APL-2024-00106

To be argued by:
Amy McCamphill
15 *minutes requested*

Court of Appeals
State of New York

Glen Oaks Village Owners, Inc.; Robert Friedrich;
9-11 Maiden, LLC; Bay Terrace Cooperative Section I, Inc.;
and Warren Schreiber,

Plaintiffs-Respondents,

against

City of New York; New York City Department of Buildings;
and Eric A. Ulrich, in his official capacity as Commissioner
of the New York City Department of Buildings,

Defendants-Appellants.

BRIEF FOR APPELLANTS

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS (cont'd)

TABLE OF AUTHORITIES

Page(s)

Cases

TABLE OF AUTHORITIES (cont'd)

Page(s)

TABLE OF AUTHORITIES (cont'd)

Page(s)

Statutes, Laws, and Legislative History

TABLE OF AUTHORITIES (cont'd)

TABLE OF AUTHORITIES (cont'd)

Rules and Regulations

Other Authorities

TABLE OF AUTHORITIES (cont'd)

Page(s)

TABLE OF AUTHORITIES (cont'd)

PRELIMINARY STATEMENT

Climate change is an existential threat—and it is already upon us. In 2019, the City of New York took a significant step in combatting climate change by enacting Local Law 97, requiring the City's largest buildings to meet annual greenhouse gas emissions limits starting in 2024. Buildings are responsible for about three-quarters of the City's greenhouse gas emissions, with large buildings being the biggest contributors. The steps contemplated by the local law are expected to reduce the City's greenhouse gas emissions, save dozens of lives a year from reduced local air pollution, and create thousands of well-paying green jobs, while also saving many building owners money in the long run.

Plaintiffs, who represent two residential building complexes and a mixed-use building, raised a grab-bag of claims to try to roll back Local Law 97. The Appellate Division, First Department upheld the dismissal of all but one of those claims: a cause of action asserting implied field preemption. That claim contends that a later-enacted state law—the Climate Leadership and Community Protection Act (the "Climate Act")—impliedly occupies the entire field of greenhouse gas emissions regulation in New York State and thus preempts Local Law 97.

This Court should now dismiss that claim too. The State itself has rejected the notion that the Climate Act preempts Local Law 97, emphasizing in this litigation that "the emissions reductions required by Local

Law 97 are complementary to—and play a crucial rule in achieving—the emissions reduction mandates established by the Climate Act." Mem. of Law for the State of New York as Amicus Curiae ("State App. Div. Br.") at 1, *Glen Oaks Vil. Owners, Inc. v. City of N.Y.*, No. 2024-00134, NYSCEF No. 19. It says a great deal that the State itself has emphatically disclaimed preemption and unreservedly endorsed Local Law 97.

The State's position is little surprise, though, because plaintiffs are miles away from the showing required for implied field preemption. While plaintiffs must show that the Climate Act clearly evinces a legislative intent to occupy the field of greenhouse gas emission regulation, all indications are that the Legislature intended the opposite: to encourage complementary local action. That intent is plain from the statutory text, which includes a saving clause affirming the continuing applicability of local laws, along with a host of other provisions that embrace complementary local action in an "all hands on deck" approach to combatting climate change. That intent is also reflected in the broader legislative backdrop, as other state laws have long empowered localities to regulate air quality and building standards, and nothing indicates that the Legislature intended to silently repeal that authority.

As icing on the cake, multiple state actors have recognized outside this litigation that the Climate Act maintains a significant role for complementary local enactments in general and Local Law 97 in particular.

Pointedly, the State's Climate Action Council—the advisory body created by the Climate Act and charged with developing a plan for meeting its goals—has repeatedly embraced Local Law 97 as an important component of the statewide project to reduce greenhouse gas emissions.

Blowing past nearly all of this, the Appellate Division remanded plaintiffs' claim for further proceedings on the theory that one "could" read the Climate Act's saving clause to capture only local laws that do not regulate greenhouse gas emissions. But the Appellate Division had no basis to simply punt on a pure question of statutory interpretation. And the saving clause means what it says: nothing in the Climate Act displaces other applicable laws, including environmental and public health laws like Local Law 97. Plaintiffs' attempt to discern preemptive intent from statutory language by negative implication fails for more than half a dozen reasons—especially when measured against the demanding standard for showing implied field preemption.

QUESTION PRESENTED

Should plaintiffs' implied field preemption claim challenging Local Law 97 be dismissed, when (a) the text and purpose of the Climate Act show that the Legislature intended to preserve opportunities for complementary local action to help combat climate change; (b) the Climate Act was enacted against a longstanding history of local regulation of air quality and building standards; (c) the State has specifically embraced Local Law 97 as key to meeting statewide greenhouse gas emissions benchmarks; and (d) neither the Climate Act's two saving clauses, nor anything else in the statute, even arguably evince preemptive intent?

STATEMENT OF THE CASE

Climate change is a generational challenge. According to the Intergovernmental Panel on Climate Change, significant and rapid worldwide action to reduce greenhouse gas emissions is needed to avoid a cataclysmic future for humanity.[1] In response to this urgent need, the City of New York enacted Local Law 97 of 2019, and the State of New York subsequently enacted its Climate Act.

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[1] *See* IPCC, 2023: Summary for Policymakers. In: *Climate Change 2023: Synthesis Report. Contribution of Working Groups I, II and III to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change*, *available at* https://perma.cc/6HK5-2V6D (captured Aug. 23, 2024).

A. The City's groundbreaking Local Law 97 of 2019, imposing necessary, but achievable, greenhouse gas emissions limits on large buildings

In New York City—an exceptionally dense and public-transit-rich urban environment—the most straightforward way to reduce our climate footprint is by reducing emissions from buildings. Indeed, buildings are responsible for nearly three-quarters of citywide greenhouse gas emissions, through their use fossil fuels for heat and energy.[2]

In 2019, the City Council passed Local Law 97, which tackles the problem of building emissions head-on.[3] The local law requires, for the first time, that the City's largest buildings monitor and reduce their greenhouse gas emissions. The local law also sets a timeline for buildings to make progressively deeper cuts to their emissions, and implementing regulations from the City's Department of Buildings (DOB) establish a goal of zero net emissions from covered buildings by 2050. 1 RCNY § 103-14(c)(3)(vi). In addition to its climate benefits, Local Law

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[2] City of New York, Mayor's Office of Long-term Planning and Sustainability, *One City: Built to Last*, at 3, *available at* https://perma.cc/LGY4-AWCG (captured Feb. 1, 2024).

[3] *See* N.Y.C. Charter § 651 (new section added by Local Law 97); N.Y.C. Admin. Code Title 28 Article 320 (new article added by Local Law 97); N.Y.C. Admin. Code Title 28 Article 321 (same); N.Y.C. Admin. Code §§ 24-802, 24-803 (amended by Local Law 97). The full local law, as enacted in 2019, is available here: https://tinyurl.com/ya6z99dt. Since its enactment, the law has been repeatedly amended, but remains substantially the same.

97 is also expected to improve local air quality and public health—while laying a foundation for approximately 15,000 well-paying green jobs (Record on Appeal ("R") 162-63).

This flagship effort to combat climate change garnered broad support (*see, e.g.*, R146-50), both from environmental groups and from the local real estate industry, which recognized the need for action (*see, e.g.*, R246 (statement from Real Estate Board of New York)). The law's supporters characterized it as "the most ambitious building emissions legislation enacted by any city in the world."[4] And the law was seen not only as a way to cut the City's greenhouse gas emissions, but also as "a worldwide model" for other cities seeking to address their building emissions, which remain a major contributor to global climate change (*see* R208-09, 255). Indeed, as explained below, *see infra* at 32, the State of New York has held up Local Law 97 as a model for others to emulate so that the State can meet its climate change goals.

