SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

In the Matter of the Application of

ROBERTA REARDON, Commissioner of the New York State Department of Labor,

Petitioner,

For a Judgment Pursuant to CPLR Article 78,

Index No. 02643-17

- against-

RJI No.

GLOBAL CASH CARD, INC. and NEW YORK STATE INDUSTRIAL BOARD OF APPEALS,

Respondents.

MEMORANDUM OF LAW IN SUPPORT OF VERIFIED PETITION

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Petitioner, Roberta Reardon, Commissioner of the New York State Department of Labor (the "Commissioner"), submits this Memorandum of Law in support of the Verified Petition, pursuant to New York Labor Law ("NYLL" or "Labor Law") § 102 and Article 78 of the New York Civil Practice Law and Rules ("CPLR"), seeking review of the February 16, 2017 Resolution of Decision ("Decision") by the Industrial Board of Appeals ("Board") revoking the regulations adopted by the Commissioner on September 7, 2016, codified at 12 NYCRR part 192 (the "Rules" or "Wage Payment Rules"), concerning permissible methods of payment of wages.

PRELIMINARY STATEMENT

The Commissioner's adoption of the Wage Payment Rules was a valid and reasonable exercise of her expansive authority under Article 6 of the Labor Law. The Rules codify longstanding agency guidance describing the methods that employers may use to pay wages to employees, including payroll debit cards. In adopting the Rules, the Commissioner directly furthered the legislative purpose of Article 6 to ensure that employers do not use methods that deprive their employees of the right to full, prompt, and unencumbered payment of wages.

Respondent Global Cash Card, Inc. ("Global Cash Card"), a payroll debit card program manager, challenged portions of the Rules, petitioning the Board for review pursuant to Labor Law § 101. The Board granted the petition and invalidated the Rules in their entirety. By this Article 78 petition, the Commissioner seeks review pursuant to Labor Law § 102 of the Board's decision invalidating the Wage Payment Rules. The Board's decision should be annulled because it was arbitrary and capricious, and affected by multiple errors of law.

The Board fundamentally misinterpreted the Wage Payment Rules by reading them as seeking to govern financial institutions and prohibit payroll debit card issuers from charging fees. By their plain terms, the Rules do no such thing; rather, they simply impose restrictions on the

conduct of "employers"—namely, their payment of wages—whether done directly or indirectly through agents. Under the Rules, financial institutions remain free to charge fees so long as employers ensure that certain of these fees are not deducted from employees' wages. Regulation of such conduct falls squarely within the scope of the employment relationship and the Commissioner's authority to regulate the payment of wages. The Wage Payment Rules do not regulate any financial services or products outside the scope of the employment relationship.

This fundamental error infects all aspects of the Board's reasoning. Global Cash Card does not have standing to challenge the Wage Payment Rules because it has not suffered any actual injury, much less one falling within the zone of interests of the Labor Law and Rules, which is confined to the employer-employee relationship, and does not include the interests of payroll card vendors. Similarly, the Rules do not run afoul of the separation of powers because, contrary to the Board's reading, they do not prohibit otherwise lawful conduct by financial institutions and thus do not apply to conduct outside of the Commissioner's purview. For the same reason, the Rules are not preempted by federal financial regulations.

Rather, the Wage Payment Rules are a reasonable exercise of the Commissioner's discretion, drawing on the deep expertise of the New York State Department of Labor ("DOL"), which has been regulating the payment of wages for over a century. This expertise includes issuing a series of authoritative opinion letters specifically concerning payment of wages by payroll debit card beginning in 2001, long before adoption of the Rules, and when debit cards were a newly emerging method of paying wages. In order to clarify, unify, and codify this longstanding guidance, the Commissioner acted well within her authority in adopting the Wage Payment Rules in 2016. Accordingly, this Court should annul the Board's Decision and grant any appropriate further relief as requested in the Verified Petition.

STATEMENT OF THE CASE

A. Statutory Framework

1. DOL's Regulatory Authority and the Board's Limited Review Power

Labor Law § 21(11) authorizes the Commissioner to "issue such regulations concerning any provision of this chapter [the Labor Law] as [s]he finds necessary and proper." Labor Law § 199 specifically confers similar authority "for the purpose of carrying out the provisions of [Labor Law Article 6]." Such "rules" as defined by State Administrative Procedure Act ("SAPA") § 102(2), must be adopted through SAPA § 202 procedures, and can be challenged for failure to do so pursuant to SAPA § 202(8). As to a substantive challenge, SAPA § 205 states:

> Unless an exclusive procedure or remedy is provided by law, judicial review of rules may be had upon petition presented under article seventy-eight of the civil practice law and rules, or in an action for a declaratory judgment. . . . Nothing in this section shall be construed to grant or deny to any person standing . . . .

Labor Law Article 3 provides an exclusive procedure to review DOL regulations: the Board's consideration subject to a subsequent Article 78 proceeding. *See* NYLL § 102. As stated in Labor Law § 101(1), "any person in interest or his duly authorized agent may petition the board for a review of the validity or reasonableness of any rule, regulation or order made by the commissioner." NYLL § 103(1) states that unless declared invalid in a proceeding pursuant to the Labor Law, regulations "shall be valid. Except as otherwise provided in this chapter, no court shall have jurisdiction to review or annul any such . . . regulation." The Board has the power to revoke, amend, or modify any regulation that it finds is invalid or unreasonable. NYLL § 101(3).

Labor Law § 101(1)'s authorization to review "validity or reasonableness" is a "limit[]" on the Board's power. *First Coinvestors, Inc. v. Carr*, 159 A.D.2d 209 (1st Dep't 1990). That is, the Board cannot substitute its own judgment; it may only decide whether DOL acted arbitrarily or irrationally—the same question that would be posed pursuant to SAPA § 205 in the absence of a

prior procedure. *See, e.g.*, *Versailles Realty Co. v. N.Y. State Div. of Hous. & Cmty. Renewal*, 76 N.Y.2d 325, 328 (1990). Whether on Board review of proposed DOL regulations or judicial review of a Board determination, the issue is not whether a reviewing tribunal agrees with a DOL regulation, but whether the regulation falls within a range of reasonableness. In other words, "that reasonable minds might differ . . . is not sufficient to establish the irrationality necessary to warrant annulment." *Med. Soc'y v. N.Y. State Dep't of Soc. Servs.*, 148 A.D.2d 144, 148 (3d Dep't 1989).

2. The Right to Prompt, Full, and Unencumbered Payment Under Article 6

The regulations at issue concern Labor Law Article 6, particularly §§ 191–193. As explained in *Angello v. Labor Ready, Inc.*, 7 N.Y.3d 579 (2006), the "purpose of Labor Law article 6 is to strengthen and clarify the rights of employees to the payment of wages." *Id.* at 583 (internal quotation marks omitted). Global Cash Card's petition to the Board ("Board Petition") recognized that payment of wages "is governed by article 6 of the Labor Law, in particular Labor Law §§ 191, 192, and 193." (Kerwin Aff. at Exh. B (Board Petition), ¶ 56; *see also id.* Exh. D (Transcript of Board Hearing), at 53 (counsel agrees that "you can read all of them together").)[1] Labor Law §§ 191, 192, and 193, which the Rules implement, include the following relevant provisions.

Labor Law § 191 requires that the full amount of wages earned must be paid within the statutorily prescribed time period. Section 191(a) requires that manual workers be paid "weekly and not later than seven calendar days after the end of the week in which the wages are earned." Section 191(d) requires that clerical and other workers be paid "not less frequently than semi-monthly, on regular pay days." Such requirements of timely payment were enacted "to assure prompt payment of daily wages to those employed in a subordinate capacity and who depended

[1] Citations to "Kerwin Aff. at Exh. __" refer to the exhibits attached to the Affirmation of Adrienne J. Kerwin, dated April 24, 2017, submitted along with this Memorandum of Law.

upon their earnings for support," *People v. Vetri*, 309 N.Y. 401, 405 (1955), "and the statute should be liberally interpreted to attain that end," *People v. Grass*, 257 A.D. 1, 3 (1st Dep't 1939).

Labor Law § 192 prohibits wage payment by direct deposit in a bank or other financial institution without advance written consent from employees. Labor Law § 193 prohibits deductions from, or charges against, wages except for specified purposes. *Labor Ready* found—reversing the Board—that an employer breached § 193 by charging for access to wages from machines that dispensed cash on insertion of a voucher, even though workers had freely and knowingly consented to the charge, and could have avoided it by opting to be paid by check. 22 A.D.3d 932 (3d Dep't 2005), *aff'd*, 7 N.Y.3d 579 (2006). The Court of Appeals rejected claims that workers who chose cash payment through the machines "are simply paying a fee for service," and found "convenience" not among the benefits for which § 193 allows charges against wages. It further held that forbidden charges do not become legal because "the worker agrees and has the option of receiving full payment," and that § 193 was meant to ensure that "unequal bargaining power . . . does not result in coercive economic arrangements by which the employer can divert a worker's wages for the employer's benefit." 7 N.Y.3d at 584–86.

B. The Commissioner's Promulgation of the Wage Payment Rules

1. DOL's Interpretation of Article 6 in Opinion Letters from 2001 to 2011

In 2001, long before adopting the Wage Payment Rules, DOL began examining the use of payroll debit cards by employers to pay wages. Drawing on its deep expertise in ensuring full and prompt payment of wages, DOL began issuing guidance on the permissible uses of payroll debit cards to pay wages in the form of opinion letters. In total, DOL's counsel's office issued eight opinion letters outlining the permissible methods of wage payment through payroll debit cards under Labor Law Article 6. (Kerwin Aff. at Exh. A (Stipulated Record), at 5–29 (Exhibits B–I).) The letters consistently furthered the purposes of Article 6. They made clear that Labor Law § 192

prohibits payment by payroll debit card except to employees who provide advance written consent, and that such consent is not sufficient for the program to be legal. They further made clear that if an employer required, directly or indirectly, an employee to pay fees in connection with accessing wages via payroll debit card, such an arrangement could violate Labor Law § 191's requirement of prompt and full payment of wages and Labor Law § 193's prohibition on unlawful deductions from or charges to wages.

The first three letters were issued between 2001 and 2003, when debit cards were a new arrangement for paying wages (Kerwin Aff. at Exh. C (Answer), ¶ 10), and before any legislation concerning payroll debit cards had been introduced in New York. Thus, an October 10, 2001 letter advised that workers must not "be subject to any costs associated with the withdrawal" of wages, and imposition of fees would violate Labor Law § 191. (Kerwin Aff. at Exh. A (Stipulated Record), at 5–6.) A November 13, 2002 letter warned that even a program in which "the employer pays for the first ATM transaction per payroll period" may involve forbidden charges to workers, in that

> If an employee attempts to access his/her wages at an ATM not affiliated with the employer's bank, then an additional service charge may be assessed . . . . Moreover, ATM machines only permit withdrawals in twenty-dollar ($20) increments. Thus, an employee will not have access to his/her wages between $.01 and $19.99 or similar increments.
>
> If your program could be structured so that all employees, even those without bank accounts, have the option to access their full wages without access fees, the Department's opinion regarding ATM payment would be modified accordingly.

(*Id.* at 8; *see also id.* at 9–10 (October 8, 2003 letter).)

A July 27, 2007 letter—concerning an employer that wished to use payroll cards provided by "Global Cash Card"—(1) enclosed the November 2002 letter, (2) added that since that letter was sent the *Labor Ready* case had been decided, and (3) stated:

> This Department disagrees with your statement that this proposed Program 'is particularly beneficial to those employees who do not maintain traditional checking

> accounts.' While it is true, as you state, that such an employee could possibly spend an entire week's pay in one transaction, thereby avoiding any charges, the failure (or lack of desire) to do so would result in payment of fees . . . .

Accordingly, DOL "continue[d] to be of the opinion, expressed in the enclosed prior opinion letter, that requiring an employee to pay such fees to access his/her wages constitutes a violation of Labor Law § 191." (*Id.* at 11–12.)

