UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

HUMAN SERVICES COUNCIL OF NEW YORK Plaintiff, versus The CITY OF NEW YORK, Defendant.	21-cv-11149-PGG

HUMAN SERVICES COUNCIL OF NEW YORK'S MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION FOR A PRELIMINARY INJUNCTION

Claude M. Millman
Caroline Rule
Usman Mohammad
Michelle Lee (not admitted)
KOSTELANETZ & FINK, LLP
Seven World Trade Center, 34th Floor
New York, NY 10007
212-808-8100
Attorneys for Plaintiff Human Services Council of New York

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INTRODUCTION

Plaintiff Human Services Council of New York ("HSC") submits this memorandum in support of its motion under Rule 65 of the Federal Rules of Civil Procedure. HSC is seeking a preliminary injunction barring the City of New York (the "City") from implementing or enforcing New York City Local Law 87 of 2021 ("Local Law 87" or the "Law"), a law that is supposed to promote "labor peace," does nothing of the sort, and, if not enjoined, would hamper the City's delivery of billions of dollars in social services.

HSC is an umbrella not-for-profit entity that represents a majority of the not-for-profit entities ("human services providers") that contract with the City to serve its neediest residents. "Human services" include social services, like homeless services, childcare, and elder care.

Preliminary relief is needed to prevent HSC and its members from suffering irreparable harm while this action is litigated. As the Complaint (*see* Claude M. Millman Declaration, dated February 18, 2022 ("Millman Decl."), Exh. 1) details, Local Law 87 is preempted by federal law. It unlawfully cedes City power to union leaders and puts the needy at greater risk. If this illegal law is implemented or enforced while the lawsuit is pending, the delivery of human services to millions of New Yorkers will be undermined.

Prompt relief is needed. HSC's members and the City are poised to process paperwork for hundreds of human services contracts that will be effective on July 1, 2022, the first day of the City's new Fiscal Year. The Mayor proposed his budget for that Fiscal Year this week (Millman Decl. Exh. 5), and joined with the City Comptroller in touting the importance of getting human services contracts processed and paid on time (Millman Decl. Exh. 4). Unfortunately, the Mayor's predecessor, Bill de Blasio ("de Blasio"), in his last weeks in office, left the new Mayor with Local Law 87, a ticking time bomb that will undermine human services contracting during the new Mayor's term, unless the Law's implementation and enforcement is

enjoined. The Law, in effect, empowers union leaders, not City elected leaders, to control whether human services contractors will deliver services to the millions of city residents in need. The Law jeopardizes New York City's safety net for the needy, at a time when it is most needed.

Regarding HSC's likelihood of success on the merits, this motion focuses on several of the Complaint's allegations that Local Law 87 is preempted by federal labor laws. First, we show that the purported "labor peace" agreements that Local Law 87 would require HSC members to sign are at the least controversial. The Eleventh Circuit declared these kinds of "labor peace" agreements illegal under the federal Taft Hartley Act, and the Supreme Court, after first taking up this issue, then determined to let the Eleventh Circuit decision stand. At a minimum, then, the controversy over this issue shows that Local Law 87 is preempted by federal law. Second, we show that the National Labor Relations Act ("NLRA") preempts Local Law 87. We identify several issues there: (a) Local Law 87's provisions, designed to bar contractors who have violated the NLRA, is preempted by federal law, including the Supreme Court's decisions, defining how the NLRA may be enforced, i.e. *not* as here, by state or local authorities attempting to disguise their spending power in order to act as regulators; (b) Local Law 87 has spill-over effects on services that the City does not contract for nor fully-fund, and is therefore preempted for the reasons spelled out in a Seventh Circuit decision, whose core holding has not been contradicted by other courts; (c) Local Law 87 interferes with organizing and collective bargaining by empowering union leaders to, in effect, block non-profits from contracting with the City, and (d) Local Law 87 silences non-profits, blocking their lawful advocacy protected by the First Amendment, and interfering with employees' rights.

The Court should grant the preliminary injunction.

BACKGROUND

A. The Parties

Plaintiff HSC is a non-profit business association located in New York City, whose 170 members include not-for-profit City contractors—both small and large—that employ more than 200,000 workers who provide human services—including access to housing, childcare, elder care, homeless shelters, food pantries, mental health counseling, and disaster response—to an estimated 2.5 million needy New York City residents annually. HSC serves its member employers by, *inter alia*, assisting with labor relations through informational meetings, community and public relations, political action, and advocacy; and protecting its members and the greater New York City-area business community against legislative and administrative actions that violate rights under federal labor laws and the United States Constitution. (*See* Michelle Jackson Declaration, dated February 18, 2022 ("Jackson Decl."), at ¶¶ 3-5.)

The City contracts with human services providers for approximately $6 billion in services each year, and many City service contractors' operating budgets are funded predominately through City contracts. Salaries or rates of service under City service contracts are often set in City Requests For Proposals, and those pre-set salaries prevent City contractors that are heavily City-funded from setting any different salaries. Indeed, in the past, the City has rejected HSC members' budgets that set higher salaries, even if these salaries were within the human services provider's budget or were funded with private dollars.