Focusing on buildings with the greatest greenhouse gas emissions (*see, e.g.*, R154-55, 205), Local Law 97 applies to roughly 50,000

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[4] Urban Green Council, *What is Local Law 97?*, *available at* https://perma.cc/SKR7-JHCZ (captured June 11, 2024).

buildings (R154).[5] These buildings—a small fraction of the City's one million-plus buildings (R631)—are collectively responsible for roughly half of the City's building emissions (R205).[6]

Local Law 97 aims to decrease greenhouse gas emissions in covered buildings by at least 40% by 2030, *see* N.Y.C. Charter § 651(a)(3), and eventually reduce such emissions to net zero, *see* 1 RCNY § 103-14(c)(3)(vi). To that end, the local law sets annual emissions limits for covered buildings, with the first compliance period starting in January 2024. N.Y.C. Admin. Code § 28-320.3.1. The law specifies emissions limits through 2034—that is, 15 years from its passage—and provides that future annual limits are to be established via DOB rulemaking. *Id.* §§ 28-320.3.2, 28-320.3.4, 28-320.3.5.

A covered building's emission limits are simple to calculate by multiplying its gross floor area by its designated emissions intensity limit, which depends on the occupancy group (such as "R-2," reflecting

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[5] *See also* Urban Green Council, *What is Local Law 97?*, *available at* https://perma.cc/SKR7-JHCZ. The City maintains a list identifying covered properties; the list contains about 28,000 properties, with some properties containing multiple buildings. *See* NYC Buildings, LL97 Greenhouse Gas Emissions Reduction, *available at* https://perma.cc/96ZM-DCBG (captured Sept. 26, 2024); *see also* NYC Buildings, "LL97 All Properties CBL (Excel)," *available at* https://perma.cc/3SZF-7VZR (captured Sept. 26, 2024).

[6] Local Law 97 covers buildings that are over 25,000 square feet in floor area and certain groups of buildings that collectively exceed 50,000 square feet, subject to exceptions for public housing, rent regulated buildings, houses of worship, and the like. N.Y.C. Admin. Code § 28-320.1 (defining "covered building").

residential buildings with more than two dwelling units). *See id.* § 28-320.3.1; *see also* N.Y.C. Building Code Chapter 3. The local law also contains a straightforward path for calculating a building's actual emissions, based on the electricity, natural gas, fuel oil, and steam consumed by the building. N.Y.C. Admin. Code § 28-320.3.1.1. Building emissions are measured as tons of carbon dioxide equivalent. *Id.* § 28-320.1 (defining "building emissions").

Local Law 97 provides building owners substantial flexibility in *how* they satisfy emissions reduction requirements. Owners may reduce emissions through retrofits to their buildings, switching to greener electrical and heating sources, reducing energy use through operational changes, or by some combination of those methods; owners can also buy greenhouse gas offsets or renewable energy credits, or use clean distributed energy resources, to help achieve emissions limits. *See, e.g.*, *id.* §§ 28-320.3.6, 28-320.3.6.1, 28-320.3.6.2, 28-320.3.6.3.

With respect to retrofits—such as improved insulation, installation of heat pumps, or energy-efficient lighting—the local law enables owners to "choose the upgrades that best suit their budgets and their buildings" (R162). The legislative record reflects that retrofits can yield substantial savings (*see, e.g.*, R200-01). For example, an upfront investment of $11 million in such steps by New York University has yielded the institution $15 million in recurring savings each year (R216-17).

Local Law 97 also requires City regulators to assist building owners in achieving compliance. N.Y.C. Admin. Code § 28-320.4. In particular, the City is obligated to help owners who lack "adequate financial resources or technical expertise." *Id.* The City has launched a hub, known as the NYC Accelerator, to provide free one-on-one assistance to building owners on planning decarbonization projects, seeking low-interest financing, and applying for available incentive programs.[7]

The local law also allows building owners significant relief in various circumstances. For instance, the compliance deadlines are delayed for certain income-restricted and rent-regulated buildings, N.Y.C. Admin. Code §§ 28-320.3.9, 28-320.3.10.1, and hospitals and similar health care buildings may claim an adjustment to their emissions limits through 2034, *id.* § 28-320.9. Owners may also seek individualized relief from DOB; the agency may adjust emissions limits for preexisting buildings when necessary capital improvements are not feasible due to building or site constraints, or legal restraints such as landmarks laws, and the owner cannot otherwise comply. *Id.* § 28-320.7.

Moreover, if a building's actual emissions in 2018 were at least 40% higher than the 2024 limits, DOB may adjust the building's limits for the first compliance period, upon a showing of special circumstances

[7] The website is available at: https://accelerator.nyc/ (last visited Sept. 26, 2024).

and the presentation of a compliance plan, among other things. *Id.* § 28-320.8. Such an adjustment may even be extended through 2035, where the building submits a plan to achieve deeper cuts. *Id.* § 28-320.8.1.1.

Nonetheless, most covered buildings will not need assistance to achieve compliance in the near term: about 89% of covered properties were in compliance with the 2024 limits before the compliance period even began (R646).[8] And as of 2023, about 37% of covered properties were already in compliance with the 2030 limits, six years before the deadline.[9]

For those buildings that do exceed annual emissions limits, DOB may reach regulatory agreements with the owners where they commit to a plan for reaching compliance in exchange for DOB staying its hand on enforcement. 1 RCNY § 103-14(j)(3). Otherwise, the owners are liable for a civil penalty. The maximum penalty is $268 per ton of carbon-dioxide equivalent in excess emissions. N.Y.C. Admin. Code § 28-320.6. The actual penalty may be lower than the maximum, depending on mitigating factors, including unforeseeable circumstances and the owner's

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[8] City of New York, *Getting 97 Done: A Plan to Mobilize New York City's Large Buildings to Fight Climate Change* (Sept. 2023), *available at* https://perma.cc/QGF5-5EMZ, at 2, 12.

[9] *Id.*

good faith compliance efforts, history of compliance, and access to financial resources. *Id.* § 28-320.6.1; *see also* 1 RCNY § 103-14(i).

B. The State's Climate Act, embracing an "all hands on deck" approach to combating climate change

After Local Law 97's widely publicized enactment,[10] the State enacted the Climate Act. Among other things, the Act amends the Environmental Conservation Law (ECL) to add a new Article 75 entitled "Climate Change."[11]

Like Local Law 97, the Climate Act recognizes that climate change is a major, pressing problem of our time. The statute notes that climate change is already "adversely affecting [the] economic well-being, public health, natural resources, and the environment of New York." L. 2019, ch. 106, § 1(1). It further recognizes that "substantial emissions reductions are necessary to avoid the most severe impacts of climate change." *Id.* § 1(5).

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[10] *See, e.g.*, William Neuman, "Big Buildings Hurt the Climate. New York City Hopes to Change That," *New York Times* (Apr. 17, 2019), *available at* https://www.nytimes.com/2019/04/17/nyregion/nyc-energy-laws.html; Tom DiChristopher, "New York City embraces pillar of AOC's Green New Deal, passing building emissions bill," CNBC (Apr. 18, 2019), *available at* https://perma.cc/72K8-HESN; Camila Domonoske, "To Fight Climate Change, New York City Will Push Skyscrapers to Slash Emissions," NPR (Apr. 23, 2019), *available at* https://perma.cc/A6CP-S4EC.

[11] The full text of the enacted bill is available at https://perma.cc/7RDC-VM4U (captured Mar. 10, 2024).

At the heart of the Climate Act are targets for statewide greenhouse gas emissions: a reduction of 100% from 1990 levels by 2050, with an interim target of 40% by 2030. L. 2019, ch. 106, § 1(4). To that end, the statute required the State Department of Environmental Protection ("DEC") to establish statewide emission limits for 2030 and 2050 in units of carbon dioxide equivalent, within one year of the effective date of the Climate Act—that is, by January 1, 2021. ECL § 75-0107; L. 2019, ch. 106, § 14 (referencing N.Y. State Senate Bill 2019-S2385); *see also* 6 NYCRR § 496.4 (statewide emission limits).

