21-2007-cv

United States Court of Appeals for the Second Circuit

AMAZON.COM, INC.,

Plaintiff - Appellant,

v.

ATTORNEY GENERAL LETITIA JAMES,
in her official capacity as the Attorney General of the State of New York,

Defendant - Appellee.

On Appeal From The United States District Court
For The Eastern District Of New York
Case No. 1:21-cv-00767, Judge Brian M. Cogan

BRIEF FOR PLAINTIFF-APPELLANT AMAZON.COM, INC.

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CORPORATE DISCLOSURE STATEMENT

Plaintiff-Appellant Amazon.com, Inc. is a publicly held corporation. Plaintiff-Appellant Amazon.com, Inc. does not have a parent company, and no publicly held corporation owns 10% or more of Plaintiff-Appellant Amazon.com, Inc.'s stock.

Dated: September 29, 2021

/s/ Jason C. Schwartz
Jason C. Schwartz

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INTRODUCTION

Amazon.com, Inc. ("Amazon") filed this action for declaratory and injunctive relief to prevent the Office of the New York Attorney General ("OAG") from attempting to regulate Amazon's workplace safety response to the COVID-19 pandemic in areas that are governed by federal laws. Since March 2020, the OAG has been disregarding the preemptive effect of those federal laws and intruding on the exclusive or primary jurisdiction of federal regulators charged with enforcing those laws. Under the U.S. Constitution's Supremacy Clause, Amazon has a well-settled right to ask a federal court for such declaratory and injunctive relief, and Amazon exercised that right in filing this action. After Amazon did so, however, the OAG filed a civil enforcement action against Amazon in state court, and the district court below subsequently "abstained" in favor of the OAG's action and dismissed Amazon's suit without resolving whether federal law barred the OAG's claims. Never before has a federal court abstained from enforcing federal law in circumstances such as these—where federal preemption of the OAG's claims is readily apparent and a federal regulator, the National Labor Relations Board ("NLRB"), already is exercising exclusive jurisdiction over the exact same conduct underlying the OAG's allegations.

As an essential business that has provided vital supplies to customers and much needed jobs throughout the COVID-19 pandemic, Amazon places the highest

priority on the health and safety of its employees and has taken extraordinary, industry-leading measures grounded in science, above and beyond government guidance and requirements, to protect its associates from COVID-19. Since the outset of the COVID-19 pandemic, Amazon has engaged with over 20 leading global medical and health experts, including pandemic response doctors, epidemiologists, and industrial hygienists, to identify and implement best practices at its facilities. It promptly implemented over 150 process changes to promote social distancing, hygiene, and the safety of its associates, expanded its paid and unpaid leave programs in light of the pandemic, and even built its own COVID-19 testing capacity and laboratories to test its workforce for asymptomatic cases. Amazon also has sponsored on-site vaccination clinics for associates and their household members and provided incentive payments to associates who were vaccinated off-site—and even has offered substantial prizes to frontline employees who can prove they have been vaccinated against COVID-19.[1] All told, Amazon has invested more than *$11.5 billion* on these and other COVID-related initiatives to keep associates safe and deliver essential products to customers.

[1] Matt Day, *Amazon Lottery Offers Vaccinated Workers Cars, $500,000 Cash*, Bloomberg (Aug. 6, 2021), https://www.bloomberg.com/news/articles/2021-08-06/amazon-lottery-offers-vaccinated-workers-cars-500-000-cash.

Amazon also has taken appropriate steps to enforce its health and safety protocols for the protection of its entire workforce. This is exactly what Amazon did with respect to Christian Smalls and Derrick Palmer, two associates at Amazon's JFK8 fulfillment center in Staten Island who committed severe health and safety violations. Amazon terminated Mr. Smalls's employment after he repeatedly violated social distancing requirements and disregarded an order to quarantine and stay off Amazon property, with full pay, due to a COVID-19 exposure. Mr. Palmer also did not comply with social distancing requirements, and Amazon issued him a final warning (he remains an employee).

On March 30, 2020, the day that Amazon terminated Mr. Smalls's employment for his safety violations and failure to quarantine, the New York Attorney General posted a Tweet on her official Twitter account describing Amazon's actions in terminating Mr. Smalls's employment as "disgraceful" and "calling on the NLRB to investigate." In an official OAG press statement on the same date, the Attorney General condemned Amazon's actions as "disgraceful," "immoral," and "inhumane." After the Attorney General publicly denounced Amazon, the OAG began a purported "investigation" of Amazon's COVID-19 response that lasted eleven months, during which Amazon worked in good faith to educate the OAG on the measures Amazon has taken to protect its associates from COVID-19 and to explain why Amazon took action against Mr. Smalls and

Mr. Palmer—all while making clear that federal law preempts the OAG's attempts to regulate the matters at issue. But the OAG was unwilling to reconsider the conclusion of wrongdoing that the Attorney General had announced in the press at the outset. When the OAG's allegations hardened into threats and unreasonable demands for relief, Amazon exercised its constitutional right to seek a federal-court injunction preventing the OAG from regulating in areas governed by federal law, and brought this action in the venue where the events at issue took place.

The OAG responded by filing its own civil enforcement action against Amazon in New York state court in Manhattan alleging workplace safety violations and retaliation against Mr. Smalls and Mr. Palmer, then moved to dismiss Amazon's federal lawsuit on jurisdictional and abstention theories. As relevant here, the OAG argued that the district court must abstain in favor of the OAG's state-court action under *Younger v. Harris*, 401 U.S. 37 (1971)—notwithstanding that the NLRB was already exercising exclusive jurisdiction over identical allegations of retaliation involving another JFK8 employee.

After receiving briefing, the district court agreed with the OAG. Relying on a ground not raised or briefed by the parties, the district court held that the OAG's state-court civil action qualified for abstention because it was "akin to a criminal proceeding." The court refused to decide Amazon's contention that *Younger* does not apply because federal preemption is "readily apparent," holding instead that the

OAG was pursuing a sovereign interest and the state-court proceeding provides an adequate opportunity for review of Amazon's federal claims. Finally, the court dismissed Amazon's detailed allegations that the predetermined-results-driven manner in which the OAG pursued its claims warranted an exception to *Younger* where the state action is brought in bad faith. Each of those holdings was erroneous.

First, the OAG's civil action against Amazon is not "akin to a criminal prosecution" because the OAG brought quintessentially civil claims pursuant to the New York Labor Law and seeks only injunctive relief, compensatory damages, and equitable disgorgement. The OAG is not seeking penalties, and it did not bring claims in aid of New York's criminal statutes or to sanction Amazon.

Second, the district court erred in abstaining without resolving Amazon's contention that federal preemption is "readily apparent." As at least six courts of appeals have held, *Younger* abstention is not appropriate where federal preemption is readily apparent, because in those circumstances the state lacks an important interest. In failing to resolve the preemption issue, the district court relied on New York's sovereign interest in protecting the health and safety of its citizens—notwithstanding that federal law supersedes any such interest here. And the district court further erred by holding that Amazon can press its preemption defenses in state court—even though the state proceeding cannot afford Amazon the federal injunctive relief to which it is entitled.

Third, the district court applied erroneous legal standards in dismissing Amazon's well-pleaded allegations that *Younger* abstention does not apply because the OAG pursued its claims in bad faith. The district court required Amazon to show that the OAG had no reasonable expectation of obtaining a favorable outcome, but this Court requires consideration of the state actor's *subjective* motivation—and Amazon adequately alleged the OAG's subjective bad faith. The district court further erred in requiring Amazon to show that the OAG's bad faith was the sole cause of the state action, where this Court requires showing only that bad faith animated the OAG's action. Under the correct standards, Amazon's well-pleaded allegations were sufficient to survive a motion to dismiss and proceed to discovery.

At bottom, this case seeks to vindicate the fundamental principle of federalism that states are not above federal law. When state actors refuse to recognize limits on state authority imposed by controlling federal law, as the OAG is doing here, federal courts have both the jurisdiction and the obligation to intervene; they may not "abstain." The district court's decision upended federalism and therefore should be reversed.

JURISDICTIONAL STATEMENT

The district court had jurisdiction pursuant to 28 U.S.C. § 1331 over Amazon's complaint seeking declaratory and injunctive relief on the basis that state regulation is preempted by federal law. *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85,

96 n.14 (1983); Special Appendix ("SA") 3-6. As the court found, Amazon "seeks a declaration regarding federal—not state—law," SA5, and therefore raises a federal question. *See infra* at 24. This Court has jurisdiction under 28 U.S.C. § 1291. The district court entered a decision on August 10, 2021, granting the OAG's motion to dismiss and declining to decide Amazon's motion for summary judgment, SA11; an order on August 11, 2021, dismissing the case, SA12; and a final judgment on August 12, 2021, disposing of all claims, SA13. Amazon timely filed a notice of appeal on August 17, 2021. Joint Appendix ("JA") 1792.

STATEMENT OF ISSUES

I. Whether the district court erred in abstaining under *Younger v. Harris*, 401 U.S. 37 (1971), on the ground that the state-court civil action filed by the OAG is "akin to a criminal prosecution." SA6-7.

II. Whether the district court erred in abstaining under *Younger* without resolving whether federal preemption is "readily apparent," SA8 n.4, and holding that the OAG is pursuing an "important state interest," SA7-8, and New York state court provides an "adequate opportunity for review of Amazon's federal claims," SA9.

III. Whether the district court erred in abstaining under *Younger* despite Amazon's well-pleaded allegations that the OAG pursued the state action in bad faith. SA10-11.

STATEMENT OF THE CASE

This appeal arises from a final decision of the district court (Cogan, J.) dismissing Amazon's complaint against the OAG for declaratory and injunctive relief. SA1-11. Amazon seeks to prevent the OAG from attempting to regulate Amazon's workplace safety response to the COVID-19 pandemic in areas governed by federal law and assigned the exclusive or primary jurisdiction of federal regulators.

A. Amazon's Industry-Leading Measures To Respond To The COVID-19 Pandemic And Keep Employees Safe.

Unless otherwise noted, the following facts are alleged in Amazon's First Amended Complaint. *See* JA13-89. Amazon is an essential business that has provided vital supplies and jobs in its communities throughout the COVID-19 pandemic. JA13. To protect its associates from COVID-19, Amazon has innovated and implemented industry-leading measures grounded in science, above and beyond government guidance and requirements, earning praise from independent health and safety officials and law enforcement officers. JA13-14, 22-44 ¶¶ 1-2, 28-116.

