SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

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INTERNATIONAL FRANCHISE ASSOCIATION, RESTAURANT LAW CENTER, and THE NEW YORK STATE RESTAURANT ASSOCIATION **Index No. 655987/2018**

Plaintiffs,

- against -

CITY OF NEW YORK

Defendant.

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BRIEF OF *AMICI CURIAE* LOCAL GOVERNMENT LAW PROFESSORS IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS

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STATEMENT OF INTEREST

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Richard Briffault is the Joseph P. Chamberlain Professor of Legislation at Columbia Law School, where his teaching, research and writing focus on state and local government law. With Laurie Reynolds, he is co-author of the textbook *State and Local Government Law* (West Academic Pub., 8th ed. 2016).

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Sarah Fox is an Assistant Professor of Law at Northern Illinois University College of Law, where she teaches state and local government law and writes about the intersection of local government law, environmental law, and preemption.

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A Better Balance, counsel for Local Government Law Professors, participated in the drafting and preparation of this brief. No party to this case or other entity contributed money to fund the preparation or submission of this brief.

INTRODUCTION

At issue in this case is whether the City of New York has the authority to enact the Fair Workweek Law (FWWL) pursuant to the New York Constitution and the Municipal Home Rule Law. *See* N.Y. Const. Art. IX, § 2(c); N.Y. Mun. Home Rule Law, § 10(1)(i). Local governments in New York generally have broad authority to enact legislation, including for the "government, protection, order, conduct, safety, health and well-being of persons or property therein," with the caveat that they may not enact laws that are inconsistent with the constitution or general laws. N.Y. Const. Art. IX, § 2(c)(i)(10). *Amici* are aligned with the defendant City of New York in urging this Court to dismiss the claims brought by the International Franchise Association that state law preempts the FWWL. New York City's FWWL does not conflict with current state labor law, nor has the state "occupied the field" of scheduling regulations.

Amici are national experts on legal issues pertaining to state and local government law and submit this brief to give the Court a fuller background on the importance and history of home rule in New York. Plaintiffs rely on *Wholesale Laundry Bd. of Trade v. City of New York* to support their claim that New York's FWWL is preempted by state law. Complaint ¶ 4. *Amici* believe that reliance is misplaced. *Wholesale Laundry* has cast an unnecessarily long shadow on local authority to enact labor regulations, and Plaintiffs propose an overly broad reading

of it, which undermines the purpose of New York's Home Rule Amendment. Specifically, *amici* argue that *Wholesale Laundry* does not apply in this case and that New York City's FWWL is not inconsistent with existing state law.

Amici urge the Court to uphold New York City's FWWL as a valid exercise of municipal power under the New York Constitution and to conclude that the Municipal Home Rule Law is not preempted by state law. *See* N.Y. Const. Art. IX, § 2(c); N.Y. Mun. Home Rule Law, § 10(1)(i).

ARGUMENT

I. New York's Home Rule Amendment Enshrined The Concept of Local Autonomy in the State's Constitution And Requires Courts To Apply A Presumption Against Preemption Of Local Regulations.

Home rule originally developed in the United States as a response to the previous "Dillon's Rule" regime, under which municipalities only possessed as much lawmaking authority as the state legislature explicitly granted to them. Starting in the late nineteenth century, a movement emerged to enable local autonomy by instituting home rule, which most states have done in some form. *See* Paul A. Diller, *Intrastate Preemption*, 87 Boston U. L. Rev. 1113, 1126-27 (2007). The introduction of home rule produced a fundamental transformation of the state-local relationship, granting broad municipal initiative powers and casting off the severe limits on local legislative powers that Dillon's Rule had established. No longer subject to Dillon's Rule's narrow interpretation of the scope of municipal

authority, home rule opened the door for local governments to exercise the discretion and flexibility necessary to provide local solutions to local problems, solutions that could respond to the specific demographic, economic, geographic, and social features of each individual home rule municipality.

