UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

HUMAN SERVICES COUNCIL OF NEW YORK

Plaintiff,

versus

The CITY OF NEW YORK,

Defendant.

Index No. 21-cv-11149-PGG

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

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Plaintiff HSC respectfully submits this reply memorandum in further support of its motion for a preliminary injunction against defendant City. The motion should be granted.

## ARGUMENT

## THE COURT SHOULD GRANT PRELIMINARY RELIEF

### A. HSC Will Be Irreparably Harmed Without Preliminary Relief

HSC showed in its moving papers that Local Law 87's attestation and investigation mandates will distract HSC from its mission, place HSC members at the mercy of union leaders who do not represent their workers, and muzzle nonprofits from exercising NLRA rights to voice views about particular organizing campaigns. Money cannot compensate for such injuries.[1]

The City knows enough about its (insufficient and routinely delayed) funding of human services providers to see how Local Law 87 will endanger the nonprofits (and the City's safety net). Instead of attempting to dispute the truth, the City demands specifics, and claims that all problems will be solved by the nonbinding March 25, 2022 "FAQ" document that the City manufactured to attach to its opposition papers. These factual attacks are dispatched in the accompanying Reply Declaration of Michelle Jackson ("Jackson Reply Decl.").

The irreparable harm faced by HSC is not mitigated by the City's litigation-driven "FAQs" (Opp. at 3-4), which are dated the same day that the City's opposition papers were due. Whatever the so-called "FAQs" may be, we know that they cannot be of "general applicability," they cannot "implement[] or appl[y] law or policy," and they cannot be setting forth "standards

[1] For this reason, among others, the City's cases (Opp. at 6-7) are inapposite. *See AFA Dispensing Group B.V. v. Anheuser-Busch, Inc.*, 740 F. Supp. 2d 465 (S.D.N.Y. 2010) (plaintiff's written demand for financial compensation "belie[d]" that money damages would not suffice); *Fox Ins. Co. v. Envision Pharmaceutical Holdings, Inc.*, 2009 WL 790312, at *8 (E.D.N.Y. Mar. 23, 2009) (challenged contract specified "amount of monetary damages"); *Ass'n of Legal Aid Attorneys, Local 2325 v. City of New York*, 1997 WL 620831, at *6 (S.D.N.Y. Oct. 8, 1997) (plaintiffs could "seek reinstatement and money damages").

for the procurement of . . . services" (City Charter § 1041(5)), because the City can only do that by promulgating a "rule" under the City Charter's Administrative Procedure Act. *See* City Charter § 1043. The City does not claim that the FAQs are binding on it, and the FAQs do not eliminate the problems with the Law that HSC identified.

Contrary to the City's assertion that the harm faced by HSC is "remote or speculative" (Opp. at 6-9), it ***is*** certain that, without relief, the City will implement Local Law 87, starting with the human services contracts that will begin on July 1, 2022 (the start of the City's Fiscal Year). *See Donohue v. Mangano*, 886 F. Supp. 2d 126, 149-50 (E.D.N.Y. 2012) (referencing "certain and imminent harm"); *Wisdom Import Sales Co. v. Labatt Brewing Co*., 339 F.3d 101, 113-14 (2d Cir. 2003).

The City mistakenly asserts that HSC cannot secure preliminary relief without proof of ***current*** harm. Yet, imminent harm, by its very definition, does not mean past or current harm. *Donohue*, 886 F. Supp. 2d at 150 (citing *Reuters Ltd. v. United Press Int'l. Inc*., 903 F.2d 904, 907 (2d Cir. 1990)) (only requiring showing of probable harm).

