SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION, THIRD DEPARTMENT

In the Matter of the Petition of	:	
	:	
NATIONAL RESTAURANT ASSOCIATION,	:	
	:	
Petitioner-Appellant,	:	
	:	
– against –	:	Case No. 522160
	:	
THE COMMISSIONER OF LABOR,	:	NOTICE OF MOTION
	:	
Respondent-Respondent,	:	
	:	
and	:	
	:	
ALVIN MAJOR REBECCA CORNICK FLAVIA CABRAL JOREL WARE JACQUIE JORDAN	:	
Intervenor-Respondents.	:	

PLEASE TAKE NOTICE THAT, upon the accompanying moving Affirmation of Laura Huizar, dated February 5, 2016, and upon all prior papers and proceedings, the National Employment Law Project ("NELP") will move this Court, at the Supreme Court, Appellate Division, Third Department, Robert Abrams Building for Law and Justice, State Street, Room 511, Albany, New York 12223, on February 16, 2016, at 10:00 a.m. or as soon thereafter as counsel may be heard, for an Order permitting NELP to serve and file an *Amicus Curiae* brief on behalf of NELP, Make the Road New York, and The Workmen's Circle as *amici curiae*.

Dated: February 5, 2016
Washington, District of Columbia

Respectfully submitted,

NATIONAL EMPLOYMENT LAW PROJECT

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SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION, THIRD DEPARTMENT

In the Matter of the Petition of	:	
	:	
NATIONAL RESTAURANT ASSOCIATION,	:	Case No. 522160
	:	
Petitioner-Appellant,	:	AFFIRMATION OF
	:	LAURA HUIZAR IN
– against –	:	SUPPORT OF
	:	NATIONAL
THE COMMISSIONER OF LABOR,	:	EMPLOYMENT LAW
	:	PROJECT'S MOTION
Respondent-Respondent,	:	FOR LEAVE TO FILE
	:	*AMICUS CURIAE* BRIEF
and	:	ON BEHALF OF
	:	NATIONAL
ALVIN MAJOR	:	EMPLOYMENT LAW
REBECCA CORNICK	:	PROJECT, MAKE THE
FLAVIA CABRAL	:	ROAD NEW YORK,
JOREL WARE	:	AND THE
JACQUIE JORDAN	:	WORKMEN'S CIRCLE
Intervenor-Respondents.	:	AS *AMICI CURIAE*.

DISTRICT OF COLUMBIA) ss.:

LAURA HUIZAR, being duly sworn, deposes and says:

1. I am a Staff Attorney for the National Employment Law Project ("NELP"), and I am admitted to the Bar of the State of New York.

2. I am fully familiar with the facts and circumstances set forth herein and I submit this affirmation in support of NELP's motion for leave to file an *amicus curiae* brief in this proceeding on behalf of NELP, Make the Road New York, and The Workmen's Circle as *amici curiae*.

3. NELP has a demonstrated interest in the issues in this matter, and can be of special assistance to this Court. A copy of NELP's proposed brief is attached hereto as Exhibit A.

4. A copy of the Notice of Appeal in this action is attached hereto as Exhibit B.

5. A copy of the Decision and Order appealed from, entered on or about December 9, 2015, is attached hereto as Exhibit C.

Background – The Decision Below

6. Petitioner attacks the validity of the Order of Acting Commissioner of Labor Mario J. Musolino (hereinafter "Labor Commissioner") on the Report and Recommendations of the 2015 Fast Food Wage Board, dated September 10, 2015 (hereinafter "Wage Order").

7. The Wage Order increased the minimum wage of certain fast food workers to $15 per hour by December 31, 2018 in New York City, and by December 31, 2021 in the rest of the state. Wage Order, A455.

8. The National Restaurant Association ("NRA") petitioned the Industrial Board of Appeals ("IBA") for review of the Wage Order, and the IBA upheld the Wage Order in a December 9, 2015 decision.

9. The NRA is appealing the IBA's decision to this Court.

10. In particular, petitioner argues that the Labor Commissioner 1) exceeded the scope of his authority by issuing an order raising the minimum wage for a subset of employees within a sector of a particular industry; 2) violated the Labor Law by issuing an order raising the minimum wage for a subset of workers without evidentiary support for doing so; 3) disregarded the State Legislature's requirements concerning the composition of a wage board; 4) violated New York law concerning the separation of powers; and 5) violated the United States Constitution by discriminating against out-of-state businesses. *See* Br. of Pet'r-Appellant.

The Interests of Proposed *Amici*

11. *Amici* are organizations dedicated to protecting the rights and advancing the interests of low-wage workers in New York and across the country.

12. NELP is a national research and policy organization known for its expertise on workforce issues.

13. NELP has an interest in ensuring that the Wage Order is fully enforced according to its terms, and that the constitutional and other challenges to its implementation are rejected.

14. NELP has worked with federal, state, and local policymakers across the United States in adopting higher minimum wages.

15. NELP also has extensive background in economic research on the minimum wage, and on the law and policy of New York's wage board system.

16. Make the Road New York ("MRNY") is a membership based non-profit organization with more than 19,000 members and offices in Brooklyn, Queens, Staten Island, and Long Island.

17. For more than fifteen years, MRNY has been fighting to improve working conditions and protect the rights of low-wage workers.

18. MRNY has litigated and recovered hundreds of thousands of dollars in unpaid wages and has successfully pursued legislation such as the Wage Theft Prevention Act, strengthening labor law protections in New York State.

19. MRNY supports affirming the Wage Order; a $15 minimum wage for New York's fast food workers pursuant to the Wage Order will significantly improve the working and living conditions of more than one hundred thousand low-wage workers whose interests MRNY represents.

20. The Workmen's Circle is a progressive Jewish non-profit organization committed to teaching and engaging in activism through a Jewish lens.

21. For more than one hundred years, The Workmen's Circle has been at the center of Jewish culture and social action.

22. Through social justice campaigns, festivals, holiday celebrations, educational programs, and more, the organization connects Jewish adults, kids, and families of all affiliations with their cultural heritage and engages them in social change.

23. The Workmen's Circle's membership includes workers, institutions, and employers who support raising the minimum wage to $15 and believe it is morally essential and economically feasible.

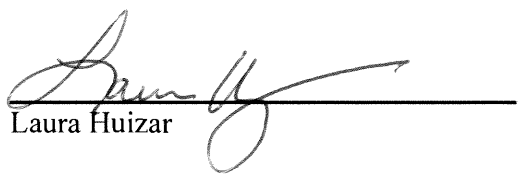
24. Since 2015, The Workmen's Circle's focus has been on building Jewish support for campaigns to raise the minimum wage to $15 per hour.

25. The organization has played a leading role in organizing a Jewish Table of Support for the Fight for $15 campaign, bringing together partner Jewish organizations that represent two million members across the U.S.

26. For these reasons, the Court should grant NELP's motion to file an *amicus curiae* brief on behalf of NELP, MRNY, and The Workmen's Circle as *amici curiae*.

27. Counsel for the Commissioner of Labor, Respondent-Respondent, and Intervenors, Intervenors-Respondents, have consented to this motion. Counsel for the National Restaurant Association, Petitioner-Appellant, did not consent to this motion.

Dated: February 5, 2016
Washington, District of Columbia



Laura Huizar

EXHIBIT A

Case No. 522160

New York Supreme Court

Appellate Division—Third Department

In the Matter of the Petition of

NATIONAL RESTAURANT ASSOCIATION,

Petitioner-Appellant,

– against –

THE COMMISSIONER OF LABOR,

Respondent-Respondent,

– and –

ALVIN MAJOR, REBECCA CORNICK, FLAVIA CABRAL, JOREL WARE and JACQUIE JORDAN,

Intervenor-Respondents.

BRIEF OF *AMICI CURIAE* NATIONAL EMPLOYMENT LAW PROJECT, MAKE THE ROAD NEW YORK AND THE WORKMEN'S CIRCLE

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Industrial Board of Appeals Docket No. WB 15-001

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INTRODUCTORY STATEMENT

On September 10, 2015, Acting Commissioner of Labor Mario J. Musolino issued an order based on the report and recommendations of the 2015 Fast Food Wage Board, which incorporated Parts I through IV of the Wage Board's report (hereinafter "Wage Order"). Wage Order, A455–57; A429–53. The Wage Order recommended increasing the minimum wage of certain fast food workers to $15 per hour by December 31, 2018 in New York City, and by December 31, 2021 in the rest of the state. Wage Order, A455. The National Restaurant Association ("NRA") petitioned the Industrial Board of Appeals ("IBA") for review of the Wage Order, and the IBA upheld the Order in a December 9, 2015 decision. *See* A15–23.[1] The NRA has now appealed the IBA's decision to this Court. The National Employment Law Project, Make the Road New York, and the Workmen's Circle, as *amici curiae*, submit this brief in support of the Wage Order and in opposition to the NRA's appeal.