New York is one of many states that enshrine the concept of home rule in its constitution. The State's move towards constitutional home rule started with the Constitution of 1894, which sought to limit the extent to which the legislature could interfere with the affairs of local governments. *See* Richard Briffault*, Article IX: The Promise and Limits of Home Rule*, Columbia Public Law Research Paper No. 14-436, Jan. 2015, at 5. A home rule amendment in 1923 delegated some specific powers to municipalities. Note, *Home Rule and the NY Constitution*, 66 Colum. L. Rev. 1145, 1147 (1966). In 1964, constitutional home rule fully arrived in New York, when the state adopted a constitutional amendment to, according to Governor Rockefeller, "strengthen the governments closest to the people so that they may help meet the present and emerging needs of [the] time." Michael A. Cardozo & Zachary W. Klinger, *Home Rule in New York: The Need for a Change*, 38 Pace L. R. 90, 91 (2017); N.Y. Const. Art. IX, §2(c). The State Legislature reiterated its commitment to home rule in New York when it enacted the Municipal Home Rule Law, which provided that "[i]n addition to powers granted in the constitution . . . every local government shall have power to adopt and amend local

laws not inconsistent with the provisions of the constitution or . . . any general law." N.Y. Mun. Home Rule Law, § 10(1)(i). New York's Home Rule Amendment and Municipal Home Rule Law empower municipalities to address the particular needs and preferences of their own communities by giving them permanent and substantive lawmaking authority. *See* Diller, *supra* p. 4, at 1124.

New York's Home Rule Amendment requires that municipal home rule powers be "liberally construed." N.Y. Const. Art. IX, § 3(c). Given that requirement, it follows that "[u]nless statutory text manifestly and unambiguously supersedes local law, courts should presume that state law does not preempt local laws." Roderick M. Hills, *Hydrofracking and Home Rule: Defending And Defining An Anti-Preemption Canon of Statutory Construction in New York*, 77 Alb. L. Rev. 647, 648 (2014). As the Court of Appeals has noted, "unless preemption is limited to situations where the intention is clearly to preclude the enactment of varying local laws, the power of local governments to regulate would be illusory." *People v. Judiz*, 38 N.Y.2d 529, 532, 344 N.E.2d 399, 402 (1976). This presumption applies even when there are state laws that deal with issues that are also addressed by local regulations: "[c]learly . . . localities are accorded a great amount of latitude in passing local legislation to address local issues, even when the State has already legislated in those areas." *McDonald v. New York City Campaign Fin. Bd*, 40 Misc.3d 826, 849 (2013).

Given New York's strong constitutional protection and endorsement of municipal home rule, courts should presume that local regulations—in this and other cases—are not preempted by state law absent clear legislative intent to impinge on local authority.

II. Strong Protections for Municipal Home Rule Heighten Government Responsiveness to Local Concerns, Facilitate Policy Innovation, and Ensure Greater Democratic Participation.

The policy rationales supporting a broad grant of authority to municipalities are many and significant. One important benefit of home rule is that it allows for the creation of policies that are responsive to local concerns. Local governments, being closest to those governed, are often best situated to identify the needs and interests of their constituents and implement responsive policies. Especially in New York, where local governments represent such a wide range of communities, a presumption in favor of statewide uniformity would be inappropriate. Because of the state's remarkable diversity and varying policy preferences, local democracy is essential to New York's ability to flourish.

Municipalities with broad home rule authority can also serve as Brandeisian laboratories of democracy. *See New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest

of the country."). Allowing localities similar latitude to experiment with solutions to persistent problems can foster even greater innovation in policymaking than can be achieved only at the state level. Indeed, cities are leading innovators on issues ranging from civil rights to environmental protections to public health. In the realm of labor law alone, cities have been at the forefront of developing more equitable laws, from higher minimum wage requirements to ban-the-box policies to paid sick leave. On the flip side, when innovation is fostered at the municipal level, it is easier to identify and fix policy mistakes locally than at the state or federal level.

Finally, home rule fosters greater democratic participation. Local government is more accessible to local communities and provides a venue where residents can make their policy preferences known. Grassroots and community organizations that might not be well represented at the state level have greater opportunities to be heard in City Hall. Local elected officials generally represent a smaller number of constituents, allowing for a more accurate representation of their interests. *See* Paul A. Diller, *Why Do Cities Innovate in Public Health? The Implications of Scale and Structure*, 91 Wash. U. L. Rev. 1219, 1257-58 (2014).

