22-491

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

BRIEF FOR STATES OF NEW YORK, CALIFORNIA, CONNECTICUT, DELAWARE, ILLINOIS, MAINE, MARYLAND, MASSACHUSETTS, MINNESOTA, NEW MEXICO, OREGON, PENNSYLVANIA, RHODE ISLAND, AND WASHINGTON, AND THE DISTRICT OF COLUMBIA AS AMICI CURIAE IN SUPPORT OF APPELLEES

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TABLE OF CONTENTS

Page

Page

TABLE OF AUTHORITIES

Cases **Page(s)**

Cases **Page(s)**

Cases **Page(s)**

Constitution

Laws & Regulations

Federal

Laws & Regulations **Page(s)**

States & Territories

Municipalities

Legislative Sources **Page(s)**

Miscellaneous Authorities

Miscellaneous Authorities **Page(s)**

INTERESTS OF AMICI STATES

Amici States of New York, California, Connecticut, Delaware, Illinois, Maine, Maryland, Massachusetts, Minnesota, New Mexico, Oregon, Pennsylvania, Rhode Island, and Washington, and the District of Columbia submit this brief in support of appellees City of New York and the Commissioner of the New York City Department of Consumer and Worker Protection. In this case, two restaurant industry groups challenge the City's Wrongful Discharge Law, which prohibits qualifying fast-food establishments from discharging employees without just cause and allows employees to arbitrate claims of wrongful discharge. *See* N.Y.C. Admin. Code §§ 20-1271 to 20-1275. The U.S. District Court for the Southern District of New York (Cote, J.) held that the National Labor Relations Act (NLRA) does not preempt the law and that the law does not violate the dormant Commerce Clause. This Court should affirm.

Amici have a substantial sovereign interest in exercising their police powers to enact and enforce laws promoting the health, safety, and welfare of their residents, including employees in the fast-food industry. Amici regularly enforce their labor laws to address violations of state minimum wage, overtime, prevailing wage, and other labor protections through

investigations and enforcement actions undertaken by state attorneys general and departments of labor. Amici therefore have a substantial interest in ensuring that these sovereign powers are unencumbered by an overly broad view of NLRA preemption and the dormant Commerce Clause, two doctrines that are not intended to tread on established areas of state authority.

This case implicates amici's interests because appellants seek to invalidate a City law that falls squarely within the ambit of traditional state and local regulation aimed at protecting vulnerable workers. Amici have long relied on well-settled precedent holding that the *Machinists* strand of NLRA preemption does not extend to state-law minimum labor standards such as the just-cause protections of the Wrongful Discharge Law because such laws do not interfere with the collective-bargaining process governed by the NLRA. Accepting appellants' expansive view of *Machinists* preemption could therefore imperil countless state and local laws governing wages, health and safety rules, and mandatory benefits.

Amici have also long regulated employment conditions in their States, notwithstanding the fact that such regulations could have incidental effects on interstate commerce given the interconnected nature of the

modern economy. A ruling in favor of appellants could unsettle amici's longstanding practices and undermine future efforts to protect workers through legislation and enforcement actions.

STATEMENT

A. The National Labor Relations Act (NLRA)

The NLRA provides that it is the policy of the United States to eliminate obstructions to commerce "by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing." 29 U.S.C. § 151. The NLRA embodies Congress's determination that protecting "the right of employees to organize and bargain collectively" promotes the flow of commerce by removing "sources of industrial strife and unrest" and "restoring equality of bargaining power between employers and employees." *Id.*

Section 7 of the NLRA gives employees the "right to self-organization, to form, join, or assist labor unions, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining." *Id.* § 157. Section 8 requires employers to bargain collectively with employees through representatives

of the employees' choosing and prohibits certain restrictions on the collective-bargaining process. *Id.* § 158.

As the Supreme Court has recognized, the NLRA is fundamentally a procedural statute. *See Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 753-54 (1985). The NLRA establishes and governs the process by which employees organize into unions as well as the process by which unions and employers collectively bargain. However, the statute does not contemplate, much less compel, any particular outcome of the collective-bargaining process. Accordingly, the NLRA neither requires nor forbids unionization and neither requires nor forbids any substantive term of employment.