B. Local Law 87

Local Law 87 was signed into law by de Blasio in late 2021, after former City Council Speaker Corey Johnson ("Johnson") championed its passage by the City Council. While Johnson and de Blasio touted the new Law as promoting union neutrality and "labor peace" in connection with the City service contractors, it has nothing to do with neutrality or peace.

Instead, Local Law 87 essentially gives union leaders the power to control who will provide the City's social services.

Local Law 87 grants union leaders de facto veto power over who will obtain a City human services contract ("City service contract"). In soliciting a City service contract, a human services provider must state that it will comply with the law. Then, within three months of being awarded a contract, a City service contractor must submit an attestation to the City, signed by "one or more labor organizations," stating that the contractor has entered into one or more "labor peace agreements" with a union or unions or that negotiations have "not yet been concluded"; or attest that its employees who work on City contracts are "not currently represented by a labor organization and that no labor organization has sought to represent" those employees. If *any* union leader thereafter gives notice to the City service contractor that it wishes to represent those employees, the contractor must submit an attestation signed by that union leader that the contractor has entered into an agreement with that union or that negotiations have not yet concluded, *regardless* of whether the contractor's employees are already represented by another union. This gives union leaders unilateral power to disrupt services to millions of New Yorkers.

Under the Law, a so-called "labor peace agreement" means an agreement between a City service contractor and a labor organization seeking to represent some or all of the contractor's employees with the proviso that the union, the contractor, and its employees agree "to the uninterrupted delivery of services" and "to refrain from actions intended to or having the effect of interrupting" services. *See* Local Law 87/N.Y.C. Admin. Code § 6-145(a) (subpart 1 of definition of "Labor Peace Agreement"). This Law limits a) *workers' rights*, guaranteed in Article 7 of the NLRA, to engage in "concerted activities for the purpose of collective bargaining or other mutual aid or protection," which includes the right to strike; and b) *employers' rights*

under NLRA Article 8 to discuss with their employees the pros and cons of unionization.

1. The Role of Union Leaders in Drafting the Law

Then-Speaker Johnson, Local Law 87's main sponsor, announced his candidacy for City Comptroller shortly before he introduced the bill that ultimately became Local Law 87. Johnson also sought and obtained the endorsement of District Council 37, the City's largest public employee union. District Council 37 has proclaimed that it was "heavily involved" in drafting Local Law 87. Johnson did not identify any historic work stoppages that the Law sought to prevent and did not suggest that the Law was intended to ensure continuity of human services. Instead, upon the passage of the Law, both Johnson and de Blasio proclaimed that it would promote union power. (*See* Jackson Decl., at ¶¶ 11-14.)

2. The Effects of Local Law 87's Union Leader Signature Requirements

Local Law 87 inserts union leaders into the City government contracting procurement process by requiring City human services contractors and subcontractors covered by the Law ("covered contractors") to submit attestations—signed by a union leader—to the City in connection with every City contract ("covered contract") and subcontract. (*See* Jackson Decl., at ¶¶ 18-21.)

This requirement for providing "attestations" signed by labor leaders applies throughout a contract's term. First, the labor leader signature must be obtained within three months of the contract award or renewal, or subcontract approval, on an attestation stating that the City contractor "has entered into one or more labor peace agreements" with one or more unions or that labor peace agreement negotiations have not yet been concluded in connection with part of its workforce. Otherwise, the contractor must attest that its employees rendering services under a City service contract ("covered employees") are not currently represented by a union *and* that no

union has sought to represent those employees. Local Law 87/N.Y.C. Admin. Code § 6-145(b)(1). Second, if, after the first three months of a City service contract, any union seeks to represent the contractor's covered employees, the contractor must submit an attestation signed by the union stating that it has entered into a labor peace agreement with that union or that negotiations have not been concluded. Local Law 87/ N.Y.C. Admin. Code § 6-145(b)(2). (*See also* Jackson Decl., at ¶¶ 20-21.)

These requirements that City contractors obtain union leaders' signatures on attestations that are now a condition of doing business with the City give union leaders effective veto power over City contracts. A union leader can unilaterally decide to withhold the union's signature on an attestation without having to give any reason and without any consequence to the union. A union leader can misuse this power in any number of ways to control, or even stop, work on a City contract. For example, a union leader could:

- withhold the union's signature on an attestation if the union leader simply does not like the contractor that was awarded a City service contract;
- withhold signature on an attestation sought by one City contractor in order to induce the City to shift work to another contractor that the union leader favors;
- threaten to withhold signature on an attestation regarding covered employees to force an employer to allow the union to begin unionizing parts of a human services provider's workforce that do not work on City contracts; and
- deploy the signature power to block human services providers from performing a type of work that the union leader believes should not be contracted to City contractors but should instead be handled by City employees.

In addition to misusing the Statute's "union signature" requirement, a union leader may trigger, or threaten to instigate, a City investigation of a contractor or subcontractor, by invoking the Statute's enforcement provisions, under which any "interested party" may submit a verified

complaint about a City contractor, which requires the City Comptroller to conduct an investigation. Local Law 87/ N.Y.C. Admin. Code § 6-145(e)(2) & (f)(1).