New York City's FWWL—which in relevant part requires fast food employers to provide workers with an estimate of their regular hours, distribute a weekly schedule fourteen days in advance, pay employees $10-$100 per instance of a specified unfair scheduling practice, and offer unscheduled shifts to existing

employees—is an example of home rule working exactly the way it was meant to. It demonstrates how cities can act as laboratories of democracy to develop and test new policy ideas. Fair scheduling laws were born at the local level—the first was passed in San Francisco—and are spreading outward to four other cities and the state of Oregon. Julia Wolfe, Janelle Jones, & David Cooper, *'Fair Workweek' Laws Help More Than 1.8 Million Workers*, Economic Policy Institute (Jul. 2018), https://www.epi.org/publication/fair-workweek-laws-help-more-than-1-8-million-workers/. New York City's FWWL was also the result of grassroots organizing from workers across the city, showing how municipalities are uniquely situated to be responsive to local concerns. And the economic security that comes along with fair scheduling laws is undeniably a local issue: cities have an interest in ensuring that those who work in the city are treated fairly.

III. The Enactment of the FWWL Was a Valid Exercise of New York's Home Rule Authority.

Municipal home rule is best understood as vesting in localities broad power to "make decisions concerning such local matters as local government organization, the delivery of local services, and the adoption of regulations dealing with local issues without having to seek specific permission from the state." Briffault, supra p. 5, at 4. Cities in New York have broad local initiative power. The Home Rule Amendment provides that "every local government shall have power to adopt and amend local laws not inconsistent with the provisions of this

constitution or any general law relating to . . . [t]he government, protection, order, conduct, safety, health and well-being of persons or property therein." N.Y. Const. Art. IX § 2(c)(ii)(10). The Amendment also provides that the "[r]ights, powers, privileges and immunities granted to local governments by this article shall be liberally construed." N.Y. Const. Art. IX § 3(c). Given the strong rhetoric around local initiative power, it is clear that "[l]ocal governments have authority to pass laws addressing local problems and concerns without having to first obtain Albany's consent." Briffault, supra p. 5, at 7.

New York City's FWWL plainly does address local problems and concerns. The FWWL provisions at issue are those that apply to fast food workers, requiring employers to provide sufficient notice when scheduling shifts and pay workers a premium when they undertake any of several enumerated abusive scheduling practices. New York City has a valid interest in protecting local workers from scheduling practices that it has found to be inequitable. Requiring fast food employers to engage in fair scheduling practices gives workers greater economic security by making it easier for workers to do things like arrange for affordable childcare, schedule classes or other work shifts, and take care of other non-work obligations. And the ordinance only applies to New York City workers at fast food and retail establishments within the city. NYC Admin. C. § 20-1201 (defining "employee" as "any person . . . who is employed within the city" and "fast food

employee" as "any person employed . . . at a fast food establishment . . . that is located within the city"). In enacting the FWWL, New York City was taking advantage of its constitutionally granted power to protect the "safety, health and well-being of persons [within the City]." *See* N.Y. Const. Art. IX § 2(c)(ii)(10).

IV. New York City's FWWL Is Not Preempted By State Law.

While it is true that cities may not enact laws that are "inconsistent with the provisions of [the state] constitution or any general law," in this case there is no such inconsistency. *See* N.Y. Const. Art. IX § 2(c). A local ordinance can be considered "inconsistent" with a state law only when the state expressly prohibits local action, when the state evinces an intent to "occupy the field" of regulation on a particular matter, or when a local ordinance conflicts with state law. *See, e.g.*, *New York State Club Ass'n, Inc. v. City of New York*, 69 N.Y.2d 207, 217, 513 N.Y.S.2d 349, 351 (1988). Express preemption is not an issue in this case, since no state explicitly prohibits localities from enacting fair scheduling regulations.