B. Efforts by State and Local Governments to Address Unjust Working Conditions in Fast-Food Industry

State and local governments have long been concerned with abusive and unjust working conditions in the fast-food industry. Fast-food workers suffer from low pay, unpredictable schedules, and unexplained termination and hours reductions.[1] As a result, fast-food workers are more likely

[1] *See, e.g.*, Evelyn Bellew, et al., *Low Pay, Less Predictability: Fast Food Jobs in California* (Shift Project 2022) (internet); Ctr. for Popular Democracy, et al., *Fired on a Whim: The Precarious Existence of NYC*

(*continued on the next page*)

to rely on public assistance programs and to live in poverty.[2] Because fast-food workers are often engaged in late-night retail, they are also at increased risk of workplace violence.[3] Over the past decade, workers have organized protests and strikes in more than 150 cities nationwide to demand labor reforms, including most prominently a $15-per-hour minimum wage.[4]

State and local governments have responded by enacting new laws to protect fast-food workers and other vulnerable employees. Since 2014, numerous cities, including Seattle, San Francisco, and Los Angeles, have adopted ordinances increasing minimum wages for fast-food workers and

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Fast-Food Workers (2019) (internet). (For sources available online, full URLs appear in the Table of Authorities. All URLs were last visited on September 28, 2022.)

[2] *See* Sylvia Allegretto, et al., *Fast Food, Poverty Wages* (U.C. Berkeley Lab. Ctr. 2013) (internet).

[3] *See* Nat'l Emp. L. Project, *Behind the Arches: How McDonald's Fails to Protect Workers from Workplace Violence* (2019) (internet).

[4] *See, e.g.*, Steven Greenhouse, *Wage Strikes Planned at Fast-Food Outlets*, N.Y. Times (Dec. 1, 2013) (internet); Steven Greenhouse, *How the $15 Minimum Wage Went From Laughable to Viable*, N.Y. Times (Apr. 1, 2016) (internet).

others.[5] In 2015, New York State's Department of Labor (DOL) issued a minimum-wage order increasing the statewide minimum wage for fast-food workers to $15 per hour by 2021. *See* 12 N.Y.C.R.R. § 146-1.2(a)(2).[6] Shortly thereafter, New York State enacted a law that gradually achieves a statewide $15 minimum wage.[7] Between 2012 and 2022, the number of counties and cities with minimum-wage laws has increased from five to 55.[8] In 2022, a record number of States and localities are expected to raise their minimum wages for fast-food workers and others, with many meeting or exceeding $15 per hour.[9] Most recently, California enacted legislation establishing a Fast Food Council to prescribe "sectorwide minimum standards on wages, working hours, and other working conditions" for

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[5] *See, e.g.*, Seattle Mun. Code ch. 14.19; S.F. Admin. Code § 12R.4; L.A. Cnty. Code of Ordinances § 8.100.040.

[6] *See also* Patrick McGeehan, *New York Plans $15-an-Hour Minimum Wage for Fast Food Workers*, N.Y. Times (July 22, 2015) (internet).

[7] N.Y. State, *New York State's Minimum Wage* (internet).

[8] U.C. Berkeley Lab. Ctr., *Inventory of US City and County Minimum Wage Ordinances* (June 1, 2022) (internet).

[9] *See* Yannet Lathrop, *Raises from Coast to Coast in 2022* (Nat'l Emp. L. Project 2021) (internet).

the fast-food industry in the State. Assemb. B. 257, 2021-2022 Sess. (Cal. 2022) (internet).

C. New York City's Protections for Fast-Food Employees

In 2017, New York City enacted the Fair Work Practices Law, a series of ordinances aimed at expanding wage and hour and other labor protections for fast-food employees. *See* Admin. Code § 20-1201 et seq. Among other things, the law (i) forbids employers from scheduling employees for consecutive shifts that involve closing the restaurant and opening it just hours later, *id.* § 20-1231; (ii) requires employers to offer additional shifts to current employees before hiring new employees, *id.* § 20-1241; and (iii) requires employers to provide employees advance notice of work schedules, *id.* §§ 20-1251 to 20-1253.

The Fair Work Practices Law applies only to "fast food establishments" that are part of a chain including "30 or more establishments nationally." *Id.* § 20-1201. The numerical metric was derived from the New York State DOL's minimum-wage increase for fast-food employees, which applied "only to fast food chains with 30 or more locations

nationally."[10] (*See* Joint Appendix (J.A.) 1740 (quotation marks omitted).) *See also* 12 N.Y.C.R.R. § 146-3.13. A restaurant qualifies as a fast-food establishment for purposes of the City's law regardless of whether it is part of "an integrated enterprise that owns or operates 30 or more such establishments," or operates under a franchise "where the franchisor and the franchisees of such franchisor own or operate 30 or more such establishments." Admin. Code § 20-1201.