By the following year, or January 1, 2022, a newly established advisory board known as the New York State Climate Action Council was charged with producing a scoping plan outlining potential means of reducing statewide greenhouse gas emissions. ECL § 75-0103(11). The Council, co-chaired by DEC's Commissioner and the President of the New York State Energy Research and Development Authority (NYSERDA), was responsible for guiding regulators and others, by issuing recommendations on regulations and other measures to reduce greenhouse gas emissions. ECL § 75-0103(4), (13). The Council's scoping plan was intended to jump-start the State's efforts in this arena. Unlike Local Law 97, the Climate Act imposes no regulatory requirements

on private actors; instead, it provides a framework for, among other things, the development of future state regulations and other measures.

Following the statute's timeline, by January 1, 2024, DEC was to "promulgate rules and regulations to ensure compliance with the statewide emissions reduction limits," *id.* § 75-0109(1), though none have yet been adopted. These regulations are required to "[r]eflect, in substantial part, the findings of the scoping plan" prepared by the Climate Action Council. *Id.* § 75-0109(2)(c).

But the Climate Act recognizes that the battle against climate change will require more than just DEC's efforts. It contemplates complementary action from a host of state entities. Section 8 broadly authorizes state agencies and authorities—listing several before including a catch-all for "any other state agency"—to also "promulgate regulations to contribute to achieving" statewide reductions in "greenhouse gas emissions." L. 2019, ch. 106, § 8. That provision specifies that such regulations "shall not limit" DEC's "authority to regulate and control greenhouse gas emissions," *id.*—reflecting the Legislature's vision that regulatory authority would coexist across the spectrum of state agencies and authorities.

More broadly, the statute requires "[a]ll state agencies" to "assess and implement strategies to reduce their greenhouse gas emissions." L.

2019, ch. 106, § 7(1). Along the same lines, "all state agencies, offices, authorities, and divisions" are required to consider the impact on greenhouse gas emissions "[i]n considering and issuing permits, licenses, and other administrative approvals and decisions, including … grants, loans, and contracts." *Id.* § 7(2). If such decisions will impede the State's attainment of its emissions targets, state entities are required to issue "a detailed statement of justification" and identify alternatives or mitigation measures. *Id.*

Beyond embracing a wide range of action from an array of state entities, the Climate Act looks to contributions from other jurisdictions as well. The legislative findings recognize that "[t]he severity of current climate change … will be affected by the actions undertaken by … other jurisdictions to reduce greenhouse gas emissions," *id.* § 1(2)(a), and they "encourage other jurisdictions to implement complementary greenhouse gas reduction strategies," *id.* § 1(3). Indeed, when the bill was under debate before its enactment, bill sponsors explicitly recognized "[i]t's all hands on deck" to fight climate change because "we are in moment of epic crisis for the planet," N.Y. Legislative Service, *Legislative History, 2019 Chapter 106* (Tr. of June 18, 2019 Regular Session) at 6415, 6413, and that actions that are "complementary to this" bill should still go forward, *id.* at 6422-23.

Moreover, the Climate Act confirms, again and again, that the Legislature intended state regulators to learn from the ongoing efforts of localities and other jurisdictions, and for the State's measures to dovetail with such efforts. For example, DEC's regulations on greenhouse gas emissions reductions must be developed in consultation with "municipal corporations … and other stakeholders." ECL § 75-0109(1). In addition, the statute requires the Climate Action Council to convene a subcommittee on local government, *id.* § 75-0103(7), and to "[c]onsider all relevant information pertaining to greenhouse gas emissions reductions programs in … localities" and other jurisdictions, *id.* § 75-0103(14)(a).

The Climate Act also reflects the Legislature's expectation that localities would have a role in requiring projects that offset greenhouse gas emissions—such as carbon sequestration, reforestation, and waste management—which is just another way of regulating greenhouse gas emissions. In fact, DEC is prohibited from approving an offset project that is otherwise "required pursuant to any local, state or federal law, regulation, or administrative … order," *id.* § 75-0109(4)(i)(i), preventing regulated entities from claiming "double credit" for a single greenhouse gas emissions offset project.

The Climate Act does not have a preemption clause. To the contrary, consistent with its "all hands on deck" approach, the statute

includes an express saving clause that embraces, among other things, complementary local laws and regulations. Namely, section 11 specifies that "[n]othing in this act shall relieve any person, entity, or public agency of compliance with other applicable federal, state, or local laws or regulations, including state air and water quality requirements, and other requirements for protecting public health or the environment." L. 2019, ch. 106, § 11. The law also specifies that "[n]othing in this act shall limit the existing authority of a state entity to adopt and implement greenhouse gas emissions reduction measures." *Id.* § 10. These provisions, along with section 8 discussed above, all swim in the same direction: welcoming complementary action on climate change at all levels.

C. State actors' explicit embrace of Local Law 97 as a complementary local action to fight climate change

Given the Climate Act's language and purpose, it is no surprise that the Climate Action Council's final scoping plan—the blueprint for efforts to achieve the Act's statewide emissions targets—repeatedly underscores the need for local action to address greenhouse gas emissions. Climate Action Council, *Scoping Plan: Full Report* ("*Scoping Plan*") (Dec. 2022), *available at* https://perma.cc/R6WX-JT4W. But the plan goes even further: it explicitly endorses the City's Local Law 97 as a key contributor to achieving statewide emissions reductions.

Namely, the plan provides that any future statewide "energy efficiency performance standard" for buildings should "align with New York City's Local Law 97 … where appropriate." *Id.* at 189. Illustrating the expectation that Local Law 97 would be implemented in tandem with the State's efforts, the scoping plan recommends that state agencies make data available "to facilitate cost-effective implementation of … Local Law 97." *Id.* at 251.

More broadly, the plan unreservedly endorses local climate efforts. Dedicating an entire chapter to the subject, *id.* at 396-403, the plan refers to local governments as being "on the frontlines of addressing climate change" and recognizes that local action is "required." *Id.* at 426 (cleaned up).[12] Furthermore, the plan envisions that "[l]ocal governments in every region of the State—small, large, urban, rural, and suburban" will "contribute directly to meeting the requirements and goals" of the Climate Act. *Id.* at 396. And the plan recognizes that "[p]artnership with local governments is a keystone of the State's clean energy, adaptation and resilience, and greenhouse gas (GHG) emissions mitigation strategies." *Id.*

To that end, the plan encourages localities to "enact codes, develop projects, adopt policies, and regulate land use" to "move toward a more

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[12] This brief uses "cleaned up" to indicate that internal quotation marks, alterations, and citations have been omitted from quotations.

energy-efficient future." *Id.* (cleaned up); *see also id.* at 18, 399. As the plan explains:

> Municipalities and other local government entities have an important role to play in meeting the Climate Act's requirements and goals. These entities are well positioned to have a far-reaching impact on community action because of their authority to enact codes and regulate land use and their leadership at the local level.

Id. at 18.

In particular, the plan recognizes that localities can play a vital role in developing and implementing laws, regulations, and measures appropriate for their communities, since "[l]ocal leaders are the most well-equipped to understand community needs" and thus "are uniquely positioned to take action that will reduce GHG emissions." *Id.* at 426. Time and again, the plan provides examples of the concrete steps that localities may take to effectively regulate in this realm, such as modifying energy and building codes. *See, e.g.*, *id.* at 185, 187, 352-53, 397. The plan recommends that the State continue to incentivize municipal greenhouse gas emissions reduction targets, *id.* at 397, and allocate additional funding to support local code enforcement, *id.* at 187. As required by the Climate Act, the Climate Action Council's scoping plan was submitted to the State Legislature and the Governor. ECL § 75-0103(12)(c).

The Climate Action Council is far from the only state entity to embrace Local Law 97. As of the time of this brief's filing, the only regulations that DEC has adopted under the statute set emission limits for 2030 and 2050 for state agencies, offices, and the like—not private actors. 6 NYCRR §§ 496.2, 496.4. But even as to potential future regulatory action, DEC has made clear that it is relying on emissions reductions from Local Law 97 to meet the Climate Act's targets.[13] And that makes sense: under the Climate Act, any DEC regulations must "[r]eflect, in substantial part, the findings of the scoping plan," ECL § 75-0109(2)(c), and as discussed above, the scoping plan is crystal clear that local action on greenhouse gas emissions—including, in particular, Local Law 97—is essential to the State's goals.

