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KATHLEEN NORCIA, Municipal
Clerk for the Township of
Lawrence, LAWRENCE TOWNSHIP,
(County of Mercer, State of
New Jersey),

Plaintiffs,

v.

COMMITTEE OF PETITIONERS,
(Christe McCoy-Lawrence,
Harold Vereen, Edith Pike,
Falk Engel, Ramon Quiones)

Defendants.

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION
MERCER COUNTY

DOCKET NO.: MER-L-2106-06

Civil Action

DEFENDANTS' BRIEF

BRIEF IN SUPPORT OF DEFENDANTS; COMMITTEE OF PETITIONERS

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STATEMENT OF FACTS

The defendants in this action, the "Committee of Petitioners," are a group of Lawrence Township, New Jersey citizens who seek to place on the ballot for the November 7, 2006, general election a referendum question to enact a "Large Retail Living Wage and Benefits Ordinance" ("the ordinance"), see Def. Exh. 2, for the Township of Lawrence, pursuant to N.J.S.A. 40:69A-184 et seq. (the Faulkner Act).

The proposed ordinance is part of a growing movement by communities across New Jersey and the nation seeking ways to ensure that economic development generates good jobs for local residents. Like many communities, residents of Lawrence Township have focused their attention initially on the retail industry - a fast-growing sector that is one of the largest sources of low-wage jobs in New Jersey.

The proposed ordinance would ask the Township's large retailers, which the law defines as those with more than \$1 billion in annual sales that operate stores of 100,000 square feet or more, to pay their employees a living wage. It defines a living wage as \$11.06 per hour in the first year - and requires employers to provide an additional \$3.50 per hour, which can be provided in the form of benefits, supplemental wages, or any combination thereof.

The ordinance's focus on the retail industry reflects local residents' concern about the prevalence of low-wage jobs with few or no employee benefits in that sector, and about that sector's disproportionate impact on the local economy. Large concentrations of low-wage workers who do not receive benefits place a disproportionate burden on taxpayer-funded social services.

The ordinance seeks to proceed cautiously by initially covering only large employers in the industry - businesses that can reasonably afford to pay a living wage. In so doing, the ordinance follows the example of a wide range of other federal, state and local laws that regulate based on industry and business size. This approach reflects a recognition that government regulation of the marketplace must walk a delicate line between protecting, on the one hand, individual health, safety and welfare and, on the other, preserving the economic viability of local business.

The proposed ordinance builds on the "living wage laws" that over 140 cities and counties, including Hudson County, Gloucester County, Jersey City, and other New Jersey communities, have enacted over the past decade. This first generation of living wage laws required businesses receiving municipal contracts or economic development assistance to provide decent wages and health benefits to their employees.

More recently, cities and counties searching for ways to protect greater numbers of low-wage workers have begun to enact broader wage ordinances that cover some or all businesses and employees in the community - regardless of whether the business receives city contracts. Washington, D.C., Santa Fe and Albuquerque, New Mexico, San Francisco, California, and Madison, Wisconsin have all enacted such ordinances in recent years.¹

Moreover, other cities have begun to adopt measures, like the proposed ordinance, that establish higher minimum wages for employees in specific low-wage industries that are rapidly expanding in their communities. Emeryville, California has adopted such an ordinance for employees at large hotels. As discussed below, that ordinance was upheld by the U.S. District Court just this week. And on July 26, 2006, the Chicago City Council overwhelmingly approved a living wage ordinance for retail workers virtually identical to the Lawrence Township proposal. See "Chicago Orders Big Box Stores to Raise Wage," N.Y. Times, p. A1 (July 27, 2006). The measure now awaits Mayor

¹ The District of Columbia has had a city-wide minimum wage law above the federal minimum wage for more than a decade. District of Columbia Code § 32-1001 et seq. Santa Fe passed its city-wide minimum wage in February 2003. Santa Fe City Code § 28.1 et seq. Albuquerque passed its city-wide minimum wage in April 2006. Albuquerque, N.M., Ordinance O-06-20 (version 2) (Apr. 20, 2006). San Francisco passed its city-wide minimum wage in November 2003. San Francisco Admin. Code ch. 12R. Madison passed its city-wide minimum wage in March 2004. Madison Gen'l Ords. § 3.45. The City of Baltimore enacted its city-wide minimum wage law in 1964 (however, the city ceased updating the wage level in the 1970's, leading it to become irrelevant when it fell below the level of the federal minimum wage). See City of Baltimore v. Sitnick, 254 Md.303, 324-26 (1969).

Richard M. Daley's action. And Washington, D.C. is holding hearings on a similar proposed ordinance.

PROCEDURAL HISTORY

On August 7, 2006, the Committee of Petitioners submitted to the Municipal Clerk of Lawrence Township, plaintiff Kathleen Norcia, initiative petitions in support of the ordinance. The following day the Clerk certified that more than the requisite number of 998 citizen signatures had been verified as valid (1054 names certified). She placed the proposed ordinance on the agenda for the next Lawrence Township Council meeting, which was August 15, 2006. See Def. Exh. 1.

At the August 15, 2006, Council meeting, the Township Council voted to table the ordinance in lieu of the first reading required by N.J.S.A. 40:69A-190. This was done upon the township attorney's recommendation. No public comment was permitted at that time.

