20-3989-cv

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

DERRICK PALMER, KENDIA MESIDOR, BENITA ROUSE, ALEXANDER ROUSE, BARBARA CHANDLER, LUIS PELLOT-CHANDLER, AND DEASAHNI BERNARD,

Plaintiffs – Appellants,

v.

AMAZON.COM, INC. AND AMAZON.COM SERVICES, LLC,

Defendants – Appellees,

On Appeal from the United States District Court for the Eastern District of New York

OPENING BRIEF FOR PLAINTIFFS-APPELLANTS

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INTRODUCTION

Defendants-Appellees Amazon.com Inc. and Amazon.com Services LLC (together, "Amazon") operate the world's largest internet company by revenue, which, with approximately 840,000 employees, is the second-biggest private employer in the United States. App. 76, ¶¶18-20. Several thousand of Amazon's employees, including four Plaintiffs in this case, work at JFK8, a fulfillment center in Staten Island, New York that runs twenty-four hours per day. App. 71, ¶1. During the COVID-19 pandemic, while New Yorkers have been encouraged to work from home as much as possible, these workers, many of whom are people of color, have traveled to and from JFK8 to work long shifts for low wages, fulfilling customer orders. Their work has enabled many others throughout the country to remain safely at home and has allowed Amazon to achieve unprecedented growth and record-breaking profits during the pandemic. *Id.*

Plaintiffs filed this case asserting claims under New York law because Amazon was flouting New York State's minimum requirements for continued business operations during the pandemic and New York COVID-19 paid leave law, endangering public health and placing JFK8 workers and their household members at particular risk. The district court turned aside Plaintiffs' request for help.

While the district court suggested it intended to show restraint by deferring to an expert federal agency, its analysis was far from restrained. The district court took the radical step of creating out of the narrow primary jurisdiction doctrine an exhaustion requirement on workers complaining of urgent workplace safety and health problems by requiring them to seek redress from the Occupational Safety and Health Administration ("OSHA") before they or their family members could pursue relief in court, even relief under state law. The statute establishing OSHA contains no such exhaustion requirement.

And after suggesting it would stay its hand in deference to OSHA, the court went on to decide other legal issues in the case in Amazon's favor, discounting plausible factual allegations that Plaintiffs had suffered special injury relative to the public generally and that Amazon's actions, not the virus itself, were the source of that special harm. The court also refused to defer to the opinion of the New York Department of Labor regarding how New York's COVID leave law should be interpreted, App. 149, or even to hear from the New York Attorney General on these important issues of state law. It denied the Attorney General leave to submit an amicus brief on Amazon's motion to dismiss. App. 21 (July 9 docket entry). Meanwhile Plaintiffs and other JFK8 workers and their family members continue to confront the consequences of Amazon's unsafe practices on a daily basis as the pandemic rages on.

The courts have a role to play in enforcing state law designed to protect workers and the public generally, especially during a pandemic. At the very least, based on their plausible factual allegations, Plaintiffs deserve an opportunity to access the courts to make their case that Amazon should be forced to change its practices. Plaintiffs respectfully request that this Court say so in no uncertain terms.

JURISDICTIONAL STATEMENT

The district court had subject matter jurisdiction under 28 U.S.C. § 1332 because Plaintiffs are citizens of New York and New Jersey while Amazon.Com, Inc. is a Delaware corporation with its primary place of business in Seattle, Washington and Amazon.Com Services LLC is a Delaware limited liability corporation. App. 76, ¶ 23. The cost of Plaintiffs' requested injunctive relief would exceed $75,000. App. 76-77, ¶ 24.

The district court dismissed Plaintiff's complaint in its entirety. App. 150. While the first and second claims were dismissed without prejudice, the court did not grant leave to amend. Rather, those claims were dismissed under the doctrine of primary jurisdiction with instructions that the plaintiffs "seek relief through [what the court considered] the appropriate administrative and regulatory framework." App. 138. Judgment in the case issued two days after the dismissal

order, App. 151, making that order final and giving this Court jurisdiction under 28 U.S.C. § 1291.

Plaintiffs filed their Notice of Appeal on November 24, App. 152-153, less than 30 days after the order of dismissal and entry of judgment. This appeal is timely. Fed. R. App. 4.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Was this case—where three Plaintiffs are household members outside OSHA's regulatory authority, the complaint asserts violations of state rather than federal law, and no related OSHA proceedings are pending—an appropriate occasion for the district court to employ the narrow doctrine of primary jurisdiction?
2. Did Plaintiffs plausibly plead special injury, necessary to state a claim for public nuisance, by alleging that Amazon's conduct exposed them to daily, sustained risk of contracting COVID-19 in their workplaces and their homes; that they experienced direct emotional and physical harm from Amazon's conduct; and that unlike other members of the public, they cannot avoid the effects of Amazon's unsafe practices by remaining at home or limiting social interactions?
3. Did Employee Plaintiffs state a legally cognizable claim under NYLL § 200, notwithstanding the exclusivity provision of New York's workers'

compensation law, where they alleged both actual present and past injury and a risk of future injury, but sought only prospective injunctive relief to make their workplace safer?

4. Are the leave payments mandated by New York law for workers diagnosed with COVID-19, or those required to quarantine, subject to the pay frequency requirements of NYLL § 191, as the New York Department of Labor has instructed?

STATEMENT OF THE CASE

This case is about Amazon's failure to comply with New York paid leave law and "New York Forward" minimum requirements for businesses during the COVID-19 pandemic. Amazon's violations have already contributed to the spread of the virus among JFK8 workers, their family members, and the public generally, and those violations pose serious and ongoing risks of harm.

Plaintiffs-Appellants are warehouse workers employed at JFK8 ("Employee Plaintiffs"), and members of their households ("Household Plaintiffs"). App. 74-75, ¶¶ 10-17. Plaintiff Derrick Palmer is a Warehouse Associate, Process Guide and Picking Master in the Pick, Count, Floor-Health department at JFK8. *Id.* at 74, ¶ 10. Plaintiff Kendia Mesidor lives with and is in a relationship with Derrick Palmer. *Id.* at ¶ 11. Plaintiff Benita Rouse is a Problem Solver in the inbound department at JFK8. *Id.* at ¶ 12. Plaintiff Alexander Rouse lives with and is the

only child of Benita Rouse. *Id.* at 74-75, ¶ 13. Plaintiff Barbara Chandler is a Process Assistant in the Pick, Count, and Floor-Health department at JFK8. *Id.* at 75, ¶ 14. Plaintiff Luis Pellot-Chandler lives with and is the oldest child of Barbara Chandler. *Id.* at ¶ 16. Plaintiff Deasahni Bernard is a member of the robotics team at JFK8. *Id.* at ¶ 17. Plaintiffs Chandler and Bernard contracted COVID-19 while employed at JFK8. *Id.* at 95, 97-98, ¶¶ 146-50; 167-68. Several family members in Chandler's household also experienced symptoms of COVID-19, and one of them died. *Id.* at 75, ¶ 15.

STATEMENT OF FACTS

COVID-19 is a highly contagious respiratory disease that can cause serious, long-term complications and death. App. 88, ¶¶ 43, 44, 47. The virus that causes COVID-19 can be spread even by people who are "asymptomatic," meaning they carry the active virus in their body but never develop any symptoms; "pre-symptomatic," meaning they have been infected and are incubating the virus but don't yet show symptoms; or very mildly symptomatic. *Id.* at 81, ¶ 52. Research from the Centers for Disease Control and Prevention ("CDC") suggests that a single person with COVID-19 is likely to infect five or six other individuals absent aggressive physical distancing practices. *Id.* at ¶ 53. The best way to prevent illness is to avoid being exposed to this virus. *Id.* at ¶ 54.

New York was and continues to be hard-hit by COVID-19. New York recorded its first confirmed case on March 1, 2020, and shortly thereafter became the global epicenter of the pandemic. *Id.* at ¶¶ 55-56. On March 20, 2020, pursuant to Governor Cuomo's executive order, all non-essential businesses in the state were closed as part of the New York State on Pause ("NYSOP") plan. *Id.* at 82, ¶¶ 60-61. Amazon remained open as an "essential business," but was required to comply with New York's guidance and directives for maintaining a clean and safe work environment. *Id.* at ¶¶ 61-63.

Beginning in May 2020, New York began a phased reopening of previously closed businesses under the New York Forward plan. *Id.* at ¶ 64. As part of this plan, the state provided detailed industry-specific guidance for businesses that are reopening, as well as those, like Amazon, that were deemed essential and continued their operations during NYSOP. *Id.* The New York Forward guidelines are minimum requirements that businesses must follow to remain open. *Id.* at ¶ 65. The New York Forward Interim Guidance for the Wholesale Trade Sector (the "Wholesale Guidance"), which applies to *all* wholesale trade businesses, including essential businesses, in New York state, applies to Amazon's JFK8 operations. *Id.* at 83, ¶¶ 66-68. The Wholesale Guidance contains requirements relating to social distancing, cleaning of facilities, surfaces and shared workstations and objects, handwashing, health screening, contact tracing, and communications. *Id.* ¶ 70.