The Statute's requirement that an employer obtain a union-signed attestation may also place a City contractor in an impossible situation. For example:

- A union leader may never respond to a contractor's request for the union to enter into a "labor peace agreement," making it impossible for the City contractor to comply with the attestation requirement.

- A City contractor's covered employees may vote against joining the union, again making it impossible for the contractor to comply with the attestation requirement —with the result that the contractor may lose its City funding, and be forced to lay off the very employees that the Statute purportedly protects.

- A union leader may directly approach covered employees about unionization, without the City contractor's knowledge, and the employees may not inform their employer, causing a contractor unwittingly to violate the attestation requirement.

- Even if a City contractor's covered employees are represented by a union, they may be approached by another, competing union. Unless the employees vote to join the new union, it will be impossible for the contractor to attest that negotiations "have not yet concluded," since negotiations will never begin with that second competing union.

If a City contractor providing human services under a contract or subcontract with the City fails to submit an attestation signed by a union leader, it is in "material breach" of the contract, and the nonprofit can lose its City funding and contract. Local Law 87/ N.Y.C. Admin. Code § 6-145(e)(2). HSC members are, not surprisingly, alarmed. (*See* Jackson Decl., at ¶¶ 26 and 31-34.)

C. The City's Recent Attempts to Implement and Enforce Local Law 87

Local Law 87 became effective on November 16, 2021. It provides that the Mayor or his designee "*shall* promulgate implementing rules and regulations, as appropriate and consistent with this section[.]" Local Law 87/ N.Y.C. Admin. Code § 6-145(d)(2) (emphasis added). The Mayor has not, however, promulgated rules and regulations through the City Administrative

Procedure Act, or CAPA, as required. Instead, the City has demanded that covered contractors enter into covered contracts without knowing if or when any rules or regulations may be promulgated, or what they may provide, including rules and regulations that may apply to union agreements for covered employees. Local Law 87/ N.Y.C. Admin. Code § 6-145(a) (defining "labor peace agreement").

Local Law 87's requirements have been incorporated by reference into the City's most recent contract offers. The City has begun requiring service providers to submit signed certifications that they will comply with Local Law 87, and to submit attestations signed by union leaders stating that they have entered into a labor peace agreement or that negotiations are ongoing. (*See* Jackson Decl., at ¶ 31.) Many of HSC's members and other human services providers have objected, noting that the Law is unconstitutional and preempted by federal law. City contractors maintain, correctly, that any union organizing must take place in accordance with the NLRA, under the exclusive jurisdiction of the National Labor Relations Board ("NLRB"). This stalemate over City contracts leaves existing and potential City contractors in limbo about their future operations.

ARGUMENT

THE COURT SHOULD GRANT HSC PRELIMINARY INJUNCTIVE RELIEF

Pending a final adjudication of this matter, the Court should grant HSC preliminary relief enjoining the City from implementing Local Law 87. "[T]he purpose of a preliminary injunction is to preserve the status quo." *Tucker Anthony Realty Corp. v. Schlesinger*, 888 F.2d 969, 972 (2d Cir. 1989). In this case, that "status quo" is the City's contracting practices before its planned implementation and enforcement of Local Law 87 in anticipation of the City's new Fiscal Year, starting July 1, 2022. In the Second Circuit, a party seeking to enjoin enforcement of

a statute must demonstrate (1) that it will suffer irreparable injury, and (2) a likelihood that it will succeed on the merits of his claim. *Alleyne v. N.Y. State Educ. Dep't*, 516 F.3d 96, 101 (2d Cir. 2008); *accord Otoe-Missouria Tribe of Indians v. N.Y. State Dep't of Fin. Servs.*, 769 F.3d 105, 110 (2d Cir. 2014). Plaintiff need show only "a threat of irreparable harm, not that irreparable harm already [has] occurred." *Mullins v. City of New York*, 626 F.3d 47, 55 (2d Cir. 2010). And, when, as here, "an alleged deprivation of a constitutional right is involved, … no further showing of irreparable injury is necessary" for the Court to issue a preliminary injunction. *Mitchell v. Cuomo*, 748 F.2d 804, 806 (2d Cir. 1984). As we demonstrate, without a preliminary injunction, HSC and its members will suffer irreparable injury, and HSC has a likelihood of success on the merits. Preliminary relief will also further the public interest.

I. HSC Faces Imminent Irreparable Harm

Without the protection of a preliminary injunction, HSC and its members will be irreparably harmed. For example, without relief, an HSC member's charitable mission could effectively be undermined or blocked unless a union leader, in that leader's sole discretion, decides to cooperate with that HSC member. Even then it may be impossible for a human services provider to comply with Local Law 87, if, among examples set out above, more than one union seeks to unionize its members. A preliminary injunction until this case is decided on the merits is the only means of preventing these potentially devastating effects on the operations of HSC's members, while preserving a meaningful opportunity for them to compete for and service the needy under City human services contracts.