In 2021, New York City enacted the Wrongful Discharge Law, which amended the 2017 law to provide additional protections for fast-food workers, many of whom were disproportionately affected by the Covid-19 pandemic and its attendant disruptions. *Id.* §§ 20-1271 to 20-1275. (*See* J.A. 1749-1750, 1754.) The New York City Council committee report prepared for the Wrongful Discharge Law observed that complaints of wrongful discharge are common in the fast-food industry, which employs

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[10] As DOL explained, "chains of this size are better equipped to absorb a wage increase due to greater operational and financial resources, and brand recognition." (Joint Appendix (J.A.) 1740 (quotation marks omitted).) DOL also promulgated guidance confirming that, in addition to national chains, "local chains that only have locations within New York State are covered [by the minimum-wage order] as long as they have at least 30 locations." (J.A. 1741 (quotation marks omitted).)

more than 67,000 people at more than 3,000 establishments in New York City. Fast-food employers frequently terminate employees without explanation or reduce their hours, resulting in financial hardship and exacerbating the already pervasive mistreatment of fast-food workers, who often belong to vulnerable populations. (J.A. 1519-1520.)

In response to these concerns, the Wrongful Discharge Law bars fast-food employers from "discharg[ing] a fast food employee who has completed such employer's probation period except for just cause or for a bona fide economic reason." Admin. Code § 20-1272(a). A "discharge" includes "any cessation of employment," including not only termination but also a reduction in hours of at least 15 percent. *Id.* § 20-1271. "Just cause" for discharging an employee must consist of "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.* A "bona fide economic reason" for discharging an employee "means the full or partial closing of operations

or technological or organizational changes to the business in response to the reduction in volume of production, sales, or profit." *Id.*[11]

The Wrongful Discharge Law also establishes procedures that employers must follow in discharging employees. For example, absent an egregious failure to perform duties or egregious misconduct, an employer may not terminate an employee without utilizing a written progressive-discipline policy.[12] *Id.* § 20-1272(c). An employer must also provide a written explanation for the discharge within five days. *Id.* § 20-1272(d). In addition, "[d]ischarges of fast food employees based on bona fide economic reason shall be done in reverse order of seniority." *Id.* § 20-1272(h).

An employee may sue to challenge a discharge, and in such a proceeding, the employer "shall bear the burden of proving just cause or a bona fide economic reason by a preponderance of the evidence." *Id.* § 20-1272(e). An employee also has the option of challenging a discharge in an

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[11] *See also* Admin. Code § 20-1272(g) ("A discharge shall not be considered based on a bona fide economic reason unless supported by a fast food employer's business records showing that the closing, or technological or reorganizational changes are in response to a reduction in volume of production, sales, or profit.").

[12] "Progressive discipline" refers to a system with a "graduated range of reasonable responses" to deficient employee performance, "ranging from mild to severe." Admin. Code § 20-1271.

arbitration proceeding, individually or on behalf of a class. *Id.* § 20-1273. A wrongfully discharged employee is entitled to reinstatement, attorney's fees, and certain other damages. *Id.* §§ 20-1272(f), 20-1274.

D. "Just Cause" Laws in Other Jurisdictions

Numerous other jurisdictions have enacted "just cause" laws that provide protections comparable to the City's law. For example, Montana prohibits discharging non-probationary employees without just cause based on "reasonable job-related grounds" or "other legitimate business reasons"; in such cases, wrongfully discharged employees may recover lost wages. Mont. Code Ann. §§ 39-2-903 to 39-2-905. Likewise, Puerto Rico mandates severance pay to employees who are discharged without just cause. P.R. Laws Ann. tit. 29, §§ 185a-185n. The U.S. Virgin Islands requires employers to reinstate wrongfully discharged employees with backpay. V.I. Code Ann. tit. 24, § 77. And a Philadelphia ordinance prohibits parking employers from terminating, suspending, or reducing the hours of parking employees absent just cause or a bona fide economic reason and requires the use of a progressive discipline policy. Phila. Code §§ 9-4701 to 9-4704.