Another early step taken by New York State to protect the public was to ensure that workers were paid wages while subject to an order of isolation or quarantine pursuant to state law because they had contracted or been exposed to the virus and experienced symptoms. *Id.* at 85, ¶ 71. New York requires that employers communicate with their workers about the availability of COVID-19 leave and any process the employer has for accessing that leave. *Id.* at ¶ 73-74. This leave is available to essential workers in New York City who are subject to orders of quarantine or isolation. *Id.* at 85-86, ¶ 75-76. According to the State of New York (but apparently disputed by Amazon), a worker subject to a mandatory or precautionary order of quarantine or isolation is entitled to their paid leave in the next pay period so that no one is encouraged to work outside the home when contagious. *Id.* at ¶ 79.

Amazon has failed to abide by New York's minimum requirements to ensure the safety of its essential workers and prevent transmission of COVID-19 at JFK8. The facility's workforce, normally around 3,500 people, swelled to as many as 5,000 during the spring of 2020. *Id.* at 88, ¶¶ 86-87. These workers toil around the clock in ten-hour shifts and are sometimes scheduled for "mandatory extra time" to meet the intense demand for Amazon's products and services during the pandemic. *Id.* at 88-89, ¶¶ 90-94. Workers raised concerns about their risk of contracting COVID-19 at work, and, as of the time Plaintiffs filed their First Amended

Complaint, there were at least 51 confirmed cases of COVID-19 at JFK8, and at least one JFK8 worker had died of the virus. *Id.* at 89-90, ¶¶ 96-100. Several family members of JFK-8 workers, including family members of Plaintiff Barbara Chandler, contracted the virus, and at least one died. *Id.* at 90, ¶ 101.

With respect to paid leave, Amazon fails to clearly communicate to JFK8 workers about the paid leave available to them if they contract COVID-19 or believe they have been exposed to someone with the virus. *Id.* at ¶¶ 102-05. Amazon also fails to promptly pay workers when they do take COVID-19 leave, in violation of New York Law. *Id.* at ¶ 106. When workers at the JFK8 facility appear to have symptoms of COVID-19 or believe they have come into close contact with the virus, Amazon requires them to communicate with Amazon's human resources team before they stay home pursuant to New York's COVID leave laws. *Id.* at 93, ¶ 126. Because of Amazon's byzantine protocols related to COVID leave, and its retaliation against workers who speak out about workplace safety and COVID-19, many Amazon workers are confused about the process and fearful about what will happen if they pursue COVID leave. *Id.* at ¶ 127. Even when workers do affirmatively seek out information from Amazon about whether they should quarantine and whether they will be able to access paid COVID leave, Amazon is slow to respond, causing workers to attend work even when they may be sick. *Id.* at ¶ 128. For example, Plaintiffs Deasahni Bernard and Barbara Chandler were

each forced to make multiple phone calls and send multiple messages over the course of days and weeks in order to receive partial payment for the time they were out of work following diagnosis with COVID-19. *Id.* at 95-103, ¶¶ 146-62; 167-210. Likewise, Plaintiff Benita Rouse was forced to make multiple phone calls and send many messages over the course of several hours when she learned she had been in close contact with a COVID-positive co-worker and sought to understand whether she should quarantine. *Id.* at 93-95, ¶¶ 129-45.

With respect to other workplace health and safety practices, Amazon's strict productivity requirements compound the effects of its failure to ensure that workers can take leave if they are sick or exposed to COVID-19. Amazon tracks employee activity on scanner devices that workers use to scan items, bins, and packages, in order to track whether workers at JFK8 are "on task" or "off task" for every minute of work. *Id.* at 104, ¶ 214. During every minute of each shift, including during paid rest breaks, Amazon tracks—down to the minute—whether the worker is actively engaged in work based on whether they perform a task in that minute and aggregates a total time off task ("TOT") for each worker every day. *Id.* at ¶ 215. If workers accumulate more than 30 minutes of TOT during a shift, other than paid break time, they are subject to progressive discipline, which increases depending on the amount of TOT. *Id.* at 104-05, ¶ 215-18. Although supervisors are authorized to re-code TOT for certain activities so that it does not

count against the worker, supervisors cannot re-code TOT for bathroom breaks, including trips to the bathroom for handwashing purposes. *Id.* at 105, ¶ 219. Instead, discipline for bathroom breaks is up to the discretion of supervisors. *Id.* at ¶ 220. In July 2020—after Plaintiffs filed this lawsuit—Amazon informed workers that time spent maintaining social distancing, handwashing, sanitizing workstations, and using the restroom would not be subject to feedback relating to rate and TOT. *Id.* at ¶ 221. However, the TOT policy otherwise remains in effect. *Id.*

Amazon also monitors workers minute-to-minute to assess whether they are scanning items quickly enough. *Id.* at ¶ 225. Amazon generally expects workers to scan hundreds of items per hour, with specific requirements varying depending on their department. *Id.* at 105-06, ¶¶ 226-27. Before the pandemic, workers who were not able to maintain Amazon's set rates were given verbal warnings and workers who consistently underperform compared to Amazon's rates were disciplined with write-ups or termination. *Id.* at 106, ¶ 228. In March 2020, according to internal corporate documents, Amazon stopped providing feedback to workers who were not maintaining their rate and stopped imposing discipline about failure to meet rate. *Id.* at ¶ 229. However, Amazon did not directly and publicly communicate that change to workers until July 13, 2020, after Plaintiffs filed this lawsuit and sought a preliminary injunction. *Id.* at ¶¶ 230-33. Even after July 13, 2020,

managers continued to post rate goals on white boards in the facility and encourage workers to meet their goals. *Id.* at 107, ¶ 240. And in October 2020, Amazon reinstated productivity requirements regarding rate and TOT. ECF Nos. 71-72.

Because Amazon does not automatically provide its warehouse workers with real-time information about how much TOT they have accrued or about how fast they are picking or counting items, these workers are unaware of how close they may be to hitting a TOT or rate-based disciplinary benchmark. *Id.* at 106-07, ¶¶ 235-37. Because of time pressures and the absence of real-time information about rate and TOT, Amazon warehouse workers are forced to work at a frenzied pace. *Id.* at 107 (¶ 238). In the context of the COVID-19 pandemic, the relentless pace of work at Amazon facilities becomes even more dangerous because the TOT and rate policies discourage workers from leaving their workstations to wash their hands and from taking the time to wipe down their workstations. *Id.* at 108 (¶¶ 245-51). The rush to avoid TOT and maintain Amazon's rates while working also impedes social distancing. *Id.* at 109, ¶ 255. Workers often find themselves rushing through the facility, which makes it difficult for them to spread out in hallways or, when they are able to use the bathroom or are required to access other cramped spaces, to allow other workers to leave before they enter. *Id.* at ¶ 256. These concerns are compounded by Amazon's failure to adequately clean the facility, and its failure to ensure that workers have sufficient time to clean their workstations.

Id. at 110, 115-16, ¶¶ 262-68; 314-24. All of this violates New York Forward's minimum requirements.

Finally, Amazon takes responsibility for contact tracing, but fails to comply with its basic requirements. Amazon relies on its in-house surveillance and technology to identify workers potentially exposed to SARS-CoV-2 inside the facility, and does not interview infected workers to learn about their close contacts. *Id.* at 111-12, 113-15, ¶¶ 279-82; 292-313. Amazon discourages workers who have tested positive for COVID-19 from informing coworkers they have tested positive and that others may be at risk. *Id.* at 112, ¶ 283. These policies directly contradict CDC and New York State guidance. *Id.* at ¶¶ 285-86.

RELEVANT PROCEDURAL HISTORY

On June 3, 2020, Plaintiffs filed a complaint in the Eastern District of New York asserting that Amazon (1) was creating a public nuisance by failing to follow the New York Forward requirements and guidance from the CDC in the JFK8 facility, (2) was in breach of its duty under New York Labor Law ("NYLL") § 200 to protect the health and safety of its employees, and (3) had failed to timely pay wages under NYLL § 191 in effectuating the New York COVID-19 paid leave law. *See* Compl., ECF No. 1. Plaintiffs sought declaratory and injunctive relief for the public nuisance and NYLL § 200 claims and requested an injunction against future NYLL § 191 violations. *See id.*

Also on June 3, Plaintiffs filed a motion for preliminary injunction demanding Amazon immediately change its policies to allow workers to take steps to protect themselves from COVID-19 and provide prompt payment of New York COVID-19 paid leave to JFK8 workers in quarantine or isolation. ECF No. 6.

On July 13, two days before a scheduled hearing on the motion for preliminary injunction, Amazon notified its JFK8 employees that the company had suspended its productivity policies and would no longer penalize workers for TOT if the non-work time was spent on safety measures like hand-washing or sanitizing work stations. *See* Decl. of Megan Fitzgerald, ECF No. 52-1. In response, Plaintiffs withdrew their motion for preliminary injunction. ECF No. 60.

On July 28, Plaintiffs filed an amended complaint ("FAC"), expanding their NYLL § 191 claims into a statewide class action, and adding one additional named Employee Plaintiff. ECF No. 63; App. 71. On August 11, Amazon filed a motion to dismiss the FAC under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). ECF No. 65. On November 1, the district court granted Amazon's motion. App. 127.[1]

The district court relied on the primary jurisdiction doctrine to dismiss Plaintiffs' public nuisance and NYLL § 200 claims, purporting to defer to OSHA

[1] The district court did not hear oral argument on the motion but did hold a pre-motion conference on July 15, 2020. App. 25.

expertise even though no OSHA investigations about JFK8 were pending and even though Plaintiffs' claims were brought under state law and sought compliance with New York's minimum requirements and paid leave laws. App. 134-38.

