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COURT OF APPEALS  
STATE OF NEW YORK

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GLEN OAKS VILLAGE OWNERS,  
Respondent,

-against-

CITY OF NEW YORK,  
Appellant.

NO. 42

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20 Eagle Street  
Albany, New York  
April 8, 2025

Before:

CHIEF JUDGE ROWAN D. WILSON  
ASSOCIATE JUDGE JENNY RIVERA  
ASSOCIATE JUDGE MICHAEL J. GARCIA  
ASSOCIATE JUDGE MADELINE SINGAS  
ASSOCIATE JUDGE ANTHONY CANNATARO  
ASSOCIATE JUDGE SHIRLEY TROUTMAN  
ASSOCIATE JUDGE CAITLIN J. HALLIGAN

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1 CHIEF JUDGE WILSON: First case on the calendar  
2 is Glen Oaks Village Owners v. City of New York.

3 MS. MCCAMPBILL: Good afternoon, Your Honors.  
4 May it please the court. Amy McCamphill, on behalf of the  
5 City, appellants. Your Honors, I'd like to reserve five -  
6 - - four minutes for rebuttal.

7 CHIEF JUDGE WILSON: Four. Thank you.

8 MS. MCCAMPBILL: Your Honors, this court should  
9 reverse and dismiss plaintiffs' implied field preemption  
10 claim. As this court recognized in Janssen, implied field  
11 preemption requires a showing that the legislature clearly  
12 evinced an intent to occupy a field to the exclusion of all  
13 others, and here, the Climate Act does nothing of the sort.  
14 To the contrary, the Climate Act expresses the  
15 legislature's all-hands-on-deck approach to climate change,  
16 welcoming contributions from all levels of government  
17 including the local level.

18 JUDGE GARCIA: Counsel, it seems to me the  
19 Appellate Division was really focused on sections 11 and 10  
20 of the act, right? So how do you read those two sections  
21 together in a way that avoids a preemption problem?

22 MS. MCCAMPBILL: So those - - - those two  
23 sections - - - first of all, the sections are savings  
24 clauses. So by the plain language of Section 11, it says,  
25 nothing in this act relieves anyone of the need to comply

1 with other local laws and regulations. So plaintiffs'  
2 reading flies in the face of the plain language of the  
3 statute because they are arguing that when you read Section  
4 10 with Section 11, it relieves them of the need to comply.

5 JUDGE GARCIA: So then why do you have Section  
6 10? What does Section 10 do then?

7 MS. MCCAMPBILL: So those two provisions, they're  
8 - - - they're - - -

9 JUDGE GARCIA: But let's stick with Section 10  
10 for a second. If your reading of Section 11 is correct,  
11 why do you need Section 10?

12 MS. MCCAMPBILL: Sure. They're doing different  
13 things. They have different language, and they're  
14 achieving different aims. So Section 10 pre - - - states  
15 that all state entities, broadly, to the extent they have  
16 pre-existing authority to take greenhouse gas emission  
17 reduction measures, which is a broad term, they retain that  
18 authority under the act. And that makes sense that that  
19 provision was included because the act includes a lot of  
20 new authorizations to state agencies and entities. We see  
21 Section 8 authorizes every state agency to promulgate  
22 regulations to reduce greenhouse gas emissions. Section 7  
23 requires all state - - -

24 JUDGE GARCIA: So your reading of that would not  
25 include then what's in Section 10, which would be nothing

1 in this act shall limit the existing authority of a state  
2 entity to adopt and implement greenhouse gas regulations.  
3 So - - - so your reading of Section 11 would not include  
4 what's in Section 10?

5 MS. MCCAMPBILL: Yes, Your Honor. They're  
6 different provisions. They're - - - they're achieving  
7 different things. Section - - -

8 JUDGE GARCIA: But you seem to have a very broad  
9 reading of Section 11, so I'm trying to understand how,  
10 given your broad reading of Section 11, you would need  
11 Section 10.

12 MS. MCCAMPBILL: Section 10, again, is just  
13 clarifying that state entities, to the extent they have  
14 existing authority to take measures to reduce greenhouse  
15 gas emissions, nothing in the act removes them - - -  
16 relieves - - - replaces that authority. The authority that  
17 - - -

18 JUDGE HALLIGAN: I thought you were arguing that  
19 measures might include steps other than laws and  
20 regulations; is that right?

21 MS. MCCAMPBILL: Yes, Your Honor.

22 JUDGE HALLIGAN: And - - - and so it sounds to me  
23 like perhaps there's some overlap between the two sections  
24 even if - - - if they're not redundant of each other under  
25 your reading. In other words, 10 covers some actions that

1 might be taken, you give examples of a couple, that  
2 wouldn't be covered by 11. But wouldn't there also be  
3 perhaps some overlap between measures such as laws or  
4 regulations that - - - that might be covered by both 10 and  
5 11?

6 MS. MCCAMPBILL: I think regulations in Section  
7 11 might - - - might also perhaps include some measures in  
8 Section 10. But plaintiffs' reading also has this kind of  
9 overlap as well because they - - - they argue that Section  
10 11 is broader than Section 10. In both of the provisions,  
11 what they're really expressing, again, is this all-hands-  
12 on-deck approach to climate change that we see throughout  
13 the statute. We see it in the legislative findings, and we  
14 see it in the multiple provisions throughout the act  
15 referring to local action. We see - - -

16 JUDGE HALLIGAN: Do we know what gave rise to  
17 Section 10? Was there particular concern that measures  
18 other than laws or regulations might somehow be viewed as -  
19 - - you know, the - - - the - - - the authority to take  
20 those might somehow be viewed as - - - as extinguished by  
21 the statute?

22 MS. MCCAMPBILL: Well, there's - - - there's  
23 nothing in the legislative history that really speaks to  
24 these two provisions. But I think what's - - - what's  
25 telling is that there's nothing in the legislative history

1 that shows that anyone view them as having this kind of  
2 preemptive effect that plaintiffs are now claiming - - -

3 CHIEF JUDGE WILSON: They also seem to - - - to  
4 use a different framing. That is, the first one, 10, talks  
5 about a limit on the authority of the state to promulgate  
6 laws, and 11 talks about compliance of people who are  
7 subject to the laws, not about the authority to promulgate  
8 laws. So they seem to operate from different directions.

9 MS. MCCAMPBILL: Your Honor, the - - - we - - -  
10 we agree completely that they - - - they're - - -

11 JUDGE GARCIA: Then would no one be allowed to  
12 promulgate laws under the first one other than the state?  
13 So if - - - if 11 doesn't cover promulgation and only 10  
14 does, then local governments couldn't promulgate, but if  
15 they had existing laws, then you would have to follow them?

16 MS. MCCAMPBILL: So Section 10 says state  
17 entities taking measures to reduce greenhouse gas  
18 emissions, which is - - - again, is a broad standard. And  
19 I think - - -

20 JUDGE GARCIA: I understand that argument from  
21 Judge Halligan, but what - - - in response to the Chief  
22 Judge's argument - - - position or question - - -

23 CHIEF JUDGE WILSON: Question, it's called.

24 JUDGE GARCIA: - - - what is measure and law and  
25 promulgate and follow? So 10 and 11, it seems to me, if

1           you take that reading, would be the existing laws you have  
2           to follow, but if you want to make new laws, then you have  
3           to be a state entity.

4                   MS. MCCAMPBILL: The - - - I - - - I don't agree,  
5           Your Honor, because Section 11 doesn't say anything about  
6           existing laws. It's Section 10 that says that state  
7           entities retain their existing authority. Section 11 says  
8           that everyone needs to comply with other applicable laws  
9           and regulations whether they're pre-existing or not. And  
10          again, these provisions, they - - - they express the same  
11          idea, which is that everyone needs to comply with  
12          regulations and - - - and - - - and measures and laws and  
13          authority.

14                   JUDGE CANNATARO: But Counsel, I - - - I don't  
15          know that there's any meaning in the distinction between  
16          pre-existing and newly promulgated laws. The - - - the  
17          question originating from the Chief, as I understood it,  
18          was that one section deals with compliance and another  
19          section deals with promulgation. And in the promulgation  
20          section, it is limited to state agencies.