In the instant action filed on August 23, 2006, the Lawrence Township Council, in the name of the Municipal Clerk, seeks a declaratory judgment pursuant to N.J.S.A. 2A:16-51, declaring the proposed ordinance invalid.

ARGUMENT

Plaintiffs' motion for a preliminary injunction should be denied because the Township is not likely to succeed on the

merits of its claim. Contrary to plaintiffs' assertions, the proposed ordinance is well within the broad home rule and police powers of New Jersey municipalities to enact local laws to protect the health, safety and welfare of the community. Neither New Jersey's minimum wage law, nor the federal Employee Retirement Income Security Act (ERISA) preempt that authority. As the ordinance would therefore be valid if enacted, the voters of Lawrence Township must be permitted to decide for themselves whether to adopt the proposed measure.

I. Lawrence Township Has the Authority to Enact the Ordinance Under Its Broad Home Rule and Police Powers

The New Jersey Constitution grants local governments broad home rule powers that "shall be liberally construed in their favor." N.J. Const. Art. IV, § VII, ¶ 11. Local governments have not only the powers explicitly granted to them by the constitution or statute but also any powers reasonably implied by those given expressly. Id.

The New Jersey State Legislature has expressly granted to local governments far-reaching police powers. Pursuant to this authority, a local government may pass any law "necessary and proper for the good government, order and protection of persons and property, and for the preservation of the public health, safety and welfare of the municipality and its inhabitants." N.J.S.A. 40:48-2. See 515 Associates v. City of Newark, 132 N.J.

180 (1993) (enactment of municipal ordinances permitted pursuant to police power); Quick Check Food Stores v. Township of Springfield, 83 N.J. 438 (1980) (municipal ordinances permitted on any subject matter of local concern which is reasonably related to a legitimate object of public health, safety or welfare).

For nearly 70 years, minimum wage legislation has been recognized as one of the most basic and important exercises of the police power to protect the health, safety and welfare of low-income Americans. See West Coast Hotel Co. v. Parrish, 300 U.S. 379, 399 (1937) (holding that minimum wage laws are an exercise of the power to protect health, safety and welfare, and stating that "the denial of a living wage is not only detrimental to [workers'] health and well being, but casts a direct burden for their support upon the community").

Relying on the U.S. Supreme Court's teaching in West Coast Hotel, the New Jersey Supreme Court long ago held that regulation of working conditions may be a proper exercise of local governments' police power. Upholding a West New York ordinance requiring that barber shops be closed certain days of the week to allow employees periods of rest, the Supreme Court explained that a local government "may, in the common interest, provide for wholesome conditions of work, if the measure is not beyond the bounds of reason." Amodio v. Board of Com'rs of Town of West

New York, 133 N.J.L. 220, 225 (1945) (citing West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937)).

As recently as last year, a New Jersey appellate court upheld a Hudson County living wage law that, like the proposed ordinance, required certain employers to pay a living wage and provide health benefits. Visiting Homemaker Service of Hudson County v. Bd. of Chosen Freeholders of County of Hudson, 380 N.J.Super. 596, 611 (App. Div. 2005).

As discussed below, the core home rule question in that case was effectively rendered moot by a legislative clarification while the appeal was pending. Nevertheless, the court in Visiting Homemaker Service reiterated that “[a] governmental subdivision has the power, in the interests of the common good, to enact all manner of laws reasonably designed for the protection of the public health, safety, or welfare,” and that “in the exercise of the police power, a governmental subdivision is presumed to have acted upon adequate factual support.” Id. at 608. Indeed, “[t]he presumption of legislative validity is particularly strong respecting enactments protective of the public health, safety, or welfare.” Id. (emphasis added). In upholding the county living wage law as a legitimate exercise of the County’s power, the court explained:

The County’s stated intention is to increase the standard of living for contract service workers in low-wage industries, while decreasing the commensurate burden on the taxpayers of the County in caring for the

uninsured through state and local health programs. Such a purpose is legitimate, and increasing the wages and benefits of covered employees rationally relates to keeping County workers out of poverty and decreasing the burden on taxpayers.

Id. at 611.

Like the Hudson County living wage ordinance, the proposed Lawrence Township ordinance aims to keep workers out of poverty and decrease the burden on taxpayers by requiring large retailers to pay a living wage. Because setting such minimum standards is rationally related to the protection of the public health and welfare, enacting the ordinance falls well within the Township's home rule and police powers.

II. The Purpose of Home Rule Is to Permit Localities to Shape Policies to Meet Local Needs, and Wage Regulation Is Not a Subject Inherently Reserved to the State

The plaintiffs fault the ordinance for its potential to create differing wage regulations in different municipalities. However, far from being a legal infirmity, local variation is the intended result of New Jersey's system of home rule. The very purpose of home rule in New Jersey is to enable local governments to supplement the minimum protections established by the state to reflect local needs. As the New Jersey Supreme Court explained in upholding a local rent control ordinance,

[I]t is of no constitutional moment that local decisions will mean diversity of treatment within the State. Diversity is an inevitable incident of home

rule, for home rule exists to permit each municipality to act or not to act or to act in a way it believes will best meet the local need.

Inganamort v. Borough of Fort Lee, 62 N.J. 521, 529, 303 A.2d 298, 302 (1973). Much as the 50 states provide "laboratories" in which new social programs can be tested, local variation allows for similar experimentation and ultimately increases the possibility that solutions to difficult local problems may be found.