Other jurisdictions are considering "just cause" laws. For example, a bill introduced in the Illinois legislature would protect employees from discharge without just cause or a bona fide economic reason, require utilization of a progressive discipline policy, limit the electronic surveillance of employees, and provide for severance pay. H.B. 3530/S.B. 2332, 102d Gen. Assemb. (Ill. 2021) (internet).

ARGUMENT

POINT I

THE NLRA DOES NOT PREEMPT THE WRONGFUL DISCHARGE LAW

When assessing whether federal law impliedly preempts a field traditionally occupied by the States, a court must "start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *California v. ARC Am. Corp.*, 490 U.S. 93, 101 (1989) (quotation marks omitted). The Supreme Court has made clear that "pre-emption should not be lightly inferred in" the area of labor law because "the establishment of labor standards falls within the traditional police power of the State." *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 21 (1987); *see*

also Building & Constr. Trades Council of the Metro. Dist. v. Associated Builders & Contractors of Mass./R.I., Inc., 507 U.S. 218, 224 (1993).

Nevertheless, the Supreme Court has recognized that the NLRA has preemptive effect in certain narrow areas. As relevant here, under the doctrine of *Machinists* preemption, state and local laws are preempted where they interfere with federal policy to leave certain aspects of the bargaining process between employers and employees "unregulated [because it should] be controlled by the free play of economic forces." *Lodge 76, Int'l Ass'n of Machinists v. Wisconsin Emp. Rels. Comm'n*, 427 U.S. 132, 144 (1976). The scope of *Machinists* preemption is narrowly directed toward maintaining "an equitable *process* for determining terms and conditions of employment," rather than controlling the "particular substantive terms" of employment. *Metropolitan Life*, 471 U.S. at 753 (emphasis added); *accord Association of Car Wash Owners Inc. v. City of New York*, 911 F.3d 74, 81 (2d Cir. 2018). It is accordingly well established that the NLRA does not preempt state and local laws establishing minimum labor standards because such statutes govern the substantive terms of the employment relationship and have only "the most indirect effect on the

right of self-organization established in the" NLRA. *Metropolitan Life*, 471 U.S. at 755.

A. The Wrongful Discharge Law Establishes Lawful Minimum Labor Standards.

The Wrongful Discharge Law governs the substantive terms of the employment relationship and thus establishes minimum labor standards that are not preempted by the NLRA. The law does not purport to regulate the collective-bargaining process but rather provides "specific minimum protections to individual workers." *Metropolitan Life*, 471 U.S. at 755 (emphasis omitted) (quotation marks omitted). These protections, for example, prohibit unexplained discharge absent just cause or a bona fide economic reason, require the use of fair systems for employee discipline, and provide avenues for redressing employer violations.[13] *See* Admin. Code §§ 20-1272 to 20-1273.

Appellants' claim of *Machinists* preemption is based largely on their contention that the Wrongful Discharge Law provides too many protec-

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[13] Appellants err in repeatedly asserting that the Wrongful Discharge Law is "unprecedented." *See* Br. at 5, 17-18, 26, 32, 37, 42-45; *see also St. Thomas–St. John Hotel & Tourism Ass'n v. Government of the U.S. Virgin*

(*continued on the next page*)

tions to employees and therefore removes certain issues "from the realm of bargaining." Br. of Appellants (Br.) at 22-23, 26-37. But as the Supreme Court has explained, "any state law that substantively regulates employment conditions" might be said to "give[] employees something for which they otherwise might have to bargain." *Fort Halifax*, 482 U.S. at 21. Minimum labor standards guaranteed by state law "do[] not limit the rights of self-organization or collective bargaining protected by the NLRA" and are therefore not preempted. *Concerned Home Care Providers, Inc. v. Cuomo*, 783 F.3d 77, 86 (2d Cir. 2015). The NLRA protects against "inequality of bargaining power," which does not turn on "having terms of employment set by public law or having them set by private agreement." *Metropolitan Life*, 471 U.S. at 754.

Appellants misplace their reliance (Br. at 24-25) on this Court's dicta in *Concerned Home Care Providers*, which assumed for the sake of argument that "there may be labor standards that are so finely targeted that they impermissibly intrude upon the collective-bargaining process," 783

Islands, 218 F.3d 232, 242-46 (3d Cir. 2000) (holding that NLRA does not preempt Virgin Islands law prohibiting wrongful discharge). See *supra* at 11-12 (discussing analogs).