DOL's most detailed letter, dated October 29, 2009, opined that while § 191 does not prohibit fees "for banking services incidentally provided to the employee"—such as "money orders, personalized checks, electronic bill-pay and fees associated with use of the debit card at other institutions such as retail outlets"—it does prohibit "fees for services that are essential for an employee to access his or her wages in full," such as for withdrawals of wages or "maintenance of the account." The letter advised that workers "must be able to access the entirety of their wages"; and that employers must take steps including, but not limited to, (1) ensuring that banks where workers can obtain the entirety of their wages "may be quickly and conveniently accessed," and (2) eliminating such "[e]ncumbrances" to wage access as minimum balance requirements. The letter reserved DOL's right "to examine any individual employer's payroll/debit card plan to ensure that it is compliant," and cautioned that violations identified in the letter "are not intended to represent a comprehensive list" or cover "every possible case." And it noted that, since fees levied "directly on the *employer*" (emphasis added) are not prohibited, "an employer seeking to utilize debit cards for the payment of wages may elect to arrange with a bank or financial institution to have any fees billed directly to the employer in lieu of taking them out of the employee's account."[2] (Kerwin Aff. at Exh. A (Stipulated Record), at 13–16.)

[2] The Board Petition describes this letter as opining that use of payroll cards "is permissible . . . in certain circumstances," or "that payroll debit cards could be used in New York," but omits any

In 2010, DOL issued three additional letters. The first letter explained that DOL interpreted Section 191's requirement of full and prompt payment of wages without encumbrances to require "an effective means by which to make an unlimited number of withdrawals on [a payroll debit card] without incurring fees," and also clarified that such access must be provided at a location "within a reasonable distance of the employee's worksite." (Kerwin Aff. at Exh. A (Stipulated Record), at 18–19.) The second and third letters provided additional guidance concerning permissible methods of payment of wages under Article 6 consistent with previous letters. (*Id.* at 20–24.)

No one, including Global Cash Card,[3] challenged these letters or DOL's power to interpret Article 6 to prohibit employers from charging fees that limit their employees' access to full wages. Nor did the Legislature intervene by passing legislation governing payment of wages via payroll debit card. No such bill has ever been considered by or voted on by the full Legislature, nor were any such bills even introduced until years after DOL had started providing authoritative guidance on the topic through its letter opinions. Courts give weight to DOL's interpretation of the Labor Law expressed in such opinion letters. *See, e.g.*, *Samiento v. World Yacht, Inc.*, 10 N.Y.3d 70, 79 (2005).[4] As in *Barenboim v. Starbucks Corp.*, 21 N.Y.3d 460, 470–71 (2013), another case that

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discussion of the detailed restrictions on fees contained in the letter. (Kerwin Aff. at Exh. B (Board Petition), ¶¶ 63, 67.)

[3] DOL's July 2007 opinion letter, stating that the existence of a possible strategy for a worker to "avoid[] any charges" does not make charges incurred by other workers permissible, specifically concerned Global Cash Card. *See supra* at p. 7.

[4] *See also Nat'l Rest. Ass'n*, 141 A.D.3d at 193 (Commissioner and DOL's "choices involving the appropriate means for achieving [statutorily defined] ends" entitled to deference); *Ingalls Shipbuilding, Inc. v. Director, Office of Workers' Compensation Programs*, 519 U.S. 248, 267–70 (1997); *Martin v. Occupational Safety & Health Review Comm'n*, 499 U.S. 144, 152–53 (1991);

found DOL "interpretation of a statute it is charged with enforcing . . . entitled to deference," DOL ultimately decided to adopt a regulation that would clarify, unify and codify policy "previously found in a patchwork of opinion letters."

2. Increasing Use, and Abuse, of Payroll Debit Cards by Employers

In addition to codifying its longstanding administrative guidance, DOL promulgated the Wage Payment Rules in response to the proliferation of payroll debit cards and the well-documented abuses that had accompanied their use. *See* Affidavit of Pico Ben-Amotz, General Counsel for the New York State Department of Labor ("DOL Aff.") ¶¶ 17–18 (describing communications with stakeholders and observing that payroll debit card practices faced increasing scrutiny by 2013).) In addition to drawing from its own experience regulating wage payment, DOL reviewed a report issued by the Office of the New York Attorney General in 2014, *Pinched by Plastic: The Impact of Payroll Cards on Low-Wage Workers* ("Attorney General's Report" or "AG Report"), based on information concerning payroll card use submitted by 38 employers with thousands of New York employees paid through payroll cards.[5] (*See* DOL Aff. ¶¶ 20–21.)

The Attorney General's Report noted that "[p]ayroll cards are cost-effective for employers," citing a 2010 Visa report "that employers who have switched to payroll cards have saved up to 65% in payroll processing costs." It stated that, compared to alternatives like check-cashing services, payroll cards can be less costly for employees as well, "particularly if those employees take advantage of the fee-free services associated with the card," but that "while some

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Cuyahoga Valley Railway Co. v. United Transp. Union, 474 U.S. 3, 7 (1985); *Versailles Realty*, 76 N.Y.2d at 328.

[5] The Attorney General's Report, which was before the Board as Exhibit I to Global Cash Card's Petition (Kerwin Aff. at Exh. B), was repeatedly referred to in comments considered by DOL during rulemaking. (*See, e.g.*, Kerwin Aff. at Exh. A (Stipulated Record), at 49–52 (comment by 1199SEIU), 53–56 (comment by AARP), 60–62 (comment by ALIGN), 86–89 (comment by ANHD).)

workers . . . use their cards without incurring any fees, payroll cards can present significant challenges for many workers, particularly low-wage workers and those with limited financial and literacy skills." (Kerwin Aff. at Exh. B (Board Petition), at Exh. I (AG Report), page 3.)

While the report found that all payroll card programs surveyed let workers access wages, without a fee, by some method at least once per pay period, actual worker use of methods other than ATM withdrawal was infrequent. For example, fewer than 10% of workers accessed their pay by over-the-counter bank tellers (by definition, possible only when a bank is open) during a 12-month period, with workers also reporting difficulty "because banks and/or tellers appeared to be unfamiliar with these procedures and may have been hesitant to provide funds to individuals who were not bank members." (*Id.* at 7–8.) Similarly, while all programs surveyed "provided free account balance information through an automated telephone line and via the internet" (to which not all workers have easy access), such information was available only in English and often Spanish, "regardless of the language(s) typically used by the employer to communicate employment-related policies." Partly for these reasons, workers' most "popular and convenient method . . . to access their account information is through a balance inquiry via an ATM." (*Id.* at 13–14.)

As the report noted, "ATM use represents a considerable revenue stream for payroll card vendors." (*Id.* at 11.) Many vendors also charged workers fees other than ATM fees, including fees already deemed illegal in the DOL opinion letters. Thus, the Attorney General found, charging workers "a monthly maintenance fee, an inactivity fee for current employees, an account closing fee, a card replacement fee, or some combination" was already "prohibited under the NYSDOL's interpretation of the New York Labor Law," but such charges "are not expressly addressed by explicit language within the Labor Law." Of 38 programs surveyed, 36 (95%) included one or

more such fees that, according to DOL interpretation of Labor Law Article 6, were already deemed illegal. For programs with per-worker data, 70-75% of cardholders had incurred at least one DOL-prohibited fee. (*Id.* at 9.) The report noted that (1) existing law constrains payroll card programs, (2) employers must ensure that their programs do not violate the law, and (3) "[w]here a fee structure or other aspect of the program is set by the payroll card vendor and not the employer, it is the employer's responsibility to choose a vendor that complies with the law or to negotiate the terms and conditions of their agreement accordingly."[6] (*Id.* at 18.)

Although the Attorney General proposed legislation to address the problems that his report identified, the basic concept of such remedial legislation to prohibit fees "for services that are essential to employees' access to their wages" (*Id.* at 22) was identical to the one expressed in DOL's October 29, 2009 letter opining that, while charging workers for "incidental" banking service is allowed, charging "for services that are essential for an employee to access his or her wages in full" is not. (Kerwin Aff. at Exh. A (Stipulated Record), at 14–15.) As discussed *supra* at p. 7, that letter also already reflected that DOL is empowered to consider what services are essential, and stated that violations listed in the letter were "not intended to represent a comprehensive list."

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[6] The report also noted that based on information collected, "a payroll card vendor can indeed offer payroll cards with few fees and remain profitable. For example, one employer's program allowed for free in-network ATM withdrawals, Visa member bank cash withdrawals, balance inquiries at any ATMs, point-of-sale transactions, live customer service, paper statements, and lost/stolen card replacement, among other services. Under this employer's program, essentially all of the basic services were provided at no cost to the employee, with the exception of out-of-network ATM withdrawals." (Kerwin Aff. at Exh. B (Board Petition), at Exh. I (AG Report), page 23.)

3. DOL's Rulemaking and Adoption of the Wage Payment Rules

In May 2015, DOL published a notice of rulemaking pursuant to SAPA § 202, with a revised notices published in October 2015 and June 2016. (Kerwin Aff. at Exh. A (Stipulated Record), at 25–43.) The Wage Payment Rules were finalized in September 2016 after a notice and comment period.[7] (*Id.* at 44–48 (Notice of Adoption).) They describe and clarify methods that employers may use to pay wages to employees, including payroll debit cards. Responding to comments that payroll debit card fee limits "will make Payroll Debit Cards unprofitable" and fees "should be permitted to ensure profitability of Payroll Debit Cards for financial institutions," the October 2015 notice of rulemaking stated that the proposed rule does not "contain a general prohibition on fees," and "is concerned with Labor Law requirements, not banking law requirements." (Kerwin Aff. at Exh. A (Stipulated Record), at 34–35.)

The Wage Payment Rules were comprehensive and included many provisions not challenged in Global Cash Card's Board Petition.[8] Of the three provisions challenged, the Board ultimately specifically addressed (and invalidated) only two.[9] First, 12 NYCRR § 192-2.3(c) states that "[a]n employer or agent shall not charge, directly or indirectly, an employee a fee for any of the following" services enumerated in the Rule. These services include, *inter alia*, the following:

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[7] DOL received and considered many comments in the course of rule-making, and made revisions accordingly. (*See, e.g.*, R at Exh. A (Stipulated Record), at 30–48 (DOL issuing 54 separate responses to public comments in first and second revised notices of rulemaking and notice of adoption).)

[8] For example, § 192-2.3(e) states that an employer "shall not pass on any of its own costs associated with a payroll debit card account to an employee."

[9] (Kerwin Aff. at Exh. E (Decision), at 10–12 (discussing and invalidating two provisions).)

- Application, initiation, loading, participation or other action necessary to hold the payroll debit card;[10] . . .
- Account inactivity; . . .
- Accessing balance or other account information online, by Interactive Voice Response through any automated system offered in connection with the payroll debit card, or at any ATM in network made available to the employee;
- Providing the employee with written statements, transaction histories or the issuer's policies; . . .
- Closing an account or issuing payment of the remaining balance by check or other means . . . .
- Declined transactions at an Automated Teller Machine that does not provide free balance inquiries.[11]

§ 192-2.3(c)(1), (4), (7), (8), (10), (11). Second, 12 NYCRR § 192-2.3(b)(1) requires employers—without reference to agents—to use payroll cards only if there is local access "to one or more automated teller machines that offers withdrawals at no cost to the employee."

C. The Board Proceeding

1. The Board Petition

On October 21, 2016, Global Cash Card petitioned the Board pursuant to Labor Law § 101, challenging the validity and reasonableness of portions of the Wage Payment Rules. According to the Board Petition, Labor Law Article 6 "requires only that an employee receive a method of full and free access to his or her wages," for which purpose "allowing free cash withdrawals at a bank or financial institution" is sufficient.[12] (Kerwin Aff. at Exh. B (Board Petition), ¶¶ 1, 3–4.)

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[10] This provision was challenged "only to the extent it can be construed as prohibiting fees for access to wages via ATM withdrawal." (Kerwin Aff. at Exh. B (Board Petition), ¶ 55 n.1.)

[11] This provision was substituted for a flat ban on fees for *any* declined transaction in response to comments on the original proposed rule, since "at ATMs that provide free balance inquiries . . . such fees can be reasonably avoided by employees." (Kerwin Aff. at Exh. A (Stipulated Record), at 32, 34.)

[12] As found in the Attorney General's Report, fewer than 10% of workers actually used the method of OTC teller withdrawals in the course of a 12-month period. *See supra* at pp. 10.

