APL-2024-00106

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 IN RESPONSE TO AMICI CURIAE RICHARD ELLENBOGEN, NADIR MAOUI, AND NEW YORKERS FOR AFFORDABLE RELIABLE ENERGY

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February 27, 2025

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PRELIMINARY STATEMENT

This Court should reject as irrelevant the arguments in the amicus brief submitted by Richard Ellenbogen, Nadir Maoui, and New Yorkers for Affordable Reliable Energy (collectively, "the Ellenbogen amici"). These amici, skeptics of green energy, proffer misplaced energy policy critiques masquerading as legal arguments. Their brief does not meaningfully engage with the relevant legal standard for implied field preemption and provides no helpful guidance to this Court.

ARGUMENT

IN ENACTING THE CLIMATE ACT, THE LEGISLATURE DID NOT CLEARLY EVINCE A PREEMPTIVE INTENT

As the City explained in its briefing on this appeal, 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). And here, the Legislature did nothing of the sort. Rather, the State's Climate Act embraces an "all hands on deck" approach to climate change regulation, welcoming contributions from all levels of government, including the local level, such as through the City's Local Law 97.

In response to the City's unassailable showing on these points, the Ellenbogen amici take a different tack, arguing that the Climate Act and the Local Law 97 are irreconcilable due to existing limitations of the state's energy supply, and thus, in the amici's view, the Climate Act must necessarily preempt Local Law 97. This conclusion is simply wrong.

First, the Ellenbogen amici's conclusion that these laws are irreconcilable is based solely on the amici's own personal policy analysis and predictions for 2030. There is absolutely no indication that any State or City government actors—including, critically, the State Legislature—have ever viewed the laws this way, or that these government actors agree with the Ellenbogen amici's analysis and predictions. To the contrary, the Legislature did not view the different laws as irreconcilable, and did not evince any preemptive intent.

Second, the Ellenbogen amici's misplaced policy arguments are unmoored from the preserved issues in this appeal. Plaintiffs' facial implied field preemption argument rests on their misreading of the Climate Act itself, rather than any analysis of the state's energy grid. Despite this Court's rule that amici briefs "shall not present issues not raised before the courts below," 22 NYCRR § 500.23(a)(4), the Ellenbogen amici present entirely new issues. What's more, the amici's

feasibility arguments are based on data that are wholly outside this record (and, indeed, often referenced without citations).

It's no wonder that plaintiffs have never raised these feasibility arguments before, because these arguments have no bearing on plaintiffs' facial implied field preemption claim. Indeed, to the extent that the Ellenbogen amici argue that the Climate Act and Local Law 97 are somehow at cross purposes, their arguments reflect—at best—a mistaken understanding of *conflict* preemption. *See, e.g.*, *Balbuena v. IDR Realty LLC*, 6 N.Y.3d 338, 356 (2006) (federal conflict preemption exists "where compliance with both federal and state regulations is a physical impossibility") (internal citation and quotation marks omitted). But the purported conflict that amici identify—the strain on the grid from compliance with both the Climate Act and Local Law 97 in 2030 and beyond—is a concern about future administrability, rather than any showing of a palpable irreconcilable conflict. More to the point, plaintiffs have disclaimed any conflict preemption theory (*see* Record on Appeal 604).

This Court can and should stop there. But in any event, it's worth noting that the Ellenbogen amici's doom-and-gloom prognostications ignore the real, meaningful progress occurring in green energy and energy storage in New York State—spurred in no small part by the

mandates of the Climate Act and Local Law 97. For instance, the Champlain Hudson Power Express transmission line, with 1,250 MW capacity, is expected to start operation in spring 2026, delivering zero-emission energy directly from Canada to the New York City metropolitan area—enough to provide up to 20% of the City's energy needs.[1] And the New York State Energy Research Development Agency (NYSERDA) is planning to install 6,000 MW of energy storage in New York State by 2030.[2] These and other developments will hasten the State's progress to a clean energy future—the same trajectory that other jurisdictions are following, across the globe.[3]

All in all, the battle against climate change is truly a global fight, with all hands on deck—including through efforts at the state and local levels, such as the complementary Climate Act and Local Law 97.

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[1] Champlain Hudson Power Express, https://chpexpress.com/ (last accessed Feb. 27, 2025); Shane O'Brien, "Construction begins on CHPE transmission line along Shore Boulevard in Astoria Park," *Astoria Post* (Nov. 21, 204), *available at* https://perma.cc/VK24-H2Z3.

[2] NYSERDA, "Energy Storage Program," *available at* https://perma.cc/V9N3-8KWY (created Jan. 28, 2025).

[3] Esme Stollard, "World shift to clean energy is unstoppable, IEA report says," *BBC News* (Oct. 24, 2023) (noting that the International Energy Agency predicts that renewables will power half of the world's energy by 2030), *available at* https://perma.cc/JQH2-QUJE.

CONCLUSION

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

Dated: New York, New York
February 27, 2025

Respectfully submitted,

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AFFIRMATION OF SERVICE

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 February 27, 2025, I served (1) three copies of the accompanying Brief for Appellants in Response to Amici Curiae Richard Ellenbogen, Nadir Maoui, and New Yorkers for Affordable Reliable Energy, on each other party, and (2) one copy of the accompanying brief on each amicus curiae, by regular U.S. mail, by depositing the same in an official

depository of the U.S. Postal Service within the state, with first-class postage prepaid, addressed to the following:

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