The list goes on. NYSERDA encourages compliance with Local Law 97 by providing detailed online advice to building owners.[14] And

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[13] DEC & NYSERDA, New York Cap-and-Invest Pre-Proposal Stakeholder Outreach, Preliminary Scenario Analyses, at 19 (Jan. 2024), *available at* https://perma.cc/U4K4-RCD4.

[14] NYSERDA, "Planning Ahead for Local Law 97," *available at* https://perma.cc/64H5-DLL5 (captured Mar. 2, 2024).

the Public Service Commission has referred to Local Law 97 as "integral to the State's ability to meet [Climate Act] mandates."[15]

D. Plaintiffs' challenge to Local Law 97 and the Appellate Division's decision

In May 2022, plaintiffs brought this lawsuit challenging Local Law 97 on various grounds (R33-94). Their suit sought both a permanent injunction and claim-specific declarations that the local law was preempted, was facially unconstitutional under the federal and state constitutions' due process clauses, and constituted an improper tax (R93). Supreme Court, New York County, granted the City's motion to dismiss the complaint (R5-32).

The Appellate Division affirmed the dismissal of most of plaintiffs' claims, but reinstated one: plaintiffs' implied field preemption claim (R881-84). As plaintiffs have not sought to cross-appeal to this Court, that claim is the only one that remains at issue. *See 511 W. 232nd Owners Corp. v. Jennifer Realty Co.*, 98 N.Y.2d 144, 151 n.3 (2002).

The Appellate Division's decision addresses just one of several grounds that the City raised against plaintiffs' implied preemption

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[15] New York Public Service Commission, Order Adopting Terms of a Joint Proposal at 20, *Proceeding on Motion of the Commission as to the Rates, Charges, Rules and Regulations of Consolidated Edison Company of New York, Inc. for Steam Service*, NY PSC Case No. 22-S-0659 (Nov. 16, 2023), *available at* https://tinyurl.com/38rvewwp (item 18).

claim. Even as to the one ground the decision does address, it is non-committal, even though the matter presents a question of statutory interpretation. The decision merely opines that when two saving clauses in the Climate Act, L. 2019, ch. 106, §§ 10, 11 are "read together," then "one could conclude" that the core saving clause does not apply to local "greenhouse gas emissions reduction measures" (R882 (cleaned up)).

The City moved for leave to appeal, supported by several amici, including the State. *Glen Oaks Vil. Owners, Inc. v. City of N.Y.*, No. 2024-00134, NYSCEF Nos. 13, 15, 19. The Appellate Division subsequently granted leave to appeal (R878-79).

JURISDICTIONAL STATEMENT

This Court has jurisdiction to hear this appeal under CPLR 5602(b)(1) because the Appellate Division granted the City leave to appeal, and certified the following question of law, pursuant to CPLR 5713, for this Court's review: "Was the order of [the Appellate Division], which modified the order of the Supreme Court to the extent of denying defendants' motion to dismiss as to plaintiffs' first cause of action, and otherwise affirmed the order, properly made" (R878-79)?

ARGUMENT

PLAINTIFFS' IMPLIED PREEMPTION CLAIM SHOULD BE DISMISSED

An implied field preemption claim requires a plaintiff to show that the Legislature "clearly evinced" its intention to occupy a field to the exclusion of all others. *Jancyn Mfg. Corp. v. County of Suffolk*, 71 N.Y.2d 91, 97 (1987). Here, the Legislature did nothing of the sort. Rather, the Climate Act embraces an "all hands on deck" approach to climate change regulation, welcoming contributions from all levels of government, including the local level. Because the Climate Act evinces *no* preemptive intent—much less clear preemptive intent—plaintiffs' implied preemption claim should be dismissed. *See, e.g.*, *Garcia v. N.Y.C. Dep't of Health & Mental Hygiene*, 31 N.Y.3d 601, 607, 621 (2018) (granting judgment to respondents, who moved to dismiss preemption claim).

Notably, the State agrees with the City that plaintiffs' preemption claim has no basis. The State has confirmed in this litigation that the Legislature "intended to embrace local efforts like Local Law 97 as an essential piece of the puzzle" in "reaching the Climate Act's ambitious emissions reduction mandates." State App. Div. Br. 9. In fact, the State has said that Local Law 97 in particular "is critical to the greenhouse gas emissions reduction mandates embodied in the Climate Act." *Id.* at 3. Put simply, "the emissions reductions required by Local Law 97 are

complementary to—and play a crucial role in achieving—the emissions reduction mandates established by the Climate Act." *Id.* at 1.

A. The Climate Act reflects an "all hands on deck" approach to combating climate change that embraces action at all levels of government.

The Climate Act's intent is clear, and it is plainly in favor of preserving room for local action combatting climate change. The statutory text reflects the Legislature's embrace of complementary local action. That intention is only more readily apparent when considered against the longstanding state recognition of local authority to regulate air pollution and buildings, as well as the views of the Climate Action Council, other state agencies, and state lawmakers, all of which have affirmed the role of localities in achieving the State's emissions reduction targets.

1. The Climate Act's text and purpose bely any claim of clear preemptive intent.

The "text of a statutory provision is the clearest indicator of legislative intent." *Wallach v. Town of Dryden*, 23 N.Y.3d 728, 746 (2014) (cleaned up); *accord DaimlerChrysler Corp. v. Spitzer*, 7 N.Y.3d 653, 660 (2006). Yet the Appellate Division failed to confront most of the relevant provisions of the Climate Act—and refused to interpret those parts of the statute that it did address, instead stopping at saying what they "could" mean (R882). This Court should resolve this purely legal issue and dismiss plaintiffs' preemption claim. *See, e.g.*, *Robbins v. County of*

Broome, 87 N.Y.2d 831, 834 (1995) (recognizing that "issue of statutory interpretation should … have been decided by the court as a matter of law"). In at least five ways, the Climate Act's text and purpose show, beyond doubt, that the Legislature intended to foster and encourage complementary local action on climate change—not to thwart such action.

First, the Climate Act includes an express saving clause. Section 11 specifies that "[n]othing in this act shall relieve any person, entity, or public agency of compliance with other applicable federal, state, or local laws or regulations, including state air and water quality requirements, and other requirements for protecting public health or the environment." L. 2019, ch. 106, § 11. This language is unequivocal: nothing in "this act"—itself a law—displaces "other applicable … laws or regulations," whether their origin be "federal, state, or local." Because Local Law 97 is another applicable law, it is protected by section 11—end of story.

That conclusion is only confirmed when one looks to the illustrative categories of laws that are listed after the term "including" in section 11—specifically, "requirements for protecting public health or the environment." Local Law 97 embodies both kinds of requirements: by dramatically reducing greenhouse gas emissions, the law will meaningfully improve public health (*see, e.g.*, R162 (noting the law is expected to prevent 90 hospitalizations and 35 deaths every year)), and significantly

protect the environment (*see, e.g.*, R224 (referring to the law as "the most significant piece of environment[al] policy taken up by the City of New York in many years")). So whether one considers section 11's umbrella language ("other applicable … laws or regulations") or its illustrative language ("requirements for protecting public health or the environment"), the answer is the same: the validity of Local Law 97 is unaffected by the Climate Act.

Second, the Climate Act's legislative findings, emphasizing the need for rapid emissions reductions to combat climate change, also show that the Legislature had no desire to preempt local laws or regulations such as Local Law 97. *See* L. 2019, ch. 106, § 1(2)(a). Greenhouse gas emissions from New York City constitute a substantial portion statewide emissions, with large buildings in the City accounting for 6% of statewide emissions.[16] That means that compliance with Local Law 97's target of net zero emissions from covered buildings by 2050, *see* 1 RCNY § 103-14(c)(3)(vi), would by itself significantly help bring the State towards its 2050 statewide emission goals. *Cf. Vatore v. Commissioner of Consumer Affairs*, 83 N.Y.2d 645, 650 (1994) (finding no

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[16] City of New York, *Getting 97 Done: A Plan to Mobilize New York City's Large Buildings to Fight Climate Change* (Sept. 2023), *available at* https://perma.cc/QGF5-5EMZ, at 11.

preemption "where … the local law would only further the State's policy interests").