The City simultaneously complains that HSC delayed in seeking relief. There was no delay, but even if there were, it would be only "'one of several factors to consider' in the preliminary injunction analysis." *Abbott Laboratories v. Adelphia Supply USA*, 2015 WL 10906060 (S.D.N.Y. Mar. 21, 2019). Delay is only relevant if it "suggests that the remedy is not really needed." *Mintzer v. Keegan*, 1997 WL 34842191 (E.D.N.Y. Sept. 22, 1997); see *Citybank, N.A. v. Citytrust*, 756 F.2d 273, 276 (2d Cir. 1985). Here, HSC has proven (as confirmed by the City's February "FAQs") that the Law's primary effect will start with the July 1, 2022 contracts. The Court can timely redress this "looming irreparable harm," *Broecker v. New York City Dep't of Educ.*, 2021 WL 5514656, at *9 (E.D.N.Y. Nov. 24, 2021).

### B. HSC Is Likely to Succeed On the Merits

#### 1. Local Law 87 is Preempted By the Taft-Hartley Act

The City's defense to HSC's Taft-Hartley (or LMRA) preemption claim is based on cases presenting precisely the opposite situation to this one (City Opp. at 10-13). The City's cases merely address whether there is a private right of action to ***affirmatively enforce*** the LMRA. HSC, by contrast, is not seeking to enforce the LMRA. HSC contends that Local Law 87 places its members at risk of ***violating*** Taft-Hartley (a problem compounded by the City's FAQs), such that the Law is preempted. *Ziglar v. Abassi*, 137 S. Ct. 1843 (2017) (City Opp. at 11) is not only unhelpful to the City (it does not address LMRA preemption and focuses, instead, on when courts may imply a *Bivens* remedy), but actually supports HSC's claim for injunctive relief. The *Ziglar* Court confirmed that injunctive relief is appropriate when a government policy (here a law, not merely policy) applies to numerous individuals. *Id*., at 1862, 1865. Local Law 87 will undoubtedly affect numerous human service providers and their employees.

#### 2. Local Law 87 is Preempted by the NLRA

Contrary to the City's revisionist history, it did not enact Local Law 87 to further its "market participation." Far from promoting its own business interests, the City's then-officials explicitly enacted Local Law 87 to make New York a "union town" (to curry favor with union leaders who represent municipal government workers). To put the situation in the most charitable light, the Law was passed to regulate human service employment conditions.

The "market participant" cases are nothing like this one. Local Law 87 was not enacted in response to a history of labor-connected work stoppages. (Jackson Decl. ¶¶ 11-14.) It was the brainchild of DC37 (*id*.), the union that bargains with the City over the rights of municipal workers. DC37 was heavily involved in drafting the Law (*id.*). The politicians that introduced the Law for DC37, voted for it, and signed it into law admitted that the Law was enacted to

unionize private contractors working with the City. (Mov. Br. at 21-22; Jackson Decl. ¶ 14.) No court has upheld a so-called "labor peace" law under such circumstances.

The City tries to sidestep its own admissions by claiming that the Court should simply accept at face value that Local Law 87 has a "proprietary" purpose of ensuring uninterrupted services. (Opp. at 15, 19 n.12.) In evaluating NLRA preemption, however, courts do not turn a blind eye to the plain facts, particularly when evidenced by the government's admissions, concerning the purpose of the law at issue. *See Wisconsin Dep't of Indus., Lab. & Hum. Rels. v. Gould Inc.*, 475 U.S. 282, 287 (1986) (rejecting "market participant" defense where state admitted that "the point of the statute is to deter labor law violations").[2]

Even if the Court had to ignore the facts, Local Law 87 would still be preempted. The Law's text defeats any claim that it has a proprietary rather than a regulatory purpose. Local Law 87 does not merely require City human service contractors to enter into "service continuity" agreements with union organizers. It imposes additional requirements that have nothing to do with ensuring uninterrupted services to the City, and everything to do with empowering union leaders – such as those with whom City politicians bargain, and from whom they solicit political support. The Law's attestation requirement gives union leaders the power to disrupt services to the City, something which no private market participant interested in uninterrupted services would permit. (Mov. Br. at 5-7.) The Law also requires Comptroller investigations and the creation of a database of NLRA violations, for the purpose of making contract award decisions. (*Id.* at 16.) These additional requirements evidence regulatory rather than proprietary intent. *See*

[2] *See also Chamber of Com. of U.S. v. Brown*, 554 U.S. 60, 63 (2008) (rejecting "market participant" defense where court discerned that actual purpose of statute was to "promote unionization"); *Van–Go Transp. Co., Inc. v. New York City Bd. of Educ.*, 53 F. Supp. 2d 278, 289 (E.D.N.Y.1999) (rejecting "market participant" defense, finding that there was "powerful evidence" that the City was acting with a regulatory motive to favor unionization).