PURPOSE AND INTEREST OF *AMICI CURIAE*

Amici are organizations dedicated to protecting the rights and advancing the interests of low-wage workers in New York and across the country. The National Employment Law Project ("NELP") is a national research and policy organization known for its expertise on workforce issues. NELP has worked with federal, state, and local policymakers across the United States in adopting higher minimum wages. NELP also has extensive background in economic research on the minimum wage, and on the law and policy of New York's wage board system. NELP has an interest in ensuring that the Wage Order is fully enforced according to its terms, and that the

[1] This brief cites to the Appendix as follows: "A___".

constitutional and other challenges to its implementation are rejected. Huizar Affirmation, ¶¶ 11–15.[2]

Make the Road New York ("MRNY") is a membership based non-profit organization with more than 19,000 members and offices in Brooklyn, Queens, Staten Island, and Long Island. For more than fifteen years, MRNY has been fighting to improve working conditions and protect the rights of low-wage workers. MRNY has litigated and recovered hundreds of thousands of dollars in unpaid wages and has successfully pursued legislation such as the Wage Theft Prevention Act, strengthening labor law protections in New York State. MRNY supports affirming the Wage Order. A $15 minimum wage for New York's fast food workers pursuant to the Wage Order will significantly improve the working and living conditions of more than one hundred thousand low-wage workers[3] whose interests MRNY represents. Huizar Affirmation, ¶¶ 16–19.

The Workmen's Circle is a progressive Jewish non-profit organization committed to teaching and engaging in activism through a Jewish lens. For more than one hundred years, The Workmen's Circle has been at the center of Jewish culture and social action. Through social justice campaigns, festivals, holiday celebrations, educational programs, and more, the organization connects Jewish adults, kids, and families of all affiliations with their cultural heritage and engages them in social change. The Workmen's Circle's membership includes workers, institutions, and employers who support raising the minimum wage to $15 and believe it is morally essential and economically feasible. Since 2015, The Workmen's Circle's focus has been on building Jewish support for campaigns to raise the minimum wage to $15 per hour. The

[2] This brief cites to The Affirmation of Laura Huizar in Support of National Employment Law Project's Motion for Leave to File *Amicus Curiae* Brief on Behalf of National Employment Law Project, Make the Road New York, and The Workmen's Circle as *Amici Curiae* as "Huizar Affirmation, ___".

[3] Raise the Minimum Wage, $15 Laws & Current Campaigns, http://raisetheminimumwage.org/pages/15-Laws-Current-Campaigns (last viewed Jan. 1, 2016).

organization has played a leading role in organizing a Jewish Table of Support for the Fight for $15 campaign, bringing together partner Jewish organizations that represent two million members across the United States. Huizar Affirmation, ¶¶ 20–25.

STATEMENT OF THE CASE

Appellant asks this Court to invalidate the Wage Order. In part, Appellant contends that the Commissioner's decision to raise the minimum wage for workers employed by fast food chains, including franchises, with thirty or more establishments nationally (as opposed to all fast food workers) exceeded his authority and relied on insufficient evidence. Br. of Pet'r-Appellant (hereinafter "Appellant's Br.") at 17–24. Appellant also claims that the Commissioner "failed to consider the value of [fast food] work and the wages paid for similar work." Appellant's Br. at 24–26. *Amici* submit that the Commissioner has the authority to regulate segments of an industry or occupation and that both of Appellant's claims concerning the sufficiency of evidence mischaracterize the record before the Wage Board; the record contained substantial, if not voluminous, evidence on both claims.

In addition, *amici* encourage this Court to consider the significant benefits to the public interest that the Wage Order entails. Economic research shows that increasing wages for fast food workers in New York pursuant to the Wage Order will likely induce other low-wage employers and industries to raise their minimum wage without significant job losses. States and cities that have enacted minimum wage increases to address the high cost of living in their area, as well as the failure of the relevant state and/or federal government to raise the minimum wage, have done so successfully, both economically and legally. The Wage Order is lawful and good policy; a decision upholding the Wage Order would allow New York to join the dozens of other

states and cities that have raised their minimum wage rates in recent years to respond to the needs of their constituents.

ARGUMENT

This Court should reject Appellant's claims that the Wage Order exceeded the Commissioner's authority, lacked support in the record, and disregarded the legislature's criteria for raising wages. Appellant's Br. at 17–26. The legislature has recognized that the employment of workers in occupations that are "insufficient to provide adequate maintenance for themselves and their families . . . impairs the health, efficiency, and well-being of the persons so employed, constitutes unfair competition against other employers and their employees, threatens the stability of industry, reduces the purchasing power of employees, and requires, in many instances, that the wages be supplemented by the payment of public moneys." N.Y. Lab. Law § 650. For those reasons, the legislature has declared that it is the policy of the state that "such conditions be eliminated as rapidly as practicable without substantially curtailing opportunities for employment or earning power" through minimum wage standards. *Id*. In establishing minimum wages, the Labor Law requires the Commissioner to "consider the amount sufficient to provide adequate maintenance and to protect health and, in addition, the wage board and the commissioner shall consider the value of the work or classification of work performed, and the wages paid in the state for work of like or comparable character." N.Y. Lab. Law § 654.

The Wage Order must be upheld as long as it is not "contrary to law." N.Y. Lab. Law § 657(2); *see also New York State Rest. Ass'n, Inc. v. Comm'r of Labor*, 45 A.D.3d 1133, 1136 (3d Dep't 2007). The Commissioner's factual findings in the Wage Order at issue "shall be conclusive on any appeal." N.Y. Lab. Law § 657. A wage board's determinations are "factual" determinations and courts have upheld such determinations when supported by "adequate

evidence." *See, e.g.*, *Kiamesha Concord, Inc. v. Catherwood*, 28 A.D.2d 275, 279 (3d Dep't 1967) ("The second contention of the appellants is that the determinations made by the Wage Board and the Commissioner were not supported by the evidence. This was a factual determination supported by adequate evidence and should be sustained."); *Kiamesha Concord, Inc. v. Lewis*, 15 A.D.2d 702, 702 (3d Dep't 1962) ("Petitioner further contends that the Commissioner made inadequate allowance for such items as gratuities and for meals and lodging furnished to employees. This was a factual determination supported by adequate evidence and should be sustained."). Where the record contains evidence on any particular factor, "it must be presumed [that it] was given consideration and appropriate weight." *Application of Wells Plaza Corp.*, 10 A.D.2d 209, 216 (3d Dep't 1960), *aff'd,* 8 N.Y.2d 975 (N.Y. 1960).

As shown in Parts I and II below, the Commissioner's decision that the Wage Order should apply only to fast food chains operating thirty or more establishments did not exceed the Commissioner's authority and reflects substantial evidence in the record concerning the unique composition, growth, and advantages of such large employers. The Commissioner's decision was also supported by testimony from numerous experts on the value of fast food work and wages paid for work of like or comparable character. *Amici* highlight in Part III how the Wage Order will improve the lives of fast food workers and others in the New York economy, thereby fulfilling the state's express policy to promote the "health, efficiency, and well-being" of persons employed "at wages insufficient to provide adequate maintenance for themselves and their families" and, more broadly, protect "the health and well-being of the people in this state." N.Y. Lab. Law § 650.

I. THE COMMISSIONER'S DECISION TO COVER ONLY EMPLOYEES AT FAST FOOD CHAINS OPERATING THIRTY OR MORE ESTABLISHMENTS DID NOT EXCEED THE COMMISSIONER'S AUTHORITY AND REFLECTS SUBSTANTIAL EVIDENCE IN THE RECORD CONCERNING THE UNIQUE COMPOSITION, GROWTH, AND ADVANTAGES OF CHAIN FAST FOOD EMPLOYERS

A. The Commissioner May Distinguish Between Subsets of An Industry or Occupation

The Commissioner did not exceed his authority in requiring only fast food chains operating thirty or more locations to comply with the Order. As Appellant has acknowledged, Appellant's Br. at 17–19, the Labor Law allows the Labor Commissioner and wage boards to set a minimum wage for "any occupation or occupations," and it defines "occupation" as "an industry, trade, business or class of work in which employees are gainfully employed." *See* N.Y. Lab. Law §§ 651, 653, 654. Appellant contends that the legislature "never empowered the Commissioner to target only certain employers within [an] 'occupation.'" Appellant's Br. at 18. This argument ignores the Labor Law's instruction that the conditions leading to the employment of workers at rates "insufficient to provide adequate maintenance for themselves and their families" must "be eliminated as rapidly as practicable *without substantially curtailing opportunities for employment or earning power*." N.Y. Lab. Law § 650 (emphasis added). The Commissioner's decision to require only larger fast food employers and those that enjoy structural and economic advantages to comply with the Order was the most logical way for the Commissioner to minimize any negative impact of the Wage Order on employment.