21                   MS. MCCAMPBILL: It's - - - it's - - - but  
22          Section 10 is not about promulgation because it's not about  
23          regulations or laws. It's about measures. So it's  
24          everyone can take all - - -

25                   JUDGE CANNATARO: But does - - - does - - - I



1 thought - - - I thought your argument was that it - - - it  
2 could include things other than promulgation. I understand  
3 that from the line of questioning with Judge Halligan. But  
4 are you saying that it excludes the promulgation of laws,  
5 regulations? It - - - it just doesn't apply to that  
6 situation?

7 MS. MCCAMPBILL: It's - - - it's broader. It's  
8 that all state entities can continue to - - - state  
9 entities can continue to take all measures to reduce  
10 greenhouse gas emissions. And - - - and again, we see in  
11 the legislative - - -

12 JUDGE CANNATARO: But not - - - not localities?

13 MS. MCCAMPBILL: Well, localities already have  
14 pre-existing authority to regulate in this area. We have  
15 authority to regulate local air pollution in buildings, and  
16 nothing in this act takes that away. And it's - - - it's  
17 significant, as this court noted in Janssen, that there is  
18 no express statement of preemptive authority anywhere in  
19 this law, particularly because it was passed shortly after  
20 Local Law 97.

21 JUDGE GARCIA: But why wouldn't that also apply  
22 to state agencies who had pre-existing authority? Why  
23 would you have to signal - - - single them out in Section  
24 10? Why wouldn't that - - -

25 MS. MCCAMPBILL: Again, that's - - -

1 JUDGE GARCIA: - - - be in the law?

2 MS. MCCAMPBILL: - - - the - - - the law grants  
3 new authority to - - - to different state agencies  
4 including all state agencies.

5 JUDGE GARCIA: But I think your point being in -  
6 - - with respect to local authorities, it didn't interfere  
7 with their existing authorities. So I would assume the  
8 same would apply to state entities. It wouldn't interfere  
9 with their existing authorities either.

10 MS. MCCAMPBILL: I mean, you could - - - you  
11 could critique it perhaps as a belt-and-suspenders  
12 approach, but I think what the legislature is - - -

13 JUDGE CANNATARO: Or you could critique as a  
14 redundancy, which would be problematic.

15 MS. MCCAMPBILL: I - - - I don't think it's  
16 redundant, Your Honor, because it's - - - it's clarifying,  
17 again, that - - - that everyone really needs to play their  
18 part - - - take a role and play a part here. It's - - -  
19 again, it's an all-hands-on-deck message, and we see that  
20 in the legislative findings.

21 CHIEF JUDGE WILSON: Let me ask - - - let me ask  
22 you an abstract question. Suppose the legislature passes a  
23 new law, Governor signs it. Is the test for determining  
24 whether that law displaces some existing state law  
25 different from the test for whether it preempts a local

1 law?

2 MS. MCCAMPBILL: I'm - - - I'm not sure, Your  
3 Honor, because, you know, we're focused on the - - - the  
4 local law at issue here. I'm - - - I'm not sure what the  
5 test would be for a state law. Again, we - - - we see  
6 multiple indications in this law that there's no - - - no  
7 preemptive intent from the legislature. We see the  
8 legislative findings, which refer to the need for  
9 complimentary action from other jurisdictions. The  
10 legislative findings also note that there's a need to  
11 rapidly reduce greenhouse gas emissions in order to avoid  
12 the worst impacts of the climate - - - of climate change.  
13 And a finding of implied field preemption here would go  
14 against that very purpose by prohibiting any localities  
15 from taking the kind of actions that are necessary to  
16 reduce greenhouse gas emissions.

17 JUDGE HALLIGAN: To go back for a second to the  
18 Section 10, Section 11 discussion, it seems to me they're  
19 also very different in scope, aren't they? Section 10  
20 applies specifically to state entities, and the compliance  
21 point in Section 11 looks to me to sweep as broadly as one  
22 could, person, entity, agency, so both private and public.

23 JUDGE GARCIA: But isn't that the problem? Why  
24 do you need the specific if you have the general?

25 MS. MCCAMPBILL: I think - - - again, I think

1 they're - - - they're doing different things. One of them  
2 is about the authority of state entities and the other one  
3 is about the need to comply with - - - with laws. And  
4 plaintiffs' reading, what they're really trying to do is -  
5 - - is find preemption by negative implication, by  
6 transposing phrases from one provision to another. And  
7 that's really the furthest thing from a clearly evinced  
8 preemptive intent. Their reading also violates the last  
9 antecedent rule, as the plaintiffs concede, but the last  
10 antecedent rule qualifying words and phrases should be  
11 applied to the words immediately preceding and not to  
12 others more remote. And plaintiffs are - - - are arguing  
13 that we should read the other all the way back to Section  
14 10 to refer to other measures than greenhouse gas emission  
15 reduction.

16 JUDGE TROUTMAN: And is that a natural way to  
17 read the statute or interpret it?

18 MS. MCCAMPBILL: No, Your Honor, because the  
19 other - - - the natural antecedent is nothing other than -  
20 - - other laws and regulations besides this act. That's  
21 the antecedent in Section 11 itself. So their reading  
22 again, it - - - it goes against the - - - the plain meaning  
23 of Section 11. There's no indication that anyone in the  
24 legislative history had this interpretation or this view of  
25 these provisions. It violates the last antecedent rule.

1 It also doesn't make sense when you look at the language of  
2 these provisions more granularly because they're arguing  
3 that Section 11 shows that local action is preemptive. But  
4 Section 11 doesn't just speak to local action. It speaks  
5 to local, state, and federal. And for - - - for two of  
6 those three categories, their preemption theory makes no  
7 sense at all. So again, these provisions are doing  
8 different things. They have different phrasing, and  
9 there's no preemptive intent evinced through these  
10 provisions, much less clearly evinced preemptive intent.

11 JUDGE HALLIGAN: Can I ask, it looks to me like -  
12 - - like the statute contemplates or - - - or requires the  
13 promulgation of regulations over time by DEC, yes? So what  
14 has the city's approach been going forward? Is the city  
15 continuing to promulgate regulations of its own,  
16 independent of what DEC is doing? What's the interplay  
17 between the two?

18 MS. MCCAMPBILL: So the city - - - I see I'm out  
19 of time, but I - - - if I can answer your question. The -  
20 - - the city - - - Local Law 97 set standards for emissions  
21 from buildings and it was passed first. Then we have the  
22 Climate Act passed after Local Law 97, again, with no  
23 preemptive statement of intent. The regulations that DEC  
24 has - - - has issued pre-proposal regulations that build on  
25 Local Law 97 and take into account Local Law 97. And we

1 cited the DEC slideshow in our brief on that point. So DEC  
2 is - - - is building on the city's local law, which already  
3 existed and which already sets standards for large  
4 buildings within the city. Thank you, Your Honors.

5 MS. NATHANSON: Good afternoon, Your Honor. May  
6 it please the court. Leigh Nathanson, representing the  
7 plaintiffs-respondents. This appeal is not about which  
8 side presents the most plausible or the best reading of the  
9 CLCPA or its savings clauses.

10 JUDGE SINGAS: Do you think that your - - - the  
11 word other can really bear the weight of your  
12 interpretation?

13 MS. NATHANSON: It has to mean other than what.  
14 If the last antecedent rule were the only governing  
15 principle that we could abide by here, and that it meant  
16 other than the act, then this section of the CLCPA, Section  
17 11, would be so broad it could be included in every statute  
18 to say, by the way, here's this law that we're passing.  
19 Other laws still exist, other laws than this act. Here,  
20 we're looking at two clauses next to one another. One of  
21 them reserves the right for state entities to promulgate  
22 laws regarding one specific area of what the CLCPA does and  
23 - - - and what Local Law 97 does, which is - - -

24 JUDGE TROUTMAN: Do the two clauses do the same  
25 thing? And if they don't do the same thing, is it logical

1 to read them the way that you are suggesting?

2 MS. NATHANSON: They do the same thing in the  
3 sense that they prescribe what roles actors within the  
4 state and within localities are able to do in the context  
5 of the CLCPA. One of the provisions in Section 10 deals  
6 with promulgation of regulations, which is something that  
7 we believe the legislature meant to reserve to - - -

8 JUDGE RIVERA: It's not - - -

9 MS. NATHANSON: - - - the state.

10 JUDGE RIVERA: It's not limited to regulations.  
11 Otherwise they would have said that.

12 MS. NATHANSON: It's not limited to regulations.  
13 It's - - - it's - - - it's limited to measures in the  
14 greenhouse gas reduction - - - greenhouse gas reduction  
15 measures. So yes, it's - - - it's limited in that way.  
16 But it - - -

17 JUDGE HALLIGAN: But it could include, I assume,  
18 something like putting solar panels on the roof of a - - -  
19 of a state university building or something like that, yes?

