitted); see

also Brown & Williamson Tobacco Corp. v. Pataki, 320 F.3d 200, 208–09 (2d Cir. 2003).

Applying the Pike test, the Law does not violate the dormant Commerce Clause. The Law is a general welfare statute. The costs of employing hourly wage workers in the City while complying with the Law are not "qualitatively or quantitatively different" for intrastate or interstate businesses. See Town of Southold, 477 F.3d at 50. The regulatory costs of the Law are not distributed based on distinction between in-state and out-of-state enterprises. Since the Commerce Clause "protects the interstate market, not particular interstate firms," NYWPA, 850 F.3d at 90 (quoting Exxon Corp. v. Maryland, 437 U.S. 117, 127 (1978)), there is no basis to find that the Wrongful Discharge Law runs afoul of the Pike test.

C. FAA Preemption

The Plaintiffs allege that the Arbitration Provision in the Wrongful Discharge Law is preempted by the FAA. The law regarding preemption is set forth above. The Plaintiffs do not suggest that the FAA contains an express provision that preempts the Arbitration Provision or rely on a theory of field preemption. They appear to assert that the Arbitration Provision conflicts with the FAA such that it is impossible for a party to comply with both.

"The FAA requires courts to enforce arbitration agreements according to their terms." Lamps Plus, Inc. v. Varela, 139 S. Ct. 1407, 1415 (2019) (quoting Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1621 (2018)). Specifically, the FAA provides that

> A written provision in any . . . contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. § 2 (emphasis added). States may not prohibit private agreements to arbitrate. See AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 341 (2011).

The Arbitration Provision of the Wrongful Discharge Law does not prohibit or impair the enforcement of private arbitration agreements. Private parties, including fast food employers and employees, remain free to agree to submit disputes to arbitration, and the Wrongful Discharge Law does not interfere with the enforcement of such agreements.

In arguing that the FAA prohibits the arbitration scheme enacted in the Wrongful Discharge Law, the Plaintiffs chiefly rely on the Supreme Court's description of the "foundational FAA principle" that "[a]rbitration is strictly a matter of consent," and that arbitrators "derive their powers from the parties'

agreement to forgo the legal process and submit their disputes to private dispute resolution." Lamps Plus, 139 S. Ct. at 1415-16 (quoting Granite Rock Co. v. Teamsters, 561 U.S. 287, 299 (2010) and Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 559 U.S. 662, 682 (2010)). The FAA, however, is silent on the subject of compelled arbitration. The Plaintiffs have failed to demonstrate that the FAA preempts the Arbitration Provision of the Wrongful Discharge Law.

III. Supplemental Jurisdiction

The Plaintiffs also bring four state law claims. A district court may decline to exercise supplemental jurisdiction over a state law claim if "the claim raises a novel or complex issue of State law" and/or the district court "has dismissed all claims over which it has original jurisdiction." 28 U.S.C. § 1367(c)(1), (3). Once a court has dismissed all federal claims, it must decide whether the traditional values of "economy, convenience, fairness, and comity" counsel against the exercise of supplemental jurisdiction. Catzin v. Thank You & Good Luck Corp., 899 F.3d 77, 85 (2d Cir. 2018) (citation omitted).

> In weighing these factors, the district court is aided by the Supreme Court's additional guidance in [Carnegie-Mellon Univ. v. Cohill, 484 U.S. 343 (1988),] that in the usual case in which all federal-law claims are eliminated before trial, the balance of factors will point toward declining to exercise jurisdiction over the remaining state-law claims.

Kolari v. New York-Presbyterian Hosp., 455 F.3d 118, 122 (2d Cir. 2006).

There is no reason in this case to depart from the ordinary practice of dismissing the remaining state law claims. Each of the federal claims has been resolved. Judicial economy and comity weigh in favor of dismissal.

The Plaintiffs argue that judicial economy would be served by deciding the state law claims raised in this action. The legal framework for addressing the federal and state law claims differs substantially. In addition, this litigation presents novel and complex issues of state law. Accordingly, the Court will not exercise supplemental jurisdiction over the state law claims.

Conclusion

The Plaintiffs' July 20, 2021 motion for summary judgment on their federal claims is denied. The City's cross-motion is granted with respect to the Plaintiffs' federal claims. The Court declines to exercise supplemental jurisdiction over the state law claims and they are dismissed without prejudice to

refiling in state court. The Clerk of Court shall close the case.

Dated: New York, New York
February 10, 2022

DENISE COTE
United States District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------X

RESTAURANTS LAW CENTER, et al.,

Plaintiffs,

-against-

21 **CIVIL** 4801 (DLC)

JUDGMENT

CITY OF NEW YORK, et al.,

Defendants.

----------X

It is hereby **ORDERED, ADJUDGED AND DECREED:** That for the reasons stated in the Court's Opinion and Order dated February 10, 2022, the Plaintiffs' July 20, 2021 motion for summary judgment on their federal claims is denied. The City's cross-motion is granted with respect to the Plaintiffs' federal claims. The Court has declined to exercise supplemental jurisdiction over the state law claims and they are dismissed without prejudice to refiling in state court; accordingly, the case is closed.

Dated: New York, New York

February 11, 2022

RUBY J. KRAJICK

Clerk of Court

BY: Kmargo

Deputy Clerk