*Gould, supra,* 475 U.S. at 282 (state acted as regulator not market participant when it passed law requiring state agencies to compile and use information regarding NLRA violations); *see also Bldg. & Const. Trades Council of Metro. Dist. v. Associated Builders & Contractors of Massachusetts/Rhode Island, Inc.*, 507 U.S. 218, 232 (1993) ("*Boston Harbor*") (for "market participant" defense to apply, government requirements must be narrowly "tailored" to alleged proprietary need).[3]

The City never bothers to explain what these additional requirements have to do with the City's purported proprietary interest of ensuring uninterrupted services. Instead, the City asks the Court to consider responses to imagined questions ("FAQs"), which the City issued on the very date that its opposing papers were due. While the City claims that the FAQs minimize the harms caused by the Law's pro-union-leader requirements, the FAQs cannot save Local Law 87, as they do not change the fact that the Law imposed these additional requirements in the first place. If anything, the FAQs are a recognition by the City that Local Law 87 went too far and is not narrowly tailored to solely ensuring the uninterrupted delivery of services. The FAQs also do not have the force of law (as they were not promulgated as City "Rules," and are not even included in the City's contracts) and the City never suggests that it is bound by them. Finally, many of the FAQs make matters worse, as they further the City's effort to promote unionization of private contractors. While the Law does not say that nonprofit human service providers have to provide union leaders with "access" to the employer's workplace and confidential "employee contact

[3] Although the City claims that the human services nonprofits have to report violations of labor relations laws anyway because (without any statutory support), the City asks them to disclose violations of law in the City's "PASSPort" system (Opp. at 23-24), that is irrelevant to the preemption analysis. Local Law 87 expressly requires the City to create a database of NLRA violations for consideration in connection with human service procurement decisions. Since that is unlawful, the Law should be struck down as preempted.

information," or to support union leaders "alternate procedures related to recognizing the labor organization for bargaining purposes," FAQ B.3 indicates that any nonprofit that fails to accede to a union leader's demands for such benefits will be found in breach of their contracts and subjected to investigation. The provisions in FAQ B.3 have nothing to do with ensuring uninterrupted City services; they are union leader tools for promoting unionization. The FAQs give such union-leader demands the City's stamp of approval, and if a nonprofit provider resists those demands and thus cannot obtain an attestation signed by the union leader (who may not even represent any of the provider's employees), the provider can expect to be found in default, placed under investigation, and debarred.[4]

There are several other features of Local Law 87 that establish that the City enacted the Law to further a "regulatory" rather than "proprietary" purpose.

First, Local Law 87 announces a blanket labor relations policy preventing a broad category of human service providers from exercising their rights under the NLRA. The Law is not limited to any particular location as it applies citywide, is not limited to any specific project, is not limited temporally, and is not predicated on any need to redress a history of service disruptions. The use of broad laws or categorical rules like Local Law 87 is characteristic of "regulatory," not "proprietary" conduct. *Brown*, 554 U.S. at 70–71 (state was acting as regulator rather than a market participant when it enacted law that was neither "specifically tailored to one particular job" nor a "legitimate response to state procurement constraints or to local economic

[4] The City attempts to distinguish *Metro. Milwaukee Ass'n of Commerce v. Milwaukee County*, 431 F.3d 277 (7th Cir. 2005), by claiming that the law at issue in that case imposed additional requirements beyond just entering into a "labor peace" agreement. (City Opp. at 21 n.14.) The City conveniently ignores the additional requirements imposed by Local Law 87, *i.e.*, the attestation requirement and the NLRA violations database. The City's attempt to distinguish *Metro. Milwaukee* is also undermined by the additional requirements approved by FAQ B.3.

needs"); *Chamber of Com. of U.S. v. Reich*, 74 F.3d 1322, 1337 (D.C. Cir. 1996) (government acts as regulator not market participant when it passes a "general law" requiring entire category of contractors doing business with state to enter into agreements with unions).