20 MS. NATHANSON: Section 10 wouldn't speak to that  
21 because Section 10 is a savings clause for measures that  
22 state - - -

23 JUDGE HALLIGAN: But my point is, Section 10 - -  
24 - it seems to me, but if you have a different view, you  
25 know, please - - - please let me know. Section 10 seems to



1 me to - - - to confirm that should a state entity, I'm just  
2 picking a state university as an example, want to take a  
3 measure like that, that it is free to do so, and that its  
4 authority isn't affected by the statute in any way. Is  
5 that fair?

6 MS. NATHANSON: I think that's what Section 11  
7 does because Section 11 provides nothing in this act shall  
8 relieve any person, entity, or public agency a - - -

9 JUDGE HALLIGAN: That's a compliance question, I  
10 think, as opposed to an authority question.

11 MS. NATHANSON: Well, but the second - - -

12 JUDGE RIVERA: In - - - in other words, Section  
13 11 might not have any law that requires solar panels.

14 MS. NATHANSON: Well, Section 11 - - - what I  
15 think Section 11 does - - - and the second half of it says,  
16 with other applicable federal, state, or local laws or  
17 regulations including state air and water quality  
18 requirements and other requirements for protecting public  
19 health or the environment. So I think Section 11 would  
20 speak to the solar panel measure because it would - - - it  
21 would allow that. It would not preclude - - -

22 JUDGE RIVERA: But they'd have - - - there would  
23 have to be a law that mandates solar panels.

24 MS. NATHANSON: Yes. A pre-existing law or a  
25 subsequent - - -

1 JUDGE HALLIGAN: Suppose - - -

2 JUDGE RIVERA: Whereas 10 would not require that.

3 MS. NATHANSON: 10 would not - - -

4 JUDGE RIVERA: Only requires a particular - - -

5 MS. NATHANSON: 10 doesn't - - -

6 JUDGE RIVERA: Only requires the state entity  
7 have authority to take a particular action, not that it's  
8 mandated to do so.

9 MS. NATHANSON: Correct. What Section 10 does is  
10 limit authority with respect to one particular type of  
11 measure.

12 JUDGE HALLIGAN: Wait, wait. Section 10 limits  
13 authority?

14 MS. NATHANSON: Well - - -

15 JUDGE HALLIGAN: Section 10 says, nothing in this  
16 act shall limit the existing authority. So where's the  
17 negative implication of the limitation you're reading  
18 there?

19 MS. NATHANSON: The negative implication is that  
20 there's one group of entities, and that is state entities,  
21 that are not limited by Section 10. Other authority - - -

22 JUDGE HALLIGAN: So - - - so you're saying you -  
23 - - you - - - you read what's covered by Section 11 to - -  
24 - to - - - to - - - you're reading the two together, I take  
25 it. That's what you're saying.



1 MS. NATHANSON: Absolutely.

2 JUDGE HALLIGAN: So - - - so can I ask, one - - -  
3 one of the things I'm struggling with is your adversary  
4 says that if the Local Law provisions are deemed preempted,  
5 that it will materially affect compliance just in terms of  
6 the numbers with the targets. And so it seems to me  
7 there's an argument that if in fact the legislature  
8 intended this to have the broad preemptive effect that you  
9 suggest it does, that it might have said so more explicitly  
10 or grappled with the fact that this would eliminate these  
11 measures which achieve some significant numbers. What's  
12 your response to that?

13 MS. NATHANSON: This gets to the crux of our  
14 argument on appeal, which is that plaintiffs have not had  
15 the opportunity to - - - to develop a record, nor has the  
16 city, as to what measures and what other information might  
17 be relevant to the question of what the legislature did  
18 mean here. And - - -

19 JUDGE HALLIGAN: And - - -

20 MS. NATHANSON: - - - of course, both sides are  
21 saying - - -

22 JUDGE HALLIGAN: But - - - but we - - - I mean,  
23 I'm not sure - - - maybe you can - - - maybe you can  
24 explain this. I'm not sure what it is that would benefit -  
25 - - would - - - would be benefited by discovery. Usually,

1 a question about preemption, I believe the courts resolve  
2 as a - - - as a matter of law, and you look to what the  
3 statute says and what the legislative history says. But  
4 there's not - - - there's not, generally, I don't think,  
5 factual development that takes place in a case like that.

6 MS. NATHANSON: That's not quite right. So the  
7 Merck - - -

8 JUDGE HALLIGAN: And so can - - - are there  
9 examples where that's happened?

10 MS. NATHANSON: Well - - - well, the Merck case,  
11 which the city distinguishes on its facts, but we cite for  
12 the principle that courts, even on a question of law like a  
13 preemption question, often need to resolve ancillary  
14 factual disputes. It's a basic legislative interp - - -

15 JUDGE RIVERA: Well, what would those be here?

16 JUDGE CANNATARO: Yeah. What would - - -

17 JUDGE RIVERA: Let's say you're right. What  
18 would those be here?

19 MS. NATHANSON: Well, I think that we would have  
20 to look to legislative records. Both sides cite a ton of  
21 information that is outside the record. And indeed the  
22 city - - -

23 JUDGE CANNATARO: I'm sorry. What are  
24 legislative record - - - are you talking about legislative  
25 history or - - -

1 MS. NATHANSON: Well, there's - - - there - - -  
2 there are public records that evince the legislative  
3 history here. The city has - - - has mentioned that those  
4 records don't really say anything one way or another about  
5 how Section 10 came about and how Section 11 came about.  
6 Almost all of the cases that the city cites on questions of  
7 preemption were decided on summary judgment, not on a  
8 motion to dismiss here. Sometimes the records in those  
9 cases have included expert testimony about exactly the type  
10 of question that Your Honor is asking, what are the  
11 practical effects of this reading versus that reading, and  
12 how does that - - -

13 JUDGE HALLIGAN: It's a question of legislative  
14 intent. I mean, that - - - that is the touchstone of  
15 preemption, I think, right? So I'm just struggling to  
16 understand how some discovery process would bear on the  
17 issue. And I - - - it seems to me that - - - that one  
18 could probably deduce, just as a matter of common sense,  
19 that given the requirements laid out in the local law, that  
20 it would have some effect on greenhouse gas emissions. And  
21 so my question is just if - - - if that's correct and  
22 deeming it preempted would make it more difficult to hit  
23 the target, why wouldn't the legislature have - - - have  
24 grappled with that more explicitly if it meant for it to be  
25 preempted as you say it does?

1 MS. NATHANSON: Sure. Two points, I think the  
 2 assumption is not necessarily correct. And I think we can  
 3 see in the developments, even since the filing of this  
 4 case, that Local Law 97 is now looking to be at odds with  
 5 the CLCPA, including, for example, in the fact that the  
 6 city is going to be instituting penalties on building  
 7 owners for their failure to, for example, convert to  
 8 electric within the time period set forth in Local Law 97.  
 9 The city is going to be collecting that revenue and putting  
 10 it into the city's general fund, not toward environmental  
 11 causes. And then those building owners are going to be  
 12 paying their money toward penalties instead of toward  
 13 taking measures along the lines of what they've been doing  
 14 in the past - - -

15 JUDGE RIVERA: That's - - - that's a - - -

16 MS. NATHANSON: - - - to try - - -

17 JUDGE RIVERA: That's a disagreement with the  
 18 policy issue. Let's - - - I'm - - -

19 MS. NATHANSON: Well - - -

20 JUDGE RIVERA: I'm not - - - I'm not - - - let's  
 21 go back to Judge Halligan's - - -

22 MS. NATHANSON: You're - - - you're - - -

23 JUDGE RIVERA: - - - question.

24 MS. NATHANSON: You're absolutely right that it  
 25 is a disagreement with the policy issue. And the city



1 argues that the policy questions are not relevant, but they  
2 are relevant, and this is exactly the type of record that  
3 many of the cases that the city cites have developed, the  
4 policy questions of, well, what would really happen here if  
5 you read the - - - the savings clauses as creating  
6 preemption versus how - - -

7 JUDGE RIVERA: So let me - - - let me ask it a  
8 different way. Let's, again, assume that we agree with  
9 you. Then - - - then what would be the state of - - -  
10 maybe that's not the best word. What - - - what would then  
11 it look like in New York under your scenario if this  
12 preempts 97 and other local initiatives?