Applying this principle, the state Supreme Court has consistently upheld the power of New Jersey municipalities to supplement state regulation in an area with ordinances that provide further protections to address local needs. For example, even after the state passed real estate licensing laws to deal with the problem of discriminatory "blockbusting" by real estate brokers, the court held that local governments were free to pass tougher ordinances that went beyond the requirements of the state law in dealing with the same problem. Summer v. Teaneck, 53 N.J. at 553. And despite the existence of a state statute requiring that certain city employees reside in the municipality for which they worked, the court held the localities were free to enact broader ordinances requiring that all city employees reside in the municipality. Kennedy v. City of Newark, 29 N.J. 178, 187 (1959). And when both the state and local governments passed soil conservation laws, the court ruled that the state laws "were intended to supplement, not supplant, the powers of a

municipality to deal with the problem of soil conservation." Fred v. Mayor and Council, Old Tappan Borough, 10 N.J. 515, 521-522 (1952). Like the local laws that were upheld in these cases, Lawrence's proposed ordinance supplements the state minimum wage law in a manner consistent with state policy and is not preempted.

It is true that the state Supreme Court has recognized a handful of areas of public law that are so "inherently in need of uniform treatment," Summer, 53 N.J. at 553, 251 A.2d at 763, as to be beyond the reach of the municipal police power:

For example, the law of wills or the law of descent and distribution may not be left to local decision. Nor could the State leave it to each municipality to say what shall constitute robbery or whether it shall be punished. The reason is evident. "The needs with respect to those matters do not vary locally in their nature or intensity. Municipal action would not be useful, and indeed diverse local decisions could be mischievous or even intolerable."

Inganamort v. Borough of Fort Lee, 62 N.J. 521, 528, 303 A.2d 298, 302 (1973) (quoting Summer, 53 N.J. at 553, 251 A.2d at 763).

But the court has never suggested that worker protections such as minimum wages fall into this narrow category. To the contrary, early in the last century, shortly after the state and local governments began to enact worker protections, the New Jersey Supreme Court held in Amodio that "provid[ing] for wholesome conditions of work" falls squarely within the local police power. 133 N.J.L. at 225.

This recognition flows from the fact that working conditions and needs vary across a state as geographically and economically diverse as New Jersey. The cost of living in rural areas of New Jersey is lower than in the well-developed suburban and urban areas. Moreover, industries and employment conditions vary by region, county and municipality. And concentrations of low-wage jobs in specific municipalities can have a disproportionate impact on the local economy, creating an increased burden on taxpayer-funded social services. While there is of course a need for a basic minimum wage that applies state-wide, that does not alter the fact that the state-wide floor may not be adequate to meet the needs of all communities in the state.

Recognizing this need, the state Supreme Court has stressed that

[even] if the evil is of statewide concern, still practical considerations may warrant different or more detailed local treatment to meet varying conditions or to achieve the ultimate goal more effectively.

Inganamort, 62 N.J. at 528, 303 A.2d at 302. Moreover, although a particular issue may "be the concern of the State itself,"

it would not be inappropriate to permit the municipalities also to wrestle with it. There is no inevitable need for a single statewide solution or for a single statewide enforcing authority. On the contrary, it may be useful to permit municipalities to act, for, being nearer the scene, they are more likely to detect the practice and may be better situated to devise an approach to their special problems.

Summer, 53 N.J. at 553.

In fact, the New Jersey Supreme Court has noted that where "a relevant federal statute assumes the appropriateness of municipal action in [a] general area," that acknowledgement reinforces the conclusion that the field is appropriate for concurrent state and municipal legislation. See Summer, 53 N.J. at 553-54, 251 A.2d at 764 (finding concurrent state and municipal power to regulate blockbusting in light of provision of the federal Fair Housing Act of 1968 expressly providing that it does not preempt local ordinances regulating such matters).² The federal minimum wage law - the Fair Labor Standards Act - contains an identical acknowledgement of the existence of local minimum wage ordinances. See 29 U.S.C. § 218(a) ("No provision of this chapter or of any order thereunder shall excuse noncompliance with any Federal or State law or municipal ordinance establishing a minimum wage higher than the minimum

²The Court explained:

We note in this connection that a relevant federal statute assumes the appropriateness of municipal action in this general area. Thus the Fair Housing Act of 1968, which includes a condemnation of blockbusting, 42 U.S.C.A. s 3604(e), stipulates that its provisions shall not be construed to invalidate any law of a State or 'political subdivision of a State,' 42 U.S.C.A. s 3615, and speaks of cooperation by the Secretary of Housing and Urban Development 'with State and local agencies charged with the administration of State and local fair housing laws,' 42 U.S.C.A. s 3616. Many municipalities have legislated with respect to blockbusting, see Fair Housing Laws (Housing and Home Finance Agency, Sept. 1964), pp. 234-- 238, and a fair-housing ordinance which included a blockbusting provision was upheld in *Chicago Real Estate Board v. City of Chicago*, 36 Ill.2d 530, 224 N.E.2d 793 (Sup.Ct.1967). With respect to the power of a municipality to deal with racial discrimination, see *District of Columbia v. John R. Thompson Company, Inc.*, 346 U.S. 100, 73 S.Ct. 1007, 97 L.Ed. 1480 (1953).

Summer, 53 N.J. at 553-54.

wage established under this chapter") (emphasis added). This federal acknowledgement underscores the appropriateness of municipalities fashioning local wage standards to address local conditions and needs.