Wage boards have previously treated segments of industries or occupations differently, and this Court has upheld those recommendations. For example, in 1966, the commissioner appointed a wage board for the hotel industry "to inquire into and to recommend modifications in allowances and regulations which might be necessary or appropriate to carry out the purposes

of the minimum wage act." *Kiamesha Concord, Inc. v. Catherwood*, 28 A.D.2d at 276. The wage board recommended increasing the allowance for tips for hotel employees, but it applied a different tip allowance to chambermaids in resort hotels than to other hotel employees. *Id*. The commissioner adopted this recommendation. This Court upheld the wage order without questioning the board's or commissioner's authority to apply different requirements to different segments of the hotel industry. *Id*.; *see also Lodging House Keepers Ass'n of New York, Inc. v. Catherwood*, 18 A.D.2d 725 (3d Dep't 1962) (affirming a Board of Standards and Appeals decision holding that a 1957 wage order for the "hotel industry" should not apply to "flop houses" even though flop houses formed part of the industry); *Application of Wells Plaza Corp.*, 10 A.D.2d at 211, 220 (upholding a 1957 wage order that did not apply to resort hotels even though the wage board had been convened to review an existing minimum wage order "applicable to the hotel industry," in general). Consistent with its past decisions, this Court should reject Appellant's claim that the Commissioner in this case lacked the authority to apply a minimum wage increase to only fast food chains operating thirty or more locations.

B. Evidence in the Record Shows that Chain Fast Food Employers Disproportionately Account for the Industry's Low Wages and Are Especially Well-Positioned to Transition to a $15 Minimum Wage

Appellant's brief before this Court claims that the Wage Board record contained *no* evidence to support raising wages only at fast food chains with at least thirty locations. Appellant's Br. at 20–24. This claim ignores the Wage Board's and Commissioner's duties under the Labor Law and mischaracterizes the record. As previously noted, the Labor Law required the Wage Board and Commissioner to consider how to eliminate the conditions leading to "wages insufficient to provide adequate maintenance . . . as rapidly as practicable without substantially curtailing opportunities for employment or earning power." N.Y. Lab. Law § 650.

The Labor Law also instructed the Wage Board and Commissioner to consider "the amount sufficient to provide adequate maintenance and to protect health," among other factors. N.Y. Lab. Law § 654.

The Commissioner expressly based the decision to require only fast food chains with thirty or more locations to comply with the Wage Order on the fact that "chains of this size are better equipped to absorb a wage increase due to greater operational and financial resources, and brand recognition." Wage Order, A447. The Wage Board's report, as incorporated into the Order, explained that:

> [t]hough some fast food franchisee owners who testified before the Board spoke of the thin margins in their line of business, experts on franchising pointed to the structural and economic advantages over traditional small businesses enjoyed by franchisees with ties to a large corporation, including that a franchise provides an established product that enjoys widespread branding recognition, giving the franchisee the benefits of a presold customer base, which would ordinarily take years to establish; shared marketing; financing assistance; a developed and tested franchise system for operating and distributing goods; economies of scale; and training and software support. Franchising experts also noted the mechanisms that large corporate franchisors use to incent franchisees to spend money on corporate initiatives, mechanisms that could be used to help a franchisee absorb a wage increase. Similarly, chain restaurants more generally enjoy significant advantages over independent restaurants, such as marketing, brand loyalty, perceived quality, and brand image, leading to higher profits and lower failure rates.

Wage Order, A446.

As shown below, the record offers a strong basis for distinguishing between large chains or franchises and smaller fast food employers as a way to address the inadequate wages of fast food employees while exercising restraint and requiring only what is sufficient to carry out the state's policy. To the extent that any testimony focused on the benefits that franchises derive from their economies of scale, the same advantages would be expected to apply to chains with thirty or more locations that create similar economies of scale. This Court must presume that

evidence on any particular factor was given consideration and appropriate weight, *Application of Wells Plaza Corp.*, 10 A.D.2d at 216, and it must uphold the Commissioner's decision to raise the minimum wage only at larger chains as a decision based on factual determinations regarding the ability of large chains to absorb additional costs, as well as these employers' role in driving fast food wages, *see Kiamesha Concord, Inc. v. Catherwood*, 28 A.D.2d at 279.

First, experts testified that chain employers, including franchise employers, disproportionately account for low wages in the fast food industry. For example, Paul Sonn of NELP testified that "[n]ationally, firms that own multiple establishments employ 63 percent of fast food restaurant workers and have on average 209 employees." Paul Sonn, A492. In New York, "[t]here are over 8500 chain fast food locations at more than a hundred fifty chains across New York State and concentration is high." Joan Moriarty, A338. In fact, the top five chains by store count "make up the majority of the chain fast food locations in the state," and if one adds the next five largest chains, the top ten make up 65 percent of all chain fast food store locations. *Id*. Also, nine out of top ten fast food chains in the state rely on the franchising model. Joan Moriarty, A339. However, "workers at franchised fast food restaurants in New York earn 8 percent less a year, on average, than workers in the industry as a whole." Paul Sonn, A492. A minimum wage increase that applies to chain or franchised employers would be expected to impact a significant portion of the fast food industry.

Second, numerous experts explained that chain employers, including franchises, are especially well-positioned to absorb an increase to a $15 minimum wage. The record, for example, contains a declaration by Professor Scott Shane of Case Western Reserve University outlining the significant advantages enjoyed by franchises relative to independent businesses. *See* Scott Shane, A3840–51. Professor Shane's research and teachings focus on economics and

entrepreneurship, including franchising. Scott Shane, A3840. While he acknowledged that the specific advantages "depend on the type of business and the terms of the franchise agreement," he explained that the benefits for franchisees

> typically include access to numerous things not available to independent businesses, such as access to brand valuable names, advertising, trade secrets, software, volume purchasing, site selection assistance, financing, operational training, human resource guidance and assistance, human resource policies and handbooks, ongoing training and operational assistance, member rewards programs that increase the customer base, legal and accounting updates, and access to franchise associations that provide forums for exchanging ideas.

Scott Shane, A3842–43.

Other experts echoed this analysis of the advantages of franchises. *See, e.g.*, Paul Sonn, A492–93 (explaining that among other benefits, a franchise allows one to sell an established product or service with widespread brand recognition; grants franchises the advantage of purchasing a business where the means for distributing goods and/or services has been developed, tested, and associated with a trademark; and provides franchisees with technology platforms and software); Joan Moriarty, A339 (noting, in part, that "[f]ranchising has numerous differences from traditional and dependent [sic] entrepreneurship" which "consist primarily of advantages and services that franchisors provide franchisees in exchange for . . . significant franchisor control of their business"); Frederick Floss, A539 (citing many of the same advantages and stating that "a franchisee who owns multiple locations can reduce fixed costs obtained from economies of scale" and that "[f]ranchisees enjoy financial and structural support that also increases their stability and profitability which are not taken into account in the financial statements"). Additional advantages of franchises include "access to financing from the franchisor or third-party lenders." Scott Shane, A3844. Professor Shane's declaration also explained that "[l]enders find it easier to assess credit risk with franchised outlets than with

independent businesses, because the franchise systems have information that makes assessing the credit risk easier." *Id*. In addition, franchises see cost savings in their ability to "obtain raw materials at a lower cost through the franchisor's volume purchasing." *Id*.

The Wage Board and Commissioner no doubt considered these numerous financial advantages and how they "explain why franchisees seek renewable franchise agreements and choose to renew their contracts when they expire." Scott Shane, A3845. In fact, some independent businesses choose to convert to franchises, referred to as "conversion franchising," precisely because "the owners of those businesses believe that the benefits of joining a franchise system exceed the cost of the franchise fees and royalties that they pay to join." *Id*. Professor Shane's declaration offered case-based evidence of the advantages inherent in the franchise model—when franchisees have left the McDonald's franchise system but remained in operation "in the same place, in the same way, [and] by the same people, sales at the businesses tended to decline substantially and the companies tended to go out of business after the outlets exited the McDonald's system." Scott Shane, A3843.

The Wage Board also heard expert testimony highlighting how the franchise structure allows franchisees to absorb new costs more easily than small or independent businesses. Joan Moriarty explained that the franchise structure has "created a system that puts pressure on franchisees [sic] profit margins and provides a powerful incentive for franchisees to keep wages low," but which franchisors can adjust to allow franchisees to absorb additional costs. Joan Moriarty, A340; *see also* Frederick Floss, A539 ("By changing the terms of the franchise agreements . . . the franchisor in fact can change the level of profits made by a franchisee. Therefore any increase in the change in labor costs . . . can be taken into account by the corporation to ensure its franchises remain profitable."). Professor Stephanie Luce of The

Murphy Institute at the City University of New York similarly explained that many large employers operate what are called monopsonies where "a large employer or several employers dominate a labor market and have enough power to set wages, often arbitrarily low." Stephanie Luce, A127. In other words, such firms "are not . . . operating in a competitive free market;" these firms "have the power to set wages and they set them low not because they have to but because they can." Stephanie Luce, A127–28.

Thus, the Commissioner based his decision to require only chain employers operating thirty or more establishments to comply with the Wage Order on extensive expert testimony that the larger chain or franchised employers dictate the wages of the majority of New York's fast food workers and are better equipped than smaller businesses to absorb the additional costs of a $15 minimum wage. Part I(C), below, shows that setting the threshold at thirty establishments was reasonable and did not require the type of empirical evidence that Appellant contends is necessary (i.e. evidence showing why a chain with "29 locations is situated differently than one with 30 locations"). Appellant's Br. at 23.