The Board Petition states that Global Cash Card is a California-based Nevada corporation that provides "payroll card solutions to a number of employers in New York," as a "program manager or vendor." (*Id.*, ¶¶ 25–26 & Ex. B (Federal Reserve Bank of Philadelphia and Center for Financial Services Innovation ("Federal Reserve Study")).) "Presently, over 45,000 employees in New York State have active payroll card accounts provided by Petitioner through MetaBank," the bank whose prepaid debit cards, including but not limited to payroll cards, furnished the data for the Federal Reserve Study attached to the Board Petition. (*Id.*, ¶¶ 16, 52 & Ex. B at 10, § 3.1.)

The Board Petition states that, as a general matter,

> payroll cards offer employers three advantages over payment by check—the method most commonly used when an employee's wages are not directly deposited into a bank account. First, payment by electronic funds transfer is less expensive than the cost of issuing a check. Second, payment by electronic funds transfer arrives in the employee's payroll card account on a date certain, an especially important advantage in light of New York's strict statutory requirements . . . (*see* Labor Law § 191). Finally, payroll cards streamline payroll operations for business, enabling business owners to spend less time processing, printing, and delivering paper paychecks.

(*Id.*, ¶ 22.)

In other words, a payroll card system by its nature (a) directly saves an employer money, (b) facilitates compliance with Labor Law § 191's timing requirements, resulting in further savings to the employer through avoidance of potential penalties, and (c) makes payroll operations more efficient, again resulting in further savings to the employer.

As explained in the Board Petition and attached Federal Reserve Study, a debit card issuer such as MetaBank typically issues payroll cards "and monitors regulatory compliance and risk, in exchange for a share of the fees paid by the cardholder and indemnification from risk by the prepaid card program manager"; the "card issuer and program manager [also] contractually agree to share the data processed by the program manager." (*Id.*, ¶ 17 & Ex. B at 10, § 3.1) In a passage

the Board Petition does not quote, the Federal Reserve Study comments on who ultimately receives the proceeds of fees charged to workers or other program revenue:

> It is very important to keep in mind that, in a typical prepaid card program, the totality of revenues earned from prepaid cards is shared among a number of organizations that are necessary to acquire and serve customers. In some prepaid card programs, all of these providers are part of the same firm. In others, independent firms are linked via a set of contractual relationships. Those contracts define how revenues are shared across the various participants. In the transactional data we study, there is no information about such allocation.

(*Id.*, Ex. B at 11, § 3.1.)

The Board Petition includes no specific information about contracts, if any exist, between Global Cash Card and MetaBank (the card issuer) or the employers to whose New York employees Global Cash Card allegedly provides over 45,000 active payroll card accounts. In particular, Global Cash Card asserts no facts, nor cites any evidence, concerning the nature and source of any fees or other monies it is paid or how "the totality of revenues earned from prepaid cards is shared among" Global Cash Card, its employer customers and/or MetaBank, all of which "are necessary to acquire and serve customers." (*Id.*, Ex. B.)

Instead, the Board Petition simply alleges without any specifics or supporting evidence that "ATM fees are essential for Petitioner to offset the costs of access to a network of ATMs" and if the challenged regulations "foreclose Petitioner from charging fees to cardholder[s] . . . cards offered by Petitioner and a number of other providers will become a money-losing proposition, leading to a contraction of the payroll debit card market." (*Id.*, ¶ 29.) While the Board Petition lists costs of a debit card system that must be defrayed somehow, and allegedly "require an investment from Petitioner to maintain" (*Id.* ¶¶ 42–51), it provides no information on how these costs compare with those incurred by an employer paying wages by check, or on what Global Cash Card (or even a typical program manager) receives or pays pursuant to its contracts.

The Board Petition alleged two bases for Global Cash Card's standing to challenge the regulations. First, "[p]ursuant to its contractual obligations as a payroll debit card vendor," Global Cash Card is allegedly "an 'agent' whose conduct is expressly subject to the challenged Regulations." (*Id.*, ¶ 27.) Second,

> [t]o the extent that the challenged Regulations expressly apply only to an employer, Petitioner is interested inasmuch as, by mandating that employers contract with payroll card vendors on terms that are not reasonable or reflective of industry realities,[13] the effect of the Regulations will likely be to prevent Petitioner from being able to offer its products and services to customers in the State of New York. The inability to market its product in this State constitutes a substantial injury to Petitioner.

(*Id.*, ¶ 28.)

As to the merits, the Board Petition alleged that because the Legislature considered, but did not enact, bills similar to the Wage Payment Rules—which allegedly reflect "choices between broad policy goals" including those that are "a matter of financial or consumer law"—certain portions of the Rules "constitute an improper attempt to circumvent the legislative process" and exceed DOL's power. (*Id.*, ¶¶ 67–112, 133, 142–148.) Although the Rules contain over 15 distinct provisions, the Board Petition specifically challenged the validity of only three of these. (*Id.* ¶ 143(a) (alleging invalidity of 12 NYCRR § 192-2.3(b)(1)'s requirement of local access to one or more ATMs and the definition of "Local Access" at § 192-1.2(d)); ¶ 143(b) (alleging invalidity of § 192-2.3(a)(2)'s requirement that consent to payment by payroll debit card not take effect for seven business days); ¶ 143(c) (alleging invalidity of § 192-2.3(c)'s fee requirements).)

The Board Petition also alleged that (1) aspects of the regulations govern banking transactions and should be struck down as preempted by federal law (*id.*, ¶¶ 150–154), (2) aspects of the regulations other than fee requirements lack a reasonable basis (*id.*, ¶¶ 156–158, 160), and

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[13] As discussed *supra* at p. 15, the Board Petition includes no specifics about "industry realities."

(3) the fee requirements "in the challenged provisions of 12 NYCRR 192-2.3(c) lack any rational basis" (*id.*, ¶ 159).

2. The Board's Decision

The Board received briefs, heard oral argument based on a stipulated agency record (Kerwin Aff. at Exh. A), and issued its Decision—which as noted *supra* at p. 12, actually discussed only two provisions of the Rules—on February 16, 2017. DOL's challenge to Global Cash Card's standing was rejected on the following grounds:

> Petitioner has standing in this proceeding as an "interested person" because the regulations govern the conduct of petitioner inasmuch as it is an "agent" of employers it has contracted with to issue payroll debit cards to employees in New York (*see* Labor Law § 101 [1] [any person in interest may petition the Board for review of the validity or reasonableness of any regulation made by the Commissioner of Labor under the Labor Law]).

(Kerwin Aff. at Exh. E (Decision), at 5.)

Having summarized certain portions of the Stipulated Record (*id.* at 5–10), the Board found that 12 NYCRR § 192-2.3(c)'s provisions concerning fees and § 192-2.3(b)(1)'s related requirement that employers not establish card programs without local access to at least one ATM "that offers withdrawal at no cost to the employee" are invalid "because they exceed respondent's rulemaking authority under Labor Law § 199 by regulating banking services." The Board concluded that the "regulations go beyond the statutory language of Article 6, specifically that of Labor Law § 192, which governs the relationship between employers and employees, by placing restrictions on financial institutions." (Kerwin Aff. at Exh. E (Decision), at 10.)

As the Board explained:

> In New York, the Department of Financial Services regulates banks and financial institutions and the fees they may charge. . . . Because the statute already allows employers to pay wages by payroll debit card with an employee's consent, the

> regulations are invalid to the extent they prohibit otherwise lawful conduct by financial institutions for providing banking services. Restrictions or requirements placed on the employer that are consistent with the statute are, of course, valid, but these regulations go beyond regulation of the employment relationship and into the area of banking law.
>
> Our view that the regulations exceed [DOL's] authority and are beyond the scope of the statute is supported by the legislature's efforts to amend the statute as well as public comments on the regulations made by members of the legislature. . . .
>
> . . . .
>
> [W]e recognize respondent has a well-founded concern that low-wage workers without access to traditional bank accounts will be coerced by their employers to receive their wages by payroll debit card at a significantly lower payroll cost to the employer, and that employees paid by payroll debit card may be subject to excessive or hidden fees. . . . While these fees may be excessive in respondent's view and disproportionately impact the most vulnerable workers in the state, she does not have authority to act in this area.

(Kerwin Aff. at Exh. E (Decision), at 11–12.)

The Board did not assess challenged provisions other than fee limits, or discuss the possible survival of provisions not referenced in its decision or, in many cases, even challenged in the Board Petition. Nor did the Board dispute or address the continuing validity of DOL's interpretation of Article 6, as expressed in a decade's worth of opinion letters, despite appearing to agree with DOL's interpretation that Article 6 "requires advance consent of any employee before an employer may make payment of wages by payroll debit card" and prohibits "any direct or indirect charge to an employee to receive his or her wages." (*Id.* at 12.) Instead, the Board simply ordered that "[t]he regulations regarding methods of payment of wages adopted September 7, 2016 to be codified as 12 NYCRR part 192 are revoked." (*Id.* at 12.)

STANDARD OF REVIEW

In an Article 78 proceeding in the nature of mandamus to review, a court must determine whether an administrative act or determination "was made in violation of lawful procedure, was

affected by an error of law or was arbitrary and capricious." CPLR § 7803(3); *see also N.Y.C. Health & Hosps. Corp. v. McBarnette*, 84 N.Y.2d 194, 204–05 (1994). When reviewing an administrative determination, the court's review is limited to the grounds invoked by the body making the determination. *Sherbyn v. Wayne-Finger Lakes Bd. of Coop. Educ. Servs.*, 77 N.Y.2d 753, 758 (1991). "If those grounds are inadequate or improper, the court is powerless to affirm the administrative action by substituting what it considers to be a more adequate or proper basis." *Id.*

The Court should consider the questions raised by the Commissioner here *de novo*. When the dispositive issue is not factual but legal—including the legal issues of standing and statutory construction—no deference is owed to the Board. *See Kurcsics v. Merchants Mut. Ins. Co.*, 49 N.Y.2d 451, 459 (1988); *Ovadia v. Off. of the Indus. Bd. of Appeals*, 19 N.Y.3d 138 n.5 (2012).

ARGUMENT

I. THE BOARD'S CONCLUSION THAT GLOBAL CASH CARD HAD STANDING TO CHALLENGE THE WAGE PAYMENT RULES IS CONTRARY TO LAW

The Board erred in finding that Global Cash Card had standing to petition the Board to challenge the Wage Payment Rules. "Whether a person seeking relief is a proper person to request an adjudication is an aspect of justiciability which, when challenged, must be considered at the outset." *Soc'y of the Plastics Indus. v. Cty. of Suffolk*, 77 N.Y.2d 761, 769 (1991); *cf. Dairylea Coop., Inc. v. Walkley*, 38 N.Y.2d 6, 9 (1975); *see also Ovadia*, 19 N.Y.3d at 138 n.5 (administrative determination of legal issue not entitled to deference).

To have standing to challenge an administrative act, including issuance of regulations, a party must meet a two-part test: the action must actually harm the party, and that harm must be "arguably within the zone of interest to be protected by the statute." *Dairylea*, 38 N.Y.2d at 9; c*f. Dental Soc'y v. Carey*, 61 N.Y.2d 330, 334 (1984). As to the "injury in fact" standing requirement, the plaintiff must "actually be harmed . . . the injury must be more than conjectural." *N.Y. State*

Ass'n of Nurse Anesthetists, 2 N.Y.3d at 211. The second requirement, that the "injury asserted fall within the zone of interests protected," has "evolved into the crucial test for standing in the administrative context," and "assures that groups whose interests are only marginally related to, or even inconsistent with, the purposes of the statute cannot use the courts to further their own purposes at the expense of the statutory purposes." *Soc'y of the Plastics Indus.*, 77 N.Y.2d at 773–74; *cf. E. 13th St. Cmty. Ass'n v. N.Y. State Urban Dev. Corp.*, 84 N.Y.2d 287, 295 (1994) ("'zone of interest' test has developed into the primary test for standing in the administrative context"); *Galvani v. Nassau Cty. Police Indem. Rev. Bd.*, 242 A.D.2d 64, 67 (2d Dep't 1998) ("zone of interest test is the most crucial").