III. The State Minimum Wage Law Does Not Preempt Local Authority to Enact Supplemental Wage Standards

In Summer v. Teaneck, the New Jersey Supreme Court outlined the standard for assessing whether state legislation preempts municipalities from regulating in a given area. As the Summer court explained: _

A municipality may not contradict a policy the Legislature establishes. Hence an ordinance will fall if it permits what a statute expressly forbids or forbids what a statute expressly authorizes. Even absent such evident conflict, a municipality may be unable to exercise a power it would otherwise have if the Legislature has preempted the field. This follows from the basic principle that local government may not act contrary to State law. But an intent to occupy the field must appear clearly. It is not enough that the Legislature has legislated upon the subject, for the question is whether the Legislature intended its action to preclude the exercise of the delegated police power. Hence the fact that the State has licensed a calling may not be enough to bar local licensure to protect an additional value of local concern. The ultimate question is whether, upon a survey of all the interests involved in the subject, it can be said with confidence that the Legislature intended to immobilize the municipalities from dealing with local aspects otherwise within their power to act.

Summer v. Teaneck, 53 N.J. at 554 (citations omitted).³ Because it cannot be said with confidence that the Legislature intended to strip New Jersey localities of their police power authority to enact supplemental wage standards, the proposed ordinance is not preempted.

A. The State Has Never Indicated, Much Less Clearly Expressed, an Intention to Bar Local Governments from Setting Local Minimum Wage Standards

Nowhere in the state minimum wage statute did the New Jersey legislature clearly express an intention to preempt local governments from adopting wage legislation. Nor did the legislature suggest any need to maintain a uniform minimum wage throughout the state. Neither the word "uniformity" nor any similar term appears in the statute. Cf. Crawley, 90 N.J. at 251 (finding intent to occupy the field where the State declared that one of the purposes of state legislation was to "*to eliminate inconsistencies, ambiguities, outmoded and conflicting, overlapping and redundant provisions*"). Indeed, the very term "minimum wage" implies the expectation that wages will vary, and

³ Although Plaintiffs do not argue that the proposed ordinance is preempted because it conflicts with the state's minimum wage law, it is worth noting that there is no conflict because the New Jersey state minimum wage was designed to be a floor on wage standards, not a ceiling, it does not prevent local governments from establishing greater protections for workers in their communities. No employer violates the state law by paying a higher wage, so the proposed ordinance does not put large retailers in a position where they cannot comply with both state and local law at the same time. Therefore, no conflict exists. See, e.g., Masters-Jersey, Inc. v. Mayor and General Council

the whole history of minimum wages is that of setting a floor, not a ceiling, on wage standards. This floor-not-ceiling concept is captured by the statute's use of the phrase "a rate not less than" to describe what it requires employers to pay. N.J.S.A. § 34:11-56a4.

Plaintiffs attempt to infer an intent by the legislature to occupy the field of wage regulation from a provision that was added to N.J.S.A. § 34:11-56a4 in 2005. That provision expressly provides that the state minimum wage does not preempt localities from adopting ordinances regulating minimum wages for municipal vendors, contractors or subcontractors.

Plaintiffs' argument both (1) misunderstands the legislative history and purpose of that provision, and (2) essentially relies on a maxim of statutory construction - the "*expressio unius*" canon - that New Jersey courts have warned plays a very limited role in divining legislative intent. Properly understood, the 2005 provision supports no inference of a broad legislative intent to preempt local wage regulation.

The maxim of construction on which plaintiffs effectively rely (although they fail to identify it by name) is "*expressio unius est exclusio alterius*" (express mention of one thing implies exclusion of all others). However, the New Jersey courts have repeatedly warned that, "[a]t best, this maxim is merely an

of Borough of Paramus, 32 N.J. 296, 302 (1960) (finding that local Sunday-

aid in determining legislative intent, not a rule of law. Moreover, great caution is necessary in its application, for blind and mechanical application can often lead . . . to an improper interpretation of the statute being construed." Allstate Ins. Co. v. Malec, 104 N.J. 1, 8 (1986) (internal citations and quotation marks omitted) (overruling lower court decision construing statute on the basis of the "expressio unius" maxim). See also Resnick v. East Brunswick Tp. Bd. of Ed., 77 N.J. 88, 98-99, 389 A.2d 944, 949 (N.J.,1978) ("[T]he maxim does not carry the weight of a rule of law and is to be applied with great caution . . .").

Because they do not carry the force of rules of law, "[c]anons of construction, such as *inclusio unius est exclusio alterius*, the inclusion of one is the exclusion of another, must yield to the paramount canon--that of legislative intent." Bunk v. Port Authority of New York and New Jersey, 144 N.J. 176, 190-191, 676 A.2d 118, 124-125 (1996).

In this case, examination of the statute's legislative history reveals no such intent to preempt local wage laws. The history is as follows: Beginning with Jersey City in 1996, a group of cities and counties across the state enacted living wage ordinances that established higher minimum wages for city contractors. Those laws were enforced without incident for years

closing laws did not conflict with less stringent state Sunday-closing laws).

until 2003, when a lawsuit was filed challenging Hudson County's ordinance. In a surprising ruling, the Hudson County Superior Court invalidated the law on numerous grounds. One of them was a finding that the state minimum wage and prevailing wage laws preempted the Hudson County ordinance. The ruling was widely recognized as erroneous. If it had not been reversed on appeal, the ruling would have made New Jersey one of just a handful of states in the United States that deny municipalities such authority.