C. The Commissioner's Decision to Distinguish Between Fast Food Chains Operating Thirty or More Establishments and Other Fast Food Employers Is Reasonable and in Line with Similar Thresholds Adopted by Other Jurisdictions

This Court should uphold the Wage Order's thirty-establishment threshold as a reasonable one that tries to achieve a balance between maximizing the impact of a minimum wage increase and minimizing the risk of job losses that such an increase would potentially bring for smaller, independent businesses which lack the myriad advantages of chains. Federal, state, and local laws arising out of many contexts apply differently to employers depending on the size of the employer, and these laws have used a variety of proxies for size, such as gross income, number of employees, and, as is the case here, the number of locations operated by the employer.

Appellant will be hard-pressed to find any studies or testimony that provided policymakers in such jurisdictions with data that supported adopting the exact threshold levels in those laws.

At the federal level, the Fair Labor Standards Act covers certain employees (individual coverage) and enterprises (enterprise coverage).[4] Enterprise coverage requires employers to pay the federal minimum wage when their annual volume of sales or business amounts to $500,000 or more.[5] This threshold reflects not a mechanical approach to distinguishing between large and small employers, but rather policy priorities, lobbying interests, and compromise.[6] A number of states distinguish between large and small businesses using different gross volume thresholds. Ohio, for example, excludes employers with annual gross receipts of $250,000 or less (adjusted annually for inflation) from the state minimum wage.[7] Montana draws the line between large and small employers in most cases at gross annual sales greater than $110,000.[8] Oklahoma's minimum wage applies to employers with more than ten full-time employees unless the business does gross business of more than $100,000 annually.[9]

A number of recent local minimum wage laws have distinguished between large and small businesses by relying on varying employee-number thresholds. For example, Los Angeles, California, phases in its local minimum wage of $15 at a slower rate for employers with fewer than twenty-six employees;[10] Emeryville, California, does the same for employers which

[4] U.S. Department of Labor, Wage and Hour Division, Fact Sheet #14: Coverage Under the Fair Labor Standards Act (FLSA), *available at* http://www.dol.gov/whd/regs/compliance/whdfs14.pdf.
[5] *Id*.; *see also* 29 U.S.C. §§ 203(s)(1), 206(a).
[6] Marc Linder, *The Small-Business Exemption Under the Fair Labor Standards Act: The "Original" Accumulation of Capital and the Inversion of Industrial Policy*, 6 J.L. & Pol'y 403, 405 (1998).
[7] Ohio Const. art. II, § 34a.
[8] Montana.gov, Wage and Hour Labor Law Reference Guide, http://erd.dli.mt.gov/labor-standards/wage-and-hour-payment-act/wage-and-hour-laws-guide (last viewed Jan. 2, 2016).
[9] Oklahoma Office of the Department of Labor, Your Rights Under the Oklahoma Minimum Wage Act, https://www.ok.gov/odol/documents/WHMWPosterStatutoryLanguage.pdf (last viewed Jan. 2, 2016).
[10] Los Angeles Mun. Code, ch. XVIII, art. 7, § 187.02.

normally have fifty-five or fewer employees in a given week;[11] and Seattle, Washington, imposes a slower phase-in rate for its $15 minimum wage for employers with 500 or fewer employees in the U.S., including all franchisees associated with a franchisor or a network of franchises with franchisees that employ 500 or fewer employees in the aggregate in the U.S.[12] The Ninth Circuit Court of Appeals recently affirmed denial of a motion for a preliminary injunction by the International Franchise Association ("IFA") that challenged the Seattle law's classification of certain franchisees as large employers subject to a faster phase-in of the $15 minimum wage.[13] The decision found, in part, that the IFA had not, at that stage of the proceeding, shown "it is likely to succeed on the merits."[14] A pending Massachusetts bill that would increase the minimum wage to $15 for fast food and big box retail employees would apply to fast food or big box employers that employ 200 or more employees in the state, as well as fast food franchisors or franchisees where the franchisor and franchisees together employ 200 or more fast food employees in the state.[15]

Finally, numerous laws across the country, including in New York City, distinguish between large and small businesses by relying on the number of locations operated. *See, e.g.*, San Francisco Mun. Code, Police Code, art. 33F, § 3300F.2 (stating that the law's protections for formula retail workers concerning scheduling practices apply only to businesses that "have at least 40 retail sales establishments located worldwide"); NYC Health Code § 81.50 (imposing requirement to post certain calorie information on menu boards and menus in any "food service establishment within the City of New York that is one of a group of 15 or more food service

[11] Emeryville Mun. Code, tit. 5, ch. 37, § 3-1.141.
[12] Seattle Mun. Code, tit. 14, ch. 14.19, §§ 14.19.010, .030.
[13] *Int'l Franchise Ass'n, Inc. v. City of Seattle*, 803 F.3d 389, 397 (9th Cir. 2015), *petition for cert. filed* (U.S. Jan. 25, 2016) (No. 15-958).
[14] *Id*.
[15] S. 1024, 189th Gen. Ct. (Mass. 2015), *available at* https://malegislature.gov/Bills/189/Senate/S1024.

establishments doing business nationally . . . [and] that operate under common ownership or control, or as franchised outlets of a parent business, or do business under the same name"); N.J. Stat. Ann. § 26:3E-17 (imposing calorie reporting requirements on retail food establishments, which are defined, in part, as "a fixed restaurant or any similar place that is part of a chain with 20 or more locations nationally and doing business . . . under the same trade name or under common ownership or control or . . . as franchised outlets of a parent business"); Or. Rev. Stat. Ann. § 616.555 (imposing calorie reporting on chain restaurants which are defined, in part, as forming "part of an affiliation of 15 or more restaurants within the United States"); La. Stat. Ann. § 47:10 (authorizing municipalities to levy a license tax on chains with the tax rate varying based on the number of stores).

Ultimately, policymakers aiming to distinguish between large and small businesses must draw the line somewhere and courts have recognized that it is not their role to second-guess this type of decision. In the equal protection context, the United States Supreme Court has stated that "[i]n areas of social and economic policy, a statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for classification." *F.C.C. v. Beach Communications, Inc.*, 508 U.S. 307, 313 (1993). In the Dormant Commerce Clause context, it has similarly upheld the type of line-drawing at issue in this case. *See Great Atlantic & Pacific Tea Co. v. Grosjean*, 301 U.S. 412, 420–24 (1937) ("We cannot say that classification of chains according to the number of units must be condemned because another method more nicely adjusted to represent the differences in earning power of the individual stores might have been chosen, for the legislature is not required to make meticulous adjustments in an effort to avoid incidental hardships.").

New York courts have also employed a highly deferential standard when considering challenges to agency line-drawing. Where a threshold or classification does not involve a suspect class or fundamental right, "the standard for judicial review of State action challenged on equal protection grounds is whether the challenged action bears a rational relation to a legitimate governmental interest." *McDermott v. Forsythe*, 188 A.D.2d 173, 176 (3d Dep't 1993) (holding that agency's establishment of varying effective dates for various civil service titles was rationally related to a legitimate governmental interest). New York courts often uphold the determination at issue. *See, e.g.*, *Bros. of Mercy Nursing & Rehab. Ctr. v. De Buono*, 292 A.D.2d 775, 776 (4th Dep't 2002) (upholding component of process for determining Medicaid reimbursement rates, noting that "equal protection does not require that all classifications be made with mathematical precision" and that "the alleged underinclusiveness or overinclusiveness of the classification is not dispositive unless it cannot be said that the classification rationally furthers the posited State interest") (internal quotations and citations omitted).

In this case, consideration of the Wage Order's impact on small business and employment was not only a legitimate governmental interest, but a required inquiry. *See* N.Y. Lab. Law § 650 ("[I]t is the declared policy of the state of New York that such conditions be eliminated as rapidly as practicable without substantially curtailing opportunities for employment or earning power."). The Wage Board's recommendation, incorporated into the Wage Order, was in line with this required inquiry. The Wage Board explained that "[a] primary consideration in determining the employers to be covered [was] ensuring that [the Board] capture segments of the fast food industry that are most likely in competition" and that it had "also given careful consideration to how smaller chains might be affected by [the Board's] recommendations." Wage Order, A444. Thus, this Court should defer to the Commissioner's

decision to require only large employers to comply with the Wage Order through the thirty-establishment threshold and reject Appellant's claim that the Commissioner must have relied on empirical evidence pinpointing a difference between fast food chains with thirty locations versus those with twenty-nine locations or non-chains.

II. THE WAGE BOARD FULFILLED THE REQUIREMENT TO CONSIDER THE VALUE OF FAST FOOD WORK AND WAGES PAID IN THE STATE FOR WORK OF LIKE OR COMPARABLE CHARACTER

The Wage Board and Commissioner considered varied and substantial evidence concerning the value of fast food work and wages paid in the state for work of like or comparable character, as required by Section 654 of the Labor Law. N.Y. Lab. Law § 654. Appellant misunderstands the type of inquiry that Section 654 requires in asserting that the record must have revealed something "about how an employee's work at a chain with 31 locations is any more difficult, or any more profitable for an employer, or any more valuable than an employee's work at a chain with 29 locations," or must have otherwise "isolate[d] the extent to which profits are actually attributable to labor." Appellant's Br. at 25. The Wage Board and Commissioner did not need to find that the work of those fast food workers affected by the Wage Order is more valuable than the work of fast food workers not affected. The Labor Law required only an examination of the value of fast food workers' work and, separately, a comparison of fast food workers' wages to wages in New York for like or comparable work (e.g. full service restaurants or other low-wage industries). As discussed here, the Wage Board considered testimony from numerous experts on the value of fast food work in New York and across the country—it considered testimony on fast food workers' wage rates; the difficulty of fast food work and skills required; and the profitability of the industry. With regards to the

"wages paid in the state for work of like or comparable character," experts submitted testimony comparing fast food workers' wages to other wages in the restaurant industry.