The order also reached the merits of Plaintiffs' claims. The district court held that Plaintiffs had failed to state a claim for public nuisance, pointing to the risks all New Yorkers faced of contracting COVID-19 as a reason not to allow fact development on the special injury posed to workers and their household members by the working conditions at JFK8. *Id.* at 138-40.

The district court also dismissed Plaintiffs' NYLL § 200 claims for injunctive relief to correct Amazon's past and continued failure to provide safe work conditions. *Id.* at 140-47. To the extent that Plaintiffs' claims were "based on past harm," the court deemed them barred by the New York Workers' Compensation Law. *Id.* at 144-46. And to the extent that Plaintiffs' claims were "based on the threat of future harm," the court determined that Plaintiffs had failed to allege a cognizable injury under NYLL § 200. *Id.* at 146-47.

Finally, the district court held that Employee Plaintiffs could not challenge Amazon's failure to make timely payments pursuant to New York's COVID-19 paid leave law under NYLL § 191. *Id.* at 147-50.

SUMMARY OF THE ARGUMENT

The district court suggested that only OSHA could resolve the questions of workplace safety this case presents and that Plaintiffs should bring their complaints to that agency in the first instance. But OSHA has no particular expertise over the leave, productivity, and contact tracing policies at the center of this lawsuit. By contrast, the New York Forward requirements outlined in the FAC provide a detailed standard of care that the district court was well equipped to enforce. Moreover, in passing the Occupational Safety and Health Act, Congress did not displace existing common law remedies for those harmed by irresponsible employer conduct or divest state and federal courts of their power to award such remedies. 29 U.S.C. § 653(b)(4). By requiring that Plaintiffs seek relief from OSHA before it would consider their claims, the district court ignored this dual enforcement scheme and imposed an administrative exhaustion requirement found nowhere in the OSH Act. The primary jurisdiction doctrine does not support this result.

The district court then compounded its error by reaching the remaining legal issues in Amazon's motion to dismiss and deciding most of them incorrectly. First, it concluded that Plaintiffs had not plausibly alleged that their heightened risk of exposure to the virus in their homes and workplaces as a result of Amazon's misconduct was different in kind than the risk faced by most other New Yorkers.

Second, the district court impermissibly divided the NYLL § 200 claim in two, dismissing the claim based on past harm as barred by New York's workers' compensation scheme and dismissing the claim based on likely future harm because no actual injury was pled. But actual injury *was* pled, and the already-injured Employee Plaintiffs sought injunctive relief to prevent further injury. Neither the exclusivity provision of N.Y. Work. Comp. Law § 11, nor NYLL § 200 itself, prevents plaintiffs from seeking such forward-looking relief.

Finally, the district court's analysis of New York's emergency COVID-19 paid leave law overlooked the nondiscretionary nature of the leave and the policy imperative that led the legislature to require timely payment of that leave. The legislature understood that paying leave promptly is essential so that workers will not feel economic pressure to come to work when they may be infectious, and the New York Department of Labor understood this necessity as well when it deemed COVID leave payments to be wages subject to the pay frequency requirements of NYLL § 191. The class claims were dismissed in error and should be reinstated.

ARGUMENT

I. The District Court's Decision to Defer to OSHA Under the Primary Jurisdiction Doctrine Misunderstands the Agency's Expertise, Does Not Advance Uniformity, and Raises Serious Federalism Concerns.

A. Standard of Review

Although earlier opinions from this Court referred to erroneous district court dismissals based on the primary jurisdiction doctrine as in excess of the district court's discretion, *Goya Foods, Inc. v. Tropicana Prods. Inc.*, 846 F.2 848, 854 (2d Cir. 1988), later opinions have clarified that the standard of review for such dismissals is "essentially *de novo*." *Nat'l Commc'ns. Ass'n, Inc. v. Am. Tel. & Tel. Co.*, 46 F.3d 220, 222 (2d Cir. 1995); *see also Ellis v. Trib. Television Co.*, 443 F.3d 71, 83 n.14 (2d Cir. 2006) (reiterating *de novo* standard of review).

The reviewing court, like the district court before it, must "examine the factors upon which the existence of the [primary jurisdiction] doctrine rests to determine whether deferral is appropriate." *Nat'l Commc'ns. Ass'n*, 46 F.3d at 222 (quoting *Gen. Elec. Co. v. MV Nedlloyd*, 817 F.2d 1022, 1026 (2d Cir. 1987)). Here, neither of the two justifications for the doctrine—agency expertise or a desire for uniformity—supports the district court's decision to decline to hear a case unquestionably within its jurisdiction.

B. The Reasons for the Primary Jurisdiction Doctrine Recognized in Supreme Court and Second Circuit Precedent Do Not Exist Here, and the Doctrine's Purposes Would Not be Served by Applying It.

Primary jurisdiction is a prudential doctrine related to but distinct from administrative exhaustion. The doctrine was first articulated in a 1907 case involving railroad rates set by the Interstate Commerce Commission, in which the Supreme Court noted that if courts usurped the ICC's role by making factual findings about the reasonableness of rates in the first instance, they would undermine Congress's goal of achieving uniform rates through a single regulatory agency. *Tex. & Pac. Ry. Co. v. Abilene Cotton Oil Co.*, 204 U.S. 426, 440-41 (1907). Later Supreme Court cases emphasized agency expertise, alongside this desire for uniformity, as a second reason for the primary jurisdiction doctrine. *See Far E. Conf. v. United States*, 342 U.S. 570, 573-75 (1952) (Federal Maritime Board, which had intervened in antitrust dispute, should make initial factual findings based on its expertise in international shipping).

The difference between administrative exhaustion and primary jurisdiction is that the former divests courts of jurisdiction entirely until administrative prerequisites are met, while primary jurisdiction is like abstention. It "comes into play whenever enforcement of [a judicially cognizable] claim requires the resolution of issues which, under a regulatory scheme, have been placed within the

special competence of an administrative body." *United States v. W. Pac. R.R. Co.*, 352 U.S. 59, 64 (1956).

Recognizing at the outset that primary jurisdiction only comes into play when courts have jurisdiction over a case but abstain, for prudential reasons, from exercising it, reinforces the doctrine's limited scope. As the Supreme Court has recently instructed, "a federal court's 'obligation' to hear and decide a case" over which it has jurisdiction is "'virtually unflagging.'" *Sprint Commc'ns., Inc. v. Jacobs*, 571 U.S. 69, 77 (2013) (quoting *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976)); *see also Goya Foods*, 846 F.2d at 851 (staying judicial proceedings to await agency action only appropriate in "relatively narrow" circumstances).

This case does not fall into the narrow category where deferring to agency fact-finding is appropriate. First, deciding whether Amazon's practices at JFK8 satisfy the standard of care set by the New York Forward requirements for business operation does not implicate OSHA's "special competence." Second, the Occupational Safety and Health ("OSH") Act that created OSHA does not seek the type of uniformity that statutes involving shipping rates and tariffs do. Instead, the Act explicitly preserves the role of the courts to resolve common law disputes like this one. Accordingly, neither of the two reasons established by the Supreme Court for the primary jurisdiction doctrine are present here.

The district court based its primary jurisdiction analysis on four factors, which, while not a "fixed formula," map loosely onto the doctrine's two underlying justifications: "(1) whether the question at issue is within the conventional experience of judges or whether it involves technical or policy considerations within the agency's particular field of expertise; (2) whether the question at issue is particularly within the agency's discretion; (3) whether there exists a substantial danger of inconsistent rulings; and (4) whether a prior application to the agency has been made." App. 134 (quoting *Ellis*, 443 F.3d at 82-83).

The first two *Ellis* factors, involving judicial versus agency competence, cut against deferring to OSHA here, given the nature of Plaintiffs' state-law claims and the way OSHA has exercised its discretion during the COVID-19 pandemic. And the third and fourth, uniformity-related *Ellis* factors likewise weigh against application of the doctrine, in light of the OSH Act's overt encouragement of overlapping enforcement, as well as the lack of any pending OSHA proceedings regarding conditions at JFK8.

1. Whether Conduct Is a Public Nuisance and Whether an Employer Breaches NYLL § 200 Are Determinations Within the Conventional Experience of Judges, and Nothing About OSHA's Discretion Alters that Analysis.

Plaintiffs do not seek to enforce any rights under the OSH Act, 29 U.S.C. § 651 *et seq*., nor do they allege that Amazon is out of compliance with any health or

safety standards promulgated by OSHA. Instead, they allege that Amazon has created unsafe conditions at the JFK8 facility that endanger the health and safety of the surrounding community as well as the workers themselves. These tort-based claims are well within the conventional experience of judges, and because they contemplate harm to others besides workers, they are explicitly beyond Congress's grant of authority to OSHA. *Steel Inst. of N.Y. v. City of New York*, 716 F.3d 31, 38-39 (2d Cir. 2013); *see also Hoover v. Durkee*, 622 N.Y.S.2d 348, 349-50 (App. Div. 1995) (private plaintiffs had standing to pursue claim for public nuisance).