In response, a broad coalition of dozens of anti-poverty groups from across the state, represented by the Brennan Center, the New Jersey Institute for Social Justice, Legal Services of New Jersey, and others, helped the county file an appeal. The widely held view among legal experts was that the Appellate Division was almost certain to reverse this unprecedented decision.

However, while the appeal was pending, legislation to raise New Jersey's minimum wage began moving through the legislature. In order to clarify once and for all that the lower court ruling in the Hudson County case was erroneous, advocates succeeded in having the legislature append to the minimum wage increase the provision in question. See S.B. 2065, 2005 Leg., 211th Sess. (NJ 2005); Visiting Homemaker Service, 380 N.J. Super. at 601-02 (explaining that "while this appeal was pending, the Legislature amended N.J.S.A. § 34:11-56a4 to expressly permit political

subdivisions to enter into agreements and establish standards providing wages and protections greater than those required by state or federal law").

The provision addressed only the limited question of whether state law preempted wage ordinances for local contractors. It did so because the Hudson County litigation and the lower court's preemption ruling had concerned only such ordinances.

In light of the intervening statutory "clarification," the Appellate Division in Visiting Homemaker Service, went on to reverse the lower court ruling. The Appellate Division did so in a sweeping ruling that, as discussed above, indicated that the trial court had held far too crabbed an understanding of the power of local governments to enact wage protections. The court held that the lower court's preemption ruling had been rendered moot by the statutory clarification, and went on to reverse the trial court on all of the other grounds on which it had invalidated the ordinance.

The history of the amendment thus shows that the legislature intended to overrule a specific court decision in order to clarify that state law did not preempt the type of ordinance at issue in that case. The history shows no intent by the legislature one way or the other regarding preemption of other kinds of laws not at issue in that case.

Just as the legislature could have expressly authorized other kinds of local wage laws, it could have expressly preempted them - but it did neither. Thus, the amendment has no bearing on the proposed ordinance. Moreover, while the Legislature may expressly clarify that certain local laws are not preempted, it need not; for, under New Jersey law, local powers are preserved unless the State Legislature clearly expresses an intent to preempt them.

This interpretation is consistent with the New Jersey courts' teaching about proper use of the "inclusio unius" maxim, which rejects mechanical application of the principle:

In cases such as this, where it is clear that the drafters of a statute did not consider or even contemplate a specific situation, th[e New Jersey Supreme] Court has adopted as an established rule of statutory construction the policy of interpreting the statute consonant with the probable intent of the draftsman had he anticipated the situation at hand. Such an interpretation will not turn on literalisms, technisms or the so-called rules of interpretation; rather it will justly turn on the breadth of the objectives of the legislation and the commonsense of the situation.

Bunk, 144 N.J. at 190-191 (internal citations and quotation marks omitted).

Finally, the history of local wage ordinances in New Jersey further supports the conclusion that the 2005 amendment simply clarified existing law and did not amount to a grant of authority to localities that did not previously exist. As discussed above, beginning n 1996 - long before the Hudson County case and the

2005 amendment - a group of New Jersey cities and counties had been enforcing local living wage ordinances.

The State clearly tolerated this local action in the same field as the State's wage regulation. Never was the legality of these ordinances questioned, nor did the legislature ever attempt to expressly preempt them. The courts appropriately view such history of "acknowledgment and accommodation" as further evidence that such local action was not preempted. Compare Mack Paramus Co. v. Mayor and Council of Borough of Paramus, 103 N.J. 564, 577, 511 A.2d 1179, 1186-1187 (1986) (finding relevant to conclusion that State did not occupy field of Sunday closing laws the fact that the State had long "acknowledged and accommodated" local Sunday closing laws). As such, the 2005 amendment was simply a clarification of existing law, and does not shed any light on the preemption question posed in this case.

B. State Laws That Establish Only Minimum Standards in a Given Field Do Not Preempt Supplemental Local Standards

There is nothing in the State Minimum Wage Act that clearly indicates intent to preempt complementary local wage standards, and, as noted above, it is well-established that the mere fact that the State has acted in a field does not support a finding that the State intended to occupy that field. See, e.g., Summer v. Teaneck, 53 N.J. at 553 (permitting more stringent local laws addressing discriminatory "blockbusting"); Kennedy, 29 N.J. at

187 (permitting broader local laws regarding residency requirements for civil service employees); Fred v. Mayor and Council, Old Tappan Borough, 10 N.J. 515, 521-522 (1952) (permitting supplemental local soil conservation laws). The Court has made it particularly clear that field preemption should not be inferred where, as here, the State regulation sets a minimum threshold of regulation which leaves room for more stringent regulation to address local variation or local needs. As the Supreme Court explained in Crawley,

In *Township of Chester v. Panicucci*, 62 N.J. 94, 299 A.2d 385 (1973), we held that a state law prohibiting hunters from possessing or discharging firearms within 300 feet of certain dwellings merely expressed "a declaration of statewide policy of minimum regulation," and hence, did not preempt a more stringent municipal gun control ordinance. Although the statute and ordinance overlapped, we found no preemption because we concluded that the Legislature did not intend to prohibit complementary local legislation.