Second, Local Law 87's use of severe penalties – including contact termination, debarment, and investigations (Mov. Br. at 7) – is characteristic of regulatory, not proprietary conduct, as such penalties do more than simply protect the City's interest in contract performance (and, indeed, undermine service continuity). *Gould,* 475 U.S. at 289 (rejecting market participant defense because "debarment scheme is tantamount to regulation," and is not conduct engaged in by "private purchaser of services").[5]

Third, the City concedes that the Law promotes unionization, claiming that if a nonprofit wishes to resist unionization, its recourse is to refrain from contracting with the City. (Opp. at 16, 18.) The fact that the City is using the Law to force unionization means that Local Law 87 is not just protecting a local interest in contract performance. The Law impermissibly promotes the City's labor relations preferences in violation of the NLRA. *Brown*, 554 U.S. at 63, 73 (state or local law or policy designed to promote unionization preempted by NLRA; statute impermissibly predicated state funds on refraining from anti-union speech and chilled NLRA-protected debate); *Metro. Milwaukee*, 431 F.3d 277; *Van–Go*, 53 F. Supp. 2d at 289; *supra* n.2.

The City relies heavily on two cases that are fundamentally different from this one, *Building & Const. Trades Council v. Associated Builders and Contractors*, 507 U.S. 218 (1993)

[5] *See also CF & I Steel v. Bay Area Rapid Transit District*, 2000 WL 1375277, *7-*8 (N.D. Cal. 2000) (rejecting market participant defense to NLRA preemption; where "remedies are punitive rather than remedial" government is not exercising its "spending power" but is instead exercising "regulatory power"); *cf. Cardinal Towing & Auto Repair, Inc. v. City of Bedford*, 180 F.3d 686, 692 (5th Cir. 1999) ("attempts by government entities to punish labor . . . practices they disfavor by withholding contract work have been found preempted by the NLRA").

("*Boston Harbor*"), and *Bldg. Indus. Elec. Contractors Ass'n v. City of New York*, 678 F.3d 184 (2d Cir. 2012) ("*BIECA*"). Both held that the NLRA did not preempt construction project labor agreements ("PLAs"), which a contractor will sometimes enter into with a union for a ***specific construction project*** before hiring workers. Those cases are inapposite because NLRA Sections 8(e) and 8(f) expressly carve out the construction industry from NLRA requirements, allowing a local government to require a PLA for a specific government construction project. *Boston Harbor*, 507 U.S. at 230–31; *BIECA*, 678 F.3d at 188. Local Law 87 has nothing whatever to do with PLAs or the construction industry. Moreover, its purpose is "not the efficient procurement of goods and services, but the furtherance of a labor policy," so it is preempted by the NLRA. *Boston Harbor*, 507 U.S. at 232.

The City also repeatedly relies on *Legal Aid Society v. City of New York*, 114 F. Supp. 2d. 204 (S.D.N.Y. 2000), which did not involve a statute, let alone one like the Law. *Legal Aid* addressed a single City contract with a single entity, and found it "troubling" that the City's actions "may have had the effect of altering the terms of the [single] collective bargaining agreement in a fashion unrelated to the asserted proprietary purposes of cost containment or strengthening the City's bargaining position," *id*. at 236, but ultimately decided the matter on other grounds. Local Law 87 is far more pernicious than the procurement at issue in *Legal Aid.* Local Law 87 allows union leaders to unilaterally dictate – through their power over whether to sign attestations and insist upon Comptroller investigations – the nonprofits' labor relations and contractual relations with the City. The Law was not enacted to address "cost containment," the concern that motivated the City in *Legal Aid*. Moreover, while *Legal Aid* held that "the imminent threat of disruption" of services to the City was indicative of a "proprietary" motive, *id*. at 237, here, the City does not dispute the complete absence of any such history or threat.