13 MS. NATHANSON: It would look exactly like what  
14 the CLCPA contemplates, which is that the city and other  
15 municipalities will have a role, a significant role, in  
16 working with the state and the expert bodies that the state  
17 has entrusted to develop these regulations including - - -  
18 or these standards, including the greenhouse gas - - - gas  
19 reduction measures. The CLCPA says a lot about what cities  
20 are going to do and what role they will play, including in  
21 reporting information, advising on how the CLCPA - - -

22 JUDGE RIVERA: And - - - and - - - and is there  
23 any language in there that says that the localities cannot  
24 take a different path? Is there anything that expressly  
25 states the localities can and must only follow in

1           accordance with this statute and what - - - what the body  
2           the council decides?

3                   MS. NATHANSON: There is only the language of  
4           Section 10 that expressly reserves that right to state  
5           entities. So it is not a - - -

6                   CHIEF JUDGE WILSON: So - - -

7                   MS. NATHANSON: It is not a prohibition, but is  
8           an exclusive reservation of the right to adopt and  
9           implement - - -

10                  JUDGE RIVERA: So if we disagree with you about  
11           Section 10, you lose, yeah?

12                  MS. NATHANSON: If - - - if you disagree that  
13           section - - -

14                  JUDGE RIVERA: If we're not persuaded by this  
15           particular reading that you're advocating for.

16                  MS. NATHANSON: Well, not on the posture of this  
17           appeal - - -

18                  JUDGE RIVERA: Okay.

19                  MS. NATHANSON: - - - because, again, we're on a  
20           motion to dismiss standard. And so the city is correct  
21           that the standard that we will ultimately have to prove on  
22           the record in the trial court is that the - - - the state  
23           legislature clearly evinced an intent for the local laws to  
24           be preempted.

25                  JUDGE RIVERA: But what - - - what would be your

1 other - - -

2 MS. NATHANSON: But - - - but for now - - -

3 JUDGE RIVERA: - - - argument on field  
4 preemption?

5 MS. NATHANSON: Well, the argument - - -

6 JUDGE RIVERA: I thought this was your argument.

7 MS. NATHANSON: The - - - yes. This is the  
8 argument on field preemption. But I don't think - - - the  
9 First Department correctly held - - - and I really haven't  
10 seen anything in the city's papers on appeal to dispute  
11 this. All the First Department held was that our reading  
12 is plausible. And the city throws - - -

13 JUDGE RIVERA: And if this court decides  
14 otherwise - - -

15 MS. NATHANSON: If this court decides - - -

16 JUDGE RIVERA: - - - isn't then the field  
17 preemption question put to rest?

18 MS. NATHANSON: If this court decides that on the  
19 merits that reading is inherently implausible, then yes, we  
20 lose. But the standard is much - - -

21 JUDGE RIVERA: Or decide that the correct reading  
22 is the reading that your adversary or some other reading  
23 that's - - -

24 MS. NATHANSON: Well - - -

25 JUDGE RIVERA: - - - not favorable to you - - -



1 MS. NATHANSON: If the - - -

2 JUDGE RIVERA: - - - is the correct reading of  
3 the statute.

4 MS. NATHANSON: Well, it's - - - there's a nuance  
5 there. It can't - - - it doesn't need to be that their  
6 reading is correct. It has to be that our reading cannot  
7 be correct under a notice pleading standard and based on  
8 any potential record that we could develop. We could - - -  
9 we could - - -

10 JUDGE RIVERA: Again, you're - - - your back door  
11 to this question that Judge Halligan asked, which is, what  
12 - - - what record is there to develop on a question of what  
13 the - - - the terms mean.

14 MS. NATHANSON: There's discovery that could be  
15 taken from the legislators who were involved in the - - -  
16 in the - - -

17 JUDGE HALLIGAN: That would be highly irregular -  
18 - -

19 MS. NATHANSON: It might - - -

20 JUDGE HALLIGAN: - - - to depose - - - to depose  
21 legislators and ask them what they - - - what they thought.  
22 I - - - I can't - - - maybe you can identify a case where a  
23 court has endorsed that approach, but I'd be surprised.

24 MS. NATHANSON: It - - - it may be difficult for  
25 that discovery to come in, and there may be other discovery



1 that the city has posited like the state's - - - the state  
2 AG's position that we're going to hear about today. That  
3 evidence may be probative - - -

4 JUDGE HALLIGAN: So you've mentioned one - - -

5 MS. NATHANSON: - - - but - - -

6 JUDGE HALLIGAN: - - - you've mentioned one type  
7 of discovery, which is to depose legislators about their  
8 intent. Is there any other discovery that you would  
9 propose engaging in if this were to be remanded?

10 MS. NATHANSON: Well, even some of the - - - the  
11 information that has come in on the papers here, which,  
12 again, the city chides us for mentioning things outside the  
13 record, but a fact finder hasn't had access to that record.

14 JUDGE HALLIGAN: So specifically, what would you  
15 look to explore in discovery?

16 MS. NATHANSON: Well, I think we would look to  
17 explore, for example, the Climate Action Council that has  
18 been created by the state legislature, which the city notes  
19 references Local Law 97 in the scoping plan - - -

20 JUDGE HALLIGAN: And do what? You would depose  
21 the - - - the members and ask them questions?

22 MS. NATHANSON: Well, not necessarily. But even  
23 looking at the scoping plan and looking at how some of the  
24 record that, again, the city said - - - the city wants to  
25 have it both ways. They say we can't cite that record on

1 appeal, which - - - which we're not - - - none - - - none  
2 of this is in the record on appeal because we haven't been  
3 able to develop a discovery record below, but the city made  
4 a decision here to move to dismiss on the pleading.

5 JUDGE CANNATARO: Counsel, you - - -

6 CHIEF JUDGE WILSON: Let me just go back - - - go  
7 ahead.

8 JUDGE CANNATARO: I - - -

9 CHIEF JUDGE WILSON: Go ahead.

10 JUDGE CANNATARO: I just want to say I think that  
11 point is well taken to how the city points to the counsel's  
12 reference to Local Law 97 in a favorable way to support  
13 their argument. But - - - but, you know, let - - - let's  
14 say we - - - we agree with you on that, and we disregard  
15 anything that they may have said about Local Law 97, I'm  
16 still struggling with this idea that a question of law such  
17 as field preemption requires development of a factual  
18 record. I don't see those two things as negating one  
19 another. So - - - and - - - and by the way, I have to tell  
20 you, in all honesty, all the proposed discovery that you,  
21 you know, just laid out here hypothetically, not only does  
22 it seem highly irregular, which you've heard - - - I - - -  
23 I don't understand how that would tend to answer the - - -  
24 the operative question that we have to answer. So is there  
25 something more that you - - - that you're looking for in



1 this fact finding?

2 MS. NATHANSON: Well, I really don't think  
3 there's something - - - something more in the sense that  
4 we're not in the position right now to be held to, what do  
5 we think the factual record would look like? It may be  
6 highly irregular, but we have - - - have shown, as the  
7 First Department held, that we're entitled to the  
8 opportunity to develop that factual record. I mentioned  
9 earlier - - -

10 JUDGE RIVERA: Well - - - but - - - but - - - but  
11 your argument is about the text. That's your argument.  
12 It's about the text.

13 MS. NATHANSON: Yes.

14 JUDGE RIVERA: And you say the text should be  
15 read this way. Your adversary says the text should be read  
16 that way. It strikes me straight up, legal question that  
17 this court can answer. On a motion to dismiss, you're, of  
18 course, correct. There are many things you - - - you  
19 cannot resolve on a motion to dismiss. But this one seems  
20 to be in that category that you can decide on a motion to  
21 dismiss. You may not even need to ever look at legislative  
22 history if - - - if we decide the text is clear.

23 MS. NATHANSON: So I think that the parties'  
24 positions in this case show exactly why there is ambiguity  
25 that requires looking beyond the language of the statute.

1 JUDGE SINGAS: Well, do you disagree - - -

2 MS. NATHANSON: We - - -

3 JUDGE SINGAS: - - - that it's a purely legal  
4 question? Because I think there was a reference in your  
5 brief that it was a mixed question. What's your position  
6 on that?