When a claim sounds in long-standing common law theories of liability, there is no reason to defer to an administrative agency's primary jurisdiction, even though the factual subject matter of the case may overlap with the subject matter regulated by that agency. For example, in *Nader v. Allegheny Airlines, Inc.*, 426 U.S. 290 (1976), the Supreme Court found deference to the Civil Aeronautics Board under the primary jurisdiction doctrine inappropriate in a case alleging common law fraud for an airline's failure to disclose its overbooking practices, because "[t]he standards to be applied in an action for fraudulent misrepresentation are within the conventional competence of the courts." *Id.* at 305. *See also Goya Foods*, 846 F.2d at 853 (courts have "long-standing familiarity" with legal standard of likelihood of consumer confusion, based on common-law trademark infringement and unfair competition claims); *Netlloyd*, 817 F.2d at 1025, 1027-28

(deferring to Federal Maritime Commission inappropriate where its expertise involved the effect of shipping rates on commerce, whereas the claim at issue involved whether a rate was so high as to be unconscionable, a question in the conventional experience of courts); *Segedie v. Hain Celestial Grp., Inc.*, No. 14 Civ. 5029, 2015 WL 2168374, at *13 (S.D.N.Y. May 7, 2015) (whether claims on product labels could reasonably mislead consumers is "within the traditional realm of judicial competence") (internal quotations omitted).

The district court expressed skepticism about its ability to determine how Amazon's practices affect "transmission of a poorly understood disease" and suggested that courts "lack the training, expertise, and resources to oversee compliance with evolving industry guidance." App. 137. But the court falsely perceived itself as limited to two choices: either deferring to OSHA or creating standards of care out of whole cloth against which to judge Amazon's conduct. There is a third option, presented by Plaintiffs' complaint: hold Amazon to New York paid leave law and the minimum requirements for business operation during the pandemic promulgated by New York's governor under the New York Forward initiative. *See id.* at 71, 82-83, 117-18, 123-25, ¶¶ 2, 64-70, 326, 362(c). Those requirements provide the district court with the standard of care Amazon owes its workers (under the NYLL § 200 claim) and the public generally (under the public nuisance claim). *Trimarco v. Klein*, 56 N.Y.2d 98, 105 (1982) (where there is a

customary "way of doing things safely, this custom may be proved to show that [the one charged with the dereliction] has fallen below the required standard."); *see also* N.Y. Pattern Jury Instr.--Civil 2:16.

Although New York Forward provides mandatory "minimum requirements," the same analysis would apply even if these standards were not binding. Non-mandatory guidelines are perfectly good evidence of the accepted method of "doing things safely." *Daniels v. N.Y.C. Transit Auth.*, 35 N.Y.3d 938, 939 (2020) ("trial court properly admitted plaintiff's expert testimony regarding non-mandatory gap standards").

Juxtaposing these New York Forward standards, designed specifically to address business operations during the COVID-19 pandemic, against the available OSHA standards in effect when the district court chose to defer to OSHA's primary jurisdiction underscores the lack of justification for that deference. Indeed, one of the *Ellis* primary jurisdiction factors is the extent of the agency's discretion, and a notable expression of OSHA's discretion during 2020 was its decision to forego promulgation of a COVID-specific standard. App. 136 (citing *In re Am. Fed'n of Labor & Cong. of Indus. Orgs.*, No. 20-1158, 2020 WL 3125324, at *1 (D.C. Cir. June 11, 2020)).[2]

[2] Even if OSHA had promulgated more specific standards, that would not affect the primary jurisdiction analysis. The OSH Act contemplates a dual enforcement scheme under which workers can seek redress for workplace hazards through the

Finally, another way that OSHA has exercised its discretion during the pandemic is by prioritizing its limited enforcement resources to focus on conducting inspections at workplaces it considers highest-risk, including nursing homes, laboratories, and medical facilities treating COVID-19 patients. *See* OSHA, Updated Interim Enforcement Response Plan for Coronavirus Disease 2019 (COVID-19) (May 19, 2020), https://www.osha.gov/memos/2020-05-19/updated-interim-enforcement-response-plan-coronavirus-disease-2019-covid-19.[3] These priorities are evident in the high proportion of nursing homes and other health care facilities included in OSHA's list of inspections conducted and citations issued to date. *See* App. 136 n.9.

Given these enforcement priorities, Plaintiffs had good reasons for seeking help from the court directly rather than first filing a complaint with an overburdened agency that had publicly announced it was focusing its resources elsewhere. And the lack of any pending proceedings with the agency should have factored against application of the primary jurisdiction doctrine here. The district

courts, and the district court's primary jurisdiction analysis creates an administrative exhaustion requirement that is contrary to that scheme.

[3] Plaintiffs request that this Court take judicial notice of all information from the websites of public agencies referenced in this brief, as it is both "ascertainable from a source whose accuracy cannot reasonably be questioned" and "not reasonab[ly] subject to dispute." *Kaggen v. IRS*, 71 F.3d 1018, 1020 (2d Cir. 1995) (internal citation and quotation marks omitted).

court's contrary ruling was devoid of explanation and at odds with the OSH Act's permissive approach to parallel private law enforcement.

2. Considerations of Uniformity and Consistency Do Not Support Primary Jurisdiction Where the OSH Act Contemplates Parallel Actions Under State Law.

OSHA is not like the Interstate Commerce Commission, whose ability to set a uniform system of shipping rates would be thwarted if courts could independently opine on the reasonableness of those rates and reach conclusions in conflict with those of the agency. *See Abilene Cotton*, 204 U.S. at 440-41. By contrast, OSHA was established under a statutory scheme that expressly authorized continued private enforcement of workers' rights under state law. 29 U.S.C. § 653(b)(4); *Sakellaridis v. Polar Air Cargo, Inc.*, 104 F. Supp. 2d 160, 163 (E.D.N.Y. 2000) ("There is a consensus that the [OSH Act's] savings clause operates to save state tort rules."); *Pedraza v. Shell Oil Co.*, 942 F.2d 48, 53 (1st Cir. 1991) (calling consensus "solid" and collecting cases); *People v. Pymm*, 76 N.Y.2d 511, 523-24 (1990) ("Congress intended State law statutory and common-law duties, rights and liabilities to survive, and . . . was willing to tolerate any tension that resulted."). Indeed, the district court recognized this parallel enforcement scheme in denying Amazon's motion to dismiss Plaintiff's NYLL § 200 claims based on OSH Act preemption, App. 140-44, an aspect of the opinion that Amazon has not cross-appealed.

The OSH Act also allows states to develop their own workplace health and safety standards, and allows courts to enforce them, in areas where OSHA has not developed a federal standard. 29 U.S.C. § 667(a). Thus, to the extent that the New York Forward plan provided more COVID-specific standards than anything OSHA had promulgated at the time of the district court's opinion, concern over inconsistent state and federal standards and a desire for uniformity should not have stayed that court's hand, for the OSH Act contemplates and explicitly welcomes such state gap-filling.[4]

Deference to administrative agencies under the primary jurisdiction doctrine is not appropriate in the context of statutory schemes like this one that permit simultaneous parallel private enforcement and regulatory oversight. *See Nader*, 426 U.S. at 299-302 (Federal Aviation Act provision allowing agency to issue cease and desist orders for airlines found to have engaged in deceptive practices was intended to coexist, and did not conflict, with common law claims against airlines, distinguishing *Abilene Cotton*); *Goya Foods*, 846 F.2d at 851 (primary jurisdiction doctrine applies "only when a lawsuit raises an issue, frequently the

[4] Of course, New York Forward's requirements are not occupational regulations but, like the scaffold rules that have been held to co-exist with OSHA standards, are focused on protecting the public as a whole. App. 84 ¶ 70(j) (regarding a communications plan for workers, visitors, and customers); *Steel Inst. of New York v. City of New York*, 832 F. Supp. 2d 310, 325 (S.D.N.Y. 2011), aff'd, 716 F.3d 31 (2d Cir. 2013) (discussing scaffold laws as laws of general applicability not preempted by OSH Act).

validity of a commercial rate or practice, committed by Congress in the first instance to an agency's determination."). None of the Amazon practices challenged by Plaintiffs here are committed to OSHA's exclusive initial determination under the OSH Act.

The risk-of-inconsistent-rulings factor, besides considering the statutory scheme at issue and the role it affords to courts and agencies generally, is also concerned with inconsistent court and agency rulings regarding the same case. *Ellis*, 443 F.3d at 88 (district court reached a conclusion at odds with that later reached by the Federal Communications Commission as to the same parties and their ownership rights, and "[s]uch a conflict within the 'law of the case' is precisely the type of problem that the primary jurisdiction doctrine is meant to avoid."). Indeed, this desire to avoid court-agency conflicts explains why the fourth *Ellis* factor, the existence of pending applications to the agency, is included in the analysis. *Id.* at 89.

There is no such risk of conflicting rulings here, because no complaints have been filed with OSHA regarding COVID-19 and conditions at JFK8. The district court noted this fact, App. 138, but instead of considering it as a factor militating against primary jurisdiction, seemed to hold the lack of pending OSHA complaints against the plaintiffs. *Id.* ("Plaintiffs chose to pursue their claims in federal court rather than apply for relief from OSHA."). But this is a choice the OSH Act gives

them—and for the three Household Plaintiffs who have no rights to pursue through OSHA, it is their only choice.

To deny these plaintiffs a forum to pursue their state-law claims simply because some of them could have raised related issues with OSHA converts the parallel enforcement scheme envisioned in the OSH Act into a scheme requiring administrative exhaustion. And given the multiple layers of review for complaints filed with OSHA, 29 U.S.C. § 659(c), requiring exhaustion of OSH Act remedies as a prerequisite for judicial consideration of state-law claims would impose substantial delay and inhibit the prompt administration of justice. *Nat'l Commc'ns. Ass'n*, 46 F.3d at 225 (reversing district court's primary jurisdiction dismissal because deferring to agency would have caused delay).