City contracts for human services are awarded after a competitive bidding process. As a result, money damages for the Law's effect of preventing a human service provider from bidding will not be readily ascertainable or, for that matter, available to HSC's members from the City.

HSC's members' potential exclusion from City human services contracts threatens irreparable harm by reducing their business and employment opportunities, nullifying their budgets, and reducing or eliminating potential profits. *See New York Pathological and X-Ray Laboratories, Inc., v. Immigration & Naturalization Serv.*, 523 F.2d 79, 81 (2d Cir. 1975) ("Irreparable harm can be found where there is a continuing wrong which cannot be adequately redressed by final relief on the merits. Such harm often resides where money damages cannot provide adequate compensation."); *Ainslie Corp. v. Middendorf*, 381 F. Supp. 305, 306-07 (D. Mass. 1974) (injunction granted to frustrated bidder for a government contract because monetary remedy would be inadequate).

In similar circumstances to those here, the court in *Glenwood Bridge, Inc. v. City of Minneapolis*, 940 F.2d 367 (8th Cir. 1991), found irreparable harm after Minneapolis entered into a project-specific labor stabilization agreement with an organization of trade unions, under which contractors on a city job were required to adhere to the stabilization agreement's specific protections against strikes and lock-outs. *Id*. at 368. After the plaintiff contractor alleged that the stabilization agreement violated the NLRA, the Eighth Circuit held that a preliminary injunction was necessary to prevent "the City from awarding a contract on which, in essence, [the plaintiff] was precluded from bidding," and to ensure that, if the plaintiff prevailed on the merits, it would be able to rebid on a contract without the stabilization agreement. *Id*. at 371-72.

Here, as in *Glenwood Bridge*, a "preliminary injunction both protects [HSC's members'] interest in participating in a legal bidding process and ensures that [a] contract awarded will be a legal one." *Id*. Only immediate injunctive relief will prevent the City from awarding a contract for a project on which HSC's contractor members may be precluded from bidding under the new Law. *See New York Pathological and X-Ray Laboratories, supra,* 523 F.2d at 81-82

(preliminary injunction granted where government agency's refusal to include plaintiff on a list of facilities qualified to administer required tests to aliens threatened serious financial loss).

Moreover, without a preliminary injunction, HSC members will be forced to give up their constitutional right to be free of the City's interference with their rights under the NLRA. The NLRA specifically confers a personal liberty interest in being free from unlawful local interference, *Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103, 112 (1989) ("*Golden State II*"), and infringement of this interest alone constitutes irreparable harm. *See, e.g., Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 381 (1992) (enforcement of preempted local laws may cause irreparable harm).

HSC is also injured by the City's efforts to implement the law without promulgating the rules required by the Law. *Cf. United States v. Mersky*, 361 U.S. 431, 437 (1960)(a statute regarding labeling of imports under Tariff Act was "not complete by itself" without regulations prescribing labeling requirements, since the "regulations [were] called for by the statute itself," and thus "neither the statute nor the regulations are complete without the other, and only together do they have any force").

Until the legality of Local Law 87 is resolved, HSC members should not have to decide either to submit to its certification and attestation requirements and thereby forego the rights granted them under the NLRA, or to suffer the substantial, punitive costs of not doing so and therefore forego a City contract that is currently slated to begin on July 1, 2022.

II. Plaintiff Will Likely Succeed on the Merits

Local Law 87 imposes requirements on City contractors, their employees, and unions that are all prohibited or preempted by federal labor law under the NLRA and the related Taft Hartley Act (sometimes jointly "federal labor law preemption"). Local Law 87 is therefore preempted by

the Supremacy Clause of the United States Constitution and the NLRA. It is also preempted because unions can use it to force concessions that violate the Taft Hartley Act. Finally, the Law violates HSC's and its members' rights to freedom of speech and freedom of association guaranteed by the First and Fourteenth Amendments to the United States Constitution.

It is a fundamental constitutional principle that Congress has the power to preempt state law. The U.S. Constitution's Supremacy Clause provides that federal law "shall be the supreme Law of the Land; . . . any Thing in the . . . Laws of any State to the Contrary notwithstanding." U.S. Const. art. VI, cl. 2. Therefore, when Congress intends explicitly or implicitly—as in the NLRA— that federal law shall "occupy the field" at issue, state law is preempted. *California v. ARC America Corp.*, 490 U.S. 93, 100 (1989).

Congress implicitly intended to occupy the field of labor relations when, in 1935, it enacted the NLRA, over which the NLRB has broad and almost exclusive jurisdiction—and thereby preempted state regulation in this area. Through the NLRA, Congress established a "comprehensive" and "complicated legislative scheme" under which "*the States as well as the federal courts must defer to the exclusive competence of the NLRB if the danger of state interference with national policy is to be averted*." *International Longshoremen's Ass'n, AFL-CIO v. Davis*, 476 U.S. 380, 381 (1986) (emphasis added); *see also id*. at 393 n.11 (Congress "created by statute a uniform body of laws governing labor relations and … vested in the [NLRB] the exclusive jurisdiction over administration of those laws"); *In Re Eckert Fire Protection, Inc.*, 332 NLRB 198, 209 (N.L.R.B. 2000) (the NLRA's policy is to define and balance the rights of employees, employers, and unions so as to "promote labor peace").