F.3d at 86. At the same time, this Court correctly observed that "the Supreme Court has never applied *Machinists* preemption to a state law that does not regulate the mechanics of labor dispute resolution." *Id.* There is no basis to do so in this case.

Even if preemption could theoretically reach a "finely targeted" labor standard, the out-of-circuit cases on which appellants rely are inapposite. *See* Br. at 30-31, 34-36. First, in *Chamber of Commerce v. Bragdon,* the Ninth Circuit held that the NLRA preempted an ordinance that dictated the precise allocation of a compensation package as between hourly wages and various benefits. 64 F.3d 497, 502 (9th Cir. 1995). The ordinance set prevailing wages for specific private construction projects using dynamic formulas keyed to collective-bargaining agreements. *Id.* Second, in *520 South Michigan Avenue Associates v. Shannon*, the Seventh Circuit relied on *Bragdon* to hold that detailed break requirements and certain procedures for retaliation lawsuits were preempted because they applied to a narrow class of employees in one locality and "would be very difficult for any union to bargain for." 549 F.3d 1119, 1133-35 (7th Cir. 2008).

Both cases are factually distinct from this one. At the outset, neither involved laws protecting workers against wrongful discharge. Unlike in *Bragdon*, the terms of the Wrongful Discharge Law do not fluctuate depending on the contents of third-party collective-bargaining agreements. *See* Admin. Code § 20-1272. And appellants concede (Br. at 31) that the Wrongful Discharge Law's protections are typical of collective-bargaining agreements and thus are not "very difficult for any union to bargain for," unlike in *Shannon*, 549 F.3d at 1134. Indeed, the Third Circuit distinguished *Bragdon* in upholding a similar law prohibiting wrongful discharge, concluding that the law "neither regulates the process of bargaining nor upsets the balance of power of management on one side and labor on the other." *St. Thomas–St. John Hotel*, 218 F.3d at 244.

Moreover, this Court has held that "*Machinists* preemption does not . . . eliminate state authority to craft minimum labor standards for particular regions or areas of the labor market." *Concerned Home Care Providers*, 783 F.3d at 86 (minimum wage for home care aides in New York City and surrounding counties); *see also Rondout Elec., Inc. v. NYS Dept. of Labor*, 335 F.3d 162, 164, 170 (2d Cir. 2003) (prevailing wage for public works employees); *Rhode Island Hosp. Ass'n v. City of Providence*,

667 F.3d 17, 23, 32-33 (1st Cir. 2011) (retention of hospitality workers in Providence, Rhode Island); *California Grocers Ass'n v. City of Los Angeles*, 52 Cal. 4th 177, 186-87, 197-201 (2011) (retention of grocery-store workers in Los Angeles, California). Indeed, the Ninth Circuit itself has clarified *Bragdon*, explaining that "state substantive labor standards, including minimum wages, are not invalid simply because they apply to particular trades, professions, or job classifications rather than to the entire labor market." *See Associated Builders & Contractors of S. Cal., Inc. v. Nunn*, 356 F.3d 979, 990 (9th Cir.), *amended by* No. 02-56735, 2004 WL 292128 (9th Cir. Feb. 17, 2004).

B. The Wrongful Discharge Law Does Not Pressure Employers to Encourage Unionization.

Appellants are also wrong to argue that allowing employees to enforce the Wrongful Discharge Law through arbitration places undue economic pressure on employers to encourage unionization. *See* Br. at 33, 37-40. As an initial matter, appellants' argument is premised on the incorrect assumption that a State or locality setting minimum labor standards is required to provide employers a concomitant benefit for every measure that protects workers. Namely, appellants contend that because

employers sometimes negotiate in the collective-bargaining process to limit employees' ability to strike in exchange for allowing employees to arbitrate their claims, it is unfair to allow employees to arbitrate claims of wrongful discharge without providing an offsetting right to employers. *Id.* at 38-39. Such an argument has no support in the case law governing *Machinists* preemption, which recognizes that States and localities have wide latitude in enacting worker protections. *See Fort Halifax*, 482 U.S. at 21.

In any event, appellants fail to explain how the arbitration provision encourages unionization. As the district court recognized, the Wrongful Discharge Law applies equally to union and nonunion employees. (Special Appendix (S.A.) 18.) Employers of a unionized workforce are not precluded from seeking a no-strike obligation in existing or future collective-bargaining agreements as a consequence of this law; though to be sure, employers may have to make other concessions to secure such an obligation in light of the existing protections of the City's law. However, the fact that a law adjusts the starting place for negotiations is not a basis for preemption. *See Fort Halifax*, 428 U.S. at 21; *Concerned Home Care Providers*, 783 F.3d at 85-86. And appellants fail to explain why the

law would *encourage* unionization, given that it provides protection to employees that might otherwise have been secured through collective bargaining.