*Legal Aid* found "no evidence that the City" had sought to impose a "general policy" with respect to "all entities with whom the City contracts for the provision of legal services," which *Legal Aid* said would "indicate the City's 'regulatory purpose.'" *Id*. at 238. By contrast, Local Law 87 imposes requirements on ***all*** human services providers with whom the City contracts, demonstrating the Law's "regulatory purpose."

The City also mistakenly relies on *Healthcare Ass'n of New York State, Inc. v. Pataki*, 471 F.3d 87 (2d Cir. 2006), which mentioned two indicators of government market participation. The first indicator, *i.e.,* the extent to which the governmental action is like "the typical behavior of private parties in similar circumstances," *id*. at 109, supports HSC's claim because private parties do not typically – and likely never – willingly invite unions to exercise power over who they contract with and whether those contracts will continue. Yet, the City did just that in enacting Local Law 87. The Court's other indicator (whether a law has a "narrow scope," *id*.) also favors HSC since Local Law 87 regulates hundreds of nonprofits, thousands of contracts, and billions of dollars, with immense "spillover" effects on federal, state, and private contracts. *See Cardinal Towing & Auto Repair, Inc. v. City of Bedford*, 180 F.3d 686, 693 (5th Cir. 1999) (also cited by the City) (considering "whether [the challenged governmental action] governs the parties' behavior on [a] specific project or projects in a contract, rather than unrelated matters to which the state might not even be a party"). Local Law 87 does not have a "narrow scope" because the Law is not limited to a single City contract for a specific project, and the City would never be a party to the labor agreements that the Law mandates. Together, the two indicators "seek to isolate a class of government interactions with the market that are so narrowly focused and so in keeping with the ordinary behavior of private parties that a regulatory impulse can be safely ruled out." *Id*. That is not the case with respect to Local Law 87.

The City also erroneously relies on *Airline Services Providers Ass'n v. Los Angeles World Airports*, 873 F.3d 1074 (9th Cir. 2017), which involved a single airport managed as a "commercial establishment." *Id*. at 1081. The court based its conclusion on the view that preemption only applies to state or local regulation. *Id*. at 1079. HSC is challenging a local regulation, *i.e.*, a City statute, and Local Law 87 does not concern a "commercial establishment."

This Court held in *George v. Richter*, 2014 WL 1666448 (S.D.N.Y. April 25, 2014), that, in issuing a new Request for Proposals for child care, the Bloomberg Administration was not regulating labor relations, but was "simply restructuring its relationship with day care providers as part of a broader effort to achieve cost savings" consistent with a proprietary interest in "cost savings." *Id.*, at *13, The Court noted that the plaintiff (a labor union) did not "allege that the City is attempting to exclude unionized day care centers from participating in the new program," *id.*, and even cited to "a number of public statements made by City officials indicating that the City wishes to implement a new program for Head Start and day care in order to reduce health care costs" that would be borne by the City, *id.*, at *3. This case is completely distinguishable because, while the Bloomberg Administration simply sought to save money, then-Mayor de Blasio, in his last days in office, signed Local Law 87 to bestow a benefit on union leaders, and ensure that the City would be a "union town."

**C. A Preliminary Injunction Is in the Public Interest**

As HSC's opening and reply declarations show, Local Law 87's implementation will jeopardize the safety net for thousands of people. It is prudent and necessary to preliminarily enjoin Local Law 87 to protect the City funding that partially supports the nonprofit human services workers who serve those people.

**CONCLUSION**

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

Dated: New York, New York
April 8, 2022

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