Federal labor law preemption issues have arisen so frequently that specific preemption doctrines have developed under the NLRA, two of the major doctrines being *Garmon* preemption and *Machinists* preemption.

Garmon preemption holds that the NLRA preempts state and local government efforts to regulate conduct that is either protected or prohibited by NLRA Sections 7 and 8, which must initially be determined by the NLRB, thereby precluding state jurisdiction. *San Diego Bldg. Trades Council, Millmen's Union, Local 2020 v. Garmon*, 359 U.S. 236, 245 (1959)("[C]ourts are not primary tribunals to adjudicate such issues. It is essential to the administration of the Act that these determinations be left in the first instance to the National Labor Relations Board. What is outside the scope of this Court's authority cannot remain within a State's power and state jurisdiction too must yield to the exclusive primary competence of the Board.") NLRA Section 7 gives employees the right to support or oppose union organizing efforts, including the right to strike. 29 U.S.C. § 157. NLRA sections 8(a)(1) and 8(b)(1) make it an unfair labor practice for either employers or unions to "interfere with, restrain, or coerce employees" in the exercise of these rights. 29 U.S.C. § 158(a)(1) & (b)(1). Section 8(a) also gives employers the right to meet and confer with employees during their working time about the pros and cons of unionization. *See* 29 U.S.C. § 158(a)(2). Section 8(c), also known as the free speech proviso, protects the First Amendment right of employers to campaign for non-unionization of employees, without being accused of illegally coercing employees, so long as this campaigning contains no threat of reprisal or promise of benefit. 29 U.S.C. § 158(c).

In contrast, *Machinists* preemption precludes state and local government efforts to regulate or interfere with labor relations matters that Congress intended to leave unregulated by the NLRA and related statutes and intended instead to be "controlled by the free play of

economic forces." *Lodge 76, Intern. Ass'n of Machinists and Aerospace Workers, AFL-CIO v. Wisconsin Employment Relations Comm'n*, 427 U.S. 132, 140 (1976).

A state or municipality cannot circumvent either the *Garmon* or *Machinists* preemption doctrine under the guise of using its spending power as a pretext for regulating labor relations. *Wisconsin Dept. of Industry, Labor and Human Relations v. Gould, Inc.*, 475 U.S. 282 (1986).

We show that Local Law 87 is preempted by the Taft Hartley Act, preempted by the NLRA generally, and preempted specifically under the *Machinists* and *Garmon* doctrines.

A. Local Law 87 is Preempted by the Taft Hartley Act

Local Law 87 is preempted because there are, at least, serious questions about whether a so-called "labor peace" agreement is unlawful under the Taft Hartley Act. Section 302 of Taft Hartley, codified at 29 U.S.C. § 186(a)(2), makes it a crime for an employer to "pay, lend, or deliver, any money or other thing of value" to a union that seeks to organize the employer's workforce. A "thing of value" is not necessarily limited to something with a monetary value. *Mulhall v. Unite Here Loc. 355*, 667 F.3d 1211, 1215 (11th Cir. 2012). The Eleventh Circuit held that it can be a crime for an employer to enter into a so-called "labor peace" or "neutrality" agreement, because Section 302 is designed, *inter alia*, to "prevent union officials from extorting tribute from employers." *Id.* at 1214 (citation omitted).

In *Mulhall*, the Eleventh Circuit held that a "neutrality" agreement between an employer and a union—under which the employer would remain neutral regarding unionization— could be deemed a violation of Section 302 when it required the employer to provide assistance to the union's organizing efforts. This organizing assistance might be a "thing of value" that, if demanded by the union, could constitute an "illegal payment" in a scheme to "extort a benefit from an employer." *Id.* at 1215 ("innocuous ground rules [under a neutrality agreement] can

become illegal payments if used as valuable consideration in a scheme to … extort a benefit from an employer"). The Supreme Court initially granted certiorari to review the *Mulhall* decision, but reversed its grant of certiorari, thereby leaving the *Mulhall* decision in place. *See Unite Here Loc. 355 v. Mulhall*, 571 U.S. 83 (2013). While some courts have held that neutrality agreements do not necessarily violate Section 302 of the Taft Hartley Act, *see Adcock v. Freightliner LLC*, 550 F.3d 369, 376 (4th Cir. 2008); *Hotel Emps. & Rest. Emps. Union, Loc. 57 v. Sage Hosp. Res., LLC*, 390 F.3d 206 (3d Cir. 2004), the Second Circuit has not ruled on this question, and the current Supreme Court will almost surely adhere to its prior decision that *Mulhall* should remain governing law. At a minimum, this case law illustrates how Local Law 87 is preempted.