The district court's reticence about reaching the merits of this dispute, given the "medical and scientific uncertainty" surrounding COVID-19, is understandable. App. 137. But courts handle complex factual issues in areas of scientific uncertainty on a regular basis. Complexity alone cannot transform a doctrine geared towards striking a balance between court and agency adjudications into a blunt instrument that deprives plaintiffs of the right to petition state courts under state law regarding issues of public health and safety, issues which have historically been at the core of the state police power. *See Toy Mfrs. of Am., Inc. v. Blumenthal*, 986 F.2d 615, 617 (2d Cir. 1992). The district court's conclusion is

inconsistent with this Court's and the Supreme Court's primary jurisdiction precedents, the text of the OSH Act, and principles of federalism. It should be reversed.

II. The District Court Wrongly Concluded That Plaintiffs Did Not Plausibly Allege Special Harm Sufficient to State a Claim for Public Nuisance.

A. Standard of Review

The district court's alternative decision to dismiss Plaintiffs' public nuisance claim is also reviewed *de novo*. At this stage, all of Plaintiffs' factual allegations, including allegations related to their special injury flowing from Amazon's conduct, should be accepted as true and all reasonable inferences should be drawn in Plaintiffs' favor. *See Excevarria v. Dr Pepper Snapple Grp., Inc.*, 764 F. App'x 108, 109 (2d Cir. 2019); *Caro v. Weintraub*, 618 F.3d 94, 97 (2d Cir. 2010).

B. Plaintiffs Plausibly Allege That Amazon's Conduct Constitutes a Public Nuisance and That Plaintiffs Suffered Special Injury Different from That Experienced by the Public Generally.

The district court incorrectly concluded that Plaintiffs had not plausibly alleged that they had experienced "special injury" sufficient to state a public nuisance claim under New York law.

The thrust of the district court's short analysis on this point is that the virus that causes COVID-19 is everywhere and puts everyone at risk ("The injury is common to the New York City community at large."); that Amazon is not the

cause of COVID-19 ("Unlike the noxious landfill, a malarial pond, or a pigsty, JFK8 is not the source of COVID-19."); and that even if Plaintiffs are at increased risk of contracting the virus, this is not sufficient to give them standing to assert a public nuisance claim ("Both plaintiffs' concern and their risk present a difference in degree, not kind, from the injury suffered by the public at large."). App. 139-40. This cursory analysis is rooted in errors of law and misunderstandings of fact that should, in any event, be irrelevant to the analysis at the motion to dismiss stage where Plaintiffs' plausible factual allegations must be credited.

1. Plaintiffs Plausibly Plead that Amazon's Conduct, Not COVID-19 Itself, Is a Public Nuisance.

As an initial matter, the district court framed the question incorrectly. Plaintiffs do not allege that COVID-19 is itself a public nuisance that they have standing to remedy through private litigation. *See* App. 139-40. They understand, of course, that Amazon is "not the source of COVID-19." App. at 139. Rather, Plaintiffs allege that Amazon's conduct—its failure to ensure workers can maintain safe distances, its unwillingness to reduce productivity requirements, and its refusal to ensure that workers exposed to the virus can stay home without losing income—violates New York law and the "minimum requirements" of New York Forward and has encouraged the spread of COVID-19 within JFK8 and beyond. App. 117-18, ¶¶ 325-30. These violations amount to a public nuisance.

Nothing about this allegation is novel. Courts in New York and elsewhere have long held that conduct by a private entity that contributes to the spread of disease—even a disease that would exist independent of that party's conduct—creates a public nuisance. *Meeker v. Van Rensselaer*, 15 Wend. 397, 398 (N.Y. Sup. Ct. 1836) (housing conditions that spread disease, even if otherwise lawful, can be a public nuisance during a pandemic); *Roth v. City of St. Joseph*, 147 S.W. 490, 491 (Mo. Ct. App. 1912) (public nuisance claim lies against city that allowed a stagnant, "disease-breeding" pond on its property); *Birke v. Oakwood Worldwide*, 169 Cal. App. 4th 1540, 1548-53 (Ct. App.2009) (second-hand smoke is a public nuisance because it can cause lung cancer and heart disease); Restatement (Second) of Torts § 821B cmt. g ("[T]he threat of communication of smallpox to a single person may be enough to constitute a public nuisance because of the possibility of an epidemic.").

In fact, during the COVID-19 pandemic, courts and state and local governments have recognized that private conduct that has or may contribute to the spread of this deadly virus is a public nuisance, notwithstanding that no private business is itself the cause of COVID-19. *See, e.g.*, *St. Louis Cty. v. House of Pain Gym Serv*s., No. 20 Civ. 655, 2020 WL 2615746, at *2 (E.D. Mo. May 22, 2020) (allowing county to pursue public nuisance action against gym violating stay-at-home order); *Massey v. McDonald's Corp*., No. 20 CH 4247, 2020 WL 5700874,

at *5-17 (Ill. Cir. Ct. June 24, 2020) (granting preliminary injunction in public nuisance case brought by workers against employer); *see also, e.g.*, Conn. Exec. Order No. 7ZZ, Protection of Public Health And Safety During COVID-19 Pandemic and Response – Reopening Phase II, https://portal.ct.gov/-/media/Office-of-the-Governor/Executive-Orders/Lamont-Executive-Orders/Executive-Order-No-7ZZ.pdf (describing violations of public health orders during COVID-19 as public nuisances under state law).

2. Plaintiffs Plausibly Allege Injury Different in Degree and in Kind from the Public Generally.

The question before this Court, therefore, is whether Plaintiffs have alleged "special injury beyond that suffered by the community at large" related to Amazon's conduct at the JFK8 facility, not whether they have experienced "special injury" related to COVID-19. *532 Madison Ave. Gourmet Foods, Inc. v. Finlandia Ctr., Inc.*, 96 N.Y.2d 280, 293 (2001).

Plaintiffs plausibly plead that they experienced such a "special injury," "different in kind, not merely in degree" from "that suffered by the community at large," *see id.* at 293-94, caused by Amazon's breach of New York law and minimum requirements. App. 118-19, ¶¶ 331-35. Amazon's actions harm the general public by exacerbating spread of the SARS-CoV-2 virus and straining healthcare resources. But Amazon's actions cause a special injury and risk of injury to Plaintiffs.

The harm experienced by Plaintiffs is different in kind from that experienced by the general public because: (1) while the public may suffer indirectly from Amazon's conduct in the form of increased community spread of the virus and strained resources, Plaintiffs are endangered directly in their homes and workplaces; (2) Plaintiffs experienced specific physical and emotional harms directly related to Amazon's conduct; and (3) unlike members of the general public, Plaintiffs lack the autonomy to avoid the hazards created by Amazon's conduct.

First, Amazon's maintenance of an unsafe work environment causes a different kind of harm to Plaintiffs because it is a direct affront to their health and safety in their homes and workplaces. Contrary to the district court's reasoning, although residents of the region may be at increased risk of contracting the virus in public spaces due to Amazon's conduct, Plaintiffs confront the risk posed by Amazon not in public spaces they can avoid, but in their own workplaces and homes. *Fresh Air for the Eastside, Inc. v. Waste Mgmt. of N.Y., L.L.C.*, 405 F. Supp. 3d 408, 444 (W.D.N.Y. 2019) ("Compared to individuals who do not own property or reside nearby and are merely affected by the Landfill's impact on public spaces, Plaintiffs' alleged injuries constitute a 'special injury.'"); *see also Seigle v. Bromley*, 124 P. 191, 195 (Colo. App. 1912) (neighbor to business

engaging in conduct likely to contribute to the spread of disease had standing to bring suit to abate public nuisance).

Although New York's minimum requirements and paid leave law are designed to protect the public generally from the spread of COVID-19, they do so by providing direct protection to workers from employer conduct. Amazon's breach of those requirements admittedly presents risk to everyone who may contact a person infected at JFK8, but it is a *direct* affront to the health of Amazon's employees and their families, making it different in kind than the risk experienced by the public at large. *See, e.g., Wilson v. Parent*, 365 P.2d 72, 78 (Or. 1961) ("The hearing of obscene words directed at and characterizing plaintiff's conduct is a different harm from the mere hearing or seeing of vile words and acts in general by a member of the public not personally defamed thereby.").

Second, unlike the general harms to the public due to the increased prevalence of COVID-19 infections and the indirect harms caused by the strains that Amazon's conduct may place on the healthcare system or other public resources, Plaintiffs have also alleged several specific pecuniary, physical, and emotional injuries flowing directly from Amazon's actions. Most Plaintiffs allege, for example, pecuniary losses flowing from their decision to stay away from work because of Amazon's workplace safety practices. App. 95, 97, 115, 119-20, ¶¶ 147-148, 167, 309-311, 332, 339. They also all allege persistent fear of

contracting the virus or spreading it to loved ones as a consequence of Amazon's conduct. App. 119, ¶¶ 332-334.

Amazon's alleged misconduct has had substantial consequences in Plaintiffs' day-to-day lives. Plaintiff Mesidor, for example, was only able to see her dying father once during his final months—not because of some general concern about COVID-19, but rather because of Amazon's conduct and the direct risks that conduct posed to her health. *Id.* at 74, ¶¶ 11. And Plaintiff Chandler alleges that she contracted COVID-19 at JFK8 as a consequence of Amazon's failures. *Id.* at 72, 97-99, ¶¶ 4-5, 166-177. She also alleges that she brought the virus home to her family, "and less than a month later awoke to find her cousin with whom she lived dead in their bathroom, after he had become ill with COVID-19 symptoms." *Id.* at 72, ¶ 5.