Plaintiffs look to *Wholesale Laundry* to support their claims that the FWWL conflicts with state labor law and that the state has occupied the field of scheduling regulations. In *Wholesale Laundry*, the First Appellate Division, in a decision affirmed by the Court of Appeals, addressed the question of whether the state's Minimum Wage Act (MWA) preempted New York City's higher minimum wage requirement. *Wholesale Laundry Bd. of Trade, Inc. v. City of New York*, 17 A.D.2d

327, 329, 234 N.Y.S.2d 862 (1st Dept. 1962). The court ultimately found that it did, on both conflict preemption and field preemption grounds. The MWA, however, set up a unique regulatory scheme that did not simply establish a state minimum wage, but also empowered the Commissioner of Labor to establish varying minimum wage rates across different occupations *and localities*. *Id*. at 330. Thus, the MWA's regulatory scheme was not only comprehensive—it consisted of state labor law and various state Department of Labor regulations and wage orders—but it affirmatively established a procedure to provide for local variation in minimum wage laws. Local establishment of minimum wages would be in clear conflict with the Department of Labor's explicitly granted statutory power to do just that. It is in that very particular context that the court in *Wholesale Laundry* held that a local law that sought to establish a higher wage than the state was in conflict with the MWA and that the state occupied the field of wage regulations.

In light of New York's constitutional protections for home rule and more recent Court of Appeals decisions repudiating it, it is clear the FWWL is not preempted by state law and *Wholesale Laundry* cannot, despite Plaintiff's urging, support a contrary finding.

Conflict Preemption

In terms of conflict preemption, *Wholesale Laundry* properly stands for the proposition that a state regulatory scheme that explicitly speaks to and addresses

the issue of local regulatory variation—as the MWA does by allowing the Commissioner of Labor to establish different minimum wage rates in different localities—establishes both a "floor" and "ceiling" for local regulation such that local laws that "prohibit what the state permits" or otherwise go beyond State regulations on the matter are conflict preempted. *Id*. On the other hand, state laws that set up a single regulatory scheme for the entire state merely set a "floor" that localities are free to supplement with their own legislation. *See, e.g., People v. Cook*, 34 N.Y.2d 100, 109, 356 N.Y.S.2d 259, 267 (1964); *New York State Club Ass'n*, 69 N.Y.2d at 221, 513 N.Y.S.2d at 354.

The far-reaching idea that any local law that "prohibits what the state permits" is in conflict with state law has been repudiated in several Court of Appeals cases. *People v. Cook*, for example, dealt with a local regulation that required cigarette retailers to charge more for cigarettes with higher tar and nicotine contents. In that case, the Court of Appeals held that mere silence at the state level regarding the sale of cigarettes without such a surcharge did not create a conflict between the local law and existing state tobacco regulations. *People v. Cook*, 34 N.Y.2d at 109 (1974). The Court noted that a conflict preemption analysis that invalidates any local law that prohibits what the state allows would go against "the essence of home rule." *Id*. Similarly, *New York State Club Ass'n* dealt with New York City's Human Rights Law, which applied nondiscrimination

protections to private clubs, and the State Human Rights Law, which excluded those clubs from the definition of "public accommodations." The Court of Appeals clarified that "the general principle set forth in *Wholesale Laundry* applies only when the Legislature has evidenced a desire that its regulations should preempt the possibility of varying local regulations." *New York State Club Ass'n*, 69 N.Y.2d at 221. And again in 1987 the Court of Appeals ruled that "[the] argument that local law prohibits what State law would allow and is therefore invalid is meritless." *Jancyn Mfg. Corp. v. Suffolk County*, 71 N.Y.2d 91, 100 (1987).

The salient difference between *Wholesale Laundry* and the cases cited above is that the state minimum wage law in *Wholesale Laundry* established a regulatory regime that required the state Commissioner of Labor to create local wage variation. By granting the Commissioner the power to set local rates, the legislature arguably evinced an intent to limit the municipal power to do so. But no such intention is apparent when the state does not reserve such powers. The state legislates against a background constitutional grant of home rule authority. That grant presumes local variation unless the state intends otherwise. State laws that set out uniform statewide standards without any other indicia of intent to address the issue of local regulatory variation on the issue merely establish a floor above which local regulations can be adopted.