Crawley, 90 N.J. at 249 (emphasis added).

Similarly, it was held in Mack Paramus Co. v. Borough of Paramus, 103 N.J. 564, 576-77 (1986), that the State's more narrow statutory Sunday blue law did not preempt broader local Sunday blue law ordinances. Notably, the court observed that although the State Sunday closing law addressed a problem of State-wide concern, it also generated local concerns and responses and was therefore not a matter upon which "diverse local decisions would be mischievous and even intolerable." Like the State Gun Control Law at issue in Panicucci, and the State Sunday closing law in Mack Paramus, the State Minimum Wage Law

sets only a minimum standard which leaves ample room for supplemental local legislation to address local needs, such as variations in the cost of living.

Plaintiff also suggests that the creation of the New Jersey Minimum Wage Advisory Commission is evidence of the state's intent to occupy the field. However, in Summer v. Teaneck, the Court rejected a similar argument, and held that the creation of a state real estate licensing commission which was empowered to enact rules against discriminatory blockbusting (and did in fact enact such rules) did not indicate intent to preempt local ordinances regulating that practice. Summer, 53 N.J. at 555.

New Jersey's constitutional policy of respecting the breadth and vitality of local governments' authority "requires a liberal construction of municipal ordinances, and therefore a finding of pre-emption must be clear." Coast Cigarette Sales v. Long Branch, 121 N.J. Super. 439, 444 (N.J. Super. Ct. App. Div. 1972) (citing Kennedy v. City of Newark, 29 N.J. 178, 187 (1959)). Given the complete absence of any express indication of intent to preempt or express indication of the need for preemption, it cannot be said that there is the requisite clarity in the state law to support a finding of field preemption.

C. Other States Have Similarly Held That State Minimum Wage Laws Do Not Preempt Higher Local Wage Ordinances

In allowing local governments to set higher minimum wage standards, New Jersey's minimum wage law mirrors that of the federal government and those of most other states. At the federal level, the Fair Labor Standards Act establishes the national minimum wage, 29 U.S.C. § 206(a) et seq., yet allows states and municipalities to supplement it with higher minimum wages of their own. To date, 22 states, including New Jersey, have enacted state minimum wages higher than the federal minimum wage of \$5.15.

A growing number of cities have done so as well. In addition to the 140 localities that have enacted higher minimum wages for city contractors, at least six cities have gone farther and enacted ordinances like the current proposal that establish higher local minimum wages for some or all businesses in their communities. See supra note 1.

While the New Jersey courts have not had the opportunity to address the power of municipalities to adopt wage ordinances that extends beyond businesses receiving city contracts, other states with comparably expansive home rule powers have upheld local minimum wage laws.

Maryland's highest court upheld Baltimore's minimum wage because the state minimum wage law did not expressly preempt local action. City of Baltimore v. Sitnick, 254 Md.303, 324-26 (1969). Most recently, the New Mexico Court of Appeals held that

Santa Fe had the home rule and police power to establish a local minimum wage and that state law did not preempt its ordinance. New Mexicans for Free Enterprise v. City of Santa Fe, 138 N.M. 785, 126 P.3d 1149, (N.M Ct. App. 2005). Opponents of the city-wide minimum wage argued that the Santa Fe ordinance conflicts with state law, "because state law purportedly 'permits' certain city employers to pay their workers a wage of \$5.15 per hour, while the ordinance does not." 126 P.3d at 1165. The court soundly rejected this argument, explaining that "[c]ourts do not apply [the] test for conflict in [such] a wooden manner because doing so would lead to absurd results." Id. Viewing the state minimum wage "as setting only a wage floor that does not bar higher local minimum wage rates," the court ultimately found that the Santa Fe ordinance "is merely complementary to the [state] Minimum Wage Act . . . not in conflict with [it]." 126 P.3d at 1166.

Similarly, a Wisconsin court affirmed Madison's power to enact a city-wide minimum wage ordinance, explaining that the ordinance "complements and does not conflict with state law because state law requires workers to be paid 'not less than' a living-wage" . . . [and] the Ordinance promotes and does not defeat the legislative purpose of protecting workers from substandard wages." Main Street Coalition for Economic Growth,

Inc. v. City of Madison, No. 04CV3853 at 19 (Wis. Cir. Ct. Apr. 21, 2005) (see Def. Exh. 3).⁴

And just this week, a federal court in California upheld a local living wage ordinance strikingly similar to the proposed Lawrence Township measure. That ordinance, adopted by Emeryville, CA, established a living wage and other requirements for workers at large hotels located in the city. The court upheld the measure as within the scope of the local home rule power, rejecting claims that California's extensive system of state wage and workplace regulation preempted it. See Woodfin Suite Hotels, LLC v. City of Emeryville, No. C 06-1254-SBA, at *22-*24 (N.D. Cal. Aug. 23, 2006) (see Def. Exh. 4).