7 MS. NATHANSON: We believe the - - - the question  
8 of preemption is a legal question, but as the Merck case  
9 says, sometimes the court's resolution of a legal question  
10 requires the resolution of ancillary factual issues.

11 JUDGE HALLIGAN: And what are those ancillary  
12 factual questions here specifically?

13 MS. NATHANSON: Those ancillary factual questions  
14 here are, what did the legislature mean when it wrote - - -

15 JUDGE HALLIGAN: But we don't - - -

16 MS. NATHANSON: - - - Section 10 - - -

17 JUDGE HALLIGAN: I mean - - -

18 MS. NATHANSON: - - - and Section 11.

19 JUDGE CANNATARO: That's legislative - - -

20 JUDGE HALLIGAN: - - - that's what I'm - - -

21 JUDGE CANNATARO: - - - intent, isn't it?

22 MS. NATHANSON: That's legislative intent.

23 JUDGE HALLIGAN: And - - - but - - - but there -  
24 - - don't courts generally, maybe always, look to answer  
25 that by examining the text and by examining the legislative

1 history as it's set forth in, you know, the documents that  
2 are generated as the legislature considers and votes on  
3 something?

4 MS. NATHANSON: The text and the legislative  
5 history are the first stop, absolutely.

6 JUDGE HALLIGAN: And - - - and - - -

7 MS. NATHANSON: But what - - -

8 JUDGE HALLIGAN: - - - where - - - where - - -  
9 what cases - - - I know - - - I know you have Merck, but  
10 beyond that, where have we or federal courts, if - - - if  
11 you want to look at them, gone beyond that, and for  
12 example, you know, deposed legislators to see what they  
13 thought or - - - or something like that?

14 MS. NATHANSON: Well, as I mentioned, most of the  
15 cases that the city cites, for example, the Garcia case,  
16 were decided on summary judgment.

17 JUDGE HALLIGAN: But that - - - that - - -

18 MS. NATHANSON: And some of - - - and the city  
19 could have decided here to answer the complaint, and if it  
20 believed that there was no factual record that we could  
21 have developed, that would have borne at all upon the  
22 question of, if this statute is ambiguous, what factual  
23 issues - - -

24 JUDGE CANNATARO: Counsel - - -

25 MS. NATHANSON: - - - could be used to resolve

1 that ambiguity. They didn't do that.

2 JUDGE CANNATARO: Can I ask you a question?

3 MS. NATHANSON: Sure.

4 JUDGE CANNATARO: I'm trying to understand this  
5 factual record point that you're making. And if - - - if  
6 we were to allow you to go back and - - - and develop the  
7 record that you say needs to be developed and you induced  
8 evidence, say that this legislation, 97, was going to  
9 impact a huge number of building owners in New York City,  
10 and not only was it going to be a - - - a large number, it  
11 was going to seriously impact. It was going to cost a lot  
12 of money to make the upgrades that the legislation  
13 requires. Are you saying that in the process of conducting  
14 a - - - a legal analysis on legislative intent, a court  
15 could say, well, you know, this was never intended to be  
16 the effect of - - - of - - - of our law, so therefore, it  
17 must be preempted? Is - - - is that - - - is that the  
18 process that you envision in this case?

19 MS. NATHANSON: That is a possibility. There may  
20 be, and I'm sure there will be, other evidence that the  
21 city brings out to try to - - - to try to rebut that. But  
22 looking at Local Law 97 here, this is a law that does a  
23 number of things. As the city points out, it pre-existed  
24 the CLCPA. So we're not arguing that the CLCPA was meant  
25 to preempt the entirety of - - - you know, of what Local

1 Law 97 had historically done. And so this would be a  
2 massive oversight on the New York legislature.

3 JUDGE GARCIA: Wasn't the only thing appealed  
4 here the motion to dismiss?

5 MS. NATHANSON: Yes.

6 JUDGE GARCIA: Was that the only thing in front  
7 of the Appellate Division? So if the Appellate Division  
8 agreed with your reading, let's say, hypothetically, their  
9 only option was to deny the motion to dismiss, right?

10 MS. NATHANSON: That's - - - that's correct.

11 JUDGE GARCIA: So it has to go back?

12 MS. NATHANSON: Yes, it would have to go back.  
13 And that's all we're asking for here. It - - - it - - - it  
14 - - - we may be back here, you know, next term. If the  
15 city decides, look, there's no discovery record that you  
16 possibly could develop that would decide this question your  
17 way, they can move for judgment on the pleadings - - -

18 JUDGE GARCIA: Because the - - -

19 CHIEF JUDGE WILSON: Let me - - -

20 MS. NATHANSON: - - - they can move - - -

21 JUDGE GARCIA: I'm sorry.

22 MS. NATHANSON: - - - for summary judgment.

23 CHIEF JUDGE WILSON: That's all right.

24 MS. NATHANSON: But we - - - all the First  
25 Department held correctly was that we, on the pleading,

1 have pled a potential cause of action here for preemption  
2 and that we're entitled to go to the next step.

3 CHIEF JUDGE WILSON: Have - - -

4 JUDGE GARCIA: They couldn't find for you, the  
5 Appellate Division. They couldn't enter summary judgment  
6 for you. There's no pending summary judgment motion,  
7 right?

8 MS. NATHANSON: Correct. Well, this is not a  
9 merits appeal. This is a - - - this is a pleading appeal,  
10 and that's why it's premature for - - -

11 CHIEF JUDGE WILSON: Suppose - - -

12 MS. NATHANSON: - - - for the court to be - - -

13 CHIEF JUDGE WILSON: Can I - - - let me try to  
14 ask you something different. You know, sometimes even when  
15 you're chief, it's really hard to get a question in. So  
16 let's - - - let's assume that we agree with you that this  
17 is preempted, okay? What I'd like to explore just a tiny  
18 bit is what that means practically. So suppose the village  
19 of Smithtown decides that it would like to mandate that new  
20 homes built in the village of Smithtown have solar roof  
21 panels. Could it do that, or is that preempted?

22 MS. NATHANSON: I think it could because - - -

23 CHIEF JUDGE WILSON: And would that depend on  
24 whether they say that we're doing this to eliminate  
25 greenhouse gases or we're doing this to protect the

1 electrical grid?

2 MS. NATHANSON: No. Because the - - - the  
3 coincidence of the goals of the CLCPA and local legislation  
4 is exactly what I think the state wanted to promote. And  
5 there's a lot that the city cites from the statute saying,  
6 we want to work with localities. I think that that works  
7 perfectly.

8 CHIEF JUDGE WILSON: Well, what if - - - what if  
9 the rollout was more aggressive than what state law  
10 contemplated?

11 MS. NATHANSON: I think the only thing that the  
12 locality couldn't do is where the state says we're  
13 reserving the right to set these emission limits, and we're  
14 going to graduate it over time, we're going to delegate to  
15 experts, and we're going to roll out regulations that will  
16 deal with this one narrow area. What the locality can't do  
17 is say, actually, we're going to make you reduce it more  
18 and faster, and we're going to charge penalties for you to  
19 do it.

20 CHIEF JUDGE WILSON: And so for example, couldn't  
21 say, we're going to mandate that everybody has a solar roof  
22 panel within five years because that will reduce greenhouse  
23 gas emissions below what the state has set?

24 MS. NATHANSON: I don't - - - I don't think we  
25 would argue that the CLCPA - - -

1 CHIEF JUDGE WILSON: Well, then why - - -

2 MS. NATHANSON: - - - preempts that.

3 CHIEF JUDGE WILSON: - - - why not then? What is  
4 - - - what is preempted then?

5 MS. NATHANSON: The setting of specific reduction  
6 targets saying this type of entity or this - - - this  
7 person bound by this law cannot - - - has to adopt these  
8 greenhouse gas - - - gas emissions limits of X - - -

9 CHIEF JUDGE WILSON: So your view is they could -  
10 - -

11 MS. NATHANSON: - - - when the state says Y.

12 CHIEF JUDGE WILSON: - - - require specific  
13 things to be done as long as they don't set greenhouse  
14 emission standards even if they expressly say, the reason  
15 we're requiring the specific measures to be taken is  
16 because we want greenhouse gases to be lower than what the  
17 state has mandated?