On the other hand, if the Climate Act were somehow meant to preempt local action, then Local Law 97 and similar efforts would *not* be able to assist the State in meeting its climate goals. And, if the State really did intend to wholly occupy the field of greenhouse gas emissions reduction regulations, then under the very timeline set out in the Climate Act itself, there would be *no* such regulations, for *years*. After all, first the Council needed to issue a scoping plan, DEC needed to promulgate statewide limits, DEC needed to consult with stakeholders, and only then could DEC start to issue any emissions reduction regulations. Yet as the State has observed, nothing in the Climate Act suggests that the Legislature intended to take the self-defeating step of preventing localities from bringing about "the very greenhouse gas emissions reduction measures that are the central goal of the statute." State App. Div. Br. 11.

Third, multiple provisions of the Climate Act reflect the Legislature's understanding that significant reductions in greenhouse gas emissions are necessary at every level of government. For starters, the legislative findings highlight the need for "complementary greenhouse gas reduction strategies" by "other jurisdictions." L. 2019, ch. 106, § 1(3). And it is no coincidence that the word "Leadership" is found in the Act's

full title. The State intended to "exercise a global leadership role" with respect to other jurisdictions, *id.* § 1(12) (cleaned up); the statute is therefore a clarion call for complementary action from all quarters.

But there's more: the Climate Act repeatedly confirms the State's intention to partner with localities in a shared effort to combat climate change, rather than to bar localities from addressing this pressing problem. *See Garcia*, 31 N.Y.3d at 620 (finding no preemption where "relevant statutes reflect the state legislature's recognition that municipalities play a significant role"). For example, the statute requires the Climate Action Council to convene a subcommittee on local government, ECL § 75-0103(7), to "[c]onsider all relevant information pertaining to greenhouse gas emissions reductions programs in … localities," *id.* § 75-0103(14)(a), and to "identify existing climate change mitigation … efforts at the … local [and other] levels" with the aim of "improv[ing] the state's efforts," *id.* § 75-0103(16).

Similarly, the Legislature specified that when DEC develops regulations to reduce greenhouse gas emissions, it must do so in consultation with "municipal corporations," *id.* § 75-0109(1), confirming that the statute is built on the foundation of a partnership among different levels of government. And by prohibiting DEC from approving any "greenhouse gas emission offset project" if it is independently "required pursuant to any local, state, or federal law [or] regulation," *id.*

§ 75-0109(4)(i)(i), the Legislature confirmed that localities have a role in requiring projects that offset greenhouse gas emissions—itself a form of regulating greenhouse gas emissions.

Fourth, it is also notable what the Climate Act does *not* include. The statute does not impose any "direct controls at the local level by, for example, creating local … boards with the power to" regulate greenhouse gas emissions, "or issuing detailed instructions to localities" on such matters. *Jancyn Mfg. Corp.,* 71 N.Y.2d at 99. There is not a single substantive provision in the statute that limits localities' authority to regulate in the field of greenhouse gas emissions in any way, let alone a provision that clearly evinces a legislative intent to displace localities entirely.

Fifth, continuing with the theme of what is omitted from the statute, it is "significant" that the Climate Act includes no express statement of preemption, especially considering that it was "enacted shortly after" the well-known passage of Local Law 97. *Jancyn Mfg. Corp.*, 71 N.Y.2d at 99. After all, the Legislature knows how to expressly preempt local laws when it wants to, including in environmental regulation. *See, e.g.*, ECL §§ 23-0303(2) (regulation of oil, gas, and solution mining industries), 27-1107 (siting of industrial hazardous waste facilities), 27-2619 (regulation of electronic waste recycling), 27-2809 (regulation of plastic carryout bags). Rather than doing so here, the Legislature specified that

other applicable laws or regulations—federal, state, or local—would be unaffected by the statute. L. 2019, ch. 106, § 11.

In sum, "giving effect to all the language employed by the particular legislation" shows that the Climate Act does not evince any preemptive intent. *Rangolan v. County of Nassau*, 96 N.Y.2d 42, 48 (2001) (cleaned up); *see also DaimlerChrysler Corp.*, 7 N.Y.3d at 662 (adopting interpretation that "gives meaning to all of the statutory language in the context of the statute as a whole"). To the contrary, the statute shows that the Legislature expected that local action would complement state action. This Court could stop here and dismiss plaintiffs' implied field preemption claim. *Cf. Hertz Corp. v. City of N.Y.*, 80 N.Y.2d 565, 568-70 (1992) (rejecting preemption claim based on statutory language alone); *Eric M. Berman, P.C. v. City of N.Y.*, 25 N.Y.3d 684, 691 (2015) (concluding, based on review of state and local laws, that the "regulatory schemes can be seen as complementary to, and compatible with, one another").

2. The Climate Act was enacted against a backdrop of longstanding local authority to regulate air pollution and local buildings.

The case against field preemption only deepens upon considering the legal backdrop to the Climate Act's passage. When the Climate Act was enacted, longstanding provisions of state law recognized local authority to regulate in the areas of air pollution and local building

standards. This context of well-established local regulatory authority further undercuts plaintiffs' claim that the statute somehow impliedly evinces preemptive intent. *Cf. Wallach*, 23 N.Y.3d at 743 (emphasizing courts "do not lightly presume preemption where the preeminent power of a locality to regulate land use is at stake").

To start, the ECL as a whole has long preserved local authority to regulate air pollution. As this Court recognized over half a century ago in upholding the City's regulation of boilers and incinerators in *Oriental Boulevard Company v. Heller*, the ECL "explicitly recognize[s] that local units of government are intended to function in the air pollution area." 27 N.Y.2d 212, 221 (1970) (citing the provisions now codified as ECL §§ 1-0101(2), 3-0301(1)(u)). On top of that, the State's Air Pollution Control Act, added to the ECL after *Heller*, reaffirms that municipalities retain the authority to regulate air pollution. *See* ECL § 19-0709; *see also Northeast Mines, Inc. v. State Dep't of Envt'l Conserv.*, 113 A.D.2d 62, 64 (3d Dep't 1985) (noting that this provision shows that "stricter local laws are expressly *not* to be preempted by State legislation" in the area of "air pollution controls"). Last, the State's Energy Law specifies that "[n]othing in this article shall be construed as abrogating or impairing the power of any municipality … to enforce the provisions of any local building regulations … provided that such local building

regulations are not inconsistent with" state building and construction codes. N.Y. Energy L. § 11-109(1).

Plaintiffs' preemption theory essentially rests on the premise that the Legislature has implicitly narrowed preexisting local regulatory authority in significant ways, in effect repealing these provisions to some degree. But repeal by implication is "heavily disfavored," and requires a party to show that the statutes are plainly repugnant to one another. *Ball v. State*, 41 N.Y.2d 617, 622 (1977); *see also Cimo v. State*, 306 N.Y. 143, 148-49 (1953). Plaintiffs have never tried to make such a showing. The fact that localities have such longstanding authority to regulate in these areas shows how far-fetched plaintiffs' claim is.

3. Multiple state actors have embraced complementary local action on climate change, including Local Law 97 specifically.

In addition to the statutory text, purpose, and context, the views of state actors only further highlight the State's intention to collaborate with, not preempt, localities. The State's views here are not ambiguous: the State has made clear in this litigation that "the Climate Act does not preempt Local Law 97." State App. Div. Br. 9 (cleaned up). But even aside from that, a variety of state actors have independently expressed their views as to the importance of Local Law 97 in the State's efforts to meet its Climate Act goals.