In *Application of Wells Plaza Corp.*, 10 A.D.2d at 216, this Court considered a claim that the wage board at issue had failed to take into account the value of the service or class of service rendered. The decision held that the wage board had fulfilled this duty, explaining:

> There was before the wage board a great mass of documentary and other evidentiary data relevant to the factor of value and which, it must be presumed, was given consideration and appropriate weight; and which, most certainly, afforded ample basis for the wage board's report and the commissioner's determination. This material *included the evidence with respect to wages currently paid*, as to which the appeals board expressed concern. The *amount of such wages—in some cases fixed by the employers and in others by collective bargaining—are of obvious importance* to the consideration and determination of at least minimum values of services.

Id. (emphasis added). This Court also made clear that the record need not arrive at a valuation of services "in terms of dollars and cents'" and that "the insertion of some figure denoting value would not materially assist review or analysis of a tripartite board report properly arrived at in somewhat general fashion and reflecting the divergent views of adverse interests." *Id*. (internal quotations omitted).

With regards to the value of fast food work, the record shows that the median hourly wage for New York's fast food workers was $9.03 per hour at the time that the Board received testimony. Dorothy Hill, A812; *see also* James Parrott, A499. David Cooper of the Economic Policy Institute stated that "median hourly wages in fast food are remarkably consistent across the state, ranging from a low of $8.75 in Elimra, to a high of $9.51 on Long Island." David Cooper, A281. James Parrott of the Fiscal Policy Institute explained that "[a]verage annual pay for fast-food workers across the state was less than $16,000 in 2014 according to the State Labor Department" and that "[i]n six of the upstate regions annual pay ranged from $11,874 in the Mohawk Valley to $14,532 in the Capital Region" with annual pay highest in New York City at

$17,667. James Parrott, A502. At least two experts pointed out that, after taking inflation into account, wages for New York's fast food workers have actually declined in recent years. Irene Tung of NELP submitted that between 2000 and 2014, real wages for the state's fast food workers declined by 3.6 percent despite large profits. Tung, A73. Mr. Cooper explained that while the fast food industry "has grown dramatically in recent years, [] pay in fast food remains exceptionally low," and when pay is adjusted for inflation to what it was in 2000 after breaking out limited-service restaurants, "which comprise the bulk of fast food, [it] is actually three percent lower today than it was in 2000." David Cooper, A281.

Some experts noted that the current rate of pay for fast food workers may not reflect the actual value of their work because of the industry's monopoly power. *See, e.g.,* Frederick Floss, A538 (explaining that "[t]he economic theory of the firm assumes no actor has monopoly power over any of the other actors in the economy . . . [such that] each factor of production . . . receives its fair share," but that the fast food industry's monopoly power will allow the industry to "make above a fair profit and exploit the other side"); Stephanie Luce, A127 (explaining that fast food firms operate as monopsonies that set wages low "not because they have to but because they can").

Additional testimony shed light on the difficulty and complexity of fast food work, which, in turn, underscores the value of the work. As the Wage Board's report noted in its discussion of the value of fast food work, "Professor Van Tran of Columbia University submitted written testimony confirming that fast food work requires a tremendous amount of cognitive coordination and balancing of simultaneous demands, and that workers routinely perform a variety of complex tasks often under extreme time pressure and poor working conditions." Wage Order, A443. The Wage Board also considered evidence regarding the fast

food industry's profits in evaluating the value of fast food work. *Id*. Irene Tung of NELP testified that the fourteen largest publicly-traded fast food restaurant chains operating in New York State together reaped over $9 billion in annual profits in 2014, representing an increase in real profits of 14.5 percent between 2010 and 2014. Irene Tung, A73. During that same period, real wages for New York's fast food workers declined by 3.6 percent. *Id*. An Albany Law School professor explained that "[m]ost fast-food restaurants are extraordinarily profitable and could easily accommodate a wage increase to their employees." Blue Caracker, A285. In 2012, McDonald's and Burger King netted $5.46 billion and $117.7 million in profits, respectively. *Id*. She added that "these fast-food companies could cover the cost of a raise by simply shaving off a small percentage of fast-food CEO salaries" given that "[i]n 2013, the average fast-food CEO compensation was 23.8 million dollars." *Id*.

The Wage Board likewise fulfilled its obligation to consider "wages paid in the state for work of like or comparable character." N.Y. Lab. Law § 654. The Wage Board's report stated that experts showed that "fast food establishments in New York pay the lowest annual average wages within the broader food services sector" with full-service workers in New York earning on average over 50 percent more than fast food workers. Wage Order, A444. Mr. Parrott's testimony stated that "[w]ithin the broader food services sector that employs nearly 600,000 workers in New York State, limited-service fast food establishments pay the lowest average annual wages" and that workers in full-service restaurants or working for food service contractors "make, on average, 52-69 percent more than New York's fast-food workers." James Parrott, A500.

The record therefore contained substantial evidence concerning the value of fast food workers' work and the wages paid in New York for work of like or comparable character. This

Court must uphold the Wage Board's determinations regarding these two separate questions as factual determinations supported by adequate evidence. *See, e.g.*, *Kiamesha Concord, Inc. v. Catherwood*, 28 A.D.2d at 279.

III. GRADUALLY INCREASING FAST FOOD WORKERS' MINIMUM WAGE TO $15 WILL SIGNIFICANTLY ADVANCE THE PUBLIC INTEREST

As discussed above, the Commissioner's decision to raise the minimum wage of fast food workers to $15 is reasonable, founded on substantial evidence in the record, and necessary to address the economic insecurity that New York's fast food workers face. In addition, both the record and outside research tell us that the Wage Order will likely bring significant benefits to the rest of the fast food industry and other workers and families across the state without significant job losses. A decision upholding the Wage Order would allow New York to join the dozens of other states and cities that have successfully raised their minimum wage rates in recent years.

A. The Wage Order Will Likely Benefit Fast Food and Other Low-Wage Workers Not Directly Covered by the Order

Economic studies and the actual experience of cities that have increased their minimum wage in recent years show that a minimum wage increase will often pressure employers not subject to the increase to also raise wages. In fact, a classic illustration of this phenomenon is the much-reported impact of Washington State's minimum wage—which is substantially higher than Idaho's—on fast food employers along the Washington/Idaho border. Nearly a decade ago, when voters in Washington approved a measure that would give the state's lowest-paid workers a raise nearly every year, many business leaders predicted that small towns on the Washington side of the state line would suffer. But instead of shriveling up, small-business owners in Washington say they have prospered far beyond their expectations. Businesses at the dividing line between the two economies found that raising prices to compensate for higher wages does

not necessarily lead to losses in jobs and profits. Idaho teenagers crossed the state line to work in fast-food restaurants in Washington, where the minimum wage was 54 percent higher. That forced businesses in Idaho to raise their wages to compete. *See* Timothy Egan, *For $7.93 an Hour, It's Worth a Trip across a State Line*, N.Y. Times, Jan. 11, 2007.

Similarly, under wage laws that exempt small employers, it is generally recognized that such employers feel pressure to pay the higher wage in order to compete for workers, as the higher wage becomes the going rate expected in the labor market. Thus, for example, during the years 2004–2007, when the Santa Fe, New Mexico, minimum wage ordinance exempted small businesses with fewer than twenty-five employees, the executive director of the Santa Fe Alliance, the city's small business trade association, reported that "many smaller businesses ha[d] been paying the minimum wage to keep good employees." Associated Press (July 13, 2007).

B. Rigorous Economic Studies Show that Higher Minimum Wages Have No Discernible Impact on Employment and Can Foster Economic Growth in the Locations or Industries Covered

The Wage Board and Commissioner also took into account the broader economic impact of increasing the minimum wage for fast food workers, as Section 650 of the Labor Law permits. *See* Lab. Law. § 650. The Wage Board asked "whether a significant increase in fast food wages could have an adverse economic impact, potentially undermining the positive effect for workers of any wage order issued by the Labor Commissioner." Wage Order, A445. The Wage Order noted that the majority of economic experts who submitted testimony "concluded that the net impact of a wage increase would be positive rather than negative." *Id*. As shown below, the empirical research that the Wage Board and Commissioner relied upon, and which shows that

minimum wage increases are not associated with significant adverse employment effects, reflects the most rigorous economic research on minimum wage increases.