These allegations of direct and specific harms flowing, not from the pandemic generally but from Amazon's conduct in particular, are sufficient to plead a claim for public nuisance. "Injuries to a person's health are by their nature special and peculiar" for the purposes of establishing a public nuisance claim. 58 Am. Jur. Nuisances § 210 (2020). And emotional injuries are also sufficient to establish special injury, just like physical injuries. *Johnson v. Bryco Arms*, 304 F.Supp. 2d 383, 392-93 (E.D.N.Y. 2004). Pecuniary losses that are different in kind from those experienced by the public generally—in this case, lost wages

resulting specifically from Amazon's violations—are also enough. Restatement (Second) of Torts § 821C cmt. h.

Public nuisance cases against gun manufacturers from early this century reinforce the point. The direct tie between Amazon's conduct and the specific harms alleged by Plaintiffs distinguishes this case from *N.A.A.C.P. v. AcuSport, Inc.*, 271 F.Supp.2d 435 (E.D.N.Y. 2003), and better resembles *Ileto v. Glock,* 349 F.3d 1191 (9th Cir. 2003). *Ileto* held that while pervasive gun violence puts the general public at heightened risk of death or injury, those that actually fall victim to or witness gun violence experience harm that is different in kind from the public generally. *See id.* at 1212. The court in *Johnson* highlighted the distinction, explaining: "Unlike the plaintiffs in *Ileto*, the NAACP did not bring any claims arising out of the manufacture, distribution or sale of a *particular* firearm alleged to have been illegally used in a shooting causing harm to the plaintiff." 304 F.Supp.2d at 393 (emphasis added). Here, Plaintiffs challenge Amazon's conduct, which causes indirect risks to the public generally, but which they allege has also resulted in their specific, special, and ongoing harm.

It is true that many people may be injured in similar ways by Amazon's violations. But "[t]he fact that multiple persons are injured does not make the nuisance such a common one as to exclude redress by a private individual; an action may be maintained by one who is not the sole sufferer when the grievance is

not common to the whole public, but is shared by a number or even a class of persons." *Id.* (citing *Lansing v. Smith*, 4 Wend. 9 (N.Y. 1829); 81 N.Y. Jur.2d, Nuisances, § 57)). "As long as they have sustained a special injury, each—no matter how numerous—is entitled to compensation." *Id.* (citing *Francis v. Schoellkopf*, 53 N.Y. 152, 154-55 (1873); 81 N.Y. Jur.2d, Nuisances, § 57).

Finally, the difference between the harm Amazon's conduct causes the public generally and the harm it causes these Plaintiffs is evident in the fact that Plaintiffs cannot protect themselves from Amazon's behavior. Whereas members of the public can exercise autonomy to protect themselves from virus spread that non-compliant businesses like Amazon cause—by, for example, limiting exposure to public spaces—Plaintiffs have no meaningful choice but to subject themselves to Amazon's misconduct, which interferes with their interests in a safe workplace and a safe home environment. Plaintiffs are at the whim of Amazon, a multi-national corporation that forces them or the people they live with to risk exposure to COVID-19 because of the hazardous conditions at JFK8. The relationship these Plaintiffs have to Amazon's alleged violations is different in kind from that members of the public have to efforts Amazon takes (or does not take) to protect its workers from COVID-19.

Although the public generally may suffer from Amazon's conduct, these Plaintiffs are forced to subject themselves to Amazon's conduct every day in their

workplaces and in their homes. They have already suffered extraordinary harm. There should be no question that they have at the very least pled special injury.

III. Employee Plaintiffs' Claims Under NYLL § 200 Should Not Have Been Dismissed.

A. Standard of Review

The district court's alternative decision to dismiss Employee Plaintiffs' NYLL § 200 claims is also reviewed *de novo*. For this claim too, under Federal Rule of Civil Procedure 12(b)(6), the Court should "accept[] *all* factual allegations in the complaint as true and draw[] all reasonable inferences in favor of the [P]laintiff[s]." *Excevarria*, 764 F. App'x at 109 (emphasis added) (citing *Caro v. Weintraub*, 618 F.3d at 97). A district court properly dismisses a claim where "the allegations in a complaint, however true, could not raise a claim of entitlement to relief." *Id.* (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 588 (2007)).

B. The District Court's Dismissal of Plaintiffs' NYLL § 200 Claims Was Based on Improper Claim Splitting.

The four Employee Plaintiffs allege that Amazon's failure to follow the New York Forward minimum requirements at the JFK8 facility exposed them and their coworkers to SARS-CoV-2 in the workplace, and that one of the Employee Plaintiffs contracted symptomatic COVID-19 from this exposure. App. 72, 113-14, ¶¶ 4, 291-304. All four Employee Plaintiffs also suffered, and continue to suffer, emotional harm—fear of getting sick themselves and infecting their loved ones—

and most suffered pecuniary harm when they took leave to avoid unsafe conditions or to protect their coworkers from a suspected infection for which Amazon would not allow them to quarantine. App. 95, 97, 115, 119-20, ¶¶ 147-148, 167, 309-311, 332, 339.

Plaintiffs allege that as long as Amazon continues to violate state public health requirements, it simultaneously breaches its duties under NYLL § 200, placing Employee Plaintiffs and their coworkers at ongoing risk of experiencing similar, recurring injuries. App. 120, ¶¶ 338, 340. Employee Plaintiffs seek a judicial declaration that Amazon is breaching its workplace safety duties, as well as injunctive relief to remedy the breach. *Id.* at ¶ 341.

The district court improperly divided this unitary claim—which seeks declaratory and injunctive relief based on claims of past harm, ongoing current harm, and risk of future harm—into one backward-looking claim based on past harm and a separate forward-looking claim to redress potential future harm. App. 144-46. It then applied New York's workers' compensation law to what it had identified as the claims for past harm and concluded that that claim was subject to workers' compensation exclusivity. *Id.* As for allegations based on risk of future harm, the district court applied a New York Court of Appeal opinion on medical monitoring to conclude—contrary to the language of the statute and seemingly ignoring Plaintiffs' allegations of actual injury—that New York does not allow

recovery under NYLL § 200 without allegations of past harm. *Id.* at 146-47. As explained further here, neither the workers' compensation law nor case law on medical monitoring applies to Plaintiffs' unitary claim for injunctive relief to ameliorate ongoing unsafe conditions that are already causing harm and will continue to cause harm if not corrected.

C. Plaintiffs' Claims for Injunctive Relief Are Not Barred by the Exclusivity Provision of New York's Workers' Compensation Law.

The district court held that the Employee Plaintiffs' claims for injunctive relief were barred by New York's Workers' Compensation Law ("NYWCL"). App. 146. Yet Plaintiffs cannot obtain injunctive relief from the workers' compensation scheme. The district court's ruling thus makes it impossible for a court to prospectively correct unsafe workplace practices. Nothing in the text or structure of the NYWCL compels such a result. Indeed, New York state courts have never interpreted the exclusivity provision of the NYWCL to bar anything other than retrospective claims for damages. Neither should this Court.

The Workers' Compensation Law requires employers to pay employees "compensation for . . . disability or death from injury arising out of and in the course of the employment without regard to fault." NYWCL § 10(1). It is an entirely backward-facing regime: The Workers' Compensation Board has no

power to issue injunctions to prevent future or recurring injuries. *See* NYWCL § 142 (enumerating Board's powers).

The law also includes exclusivity provisions, *see* NYWCL §§ 11, 29(6), such that an employee's sole remedy "for losses suffered as a result of an injury sustained in the course of employment" is workers' compensation benefits. *Slikas v. Cyclone Realty, LLC*, 908 N.Y.S.2d 117, 122 (App. Div. 2010). "[T]he obvious purpose of those provisions [is] to foreclose the possibility of duplicative recoveries." *Werner v. State*, 441 N.Y.S.2d 654, 657 (1981); *see also Beth V. v. N.Y. State Office of Children & Family Servs.*, 980 N.Y.S.2d 47, 53 (2013) (interpreting § 29(6) as intended to prevent "the possibility of a recovery at law for the same injuries" (internal quotation omitted)). The system would collapse if an employer were required to compensate an injured employee twice over, through both workers' compensation benefits and a court-mandated damages award. But it is only claims for "recovery at law" that are therefore statutorily barred. *Acevedo v. Cons. Edison Co. of N.Y., Inc.*, 596 N.Y.S.2d 68, 71 (App. Div.1993), not claims for equitable or prospective relief.

The exclusivity provision reflects a particular "tradeoff" at the heart of the workers' compensation scheme. *Dumervil v. Port Auth. of N.Y. & N.J.*, 80 N.Y.S.3d 421, 423 (App. Div. 2018) (internal quotation omitted). Employees receive "the security of knowing that fixed benefits will be paid," but give up the

chance for "a more substantial recovery through a jury award." *Id*. Employers, for their part, are subjected to "no-fault liability," but are protected from the "large damage verdicts which the statute was intended to foreclose." *Reich v. Manhattan Boiler & Equipment Corp.*, 676 N.Y.S.2d 110, 114 (1998) (internal quotation omitted). Claims for injunctive relief, by contrast, never factored into this bargain.