18 MS. NATHANSON: I think so.

19 CHIEF JUDGE WILSON: Okay.

20 MS. NATHANSON: I - - - I - - - I don't think  
21 that the - - - the purpose of Local Law 97 is at cross  
22 purposes with the CLCPA. I think it's the particular  
23 measures that the city has taken to try to do this, which,  
24 again, I think, has turned sort of a - - - an incentive-  
25 based sort of carrot system that the state saw fit to

1 provide into a stick system, where the city is collecting  
2 revenue, again, to go into its general coffers with  
3 different standards. The - - - one of the reasons that the  
4 state may - - -

5 JUDGE RIVERA: So your problem is not really the  
6 standards. Your problem is that someone will be penalized  
7 for not meeting the locality standards?

8 MS. NATHANSON: No. I think the problem is the  
9 standards because the entire field is preempted. But I  
10 think the fact that - - -

11 JUDGE RIVERA: Even if they made it voluntary and  
12 said, we really, really would like you to do this. It  
13 would be good for all of us.

14 MS. NATHANSON: I - - - I'd have to think about  
15 that question. I mean, I think that - - - that - - - that  
16 adding additional incentives to meet standards that are  
17 consistent with the standards that - - - that are set by  
18 the states would prevent - - - would present a much closer  
19 question.

20 JUDGE RIVERA: If they say, we'll pay everybody  
21 ten percent of the income you usually get in a year if you  
22 do the following.

23 MS. NATHANSON: I think if the following is  
24 consistent with what the CLCPA is doing, then that - - -  
25 that might be fine. And - - - and one of the - - - the - - -

1 - the issue with the different standards at the state level  
2 and the local level is really that it takes a long time,  
3 practically, to retrofit or - - - or renovate your building  
4 to make sure that you have emission limits that are going  
5 to comply with - - -

6 JUDGE RIVERA: Let's say the - - - the city  
7 provided assistance so that those who are subject to the  
8 requirements are able to meet them - - -

9 MS. NATHANSON: I - - -

10 JUDGE RIVERA: - - - without too much burden.

11 MS. NATHANSON: I think, again, it would depend  
12 on what the requirements are. If the requirements  
13 themselves are not consistent with the CLCPAs - - - and  
14 again, for field preemption, it just has to be the  
15 inconsistency is the potential inconsistency of stepping  
16 into the field, the - - - the state is going to set limits.  
17 And if the city sets different limits, that, I think, would  
18 be preempted. I think if the city says, look, the state  
19 set these targets. We think the goals are great. We want  
20 to provide an extra incentive for - - - for New York City  
21 buildings to comply with them. We want to provide extra  
22 help in complying with them. I think that that would - - -

23 JUDGE CANNATARO: Does - - -

24 MS. NATHANSON: - - - present a much closer - - -

25 JUDGE CANNATARO: Does that kind of approach

1           require some sort of inconsistency? Because I'm just  
2           sitting here thinking, we're all rowing in the same  
3           direction, right? We just want to reduce greenhouse gas  
4           emissions by a certain amount by a certain date. And there  
5           may be differences that ultimately come out. We don't even  
6           - - - well, no, we know what the targets are under the  
7           state act as well. So there's no, really - - - the  
8           inconsistency might be in the details at best. And I'm  
9           wondering if that's simply not enough to say this is  
10          preempted.

11                       MS. NATHANSON: This is not a conflict preemption  
12          case. It wouldn't be enough if we were bringing a conflict  
13          - - - a conflict preemption claim, but it's a field  
14          preemption claim.

15                       JUDGE CANNATARO: Does - - - does that question  
16          matter at all in field preemption that - - - that  
17          everyone's, as I said, rowing in the same direction, or as  
18          they put it, all hands on deck?

19                       MS. NATHANSON: It - - - it - - - it matters in  
20          the sense that conceiving of an inconsistency can be  
21          illustrative of why the state might have wanted to preempt.  
22          It doesn't matter in the sense that, in our view, you have  
23          to look at the text, look at Section 10, look at Section  
24          11, and you can see that the state meant to reserve this  
25          area of legislation for the state.

1 CHIEF JUDGE WILSON: Thank you.

2 MS. NATHANSON: I see I'm out of time. Thank  
3 you, Your Honors.

4 MR. LEVITZ: Thank you, Your Honors. Phillip  
5 Levitz, for the State, amicus. The state's Climate Act  
6 does not preempt New York City's Local Law 97 because the  
7 state statute creates a broad framework of emissions  
8 reduction targets that localities - - -

9 JUDGE RIVERA: Can you - - -

10 MR. LEVITZ: - - - are intending - - -

11 JUDGE RIVERA: Can you respond, Counsel, to this  
12 argument that she just made that the city cannot impose or  
13 raise the bar, right? Impose more than the state does.  
14 That's the conflict.

15 MR. LEVITZ: Well, again, nobody is even arguing  
16 for a conflict and that - - - that makes sense because what  
17 the state scheme does is it sets out these broad emissions  
18 targets, and that's it. There is no detailed regulatory  
19 scheme that's intended to apply statewide with which the  
20 Local Law 97 could be inconsistent. The - - - this scheme  
21 looks absolutely nothing - - -

22 JUDGE RIVERA: Is there authority to do that in  
23 the future under the statute?

24 MR. LEVITZ: Is there authority to - - -

25 JUDGE RIVERA: To set those kinds of specific

1 targets in the future?

2 MR. LEVITZ: The - - - there is authority to - -  
3 - to promulgate regulations with more specific - - -

4 JUDGE CANNATARO: Isn't that process taking place  
5 right now?

6 MR. LEVITZ: Yes.

7 JUDGE CANNATARO: Aren't they working on the  
8 scoping plan?

9 MR. LEVITZ: Ab - - - the scoping plan is - - -  
10 is - - - is published, and there are regulations that have  
11 already come out under the statute. There - - - there may  
12 be more regulations, yes. But none of those regulations -  
13 - - again, nobody has even claimed a - - - a - - - a  
14 conflict between any such regulations and the state  
15 statute. And - - - and - - - and when we're asking - - -  
16 what we're actually dealing with here is - - - is a claim  
17 of field preemption. So let's talk about what - - - what  
18 field preemption requires. What field preemption requires  
19 is - - - field preemption applies when a state statute  
20 establishes a detailed regulatory scheme demanding  
21 statewide uniformity that precludes local regulations.  
22 That doesn't - - - that's - - -

23 JUDGE GARCIA: Can you avoid that by kind of  
24 offshoring your detailed scheme to another entity and then  
25 say, well, the statute doesn't do this?

1 MR. LEVITZ: Well, the scoping plan doesn't  
2 establish the detailed scheme.

3 JUDGE GARCIA: No. But - - - what they're going  
4 to do under that at some point, will that have that type of  
5 detail in it?

6 MR. LEVITZ: It - - -

7 JUDGE GARCIA: So you've kind of offshored your  
8 preemption problem.

9 MR. LEVITZ: I - - - I mean, in - - - in theory,  
10 one might have regulations that - - - that provide these  
11 more specific details. You might have a conflict  
12 preemption assertion at that point. That's an issue that's  
13 not before this court.

14 JUDGE HALLIGAN: And you could raise it at that  
15 point, couldn't you?

16 MR. LEVITZ: Right. Absolutely.

17 JUDGE HALLIGAN: So - - -

18 MR. LEVITZ: Absolutely.

19 JUDGE HALLIGAN: So if, as - - - as things  
20 evolve, the regulations that are promulgated do give rise  
21 to a conflict with provisions or penalties in local law,  
22 that that could then be addressed in a - - -

23 MR. LEVITZ: That's not - - -

24 JUDGE HALLIGAN: - - - more tailored  
25 promulgation, yes?

1 MR. LEVITZ: Absolutely.

2 JUDGE GARCIA: How about a preemption claim,  
3 could you make that later? A field preemption claim.  
4 Sorry.

5 MR. LEVITZ: I guess, in theory, if you had a  
6 claim that the particular regulations were so detailed and  
7 - - - and - - - and were intended to apply on a statewide  
8 uniform basis, you might. But that's not going to happen,  
9 and I'll tell you why. Because what the statute makes  
10 clear is the exact opposite. What the statute is saying is  
11 you should have regulations that embrace local efforts - -  
12 -

13 CHIEF JUDGE WILSON: But if the state had - - -

14 MR. LEVITZ: - - - to support - - -

15 CHIEF JUDGE WILSON: If the state had preempted  
16 the - - - the field, right? What would be left for local  
17 governments to do in this area? What could they do?