Amazon implemented over 150 process changes to promote social distancing, hygiene, and the safety of its associates, often doing so well before state and federal officials recommended analogous measures. JA13-14, 24 ¶¶ 2, 35-36. For example, in March 2020, Amazon expanded its leave programs in light of the pandemic, required associates to observe social distancing, formalized its contact tracing

process, and instituted daily temperature checks of all associates at Amazon's JFK8 fulfillment center in Staten Island. JA14 ¶ 3. Amazon also staggered shift times, extended breaks, eliminated in-person stand up meetings, rearranged facilities, break rooms, and work stations to facilitate social distancing, and instituted enhanced cleaning protocols. *Id.* Amazon distributed face masks to all associates and required that they be worn at all times by anyone in its facilities, consistent with applicable public health guidance. *Id.* In April 2020, Amazon also began conducting daily disinfectant spraying of its facilities. *Id.*

Following an unannounced inspection of JFK8 on March 30, 2020, the New York City Sheriff's Office—which was charged by the Mayor with enforcing COVID-19 safety requirements—found that "[t]he facility appeared to go above and beyond the current compliance requirements." JA14 ¶ 4. The report favorably cited "the facility's temperature screening procedure which is required to enter the facility"; "numerous legible signs explaining the six-foot social distancing policy"; "taped indicators on the floor to enforce this policy"; "work areas, which had every other desk space shut down so that no employees were within the vicinity of any other employee"; a breakroom that "appeared to be in strict compliance"; and Amazon's "staggering [of] employee shifts to both minimize the amount of staff in the facility at once, and to reduce the amount of staff that was entering and exiting the building at once to further promote social distancing." JA14-15 ¶ 4. The

Sheriff's lieutenant leading the inspection concluded that any complaints about JFK8 were "completely baseless" and "there were absolutely no areas of concern." JA15 ¶ 4.

To further increase workplace safety, Amazon has taken numerous additional, industry-leading steps that go above and beyond applicable regulatory requirements. These steps include building its own COVID-19 testing facilities to test its workforce for asymptomatic cases of COVID-19, hosting free on-site vaccination programs at its facilities (including JFK8) for associates and their household members, and offering a financial incentive to associates who receive the COVID-19 vaccine offsite. JA40-43 ¶¶ 95-112. In total, Amazon has spent more than *$11.5 billion* on COVID-related initiatives. JA19 ¶ 16.

In addition to these extraordinary safety measures, Amazon also has taken reasonable measures to enforce its COVID-19 workplace-safety rules for the protection of its entire workforce—including rules requiring social distancing. JA52-53 ¶ 137. Amazon clearly communicated its social distancing rules to associates at JFK8 and implemented numerous process changes that made clear that Amazon was going to great lengths to maintain social distance, including staggering shifts, eliminating in-person stand up meetings, and extending breaks. JA53 ¶ 140.

Two employees at JFK8, however—Mr. Smalls and Mr. Palmer—disregarded Amazon's rules and placed the health of their co-workers (and their own health) at

risk by repeatedly failing to maintain social distancing during protests at JFK8 that they organized and attended in March 2020. JA53-56, 58, 64-65 ¶¶ 141-147, 149-150, 171. On March 25, 26, and 27, Mr. Smalls led groups of associates, including Mr. Palmer, in disrupting production meetings among members of JFK8's leadership to raise concerns about Amazon's COVID-19 workplace-safety measures. JA54, 58 ¶¶ 142, 149. Mr. Smalls and the other associates did not maintain social distancing during these disruptions, as they were gathered in rooms not sufficiently large to accommodate the required six-foot distance between individuals. JA54 ¶ 142. Following Mr. Smalls's third violation in three days, Amazon warned him on March 27 that continued disregard of social-distancing requirements could lead to the termination of his employment. *Id.*

On March 28, 2020, Amazon directed Mr. Smalls to self-quarantine at home and stay off Amazon's property for 14 days, with full pay, after Amazon's contact-tracing procedures showed he had been within 6 feet of another employee diagnosed with COVID-19. JA54-55 ¶¶ 143, 145. In violation of Amazon's quarantine order, Mr. Smalls returned to JFK8 property on March 30 to participate in a protest he had organized with Mr. Palmer. JA54-56, 58 ¶¶ 143-146, 150. Both Mr. Smalls and Mr. Palmer again failed to maintain social distancing. JA56, 58 ¶¶ 147, 150.

Amazon terminated Mr. Smalls's employment on the same day for his repeated disregard of social distancing and his intentional violation of the quarantine

order. JA57 ¶ 148. Amazon issued a final warning to Mr. Palmer on April 10, 2020, for repeatedly failing to comply with social distancing requirements. JA16, 58 ¶¶ 7, 151.

B. The OAG's Rush To Judgment And Biased Investigation Into Federally Regulated Matters.

On March 30, 2020, within hours of Mr. Smalls's termination—and before the OAG had obtained any facts from Amazon or even spoken to Amazon about the events in question—the New York Attorney General issued an official statement denouncing Amazon's termination of Mr. Smalls's employment as "disgraceful," "immoral," and "inhumane" and "calling on the [National Labor Relations Board] to investigate." JA62, 79 ¶¶ 164, 218. The Attorney General posted a similarly worded Tweet on her official Twitter account calling Amazon's actions "disgraceful" and calling for an NLRB investigation. JA62 ¶ 164 & n.22.

After the Attorney General publicly condemned Amazon, the OAG began an investigation into Amazon's COVID-19 response and Amazon's termination of Mr. Smalls's employment and discipline of Mr. Palmer. JA16 ¶ 10.

Less than a month later, on April 22, 2020, the OAG took the unusual step of sending Amazon a letter containing a "preliminary assessment" that Amazon had violated safety requirements—including the federal Occupational Safety and Health Act ("OSH Act") and its regulations—in connection with Amazon's response to the COVID-19 pandemic, and that Amazon had unlawfully retaliated against Mr. Smalls

and Mr. Palmer for their COVID-19 safety protests. JA16 ¶ 10. The April 22 letter did not acknowledge the first-hand findings of the Sheriff's Office based on its March 30 inspection of JFK8, even though the OAG was aware of those findings. *See* JA16 ¶ 10, JA17 ¶ 12, JA62-63 ¶ 165, JA64 ¶ 168. The April 22 letter also demanded Mr. Smalls's reinstatement "regardless [of] what conclusion is ultimately reached" as to the merits of his discharge. JA64-65 ¶ 171.[2]

The OAG's "preliminary assessment" was also leaked to the press. JA16, 80 ¶¶ 10, 221. On April 27, 2020, NPR reported that it had obtained a copy of the letter, and published an article quoting from the letter and describing its contents. JA80 ¶ 221.[3] The Deputy Labor Bureau Chief who led the OAG's investigation of Amazon and co-signed the April 22 letter retweeted the NPR article on April 27—the day NPR published it—noting "Letter quoted in article." JA65 ¶ 175.

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[2] Mr. Palmer and Mr. Smalls each sued Amazon concerning the subject matter of the OAG's investigation. Mr. Palmer filed a complaint on behalf of himself and others alleging that Amazon's COVID-19 health and safety policies fell short of state and federal guidance, in violation of New York Labor Law ("NYLL") § 200 and other state law. The district court (Cogan, J.) held that the workplace safety claims were within OSHA's primary jurisdiction and dismissed the suit. *Palmer v. Amazon.com, Inc.*, 498 F. Supp. 3d 359, 368-70 (E.D.N.Y. 2020), *appeal pending*, No. 20-3989 (2d Cir.). Separately, Mr. Smalls filed a putative class action challenging Amazon's COVID-19 workplace-safety policies at JFK8 as racially discriminatory and alleging that his termination was retaliatory and discriminatory. *See Smalls v. Amazon, Inc.*, No. 1:20-cv-5492-RPK (E.D.N.Y.). Amazon's motion to dismiss is pending.

[3] Amazon did not leak the OAG's April 22 letter. JA65 ¶ 174.

Amazon provided the OAG with extensive information about its efforts to protect its associates against COVID-19, JA17, 62 ¶¶ 11, 165, while also objecting that the OAG's investigation intruded on areas governed exclusively by federal law and within the jurisdiction of federal regulators, Dkt. 33-8 at 15.[4] The OAG was unwilling to reconsider its preliminary assessment. JA67-68 ¶¶ 181-188.

C. The NLRB Exercises Jurisdiction Over Retaliation Claims Arising From The Same Protests That Mr. Smalls And Mr. Palmer Organized And Attended.

As the OAG's investigation continued, the NLRB asserted jurisdiction over the same events that gave rise to the OAG's retaliation claims. In April 2020, Amazon discharged JFK8 employee Gerald Bryson. JA277.[5] The NLRB's General Counsel has alleged that the discharge was retaliation for Mr. Bryson protesting working conditions at JFK8 in March and April 2020. JA277-80, 286-87. Specifically, the NLRB General Counsel alleged that Mr. Bryson "engaged in protected concerted activity," on March 25, "during [Amazon's] morning managers meeting, … by advocating, with a group of coworkers, for greater COVID-19 protections and by raising concerns about potential COVID-19 exposure." JA286. The General Counsel also alleged that, on March 30, Mr. Bryson "engaged in

[4] Citations to "Dkt. __" refer to entries on the district court docket below.

[5] The information concerning Mr. Bryson's proceeding comes in part from the official public records of that proceeding, which were filed as exhibits in the district court below.

protected concerted activity by protesting with coworkers [Amazon's] failure to provide greater COVID-19 safety protections to employees." *Id.* These were the same protests organized by Mr. Smalls and Mr. Palmer. JA78 ¶ 214, JA246-47, 256-57.

Mr. Bryson subpoenaed Amazon for documents regarding, *inter alia*, any "disciplinary actions … taken against … Derrick Palmer [and] Christian Smalls." JA298. After Amazon moved to quash, the Administrative Law Judge ruled that information about Mr. Smalls and Mr. Palmer was relevant to the NLRB's case because the two men allegedly "concertedly engaged in the same protected activity" as Mr. Bryson. JA304.