Appellants' arguments based on legislative history fare no better. *See* Br. at 45-48. Appellants chiefly take issue with the fact that a labor union was involved in the process of proposing and drafting the law. But there is nothing uncommon or unusual about constituents and interested groups proposing legislation and providing advice during the drafting process. Moreover, the "[f]ederal preemption doctrine evaluates what the legislation *does*, not why legislators voted for it or what political coalition led to its enactment." *Northern Ill. Chapter of Associated Builders & Contractors, Inc. v. Lavin*, 431 F.3d 1004, 1007 (7th Cir. 2005); *see also Johnson v. Rancho Santiago Cmty. Coll. Dist.*, 623 F.3d 1011, 1026 (9th Cir. 2010). The fact that unions advocated for certain of the law's substantive protections does not evince an "improper purpose of creating pressure to unionize" (Br. at 46-47); by that measure, the routine involvement of industry groups (like appellants and their affiliates) in the

proposal and drafting of legislation could reflect an improper purpose of *discouraging* unionization.[14]

C. The Wrongful Discharge Law Does Not Regulate the Use of Economic Weapons.

Finally, appellants are wrong to argue (Br. at 40-42) that the Wrongful Discharge Law impermissibly regulates "economic weapons of self-help" such as lockouts,[15] *see Golden State Transit Corp. v. City of Los Angeles*, 475 U.S. 608, 614-15 (1986). The law does not mention employer lockouts or any other economic self-help tool. *See* Admin. Code. §§ 20-1271 to 20-1275. Nothing in the legislative history of the law reflects an intent to limit economic self-help in the bargaining process. (*See, e.g.*, J.A. 1515-

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[14] *See* Rest. L. Ctr., *About* (internet) (organization "promote[s] pro-business laws and regulations" and is affiliated with the National Restaurant Association); Nat'l Rest. Ass'n, *Policy Agenda* (internet) (discussing support and opposition to various federal and state legislation); N.Y. State Rest. Ass'n, *Advocate* (internet) (describing organization's "army of lobbyists" and efforts to "create momentum or stop momentum" behind legislation); *see also* Letter from Nat'l Rest. Ass'n, et al., to Sen. Tim Scott (Mar. 21, 2022) (internet) (letter supporting bill that would modify federal labor and employment laws to require secret ballots in union elections and to support workers who do not wish to unionize).

[15] A "lockout" is a process during which employers prohibit their unionized employees from working pending the resolution of a labor dispute. *See American Ship Bldg. Co. v. NLRB*, 380 U.S. 300, 308 (1965).

1523 (committee report).) And no court has interpreted the law's definition of "discharge," which includes "any cessation of employment, including layoff, termination, constructive discharge, reduction in hours and indefinite suspension," to include lockouts.[16] *See* Admin. Code § 20-1271.

As the district court observed, the law speaks in terms of the rights of individual fast-food employees, *see id.* § 20-1272, and nowhere purports to prevent employers from engaging in otherwise protected activities (S.A. 19). Appellants cite no example of any fast-food employer located anywhere in the country that has ever employed a "lockout" during a dispute with a unionized workforce; this is unsurprising, because the fast-food industry is overwhelmingly nonunionized.

Against this backdrop, appellants' speculation about the law's application to lockouts is plainly insufficient to warrant facial invalidation of the law. *See United States v. Salerno*, 481 U.S. 739, 745 (1987) (facial challenge "must establish that no set of circumstances exists under which the Act would be valid"); *see also Washington State Grange v. Washington*

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[16] Notably, the City Council defined the term "lockout" elsewhere in New York City Administrative Code § 22-501 and declined to use the term in the definition of "discharge." *See United States v. Pristell*, 941 F.3d 44, 52 (2d Cir. 2019).

State Republican Party, 552 U.S. 442, 449-51 (2008). If, in the future, a fast-food employer seeks to deploy a lockout but believes that the Wrongful Discharge Law precludes such a measure, that employer may bring an as-applied challenge to the law.