18 MR. LEVITZ: If the state had preempted the  
19 field?

20 CHIEF JUDGE WILSON: Yeah.

21 MR. LEVITZ: I mean, I - - - I guess it depended  
22 exactly what field they had preempted. But the - - - the  
23 point is, there is no such - - -

24 CHIEF JUDGE WILSON: Well, I mean, the - - - the  
25 - - -



1 MR. LEVITZ: I'm - - - I'm sorry.

2 CHIEF JUDGE WILSON: Let's assume for a moment  
3 that the field that is preempted is the regulation of  
4 greenhouse gases. I think that's what we're talking about.

5 MR. LEVITZ: Okay.

6 CHIEF JUDGE WILSON: But maybe I'm wrong.  
7 Suppose the state has preempted that field. Is there  
8 anything, if it's field preempted, that New York City or  
9 Smithtown could do to regulate greenhouse gas emissions  
10 different from the state? Could they promulgate their own  
11 regulations or rules - - - statutes?

12 MR. LEVITZ: It would depend what the state  
13 statute said and the scope of the state statute. If the -  
14 - - the state statute said you can't do anything that could  
15 affect emission reduction, then, no, the - - - the locality  
16 couldn't. But that's - - - again, that's - - - that's the  
17 exact opposite of what the state statute - - -

18 JUDGE RIVERA: If we take her hypothetical, let's  
19 say the - - -

20 MR. LEVITZ: Yeah.

21 JUDGE RIVERA: - - - state - - - I'll - - - I'll  
22 make up a number. Say it's ten. You're trying to get to  
23 ten. I'm just making up a number. And the city says, you  
24 know, we - - - we want it to be even lower. We want it to  
25 be at two, right? But if the state has made clear that

1 they are, as she was saying, staggering or staging the - -  
2 - the reduction, and they don't want it to go that fast,  
3 you would agree that then the state law controls or the reg  
4 controls, and the city cannot, or the locality could not  
5 seek to go faster than the state's time frame?

6 MR. LEVITZ: The - - - the state certainly could  
7 set up a scheme where - - - where, you know, the - - - the  
8 local - - - local government could take a more stringent  
9 approach than the state. That happens on - - -

10 JUDGE RIVERA: No. No. I didn't ask that.

11 MR. LEVITZ: Okay. Sorry.

12 JUDGE RIVERA: I asked the opposite.

13 MR. LEVITZ: Maybe I didn't understand the  
14 question.

15 JUDGE RIVERA: If the state made clear that this  
16 is the - - - this is the timetable we want this to move on.

17 MR. LEVITZ: Right. Then a - - - then a locality  
18 couldn't say, oh, we're going to do something that's going  
19 to be an obstacle to that.

20 JUDGE RIVERA: But the locality, unless the - - -  
21 the state said otherwise, whether it's in the statute - - -

22 MR. LEVITZ: Right.

23 JUDGE RIVERA: - - - itself or by regulation, the  
24 - - - the locality could determine how best to achieve  
25 those goals even if it can't go further.

1 MR. LEVITZ: Right.

2 JUDGE RIVERA: Do you agree with that?

3 MR. LEVITZ: I - - - I - - - I - - - I think so.

4 JUDGE HALLIGAN: Wouldn't that - - - that  
5 scenario - - - if the state put a calendar that said we'll  
6 do this in ten years, and the locality said we're going to  
7 do it in two years, wouldn't that be a question of conflict  
8 preemption not - - -

9 MR. LEVITZ: Yes, it would.

10 JUDGE HALLIGAN: - - - field preemption?

11 MR. LEVITZ: Yes. Exactly. Thank you, Your  
12 Honor. And - - - and again, let's - - - let's talk about  
13 what's actually at issue here, which is field preemption of  
14 the statute. They're claiming field preemption by a  
15 statute that we already have in place, and - - - and  
16 there's just absolutely no basis for that. What - - - what  
17 field preemption looks like, again, is - - - is a detailed  
18 regulatory scheme we don't have, requiring uniformity  
19 statewide, which there's no intention of and it's - - -  
20 it's the exact opposite intention that's written into the  
21 Climate Act. Let me give you an example, a - - - a sort of  
22 a counter example here. The kinds of things that this  
23 court has found to be field preemptive, the kinds of state  
24 statutory schemes that are field preemptive are things like  
25 the Alcohol and Beverage Control law. So for instance, in

1 the People v. DeJesus case, that's one of our leading - - -  
2 this court's leading cases on field preemption, what the -  
3 - - what the court said when it found field preemption  
4 there is that the alcohol and beverage - - - Alcoholic  
5 Beverage Control Law preempts the field because it has an  
6 extremely detailed regulatory scheme. That scheme imposes  
7 its own direct controls at the local level. And there's an  
8 express declaration in the statute that the state intends  
9 to regulate and control the manufacture, sale, and  
10 distribution of alcohol broadly within the state.

11 JUDGE GARCIA: So - - -

12 MR. LEVITZ: That is - - - I'm sorry.

13 JUDGE GARCIA: I'd like to interrupt you there if  
14 I could. So on field preemption, it seems the statute  
15 might not be as detailed. For example, you could have this  
16 entity that's going to fill in the details later, but it  
17 could express an intent by the state to preempt in the  
18 field nevertheless, or do you think you need both things?

19 MR. LEVITZ: You - - - you could have express - -  
20 - you could have express preemption.

21 JUDGE GARCIA: Let's say there's a statement that  
22 says, the state intends to preempt the field here. Is that  
23 - - - is that a - - - why isn't that field preemption then?

24 MR. LEVITZ: I mean, I - - - I guess - - - and  
25 you might have to look at the details of the statute as a

1 whole and - - -

2 JUDGE GARCIA: But would you? That's my  
3 question. If the state just said, this is a highly  
4 regulated area. We're talking about greenhouse gas  
5 emissions.

6 MR. LEVITZ: But I think - - - I think what  
7 you're - - -

8 JUDGE GARCIA: There's no way - - - way to - - -

9 MR. LEVITZ: I think what you're describing is -  
10 - -

11 JUDGE GARCIA: Can they say - - -

12 MR. LEVITZ: I'm sorry.

13 JUDGE GARCIA: - - - we intend to preempt this  
14 into entire field?

15 MR. LEVITZ: Maybe. But I think, actually,  
16 that's better understood as express preemption. It - - -  
17 it's not what we traditionally think of as - - - as field  
18 preemption which is an implied preemption doctrine. And -  
19 - - and - - - and maybe that is a - - - is a good link to  
20 just - - - if I could make one - - - one final point going  
21 back to - - -

22 JUDGE GARCIA: So then would their argument on  
23 Sections 10 and 11 be more of a conflict preemption  
24 argument or field preemption argument?

25 MR. LEVITZ: I mean, the - - - the only claim

1 that they have made in this case is a field preemption  
2 argument. And - - - and - - - but let me - - - let me just  
3 go to - - - to Sections 10 and 11 because, you know, that's  
4 - - - that's the entire statutory basis for their argument,  
5 and it just doesn't get them there, and I think Your Honors  
6 were getting at some of the reasons why.

7 JUDGE GARCIA: But under - - -

8 MR. LEVITZ: Section - - -

9 JUDGE GARCIA: - - - Section 10, let's say, if  
10 you know one, could you give me an example of a state  
11 entity that could adopt and implement greenhouse gas  
12 emissions measures that aren't laws or regulations?

13 MR. LEVITZ: Yes. I - - - I think there was  
14 discussion of, you know, if you have some sort of state  
15 green infrastructure program.

16 JUDGE GARCIA: Do you know of one?

17 MR. LEVITZ: I'll - - - I'll give you another  
18 example that I know of. Public - - - the Public Service  
19 Commission has these clean energy rate orders.

20 JUDGE HALLIGAN: Clean energy rate - - -

21 JUDGE CANNATARO: Clean energy rate what - - -  
22 what?

23 MR. LEVITZ: Rate orders. They're rate orders.

24 JUDGE HALLIGAN: - - - orders.

25 MR. LEVITZ: You might - - - you might call them

1 laws, you know. So maybe they'd also fit in Section 11,  
2 but you might not. They're certainly not as obviously  
3 fitting in that category. And - - - and that's the idea of  
4 Section 10, is it's this belt-and-suspenders approach of -  
5 - - of having - - - you know, recognizing that there's all  
6 this existing stuff that the state has been doing in - - -  
7 in forms like rate orders, like green infrastructure  
8 projects, whatever.