While the Court does not have to decide whether Local Law 87 actually violates the Taft Hartley Act to find preemption, it actually does violate federal law under *Mulhall*'s reasoning because it requires nonprofits to give "things of value" ("labor peace" agreements) to unions. Local Law 87 goes further, giving union leaders unilateral power to extract any number of concessions from a human services provider to secure a "labor peace agreement" or the attestation required by the Law. (*See* Background, B.2, *supra*.) Because Local Law 87 gives unions unfettered power to extract from employers concessions that violate the Taft Hartley Act, or at least raises issues under that law, it is preempted. *Cf. Williams v. Marinelli*, 987 F.3d 188, 198 (2d Cir. 2021) (state law preempted when it "stands as an obstacle to the accomplishment and execution" of federal law); *Medford v. Eon Labs, Inc.*, 2021 WL 5204035, at *3 (D.N.J. Nov. 9, 2021) (state law "impliedly preempted insofar as it would obligate" party to violate its duty under federal law).

B. Local Law 87 is Preempted by the NLRA

1. Local Law 87 Improperly Seeks to Enforce the NLRA

Local Law 87's requirement that bidders on City service contracts sign a certification identifying any instances within the preceding five years where that bidder has been found to be in violation of federal "laws regulating labor relations"—i.e., the NLRA— illegally seeks to enforce the NLRA. Indeed, the Law's requirement that such data be provided can have no purpose other than to serve as grounds to deny or terminate a City service contract. But the Supreme Court in *Wisconsin Dept. of Industry, Labor and Human Relations v. Gould, Inc.*, 475 U.S. 282 (1986), expressly held that the NLRA prohibited a "[State] statute debarring certain repeat violators of the [NLRA] from doing business with the State." *Id*. at. 283.

Local Law 87 requires City service contractors to submit an initial certification to the City identifying any NLRA violations in the prior five years, and to update that certification annually. Local Law 87/N.Y.C. Admin. Code §§ 6-145(c)(1)(c) & 6-145(c)(2). The "information set forth in the certifications" will be "integrated into and contained in" a "database" maintained by the City. *Id.*, § 6-145(d)(3). As part of its recent implementation of Local Law 87, the City is indeed requiring human service contractors who bid on or receive a City contract to sign such a certification. (*See* Jackson Decl., ¶ 31 and Exhibit B.)

In *Gould, Inc*., a Wisconsin state statute prohibited state procurement officers from entering into contracts with entities that violated the NLRA three times in a five-year period. *Id*. at 283-84. Wisconsin argued that this scheme "escapes pre-emption because it is an exercise of the State's spending power rather than its regulatory power." *Id*. at 287. The Court disagreed,

stating "that seems to us a distinction without a difference … because on its face the debarment statute serves plainly as a means of enforcing the NLRA," which is outside a state's authority. *Id*. at 286-87.

In this case, the City is similarly attempting to enforce the NLRA, which is beyond the City's authority, as stated in *Gould, Inc*. Indeed, there is no plausible explanation for the City to compile information about NLRA violations by City service contractors, other than that the City intends to use those violations as a basis for denying contract awards. While Congress could have decided to debar NLRA violators from state or local government contracting, it chose not to enforce the NLRA in that manner. The City's approach which, as explained in *Gould, Inc.,* is "tantamount to regulation," *id*. at 289, is unlawful.

2. Local Law 87 Has an Illegal Spill-Over Effect on Non-City Contracts

Local Law 87 is also preempted by the NLRA because it will have impermissible spill-over effects on non-City contracts. HSC's members include employers that provide human services through City contracts, *and* services funded by the federal government, the state government, and/or private organizations. These organizations also employ workers who work on both City projects and on non-City projects. In some cases, moreover, these workers provide human services under an entity that is only partially funded by the City, and partially funded by the federal government, the state government, and/or private donors. (*See* Jackson Decl., ¶¶ 3 and 28-29.) As a hypothetical example, a day-care center might serve 15 children, 5 paying privately and 10 funded by the City, and yet the center would be fully subject to Local Law 87's union leader attestation requirements.

Since the definition of "covered employee" reaches employees of a City service contractor without regard to whether the employee's salary is fully paid for by the City, the

Law's regulatory effects spill over into work that is not funded by the City. Even if a City contractor could separate its workers who provide services under a City contract from workers who provide non-City services, Local Law 87's effects would still improperly spill over into these non-City services by giving a union leader the power to withhold the union's signature on an attestation as leverage to force an employer to allow the union to begin organizing those parts of the employer's workforce that are not working on City projects.

These spill-over effects demonstrate that Local Law 87 impermissibly regulates labor relations unquestionably preempted by the NLRA. *Metro. Milwaukee Ass'n of Commerce v. Milwaukee County*, 431 F.3d 277 (7th Cir. 2005), is directly on point. There, the court held that the NLRA preempted a county ordinance mandating that human service providers contracting with the county enter into labor-peace agreements with unions that contained specified provisions. *Id.* at 278. Although the county claimed that it was simply exercising its spending power to ensure uninterrupted services on county projects, the court relied on *Gould, Inc*. to hold that the ordinance's spill-over effects improperly made all county contractors "subject to the County's philosophy of labor relations," even when they were performing work on non-county projects. *Id*. at 279. *Metro. Milwaukee* applies equally here because, as in this case, "it would hardly be feasible for the contractors to segregate their workforces, with one part governed by labor-peace agreements and the other not even though the two groups of workers would be doing identical work, just for different customers." *Id*.