IV. ERISA Does Not Preempt Combined Wage and Benefit Laws Such As the Proposed Large Retail Living Wage and Benefits Ordinance

It is well-established that combined wage and benefits laws, like the proposed ordinance, that require employers to provide a minimum level of compensation, and give them the option of providing some of that compensation in the form of benefits, are not preempted by ERISA. To date, four federal appeals courts,

⁴ Although the city minimum wage was repealed after this decision because the Wisconsin state legislature subsequently enacted an express preemption provision, see supra note 1, the Wisconsin court's holding that the city minimum wage law was not preempted in the absence of that express preemption provision remains good law.

including the Third Circuit Court of Appeals, have ruled on whether ERISA preempts such laws, and all four appellate courts have ruled that they are not so preempted. In addition, this very week, a federal district court rejected an ERISA preemption argument to an ordinance very similar to that at issue here: Emeryville, California's ordinance establishing a living wage and benefits requirement for large hotel employers in the city. See Woodfin Suite Hotels, LLC v. City of Emeryville, No. C 06-1254-SBA, at *22-*24 (N.D. Cal. Aug. 23, 2006) (see Def. Exh. 4).

Plaintiffs mistakenly rely on Retail Industry Leaders Ass'n v. Fielder, 435 F. Supp.2d 481 (D. Md. 2006), which held that ERISA preempted a Maryland law that required employers to contribute 8% of payroll to employee health benefits. Unlike the proposed ordinance, the Maryland law did not permit employers to substitute cash wages for health benefits. Because the Maryland law was a straight health benefits mandate, the trial court found that it effectively forced covered employers to modify their health benefits offerings and therefore impermissibly related to ERISA plans.

By contrast, the proposed ordinance follows exactly the structure of the wage laws that the federal courts have repeatedly upheld: it establishes a minimum compensation level, a portion of which can be satisfied in the form of cash wages, benefits, or any combination thereof. The fact that the proposed ordinance follows this approach distinguishes it from the

Maryland law and means that it is not impermissibly related to an ERISA plan.

A. The Federal Courts Have Repeatedly Held That Combined Wage and Benefits Laws Are Not Preempted by ERISA

ERISA is a federal statute that regulates certain categories of employee benefits plans (known as "ERISA plans") - most notably, health benefits plans. ERISA bars states and localities from adopting laws that require employers to establish or modify ERISA plans. Significantly, however, ERISA does not regulate all employee benefits. Paid vacation, paid sick leave, severance pay, and health savings accounts are common examples of employee benefits that are generally not considered ERISA plans. See Massachusetts v. Morash, 490 U.S. 107 (1989); see also Cal. Div. of Labor Standards Enf't v. Dillingham Constr., 519 U.S. 316, 326-27 (1997) (distinguishing between ERISA and non-ERISA benefits). Just as importantly, cash wages do not constitute ERISA plans either.

The fact that wages and many types of benefits do not constitute ERISA plans explains why the federal courts have repeatedly upheld laws that establish combined wage and benefits standards. In all five recent cases where the federal courts have addressed such laws, the courts have upheld the laws under ERISA. See Burgio v. N.Y.S. Dep't of Labor, 107 F.3d 1000 (2d Cir. 1997); WSB Electric v. Curry, 88 F.3d 788 (9th Cir.

1996); Minnesota Chapter of Associated Builders and Contractors, Inc. v. Minnesota Department of Labor and Industry, 47 F.3d 975 (8th Cir. 1995); Keystone Chapter, Ass'd Builders & Contractors Inc. v. Foley, 37 F.3d 945 (3rd Cir. 1994), *cert. denied*, 115 S. Ct. 1393 (1995); Woodfin Suite Hotels, LLC v. City of Emeryville, No. C 06-1254-SBA, at *22-*24 (N.D. Cal. Aug. 23, 2006) (see Def. Exh. 4).⁵

The Woodfin case involved a local minimum wage law that established a combined wage and benefits standard for all large hotels located within the City of Emeryville. The four court of appeals cases all involved prevailing wage laws that established combined wage and benefits standards for construction contractors performing public works projects. In all five cases, employers challenged the laws as preempted by ERISA. Each of the five laws set a minimum standard for employers' hourly compensation packages. Under each of the five laws, employers could provide the whole package in wages, or could provide a portion in benefits if the employer so chose. See, e.g., Minnesota Chapter,

⁵ The Second Circuit had held in 1989 that ERISA preempted New York's prevailing wage law; at that time, New York's law, unlike the proposed ordinance, required employers to provide a specific amount of health benefits and did not allow employers the flexibility to substitute wages or other non-ERISA plan benefits. See General Electric Co. v. N.Y. State Dep't of Labor, 891 F.2d 25 (2d Cir. 1989). However, after General Electric was decided, the U.S. Supreme Court issued a series of new opinions clarifying the ERISA preemption standard, and New York modified its prevailing wage law to provide employers greater flexibility in mixing and matching wages and benefits. In light of those developments, the Second Circuit reversed itself and upheld New York's prevailing wage law in Burgio v. N.Y.S. Dep't of Labor, 107 F.3d 1000 (2d Cir. 1997), making clear that more flexible combined wage and benefits laws are not preempted by ERISA.

47 F.3d at 977 (“[a]n employer can divide the amount between wages and benefits as it chooses, so long as the combined total meets or exceeds the prevailing wage rate”); *id.* at 980 (“benefits and wages can be used interchangeably”); Burgio, 107 F.3d at 1009 (“an employer may provide supplemental benefits in any form or combination so long as the sum total is not less than locally prevailing benefits”).

An employer’s “total liability would thus be the same whether the [employer] had bargained to provide benefits exclusively through ERISA plans, exclusively through non-ERISA plans, through additional cash wages, or through some combination of the three.” Burgio, 107 F.3d at 1009. Because of this, “The [combined wage and benefits laws] do[] not force employers to provide any particular employee benefits or plans, to alter their existing plans, or to even provide ERISA plans or employee benefits at all.” WSB Electric, 88 F.3d at 793.