Here, Plaintiffs ask Amazon to comply with its statutory duty to "provide reasonable and adequate protection to the lives, health and safety" of its employees. NYLL § 200(1). Plaintiffs seek to prevent further COVID-related injuries that may be caused by Amazon's failure to ensure a safe workplace. Plaintiffs do not seek "compensation for . . . disability or death from injury." NYWCL § 10(1). In fact, Plaintiffs do not seek compensation for this claim at all. There is thus no risk that any relief the court affords will duplicate a workers' compensation award—and no reason for Plaintiffs' claims to be barred by the exclusivity provisions of the NYWCL.

The district court's contrary ruling relied on a misreading of the statutory text. NYWCL § 11 states that liability for workers' compensation benefits "shall be exclusive and in place of any other liability whatsoever, to such employee . . . or any person otherwise entitled to recover damages, contribution or indemnity, at common law or otherwise, on account of such injury or death or liability arising therefrom." NYWCL § 11. The provision makes clear that the type of "liability"

foreclosed takes the form of "damages, contribution or indemnity." *Id.*; *see City of New York v. Beretta U.S.A. Corp.*, 524 F.3d 384, 501 (2d Cir. 2008) ("[W]here specific words follow a general word, the specific words restrict application of the general term to things that are similar to those enumerated." (internal quotation omitted)).

Yet the district court isolated the phrase "any other liability whatsoever" and, seeing "broad" terminology, ignored the qualifying language in the remainder of the text. App. 145. The district court thus expanded § 11 far beyond its intended reach, reading workers' compensation to abrogate "'any liability whatsoever' for an employer to an employee." *Id.* (quoting NYWCL § 11).

This is simply not the law, even when it comes to claims for damages—let alone claims for injunctive relief. *See, e.g.*, *Hanford v. Plaza Packaging Corp.*, 727 N.Y.S.2d 407, 408 (App. Div. 2001) (finding claim that employer created a hostile work environment was not barred by workers' compensation); *Kondracke v. Blue*, 716 N.Y.S.2d 533, 536 (App. Div. 2000) (same as to claim of racial discrimination and sexual harassment); *Conroy v. Incorporated Village of Freeport*, 984 N.Y.S.2d 819, 823-24 (Sup. Ct. 2014) (same as to claim that employer negligently installed camera in violation of employee's statutory right to privacy). And it distorts beyond recognition the role of § 11, which is to prevent duplicative recoveries at

law and maintain the careful "balance" set by the workers' compensation scheme. *Reich*, 698 N.E.2d at 943 (internal quotation omitted).

Other jurisdictions have held that injunctive claims to correct unsafe working conditions are not barred by the exclusivity provision of a workers' compensation law. For example, in *Shimp v. N.J. Bell Tel. Co.*, an employee sought to enjoin her employer's practice of permitting cigarette smoking in her office, invoking her employer's duty "to provide a work area that is free from unsafe conditions." 368 A.2d 408, 410 (N.J. Super. Ct. Ch. Div. 1976). The court rejected the employer's contention that the suit was barred by New Jersey's workers' compensation law. That law barred "common law action[s] in tort for damages resulting from work-related injury." *Id.* at 412. But it did not prevent the court from ordering the employer to eliminate a workplace hazard before it had "ripened to injury." *Id.* The same reasoning applies here, where Plaintiffs seek to mitigate risks to health and safety caused by Amazon's mismanagement of the COVID-19 pandemic. Workers' compensation was not designed to keep employees from *preventing* workplace injury through claims for injunctive relief. *See Conway v. Circus Casinos, Inc.*, 8 P.3d 837, 838, 841 (Nev. 2000) (finding claim to provide a safe workplace not barred by workers' compensation law); *Nelson v. U.S. Postal Serv.*, 189 F. Supp. 2d 450, 460 (W.D. Va. 2002) (finding claim to correct workplace hazards not barred by workers' compensation law); *see also Hicks v.*

Allegheny E. Conf. Ass'n of Seventh Day Adventists, 712 A.2d 1021, 1021-22 (D.C. Ct. App. 1998) (finding claim for injunctive relief not barred by workers' compensation law); *Amalgamated Transit Union Local 1277 v. Los Angeles Cty. Metro. Transp. Auth.*, 107 Cal. App. 4th 673, 682-84 (2003) (same).

D. Plaintiffs' NYLL § 200 Claim Is Premised on Allegations of Actual Injury, But No Such Allegation Is Necessary to Seek Injunctive Relief to Remedy Unsafe Working Conditions.

The district court reasoned that because New York tort law requires actual injury, Employee Plaintiffs' NYLL § 200 claim "based on the threat of future harm" does not allege a legally cognizable injury. App. 146-47. But the claimed violation of NYLL § 200 *is* premised on allegations of actual injury; allegations of likely future harm simply justify Plaintiffs' requests for injunctive and prospective relief. And in any event, section 200 includes no such "actual injury" requirement. This Court should enforce NYLL § 200 as drafted and decline to read an additional element into the statutory text.

The district court relied on *Caronia v. Philip Morris USA, Inc.*, 22 N.Y.3d 439, 446 (2013) for the proposition that a threat of future harm is insufficient to establish liability in tort under New York law. App. 147. Assuming this principle does extend to NYLL § 200 claims—despite the absence of any such language in the statutory text—Plaintiffs' allegations more than satisfy any "actual injury" requirement. As discussed above, Employee Plaintiffs have alleged physical,

emotional, and pecuniary harms already resulting from Amazon's failure to provide a safe work environment, as NYLL § 200 mandates. App. 95, 97, 113-15, 119-20, ¶¶ 147-148, 167, 292-304, 309-311, 332, 339. True, Plaintiffs also allege ongoing and likely future harm. *Id.* at 120, ¶¶ 338, 340. These allegations, however, do not form a separate NYLL § 200 claim. Rather, they merely establish that Amazon's violations of NYLL § 200 may appropriately be remedied through injunctive relief. Even in cases involving common-law negligence claims, nothing prevents a court from crafting equitable relief based on likely future harm as well. *See, e.g.*, *Theofilatos v. Koleci*, 481 N.Y.S.2d 782, 784 (App. Div. 1984) (affirming trial court's use of "equitable powers [to] fashion[] a remedy that benefit[ed] both parties" in an action concerning allegations of nuisance, trespass, and negligence); *Incorporated Village of Garden City v. Genesco, Inc.*, No. 07-CV-5244, 2009 WL 3081724, at *7 (E.D.N.Y. Sept. 23, 2009) (citing *Thoma v. Town of Schodack*, 776 N.Y.S.2d 109, 110 (App. Div. 2004)) (allowing claims for injunctive relief arising from negligence to proceed even as damages claims were time-barred).

Moreover, even if Plaintiffs had not pled actual injury, which they did, *Caronia* does not sweep so broadly as to foreclose a NYLL § 200 claim based solely on future harm. The New York Court of Appeals in *Caronia* was asked a specific certified question by this Court: does an independent equitable claim for medical monitoring exist under New York law based on the threat of future harm

alone, when the plaintiffs "do not allege personal injury"? *Benoit v. Saint-Gobain Performance Plastics Corp.*, 959 F.3d 491, 498 (2d Cir. 2020) (quoting *Caronia v. Philip Morris USA, Inc.*, 715 F.3d 417, 428 (2d Cir. 2013)). The New York Court of Appeals thus considered whether it should "recognize a new tort, namely, an equitable medical monitoring cause of action." *Caronia*, 22 N.Y.3d at 447. And it concluded that policy reasons "militate against a judicially created cause of action for medical monitoring" and that the legislature is "plainly in the better position" to assess the costs and benefits of establishing such a new tort. *Id.* at 452.

Unlike the plaintiffs in *Caronia*, Employee Plaintiffs here did not ask the court to create a new independent cause of action. Instead, they asked the court to enforce an existing statute, NYLL § 200, and to enforce that statute as written. NYLL § 200 was enacted in 1921 and, though it has been amended three times in the intervening decades, has never included an "actual injury" requirement. This Court should decline to read an unwritten element into § 200 claims. The legislature has had ample time to weigh the costs and benefits that the Court of Appeals considered appropriate for legislative determination in the first instance. *Caronia*, 22 N.Y.3d at 452. And the legislature has chosen to codify the duty to "provide reasonable and adequate protection to the lives, health and safety of all persons" performing work, regardless whether the breach of that duty has already

caused injury, is causing ongoing injury, threatens future injury, or—as here—all of the above. NYLL § 200(1).

Because NYLL § 200 is concerned with ensuring that workplaces become and remain safe, rather than with punishing violators, it is necessarily prophylactic in nature. *See, e.g.*, NYLL § 200(2) (allowing Commissioner of Labor to post notices warning of dangerous conditions and prohibiting further work in the affected area "until the dangerous condition is corrected"); *Huston v. Hayden Bldg. Maintenance Corp.*, 617 N.Y.S.2d 335, 337 (App. Div. 1994) (finding that "the primary purpose of [NYLL § 200] is to regulate conduct" and its "loss-allocation provisions are subsidiary").

New York state courts interpreting NYLL § 200 likewise focus on the ability to prevent future or ongoing injury as a key factor in determining who is liable under the statute. *See Russin v. Louis N. Picciano & Son*, 54 N.Y.2d 311, 317 (1981) ("An implicit precondition to this duty to provide a safe place to work is that the party charged with that responsibility have the authority to control the activity bringing about the injury to enable it to avoid or correct an unsafe condition"). It would be perverse indeed if a statute focused on securing safe workplaces and aimed at holding liable those with the ability to "avoid or correct an unsafe condition" did not permit Employee Plaintiffs to seek an injunction to correct the unsafe conditions Amazon continues to cause at JFK8, simply because

that claim for injunctive relief is based in part on the risk of future harm to Employee Plaintiffs and their colleagues.