Plaintiffs claim that since New York's current labor law—which defines a workweek for overtime purposes, requires meal breaks for workers, and regulates minimum wage—does not prohibit the abusive scheduling practices that the FWWL addresses, they are preempted. Complaint ¶¶ 30-31; 42. This argument directly contradicts several Court of Appeals cases that amply show that state laws, absent some evidence of intent to limit local variation, set a floor above which municipalities can add additional regulations. And while under *Wholesale Laundry*, localities cannot institute a higher minimum wage than the state has set, the FWWL does no such thing, dealing as it does with *scheduling* rather than *wages*. The few state laws and regulations that deal with employee scheduling practices should be properly understood to set a baseline above which localities can further require employers to engage in fair scheduling. Since none of those state laws establish a mechanism to impose varying fair schedule practices on different municipalities, the conflict preemption analysis in *Wholesale Laundry* does not apply. Instead, this Court should follow the precedent established by numerous Court of Appeals decisions to find that the FWWL, which *supplements* existing state law, does not conflict with said law.

Field Preemption

Finally, "field preemption" occurs when state law establishes a "comprehensive and detailed regulatory scheme in a particular area" that evinces a

legislative intent to occupy the field of regulation in that area. *See, e.g. New York State Club Ass'n,* 69 N.Y.2d at 217. The existence of state laws and regulations on a matter does not in itself indicate that the State has "occupied the field." *People v. Judiz*, 38 N.Y.2d at 531-2 ("The mere fact that a local law may deal with some of the same matters touched upon be State law does not render the local law invalid"). No such comprehensive regulatory scheme exists in the fair scheduling context. As for what constitutes a field, in its most recent treatment of the subject the Court of Appeals took a narrow approach. In *Wallach v. Dryden*, the Court upheld a local zoning ordinance that prohibited fracking within the town, despite a law explicitly stating that state's Oil, Gas and Solution Mining Law supersedes local regulations relating to the extractive mining industry. *Wallach v. Town of Dryden*, 992 N.Y.S.2d 710, 717; 723 (2014). *Dryden* makes clear that the state must make a clear expression of legislative intent to occupy an entire field of regulation. *Id*.

Plaintiffs once again overstate the effect of *Wholesale Laundry* to support their claim that the state has occupied the field of fair scheduling regulations. The holding in *Wholesale Laundry* that the state has "occupied the field" of minimum wage regulations is irrelevant for a simple reason: the FWWL does not regulate wages. *See Wholesale Laundry,* 17 A.D.2d at 330. The FWWL, among other things, requires fast food employers to provide employees with an estimate of their regular hours, distribute a weekly schedule fourteen days in advance, and offer

unscheduled shifts to existing employees. Complaint ¶¶ 16-17; 20. The law also requires fast food employers to pay employees $10-$75 per instance of untimely schedule changes and $100 per instance of requiring an employee to "clopen," or work a closing shift immediately followed by an opening shift. Complaint ¶¶ 18-19. None of these requirements remotely regulate the underlying *wage rate* that an employer must pay their workers, which is the area that has been found to be field preempted under *Wholesale Laundry*. In fact, New York's Labor Law is clear that "wage" is defined as remuneration "for labor or services rendered." N.Y. Labor Law § 190(1). The FWWL, on the other hand, requires compensation for specified unfair scheduling practices, entirely distinct from payment for the labor performed during a shift.

As for the field of scheduling practices, the few state laws on the matter do not indicate an intent on the part of the state legislature to preempt local fair scheduling regulations. The only state laws dealing with the issue of scheduling, and tangentially at that, merely set out what constitutes a day's work for overtime purposes, required meal and break times, and a requirement that employers provide employees with one day off per week. N.Y. Labor Law §§ 160-162. These laws address overtime and work hours, which are very different issues than what the FWWL deals with. None of these laws address the abusive scheduling practices that led to the enactment of the FWWL.

Moreover, none of these laws create a "comprehensive" regulatory scheme. On the matter of fair scheduling specifically, the Commissioner of Labor has issued a Hospitality Wage Order that regulates "call-in pay" for workers who are sent home early from scheduled shifts. 12 NYCRR § 146-1.5. But the fact that the FWWL has identified and seeks to regulate various other kinds of abusive scheduling practices makes it is clear that the Wage Order is hardly a "comprehensive" regulation of the field.

Since the FWWL does not regulate wages and the State has not established a comprehensive scheme of laws on regulations in the field of fair scheduling, the FWWL is not subject to field preemption.