This "zone of interest" requirement applies even if it is clear that challenged action will economically harm the challenger. A grocer, for example, would not have standing "to challenge the rate of assistance payments" to welfare recipients even if a rate change clearly threatened the grocer's sales. *Dental Soc'y*, 61 N.Y.2d at 336–37 (Simons, J., dissenting). Determining whether economic harm is sufficient for standing under the "zone of interests" test calls for attention to the specific purposes behind a particular law. For example, to have standing to challenge regulations issued under environmental statutes petitioners must allege "environmental harm," not just "that the regulations will impede their ability to develop the property. . . . '[E]conomic injury [alone] does not confer standing.'" *Ass'n for a Better Long Isl.*, 23 N.Y.3d at 9 (citation omitted); *see also, e.g.*, *Soc'y of the Plastics Indus.*, 77 N.Y.2d at 777-78; *Mobil Oil Corp. v. Syracuse Indus. Dev. Agency*, 76 N.Y.2d 428, 434 (1990) ("economic costs to Mobil and to local taxpayers and consumers if Mobil's facilities are relocated" not equivalent to "environmental injury").

A. Global Cash Card Does Not Satisfy the Two-Part Test for Standing

On the present record, Global Cash Card does not satisfy either part of the two-part test for standing. First, Global Cash Card has not established an in-fact injury because its allegations of

harm are "conjectural" and premised on a misunderstanding of the Rules. *N.Y. State Ass'n of Nurse Anesthetists*, 2 N.Y.3d at 211. Specifically, the Wage Payment Rules do not forbid Global Cash Card from recouping ATM network access charges and other costs of business by imposing fees; they only require employers to ensure that an employee does not pay those fees. While it is conceivable that some employers may seek to reduce their own payments to Global Cash Card if they were required to cover fees that had previously been paid by their employees—which, in turn, might affect Global Cash Card's profit rate—Global Cash Card has not attempted to support such a scenario. Because the Rules have not yet taken effect, there is no record of actual harm that Global Cash Card can cite. And it has done nothing in its Petition to establish the likelihood of such harm, providing no information about its receipt of fees or its contractual relationships with its employer customers and Metabank.[14] *See supra* at pp. 14–15. These unsupported claims of injury are purely conjectural and insufficient to establish standing.

Second, Global Cash Card's failure to satisfy the zone of interest test is even more glaring. As explained in *Society of the Plastics Industries*, 77 N.Y.2d at 773–74, standing requires an injury "within the zone of interests protected" by a law in order to keep parties "whose interests are only marginally related to, or even inconsistent with, the purposes of the statute" from "us[ing] the courts to further their own purposes at the expense of the statutory purposes." That is just what Global Cash Card is attempting here.

Labor Law Article 6's purposes are "to strengthen and clarify the rights of employees to

[14] Perhaps because it could not provide this support, Global Cash Card did not even rely on a claim of reduced profit, instead advancing the far more sweeping claim that the effects of protecting employees from the fees in question "will likely be to prevent Petitioner from being able to offer its products" at all, and making "cards offered by Petitioner and a number of other provider . . . a money-losing proposition," and "leading to a contraction of the payroll debit card market." (Board Petition, ¶¶ 28–29.) These claims are completely unsupported and purely speculative.

the payment of wages," *Labor Ready*, 7 N.Y.3d at 583, and define workers' and employers' mutual rights and responsibilities. No provision in Article 6 has the purpose of protecting payroll card vendors' current profits or preserving their ability to collect fees from workers, rather than charging employers or using other business models. Any such purpose is "marginally related to, or even inconsistent with, the purposes of" Article 6. *Soc'y of the Plastics Indus.*, 77 N.Y.2d at 773–74. As in *Dorsett-Felicelli, Inc. v. County of Clinton*, 18 A.D.3d 1064, 1065 (3d Dep't 2005), Global Cash Card "primarily seeks to protect its own financial interest, which is not an interest protected by the applicable statutes." And although the Labor Law recognizes the interests of employers, who are undoubtedly "persons in interest" under Labor Law §101 who may petition the Board to review proposed DOL regulations, the inclusion of employers does not open the door to challenges by any third-party—like Global Cash Card—whose interests may be derivatively affected by regulation of the employer-employee relationship. Accordingly, Global Cash Card lacks standing to challenge the Wage Payment Rules and the Board's decision should be vacated for that reason.[15]

[15] This is not a case where application of standing principles would "completely shield a particular action from judicial review." *Ass'n for a Better Long Isl.*, 23 N.Y.3d at 6 (courts reluctant to apply standing principles in overly restrictive manner where it would erect an impenetrable barrier to judicial scrutiny). Many employers, some of whom filed comments during rule-making in opposition to the regulations, had standing to challenge their issuance, but chose not to do so. While the time for a challenge to the regulations pursuant to Labor Law § 101 has now passed, any employer (or, for that matter, even Global Cash Card) will be free to challenge the Wage Payment Rules in a specific factual context should DOL or anyone else seek to enforce the Rules against that party. *See N.Y. State Psychiatric Ass'n*, 29 A.D.3d at 1058–60 (dismissing for lack of standing and observing that "no impenetrable barrier to judicial scrutiny of the regulations exists" since "if any intended beneficiaries of the statute—recipients of psychoanalytic services—suffer concrete harm, those aggrieved individuals could challenge the governmental action").

B. Global Cash Card Does Not Have Standing as a "Person in Interest" Under Labor Law § 101 Just Because It Purports to Be an Employer "Agent"

Without considering whether Global Cash Card sustained an in-fact injury within the zone of interests protected by the Labor Law, the Board found that Global Cash Card had standing to challenge the Wage Payment Rules as an "interested person" under Labor Law §101(1) "inasmuch as it is an 'agent' of employers it has contracted with to issue payroll debit cards." (Kerwin Aff. at Exh. E (Decision), at 5.) The Board appeared to reason that since 12 NYCRR § 192-2.3(c), the principal provision invalidated, states that "[a]n employer or agent shall not charge" specified fees, "agents" as well as "employers" are interested persons within the meaning of the statute. This reasoning is erroneous as a matter of law. The Board did not support its conclusion that Global Cash Card is an "agent" of employers, and Global Cash Card has not provided sufficient information concerning its relationship with employers for DOL to determine whether it is an "agent" within the meaning of meaning of 12 NYCRR § 192-2.3(c). *See supra* at 14–15. Even assuming that Global Cash Card is an "agent," however, its status as an agent does not render it a "person in interest" with standing to petition the Board.

Employer agents do not qualify as "persons in interest" under Labor Law § 101 because their inclusion within the scope of 12 NYCRR § 192-2.3(c) was meant only to prevent employers from evading the provision's ban on fees for certain services by imposing such fees indirectly, through their agents. Under Labor Law Article 6, employers cannot directly impinge on employees' timely access to full wages, and there is nothing radical or even unusual in the idea that that prohibition applies even when the employer acts indirectly through an agent.[16] *See Labor*

[16] The understanding that principals act through agents is very old. *See, e.g.*, *United States v. Gooding*, 25 U.S. 460, 470 (1827) ("'the act of the agent, coextensive with the authority, is the act of the principal'") (citation omitted). *Gooding* held that a ship owner whose agents readied

Ready, 7 N.Y.3d at 585 (observing that Labor Law § 193 is intended to "prohibit wage deductions by indirect means where direct deduction would violate the statute"). But agents' mention in such a context does not imply they have any interest independent of their employer principals, nor does it confer standing on them to challenge the validity of the proposed regulations.

Outside their relationship with employers, agents have no independent interest affected by the Rules because the Rules do not directly regulate products or services that they may offer. As noted above, the Wage Payment Rules do not prohibit payroll card vendors from charging for withdrawal of cash at ATMs or other services; they only state that employers shall not charge, directly or through their agents, such fees to employees seeking access to wages. But payroll debit card vendors remain free under the Rules to charge fees to employers or to recoup their costs by other means. (*See* Kerwin Aff. at Exh. D (Transcript of Jan. 25, 2017 Board Hearing), at 66 ("They can charge fees to the employers, get reimbursement . . . say, Well, hey, your employee cost us $4 in fees. Employer, you owe us back $4.").) This limited prohibition is consistent with the DOL's longstanding guidance. (*See, e.g.*, Kerwin Aff. at Exh. A (Stipulated Record), at 15 (Oct. 29, 2009 opinion letter advising that since fees levied "directly on the employer" are not prohibited, "an employer seeking to utilize debit cards for the payment of wages may contract with a bank or financial institution to have any fees billed directly to the employer in lieu of taking them out of the employee's account"); *see also supra* at 5–8.) Since vendors remain free to collect fees, the duty not to charge workers for services essential to wage access continues to rest, in substance, on employer principals, not vendor agents.[17] Indeed, an employer that allows workers to be charged

his ship for the illegal slave trade fell within the statutory ban, especially since "fitment of a vessel is ordinarily, and, indeed, must be done through the instrumentality of others." *Id.* at 471.

[17] The very point of having an agent is "to accomplish results by utilizing the services of others. . . . The matter is put in the old Latin maxim, *Qui facit per alium facit per se.* (He who

such fees rather than itself paying them is "pass[ing] on [some] of its own costs associated with a payroll card debit account to an employee," contrary to 12 NYCRR § 192-2.3(e), a provision Global Cash Card did not even challenge. *See supra* at 15–16.

There are two reasons NYCRR § 192-2.3(c) expressly refers to agents. First, development of a payroll debit card system—like outfitting of a ship in *Gooding*, *supra* p. 23 n.16—"ordinarily, and, indeed, must be done through the instrumentality of others." Second, the reference removes any possible doubt that the principal, the employer, remains obligated under Labor Law Article 6 even if it authorizes a vendor to set up a payroll debit card wage system. Neither reason establishes an agent's independent interest in challenging the Wage Payment Rules.

In similar circumstances and probably for similar reasons, other statutes also refer to agents without thereby conferring standing upon agents to challenge agency determinations absent the agent itself being the subject of the determination. For example, in *Scheier v. Mitchell*, 188 A.D. 182 (1st Dep't 1919), DOL issued an order directing a company that leased a building to comply with certain safety codes. An employee of the leasing company brought an action to vacate the order under a former section of the Labor Law that allowed a "person in interest" to bring an action in Supreme Court against DOL to challenge the determination. The court found that the employee was not a "person in interest" under the statute because he was merely acting as an agent of the real party in interest, the leasing company. The employee himself was not "interested personally in the event of the action or in the matters concerning which it is brought." *Id.* at 190. Although the agent could institute the action on his principal's behalf and in its name, he was not himself a "person in interest" who could challenge the determination on his own behalf. Accordingly, the

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acts through another, himself acts.)" William A. Gregory, *The Law of Agency and Partnership* (3d ed. 2001) at 2–3.

court declined to reach the merits of the dispute. *Id.* at 191. So too here, Global Cash Card is not a "person in interest" with standing to bring its own challenge to the Wage Payment Rules just because it may be an agent of affected employers.

Here, the Board Petition did not allege any threatened DOL action against Global Cash Card as an "agent," or even, for that matter, against employers whom Global Cash Card serves in that capacity. Nor did it allege that Global Cash Card was filing the Board Petition on an employer's behalf, as contemplated by Labor Law § 101(1)'s statement that a "person in interest or his duly authorized agent may petition" the Board. If DOL ever did take action against Global Cash Card as an agent, Global Cash Card would have standing to challenge such action, but the Board erred as a matter of law by concluding that mere status as an "agent" makes a party a "person in interest" with standing to challenge the Rules.

II. THE BOARD'S RULING THAT THE WAGE PAYMENT RULES GO BEYOND THE SCOPE OF THE LABOR LAW IS CONTRARY TO LAW

Even if Global Cash Card did have standing, the Board's Decision should nonetheless be reversed on the merits. The Board revoked the Wage Payment Rules based on its determination that the Rules "go beyond the statutory language of Article 6, specifically that of Labor Law § 192, which governs the relationship between employers and employees, by placing restrictions on financial institutions," which the Board viewed as "exceed[ing] [the Commissioner's] rulemaking authority under Labor Law § 199 by regulating banking services." (Kerwin Aff. at Exh. E (Decision), at 10.) This determination is based on multiple errors of law and a fundamental misreading of the regulations. Moreover, the Board is not entitled to any deference on this matter of statutory construction. *Ovadia*, 19 N.Y.3d at 138 n.5. Construed correctly, the Wage Payment Rules lie squarely within the scope of the Commissioner's authority to regulate the payment of wages.