Nothing in the text of NYLL § 200, the workers' compensation law, or New York caselaw interpreting either statute prevents Employee Plaintiffs from seeking injunctive relief based on a combination of past, present, and threatened future harm. The district court's importation of *Caronia* from its proper medical monitoring context into an entirely separate, forward-looking statutory scheme was inappropriate, and this Court should reject its reasoning.

IV. The District Court Improperly Dismissed Plaintiffs' Damages and Injunctive Relief Claims Regarding COVID-19 Leave Pay.

A. Standard of Review

This Court also reviews dismissal of Plaintiffs' wage claims *de novo*. *Excevarria*, 764 F. App'x at 109; *Caro*, 618 F.3d at 97. Because review of the Court's dismissal of these claims presents pure issues of law, the *de novo* standard applies regardless whether the claims were dismissed with or without prejudice. *Compare Estler v. Dunkin' Brands, Inc.*, 691 F. App'x 3, 4 n.1 (2d Cir. 2017), *with Document Techs., Inc. v. LDiscovery, LLC*, 731 F. App'x 31, 33 (2d Cir. 2018).

B. The District Court Wrongly Concluded That New York's Emergency COVID-19 Leave Law Payments Constitute Benefits or Wage Supplements Not Subject to NYLL § 191.

The district court improperly dismissed Plaintiffs Chandler's and Bernard's class claims for untimely and inadequate payment of COVID-19 leave under New

York law, and the injunctive relief claims of Employee Plaintiffs against future underpayments. In dismissing these claims, the district court incorrectly concluded that the wage replacement provisions of New York's emergency sick leave bill were a "benefit or wage supplement" not subject to the frequency of payment requirements of NYLL § 191. App. 148.

On March 18, 2020, Governor Cuomo signed emergency COVID-19 paid leave legislation (the "Leave Law") so that workers would not have to "make the impossible choice between losing their job or providing for their family and going to work."[5] The Governor and New York's legislators recognized that paid leave "is one of the most effective tools at protecting public health" and was necessary to curb the spread of COVID-19. *See* 2020 N.Y. Senate Bill S8091, "Justification."

The Leave Law requires employers to pay an employee's wages during their mandatory or precautionary quarantine or isolation due to COVID-19. *See* 2020 N.Y. Senate Bill S8091 §1(c). NYLL § 191, in turn, governs the frequency with which employers must pay wages to employees.[6] The law was designed to "compel

[5] *See Governor Cuomo Signs Bill to Guarantee Paid Leave for New Yorkers Under Mandatory or Precautionary Quarantine Due to COVID-19*, New York State (March 18, 2020), https://www.governor.ny.gov/news/governor-cuomo-signs-bill-guarantee-paid-leave-new-yorkers-under-mandatory-or-precautionary.

[6] Wages must be paid within seven calendar days of the end of the work week, in the case of manual workers, and not less frequently than semi-monthly, in the case of clerical and other workers. NYLL § 191(1)(a)(i), (d).

prompt payment of daily wages to the small wage earner." *People v. Vetri*, 309 N.Y. 401, 406 (1955).

Wages paid under the Leave Law are subject to the requirements of NYLL § 191. Excepting such wages from the frequency-of-pay provisions would undermine the Leave Law entirely: Promise of wages at some unspecified future date is unlikely to convince a potentially infected worker to self-isolate if that worker is subsisting week-to-week. Recognizing this threat, the New York State Department of Labor ("NYDOL") issued guidance explicitly establishing that COVID-19 leave payments "are subject to . . . Section 191 of the Labor Law,"[7] an interpretation that is entitled to deference. *See Samiento v. World Yacht Inc.*, 10 N.Y.3d 70, 79 (2008).

In reaching the opposite conclusion, the district court determined that the Leave Law provides no more than "benefits or wage supplements," which are excluded from NYLL § 191's frequency-of-pay requirements. *See* App. 148. (citing NYLL § 190(1)). Yet this holding misapprehends both the text of the NYLL and the nature of payments made under the Leave Law.

The exclusion of "benefits or wage supplements" from the coverage of § 191 derives from a mid-century New York Court of Appeals case, *People v. Vetri*, 309

[7] New York State Department of Labor, "New York Paid Family Leave COVID-19: Frequently Asked Questions" available at https://paidfamilyleave.ny.gov/new-york-paid-family-leave-covid-19-faqs.

N.Y. 401 (1955). *See Trueblood v. Ne. Cap. & Advisory, Inc.*, 715 N.Y.S.2d 366, 368 (2000) (explaining that the Legislature "intentionally followed *Vetri*[]" by "excluding from the definition [of wages] wage supplements" in § 191). The court in *Vetri* addressed whether "vacation pay" constituted "wages" within the meaning of the predecessor statute to § 191, then-NYLL § 196. 309 N.Y. at 405. Because violation of the pay provision exposed the employer to criminal prosecution, the court adopted a narrow approach, determining that "wages" under the frequency-of-pay provision were to be "restricted to the basic rate of pay." *Id.* at 407. While "additional benefits accruing to [employees] under their contract of employment"—such as "vacation pay, severance pay, voluntary bonuses and tips"—may broadly be construed as wages in the civil enforcement context, the court explained, "the same construction may not be extended to penal provisions *where there is no statutory obligation placed on the employer* . . . to make such payments." *Id.* at 408 (emphasis added).

In short, the term "benefits or wage supplements" under the NYLL encompasses payments related to "vacation and sick pay [that] are purely matters of contract between an employer and employee." *Chan v. Big Geyser, Inc.*, No. 1:17-CV-06473, 2018 WL 4168967, at *5 (S.D.N.Y. Aug. 30, 2018) (internal quotation omitted); *see* NYLL § 198-c(2) (defining "benefits or wage supplements" to include "reimbursement for expenses; health, welfare and

retirement benefits; and vacation, separation or holiday pay"). Conversely, payments mandated by the Leave Law constitute wages plain and simple, and employers are under a "statutory obligation" to pay. *See Vetri*, 309 N.Y. at 408.

By equating wages paid under the Leave Law with an employer's discretionary provision of sick pay to employees, App. 148, the district court failed to grapple with the distinction between a statutory entitlement and an ancillary "benefit or wage supplement" created by an employment contract. *Compare* 2020 N.Y. Senate Bill S8091 §1(c) (mandating that employees "shall" be provided with COVID-19 leave pay), *with Sosnowy v. A. Perri Farms, Inc.*, 765 F.Supp.2d 457, 475 (E.D.N.Y. 2011) ("It is axiomatic that an employee has no inherent right to paid vacation and sick days, or payment for unused vacation and sick days, in the absence of an agreement, either express or implied."). Indeed, the district court only cited cases involving claims for payment of accrued but unused sick or vacation pay upon termination of employment. *See* App. 148-49; *see, e.g.*, *Crawford v. Coram Fire Dist.*, No. CV 12-3850, 2015 WL 10044273, at *5 (E.D.N.Y. May 4, 2015) (granting summary judgment to employer absent contractual requirement to pay accrued vacation, sick, and holiday pay); *see also Sosnowy*, 764 F. Supp. 2d at 476 (no statutory right to accrued vacation and sick day payments upon termination). Here, by contrast, Chandler, Bernard and the class they seek to represent have a statutory entitlement to wages as a result of their

COVID-19 diagnoses or exposures, and should be allowed to seek recovery under § 191.

C. The District Court Improperly Ignored Guidance from the New York State Department of Labor.

The district court's misunderstanding of the NYLL also led it to afford less deference to the NYDOL's guidance than was properly due. *See* App. 149-50. The district court characterized the NYDOL guidance as "a new interpretation of § 191 that conflicts with its prior guidance that paid sick time off is a benefit provided at the discretion of the employer and for which 'no correct or prescribed method' of provision or payment exists." *Id.* at 149 (quoting NYDOL, Request for Opinion, Personal/Sick/Vacation Policy (Mar. 11, 2010), available at: https://on.ny.gov/33pXXhh). But the 2010 opinion letter the district court cited as "prior guidance" involved a voluntary employer policy—a "benefit[] . . . provided at the discretion of the employer"—and expressly noted that "neither federal or New York State law requires that an employer provide vacation, personal or sick paid time off to its employees" and that "there is no requirement for an employer to provide such benefits." NYDOL, Request for Opinion, Personal/Sick/Vacation Policy (Mar. 11, 2010), https://on.ny.gov/33pXXhh). Here, there is a statutory requirement that an employer pay regular wages to employees who qualify for COVID-19 leave, thus the "prior guidance" on which the district court relied is inapplicable.

CONCLUSION

Plaintiffs respectfully request that the Court vacate the order granting Amazon's motion to dismiss, including those portions of the FAC dismissed with prejudice, and remand for further proceedings based on the reinstated FAC.

Dated: January 11, 2021
New York, NY

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure because it contains 12,907 words, excluding the parts of the brief exempted by Rule 32(f).

This brief complies with the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman 14-point font.

Dated: January 11, 2021

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Karla Gilbride, certify under penalty of perjury, that on January 11, 2021, I electronically filed the document entitled Opening Brief of Plaintiffs-Appellants with the Clerk of the Court for the United States Court of Appeals for the Second Circuit by using the CM/ECF System.

I further certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

DATED this 11th day of January, 2021.

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