First, the Climate Action Council—the engine of the statutory scheme—has repeatedly emphasized the importance of complementary municipal regulation, referring to local action as a "keystone" of the State's climate change strategies. *Scoping Plan* 396. Indeed, the Council envisioned that "[l]ocal governments in every region of the State—small, large, urban, rural, and suburban," will "contribute directly to meeting the requirements and goals" of the Climate Act. *Id.*

As the Council's scoping plan explains, "[l]ocal governments are on the frontlines of addressing climate change," *id.* at 426, and are "are well positioned to have a far-reaching impact" on reducing greenhouse gas emissions "because of their authority to enact codes and regulate land use and their leadership at the local level," *id.* at 18. The plan also notes that localities can appropriately tailor regulatory action to their communities, because "[l]ocal leaders are the most well equipped to understand community needs and are uniquely positioned to take action that will reduce GHG emissions." *Id.* at 426. Recognizing the importance of local regulatory efforts, the Council recommended that the State continue to incentivize municipal greenhouse gas reduction efforts, *id.* at 397, and allocate more state funding to localities to fund local code enforcement, *id.* at 187.

What is more, the Climate Action Council has specifically held up Local Law 97 as a model. Specifically, the Council's scoping plan

recommends that the State help "facilitate cost-effective implementation" of Local Law 97—a sure sign that the Council believes that the local law can and should be implemented alongside the Climate Act. *Id.* at 251. And the scoping plan recommends that the State ultimately adopt a statewide energy efficiency standard for large buildings that "align[s] with New York City's Local Law 97." *Id.* at 189.

Certainly, the Climate Action Council believes that no preemption was intended. *See Jancyn Mfg. Corp.*, 71 N.Y.2d at 99 (recognizing that "it is significant that the [implementing state agency] believed that the statute was not intended to preempt local legislation"). And the Council's views should carry particular weight here, where the statute required the scoping plan to be submitted to the Legislature and the Governor, ECL § 75-0103(12)(c), and after that happened, lawmakers never gave any indication that they disagreed with the Council's vision of parallel local action as essential to addressing the grave threat of climate change.

Second, other state agencies share the Climate Action Council's view that Local Law 97 is an important component of the State's efforts to meet its climate goals. DEC is relying on emissions reductions from Local Law 97 to meet the Climate Act's targets.[17] NYSERDA advises

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[17] *See supra* n.13.

building owners on how to achieve compliance with Local Law 97.[18] And the Public Service Commission has stated that Local Law 97 is "integral to the State's ability to meet [Climate Act] mandates."[19]

Third, state lawmakers have also recognized that climate change requires an "all hands on deck" approach. Indeed, one bill sponsor used that exact term when debating the statute before its enactment. N.Y. Legislative Service, *Legislative History, 2019 Chapter 106* (Tr. of June 18, 2019 Regular Session) at 6413, 6515 (statement of Senator Krueger that "we are in a crisis," and that "[i]t's all hands on deck" to fight climate change). Similarly, another sponsor recognized that the Climate Act left room for additional legislative and regulatory "complementary" action "in order to make it easier" to achieve the Climate Act's emissions reduction goals. *Id.* at 6422-23. Certainly, nothing in the Act's legislative history evinces any preemptive intent. *Cf. Police Benevolent Ass'n of the City of N.Y., Inc. v. City of N.Y.*, 40 N.Y.3d 417, 425 (2023) (examining statutory text and legislative history in rejecting implied preemption claim).

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[18] *See supra* n.14.

[19] *See supra* n.15.

B. Plaintiffs' deeply misguided arguments do not require a different result.

Against all this, plaintiffs offer three basic arguments in support of their implied field preemption claim. They lead nowhere.

1. Plaintiffs' interpretation of the Climate Act's core saving clause is flawed for more than half a dozen reasons.

In reversing the dismissal of plaintiffs' implied field preemption claim, the Appellate Division pointed only to their argument based on sections 10 and 11 of the Climate Act (R882). Section 10 speaks to the preexisting authority of state entities, specifying that "[n]othing in this act shall limit the existing authority of a state entity to adopt and implement greenhouse gas emissions reduction measures." L. 2019, ch. 106, § 10. Section 11 speaks to a different subject: it specifies that nothing in the statute relieves persons from complying with "other applicable . . . laws or regulations." *Id*. § 11.

The Appellate Division suggested that if these two clauses are "read together," then "one could conclude" that the saving clause in section 11 excludes "greenhouse gas emissions reduction measures" from its scope (R882 (cleaned up)). That statement traces directly to a theory pressed by plaintiffs, which goes something like this: (1) the term "other" in section 11 should be understood as a reference to a phrase that appears in section 10—"greenhouse gas emissions reduction

measures"; (2) so when section 11 refers to "other applicable . . . laws or regulations," it is really saying that nothing in the Climate Act relieves persons from complying with laws or regulations *other than* greenhouse gas emissions reduction laws or regulations; (3) by negative implication, section 11 in fact relieves persons from complying with local greenhouse gas emissions reduction laws or regulations.

To describe the theory is to refute it. Transplanting a phrase from one provision to another and relying on negative implication to conjure an inference is a far cry from a "clearly evinced" preemptive intent. *Cf. Jancyn Mfg. Corp.,* 71 N.Y.2d at 97. In any case, plaintiffs' interpretation is simply incorrect. The only natural reading of sections 10 and 11 is that they convey the Legislature's "all hands on deck" vision of climate change regulation, where all state entities, as well as local and federal authorities, have a role to play. Plaintiffs' contrary interpretation is implausible, for a number of reasons.

First, section 11 begins with the emphatic "[n]othing in this act" to convey that literally nothing in the Climate Act—including section 10—provides relief from "other applicable federal, state, or local laws or regulations." L. 2019, ch. 106, § 11. Local Law 97 is such an "other applicable" law. Thus, reading section 11 as expressing a preemptive intent flies in the face of its plain language. *Cf. DaimlerChrysler Corp.*, 7

N.Y.3d at 660 ("courts should construe unambiguous [statutory] language to give effect to its plain meaning").

Second, plaintiffs' interpretation founders against the words of the statute in other ways, too. Their argument is that the Legislature intended to "preserve for itself the authority to regulate greenhouse-gas emissions statewide, while ensuring that the [Climate Act] is not read to displace other local requirements." Reply Brief of Plaintiffs-Appellants ("Pls.' App. Div. Reply Br."), *Glen Oaks Vil. Owners, Inc. v. City of N.Y.*, No. 2024-00134, NYSCEF No. 10, at 6-7 (cleaned up). That theory would suggest that section 11 is targeted at local action alone. But it is not. The section's text speaks broadly about the continued need to comply with "other applicable *federal, state, or local* laws or regulations," L. 2019, ch. 106, § 11 (emphasis added); it brooks no distinction between those three levels of legal authority. And plaintiffs' interpretation simply does not compute at all when applied to two items in the trio.

Take section 11's reference to "federal" laws. If, as plaintiffs suggest, sections 10 and 11 should be read together to create a negative implication that the latter excludes "greenhouse gas emissions reduction measures," *id.* § 10, then that logic would apply to federal laws targeting greenhouse gases as well. But the New York Legislature cannot preempt the enforceability of any law—including greenhouse gas laws—adopted by the federal government. Nor would the Legislature plausibly want to

preempt federal greenhouse gas laws, when the contributors to climate change transcend jurisdictional boundaries—a key area of concern, after all, is *global* warming due to greenhouse gas emissions across the nation and indeed the planet. Reflecting this, the Act's legislative findings explicitly recognize the need for action by other jurisdictions beyond New York. L. 2019, ch. 106, § 1(3). Plaintiffs' argument, if adopted, would therefore attribute an intention to the Legislature regarding federal laws that is both legally absurd and at sharp "variance with the policy and purpose" of the Climate Act. *Matter of Jose R.*, 83 N.Y.2d 388, 393 (1994).

Next consider section 11's reference to "state" laws. As applied to New York state laws, plaintiffs' argument once more makes no sense. Under plaintiffs' own theory, the Legislature wanted to preserve state-level authority to adopt greenhouse gas emissions reduction laws. So why would it have carved such laws out from the saving clause of section 11? The answer is that it would not have done so—and it did not do so.

Applying section 11's reference to "state" law to *other* states' laws doesn't help either. Plaintiffs' argument again would posit a legally dubious intention that conflicts with the Act's core purpose and legislative findings. Clearly the Legislature's desire is for other states to adopt greenhouse gas reduction laws of their own. *See* L. 2019, ch. 106, § 1(3). The Legislature would not have intended to undercut those laws.