The NLRB General Counsel's charges concerning Mr. Bryson were tried before the Administrative Law Judge. At trial, the NLRB's General Counsel argued that Mr. Smalls and Mr. Palmer were "the leaders of the employee protests for safe working conditions," which the NLRB General Counsel argued was "protected concerted activity." JA309-10. Mr. Palmer testified that these protests with Mr. Smalls and Mr. Bryson in March 2020 were "to improve working conditions at Amazon," and stated that he viewed the protests as "concerted activity" that was "protected" by NLRB rules. JA258-59.[6] The *Bryson* proceeding remains pending.

[6] Mr. Smalls did not testify in the *Bryson* proceeding. In his civil complaint against Amazon, however, he alleged that the March 30, 2020 protest was "concerted

D. Procedural History Of This Litigation.

As the NLRB proceeding progressed, the OAG's investigation continued in parallel. When the OAG's position hardened into threats and unreasonable demands for relief, Amazon sued in federal court to enforce its federal rights. JA17, 19-20, 68-69 ¶¶ 13, 17-18, 189-190. On February 12, 2021, Amazon filed this lawsuit in the Eastern District of New York seeking injunctive and declaratory relief from the OAG's attempted regulation of Amazon's COVID-19 response. *See* Dkt. 1. Amazon alleged that the OSH Act preempted the OAG's attempts to regulate Amazon's COVID-19 workplace safety measures, and that OSHA had primary jurisdiction. JA69-76, 86-87 ¶¶ 192-209, 237-238, 247-248. Amazon also alleged that the National Labor Relations Act ("NLRA") preempted the OAG's attempts to exercise regulatory authority over claims of retaliation against Mr. Smalls and Mr. Palmer for their protests of working conditions, and that the NLRB had exclusive jurisdiction. JA77-79, 86-87 ¶¶ 210-216, 239, 249.

Four days later, the OAG responded by suing Amazon in New York Supreme Court in Manhattan. JA68-69 ¶ 190. In its first count, the OAG alleged that Amazon failed to provide employees at JFK8 and DBK1, a delivery station in Queens, with "reasonable and adequate protection" against COVID-19 in violation of NYLL

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activity," in which he had "l[ed] a demonstration of workers," and that Amazon terminated his employment because he "organiz[ed] workers" to protest Amazon's COVID-19 policies. JA315, 320.

§ 200. JA182. In its remaining four counts, the OAG alleged that Amazon retaliated against Mr. Smalls and Mr. Palmer in violation of NYLL §§ 215 and 740. JA183-86.[7]

The OAG then moved to dismiss Amazon's complaint, JA11-12, and Amazon timely amended, JA13-100. The OAG again moved to dismiss. JA126-27. The OAG argued that the district court lacked subject-matter jurisdiction on the theory that Amazon sought an interpretation of state law. Dkt. 32 at 4-5. The OAG also argued that the court must abstain in favor of the OAG's state-court lawsuit under *Younger v. Harris*, 401 U.S. 37 (1971), and also should abstain under *Wilton v. Seven Falls Co.*, 515 U.S. 277 (1995). Dkt. 32 at 5-15.

Amazon opposed the OAG's motion. Dkt. 34. Amazon argued that the district court had jurisdiction because Amazon sought only a declaration of federal law, and neither *Younger* abstention nor *Wilton* abstention applied. *Id.* at 6-16. With respect to *Younger*, Amazon argued that abstention was inappropriate because federal preemption was readily apparent, and because Amazon had adequately

[7] Amazon removed the OAG's case to the Southern District of New York. *New York v. Amazon.com, Inc.*, No. 1:21-cv-1417 (S.D.N.Y.). Amazon explained that the court had subject-matter jurisdiction because the real parties in interest were the individuals on whose behalf the OAG sought relief, and the OAG sought to enforce federal workplace standards and COVID-19 guidance. Although the court recognized that the jurisdictional issues were "somewhat complicated," Mar. 25, 2021 Hr'g Tr. 2:16-21, ECF No. 33, it remanded to the state court, ECF No. 36. On remand, Amazon moved to dismiss the OAG's complaint; that motion is pending.

pleaded that the OAG pursued its claims in bad faith. *Id.* at 8-12. Amazon also filed a cross-motion for summary judgment on the basis of NLRA preemption, OSH Act preemption, and OSHA's primary jurisdiction. JA128-29. The OAG opposed summary judgment. Dkt. 36.

On August 10, 2021, the district court granted the OAG's motion to dismiss and declined to decide Amazon's summary judgment motion. SA1-11.

The district court found subject-matter jurisdiction because Amazon sought only a declaration of federal law. SA3-6. However, the court held that *Younger* abstention was appropriate. Deciding a question the parties had not briefed, the court held that Amazon's lawsuit qualified for *Younger* abstention because the OAG's civil enforcement action was "akin to a criminal prosecution" in that it was "commenced by a state actor following an investigation" for the purpose of "sanction[ing] Amazon." SA6-7. The court further held that the OAG was pursuing its "fundamental interest" of "protecting the health and safety of its citizens." SA8. The court declined to resolve Amazon's contention that the OAG lacks a legitimate interest where, as here, federal preemption is "readily apparent." SA8 & n.4.

The court further held that the bad faith exception to *Younger* abstention was "not appropriate" because Amazon had not shown that the OAG had "no 'reasonable expectation of obtaining a favorable outcome.'" SA10-11. The court reasoned that even if the OAG's state-court action was "brought in bad faith," Amazon had not

shown that it "entirely lacks a legitimate purpose." SA11. The court dismissed Amazon's complaint without resolving Amazon's summary judgment motion. *Id.*

SUMMARY OF ARGUMENT

The district court was not free to "abstain" from exercising its jurisdiction to prevent a recalcitrant state actor from regulating in areas governed by federal law and assigned to the exclusive or primary jurisdiction of federal regulators. The narrow *Younger* exception does not apply here.

I. The district court erred in ruling *sua sponte* that the OAG's case qualified for *Younger* abstention because it is "'akin to a criminal prosecution' in 'important respects.'" SA6 (quoting *Sprint Commc'ns, Inc. v. Jacobs*, 571 U.S. 69, 79 (2013)). The fundamentally civil nature of the OAG's state-court action bears no resemblance to a criminal prosecution, and raises none of the special equitable considerations that compel a federal court to refrain from interfering in a state's criminal and quasi-criminal enforcement schemes. The OAG seeks only compensatory and equitable relief, not penalties or sanctions. Indeed, the NYLL claims are typically brought by private individuals—not the state as sovereign. The OAG's claims qualify for none of the exceptional categories of cases for which *Younger* abstention is appropriate.

II. The district court independently erred in abstaining without resolving Amazon's federal preemption arguments. In refusing to consider the preemption

issue, the district court misapplied two factors whose application should have precluded abstention.

First, the court failed to recognize that *Younger* abstention is inappropriate when federal preemption is readily apparent because in those circumstances a state has no cognizable interest in continuing the state-court proceeding. With respect to the OAG's retaliation claims, federal preemption is readily apparent because the NLRB is already exercising exclusive jurisdiction over the exact same events giving rise to the OAG's retaliation claims. With respect to the OAG's workplace-safety claim, federal preemption is readily apparent because OSHA has imposed enforceable obligations on employers to protect employees from COVID-19. OSHA's primary jurisdiction over workplace safety confirms the overriding federal interests implicated by the OAG's civil suit.

Second, the district court mistakenly concluded that Amazon could receive adequate relief in the (preempted) state proceeding. Only a federal court can grant Amazon the prospective injunctive relief it seeks.

III. The district court applied the wrong legal standard in dismissing Amazon's well-pleaded allegations that *Younger* abstention does not apply because the OAG pursued its state-law claims in bad faith. The district court erroneously required Amazon to show that the OAG had "no reasonable expectation" of prevailing in the state-court proceedings—even though this Court's standard focuses

primarily on the OAG's subjective motivation. The district court also erred in requiring that the OAG's bad faith be the sole cause of the preempted state action—even though but-for causation is sufficient. And the district court wrongly denied Amazon discovery into the OAG's bad faith. Amazon needed only to allege sufficient facts to create a plausible inference that the bad-faith exception applies, and Amazon did so.

STANDARD OF REVIEW

This Court reviews *de novo* whether a district court erred in abstaining under *Younger*. *Trump v. Vance*, 941 F.3d 631, 636 (2d Cir. 2019). In resolving a motion to dismiss, the district court must accept all well-pleaded factual allegations as true. *Lynch v. City of New York*, 952 F.3d 67, 75 (2d Cir. 2020). The same standard governs whether an exception to *Younger* abstention applies. *See, e.g.*, *Gubitosi v. Kapica*, 895 F. Supp. 58, 62 (S.D.N.Y. 1995) (Parker, J.).

ARGUMENT

The district court's errors individually and collectively had the effect of elevating nonexistent state interests over the exclusive federal law and federal jurisdiction that controls this case. All of the OAG's allegations concerning Amazon's workplace safety measures responding to the COVID-19 pandemic and alleged "retaliation" against employees for protesting those measures are preempted by federal law and assigned to the exclusive or primary jurisdiction of federal

regulators—OSHA and the NLRB. Indeed, the NLRB is currently exercising exclusive jurisdiction over the subject matter of the OAG's four retaliation claims. *Younger* abstention does not apply in these circumstances.

The district court first erred in ruling *sua sponte* that the OAG's state-court action categorically qualified for *Younger* abstention because it was "akin to a criminal prosecution," when in fact the OAG's action does not seek to sanction Amazon and is not closely related to New York's criminal laws. The district court further erred in refusing to resolve whether federal preemption is readily apparent—a decision that distorted the district court's assessment of New York's interests and the adequacy of Amazon's state-court remedies. Finally, the district court applied an erroneous legal standard in dismissing Amazon's well-pleaded allegations that the OAG pursued its allegations against Amazon in bad faith. Correcting any of these errors requires reversal or vacatur and remand.

I. *Younger* Abstention Is Unwarranted Because The OAG's Civil Lawsuit Is Not "Akin To A Criminal Prosecution."

The district court first erred by trying to shoehorn the OAG's civil lawsuit into one of the three "exceptional categories" to which *Younger* abstention is confined—cases "akin to a criminal prosecution." *Sprint*, 571 U.S. at 78. The OAG's case does not qualify for that category, nor any of the other categories eligible for *Younger* abstention.