POINT II

THE WRONGFUL DISCHARGE LAW DOES NOT VIOLATE THE DORMANT COMMERCE CLAUSE

A. The Dormant Commerce Clause Does Not Displace State Sovereign Authority to Regulate In-State Economic Activity.

The Commerce Clause gives Congress the power "[t]o regulate Commerce . . . among the several States." U.S. Const. art. I, § 8, cl. 3. In addition to its affirmative grant of authority to the federal government to regulate commerce among the States, the Commerce Clause has "long been understood to have a 'negative' aspect that denies the States the power unjustifiably to discriminate against or burden the interstate flow of articles of commerce." *Oregon Waste Sys., Inc. v. Department of Env't Quality*, 511 U.S. 93, 98 (1994).

However, the "dormant" Commerce Clause "is by no means absolute." *Maine v. Taylor*, 477 U.S. 131, 138 (1986) (quotations omitted). Unless Congress has regulated to the exclusion of States in a particular arena,

States retain authority to "regulat[e] their own purely internal affairs," including by enacting "laws for regulating the internal commerce of a State." *See Gibbons v. Ogden,* 22 U.S. (9 Wheat.) 1, 203, 209 (1824). States may exercise this power to regulate their internal affairs "even by use of measures which bear adversely upon interstate commerce." *H.P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 531-32 (1949). The focus of the "negative aspect" of the Commerce Clause is not to preclude the States from enacting laws that may have incidental impacts beyond their borders, but to ensure that States do not engage in discriminatory and protectionist practices. *See CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 87 (1987); *see also Tennessee Wine & Spirits Retailers Ass'n v. Thomas*, 139 S. Ct. 2449, 2459 (2019).

To that end, this Court's dormant Commerce Clause analysis proceeds in two steps. First, the Court asks "whether the challenged law discriminates against interstate commerce or regulates evenhandedly with only incidental effects on interstate commerce." *New York Pet Welfare Ass'n v. City of New York*, 850 F.3d 79, 89 (2d Cir. 2017) (quotation marks omitted). "In this context, discrimination 'means differential treatment

of in-state and out-of-state economic interests that benefits the former and burdens the latter.'" *Id.* (quoting *Oregon Waste Sys.*, 511 U.S. at 99).

Second, the Court applies "the appropriate level of scrutiny." *Town of Southold v. Town of Easthampton*, 477 F.3d 38, 47 (2d Cir. 2007). While laws that discriminate against interstate commerce are subject to heightened scrutiny, *id.*, laws that "regulate[] even-handedly to effectuate a legitimate local public interest" and have only incidental effects on interstate commerce "will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits," *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

B. The Wrongful Discharge Law Does Not Discriminate Against Interstate Commerce.

On appeal, appellants do not attempt to demonstrate that the Wrongful Discharge Law is unlawful under the *Pike* balancing test. Instead, appellants argue only that the law is discriminatory in effect and fails to survive strict scrutiny review. *See* Br. at 59-60. The district court properly rejected this argument. (S.A. 23-25.)

"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." *New York Pet Welfare Ass'n*, 850 F.3d at 90. Here, appellants concede that the Wrongful Discharge Law "employ[s] facially neutral criteria." Br. at 2, 53. Specifically, the law applies to "fast food establishments," which are defined to mean limited-service chain restaurants that are "one of 30 or more establishments nationally," operated as part of an enterprise or under a franchise agreement. *See* Admin. Code § 20-1201. Moreover, the law applies to both "national fast food chains and chains with more than thirty locations that are solely located within New York." (S.A. 24; *see also* J.A. 1741.) On that basis, New York State's near-identical definition of "fast food establishment," as used in minimum-wage regulations for fast food establishments, has withstood challenge under the dormant Commerce Clause. *See Matter of National Rest. Ass'n v. Commissioner of Labor*, 141 A.D.3d 185, 193-94 (3d Dep't 2016).

Appellants miss the mark in asserting that the Wrongful Discharge Law discriminates against interstate commerce in effect if there are no intrastate chains with more than 30 locations. *See* Br. at 52-54. At the outset, it is unclear what (if any) evidence supports this proposition other than one sentence in one appellant's declaration, which states, "I am not

aware of any intrastate restaurant chains that would be subject to the" Wrongful Discharge Law. (*See* J.A. 64.) And even if the statement were accurate, the law would still not discriminate against interstate commerce.