This feature – the fact that employers can mix and match wages, non-ERISA benefits, and ERISA benefits – was crucial to the courts in finding that these laws comply with ERISA. As the Eighth Circuit explained, “[A state or local government] can set a minimum cash wage, and allow an employer the option of paying part of that in benefits,’ without triggering ERISA preemption.” Minnesota Chapter, 47 F.3d at 980 (quoting Keystone, 37 F.3d at 961). “Where a legal requirement may be easily satisfied through means unconnected to ERISA plans, and only relates to ERISA plans

at the election of the employer, it 'affects employee welfare benefit plans in too tenuous, remote, or peripheral a manner to warrant a finding that the law 'relates to' the plan'" and so is not preempted. Keystone, 37 F.3d at 960. Accord Burgio, 107 F.3d at 1009; WSB Electric, 88 F.3d at 794.

B. The Proposed Ordinance Follows Exactly the Structure of the Combined Wage and Benefits Laws That Have Been Upheld by the Courts

The proposed ordinance is structurally identical to the combined wage and benefits laws that have been upheld by the federal courts, including the Second, Third, Eighth and Ninth Circuit Courts of Appeals. It establishes a minimum compensation rate, a portion of which can be provided in the form of supplemental wages, benefits, or any combination thereof.⁶ Employers are allowed to mix and match wages, non-ERISA benefits, and ERISA benefits. Whether to provide any benefits at all, and what kind of benefits to provide - paid vacation days, health or

⁶ Like the laws upheld in Burgio, Keystone, WSB Electric, 88 F.3d at 790 the proposed ordinance divides the minimum compensation package into two components, (1) a wage component, which must be paid in wages, and (2) a benefits component, which can be paid in wages or benefits. See Burgio, 107 F.3d 1003; Keystone, 37 F.3d at 950; WSB Electric, 88 F.3d at 790. The laws upheld in Minnesota Chapter and Woodfin adopt a slightly different approach: they set only one rate, and allow any portion of that rate to be satisfied with wages or benefits. Minnesota Chapter, 47 F.3d at 980; Woodfin, No. C 06-1254-SBA, at *23. However, the courts have characterized both approaches as establishing a minimum wage and affording employers the option of paying a portion of the required compensation in benefits, and this minor difference between the two approaches did not affect the ERISA preemption analysis in any of these cases.

other benefits, or just supplemental wages - are left to the employer's discretion. Like the prevailing wage law upheld by the Third Circuit in Keystone, the proposed ordinance "require[s] only that when [employers'] benefits contributions fall short of the . . . minimum, they may make up the difference with cash." 37 F.3d at 961. Thus, the proposed ordinance "is not preempted, because an employer may comply without making any adjustment in its ERISA plans." Id.

C. Unlike the Proposed Ordinance and the Combined Wage and Benefits Laws That Have Been Approved Under ERISA, the Maryland Law Was a Straight Health Benefits Mandate

Unlike the combined wage and benefits laws upheld by the federal courts, the Maryland health benefits law addressed only health benefits. It established a requirement that covered for-profit employers had to spend at least 8% of their payroll on providing health benefits (which are generally deemed to be ERISA plans), or pay the balance in the form of a tax to the state. Retail Industry Leaders Ass'n, 435 F.Supp.2d at 484. The Maryland law did not allow employers the option of meeting any portion of its health benefits requirement by providing wages or non-ERISA plan benefits such as paid vacation, paid sick leave, severance pay, etc.

Because the Maryland law did not permit employers to satisfy its health benefits requirement through any viable means

unconnected to ERISA plans, the court interpreted the Maryland law as "impos[ing] [an] employee health or welfare mandate[]," and on that ground ruled that it was preempted by ERISA. Id. at 495. The defenders of the Maryland law had argued that it was not actually a mandate, since employers had the option of paying a tax to the state rather than providing the mandated benefits. However, the court held that such an option presented a "Hobson's choice" because payment of the tax to the state would not "generate good will with its work force" like an increase in employee benefits and therefore did not alter the basic fact that the law was a health benefits mandate. Id. at 497. By contrast, the proposed ordinance affords employers a variety of compliance options, all of which would generate comparable good will among employees.

Thus, Retail Industry Leaders Ass'n does not change in any way the established law regarding combined wage and benefits laws: that "[A state or local government] can set a minimum cash wage, and allow an employer the option of paying part of that in benefits,' without triggering ERISA preemption." Minnesota Chapter, 47 F.3d at 980 (quoting Keystone, 37 F.3d at 961). Because the proposed ordinance mirrors the combined wage and benefits laws that have consistently been upheld by the federal appeals courts, it is not preempted by ERISA.

CONCLUSION

For the foregoing reasons, Lawrence Township enjoys the legal authority under New Jersey and federal law to adopt and enforce an proposed ordinance. Plaintiffs' motion for a preliminary injunction should accordingly be DENIED, and the proposed ordinance should permitted to appear on the upcoming election ballot.⁷

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⁷ We also note that plaintiffs lack standing to seek a preliminary injunction. Because it is not certain that the proposed ordinance will be enacted if placed on the ballot, and the proposed ordinance has a delayed effective date, they cannot show that they will suffer imminent and irreparable harm absent and injunction.

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