A. The OAG Seeks Only Civil And Equitable Relief.

It is a fundamental principle of constitutional law that federal courts must decide the cases that Congress has empowered them to adjudicate. *See New Orleans Pub. Serv., Inc. v. Council of New Orleans* ("*NOPSI*"), 491 U.S. 350, 358-59 (1989). As over a century of Supreme Court precedent makes clear, "[w]hen a Federal court is properly appealed to in a case over which it has by law jurisdiction, it is its duty to take such jurisdiction." *Willcox v. Consol. Gas Co.*, 212 U.S. 19, 40 (1909). The court is "bound to proceed to judgment and to afford redress to suitors before [it] in every case to which [its] jurisdiction extends." *Chicot Cty. v. Sherwood*, 148 U.S. 529, 534 (1893). Federal courts' "obligation to adjudicate claims within their jurisdiction" is "virtually unflagging," and they "lack the authority to abstain from the exercise of jurisdiction that has been conferred." *NOPSI*, 491 U.S. at 358-59.

"Underlying these assertions is the undisputed constitutional principle that Congress, and not the Judiciary, defines the scope of federal jurisdiction within the constitutionally permissible bounds." *NOPSI*, 491 U.S. at 359. Article III empowers Congress to "ordain and establish" lower courts, U.S. Const. art. III, § 1, and thus to prescribe the cases and controversies those courts will hear. *See Kontrick v. Ryan*, 540 U.S. 443, 452-53 (2004). Federal courts, consequently, "have 'no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given.'" *Sprint*, 571 U.S. at 77 (quoting *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264,

404 (1821) (Marshall, C.J.)). Either course "would be treason to the [C]onstitution." *Cohens*, 19 U.S. (6 Wheat.) at 404.

This bedrock rule required the district court to adjudicate Amazon's claims. Amazon brought this action to prevent the OAG from regulating Amazon's workplace safety response to the COVID-19 pandemic in areas governed by federal law. The district court had subject-matter jurisdiction over Amazon's claims for declaratory and injunctive relief. SA4-6. As the Supreme Court has held, "[i]t is beyond dispute that federal courts have jurisdiction over suits to enjoin state officials from interfering with federal rights," and "[a] plaintiff who seeks injunctive relief from state regulation, on the ground that such regulation is preempted by a federal statute which, by virtue of the Supremacy Clause of the Constitution, must prevail, thus presents a federal question which the federal courts have jurisdiction under 28 U.S.C. § 1331 to resolve." *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 96 n.14 (1983); *accord*, *e.g.*, *Cable Television Ass'n of N.Y., Inc. v. Finneran*, 954 F.2d 91, 94-95 (2d Cir. 1992).

The circumstances in which a district court may "abstain" from exercising its jurisdiction are extremely narrow. The doctrine known as *Younger* abstention is "an extraordinary and narrow exception to the duty of a District Court to adjudicate a controversy properly before it." *Williams v. Lambert*, 46 F.3d 1275, 1281 (2d Cir. 1995). It applies in only three tightly proscribed "'exceptional circumstances'":

where there are (1) "ongoing state criminal prosecutions," (2) "certain 'civil enforcement proceedings'" that are "akin to a criminal prosecution in important respects," and (3) "civil proceedings involving certain orders … uniquely in furtherance of the state courts' ability to perform their judicial functions." *Sprint*, 571 U.S. at 78-79 (omission in original). In *Sprint*, the Supreme Court emphatically repudiated a broader understanding of *Younger* that would extend it to other contexts, expressly holding that these three categories "define *Younger*'s scope." *Id.*; *see also, e.g.*, *In re One2One Commc'ns, LLC*, 805 F.3d 428, 440 (3d Cir. 2015) ("[T]he [Supreme] Court has repeatedly endeavored to narrow the scope of abstention doctrines ….").

The OAG never argued below that its case fit within any of these three exceptional categories, and for good reason. There are no ongoing state criminal prosecutions of relevance to this matter, and the district court correctly recognized that this category of cases is inapplicable. *See* SA6. There also are no civil proceedings involving orders "uniquely in furtherance of the state courts' ability to perform their judicial functions," such as contempt or judgment-enforcement proceedings. *Sprint*, 571 U.S. at 78. The district court also correctly recognized that this category does not apply. *See* SA6.

The district court erred, however, in ruling on its own initiative—without the benefit of briefing on this question—that the OAG's case qualified for the remaining

category: civil enforcement proceedings that are "'akin to a criminal prosecution' in 'important respects.'" SA6 (quoting *Helms Realty Corp. v. City of New York*, 820 F. App'x 79, 80 (2d Cir. 2020)). Although the OAG, as the movant below, had the burden of "show[ing] entitlement to dismissal," *Marcure v. Lynn*, 992 F.3d 625, 631 (7th Cir. 2021), it never argued that its civil case was a quasi-criminal proceeding brought "to sanction Amazon." SA6-7; *see also Sprint*, 571 U.S. at 81. That should have been a red flag for the district court, and it erred in holding that this category was satisfied.

A criminal prosecution—and a civil enforcement action "akin to a criminal prosecution"—is "characteristically initiated" for one reason: "to sanction" a party "for some wrongful act." *Sprint*, 571 U.S. at 79. In proceedings of this genre, "the 'sanction' is clear." *Gonzalez v. Waterfront Comm'n of N.Y. Harbor*, 755 F.3d 176, 182 (3d Cir. 2014). If the accusations are sustained, the party challenging state action is subject to imprisonment, *see, e.g.*, *Younger*, 401 U.S. at 38 & n.1, termination of employment, *see, e.g.*, *Gonzalez*, 755 F.3d at 182, disbarment, *see, e.g.*, *Middlesex Cty. Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423, 427 (1982), expulsion, *see, e.g.*, *Doe v. Univ. of Ky.*, 860 F.3d 365, 370 (6th Cir. 2017), or "statutory penalties" and "punitive damages," *e.g.*, *Helms Realty*, 820 F. App'x at 81—all of which are properly categorized as punishments. A case is not akin to a criminal prosecution when it seeks "simply compensatory[ ] damages." *Neroni v.*

Becker, 595 F. App'x 94, 95 (2d Cir. 2015). Compensatory damages are inherently *civil*, not criminal, in nature.

In this case, the OAG seeks only remedies that are compensatory and equitable—and therefore inherently civil, not punitive. There are no "statutory penalties" at issue. *Helms Realty*, 820 F. App'x at 81. The OAG seeks "backpay" for "lost compensation and benefits, emotional distress damages, and liquidated damages," for Mr. Smalls, and "emotional distress" and "liquidated damages" for Mr. Palmer, JA187—all of which are civil compensatory remedies. Contrary to the district court's assumption (SA7), none of these remedies is a sanction or penalty. *See, e.g.*, *Irizarry v. Catsimatidis*, 722 F.3d 99, 116 (2d Cir. 2013) (explaining that "compensatory damages," including liquidated damages, "are not penalties"). They are run-of-the-mill compensatory remedies that private parties seek in almost every civil case.

The injunctions the OAG seeks are no more punitive. JA186-87. As the Supreme Court has long recognized, the "sole function" of an injunction "is to forestall future violations." *United States v. Or. State Med. Soc'y*, 343 U.S. 326, 333 (1952). "It is so unrelated to punishment" that the OAG cannot seriously argue—and in this case, has never argued—that an injunction is the type of sanction that calls to mind a criminal prosecution. *Id.*; *see, e.g.*, *Conmar Prods. Corp. v. Universal Slide Fastener Co.*, 172 F.2d 150, 156 (2d Cir. 1949) (Hand, C.J.) (finding "no

support" to rest an injunction "upon the theory that it is a proper penalty for the [defendant's] wrong"). The OAG insisted below that its investigation has never been "motivated by anything other than a desire to protect workplace safety during an unprecedented pandemic." Dkt. 32 at 9-10.

The OAG's request for "disgorgement" does not alter the fundamentally civil nature of its case. JA187. Assuming *arguendo* that the OAG can seek disgorgement of profits under New York Executive Law § 63(12)—a point Amazon does not concede—such a remedy could recover only *equitable* relief. Where it is permitted, "disgorgement 'merely requires the return of wrongfully obtained profits [and] does not result in any actual economic penalty.'" *People ex rel. Schneiderman v. Greenberg*, 54 N.E.3d 74, 77 (N.Y. 2016) (alteration in original) (quoting *Official Comm. of Unsecured Creditors of WorldCom, Inc. v SEC*, 467 F.3d 73, 81 (2d Cir. 2006)); *see also, e.g.*, *People v. Ernst & Young, LLP*, 980 N.Y.S.2d 456, 457 (1st Dep't 2014) ("Nor would ordering disgorgement be tantamount to an impermissible penalty ...."). This is consistent with the longstanding principle that equity never "lends its aid to enforce a forfeiture or penalty," *Marshall v. Vicksburg*, 82 U.S. (15 Wall.) 146, 149 (1873), and that courts must tightly circumscribe the disgorgement award "to avoid transforming it into a penalty outside their equitable powers," *Liu v. SEC*, 140 S. Ct. 1936, 1944 (2020). The OAG's request for equitable

disgorgement, therefore, does not transform its case into a quasi-criminal action to "sanction" Amazon.

The district court was thus wrong in holding, without the benefit of briefing or argument, that the OAG's state proceedings were akin to a criminal prosecution. To the extent the district court rested its decision to abstain on that basis, that decision was wrong and should be reversed or, alternatively, vacated and remanded for consideration in light of briefing from the parties. *See, e.g.*, *Mulholland v. Marion Cty. Election Bd.*, 746 F.3d 811, 817 (7th Cir. 2014) (declining to abstain where the state's "authority to sanction offenders is extremely limited"); *ACRA Turf Club, LLC v. Zanzuccki*, 748 F.3d 127, 139 (3d Cir. 2014) (same where there was "no evidence that the state proceeding was commenced to sanction").

B. The OAG's NYLL Claims Are Civil In Nature.

The type of case the OAG brought independently undercuts any assertion that it raises the equitable concerns counseling against the restraint of a criminal or quasi-criminal prosecution. In *Sprint*, the Supreme Court described a class of cases that are akin to a criminal prosecution, explaining that in such proceedings "a state actor is *routinely* a party to the state proceeding and *often* initiates the action." 571 U.S. at 79 (emphases added). The relevant question, therefore, is not whether a particular case was "commenced by a state actor," SA7, but whether the state's case is of the type that is *usually* brought by a state actor. In *Neroni*, for example, this Court

explained that a state action may be akin to a criminal prosecution even though "it was initiated by a private party" because "[t]he state is 'routinely,' but not necessarily, a party to such proceedings." 595 F. App'x at 95. The district court here focused solely on who filed the case, which is the wrong standard.