Economic research over the past twenty years—examining scores of state and local minimum wage increases across the United States—demonstrates that minimum wage increases have had the effect of raising workers' incomes *without* reducing employment. The substantial weight of evidence reflects a significant shift in the views of economists away from a former view that higher minimum wages cost significant numbers of jobs. As *BloombergView* summarized in 2012: "[A] wave of new economic research is disproving those arguments about job losses and youth employment. Previous studies tended not to control for regional economic trends that were already affecting employment levels, such as a manufacturing-dependent state that was shedding jobs."[16]

The most sophisticated of the new wave of minimum wage studies was published in 2010 by economists at the Universities of California, Massachusetts, and North Carolina in the prestigious *Review of Economics and Statistics*.[17] That study carefully analyzed minimum wage impacts across state borders by comparing employment patterns in more than 250 pairs of neighboring counties in the U.S. that had different minimum wage rates between 1990 and 2006 as the result of being located in states with different minimum wages.[18] Consistent with a long line of similar research, the study found no difference in job growth rates in the data from the 250 pairs of neighboring counties and found no evidence that higher minimum wages harmed

[16] Editorial Board, *Raise the Minimum Wage*, BloombergView, Apr. 18, 2012, *available at* http://www.bloombergview.com/articles/2012-04-16/u-s-minimum-wage-lower-than-in-lbj-era-needs-a-raise.
[17] Arindrajit Dube et al., *Minimum Wage Effects across State Borders: Estimates Using Contiguous Counties*, The Review of Economics and Statistics, Nov. 2010, at 92(4): 945–64. A summary of the study prepared by NELP is available at http://nelp.3cdn.net/98b449fce61fca7d43_j1m6iizwd.pdf.
[18] *Id*.

states' competitiveness by pushing businesses across the state line.[19] This study's innovative approach of comparing neighboring counties on either side of a state line is generally recognized as especially effective at isolating the true impact of minimum wage differences, and the results can be analogized to counties within a state that have differing minimum wages due to a citywide ordinance in an urban area.

However, it is not simply individual state-of-the-art studies, but the whole body of modern research on the minimum wage that now indicates that higher minimum wages have had little impact on employment levels. This is most clearly demonstrated by several recent "meta-studies" surveying research in the field. For example, a meta-study of sixty-four studies of the impact of minimum wage increases published in the *British Journal of Industrial Relations* in 2009 shows that the bulk of the studies find close to no impact on employment.[20] Another recent meta-study of the minimum wage literature demonstrates similar results.[21] Further underscoring how minimum wage increases are simply not a major factor affecting job growth, economists at the Center for Economic and Policy Research have noted that the states that have raised their minimum wages above the minimal federal level are enjoying stronger job growth than those that have not.[22]

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[19] *Id*. Similar, sophisticated new research has also focused in particular on teen workers—a very small segment of the low-wage workforce affected by minimum wage increases, but one that is presumed to be especially vulnerable to displacement because of their lack of job tenure and experience. However, the research has similarly found no evidence that minimum wage increases in the U.S. in recent years have had any adverse effect on teen employment. *See* Sylvia Allegretto et al., *Do Minimum Wages Reduce Teen Employment?*, Industrial Relations, Apr. 2011, at vol. 50, no. 2. A NELP summary is available at http://nelp.3cdn.net/eb5df32f3af67ae91b_65m6iv7eb.pdf.

[20] Hristos Doucouliagos & T.D. Stanley, *Publication Selection Bias in Minimum-Wage Research? A Meta-Regression Analysis*, British J. of Indus. Relations, May 2009, at vol. 47, Iss. 2.

[21] Paul Wolfson & Dale Belman, W.E. Upjohn Inst. for Employ. Res., What Does the Minimum Wage Do? (2014), *available at* http://research.upjohn.org/up_press/227/.

[22] Center for Economic & Policy Research, 2014 Job Creation Faster in States that Raised the Minimum Wage (June 2014), *available at* http://www.cepr.net/index.php/blogs/cepr-blog/2014-job-creation-in-states-that-raised-the-minimum-wage.

The two United States cities that have had higher local minimum wages for the longest period are San Francisco, California, and Santa Fe, New Mexico.[23] Both adopted significantly higher local minimum wages in 2003, and the impact of the minimum wage increase has been the subject of sophisticated economic impact studies. In San Francisco, a 2007 study by University of California researchers gathered employment and hours data from restaurants in San Francisco as well as from surrounding counties that were not covered by the higher minimum wage. The researchers found that the higher wage had not led San Francisco employers to reduce either their employment levels or employee hours worked.[24] A follow-up 2014 study examined the combined impact on San Francisco employers of the city's minimum wage ordinance and of other city compensation mandates that cumulatively raised employment costs 80 percent above the level of the federal minimum wage. The study again found no adverse effect on employment levels or hours, and found that food service jobs—the sector most heavily affected—actually grew 17 percent faster in San Francisco than surrounding counties during that period.[25]

Similarly, after Santa Fe raised its minimum wage to 65 percent above the state rate, a 2006 study compared job growth in Santa Fe with that in Albuquerque, which at that time did not have a higher city minimum wage. It determined that "[o]verall, . . . the living wage had no discernible impact on employment per firm, and that Santa Fe actually did better than

[23] For a helpful overview of this literature on the impact of city minimum wages, see Michael Reich et al., Local Minimum Wage Laws: Impacts on Workers, Families and Businesses: Report prepared for the Seattle Income Inequality Advisory Committee 17–19 (Mar. 2014), available at http://murray.seattle.gov/wp-content/uploads/2014/03/UC-Berkeley-IIAC-Report-3-20-2014.pdf.

[24] Michael Reich et al., University of California, Berkeley, The Economic Effects of a Citywide Minimum Wage (2007), *available at* http://www.irle.berkeley.edu/cwed/wp/economicimpacts_07.pdf.

[25] Michael Reich et al., When Mandates Work: Raising Labor Standards at the Local Level 31 (Univ. of Cal. Press 2014); *see also* Susan Berfield, *San Francisco's Higher Minimum Wage Hasn't Hurt the Economy*, BloombergBusiness, Jan. 22, 2014, *available at* http://www.businessweek.com/articles/2014-01-22/san-franciscos-higher-minimum-wage-hasnt-hurt-the-economy; Carolyn Lochhead, *S.F. praised as model for U.S. on increasing minimum wage*, SF Gate, Jan. 28, 2014, *available at* http://www.sfgate.com/politics/article/S-F-praised-as-model-for-U-S-on-increasing-5183378.php.

Albuquerque in terms of employment changes."[26] Finally, a 2011 study of higher minimum wages in San Francisco, Santa Fe, and Washington, DC, compared employment impacts to control groups in surrounding suburbs and cities. Its findings were similar to the studies described above. The study concluded that "[t]he results for fast food, food services, retail, and low-wage establishments . . . support the view that a citywide minimum wages [sic] can raise the earnings of low-wage workers, without a discernible impact on their employment."[27]

Ultimately, the Wage Order at issue in this case would allow New York to join a growing list of cities and states that have successfully increased the minimum wage for workers whose wages have been declining for decades and cannot make ends meet.

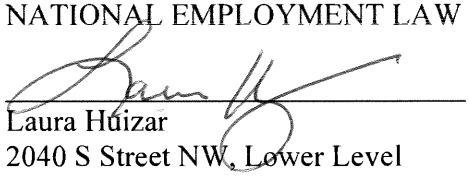
CONCLUSION

For the foregoing reasons, *amici curiae* respectfully requests that this Court uphold the Wage Order as not contrary to law and in the interest of public policy.

Dated: February 5, 2016
Washington, District of Columbia

Respectfully submitted,

NATIONAL EMPLOYMENT LAW PROJECT



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[26] Bureau of Business and Economic Research, University of New Mexico, Measuring the Employment Impacts of the Living Wage Ordinance in Santa Fe, New Mexico (Jun. 2006), *available at* http://bber.unm.edu/pubs/EmploymentLivingWageAnalysis.pdf.

[27] John Schmitt & David Rosnick, Center for Economic & Policy Research, The Wage and Employment Impact of Minimum-Wage Laws in Three Cities 1 (Mar. 2011), *available at* http://www.cepr.net/documents/publications/min-wage-2011-03.pdf.

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EXHIBIT B

A1

NOTICE OF APPEAL, IBA DOCKET NO. WB 15-001, DATED DECEMBER 10, 2015 [A1-A2]

STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

In the Matter of the Application of
NATIONAL RESTAURANT ASSOCIATION,

Petitioner,

To review under Section 657 of the Labor Law:
Order on the Report and Recommendation of the 2015 Fast Food Wage Board, dated September 10, 2015

- against -

THE COMMISSIONER OF LABOR,

Respondent.

NOTICE OF APPEAL

Docket No. WB 15-001

PLEASE TAKE NOTICE that the National Restaurant Association, the Petitioner in the above-referenced action, hereby appeals to the Appellate Division of the Supreme Court, Third Judicial Department, from the Resolution of Decision and Order of the New York State Industrial Board of Appeals entered on the 9th day of December, 2015. This appeal is taken from each and every part of the Resolution of Decision and Order and from the whole thereof.