V. The Outsized Influence Plaintiffs Attribute To *Wholesale Laundry* Is Undeserved And Threatens to Undermine Home Rule in New York, Which Is Meant to Grant Municipalities Broad Authority Over Their Own Legislative Agenda.

As this brief describes in Section I, New York's constitutional guarantee of Home Rule granted broad municipal authority to enact their own legislative agendas and to act on issues that are of particular importance to those localities. Thus, home rule encourages creative problem-solving and innovative policies that reflect the views and values of local communities. New York City's FWWL is a prime example of how home rule is meant to work.

For decades, *Wholesale Laundry* has cast an unnecessarily long shadow on municipal attempts to use that home rule authority, as is amply demonstrated by

Plaintiff's attempt to use it to strike down the FWWL. *See*, *e.g.,* Rick Su, *Have Cities Abandoned Home Rule?*, 44 Fordham Urb. L. J. 181, 200-201 (2017); Rebeccah G. Watson, *Defending Paid Sick Leave In New York City*, 19 J. L. Poly. 973, 991-992 (2011). The case cannot support such a reading. Attempts to make it carry that weight are particularly inapt given its posture as a simple affirmation of the lower court's decision. Although Plaintiffs invoke the expansive language used by the lower court in *Wholesale Laundry*, much of that language was unnecessary to the outcome of the case. In fact, the mere affirmance without opinion by the Court of Appeals leaves us with no understanding of the court's rationale or the extent to which it agreed with the lower court. Moreover, because *Wholesale Laundry* was decided *before* New York's Home Rule Amendment went into effect in 1964, it is time to revisit the case to ask whether its narrow holding is consistent with the broadening of constitutional authority that came with the 1964 Amendment. This amendment was foundation for the modern law of home rule in New York

In addition, the expansive language used by the lower court in Wholesale Laundry has been thoroughly undermined by the numerous Court of Appeals decisions that have rejected its approach treatment of both conflict and field preemption and have expressly recognized that state law generally sets a floor above which localities can regulate rather than a floor and a ceiling. *See, e.g.*,

People v. Cook, 34 N.Y.2d at 109; *New York State Club Ass'n*, 69 N.Y.2d at 221; *People v. Judiz*, 38 N.Y.2d at 531-2.

To read *Wholesale Laundry* as Plaintiffs urge would improperly remove an entire area—specifically, labor regulation—from the aegis of local power, which is not what the legislature intended nor what the people of New York envisioned when they adopted the Home Rule Amendment. A broad reading of *Wholesale Laundry* is contrary to the entire thrust of home rule reform in the latter part of the twentieth century. *See* Paul Diller, *Intrastate Preemption*, supra p. 4, at 1125. It is also out of step with the pressures cities face to develop innovative solutions to difficult problems in the twenty-first century. *See generally*, Edward Glaeser, *Triumph of the City*: *How Our Greatest Invention Made Us Richer, Smarter, Greener, Healthier, and Happier* (Penguin Press 2010); Bruce Katz & Jennifer Bradley, *The Metropolitan Revolution: How Cities and Metros Are Fixing Our Broken Politics and Fragile Economy* (Brookings Institution Press 2013); Bruce Katz & Jeremy Nowak, *The New Localism: How Cities Can Thrive in the Age of Populism* (Brookings Institution Press 2018). The expansive preemption analysis relied on by Plaintiffs would essentially overrule the state's Home Rule Amendment, by allowing the narrow exception presented by the facts and the statute in one case to swallow the substantive grant of home rule. *See, e.g., People v. Judiz*, 38 N.Y.2d at 532, ("unless preemption is limited to situations where the

intention is clearly to preclude the enactment of varying local laws, the power of local governments to regulate would be illusory").

In sum, this Court should reject Plaintiff's overbroad reading of *Wholesale Laundry*, which properly should be read as applying to the unique regulatory scheme at issue in that case. This reading comports with the purpose of New York's Home Rule Amendment and several Court of Appeals decisions that have repeatedly affirmed the appropriate exercise of local power.

CONCLUSION

For the reasons above, *amici curiae* respectfully request that the Court uphold New York City's Fair Workweek Law and grant the City's motion to dismiss in this case.

Dated: March 15, 2019

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