Applying the correct standard, it is clear that the OAG's civil case is not the type of case *routinely* brought by a state actor, and thus does not warrant abstention as a matter of comity. Although the OAG brought its NYLL claims pursuant to Section 63(12) of the Executive Law, that section is only a "mechanism" to obtain "relief" for the alleged violation of "other statutes." *People v. One Source Networking, Inc.*, 3 N.Y.S.3d 505, 508 (4th Dep't 2015). It does not alter the nature of the underlying statutes, which "create an independent cause of action." *Id.* The OAG's NYLL causes of action are almost always brought by private plaintiffs to vindicate private interests. The OAG, for example, alleges that Amazon violated NYLL § 200, which is the "codification of the common law duty to maintain a safe work environment" and "essentially a negligence claim." *Palmer*, 498 F. Supp. 3d at 373. Section 200 claims are almost exclusively brought by employees, *see, e.g.*, *Santibanez v. N. Shore Land All., Inc.*, 2021 WL 3889874 (N.Y. 2d Dep't Sept. 1, 2021); *Harris v. Tesmer Builders, Inc.*, 2021 WL 3782803 (N.Y. 4th Dep't Aug. 26, 2021)—including Mr. Palmer himself, one of the individuals for whom the OAG seeks redress, *see Palmer v. Amazon.com, Inc.*, 20-3989 (2d Cir.). As the state-court

judge presiding over the OAG's claims noted, "we have thousands of those Labor Law 200 claims here," but none involve "the Attorney General's particular authority" to bring such a claim. JA1600.

The same is true of the OAG's retaliation claims under NYLL §§ 215 and 740. Both statutes create a right of action for "an employee," not the OAG, underscoring the fact that these claims routinely are brought by private individuals to vindicate private interests. NYLL §§ 215(2)(a), 740(4)(a); *see, e.g.*, *Schmidt-Sarosi v. Offices for Fertility & Reproductive Med., P.C.*, 150 N.Y.S.3d 75 (1st Dep't 2021); *Tsatskin v. Kordonsky*, 138 N.Y.S.3d 641 (2d Dep't 2020). These are not the types of claims so closely analogous to a criminal prosecution that principles of equity and comity require a federal court to stay its hand.

If the mere initiation of a civil action by a state actor were enough to warrant *Younger* abstention, then *Younger* would extend to "all state civil enforcement proceedings." *Gonzalez*, 755 F.3d at 180-81. "This would render meaningless the 'virtually unflagging obligation of the federal courts to exercise the jurisdiction given them,'" *ReadyLink Healthcare, Inc. v. State Compensation Ins. Fund*, 754 F.3d 754, 760 (9th Cir. 2014), and would be "irreconcilable with [the Supreme Court's] dominant instruction that, even in the presence of parallel state proceedings, abstention from the exercise of federal jurisdiction is the 'exception, not the rule,'" *Sprint*, 571 U.S. at 81-82.

II. The District Court Erred In Refusing To Consider Federal Preemption.

Even if the OAG's civil case could fit into one of the exceptional categories to which *Younger* is confined, there would still be no basis for abstaining. The district court received extensive briefing on the federal preemption question—both on the OAG's motion to dismiss and Amazon's cross-motion for summary judgment. But the court refused to resolve that crucial question. That failure, in turn, tainted the court's analysis of the traditional "three-part test" for applying *Younger* abstention. SA7 (citing *Middlesex*, 457 U.S. 423).

In *Sprint*, the Supreme Court rejected the view that whether *Younger* abstention is appropriate turns exclusively on three factors identified in *Middlesex*: whether the state proceeding constitutes "an ongoing state judicial proceeding," whether that proceeding "implicates important state interests," and whether the state proceeding provides "an adequate opportunity to raise" the federal claims at issue. *Sprint*, 571 U.S. at 81 (citing *Middlesex*, 457 U.S. at 432). These "conditions," the Court held, do not by themselves constitute the test for abstention; instead, they are "*additional* factors appropriately considered by the federal court before invoking *Younger*." *Id.* The *Middlesex* criteria are thus *necessary* conditions, and their absence can preclude abstention when it would otherwise be appropriate. *See, e.g.*, *Tokyo Gwinnett, LLC v. Gwinnett Cty.*, 940 F.3d 1254, 1267-68 (11th Cir. 2019).

But they are not *sufficient* conditions that justify abstention when *Younger*'s other prerequisites are absent.

In refusing to resolve the preemption issue, the district court misapplied two of the *Middlesex* factors. The court failed to recognize that the OAG had no legitimate interest in continuing the state-court proceeding, because no state can have a cognizable interest in "entrench[ing] upon the federal domain." *In re Pan Am. Corp.*, 950 F.2d 839, 847 (2d Cir. 1991). The court also mistakenly concluded that Amazon could receive adequate relief in the (preempted) state proceeding—even though only a federal court can grant Amazon the prospective equitable relief it seeks. For either reason, abstention was not appropriate.

A. Abstention Is Not Appropriate When Federal Preemption Is Readily Apparent.

In the seminal *NOPSI* case, the Supreme Court expressly left open the question whether a "facially conclusive claim" of federal preemption is "sufficient to render abstention inappropriate" under *Younger*. 491 U.S. at 367 (emphasis removed). Since then, every circuit to consider the question—at least six circuits to date—has held that *Younger* abstention is inappropriate when federal preemption of the state proceeding is readily apparent. *See, e.g.*, *Chaulk Servs., Inc. v. Mass. Comm'n Against Discrimination*, 70 F.3d 1361, 1370 (1st Cir. 1995); *Norfolk & W. Ry. Co. v. Pub. Utils. Comm'n of Ohio*, 926 F.2d 567, 573 (6th Cir. 1991); *Midwestern Gas Transmission Co. v. McCarty*, 270 F.3d 536, 539 (7th Cir. 2001);

Gartrell Constr. Inc. v. Aubry, 940 F.2d 437, 441-42 (9th Cir. 1991); *Seneca-Cayuga Tribe of Okla. v. Oklahoma ex rel. Thompson*, 874 F.2d 709, 716 (10th Cir. 1989); *Nat'l R.R. Passenger Corp. v. Florida*, 929 F.2d 1532, 1537 n.12 (11th Cir. 1991); *see also Freehold Cogeneration Assocs., L.P. v. Bd. of Regulatory Comm'rs*, 44 F.3d 1178, 1187 & n.6 (3d Cir. 1995) (holding that *Younger* "abstention is not appropriate" for a "preemption claim").

The holdings of these circuits are correct under the principles of federalism and comity that animate the *Younger* doctrine. Those comity considerations between federal and state courts "are not implicated when federal questions are presented since supremacy clause questions are 'essentially one[s] of federal policy.'" *In re Pan Am.*, 950 F.2d at 847 (alteration in original) (quoting *Hagans v. Lavine*, 415 U.S. 528, 550 (1974)). That is why, for example, the Supreme Court has upheld a district court order enjoining a state commission from regulating interstate gas prices, noting that such actions were "on their face plainly invalid" because they "conflict[ed] with [a] federal Act." *Pub. Utils. Comm'n of Ohio v. United Fuel Gas Co.*, 317 U.S. 456, 469 (1943); *see also NOPSI*, 491 U.S. at 366. In such circumstances, a federal court owes no comity to the preempted state proceeding.

These decisions are also in accord with this Court's precedents. In a line of decisions both predating and postdating *NOPSI*, this Court has recognized that "[a]bstention … is not appropriately invoked in a preemption case." *In re Pan Am.*,

950 F.2d at 847 (alterations in original) (quoting *Stone & Webster Eng'g Corp. v. Ilsley*, 690 F.2d 323, 326 n.2 (2d Cir. 1982), *aff'd sub nom. Arcudi v. Stone & Webster Eng'g Corp.*, 463 U.S. 1220 (1983)). Foreshadowing *NOPSI*'s suggestion that a "facially conclusive" claim of preemption might foreclose abstention, 491 U.S. at 367 (emphasis removed), this Court has recognized that *Younger* abstention "would be futile" when the state court does "not have jurisdiction over a dispute due to the preemptive jurisdiction of a federal body." *Christ the King Reg'l High Sch. v. Culvert*, 815 F.2d 219, 223 n.4 (2d Cir. 1987); *see also Marshall v. Chase Manhattan Bank*, 558 F.2d 680, 684 (2d Cir. 1977) (holding that *Younger* "abstention [is] improper" when the relevant "state laws are superseded" by federal law). Writing for the Court, Judge Friendly stated it succinctly: "[A]bstention is peculiarly inappropriate when the federal claim is that the state has been ousted from jurisdiction." *Chem. Specialties Mfrs. Ass'n v. Lowery*, 452 F.2d 431, 433 (2d Cir. 1971). That is precisely what Amazon alleges.

This Court's decision in *In re Pan American Corp.* is illuminating. There, a district court had abstained from ordering the transfer of certain Florida state-court cases to federal court in New York. 950 F.2d at 842-43. The district court reasoned that abstention from exercising the court's transfer power was appropriate because, had the cases been transferred, they would have faced immediate dismissal under Second Circuit precedent, which held them to be preempted by a federal treaty. *Id.*

at 843. This Court reversed. Discussing the Supreme Court's "several distinct abstention doctrines," including *Younger* abstention, the Court held that "[a]bstention … is not appropriately invoked in a preemption case." *Id.* at 846-47 & n.9 (alterations in original) (quoting *Stone & Webster*, 690 F.2d at 326 n.2). As this Court explained, it "would [have] be[en] futile to abstain in deference" to the Florida state courts when those courts did "not have jurisdiction over [the] dispute due to the preemptive jurisdiction" of federal law. *Id.* at 847 (quoting *Culvert*, 815 F.2d at 223 n.4). Moreover, the "notion of 'comity' … is 'not strained when a federal court cuts off state proceedings that entrench upon the federal domain.'" *Id.* (omission in original).