Plaintiffs' argument simply cannot be squared with the sweep of section 11. The section is exactly what it appears on its face to be: a broad statement that the Climate Act does not relieve entities or persons from complying with any other applicable laws or regulations, of any type, whether their origin be federal, state, or local.

Third, plaintiffs' argument doesn't hold up to a broader reading of the statute, either. Plaintiffs try to paint section 10 as a statement on the regulatory power of state agencies, but the Legislature addressed that subject elsewhere, using distinct language. In particular, section 8 directs "any state agency … [to] promulgate regulations to contribute to achieving the statewide greenhouse gas emission limits." L. 2019, ch. 106, § 8. Section 10, in contrast, refers to "any state *entity*," which need not be an agency with the power to adopt regulations at all. *See, e.g.*, *id.* § 9 (referencing "state agencies and other entities"). And consistent with that broader lens, the Legislature did not use the term "regulations" in section 10, as it did in section 8. Rather, it reaffirmed the existing authority of those entities to adopt and implement "greenhouse gas emissions reduction *measures*"—a defined term that captures "programs, measures, and standards," ECL § 75-0101(6); *see also id.* § 75-0103(13) (discussing "regulatory measures and other state actions" that the scoping plan must address, including, for example, measures to increase

statewide solar power, and "strategies to reduce greenhouse gas emissions from the transportation sector").

Section 10 therefore covers things like state universities pursuing green infrastructure projects, or state transportation authorities pursuing fleet electrification. It makes little sense to recast it as a provision focused on state agencies' retaining authority to adopt greenhouse gas *regulations*, since all state agencies are explicitly and directly authorized to adopt such regulations by section 8 of the Act itself.

Fourth, plaintiffs' interpretation is premised on the fiction that sections 10 and 11 mirror each other, but the two provisions are mismatched in several ways. Section 10 is concerned with "authority" (of state entities), while section 11 is concerned with "laws or regulations" (of "federal, state, or local" government). If the two were meant to be mirror images of one another, then one would expect section 10 at least to refer to laws or regulations, but it does not. Instead, section 10 uses the phrase "greenhouse gas emissions reduction measures," which has a distinct and more general meaning, as we have explained. *See supra* at 39. Section 10 is also backwards-looking, referring to the "existing" authority of state entities—that is, authority that predates the Climate Act. Section 11, on the other hand, refers to "other applicable … laws or regulations" without regard to whether they predate or postdate the

Climate Act. Far from accidental, these textual distinctions underscore that sections 10 and 11 are talking about entirely different things. Whereas section 10 is about preserving the preexisting authority of an array of state entities to pursue a wide range of programs and other measures to reduce greenhouse gas emissions, section 11 is a broad disclaimer of any intent to supplant other laws or regulations—federal, state, or local. To be sure, both provisions advance the Climate Act's "all hands on deck" approach to fighting climate change, but that is about all they have in common.

Fifth, plaintiffs' construction runs afoul of "the last antecedent rule," under which "relative and qualifying words or clauses in a statute are to be applied to the words or phrases immediately preceding, and are not to be construed as extending to others more remote." *Colon v. Martin*, 35 N.Y.3d 75, 78-79 (2020) (cleaned up). Plaintiffs posit that the use of the term "other" in two places in section 11 harkens all the way back to the phrase "greenhouse gas emissions reduction measures" in section 10. Pls.' App. Div. Reply Br. 4. But when section 11 uses "other," the last antecedents are found in section 11 itself: (a) "other applicable federal, state, or local laws" refers to "this act"—the Climate Act, which is itself a law; and (b) "other requirements for protecting public health or the environment" refers to "state air and water quality requirements." L. 2019, ch. 106, § 11. There is no need to reach back to section

10 to give meaning to section 11, and the last antecedent rule prohibits such a maneuver. Section 11 means what it says: "this act"—or *law*—does not "relieve any person [or] entity … of compliance with *other* applicable … *laws*" (emphasis added).

Sixth, plaintiffs' interpretation also requires drawing an artificial and untenable distinction between, on one hand, greenhouse gas emissions reduction measures (covered in section 10), and, on the other hand, public health and environmental laws or regulations (covered in the illustrative clause that concludes section 11). But in many instances, laws cannot be so easily classified, because these legislative purposes often go hand in hand. All manner of environmental laws or regulations bear on greenhouse gas emissions—from composting rules, to prohibitions against vehicles idling, to restrictions on business air conditioning use when windows or doors are open. Similarly, actions that tend to reduce greenhouse gas emissions, like Local Law 97, also protect public health and the environment. In particular, Local Law 97 is expected to significantly reduce local deaths and hospitalizations associated with air pollution (R162). The Legislature purposefully crafted section 11 broadly to encompass *all* "other applicable … laws or regulations"—and did not carve out any categories of laws or regulations from its scope. *Cf. Walsh v. N.Y.S. Comptroller*, 34 N.Y.3d 520, 524-25 (2019) (when term

"any act of any inmate" is not defined in statute, the term could not be restricted to only volitional acts).

Seventh, on top of all the shortcomings identified above, plaintiffs' interpretation is profoundly out of step with the entire tenor of the Climate Act, which indicates at every turn that the responsibility for fighting climate change should be broadly shared. Consider: the Climate Act expressly authorizes "*any* … state agency" to "promulgate regulations to contribute to achieving" statewide reductions in "greenhouse gas emissions." L. 2019, ch. 106, § 8 (emphasis added). The Act further requires "*[a]ll* state agencies" to "assess and implement strategies to reduce their greenhouse gas emissions," L. 2019, ch. 106, § 7(1) (emphasis added), and "*all* state agencies, offices, authorities, and divisions" to consider impacts on greenhouse gas emissions in all of their permitting, licensing, contracting, grant, and other administrative decisions, *id.* § 7(2) (emphasis added).

These provisions point to a need for multiple, overlapping, and across-the-board actions to address greenhouse gas emissions. Considering the context of the Climate Act, it would make no sense for the Legislature to silently, by implication, squeeze out local governments from adopting any laws to help to address the problem.

Eighth, nothing in the legislative record indicates that anyone viewed sections 10 and 11 as somehow expressing a preemptive intent. Rather, the bill summary from Alliance for Clean Energy New York refers to section 10 as memorializing that "State entities can take emission reduction actions regardless of" the Climate Act and section 11 as clarifying that "[e]veryone must still meet other laws & regs." N.Y. Legislative Service, *Legislative History, 2019 Chapter 106* (ACE NY Summary of Climate Leadership and Community Protection Act).

All in all, plaintiffs' reading doesn't hold up. This Court should read section 11 to mean what it says: other applicable laws and regulations, including Local Law 97, are unaffected by the Climate Act.

2. Nothing else in the Climate Act indicates any preemptive intent, either.

Notably, the Appellate Division pointed only to sections 10 and 11 in reviving plaintiffs' implied field preemption claim (R882). The court apparently did not find that anything else in the statute, its history, or its context even arguably indicates any preemptive intent. And that's no wonder, because plaintiffs' other arguments for preemption are even weaker than their strained, implausible interpretation of sections 10 and 11. Those arguments are easily dispatched.

For starters, the Climate Act does not evince a need for statewide uniformity. *See Garcia*, 31 N.Y.3d at 618; Brief of Plaintiffs-Appellants,

Glen Oaks Vil. Owners, Inc. v. City of N.Y., No. 2024-00134 ("Pls.' App. Div. Br."), NYSCEF No. 5, at 34-35. The context of this statute is entirely different from the situation in *People v. Diack*, for example, where state regulations noted the need to prevent a community from "attempt[ing] to shift its responsibility" to house sex offenders onto other communities, and the Governor's approval memo struck a similar chord, highlighting the problems caused by local ordinances imposing residency restrictions on sex offenders. 24 N.Y.3d 674, 683, 686 (2015) (cleaned up). In stark contrast, as explained above, *see supra* at 12-16, the Climate Act contemplates a variety of paths that may be utilized by both the State and its localities to reduce emissions. Moreover, state implementing agencies—and the State itself in filings in this litigation—have emphasized the critical role that local actions such as Local Law 97 play in achieving the Act's core objectives.