A2

Dated: New York, New York
December 10, 2015

Respectfully submitted,

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EXHIBIT C

A15

RESOLUTION OF DECISION AND ORDER, STATE OF NEW YORK INDUSTRIAL BOARD OF APPEALS, DATED DECEMBER 9, 2015 [A15-A23]

STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

In the Matter of the Petition of: NATIONAL RESTAURANT ASSOCIATION, Petitioner, To Review Under Section 657 of the Labor Law: Order on the Report and Recommendation of the 2015 Fast Food Wage Board, dated September 10, 2015, - against - THE COMMISSIONER OF LABOR, Respondent.	DOCKET NO. WB 15-001 RESOLUTION OF DECISION AND ORDER

APPEARANCES

Gibson, Dunn & Crutcher LLP (Randy M. Mastro of counsel), for petitioner.

Mario J. Musolino, Acting Commissioner of Labor (Pico Ben-Amotz of counsel), for respondent.

Gladstein, Reif & Meginniss, LLP (James Reif of counsel), for Make the Road New York, Alvin Major, Rebecca Cornick and Flavia Cabral, amici curiae.

WHEREAS:

This is an appeal of a minimum wage order issued by respondent on September 10, 2015, which adopted the recommendations of the 2015 fast food wage board to increase the minimum wage for certain fast food workers in the state of New York to $15.00 an hour by 2018 for New York City and by 2021 for the rest of the state. We have jurisdiction over this appeal under Labor Law § 657 (2), which provides that, "[a]ny person in interest, including a labor organization or employer association, in any occupation for which a minimum wage order . . . has been issued under the provisions of [Article 19 of the Labor Law] who is aggrieved by such order . . . may obtain review before the [Industrial Board of Appeals]." Petitioner National Restaurant Association has standing because it is an employer association with members in New York who are affected by the wage order[1]. Our standard of review in this proceeding is limited to determining whether the minimum wage order under review is "contrary to law" (*id.*).

[1] Petitioner has provided the Board with an affirmation swearing that its members include fast food establishments within the state of New York who meet the definition of "fast food establishment" set forth in the wage order.

The wage order provides that the minimum wage rate for fast food employees in fast food establishments shall be increased for New York City to $10.50 an hour on December 31, 2015; $12.00 an hour on December 31, 2016; $13.50 an hour on December 31, 2017; and $15.00 an hour on December 31, 2018. The order provides that the minimum wage for fast food employees in fast food establishments shall be increased for the rest of the state to $9.75 an hour on December 31, 2015; $10.75 an hour on December 31, 2016; $11.75 an hour on December 31, 2017; $12.75 an hour on December 31, 2018; $13.75 an hour on December 31, 2019; $14.50 an hour on December 31, 2020; and $15.00 an hour on July 1, 2021.

The order defines "fast food employee" as "any person employed or permitted to work at or for a fast food establishment by any employer where such person's job duties include at least one of the following: customer service, cooking, food or drink preparation, delivery, security, stocking supplies or equipment, cleaning, or routine maintenance."

A "fast food establishment" is defined by the order as:

> "any establishment in the state of New York: (a) which has as its primary purpose serving food or drink items; (b) 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; (c) which offers limited service; (d) which is part of a chain; and (e) which is one of thirty (30) or more establishments nationally, including: (i) an integrated enterprise which owns or operates thirty (30) or more such establishments in the aggregate nationally; or (ii) an establishment operated pursuant to a franchise where the franchisor and franchisee(s) of such franchisor owns or operate [sic] thirty (30) or more such establishments in the aggregate nationally. 'Fast food establishment' shall include such establishments located within non-fast food establishments."

The order defines "chain" as "a set of establishments which share a common brand, or which are characterized by standardized options for décor, marketing, packaging, products, and services."

"Franchisee" is defined by the order as "a person or entity to whom a franchise is granted."

The order defines "franchisor" as "a person or entity who grants a franchise to another person or entity."

"Franchise" is defined by the order as having the same definition as set forth in General Business Law § 681.

The order defines "integrated enterprise" as "two or more entities sufficiently integrated so as to be considered a single employer as determined by application of the following factors: (i) degree of interrelation between the operations of multiple entities; (ii) degree to which the

entities share common management; (iii) centralized control of labor relations; and (iv) degree of common ownership or financial control."

The petition alleges the wage order is contrary to law because the 2015 fast food wage board was improperly constituted; the order does not adequately analyze the Labor Law's exclusive employee-focused factors for when to raise the minimum wage; the order violates the Labor Law because it improperly focuses on employers affiliated with chains with more than 30 locations, not an occupation or industry; the order is arbitrary and capricious and not supported by the evidence; the order violates separation of powers; and the order is unconstitutional.

Pursuant to Labor Law § 657 (2), respondent filed his answer and a certified transcript of the record of the 2015 fast food wage board on November 3, 2015. The answer denies the claims in the petition and challenges petitioner's standing, an argument we reject as discussed above, and asserts that the wage order is lawful in all respects. We heard oral arguments from the parties in Albany, New York, on November 19, 2015, as required by Labor Law § 657, and thereafter the parties and amici curiae filed legal briefs. Having reviewed the record and considered the arguments, we find for the reasons discussed below that the wage order is not contrary to law.

Proceedings of the 2015 Fast Food Wage Board

Article 19 of the Labor Law, also known as the "minimum wage act," sets forth the public policy of the state of New York to establish and maintain minimum wage standards to eliminate employment at wages that are insufficient to provide adequate maintenance for employees and their families and that impairs their health, efficiency, and well-being (Labor Law § 650). Consistent with this public policy, the legislature provided respondent a mechanism to appoint wage boards to "inquire into and report and recommend adequate minimum wages" for employees in occupations the respondent believes employ a substantial number of persons who are receiving wages "insufficient to provide adequate maintenance and to protect their health" (Labor Law § 653 [1]). Respondent, having determined that a substantial number of fast food workers in the hospitality industry receive wages insufficient to provide adequate maintenance and to protect their health, appointed the 2015 fast food wage board on May 7, 2015, to inquire into and report and recommend adequate minimum wages and regulations for fast food workers.

The 2015 fast food wage board consists of Byron Brown, Mayor of Buffalo, representing the interests of the public; Michael Fishman, Secretary-Treasurer of Service Employees International Union (SEIU), representing the interests of workers; and Kevin P. Ryan, founder and chairman of Gilt Groupe, and vice president of the Partnership for New York City, representing the interests of employers.

On May 20, 2015, respondent charged the wage board to "inquire into and report and recommend adequate minimum wages and regulations for fast food workers in fast food chains," and to investigate and report back, together with any recommendations, on what the minimum wage should be for fast food workers.

The fast food wage board met a total of eight times, including conducting four public hearings at which testimony was heard, and issued its report to respondent on July 31, 2015, recommending an incremental increase of the minimum wage for certain fast food workers to $15.00 an hour phased in over time. According to its report, the wage board in reaching its

conclusions considered the oral testimony of some 225 people, received more than 2,000 written comments and submissions, and received various governmental, academic, and other studies and reports presenting data and statistics. Respondent accepted the fast food wage board's report and recommendations in all respects.

Appointment of the 2015 Fast Food Wage Board was not contrary to law

Labor Law § 655 provides for the manner in which respondent may appoint a wage board. The statute requires the wage board to be composed of not more than three representatives of employers, an equal number of representatives of employees, and an equal number of persons selected from the general public (Labor Law § 655 [1]). The 2015 fast food wage board consisted of three members, one each representing employers, employees, and the general public. This is the minimum number of members allowed by statute and is not contrary to law. The statute further sets forth the method for appointing the wage board's members. Labor Law § 655 (1) provides that "[t]he commissioner shall appoint the members of the board, the representatives of the employers and employees to be selected so far as practicable from nominations submitted by employers and employees in such occupation or occupations."

Petitioner objects to the appointment of internet entrepreneur Kevin P. Ryan as the employer's representative, because, according to petitioner, he has no background in the fast food industry, and therefore, is not able to represent the interests of fast food employers. Mr. Ryan is founder and chairperson of several internet retail companies, and vice president of the Partnership for New York City, a nonprofit membership organization comprised of nearly 300 CEOs from New York City's top corporate, investment, and entrepreneurial firms. Petitioner also objects to the appointment of Michael Fishman as the employee's representative, because he is an officer of a labor union that petitioner believes does not represent fast food workers. Mr. Fishman is Secretary-Treasurer of SEIU and a former president of its Local 32BJ. Although the certified record filed by respondent contains no evidence of how the members were nominated, respondent asserts that Mr. Ryan was nominated by the Partnership for New York City to serve on the wage board as the employer's representative,[2] and Mr. Fishman was nominated as the employee's representative by three labor organizations — SEIU, 32BJ, and the New York State AFL-CIO.[3]

While we may agree with petitioner that Mr. Ryan seems an unlikely choice as the employer's representative to a fast food wage board, the statute does not require the employer's representative to be an employer in the specific occupation under investigation or in any other occupation. The statute merely requires that if respondent makes appointments to the wage board from nominations, those nominations must be from employers for the employer's representative, and employees, for the employee's representative, in the occupation or occupations in question. Since the Partnership for New York City, which includes individuals who sit on boards of directors of and own substantial stakes in the largest fast food chains operating in New York,[4] nominated Mr. Ryan, we find his appointment complied with Labor Law § 655 (1) and was not contrary to law.

[2] Respondent's answer to the petition at ¶ 13.
[3] Respondent's answer to the petition at ¶ 16.
[4] Respondent's supplemental memorandum of law, dated November 25, 2015, at pp. 24-25.