In this case, the district court refused to resolve Amazon's contention that federal preemption of the OAG's actions is readily apparent. In a three-sentence footnote, the court "decline[d]" to "adopt" what it characterized as "a new exception" to *Younger* based on the "'readily apparent'" preemption of state law. SA8 n.4. However, as the foregoing authorities show, the principle that a federal court should not abstain in favor of a state proceeding where federal preemption is readily apparent is neither exceptional nor new. It is a recognition, well-grounded in precedent, that when it is "readily apparent" that a state "is acting beyond the lawful limits of its authority," there is "no principle of comity or of 'our federalism'" that abstention would serve, *Baggett v. Dep't of Prof'l Regulation*, 717 F.2d 521,

524 (11th Cir. 1983), because no state has a "cognizable … interest in enforcing [state] laws that are preempted by federal law," *Champion Int'l Corp. v. Brown*, 731 F.2d 1406, 1409 (9th Cir. 1984).

These principles also foreclose the OAG's argument below that the district court should have abstained under *Wilton*. Although the district court never reached that issue, *Wilton* abstention plainly does not apply. Most fundamentally, *Wilton* abstention is reserved for cases in which there is a pending state-court proceeding between the same parties presenting the same issues "not governed by federal law" and the federal plaintiff seeks only declaratory relief. 515 U.S. at 282; *Dittmer v. Cty. of Suffolk*, 146 F.3d 113, 118 (2d Cir. 1998). Here, Amazon raises federal issues and seeks injunctive relief, not "purely declaratory relief." *Kanciper v. Suffolk Cty. Soc'y for the Prevention of Cruelty to Animals, Inc.*, 722 F.3d 88, 93 (2d Cir. 2013). For these and other reasons, abstaining under *Wilton* in favor of a preempted state proceeding would be inappropriate.

In sum, the district court erred in abstaining without resolving the preemption question. As every circuit to consider the issue has held, the *Younger* doctrine does not apply when federal preemption is readily apparent. And, as discussed *infra*, federal preemption of the OAG's attempted regulation of Amazon easily satisfies that standard.

B. Federal Preemption Of The OAG's Claims Is Readily Apparent.

Had the district court resolved whether preemption was readily apparent, it necessarily would have answered the question in Amazon's favor. With respect to the OAG's retaliation claims, preemption is readily apparent because the NLRB is exercising exclusive jurisdiction over the exact events giving rise to the OAG's retaliation claims. With respect to the OAG's remaining workplace-safety claim, preemption is no less apparent because OSHA has imposed "enforceable obligations on employers to protect workers from COVID-19," and is enforcing those obligations every day. JA70 ¶ 195, JA1466.

1. The NLRB Is Exercising Exclusive Jurisdiction Over The Same Labor Dispute That The OAG Seeks To Regulate.

The NLRA plainly preempts the OAG's allegation that Amazon "retaliat[ed]" against Mr. Smalls and Mr. Palmer for "protest[ing]" working conditions at JFK8. JA177-85 ¶¶ 88, 121, 124, 139, 142. That allegation underlies four of the OAG's five claims against Amazon.

a. In the NLRA, Congress sought to "establish a uniform national labor policy." *Int'l Longshoremen's Ass'n, AFL-CIO v. Allied Int'l, Inc.*, 456 U.S. 212, 221 n.17 (1982). To that end, Congress entrusted the interpretation and enforcement of the Act, not to a "multiplicity" of state attorneys general, but to a single, "centralized administrative agency" armed with "specialized knowledge" and "experience." *San Diego Bldg. Trades Council, Millmen's Union, Local 2020 v.*

Garmon, 359 U.S. 236, 242-43 (1959). The OAG has no role to play in this "integrated [federal] scheme." *Id.* at 247. Under the *Garmon* doctrine, the state "may not regulate" any "activity that the NLRA protects" or "prohibits," or even "arguably protects or prohibits." *Wis. Dep't of Indus., Labor & Human Relations v. Gould Inc.*, 475 U.S. 282, 286 (1986). As the Supreme Court has emphasized, "if the danger of state interference" in the NLRB's formulation of a uniform, "national [labor] policy is to be averted," state authorities "must defer to the exclusive competence" of the NLRB on any matter that is even "arguably subject to … the Act." *Garmon*, 359 U.S. at 245.

The OAG's retaliation claims flout this command. The NLRA unquestionably governs the right of employees to protest allegedly unsafe working conditions. That is quintessential "concerted activit[y]" protected by the Act. 29 U.S.C. § 157; *see, e.g.*, *SEIU Local 87 v. NLRB*, 995 F.3d 1032, 1035 (9th Cir. 2021); *St. Paul Park Refining Co. v. NLRB*, 929 F.3d 610, 616 (8th Cir. 2019); *NLRB v. Lloyd A. Fry Roofing Co.*, 651 F.2d 442, 445 (6th Cir. 1981); *Socony Mobil Oil Co. v. NLRB*, 357 F.2d 662, 663 (2d Cir. 1966) (per curiam). As a result, any claim that Amazon "retaliate[ed]" against Mr. Smalls and Mr. Palmer for engaging in such protest activity, JA183-85 ¶¶ 124, 142, is "within the 'exclusive jurisdiction' of the [NLRB]," *Smith v. Johnson*, 636 F. App'x 34, 37 (2d Cir. 2016); *see also Buscemi v. McDonnell Douglas Corp.*, 736 F.2d 1348, 1350 (9th Cir. 1984).

The NLRB's jurisdiction is so readily apparent that the New York Attorney General herself publicly "call[ed] on the National Labor Relations Board" to intervene. JA81 ¶ 224, JA261; *see also* JA267 (simultaneously announcing that retaliation for exercising "the right to organize" is prohibited). And the NLRB did just that. The NLRB's General Counsel is currently litigating a claim that Amazon retaliated against an associate, Gerald Bryson, by firing him for participating in the *same* protests as Mr. Smalls and Mr. Palmer. JA78 ¶ 214; *see also supra* at 14-15. The gravamen of the NLRB's retaliatory discharge claim is that in March and April 2020, "during a demonstration at the JFK8 Facility, Bryson engaged in protected concerted activity by protesting with coworkers [Amazon's] failure to provide greater COVID-19 safety protections to employees." JA286. That is exactly what the OAG alleges with respect to Mr. Smalls and Mr. Palmer. *See* JA175-77. As the NLRB's Administrative Law Judge noted in confirming the relevancy of documents concerning both men, Mr. Smalls and Mr. Palmer allegedly "concertedly engaged in the same protected activity" as Mr. Bryson. JA304; *see also* JA78 ¶ 214.

Mr. Smalls and Mr. Palmer also featured prominently in the NLRB's case. The NLRB's General Counsel alleged that Mr. Smalls and Mr. Palmer were "the leaders of the employee protests for safe working conditions," which the General Counsel argued was "protected concerted activity." JA309:20-25. Mr. Palmer's account mirrored the NLRB's. Mr. Palmer testified that he protested with Mr.

Smalls and other associates "to improve working conditions," and that he viewed these protests as "concerted activity" that were "protected" by NLRB rules. JA258:5-11, 259:1-5.

The OAG's retaliation claims present a particularly glaring threat of interference with exclusive federal policy. The NLRB could determine that Amazon's disciplinary actions are not retaliatory under federal labor law, yet the state court could determine that those same actions were retaliatory under New York Labor Law. This risk of conflict is why state courts are divested of jurisdiction over issues that arguably could be—and in this case, were—brought before the NLRB. Under these circumstances, where the NLRB is exercising jurisdiction over the "very same conduct" giving rise to the OAG's retaliation claims, it is "readily apparent" that those claims are at least "arguably" within the NLRB's jurisdiction. *Chaulk*, 70 F.3d at 1370. That is all that is needed to establish *Garmon* preemption. Accordingly, "abstention [is] inappropriate." *Id*.

b. In the district court, the OAG attempted to avoid this straightforward outcome by arguing that its state-law claims are not "identical" to a case that could have been brought before the NLRB. *Healthcare Ass'n of N.Y. State, Inc. v. Pataki*, 471 F.3d 87, 96 (2d Cir. 2006). But it "is the conduct being regulated, not the formal description of governing legal standards, that is the proper focus of concern" in the *Garmon* preemption analysis. *Gould*, 475 U.S. at 289. Here, the conduct is identical.

The OAG cannot evade preemption simply by "repackag[ing]" retaliatory discharge claims as whistleblower retaliation claims under state law. *Chaulk*, 70 F.3d at 1370.

The OAG also argued that it was seeking state-court remedies that are not available under the NLRA. But that is a reason to *enforce* preemption, not to disregard it. *Garmon* preemption prevents states from "providing their own regulatory or judicial remedies for conduct prohibited or arguably prohibited by the [NLRA]." *Gould*, 475 U.S. at 286. "[S]ince remedies form an ingredient of any integrated scheme of regulation, to allow the State to grant a remedy here which has been withheld from the National Labor Relations Board only accentuates the danger of conflict." *Garmon*, 359 U.S. at 247. Thus, the OAG's retaliation claims seeking emotional-distress damages are preempted irrespective of any "difference between available state and NLRB remedies." *Kolentus v. Avco Corp.*, 798 F.2d 949, 962 (7th Cir. 1986).

The OAG also relied heavily on the so-called local interest exception to *Garmon* preemption, but that exception does not make preemption any less readily apparent in this case. To avoid undermining the NLRB's exclusive jurisdiction, the local interest exception applies only where "the exercise of state jurisdiction … entail[s] little risk of interference with the regulatory jurisdiction of the [NLRB]." *Sears, Roebuck & Co. v. San Diego Cty. Dist. Council of Carpenters*, 436 U.S. 180, 196 (1978). Where, as here, the exercise of state jurisdiction presents an "obvious

and substantial" "risk of interference with the Board's jurisdiction," the local interest exception does not apply. *Local 926, Int'l Union of Operating Eng'rs v. Jones*, 460 U.S. 669, 676, 683 (1983).

The OAG's attempt to regulate matters under the NLRB's exclusive jurisdiction presents an obvious and substantial risk of interference. There is already a retaliatory discharge claim being litigated before the NLRB arising out of the same concerted activities that gave rise to the OAG's claims. JA78 ¶ 214. When "the same issues brought to the [NLRB] are raised in a state court complaint," the local interest exception "does not apply." *Casumpang v. Hawaiian Commercial & Sugar Co.*, 712 F. App'x 709, 710-11 (9th Cir. 2018). That is because when "the conduct forming the basis of" the state's claims "also underlies the potential unfair labor practice charges, and the same facts would need to be determined in each proceeding," allowing the state to retain jurisdiction would "create[ ] a risk of conflicting rulings" and therefore "interfer[e] with" the NLRB's jurisdiction. *Pa. Nurses Ass'n v. Pa. State Educ. Ass'n*, 90 F.3d 797, 804 (3d Cir. 1996). The NLRA thus precludes the OAG from "relitigat[ing]" the same issue "under state law." *Casumpang*, 712 F. App'x at 710-11; *see also Platt v. Jack Cooper Transp., Co.*, 959 F.2d 91, 95 (8th Cir. 1992) (local interest exception is inapplicable, despite "deeply rooted local interest," where plaintiff could have brought claim "that he was fired for making job safety complaints" to the NLRB).