3. <u>Local Law 87 Improperly Empowers Unions to Control City Contracting</u>

Local Law 87's requirement that City contractors submit attestations signed by a union leader—which applies to every City service contract, Local Law 87/N.Y.C. Admin. Code § 6-145(b)(1) & (b)(2)—also renders the Law invalid, under both the *Garmon* and *Machinists*

preemption doctrines. This attestation requirement gives union leaders effective veto power over City contracts. A union leader can unilaterally decide to withhold the union's signature on an attestation without having to give any reason and without any consequence to the union. A union leader may also withhold signature on an attestation if the union prefers that a different human services provider be awarded the contract at issue, or if the union prefers that the services at issue not be performed by a private service provider at all. In addition, a union leader may instigate a City Comptroller investigation of a City contractor by invoking the Statute's enforcement provisions. (*See* Background, B.2, *supra*.) As a result, under Local Law 87, union leaders have the power to unilaterally prevent human services providers from obtaining City contracts, and place City contractors in breach of their contracts, for any number of reasons that either benefit a union in violation of the NLRA; or that essentially allow a union, not just the City, to regulate in an area where Congress intended there be no regulation.

The City cannot justify giving union leaders this overarching control of City service contracts by arguing that it is a proper exercise of the City's spending power as a market participant. As *Gould, Inc*. confirmed, even when a local authority claims to be acting as a market participant (and the City cannot do so here), its regulations may be preempted by *Garmon*, which recognizes that "[t]he NLRA … was designed in large part to 'entrus[t] administration of the labor policy for the Nation to a centralized administrative agency,'" 475 U.S. at 289-90 (citation omitted); or by *Machinists*, which recognizes that "[t]he NLRA … has long been understood to protect a range of conduct against state … interference," *id*. at 290. No business or governmental entity honestly interested in continuity of services would provide union leaders with the kind of power to disrupt contracted services that Local Law 87 bestows, disproving the assertion that the Law is in fact intended to ensure "the uninterrupted delivery of

services" to the City. Local Law 87/ N.Y.C. Admin. Code § 6-145 (definition of "labor peace agreement"). The Law's empowerment of unions instead is an attempt by the City to use its spending power as a pretext to regulate labor relations in a way more favorable to unions than the NLRA and/or to regulate labor relations in a way that the Congress intended to be free from any regulation.

Local Law 87 is preempted for the additional reason that it gives unions tools to disrupt City contracts and services not envisaged by the NLRA or the Taft Hartley Act. While "federal law intended to leave the employer and the union free to use their economic weapons against one another," *Golden State Transit Corp. v. City of Los Angeles*, 475 U.S. 608, 618 (1986) ("*Golden State I*"), Local Law 87 interferes with this free bargaining power by vastly increasing, via regulation, a union's ability to disrupt labor contracts at the expense of an employer's freedom to bargain. In *Golden State I*, the Court again confirmed that the "*Garmon* rule [was] intended to preclude state interference with the National Labor Relations Board's interpretation and active enforcement of the 'integrated scheme of regulation' established by the NLRA." *Id*. at 613. Local Law 87 is just such an impermissible local interference with the NLRB's authority.

Conversely, Local Law 87 also falls under *Machinists* preemption because "a local government … lacks the authority to 'introduce some standard of [what it believes to be] properly "balanced" bargaining power' … or to define 'what economic sanctions might be permitted negotiating parties in an "ideal" or "balanced" state of collective bargaining.'" *Id*. at 619 (citations omitted). Local Law 87 improperly attempts to introduce or define just such standards of what the City believes to be balanced bargaining power or economic sanctions that parties may use in collective bargaining, when the NLRA intends to leave those economic weapons free from any regulation.

4. Local Law 87 Improperly Regulates Employers' Speech

Local Law 87 is an improper content-based regulation that restricts human services providers' right to argue against unionization by punishing them if they do not secure labor agreements requiring them "to refrain from actions intended to or having the effect of interrupting" City services. Local Law 87/N.Y.C. Admin. Code § 6-145(a) (subpart 1 of definition of "labor peace agreement"). The Law's attestation requirements similarly handicap a human services provider from advocating against unionization by requiring a union leader to attest that the provider has either entered into a labor peace agreement or that negotiations for such an agreement are ongoing. (*See* Background, B.2, *supra*.) Any violation can result in an employer failing to be awarded a contract or losing existing and future City contracts. *Id.*, at §§ 6-145(c)(1)(b); (e); (f)(1)(c)-(d). An employer cannot comply with either the labor agreement or attestation requirements without *necessarily* giving up its right to advocate to its workers against unionization that is secured by Sections 8(a) and 8(c) of the NLRA. *See* 29 U.S.C. §§ 158(a)(2) & (c).

Local Law 87 is a therefore an improper content-based speech regulation, designed to suppress anti-union speech by human services providers in violation of the NLRA and the First and Fourteenth Amendments. The Law's drafters, which included the City's largest public employee union, have made clear that this is the Law's purpose and intended effect. The union as well as the New York City Speaker who introduced the Law have both emphasized that the Law is designed to make it easier to unionize human service employees by removing any "interference from . . . employers" against unionization. *See* District Council 37 Press Release, dated August 18, 2021, at https://www.dc37.net/news/newsreleases/2021/nr8_18.