A. The Commissioner Acted Well Within Her Authority Under Article 6 of the Labor Law in Promulgating the Wage Payment Rules

The Legislature conferred an expansive grant of regulatory authority on the Commissioner, who is empowered to issue regulations "governing any provision of [the Labor Law] as [s]he finds necessary and proper," NYLL § 21(11), and is also specifically authorized to issue "such rules and regulations as [s]he determines necessary for purposes of carrying out the provisions of [Article 6]," NYLL § 199. The Court of Appeals has recognized that Article 6 "manifests the legislative intent" to assure that employers do not adopt methods of payment "by which the employer can divert a worker's wages for the employer's benefit." *Labor Ready,* 7 N.Y.3d at 583, 586 (finding that the § 193 was intended to "prohibit wage deductions by indirect means where direct deduction would violate the statute" and "to strengthen and clarify the rights of employees to the payment of wages"); *see also Grass*, 257 A.D. at 3 ("[Labor Law] should be liberally interpreted" to further its remedial purpose). To effectuate this legislative intent, Article 6 requires that workers be paid their wages in full and within a statutorily prescribed time period (§ 191), requires informed written consent before an employer can require payment by direct deposit (§ 192), and prohibits deductions from a worker's wages except for specified purposes (§ 193). *See supra* at pp. 4–5. As interpreted by DOL, and as recognized by the Board, Article 6 is designed to ensure "timely payment in full of an employee's agreed upon wages without encumbrances." (Kerwin Aff. at Exh. E (Decision), at 5.)

The Wage Payment Rules directly further the legislative purposes of Article 6 and fall squarely within the Commissioner's broad regulatory authority. The Rule requiring employers using payroll debit cards to ensure local access to at least one ATM that enables their employees to make withdrawals at no cost (12 NYCRR § 192-2.3(b)) directly furthers Labor Law § 191's purpose of ensuring full and prompt access to their wages. The Commissioner was not required to

accept that, as alleged in the Board Petition, the mere existence of "a method" to obtain wages, such as approaching a teller when a bank is open, is sufficient for actual full and prompt access. *See supra* at p. 10 (AG Report discussion of teller access). The Rule requiring employers to ensure that employees are not charged certain fees when performing actions necessary to access their wages through payroll debit cards, such as participation fees or balance access fees (12 NYCRR § 192-2.3(c)) also directly furthers this purpose, as well as Labor Law § 193's purpose of protecting employees from methods of payment that make unlawful deductions from their wages. The remaining provisions of the Rule, which the Board Decision did not even discuss before striking down the entire regulation, also plainly support the legislative policies underlying Article 6. *See, e.g.,* § 192-2.3(a) (furthering Labor Law § 192's purpose of ensuring informed consent by requiring employers to obtain consent from employees before paying wages by payroll debit card).

In short, the Wage Payment Rules are an uncontroversial exercise of the Commissioner's rulemaking authority in direct furtherance of the legislative purpose of Article 6. It is well established that an "agency can adopt regulations that go beyond the text of its enabling legislation, provided they are not inconsistent with the statutory language or its underlying purposes," and this is precisely what DOL has done by promulgating the Wage Payment Rules. *Greater N.Y. Taxi Ass'n v. N.Y.C. Taxi & Limousine Comm'n*, 25 N.Y.3d 600, 608–09 (2015) (enabling legislation "need not be detailed or precise as to the agency's role"); *Levine v. Whalen*, 39 N.Y.2d 510, 517 (1976); (observing that the Legislature may "assign broad functions" to agencies and leave to them "the duty of bringing about the result pointed out by statute"); *Kigin v. State*, 24 N.Y.3d 459, 467 (2014) (upholding regulations where "they reasonably supplement [the statute] and promote the overall statutory framework").

B. The Board's Determination That the Rules Exceed the Commissioner's Authority Is Based on Its Erroneous Interpretation of the Rules

Importantly, the Board does not appear to dispute that the Wage Payment Rules are valid, to the extent that they regulate employers' payment of wages to employees. (Kerwin Aff. at Exh. E (Decision), at 11) ("Restrictions or requirements placed on the employer that are consistent with the statute are, of course, valid[.]").) Indeed, the sole reason that the Board found the Rules to exceed the Commissioner's authority under Article 6 is its erroneous finding that the Rules seek to govern conduct outside the scope of the employer-employee relationship. The Board's interpretation ignores the plain language of the Rules, which regulate the payment of wages by employers to employees—and nothing more. The Rules impose obligations only on two types of persons: (1) an "employer" paying wages directly ("An employer shall . . ."), *see, e.g.*, 12 NYCRR §§ 192-1.3, -2.1, -2.3(a), (b), (e), (g), (h); and (2) an "agent" carrying out the payment of wages on behalf of an employer ("An employer or its agent shall . . ."), *see, e.g.*, §§ 192-1.4, -2.3(c), (d), (f). Both types of persons are acting within the scope of the employment relationship by carrying out an employer's payment of wages to an employee, and are clearly subject to regulation by the Commissioner under Article 6.

Nowhere do the Wage Payment Rules place any obligations or restrictions on anyone except "employers" and their "agents" carrying out the payment of wages to employees. It is true that the Rules refer to payroll debit card "issuers" and "financial institutions" (*see* §§ 192-2.3(c)(12), (d), (e), (g)), but in each such instance the language of the Rules specifically places the regulatory obligation on the "employer" or its "agent"—not the issuer or financial institution. *See, e.g.*, § 192-2.3(g) ("If the issuer charges the employee any new or increased fee . . . the *employer* must reimburse the employee the amount of that fee." (emphasis added)); § 192-2.3(c)(12) ("An *employer or agent* shall not charge, directly or indirectly, and employee a fee . . . not explicitly

identified by type and dollar amount in the contract between the employer and the issuer . . . ." (emphasis added)). Had the Commissioner intended, she easily could have drafted the Rules to place obligations directly on payroll card issuers and financial institutions. That she did not is only further indication that the Board's interpretation of the Wage Payment Rules is erroneous. *See Barnhart v. Sigmon Coal Co., Inc*., 534 U.S. 439, 448 (2002).[18]

The obligations on employers and their agents imposed by the Wage Payment Rules are also consistent with the Court of Appeals' construction of Article 6 and DOL's longstanding guidance in its letter opinions. *See Labor Ready*, 7 N.Y.3d at 586 (holding that staffing firm's deduction "from wages of a fee that goes directly to the employer or its subsidiary violates both the letter of [Article 6] and the protective policy underlying it"); (Kerwin Aff. at Exh. A (Stipulated Record), at 16 (2009 DOL opinion letter stating that "so long as fees do not relate to the employee's access to wages . . . and no part of those fees are remitted or otherwise directed to the employer or its subsidiary, permissible fees . . . imposed by a financial institution for banking services related to a payroll/debit card account would not run afoul of . . . the Labor Law").) Accordingly, because the Wage Payment Rules do not seek to regulate conduct outside of the employment relationship, the Board erred in determining that the Commissioner exceeded her authority in adopting the Rules. *See Ovadia*, 19 N.Y.3d at 138 n.5 (agency legal interpretation not entitled to deference).

III. THE BOARD'S RULING THAT THE WAGE PAYMENT RULES VIOLATE THE SEPARATION OF POWERS IS CONTRARY TO LAW

The Board determined that the Wage Payment Rules ran afoul of the separation of powers because they "prohibit otherwise lawful conduct by financial institutions for providing banking

[18] Quoting *Rusello v. United States*, 464 U.S. 16, 203 (1983), stating, "[I]t is a general principle of statutory construction that when 'Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.'").

services," and thus seek to regulate conduct "not within [the Commissioner's] purview." (Kerwin Aff. at Exh. E (Decision), at 11.) The Board's determination is affected by multiple errors of law—including its fundamental misreading of the Wage Payment Rules—and should be reversed.

The "constitutional principle of separation of powers . . . requires that the legislature make the critical policy decisions, while the executive branch's responsibility is to implement those policies." *Greater N.Y. Taxi Ass'n*, 15 N.Y.3d at 609 (citation omitted). The Court of Appeals has recognized that "some overlap" between the three branches of government is allowed, and that "in this State the executive has the power to enforce legislation and is accorded great flexibility in determining the methods of enforcement." *Clark v. Cuomo*, 66 N.Y.2d 185, 189 (1985) (citation omitted); *see also Citizens for an Orderly Energy Policy v. Cuomo*, 78 N.Y.2d 398, 410 (1991) (observing that the Legislature may "declare its policy in general terms," and "endow administrative agencies with the power and flexibility to fill in details and interstices and to make subsidiary policy choices consistent with the enabling legislation.").

The Court of Appeals has identified four "coalescing circumstances" that can serve as guidelines for determining a separation-of-powers violation. These include the following:

> whether (1) the agency did more than balanc[e] costs and benefits according to preexisting guidelines, but instead made value judgments entail[ing] difficult and complex choices between broad policy goals to resolve social problems; (2) the agency merely filled in details of a broad policy or if it wrote on a clean slate, creating its own comprehensive set of rules without benefit of legislative guidance; (3) the legislature has unsuccessfully tried to reach agreement on the issue, which would indicate that the matter is a policy consideration for the elected body to resolve; and (4) the agency used special expertise or competence in the field to develop the challenged regulation.

N.Y.C. C.L.A.S.H., Inc. v. N.Y. State Off. of Parks, Recreation & Historic Pres., 27 N.Y.3d 174, 179–80 (2016) (internal quotation marks omitted) (citing *Boreali v. Axelrod*, 71 N.Y.2d 1 (1987)). These factors (sometimes known as the *Boreali* factors) are not to be applied rigidly, are not mandatory, need not be weighed evenly, and are essentially guidelines. *See Nat'l Rest. Ass'n v.*

N.Y. City Dep't of Health & Mental Hygiene, --- N.Y.S.3d --- , No. 2629, 2017 WL 549039, at *4 (1st Dep't Feb. 10, 2017). In this case, all four *Boreali* factors favor the Commissioner.

A. The Rules' Clarification of Permissible Methods for Payment of Wages Is Not an Attempt to Resolve Broadly Controversial Issues by Balancing Societal Goals

The first *Boreali* factor is the most important and lies at the heart of the separation of powers analysis. *Nat'l Rest. Ass'n*, 2017 WL 549039, at *4 (observing that the "focus" of the analysis "must be on whether the challenged regulation attempts to resolve difficult social problems" by "making choices among competing ends"). Crucially, the Board's decision failed to perform this analysis. The Board did not even address the recent decisions upholding the Commissioner's regulations—addressing social problems far more controversial and far-reaching than those at issue here—establishing minimum wage and overtime rates against separation-of-powers challenges. *See Nat'l Rest. Ass'n v. Comm'r of Labor*, 141 A.D.3d 185 (3d Dep't 2016) (upholding minimum wage order for fast food workers at large chains); *Rocha v. Bakhter Afghan Halal Kababs, Inc.*, 44 F. Supp. 3d 337, 355 (E.D.N.Y. 2014) (upholding overtime rule).

The instances where courts have struck down regulations for violating the separation-of-powers doctrine have generally involved highly controversial issues that were the subject of broad and vigorous public debate at the time the case was decided. *See, e.g., Statewide Coal. of Hispanic Chamber of Commerce v. N.Y.C. Dep't of Health & Mental Hygiene*, 23 N.Y.3d 681 (2014) (striking Department of Health rule banning large servings of sodas and sugary drinks); *Garcia v. N.Y.C. Dep't of Health*, 144 A.D.3d 59 (1st Dep't 2016) (striking down Department of Health rule permitting certain childcare programs to enroll unvaccinated children); *Boreali*, 71 N.Y.2d 1 (striking rules restricting smoking in public areas, a highly controversial measure when the case was decided in 1987). Those regulations wrestled with questions of the proper balance between personal autonomy and societal goals, and involved the type of value judgments concerning

"difficult and complex choices between broad policy goals" that are "reserved to the legislative branch." *Statewide Coal.*, 23 N.Y.3d at 698.