The local interest exception independently fails because the alleged protected activity underlying the OAG's retaliation claims—Mr. Smalls's and Mr. Palmer's complaints regarding Amazon's workplace safety response to a global pandemic—does not touch interests "deeply rooted in local feeling and responsibility." *Garmon*, 359 U.S. at 244, 247. Where the exception applies, courts ordinarily limit it to a state's traditional power to address exigent threats to the public peace—"activity … involving threats to public order such as violence, threats of violence, intimidation and destruction of property." *Pa. Nurses*, 90 F.3d at 803; *see, e.g.*, *K.D. Hercules, Inc. v. Laborers Loc. 78 of Laborers' Int'l Union*, 2021 WL 1614369, at *4 (S.D.N.Y. Apr. 26, 2021) (local interest exception did not apply where plaintiffs failed to "allege any violence or threat to the public order"). There were no such threats here. Nor has the OAG sought emergency relief, or alleged that events at JFK8 threatened the "public order." The OAG thus cannot show that Mr. Smalls's and Mr. Palmer's complaints were "of special or overriding *local* concern," *Andrewsikas v. Supreme Indus., Inc.*, 2021 WL 1090786, at *6 (D. Conn. Mar. 22, 2021) (emphasis added), as opposed to issues that are now affecting workplaces the world over. There is no basis for the local interest exception here.

Accordingly, federal preemption is readily apparent for four of the OAG's five claims against Amazon under the *Garmon* doctrine. The NLRB's exclusive jurisdiction over the subject matter of those claims means that the state courts are

"permanently divested of jurisdiction over the" same subject matter. *Local Union No. 12004, United Steelworkers of Am. v. Massachusetts*, 377 F.3d 64, 78 (1st Cir. 2004) (emphasis removed). On this basis alone, the district court should have refused to abstain.

2. Federal Law And Federal Regulators Plainly Govern An Employer's Health-And-Safety Response To COVID-19.

Younger abstention is inappropriate for an additional, independent reason: The OAG's workplace safety allegations are preempted by the OSH Act and fall within OSHA's primary jurisdiction.

The OSH Act "'unquestionably' pre-empts any state law or regulation that establishes an occupational health and safety standard on an issue for which OSHA has already promulgated a standard, unless the State has obtained the [Secretary of Labor's] approval for its own plan." *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 97 (1992) (plurality). New York has not done so; it withdrew its federally approved plan for private sector employees in 1975. *Palmer*, 498 F. Supp. 3d at 372. Thus, New York "cannot enforce state occupational safety and health standards for issues covered by a federal standard" for private employers. *Id.*; *see Gade*, 505 U.S. at 98-99.

OSHA has several preexisting standards that "impose enforceable obligations on employers to protect workers from COVID-19." JA70 ¶ 195, JA1466. These include 29 C.F.R. §§ 1910.141 (sanitation), 1910.134 (respiratory protection),

1910.132, 1910.133, 1910.134, 1910.138 (personal protective equipment ("PPE")), and 1904.4 (recordkeeping). *See* JA330-36. In addition, "employers who fail to take preventative measures against COVID-19 face potential liability under the general duty clause [29 U.S.C. § 654(a)(1)]." JA1470.

There is no doubt that OSHA is actively applying these standards to COVID-19—issuing dozens of citations for employers' violations of OSHA's standards for respiratory protection, 29 C.F.R. § 1910.134, PPE, *id.* § 1910.132, and recordkeeping and reporting, *id.* §§ 1904.4, 1904.39. *See* JA339-55; *see also* JA362 (listing "OSHA standards [that] have been cited most frequently during COVID-19 related inspections"). These federal standards cover the categories of violations the OAG alleges: "Failure to Conduct Adequate Cleaning and Disinfection"; "Relentless Focus on Productivity at the Expense of Allowing Employees to Take Appropriate Health Precautions"; and "Inadequate Identification of Contacts and Notification to Workers." JA159, 169-74, 182 ¶¶ 3, 51-77, 118. That is presumably why the OAG itself, in its preliminary assessment, asserted that Amazon was likely "violat[ing] both specific OSHA safety standards applied specifically to this crisis by the OSHA Guidance, and the OSHA general duty clause." JA63 ¶ 167.

OSHA's decision to promulgate an Emergency Temporary Standard ("ETS") only for healthcare settings further reflects OSHA's determination that its existing standards sufficiently address COVID-19 in non-healthcare settings. OSHA is

obligated to issue an ETS when it determines an ETS is "necessary" to protect against a "grave danger." 29 U.S.C. § 655(c)(1). Thus, while OSHA determined that "enforcement of existing standards and the General Duty Clause" was not "adequate" to protect against the risk of COVID-19 "in healthcare settings," JA615, OSHA necessarily determined that enforcement of existing standards *is* adequate in non-healthcare settings. Otherwise, OSHA would have been required to issue an ETS for non-healthcare industries—particularly in light of the Executive Order directing OSHA to issue any COVID-19 ETS it deemed "necessary." JA358. In these circumstances, there is little doubt that workplace safety responses to COVID-19 are a matter of federal, not state, law.

Not only do OSHA's existing standards govern the COVID-19 safety issues underlying the OAG's claims, but there may soon be an additional OSHA standard that governs COVID-19 safety at Amazon. The President recently announced that OSHA "will issue an [ETS]" requiring large employers "to ensure their workforce is fully vaccinated." *Path Out of the Pandemic*, White House, https://www.whitehouse.gov/covidplan (last visited Sept. 28, 2021). The announcement reflects the federal government's judgment as to the measures appropriate to protect against the spread of COVID-19 in non-healthcare workplaces, such as JFK8.

Even if there were some doubt about whether OSH Act preemption is readily

apparent—and there should not be—OSHA's primary jurisdiction is an independent reason why the federal interests take precedence over the state's claims. The district court previously dismissed a NYLL § 200 claim filed by Mr. Palmer that was nearly identical to the OAG's NYLL § 200 claim on the basis of OSHA's primary jurisdiction. *Palmer*, 498 F. Supp. 3d at 368-70. That holding correctly reflects a determination that the courts should refrain from deciding issues within the special competence of a federal administrative body. Here, however, the district court failed to consider those same federal interests in abstaining under *Younger*.

Application of the primary jurisdiction doctrine is "appropriate 'whenever enforcement of [a] claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body.'" *Ellis v. Tribune Television Co.*, 443 F.3d 71, 81 (2d Cir. 2006). It is difficult to conceive of issues more squarely placed within OSHA's special competence than the fashioning, enforcement, and supervision of workplace safety policies and standards in the face of an ongoing, evolving pandemic. These issues "involve[ ] technical or policy considerations within [OSHA's] field of expertise," and questions regarding the adequacy of COVID-19-related workplace-safety matters are also plainly committed to OSHA's, rather than the courts' or the OAG's "discretion." *Id.* at 82-83. The district court, therefore, should have entertained Amazon's request for declaratory and injunctive relief—not deferred to the OAG's

ongoing encroachment on federal authority.

C. In Failing To Address The Preemption Issue, The District Court Misapplied Another *Middlesex* Factor.

The district court further erred by insisting that Amazon could press its preemption defenses in the (preempted) state proceedings. SA9. This misapplied *Middlesex*'s requirement that there must be an "adequate opportunity in the state proceedings to raise constitutional challenges." 457 U.S. at 432.

Amazon's preemption arguments are rooted in the Constitution's Supremacy Clause, but the state proceedings do not provide "an *adequate* forum for the vindication of [Amazon's] federal constitutional rights." *Cullen v. Fliegner*, 18 F.3d 96, 103 (2d Cir. 1994) (emphasis added). Amazon is not merely seeking to dismiss the OAG's state proceeding—which was filed *after* Amazon sought relief in federal court. Rather, Amazon seeks an injunction against the OAG's broader effort to regulate Amazon on matters that are governed exclusively by federal law or within the primary or exclusive jurisdiction of federal regulators. The state court is not an adequate forum to "afford [Amazon] the full relief [it] seeks." *Bridges v. Kelly*, 84 F.3d 470, 477 (D.C. Cir. 1996). If Amazon prevails on the preemption issues it has raised as grounds for dismissing the OAG's state-court action, then the result should be the immediate dismissal of the OAG's case. In that outcome, Amazon will have lost the opportunity to file a "counterclaim" for injunctive relief under federal law, as the district court posited. SA9.

Even if the state court declines to dismiss the OAG's case on the basis of preemption and Amazon later were to prevail on a counterclaim seeking injunctive relief against the OAG, those state proceedings likely would take many months or years to complete. In the meantime, the state court will have exercised jurisdiction in the face of the NLRB's exclusive jurisdiction over the same issues, creating a unique risk of conflict with national labor policy. Amazon should not be forced to endure competing regulation from two sovereigns each claiming the exclusive right to regulate the same conduct.

III. The District Court Erred In Dismissing Amazon's Well-Pleaded Allegations Establishing The Bad-Faith Exception To *Younger*.

The district court independently erred in applying the wrong legal standards in dismissing Amazon's well-pleaded allegations that *Younger* abstention does not apply because the OAG pursued its state-law claims in bad faith. SA10-11.

A. Amazon Adequately Pleaded The Bad-Faith Nature Of The OAG's Investigation.

Younger abstention is inappropriate when a state proceeding is "brought in bad faith or for the purpose to harass." *Cullen*, 18 F.3d at 103-04; *accord Younger*, 401 U.S. at 53-54. In such cases, abstention "would serve no purpose because a state cannot have a legitimate interest in … continuing actions … brought in bad faith, thereby reducing the need for deference to state proceedings." *Cullen*, 18 F.3d at 104. There is no heightened pleading standard for the bad-faith exception. Rather,

to survive a motion to dismiss, "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citation omitted).