9 The - - - the - - - the - - - the state Climate  
10 Act didn't come out of nowhere. It came out of a long  
11 history of existing state measures to deal with this  
12 problem of emissions reduction. And - - - and what Section  
13 10 is doing is something different than Section 11. It's  
14 saying, look, we know there's stuff the state's already  
15 done. We're preserving that. We're making sure that that  
16 stays in place to support these ambitious goals that we're  
17 now setting in the new statute.

18 Section 11 then adds on something different,  
19 which it says, we're also making sure we're preserving all  
20 - - - not just state laws, local laws, federal laws, every  
21 law. You still have to comply with those because those are  
22 going to support these ambitious goals that the state - - -  
23 these ambitious targets that the state set in the statute  
24 as well. And - - - and we need, again, all hands on deck  
25 to - - - to get there. You know, if there's any redundancy

1 in Section 11, it - - - it's possible you could read it  
2 that way. There's nothing particularly unusual about a  
3 little redundancy in a - - - in a statute like this. And a  
4 little redundancy actually makes particular sense in this  
5 context because we're dealing with this sort of all-hands-  
6 on-deck approach, where the - - - the legislature - - - the  
7 state legislature is intending to make sure that all these  
8 different sources of authority and support for these  
9 ambitious goals to reduce emissions and protect the state  
10 from the devastating effects of climate change are effect  
11 can - - - can be marshaled together.

12 CHIEF JUDGE WILSON: Thank you.

13 MR. LEVITZ: Thank you.

14 MS. MCCAMPBILL: Your Honors, plaintiffs, they're  
15 now conceding that their entire case hinges on this Section  
16 10, Section 11. For the reasons we've already discussed,  
17 it doesn't get them there. And there's so many other  
18 indications in the statute that the legislature did not  
19 intend to preempt local action, and we - - - we discussed  
20 them at length in our - - - in our brief. So I'd like to  
21 just talk about the - - - the standard for remand right  
22 now. It - - - the plaintiffs are arguing that, if there's  
23 any dispute, this needs to be remanded for further fact  
24 finding. Multiple cases that we cited have resolved  
25 preemption questions on the motion to dismiss stage. The

1 Garcia case, the Vittor case, the Hertz case.

2 JUDGE HALLIGAN: What about the ones that  
3 resolved with summary judgment?

4 MS. MCCAMPBILL: There are some cases that have  
5 been resolved on summary judgment, but - - -

6 JUDGE HALLIGAN: Is there anything that indicates  
7 there was the kind of discovery that's contemplated here in  
8 those cases? I don't know.

9 MS. MCCAMPBILL: Absolutely not, Your Honor. And  
10 I think what - - - in a lot of those cases, there were  
11 other claims at issue. And some of those cases were cross  
12 motions for summary judgment.

13 JUDGE HALLIGAN: So there might be other  
14 litigation reasons why it resolves its summary judgment?

15 MS. MCCAMPBILL: Exactly, Your Honor. They - - -  
16 they've never cited a case that relies on expert testimony.  
17 They've never cited a preemption case where any legislators  
18 have been deposed. And there's, again - - -

19 JUDGE GARCIA: But if the Appellate Division  
20 thought their argument was correct, what was the remedy  
21 they could give to the plaintiffs? What could the  
22 Appellate Division do at that point?

23 MS. MCCAMPBILL: It - - - it did - - - to  
24 reinstate the claim, as it did. But again, if the - - -

25 JUDGE GARCIA: To deny your motion to dismiss, so

1 then it goes back to the trial court, right? Trial court  
2 can do it once. At that point, take motions for summary  
3 judgment. It could - - - so why is it we need any further  
4 discovery if they - - - if a court thinks they have a  
5 better argument?

6 MS. MCCAMPBILL: The - - -

7 JUDGE GARCIA: It's just a denial of your motion  
8 to dismiss at that point. There's no other remedy, right?

9 MS. MCCAMPBILL: Yeah. But there's - - - there's  
10 no need for remand here because, again, there's nothing to  
11 - - - to favor their interpretation. And I'd like to just  
12 point out that they're - - - they're arguing that the field  
13 that's - - - that's preempted is greenhouse gas emission  
14 limits, and that's a phrase that's not even in Section 10  
15 or 11. They're - - - they're making up this theory that by  
16 reading these provisions in a way that's convenient to  
17 them, but it's at odds with what that statute actually  
18 says, it's at odds with the legislative findings of the  
19 statute, it's at odds with the other language in the  
20 statute that repeatedly refers to local action and the  
21 state information gathering and collaborating with  
22 localities and the shared effort, and it's also at odds  
23 with multiple statements from the - - - the state entities  
24 implementing the act, which are relevant under Janssen.  
25 This court noted in Janssen that the implementing state

1 entities, their views are significant under the question of  
2 implied field preemption. So really, everything cuts  
3 against plaintiffs here. This court can and should dismiss  
4 this claim as a matter of law.

5 JUDGE RIVERA: It is an odd - - - if we'd just  
6 get back to the Appellate Division's language, or maybe  
7 I've missed something in - - - this opinion. It is an odd  
8 resolution, if I can call it that, of - - - of the motion  
9 to dismiss on the Section 10, 11 issue, simply saying at  
10 the end, one could conclude, as plaintiffs do, that Section  
11 11 applies to local laws other than greenhouse gas  
12 emissions reduction measures. But I - - - I - - - perhaps  
13 I missed it. Help me here. I - - - I couldn't find  
14 anything else in this decision that explained to me how  
15 that would be resolved. It's a - - - it's a text-based  
16 question. How would one resolve that?

17 MS. MCCAMPBILL: We - - -

18 JUDGE RIVERA: It says one could conclude this,  
19 but doesn't explain how one would resolve - - -

20 MS. MCCAMPBILL: We - - - we agree, Your Honor,  
21 that this is a purely legal question. The court can answer  
22 - - -

23 JUDGE GARCIA: Isn't the court in a very  
24 difficult position. Let's say the Appellate Division  
25 thought you were wrong. What could they do besides what

1           they did?

2                       MS. MCCAMPBILL:  They could have actually  
3           interpreted the provisions, but they didn't do that in the  
4           - - -

5                       JUDGE GARCIA:  That would be giving an opinion on  
6           an issue that's - - - it's not already before them.  If it  
7           goes back, they move for summary judgment.  It comes up  
8           again, right?  And then they decide if that interpretation  
9           is right or wrong.  So what they're saying, it seems to me,  
10          the Appellate Division, is you don't - - - you are not - -  
11          - the only issue in front of them is you are not entitled  
12          to judgment on a motion to dismiss.  That's all they have.  
13          So they can't say no because they're right, right?  I guess  
14          they could, but they'd almost be giving an advisory opinion  
15          on a motion that hasn't come before them yet.

16                      JUDGE HALLIGAN:  Were there - - - was their  
17          position that the - - - that - - - that I think we see now,  
18          which is that there's discovery to be had?  Was that the  
19          position in the Appellate Division?

20                      MS. MCCAMPBILL:  Yes, Your Honor.  And the  
21          discussion of deposing lawmakers came up in the argument  
22          for the Appellate Division as well.  And again, there's - -  
23          - there's no need for discovery here.  This is - - -

24                      JUDGE RIVERA:  But then even more odd for the  
25          Appellate Division not to make reference to the fact that

1           it thinks this is a factual issue that has to be determined  
2           before they can resolve what looks to me like a plain text  
3           reading that only a court can resolve.

4                       MS. MCCAMPBILL: We - - - we agree it's an odd  
5           decision. And again, plaintiffs' - - - plaintiffs'  
6           interpretation of these provisions, it's really the  
7           farthest thing from a clearly evinced preemptive intent.  
8           And again, everything else cuts against plaintiffs as well.  
9           So we ask this court to reverse and dismiss the implied  
10          field preemption claim.

11                      CHIEF JUDGE WILSON: Thank you.

12                      MS. MCCAMPBILL: Thank you.

13                      (Court is adjourned)

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C E R T I F I C A T I O N

I, Brandon Deshawn, certify that the foregoing transcript of proceedings in the Court of Appeals of Glen Oaks Village Owners v. City of New York, No. 42 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

*Brandon Deshawn*

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