At the same time, Local Law 87 is designed to facilitate dissemination of pro-union messaging to City service contract workers. New York City council members who voted for the passage of Local Law 87 stated that the Law was designed to "make[] it easier . . . to unionize," and to ensure "an unimpeded path to unionization." *Id.* The union involved in drafting the Law stated that it "represents a sea change in how labor unions can proceed in organizing and developing collective bargaining agreements with private sector and non-profit organizations under contract with the City." *Id.*

The City may not, however, promote pro-union views while suppressing a human services provider's right to express its own anti-union views. As the Supreme Court held in *Chamber of Com. of U.S. v. Brown*, 554 U.S. 60, 71 (2008), state or local laws that "impose[] a targeted negative restriction on employer speech about unionization," are preempted by Section 8(c) of the NLRA, which was designed to protect employer's free speech rights under the First Amendment. *See also Healthcare Ass'n of New York State v. Cuomo*, 2011 WL 7983371, at *7 (N.D.N.Y. Sept. 7, 2011) (state law that prohibited employers doing business with the state from expressing anti-union views was preempted by the NLRA under the *Machinist* preemption doctrine, because the state law "imposes a targeted negative restriction on employer speech about unionization," and thereby "regulates in a zone protected and reserved for market freedom").

5. Local Law 87 Improperly Regulates Employers' and Unions' Bargaining Rights

Local Law 87 requires private employers subject to the Law to agree to a "labor peace agreement," designed to strip those employers of their rights under the NLRA to resist unionization efforts, and thereby, again, violates the *Garmon* and *Machinists* preemption doctrines. Local Law 87's requirement that a union and unionized employees agree in the "labor peace agreement" to lay down the economic weapons they have under the NLRA, e.g., to strike,

boycott, or picket, also violates these preemption doctrines. *See* Local Law 87/N.Y.C. Admin. Code § 6-145(a) (subpart 1 of definition of "Labor Peace Agreement").

Congress intended to preempt state and local efforts to regulate or interfere with the tactics that employers, employees and unions use to exert economic pressure on each other. *Golden State I* illustrated this point when the Supreme Court held that a city council could not condition the extension of a taxi franchise on the franchisee's resolution of a strike by a particular date. Under the *Machinists* doctrine, the NLRA "leaves the bargaining process largely to the parties" and the "parties' resort to economic pressure was a legitimate part of their collective-bargaining process." 475 U.S. at 615-16. The Court observed that "the bargaining process was thwarted when the city in effect imposed a positive durational limit on the exercise of economic self-help." *Id.* at 615. *Golden State* therefore reaffirmed the basic *Machinists* principle that local governments lack the authority to promulgate regulations that impose their own beliefs about a proper balance of collective bargaining power or that frustrate Congress' decision to leave open the use of economic weapons in collective bargaining. *Id.* at 619. This area is to remain free from all regulations, whether state or federal. *See Machinists*, 427 U.S. at 153 (the availability of economic weapons that federal law permits parties to use cannot "depend upon the forum in which the (opponent) presses its claims").

III. The Public Interest Weighs in Favor of a Preliminary Injunction

As discussed, Local Law 87's requirement that contractors obtain signatures from union leaders on attestations that are now a condition of doing business with the City gives union leaders effective veto power over City contracts. Under the Law, a union leader can unilaterally decide to withhold the union's signature on an attestation without having to give any reason and without any consequence to the union, and can misuse this power in any number of ways to

control which human services provider is awarded a City contract, whether a City contract is renewed, and even to stop work under an existing City contract. (*See* Background, B.2, *supra*.)

The City has not only ceded to union leaders power over the award and renewal of human services contracts, but has also given unions power over whether human service providers breach the Law, *and* allows unions to report a purported violation of the Law, which requires an investigation by the City Comptroller. Local Law 87 thereby places New York City's neediest communities at risk by allowing union leaders to decide which human service providers will receive the government funds they need to help those in crisis, and gives these union leaders the power to cut off critical services.

These factors all weigh in favor of the Court granting a preliminary injunction. *Cf. New York v. United States Dep't of Homeland Sec.*, 475 F. Supp. 3d 208, 229 (S.D.N.Y. 2020) ("harm to the public" weighed in favor of preliminary injunction halting implementation of INS rule that could potentially harm health of immigrants). On the other hand, the City will not be harmed by a preliminary injunction because its ability to contract with human services providers for human services, which long preceded Local Law 87, will be unaffected.

CONCLUSION

The Court should grant HSC's motion for preliminary injunctive relief.

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KOSTELANETZ & FINK, LLP

By: _____

Claude M. Millman
Caroline Rule
Usman Mohammad
Michelle Lee (not admitted)
Seven World Trade Center, 34th Floor
New York, NY 10007
212-808-8100
cmillman@kflaw.com

Attorneys for Plaintiff Human Services Council of New York