Likewise, Mr. Fishman's appointment to the wage board was not contrary to law. Mr. Fishman was nominated by labor organizations, including SEIU, which have been actively involved in the national campaign for an increase in the minimum wage for fast food workers to $15.00 an hour. The statute's requirement that the nomination for the employees' representative come from fast food employees is satisfied because Mr. Fishman was nominated by labor organizations that advocate on behalf of fast food workers. We do not find that the appointment of the 2015 fast food wage board was improperly constituted or otherwise contrary to law.

The fast food minimum wage order is not contrary to law

Labor Law § 654 states:

> "In establishing minimum wages and regulations for any occupation or occupations pursuant to the provisions of the following sections of this article, the wage board and the commissioner shall consider the amount sufficient to provide adequate maintenance and to protect health and, in addition, the wage board and the commissioner shall consider the value of the work or classification of work performed, and the wages paid in the state for work of like or comparable character."

The wage board's report and recommendations, which was adopted by the commissioner in its entirety, states that all three factors -- amount sufficient to provide adequate maintenance and protect health, the value of the work or classification of work performed, and the wages paid in the state for work of like or comparable character -- were considered, and our review of the record shows that a great deal of information was available to the wage board and respondent, including, but not limited to, economic reports and data prepared by government agencies and academics, testimony, and written comments. This evidence touched on each of the statutory factors set forth in Labor Law § 654 and included data such as average wage rates of fast food workers in New York, the percentage of fast food workers receiving public assistance, cost of public assistance for fast food workers in New York, educational level of fast food workers, average hours worked per week by fast food workers in New York, percentage of fast food chains in New York that are franchised, percentage of fast food workers in New York who work in franchises, employment growth in the fast food industry, amount of profit of publicly traded fast food chains in New York, types of work done by fast food workers, and a comparison of wages earned by fast food workers in chain restaurants to those who do not work in chains and those who work in the broader restaurant industry. The record also consists of testimony from fast food workers describing their work and standard of living.

The wage board and respondent found based on the evidence before it that the minimum wage for fast food workers employed in New York in chains with 30 or more locations nationally should be raised to $15.00 an hour. The wage board and respondent in reaching this decision considered that current wages paid to fast food workers in New York are not sufficient to meet their cost of living, that the value of fast food work is reflected in the difficulty of the tasks performed and the profit the work creates for the industry, and that fast food establishments in New York pay the lowest annual wages within the broader food services sector. These findings are final, and not subject to our review except to the extent that we find a sufficient

basis for them in the record no matter our opinion of the conclusions reached (*see* Labor Law § 657 [1] ["The findings of the commissioner as to the facts shall be conclusive."]).

Petitioner alleges the wage order is contrary to law because the wage board and respondent did not adequately analyze the statutory factors for when to raise the minimum wage, and urges us to review the conclusions reached by the wage board and respondent to determine that they acted unreasonably or made policy choices that are arbitrary and capricious. Petitioner, however, greatly misjudges our authority to review the minimum wage order's substance. Our review is limited to determining whether the respondent complied with the statute, not to question policy decisions reached by the wage board or to second guess whether information before the wage board and acting commissioner was considered or properly weighed (*Matter of Wells Plaza Corp. v Industrial Commissioner*, 10 AD2d 209, 215-216 [3d Dept 1960], *affd by Application of Wells Plaza Corp.*, 8 NY2d 975 [1960]).

Legislative history and case law underscore this narrow scope of review. Our scope of review of minimum wage orders was originally to determine whether they were "invalid or unreasonable," which remains our standard of review for petitions for review of compliance orders issued by respondent finding employers have violated specific provisions of the Labor Law, and in which proceedings we hold evidentiary hearings and make findings of fact (*see* Labor Law § 101; *compare* Labor Law § 101 [review of compliance orders] to Labor Law § 657 [review of minimum wage orders]). With respect to minimum wage orders, in 1960, the legislature narrowed our review from "invalid or unreasonable" to "contrary to law" (L. 1960, c. 619, §§ 1-2). Based on the legislature's intent to prevent us from passing on the reasonableness of minimum wage orders we are constrained from reviewing the record of the proceedings of the fast food wage board to determine whether the members made rational decisions based on the available evidence, nor may we substitute our judgment for that of the wage board or acting commissioner by questioning the choices they made and the decisions reached based on their review of the evidence before them. As the Third Department explained in *Wells Plaza*, 10 AD2d at 216, we must presume that the documentary and other evidentiary data relevant to the statutory factors for raising the minimum wage were considered by the wage board and given appropriate weight, and not second guess policy choices made by the wage board and respondent. Moreover, *Wells Plaza* was decided before the legislature acted to further constrain our review (*see Wells Plaza*, 10 AD2d at 211 [citing the "invalid and unreasonable" standard]). The evidence before the fast food wage board amply demonstrates that sufficient information on all the statutory factors under Labor Law § 654 was available, and the wage board's report and recommendations demonstrate that the factors were considered in compliance with the statute.

It is for the same reason that we reject petitioner's argument that we must set aside the wage order for impermissibly defining the covered occupations as fast food chains in New York with 30 or more locations nationally. We find nothing in the statute to prohibit the respondent from issuing a minimum wage order that classifies employees based on the number of locations their employers are affiliated with or that such a definition exceeds respondent's authority. The Labor Law defines "occupation" as "an industry, trade or class of work in which employees are gainfully employed" (Labor Law § 651 [4]), and respondent has the power to investigate the wages paid to persons in any occupation or occupations and to appoint wage boards to inquire into and report and recommend adequate minimum wages and regulations for employees in any occupation or occupations where he believes wages are insufficient (Labor Law § 653 [1]). We note that respondent's determination regarding the adequacy of wages only mentions fast food

workers and that is all we review to determine compliance with Labor Law § 653 (1). Respondent's focus on fast food chains is stated in respondent's charge to the wage board and the definition used that includes a threshold of 30 or more locations nationally, was only present in the wage board report and recommendations ultimately accepted by respondent. A wage board, once appointed, may "classify employments in any occupation according to the nature of the work rendered and recommend minimum wages in accordance with such classification" (Labor Law § 655 [5]). This broad language provides for distinctions within industries and allows respondent to carve out a "sliver of a slice of a subset of a segment of an industry," as petitioner argues, so long as the record establishes a factual basis for doing so.

The 2015 fast food wage board explained in its report that it recommended an increase in the minimum wage only for workers employed by fast food chains with 30 or more locations nationally because, among other reasons, they are "better equipped to absorb a wage increase due to greater operational and financial resources, and brand recognition." Since this finding is final (Labor Law § 657) and reflected in the record evidence, and the definition of "fast food establishment" covered by the order is consistent with the statute's broad language allowing respondent to make distinctions within occupations, we confirm the order.

We find that petitioner's other objections to the minimum wage order — that it violates separation of powers and is unconstitutional — are without merit or not properly before us. The minimum wage order does not violate separation of powers, because the statutory framework for respondent to investigate the adequacy of wages in occupations and appoint wage boards to make recommendations to respondent on whether to raise the minimum wage in those occupations demonstrates the legislature's intent to delegate the authority to raise the minimum wage to respondent so long as the guidance provided by the legislature by the applicable statutes is followed. As discussed above, we find respondent followed the prescribed statutory process and did not act contrary to law. With respect to petitioner's constitutional challenges to the wage order, they are not properly before us. While the parties agree that in certain circumstances administrative agencies have jurisdiction to decide whether application of a rule or regulation is constitutional, such is not the case here, where there is no procedure available to us by which to make our own findings of fact on the constitutional issues raised, and where the minimum wage order, in any event, will not be effective within the time period by which we are statutorily bound to issue our decision (*see* Labor Law § 657 [2] [providing that our decision affirming, amending or setting aside the wage order must be issued within 45 days of the expiration of statute of limitations to file an appeal]).

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NOW, THEREFORE, IT IS HEREBY RESOLVED AND ORDERED THAT:

1. The order on the report and recommendation of the 2015 fast food wage board, dated September 10, 2015, is confirmed; and

2. The petition for review be, and the same hereby is, denied.

Vilda Vera Mayuga, Chairperson

J. Christopher Meagher, Member

LaMarr J. Jackson, Member

Michael A. Arcuri, Member

Dated and signed in the Office
of the Industrial Board of Appeals
at New York, New York, on
December 9, 2015.

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CERTIFICATION

STATE OF NEW YORK)
) ss:
INDUSTRIAL BOARD OF APPEALS)

I, Devin A. Rice, an attorney licensed to practice in all the courts of the state of New York and Deputy Counsel to the New York State Industrial Board of Appeals, do hereby certify that:

> The attached is a true copy of a Resolution of Decision and Order dated December 9, 2015, in the Matter of the Petition of NATIONAL RESTAURANT ASSOCIATION, filed under IBA Docket Number WB 15-001 which I have compared with the original in this office and which I do hereby CERTIFY to be a true and correct transcript thereof.

IN WITNESS WHEREOF, I set my hand and the seal of the Industrial Board of Appeals, this 9th day of December, 2015.

Devin A. Rice
Deputy Counsel