It is undisputed that the Wrongful Discharge Law's application depends on the size of a particular fast-food chain, and not on whether an establishment engages in interstate commerce. In other words, a New York City–based franchisee of a national chain with more than 30 locations is subject to the law but a New York City–based franchisee of a national chain with fewer than 30 locations is not. The Chamber of Commerce, as amicus, criticizes the law in noting that a "national chain with only one restaurant in New York City and twenty-nine restaurants outside of New York is subject to the Law's stringent requirements; yet a chain with twenty-nine restaurants in New York City and none in other States is exempt." Br. for Amicus Curiae Chamber of Com. at 24. But a chain with 30 restaurants, all in New York City, would *also* be subject to the law, demonstrating that the statute distinguishes between companies based on chain size and not based on their participation in interstate commerce.

Even if the Wrongful Discharge Law were construed to burden large chains (which, according to appellants, are all interstate), it must also be construed as inapplicable to small chains (both interstate and intrastate). In that context, appellants' challenge fails because the mere fact that a law's burden "falls solely on interstate companies" is insufficient to demonstrate discrimination against interstate commerce. *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 125 (1978) (rejecting dormant Commerce Clause challenge to Maryland statute precluding petroleum producers or refiners from operating retail service stations in the State); *see also New York Pet Welfare Ass'n*, 850 F.3d at 90 (rejecting dormant Commerce Clause challenge to New York City licensing law making it more difficult for some, but not all, out-of-state breeders to sell to City pet shops). In any event, the law does not burden out-of-state franchisors or any other out-of-state entity—only individual restaurants operating in New York City. (*See* S.A. 25; *see also* Br. at 54 (acknowledging that the law primarily burdens "local franchisees").) Therefore, the law "does not confer a competitive advantage upon local business vis-a-vis out-of-state competitors." *Town of Southold*, 477 F.3d at 49.

The law's focus on chain size is neither unique nor illogical. Franchisees of larger chains—regardless of where the chain's establishments are located—have access to greater resources and brand recognition and are better able to absorb any compliance costs associated with the changed law. (*See* J.A. 1740.) Indeed, the Ninth Circuit rejected a similar dormant Commerce Clause challenge to Seattle's minimum-wage ordinance, which subjected franchisees of large chains "to a steeper schedule of incremental wage increases." *See International Franchise Ass'n v. City of Seattle*, 803 F.3d 389, 397 (9th Cir. 2015). While the ordinance arguably imposed costs on businesses "highly correlated with out-of-state firms or interstate commerce," *id.* at 404, it was franchisees in Seattle that bore the burdens of the law, *id.* at 406. Absent evidence demonstrating a direct effect on out-of-state firms or interstate commerce, the court held that the ordinance did not discriminate against interstate commerce. *Id.* at 405-06.

Similarly, appellants here do not demonstrate how the Wrongful Discharge Law affects interstate commerce in light of the "highly local" burdens it imposes. *See id.* at 406. Appellants do not cite, for example, evidence showing that franchise royalties or profits have diminished, and do not (beyond mere speculation) show that expansion of out-of-state

companies will be limited. *See* Br. at 54-55; *see also International Franchise Ass'n*, 803 F.3d at 406. At most, the record shows that "in-state franchisees are burdened, not the wheels of interstate commerce." *See International Franchise Ass'n*, 803 F.3d at 406.

For similar reasons, *Cachia v. Islamorada* is distinguishable. *See* 542 F.3d 839 (11th Cir. 2008). In that case, the Eleventh Circuit invalidated a local law that completely barred chain restaurants from operating. *Id.* at 840-41. The court explained that the law did "not simply raise the costs of operating a [chain] restaurant in Islamorada, but entirely prohibits such restaurants from opening." *Id.* at 842. The law thus went beyond regulating "methods of operation" and had the effect of discriminating against interstate commerce. *Id.* at 843. Appellants do not allege that the Wrongful Discharge Law is at all akin to the law at issue in *Cachia* with respect to discriminatory effects on interstate commerce.

CONCLUSION

This Court should affirm the district court's decision.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a) of the Federal Rules of Appellate Procedure, Kelly Cheung, an employee in the Office of the Attorney General of the State of New York, hereby certifies that according to the word count feature of the word processing program used to prepare this brief, the brief contains 5,791 words and complies with the typeface requirements and length limits of Rules 29 and 32(a)(5)-(7) and Local Rules 29.1 and 32.1.

/s/ *Kelly Cheung*