The issues addressed by the Wage Payment Rules simply do not raise comparable policy tensions. The purpose of the Rules is to "provide[] clarification and specification as to the permissible methods of payment" that employers can use to pay wages to employees. (Kerwin Aff. at Exh. A (Stipulated Record), at 44 (Notice of Adoption).) These narrow rules do not venture outside the Commissioner's delegated sphere. Nor do they concern the type of broad societal debate inextricably entangled with "difficult, intricate and controversial issues of social policy" and requiring the type of value judgments that are the exclusive province of the legislature. *Statewide Coal.*, 23 N.Y.3d at 681. Rather, the Wage Payment Rules are precisely the type of regulation that courts have repeatedly upheld against a separation-of-powers challenge.

In *Statewide Coalition*, the Court of Appeals explained that an agency regulation does not invade the legislative policymaking sphere when its "connection . . . with the [agency's statutory purpose] is very direct," the "value judgments concerning [these] underlying ends are widely shared," and "there is minimal interference with the personal autonomy of those whose [interest] is being protected." 23 N.Y.3d at 700. Here, the Wage Payment Rules were specifically designed to further the purpose of Article 6 of the Labor Law to ensure full, prompt, and unencumbered payment of wages. *See supra* at pp. 27–28. This goal is a noncontroversial one with which few would take issue, *i.e.*, that workers—especially low-wage workers—should be paid what they are owed, on time, and without unnecessary obstacles. Furthermore, the Rules do not decrease employee autonomy, but rather *increase* it by, for example, requiring employers to ensure that informed consent is obtained before utilizing payroll debit cards. *See* 12 NYCRR § 192-1.3; *see also Nat'l Rest. Ass'n*, 2017 WL 549039, at *7 (rule requiring sodium warning on restaurant menus

increased customer autonomy). Nor is the "personal autonomy" of others infringed by the Rule: a debit card vendor's power to charge employees as opposed to employers for certain services is not a matter of "personal autonomy." Accordingly, the first *Boreali* factor favors the Commissioner.[19]

B. The Commissioner Did Not Write on a "Clean Slate" but Rather Codified More Than a Decade of DOL Guidance Implementing a Clear Legislative Policy

The second *Boreali* factor evaluates whether an agency is seeking to regulate a new area for the first time with no legislative guidance whatsoever. If an agency writes on a "clean slate" in this manner, it can run afoul of the separation of powers.[20] However, if an agency has a longstanding history of regulating a particular area, and the legislature has set forth a policy by statute and "largely left [] regulation to the [agency], with little interference," then the agency is not writing on a clean slate. *Greater N.Y. Taxi Ass'n*, 25 N.Y.3d at 611 ("The TLC was not writing on a clean slate [by adopting regulations selecting a specific make and model as the official NYC taxi] in the sense that it has always regulated the taxi industry as to almost every detail of its

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[19] In *Boreali*, the Court also pointed to the fact that the regulations before it were "laden with exceptions" for "various special interest groups," indicating an improper attempt to make value judgments unrelated to the purpose of the regulation. 71 N.Y.2d at 10 (striking regulations prohibiting public smoking that had exceptions for bars, convention centers, and other entities that "have no foundation in considerations of public health"); *see also Garcia*, 144 A.D.3d at 65 (striking rule that prohibited enrollment of unvaccinated children in childcare facilities but created exceptions for larger childcare programs that were "not primarily grounded in science or health"). The Wage Payment Rules contain no exceptions designed to accommodate special interest groups, and thus these concerns are not relevant in this case.

[20] *Compare Campagna v. Shaffer*, 73 N.Y.2d 237, 243 (1989) (observing that a "key feature" supporting the Court's invalidation of the Department of Health's public smoking ban in the *Boreali* case "was the Legislature had never articulated a policy regarding the public controversy" in 1987 when the case was decided), *with, N.Y.C. C.L.A.S.H.*, 27 N.Y.3d at 184 (upholding public smoking ban and observing that "by contrast" to *Boreali* "the legislature has spoken against secondhand smoke" by 2016). *See also Statewide Coalition*, 23 N.Y.3d at 687 (invalidating soda portion ban because "neither the state legislature nor the City Council has ever promulgated a statute defining a policy with respect to excessive soda consumption").

operation."); *Nat'l Rest. Ass'n*, 2017 NY Slip Op 01140, at *7 (finding same for sodium warning rule where Health Board had always regulated restaurants as necessary to promote public health).

In this case, the DOL is not seeking to regulate a new area for the first time. Far from it. The Wage Payment Rules represent the Commissioner's attempt to clarify, unify, and codify the DOL's longstanding guidance in this area—namely, a series of opinion letters issued from 2001 to 2011 instructing employers and employees as to permissible methods of payment of wages by payroll debit card under Article 6. *See supra* at pp. 5–9. In this regard, the Commissioner "has always regulated [employers] as necessary to promote [access to wages by employees]." *Nat'l Rest. Ass'n*, 2017 NY Slip Op 01140, at *7. As the Board acknowledged, DOL has been the authoritative source of guidance concerning payment of wages by payroll debit card for 15 years. (Decision 5.) Moreover, the Legislature has "largely left [] regulation [of payroll debit cards] to the [DOL], with little interference." *Greater N.Y. Taxi Ass'n*, 25 N.Y.3d at 611; *see also Med. Soc'y*, 148 A.D.2d at 148 (upholding regulations where agency "has, for more than 25 years and without any interference from the Legislature, promulgated regulations—never before challenged").

All eight opinion letters issued during this time made clear that employers' payroll debit card programs may violate Article 6 if they deduct from employee wages or charge fees for services that are essential for employee access to wages or other improper encumbrances of an employee's prompt access to wages. *See supra* at pp. 5–9. In its guidance, DOL also clarified that payroll debit card fees are not prohibited, and instructed that "an employer seeking to utilize debit cards for the payment of wages may elect to arrange with a bank or financial institution to have any fees billed directly to the employer in lieu of taking them out of the employee's account." *See supra* at p. 7. Global Cash Card is undoubtedly aware of DOL's longstanding guidance concerning

payroll debit cards. Not only is it discussed at length in the Board Petition, but Global Cash Card was also specifically mentioned in one of the DOL opinion letters. *See supra* at 6. Nonetheless, neither Global Cash Card nor any other party challenged the DOL opinion letters or DOL's power to implement Article 6's policy against fees that limit access to full wages by setting forth restrictions on employers relating to payroll debit cards, despite having over a decade to do so.

Moreover, the Legislature did "articulate[] a policy regarding the public controversy" in this case. *Campagna*, 73 N.Y.2d at 243. Specifically, Article 6 bans deduction from and charges to employee wages outside exceptions not applicable here, *see* Labor Law §193, and "manifests the legislative intent to assure that the unequal bargaining power between an employer and an employee" does not result in payment methods "by which the employer can divert a worker's wages for the employer's benefit," *Labor Ready*, 7 N.Y.3d at 586. Further, Article 6 requires that employers "assure prompt payment of daily wages to those employed in a subordinate capacity and who depended upon their earnings for support." *Vetri*, 309 N.Y. at 405. The Legislature has also specifically designated the Commissioner to "investigate and attempt to adjust equitably controversies between employers and employees relating to [Article 6]." NYLL § 196. As discussed in detail *supra* at pp. 27–28, the Rules directly further these legislative policies.

Therefore, DOL's eventual adoption of regulations that clarify, unify and codify its longstanding guidance as expressed through opinion letters is hardly writing on a "clean slate." The second *Boreali* factor therefore also weighs in the Commissioner's favor.

C. The Refusal to Enact Laws Superseding DOL's Guidance Is a Legislative Acknowledgment of DOL's Longstanding Regulation of Payroll Debit Cards

Evaluating the third *Boreali* factor, the Board determined that the existence of nine unsuccessful bills seeking to amend Article 6 indicates the Legislature's "satisfaction with the current statutory language or their inability to reach consensus on the manner in which payroll

debit cards should be regulated." (Kerwin Aff. at Exh. E (Decision), at 11.) The Board described the bills, introduced between 2007 and 2015, in detail and portrayed the 2016 Wage Payment Rules as having been promulgated in the wake of an unsettled legislative debate. *See Boreali*, 71 N.Y.2d at 13 (invalidating rule where agency acted in the wake of 40 unsuccessful bills seeking to pass a highly controversial public smoking ban).

But the story told by the Board omits the most crucial detail; DOL did not start regulating payment of wages by payroll debit card in 2016, but rather started regulating in this area in 2001, long before the first bill on this topic was introduced. Moreover, certain bills cited by the Board were introduced *in reaction* to DOL's longstanding authoritative guidance—not vice versa, as suggested by the Board—attempting to roll back that guidance legislatively. (*See, e.g.*, Kerwin Aff. at Exh. E (Decision), at 8–9 (describing 2011 NY Assembly Bill A6894-A, which would have permitted employees to be charged payroll debit card fees as long as one fee-free withdrawal or transfer was provided each pay period).) Against this backdrop, "[t]he Legislature's failure to enact [legislation governing payroll debit cards], despite having repeatedly considered doing so, [] evinces a legislative preference to yield to administrative expertise in filling in an interstice in the statutory scheme." *Med. Soc'y*, 148 A.D.2d at 148. In other words, if anything can be inferred from the lack of legislative action, it is that the Legislature preferred the guidance contained in DOL's letter opinions to the alternatives proposed in the unsuccessful bills. *See Nat'l Rest. Ass'n*, 141 A.D.3d at 190 ("The fact that the Legislature failed to agree on an increase in the statutory minimum wage in the lead-up to the issuance of the wage order in no way reflects dispute or confusion as to the longstanding authority of the Commissioner to set a minimum wage for employees in a given occupation."); *N.Y.C. C.L.A.S.H.*, 27 N.Y.3d at 184 (noting that the existence of 24 unsuccessful bills seeking to prohibit public smoking could indicate a legislative consensus

that the "law already delegates to [the agency] the authority to designate no-smoking areas"). Accordingly, the third *Boreali* factor weights in favor of the Commissioner.[21]

D. DOL Used Its Special Competence and Expertise in Promulgating the Rules

The Wage Payment Rules lie at the heart of DOL's expertise and special competence, developed over a century of serving as the primary regulator of payment of wages in New York State. The Commissioner drew directly on this deep expertise, including over a decade of agency legal opinions guiding employers concerning their obligations to ensure full and timely payment, in promulgating and adopting the Rules. *See supra* at pp. 5–13.

Article 6 of the Labor Law traces its prohibition on "diver[sion of] a worker's wages for the employer's benefit " back over a century to an 1889 statute prohibiting payment of wages in company scrip or money orders, and its 1893 amendment prohibiting charges against wages for provisions or clothing. *Labor Ready*, 7 N.Y.3d at 583; (*see also* Affidavit of Pico Ben-Amotz, General Counsel for the New York State Department of Labor ("DOL Aff.") ¶ 2.) A state agency authorized to regulate the workplace was first established in New York in the late 19th century, and DOL is the direct successor to that agency. (*Id.*) DOL has been the primary regulator of

[21] The Court of Appeals has warned that "[l]egislative inaction, because of its inherent ambiguity, affords the most dubious foundation for drawing positive inferences" of legislative intent. *N.Y.C. C.L.A.S.H.*, 27 N.Y.3d at 184. For this reason, courts have repeatedly found that the existence of prior unsuccessful legislation, in even greater amounts than present here, does not mean that an agency has exceeded its mandate. *See, e.g.*, *Rent Stabilization Ass'n of N.Y.C. v. Higgins*, 83 N.Y.2d 156, 170 (1993) (27 prior unsuccessful bills on same subject); *N.Y. State Health Facilities Ass'n*, 77 N.Y.2d at 348 n.2 (1991), *rev'g* 155 A.D.2d 208 (3d Dep't 1990) (ten prior unsuccessful bills). The Board, in relying so heavily on these nine unsuccessful bills to support its determination, disregarded the Court of Appeals' warning. Moreover, the probative value of these bills is especially limited because none of them moved beyond a committee to be considered by the full legislature. *See* A7701-2007 (referred to labor committee without further action); A5968-2015 (same); A6608-2015 (same); A6811-2015 (same); S4685-A (same); A6894-2011 (same); A6419-B-2013 (same); S7790-2014 (same); A3109-A-2015 (referred to rules committee without further action). *See Nat'l Rest. Ass'n*, 2017 NY Slip Op 01140, at *7 (finding that unsuccessful bills were not probative because "on each occasion, the proposed legislation was sent to a committee, and no further action was taken, so there is no indication that it was the subject of vigorous debate").

payment of wages in New York State for over a century, and today the Commissioner continues to be charged with enforcing and interpreting the Labor Law, including the protections of Article 6 ensuring full, prompt, and unencumbered payment of wages. (*See id.*) "The Commissioner is tasked with making complex economic assessments" and "has special expertise to do so in the form of investigative powers in the area of wages and leadership of an agency capable of providing expert guidance." *Nat'l Rest. Ass'n*, 141 A.D.3d at 192 (2016). The Legislature has also specifically authorized the Commissioner to "investigate and attempt to adjust equitably controversies between employers and employees relating to [Article 6]." NYLL § 196.