Furthermore, nothing in the Climate Act constitutes "a declaration of State policy by the Legislature" regarding statewide control of the matter, so as to impliedly indicate preemptive intent. *Consol. Edison Co. v. Town of Red Hook*, 60 N.Y.2d 99, 105 (1983); *see* Pls.' App. Div. Br. 25-31. Consider the contrast with *Consolidated Edison Company v. Town of Red Hook*, where the state statute included a declaration decrying "the existing practice of un-co-ordinated regulation" and stating

that "there is a need for the state to control" the matter. 60 N.Y.2d at 105. Here, any such declaration is conspicuously absent.

To the contrary, as explained above, *see supra* at 27-28, the Climate Act repeatedly confirms the State's intention to partner with localities in a shared effort to combat climate change. If local laws and regulations were indeed preempted by the Climate Act, then the very partnership and collaboration that the law envisions would be impossible. The Climate Act's goals would be frustrated, rather than furthered, by statewide uniformity on greenhouse gas emissions regulations.

Last, the Climate Act decidedly does not represent "the legislative enactment of a comprehensive and detailed regulatory scheme in a particular area." *N.Y. State Club Ass'n v. City of N.Y.*, 69 N.Y.2d 211, 217 (1987); *see* Pls.' App. Div. Br. 31-34. The very nature of the statute belies any such claim. As the State has made clear, in enacting the Climate Act, the Legislature "intentionally avoided enacting any detailed regulatory scheme." State App. Div. Br. 10.

To be sure, the Climate Act sets a schedule for reducing statewide greenhouse gas emissions (from any source)—but that does not make the statute a "detailed regulatory scheme." *N.Y. State Club Ass'n*, 69 N.Y.2d at 217. Any details are to be filled in, in the future, based on the recommendations of the Climate Action Council and the decisions of state regulators, in consultation with localities. *See* ECL

§§ 75-0103(14)(a), 75-0103(16), 75-0109(1), 75-0109(2)(c). While the Climate Act, with understandable pride, refers to itself as "creating a comprehensive regulatory program to reduce greenhouse gas emissions" L. 2019, ch. 106, § 1(12), such language simply recognizes that the statute sets in motion the apparatus for state regulators to develop emissions reduction regulations in the future. This situation is a far cry from cases in which the Legislature itself enacted detailed regulatory schemes. *Cf. Chwick v. Mulvey*, 81 A.D.3d 161, 170-71 (2d Dep't 2010) (firearm regulation); *Ba Mar, Inc. v. County of Rockland*, 164 A.D.2d 605, 613 (2d Dep't 1991) (mobile home park regulation).

As for those yet-to-be-promulgated agency regulations, this Court has only pointed to agency regulations as contributing to a finding of field preemption in instances where the Legislature has expressly indicated its desire for uniform statewide control of the issue. *See, e.g.*, *Consol. Edison Co.*, 60 N.Y.2d at 105 (noting legislative declaration that "there is a need for the state to control" the issue); *Robin v. Hempstead*, 30 N.Y.2d 347, 350 (1972) (noting legislative declaration that a state agency "shall have the central, comprehensive responsibility" for regulations pertaining to "all public and private" health facilities, "whether state, county, municipal"). Of course, nothing of the sort exists here. There is no legislative statement of the need for a single uniform approach. Moreover, state regulators have made clear that future

regulation is being designed to complement, rather than supplant, Local Law 97, consistent with the Climate Action Council's scoping plan. *See supra* at 16-18 (discussing the scoping plan), n.13 and accompanying text (discussing DEC outreach).

3. There is no basis for remand since this case hinges on pure legal interpretation.

As a last-ditch argument against dismissal of their implied field preemption claim, plaintiffs suggest that such an outcome would be premature. Instead, plaintiffs envision discovery, and perhaps a trial. *See* Pls.' App. Div. Br. 30-31. But plaintiffs' efforts to prolong this litigation are just as baseless as their preemption claim. "[F]urther review of the facts" is simply inappropriate for "purely legal" issues, such as plaintiffs' preemption claim. *See, e.g.*, *People v. Deegan*, 69 N.Y.2d 976, 979 (1987).

Even at this late hour, plaintiffs have yet to articulate what fact-finding they believe could possibly move the needle here. At oral argument in the Appellate Division, grasping at straws, plaintiffs expressed a desire to depose former Governor Andrew Cuomo to probe his thoughts when he signed the Climate Act into law. Yet tellingly, plaintiffs have never argued in their briefing that such discovery would be appropriate. To the contrary, such discovery is both heavily disfavored, *see, e.g.*, *Lederman v. N.Y.C. Dep't of Parks & Rec.,* 731 F.3d 199, 203 (2d

Cir. 2013), and entirely irrelevant to the statutory interpretation question at hand.

And while plaintiffs have pointed out that not every preemption claim has been resolved at the motion to dismiss stage, *see* Pls.' App. Div. Br. 30-31, that observation provides no reason to prolong this litigation, where the City *has* moved to dismiss the claim and the question of preemption may easily be resolved as a matter of law. The mere fact that parties may have charted a somewhat different course in some prior cases doesn't show that the City's motion here was somehow premature. For example, while plaintiffs have pointed to *Dougal v. County of Suffolk*, 102 A.D.2d 531, 532 (2d Dep't 1984), as an example of a preemption case that went to trial, that case hardly helps them, since the Second Department resolved the preemption issue as a matter of law based on the relevant statutory provisions and without any reference to evidentiary material. Similarly, *Jancyn Manufacturing Corp*. doesn't indicate that defendants must wait until summary judgment to resolve preemption claims; rather, in *Jancyn*, the plaintiffs moved for summary judgment first, prompting a cross-motion from the defendants. 71 N.Y.2d at 95.

The bottom line is that when purely legal claims—including implied field preemption—fail as a matter of law, dismissal is appropriate. *See, e.g.*, *Garcia*, 31 N.Y.3d at 607, 620-21; *State ex rel. Grupp v. DHL*

Express (USA), Inc., 19 N.Y.3d 278, 284-85 (2012); *see also Hertz Corp.*, 80 N.Y.2d 565 (resolving preemption claim as certified question of law following dismissal of complaint). Indeed, plaintiffs have not cited a single case finding that dismissal would be inappropriate under circumstances remotely like those here. Simply put, the conclusion that the Climate Act does not impliedly preempt the entire field of greenhouse gas emissions regulation is legally overdetermined. Therefore, plaintiffs' case should be ended now.

CONCLUSION

This Court should reverse in relevant part and dismiss plaintiffs' implied field preemption claim.

Dated: New York, New York
September 27, 2024

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief was prepared using Microsoft Word, and according to that software, it contains 10,924 words, not including the table of contents, the table of cases and authorities, the statement of questions presented, this certificate, and the cover.

AMY MCCAMPHILL

APL-00106

Court of Appeals
State of New York

GLEN OAKS VILLAGE OWNERS, INC.; ROBERT FRIEDRICH; 9-11 MAIDEN, LLC; BAY TERRACE COOPERATIVE SECTION 1, INC.; and WARREN SCHREIBER,

Plaintiffs-Respondents,

against

CITY OF NEW YORK; NEW YORK CITY DEPARTMENT OF BUILDINGS; and ERIC A. ULRICH, in his official capacity as Commissioner of the New York City Department of Buildings,

Defendants-Appellants.

AFFIRMATION OF SERVICE BY OVERNIGHT DELIVERY

AMY MCCAMPHILL, affirms under the penalties of perjury under the laws of New York, which may include a fine or imprisonment, that the following is true and that this document may be filed in an action or proceeding in a court of law: on September 27, 2024, I served three copies of (1) the accompanying Brief for Appellants and (2) two-volume Record on Appeal on all parties, by dispatching the papers to the parties by overnight delivery service at the address designated by them for that purpose, pursuant to CPLR 2103(b)(6):

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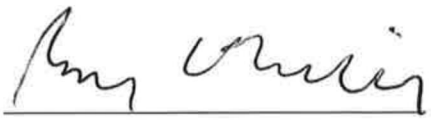

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