Long before the existence of payroll debit cards, DOL had already begun interpreting Article 6 to require consent and prohibit fees in connection with direct deposit of wages. In 1991, DOL issued an opinion letter advising that a payment scheme requiring employees to receive wages by direct deposit subject to payment of maintenance fees could violate the consent and non-diminution requirements of Article 6. (DOL Aff. ¶ 4.) The DOL specifically advised that "'if the bank in which employees' wages are deposited charges a fee for the maintenance of the account into which the wages are deposited, such fee must be paid by the employer, unless the employee already maintained an account at the same bank which was subject the same fee.'" (*Id.* (quoting Opinion Letter, Oct. 11, 1991).).

Debit cards began to emerge as a new method of paying wages at the turn of the 21st century, and DOL issued its first opinion letter specifically addressing this practice shortly thereafter, in 2001. (*Id.* ¶¶ 3, 5.) Consistent with prior agency interpretation of Article 6, DOL's 2001 opinion letter required advance consent and prohibited employers from subjecting employees to "'any costs associated with the withdrawal'" of wages. (*Id.* ¶ 6 (quoting Opinion Letter, Oct. 10, 2001).) As discussed in detail *supra* at pp. 5–9, over the course of the next decade DOL issued

seven more opinion letters providing authoritative guidance in response to inquiries concerning permissible methods of payment by payroll debit card under Article 6. (*See also* DOL Aff. ¶¶ 5–16.) Indeed, prior to the issuance of the Rules, DOL's opinion letters were the sole source of guidance concerning permissible use of payroll debit cards by employers. It is precisely for this reason—building on its expertise in ensuring prompt and full payment of wages and seeking to clarify, unify, and codify its opinion letters—that the Commissioner promulgated the Wage Payment Rules. (*See* DOL Aff. ¶¶ 17–21; *see also* Kerwin Aff. at Exh. A (Stipulated Record), at 28 (initial DOL notice of rulemaking stating that the Wage Payment Rules "provide[] clear rules governing the payment of wages via payroll debit cards, a method of payment that was not specifically addressed in anything other than Departmental guidance document[s]").[22]

In evaluating the fourth *Boreali* factor, the Board did not engage in the above analysis because, as discussed *supra* at pp. 29–30, it erroneously construed the Wage Payment Rules to "go beyond regulation of the employment relationship and into the area of banking law," and thus to fall "outside the [Commissioner's] competence and expertise." (Kerwin Aff. at Exh. E (Decision),

[22] In drawing on its deep expertise concerning the payment of wages, DOL also reviewed the Attorney General's Office June 2014 Report on the impact of payroll cards on low-wage workers, which was also cited in multiple public comments submitted during the rulemaking process. (*See supra* at pp. 9–11 & n.5; DOL Aff. ¶¶ 17–18); *see Nat'l Rest. Ass'n*, 141 A.D.3d at 196–97 (agencies may rely on studies to support rulemaking). Based on an analysis of broad survey data, the Attorney General's Report concluded that many payroll debit card programs "charge fees for card-related activities [in connection with the payment of wages], and these fees can add up, reducing the meager take-home pay received by the lowest paid workers in the state." (Kerwin Aff. at Exh. B (Board Petition), at Exh. I (AG Report), page 1.) The Report discussed maintenance, closing, inactivity, card replacement, and ATM fees, and their impact on employees' take-home wages. (*Id.* at 8–13.) The survey data also reflected that "ATM withdrawals were the most popular method for these employees to access their wages . . . [and] far outpaced other alternative methods such as [over the counter] cash withdrawals." (*Id.* at 7.) The findings in the Report are broadly consistent with the findings of DOL in studying the issue of payment of wages by payroll debit card and its experience administering Article 6. (*See* DOL Aff. ¶¶ 17–21. *See generally supra* at pp. 5–11.)

at 11.) To support its erroneous conclusion, the Board relied on "public comments on the regulations made by members of the legislature . . . urging [the Commissioner] to consult with the Department of Financial Services ["DFS"] to ensure its rules do not duplicate or conflict with banking regulations." (*Id.*) This reliance was misplaced. There was no evidence before the Board as to the necessity, nature, or extent any such inter-agency consultation—and, in any event, DOL *did* consult with DFS on multiple occasions in advance of promulgating the Rules.

Specifically, in 2014, well before promulgating the Rules, DOL had several meetings with DFS consumer and banking regulators to identify relevant concerns and opportunities for rulemaking to codify and clarify DOL's opinion letters concerning payment of wages by payroll debit card. (DOL Aff. ¶ 19.) During the course of this consultation process, the two agencies agreed that the Wage Payment Rules would not impinge on or interfere with DFS's regulatory authority over financial products and services because the Rules concern the employer-employee relationship and payment of wages, which DFS does not regulate. (*See* Affirmation of Brian Montgomery, Supervising Counsel for the Financial Frauds & Consumer Protection Division of DFS ("DFS Aff."), ¶¶ 3–6.) DFS specifically informed DOL, before the Wage Payment Rules were put forward for notice and comment, that the Rules do not interfere with DFS's regulatory authority, and DFS's review of the proposed Rules during the notice and comment period raised no issues warranting comment from DFS. (DFS Aff. ¶ 6.) The conclusions drawn from this inter-agency consultation process are reflected in DOL's response to comments in its October 2015 revised notice of rulemaking, which states that the proposed Rules do not "contain a general prohibition on fees" and are "concerned with Labor Law requirements, not banking law requirements." (Kerwin Aff. at Exh. A (Stipulated Record), at 34–35.)

In sum, the four coalescing factors identified in *Boreali* only further confirm that the Wage Payment Rules are well within the Commissioner's broad delegation of authority and advance the legislative policy goals of Article 6 to ensure the right of employees to full, prompt, and unencumbered payment of wages.

IV. THE BOARD'S REVOCATION OF THE WAGE PAYMENT RULES IN THEIR ENTIRETY WAS ARBITRARY AND CAPRICIOUS

As discussed *supra* at p. 18, upon determining that the Commissioner had exceeded her authority in adopting the Wage Payment Rules, the Board granted Global Cash Card's petition. Although the Rules contain over 15 distinct provisions, the Board Petition specifically challenged the validity of only three of these—namely, 12 NYCRR § 192-2.3(b)(1) (local access), § 192-2.3(a)(2) (delayed effectiveness of employee consent), and § 192-2.3(c) (fee requirements). *See supra* at pp. 16–17. The Board's Decision specifically addressed only two provisions of the Rules: the local access and fee requirements. *See supra* at pp. 17–18. The Board did not assess the validity of any challenged provisions other than fee requirements and local access, did not assess the Board Petition's challenges to the Rules based on preemption or reasonableness, and did not discuss the possible survival of provisions not invalidated in its decision or, for several provisions, not even challenged in the Board Petition. Instead, the Board simply ordered that "[t]he regulations regarding methods of payment of wages adopted September 7, 2016 to be codified as 12 NYCRR part 192 are revoked." (Kerwin Aff. at Exh. E (Decision), at 12.)

There is no rational basis supporting the Board's revocation of the Rules in their entirety. Under Labor Law § 101, the Board is authorized to review DOL regulations "or any part thereof," and upon finding that it is "invalid or unreasonable it shall revoke, amend or modify the same." NYLL § 101(3). Section 101 is intended as a "limit[]" on Board power to review DOL regulations.

First Coinvestors, Inc., 159 A.D.2d at 209. Thus, the Board can review a discrete part of a regulation and amend or modify it if appropriate, consistent with its limited review authority.

The Board should have exercised that power here and upheld the Rules in substantial part or under an authoritative, saving interpretation. Specifically, the Board determined that the Wage Payment Rules were invalid "to the extent they prohibit otherwise lawful conduct by financial institutions for providing banking services" by restricting their ability to charge "fees associated with use of a payroll debit card." (Kerwin Aff. at Exh. E (Decision), at 11; *see also id.* ("[r]estrictions or requirements placed on the employer that are consistent with the statute are, of course, valid")). In other words, if the Board found that the Wage Payment Rules were invalid to the extent they applied to financial institutions, it should have so held without invalidating the Rules as applied to employers. Likewise, if the Board believed that the inclusion of "agents" rendered § 192-2.3(c) invalid, it should have excised that term and saved the Rules as so modified. This type of narrowly tailored disposition is consistent with—and, indeed, was required by—the Board's "limit[ed]" review authority under Labor Law § 101. *First Coinvestors, Inc.*, 159 A.D.2d at 209.

Alternatively, at the very least, even if the Board had determined to strike the two provisions of the Rules discussed in its Decision, it was not authorized to revoke the remaining provisions under Labor Law § 101 without any finding that they were also invalid. For instance, according to the Board's own logic, there was no rational basis to revoke the portions of the Rules that have nothing whatsoever to do with payroll debit cards.[23] Similarly, there was no rational basis

[23] *See* 12 NYCRR §§ 192-2.1 ("Payment of Wages by Check"), 192-2.2 ("Payment of Wages by Direct Deposit").

to revoke the Rules that relate to payroll debit cards in part but do not concern local access to ATMs or fees requirements, the only provisions actually addressed in the Board's Decision.[24] Indeed, the majority of these provisions were not even challenged by the Board Petition. Accordingly, the Board should have upheld these portions of the Rules, and its revocation of the Rules in their entirety was arbitrary and capricious.

V. THE WAGE PAYMENT RULES ARE NOT PREEMPTED BY FEDERAL LAW

The Board did not find that the Wage Payment Rules are preempted, as argued in the Board Petition, and thus federal preemption cannot be grounds for upholding its Decision. *See Sherbyn*, 77 N.Y.2d at 758 (court review limited to grounds invoked by administrative body making determination). In any event, should respondents raise these arguments again in this proceeding, the Court should dismiss them because the Rules are not preempted by federal law.

The Supremacy Clause provides that federal laws "shall be the supreme Law of the Land; and the Judges in every state shall be bound thereby." *See* U.S. Const., art. VI, cl. 2. Therefore, federal law supersedes state statutory, regulatory and common law. *People v. First Am. Corp*., 18 N.Y.3d 173, 179 (2011). "Preemption can arise by: (i) express statutory provision, (ii) implication, or (iii) an irreconcilable conflict between federal and state law." *People v. Applied Card Sys., Inc.*, 11 N.Y.3d 105, 113 (2008) (citation omitted). Preemption by implication occurs when "[t]he scheme of federal regulation [is] so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it . . . [o]r the Act of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement

[24] *See* 12 NYCRR §§ 192-1.1 ("Permissible Methods of Payment"), 192-1.2 ("Definitions"), 192-1.3 ("Written Notice and Consent"), § 192-1.4 ("Prohibited Practices"), and certain subsections of 192-2.3 ("Payment of Wages by Payroll Debit Card").

of state laws on the same subject." *First Am. Corp.*, 18 N.Y.3d at 179 (quotation omitted); *see also Sharabani v. Simon Prop. Group, Inc.*, 96 A.D.3d 24, 28 (2d Dep't 2012) ("A state law conflicts with federal law where compliance with both federal and state regulations is a physical impossibility, or where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." (quotations omitted)).

Before the Board, Global Cash Card alleged that the Rules are preempted by implication by the Home Owners Loan Act ("HOLA"), 12 U.S.C. §§ 1461–1470, and its implementing regulations based on the incorrect premise, discussed *supra* at pp. 29–30, that the Rules regulate banks and financial institutions. In so arguing, Global Cash Card misapplied HOLA preemption, which preempts state laws that affect the operations of federal savings associations only when appropriate to (1) "[f]acilitate the safe and sound operations of federal savings associations"; (2) "[e]nable federal savings associations to operate according to the best thrift institutions practices in the United States"; or "[f]urther other purposes of HOLA." 12 C.F.R. § 557.11.

HOLA and its regulations, which were enacted to address "the financial devastation" of the Great Depression,[25] are intended to comprehensively cover the field of home savings associations' deposit-related regulations. *First Am. Corp.*, 18 N.Y.3d at 180. However, the Department of the Treasury has specifically explained that HOLA does not preempt the incidental effects of state laws on deposit-related activities relating to "(1) [c]ontract and commercial law; (2) [t]ort law; (3) [c]riminal law," 12 C.F.R. § 557.13(a), and (4) any other law that "furthers a vital state interest," 12 CFR § 557.13(b) (explaining that a state law that "[e]ither only incidentally

[25] "The purpose of [the] comprehensive legislation [of HOLA] was to provide emergency relief with respect to home mortgage indebtedness . . . ." *First Am. Corp.*, 18 NY3d at 180 (internal quotation marks and citation omitted).

affects deposit-related activities or is not otherwise consistent with the purposes expressed in 557.11" is not preempted); *see also First Am. Corp*., 18 N.Y.3d at 183. [26]

Accordingly, the Wage Payment Rules are not preempted by HOLA, since they protect employees and require employers to provide a method of wage payment that ensures full, prompt, and unencumbered access to wages. The Rules do not impose requirements on banks, financial institutions or federal savings associations in a way that directs or mandates any actions associated with deposit-related activities. *See supra* at pp. 29–30. Instead, the regulations further a vital state interest of the State of New York; namely, ensuring that New York workers are able to fully access their wages. *See supra* at pp. 27–28. In addition, no effects on deposit-related activities due to the regulations have been identified, much less any conflicts. Therefore, any claim by respondents that the regulations are preempted by federal law should be rejected. *Sharabani*, 96 A.D.3d at 31–33; *cf. Monroig v. Wash. Mut. Bank, FA*, 19 A.D.3d 563, 564–65 (2d Dep't 2005) (requiring that state law claims "more than incidentally concern" credit and lending activities to find preemption).

VI. THE WAGE PAYMENT RULES ARE A REASONABLE EXERCISE OF THE COMMISSIONER'S EXPANSIVE REGULATORY DISCRETION

As discussed *supra* at p. 3, pursuant to Labor Law § 101, the Board is authorized to review the reasonableness of a regulation issued by the Commissioner. *See* Labor Law §101(1). Here, the

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[26] In closely analogous circumstances, the federal Consumer Financial Protection Bureau ("CFPB") considered whether its Regulation E, governing prepaid accounts under the Electronic Fund Transfer Act, preempted state laws governing payroll accounts, including "the Illinois payroll card law, which . . . provides certain employee protections that are not contemplated by [Regulation E], and . . . may have additional obligations and restrictions" applicable to employers. Consumer Fin. Protection Bureau, Notice of Final Rulemaking for Prepaid Accounts Under the Electronic Fund Transfer Act (Regulation E) and the Truth in Lending Act (Regulation Z), RIN 3170-AA22, at 224 (Oct. 3, 2016), *available at* http://files.consumerfinance.gov/f/documents/20161005_cfpb_Final_Rule_Prepaid_Accounts.pdf. CFPB determined that Regulation E, like HOLA, "makes clear that it does not preempt State laws except to the extent those laws are inconsistent with [Regulation E]," and that a state law affording greater protections than those in Regulation E is "not inconsistent" with Regulation E. *Id.*

Board did not determine that the Wage Payment Rules are unreasonable, and thus irrationality cannot be grounds for upholding its Decision. *See Sherbyn*, 77 N.Y.2d at 758. Should respondents raise arguments concerning reasonableness in this proceeding, the Court should disregard them for this reason, and also because the Rules are a reasonable exercise of the Commissioner's discretion.

The Wage Payment Rules set forth and codify reasonable standards for the methods that employers can use to pay employees' wages. These standards do not require drastic changes in the actions of employers; instead, they clarify for employers the requirements of Article 6 of the Labor Law. Global Cash Card argued below that the local access, language access, seven-day delay for consent, fee prohibitions, and notice requirements are unreasonable. These arguments merely raised disagreements with the Wage Payment Rules, and failed to establish that the Rules are so irrational as to fall outside a range of reasonableness. *See Medical Society*, 148 A.D.2d at 148 ("that reasonable minds might differ . . . is not sufficient to establish the irrationality necessary to warrant annulment"). As such, the Court should dismiss these arguments as without merit.

A. Local Access

Consistent with DOL's interpretation of Article 6, the Rules codify the requirement that employees be ensured "local access" to their wages. Local access is defined as follows:

> Local Access shall mean that the employee is provided with access to his or her wages, at a facility or machine which is located within a reasonable travel distance to the employee's work location or home, and without unreasonable restraint by the employer or its agent.

12 NYCRR § 192-1.2(d). This definition operates, as does Article 6 as a whole, to ensure that employees are able to access their wages in a manner and method that is effective. This requirement is consistent with DOL's guidance, particularly an October 29, 2009 opinion letter which provides that "employers must take positive steps to ensure that the employee is able to access [their wages]," and that such steps may include "ensuring that bank branches where the

employee could obtain the entirety of his/her wages are in close proximity to the employee and may be quickly and conveniently accessed." (Kerwin Aff. at Exh. A (Stipulated Record), at 15.)

In response to inquiries about the October 29, 2009 opinion letter, the Commissioner issued a follow-up opinion letter dated January 15, 2010, explaining:

> [P]lease be advised that the location at which free withdrawals may be made must be located within a reasonable distance of the employee's worksite so that the employee may make withdrawals without difficulty since the employee cannot be said to be given access to free bank withdrawals at a bank with few or no branches or ATMs in geographical proximity to the place of employment.

(*Id.* at 18.)

These opinions were codified in the Rules by incorporating the local access requirement for ATMs, a requirement that arose from opinions the Commissioner issued with regard to pay checks, and was applied to payroll debit cards through later opinions. (*See id.* at 1–4.) The Court should reject the Board Petition's argument that ATM access is "secondary" and unnecessary as long as employees can approach bank tellers without charge. It was reasonable for the DOL to conclude that access to wages limited to "banker's hours," which for many employees generally coincide with working hours, is insufficient to constitute genuine full and unimpeded access. *See also supra* at pp. 10 (low rate of teller use reported by workers in AG Report surveys). [27]

To require that employees have access to their wages within a reasonable travel distance from their work or home is not only reasonable, it is an essential requirement of Article 6. The

[27] Furthermore, this definition does not, as the Board Petition argued, require that an employer or financial institution know where an employee resides. The Rule only requires employers to provide local access to ATMs near an employee's "work location or home," thereby relieving employers of the need to know the location of each employee's residence. § 192-1.2(d); *see also* 12 NYCRR § 142-2.6(1)(a)(1) (separate regulation requiring that employers maintain records of employee addresses, suggesting that employers already generally know or have access to the addresses of their employees).

Commissioner, by codifying DOL interpretation into the Rules, is clarifying for employers the specific requirements applicable to them thus ensuring employee access to wages.

B. Language Access

The language access provisions of the Rules were adopted in furtherance of Labor Law § 195, which, in relevant part, requires employers to provide employees with a notice containing information concerning payment of wages in English and certain additional languages. Specifically, employers must provide to their employees a notice of certain specified information, as well as "such other information as the commissioner deems material and necessary," "in English and in the language identified by each employee as the primary language of such employee." § 195(1)(a). Section 195(1)(c) tempers that requirement by providing, in relevant part, that "[w]hen an employee identifies as his or her primary language a language for which a template is not available from the commissioner, the employer shall comply with this subdivision by providing that employee an English-language notice or acknowledgment." This notice scheme in Labor Law § 195 mirrors the scheme contained in the challenged Rules, and it provides additional statutory support for the Commissioner's authority to require that employers provide certain information to employees as "the commissioner deems material and necessary." Accordingly, the notice requirements in the Rules are not only reasonable, they are entirely consistent and complementary to the statutory provisions from which the Rules arise.

C. Seven-Day Consent

The Rules set a reasonable limitation on the effective date of employee consent by requiring that employee consent for the payment of wages via payroll debit card must be at least "seven business days prior to taking action to issue the payment of wages by payroll debit card, during such seven business days the employee's consent shall not take effect." *See* 12 NYCRR § 192-2.3(b)(2). The Commissioner's May 27, 2015 proposal would have prohibited employers

from seeking employee consent for seven days after employees were provided with the required notices specified in the Rules. (*See* Kerwin Aff. at Exh. A (Stipulated Record), at 26.) In response to comments asserting that such a requirement would cause significant hardship to employers, the Commissioner amended the proposed rule to "permit immediate consent with a subsequent seven day waiting period before an employer may act upon it." (*See id.* at 33 (response to comment 3).)

This provision, which was amended in order to ease the administrative burden placed on employers during the immediate onboarding or hiring process, operates to ensure that employees are neither required nor permitted to make an immediate or pressured decision to receive payment via payroll debit card without the ability to withdraw such consent for a period of time. This protection helps to ensure that employees have a full and fair opportunity to decide if the payment of wages via payroll debit cards is appropriate for them. This is particularly relevant given the fact that payroll debit cards are typically utilized and targeted to low-wage workers, as they tend not to have an existing relationship with a bank or financial institution that would permit them to be paid via direct deposit. *See supra* at p. 40 n.22 (discussing impact on low-wage workers). The Board acknowledged the Commissioner's "well-founded concern that low-wage workers without access to traditional bank accounts" are vulnerable to exploitation (Kerwin Aff. at Exh. E (Decision), at 11–12), and the requirement that consent not take effect immediately provides such workers with greater autonomy and opportunity to provide consent that is truly informed.

D. Fee Requirements

The Rules prohibiting employers from charging fees, directly or through their agents, to employees are reasonable for the reasons discussed at length herein. *See supra* at pp. 6–9 (discussing history of DOL opinion letters consistently prohibiting employers from requiring employees to pay such fees to ensure full payment under Labor Law § 191 and protect against unlawful deductions from or charges to wages under Labor Law § 193); *supra* at pp. 9–11, 41 n.22

(discussing payroll card abuses and Attorney General's Report's conclusion that fees adversely impact wages of low-wage workers); *see also Labor Ready, Inc*., 7 N.Y. 3d at 585 (2006) (finding that employer deduction of wages through cash machine owned by employer subsidiary violated Labor Law § 193 and holding employer liable for improperly charged fees was consistent with the statute and its legislative purpose to avoid employer diversion of workers' wages).

The arguments raised in the Board Petition are conclusory and, at best, express disagreements with the wisdom of the provisions of the Rules relating to fees. (*See* Board Petition ¶ 159 (asserting that the Rules are unreasonable because they differ in some respects from prior requirements in opinion letters, are burdensome to employers, are more rigorous than federal requirements, and because fees may be avoided if employees use alternate means to access wages).) These arguments are without merit, for the reasons discussed *supra* at pp. 6–11, but even assuming that they show that "reasonable minds might differ" as to the wisdom of the Rules, such a showing is "not sufficient to establish the irrationality necessary to warrant annulment." *Medical Society*, 148 A.D.2d at 148.

E. Notice Requirements

The Board Petition argued that the notice provisions of the Rules conflict with, and exceed, those imposed upon banks or financial institutions by federal law and that, as such, they are unreasonable. As discussed *supra* at pp. 23–26, the Rules apply to employers and their agents carrying out the payment of wages to employees. They do not apply independently to banks or other financial institutions. Employers and their agents, in their capacity as such, are not subject to federal banking and financial regulations. Nor does providing longer notice than the federal minimum cause anyone to violate a federal requirement. *See supra* at pp. 46–47 & n.26.

Accordingly, the Wage Payment Rules should be upheld as a reasonable exercise of the Commissioner's discretion to ensure that employers use wage payment methods that protect the right of employees to full, prompt, and unencumbered access to wages.

CONCLUSION

For the foregoing reasons, and as requested in the Commissioner's Verified Petition, the Court should (1) annul the February 16, 2017 Resolution of Decision of respondent Board and (2) grant the petitioner any further relief that the Court deems just, proper and equitable.

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Respectfully submitted,

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