Amazon's well-pleaded allegations easily satisfied this standard and created at least the plausible inference that the OAG pursued a predetermined outcome with harassing and illegitimate motives. The Amended Complaint specifically alleges the following facts:

- **Rush to Judgment:** Within hours of Amazon terminating Mr. Smalls's employment, the Attorney General publicly condemned Amazon's actions in widely disseminated public statements *before* opening an investigation or even asking Amazon for its account. JA79 ¶ 218.
- **Predetermined Outcome:** Less than a month later—before the OAG asked Amazon to make a single employee available for an interview—the OAG took the unusual step of issuing to Amazon a "preliminary assessment" letter alleging that Amazon's response to the COVID-19 pandemic had violated safety requirements and that Amazon had retaliated against Mr. Smalls and Mr. Palmer. JA65 ¶ 176, JA80 ¶ 220.
- **Leaked Findings:** The OAG's "preliminary assessment" letter was leaked to the press. JA80 ¶ 221. A fair inference from the alleged circumstances is that the OAG was the source of the leak. *See* JA65 ¶¶ 173-175.

- **Lack of Jurisdiction:** The authority that the OAG purports to wield against Amazon is plainly preempted by federal law. Before this litigation, the OAG accused Amazon of violating OSHA standards and called on the NLRB to investigate Mr. Smalls's firing. JA71 ¶ 196; JA81 ¶ 224.
- **Double Standards:** Although Amazon has adopted similar and, in many cases, more extensive protective measures than the New York State Courts, the OAG, in separate litigation, has defended the State Courts' measures as "reasonable" and "effective," JA82 ¶ 227, while at the same time condemning Amazon's far more extensive measures as "inadequate," JA143.

Measures	New York State Courts	Amazon
Temperature Screenings	Beginning July 6 for visitors and July 15, 2020 for judges and non-judicial personnel.	Beginning three months earlier, on March 29, for all associates.
Personal Protective Equipment	Required on or before May 15, except when in a closed private office.	Required a month earlier, on April 15—and not just in designated areas.
Hand Sanitizer	Encouraged on May 29.	Encouraged three months earlier, on February 29, with signs posted throughout JFK8. Since April 17, all Amazon facilities have had hand sanitizer available for associates at each entrance and exit.
Social Distancing	Directed on May 29.	Directed months earlier, on March 17, with a three-foot social distancing policy, which

Measures	New York State Courts	Amazon
		was changed to six feet on March 20. Amazon modified its operations and facilities' layouts to facilitate social distancing.
Exposure Procedures	Adopted on or before May 15; govern when a courthouse visitor or court staff member self-identifies as having COVID-19 or having been exposed to COVID-19.	Adopted months earlier, on March 5; instructed all associates feeling sick to stay home. Amazon began contact tracing in February.
Testing	No independent COVID-19 testing capacity; recommends that court personnel make use of the testing facilities of New York State, county, and municipal agencies.	Administers its own COVID-19 testing program, conducting tens of thousands of tests a day across 650 sites—including JFK8. Because Amazon built this testing capacity itself, Amazon added to the total number of tests available—it did not take supply from others. Amazon also partners with Grand Rounds to provide telehealth consultations and up-to-the-minute support at no cost.

See generally JA48-51 ¶ 129.

- **Disregard of Contradictory Evidence:** No one from the OAG ever visited Amazon's JFK8 or DBK1 facilities during the COVID-19 pandemic. In contrast, the New York City Sheriff's Office conducted multiple inspections—the first

unannounced—of the JFK8 facility to assess the facility's compliance with health and safety requirements. JA47 ¶ 123. In its report on the March 30, 2020 unannounced inspection, the Sheriff's Office concluded that JFK8 "appeared to go above and beyond the current compliance requirements" and that "complaints" to the contrary were "completely baseless." JA82-83 ¶ 229. The OAG has ignored those contemporaneous, independent, and authoritative findings.

Further, Amazon alleged that these and other circumstances evidenced the bad-faith, predetermined-results-driven manner in which the OAG pursued its investigation and ultimately initiated the state-court proceeding "designed to damage Amazon." JA79 ¶ 217. Even in cases where a heightened pleading standard applies—and it does not apply here—"[m]alice, intent, knowledge, and other conditions of a person's mind may be alleged generally." Fed. R. Civ. P. 9(b). Here, Amazon's allegations of the OAG's intent are anything but general.

B. The District Court Applied The Wrong Legal Standards In Dismissing Amazon's Allegations.

The district court dismissed Amazon's well-pleaded allegations of the OAG's bad faith and held that the exception is "not appropriate in this case." SA11. Had the court applied the correct legal standards, it should have allowed Amazon to proceed to discovery on its allegations of the OAG's bad faith.

1. The district court held that the bad-faith exception was not appropriate because, in the court's view, Amazon had not explained why the OAG had no "reasonable expectation of obtaining a favorable outcome" on its claims. SA10 (quoting *Jackson Hewitt Tax Serv. Inc. v. Kirkland*, 455 F. App'x 16, 18 (2d Cir. 2012)). That misstates the governing legal standard. In *Cullen*, this Court explained that "[g]enerally," to show bad faith in this context, "the party bringing the state action must have no reasonable expectation of obtaining a favorable outcome." 18 F.3d at 103. In the next sentence, however, the Court stated that "a refusal to abstain *is also justified* where … a prosecution or proceeding is otherwise brought in bad faith or for the purpose to harass." *Id.* at 103-04 (emphasis added). "In such cases, a showing of retaliatory or bad faith prosecution" alone defeats *Younger* abstention, "and the expectations for success of the party bringing the [state] action need not be relevant." *Id.* at 104; *accord Fitzgerald v. Peek*, 636 F.2d 943, 945 (5th Cir. 1981) ("Nor is it necessary for plaintiff to prove that the prosecution could not possibly result in a valid conviction.").

The district court erred in considering only the OAG's expectations of success, without independently considering whether Amazon's well-pleaded allegations raised a plausible inference that the OAG otherwise acted in bad faith or with a purpose to harass. It is the "the subjective bad faith of the prosecuting authority" that "is the gravamen of the exception to *Younger* abstention." *Kern v.*

Clark, 331 F.3d 9, 12 (2d Cir. 2003). Amazon's factual allegations created at least the plausible inference that the OAG has been pursuing Amazon in bad faith or with the intent to harass ever since the Attorney General publicly accused Amazon of wrongdoing on March 30, 2020, before investigating the facts. The district court's failure to even consider these clear indications of the OAG's subjective motivation—often "determinative of" the bad faith "inquiry"—is inconsistent with this Court's precedent, and that alone warrants reversal. *Diamond "D" Constr. Corp. v. McGowan*, 282 F.3d 191, 199 (2d Cir. 2002).

Even if the OAG's "reasonable expectation of obtaining a favorable outcome" were the correct standard here (and it is not), the district court erred in ruling that Amazon had not satisfied the standard merely because the OSH Act and the NLRA are not "among the short list of federal statutes recognized as having complete preemption over state law." SA10. The court cited no authority holding that a federal statute must completely preempt the field of state regulation to overcome *Younger* abstention. Indeed, many courts have held that preemption is "readily apparent" or "facially conclusive" even where the federal statute in question does not preempt the field of state regulation. *See, e.g.*, *Chaulk*, 70 F.3d at 1370 (NLRA); *Norfolk & W. Ry. Co.*, 926 F.2d at 573 (Federal Railroad Safety Act); *Midwestern Gas Transmission Co.*, 270 F.3d at 539 (Natural Gas Act); *Gartrell Constr. Inc.*, 940 F.2d at 441-42 (Federal Acquisition Regulations); *Seneca-Cayuga Tribe of Okla.*,

874 F.2d at 713 & n.3, 716 (Indian Gaming Regulatory Act); *Nat'l R.R. Passenger Corp.*, 929 F.2d at 1537 n.12 (Rail Passenger Service Act). The district court did not explain—nor is it evident—how the OAG could have a reasonable expectation of obtaining a favorable outcome where, as here, federal preemption is readily apparent.

The First Circuit's decision in *Chaulk* addresses these exact circumstances. There, the First Circuit held that federal preemption under the NLRA was "readily apparent" where a state commission was hearing a discrimination claim and "the very same conduct provides the factual basis for the unfair labor practice charges" filed with the NLRB by the complainant's Union. 70 F.3d at 1370. The Court observed that "the fact that the Union clearly considered [the employer's] conduct an unfair labor practice, and that the Board entertained such charges, only buttresses the Court's conclusion that said conduct is not only 'arguably', but obviously prohibited under section 8(a) of the NLRA." *Id.* at 1365-66. Those circumstances are materially indistinguishable from the circumstances here, and refute the district court's unfounded assumption that the OAG's "reasonable expectations" depend on whether there is complete preemption.

2. The district court further erred in requiring Amazon to show that the OAG's action—"even if brought in bad faith—entirely lacks a legitimate purpose." SA11. The district court cited no authority for that standard, and it is wrong.

No precedent of this Court requires federal courts to rule out all possible legitimate motives—however inconsequential they may have been to the state's decisionmaking—before intervening in an improperly brought state proceeding. It is sufficient that the state proceeding was "initiated with and is animated by" an improper motive. *Diamond "D,"* 282 F.3d at 199. As other courts of appeals have held, as long as bad faith caused the state's proceeding in part, it does not matter that the state actor might have had additional, benign motives. *See, e.g.*, *Lewellen v. Raff*, 851 F.2d 1108, 1110 (8th Cir. 1988) (evidence that a state prosecution was motivated "in part" by an improper purpose is sufficient to make an initial showing of bad faith); *Wilson v. Thompson*, 593 F.2d 1375, 1387 (5th Cir. 1979) (bad faith exception can apply where "State's bringing of the criminal prosecution was motivated at least in part by" an improper motive). Amazon's allegations were sufficient to show that the OAG decided to pursue Amazon at least in part based on a bad-faith desire to harass.

3. Finally, Amazon's detailed allegations were at least sufficient to warrant discovery in the normal course of litigation. As with any "part of the plaintiff's case, each element must be supported in the same way as any other matter on which plaintiff bears the burden of proof, *i.e.*, with the manner and degree of evidence required at the successive stages of litigation." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992). *Younger* abstention is no exception to this general rule.

In an analogous context, this Court has vacated a district court's abstention order and remanded for an evidentiary hearing where the district court failed to apply the settled evidentiary standard for deciding preliminary injunction motions. *See Kern*, 331 F.3d at 12.

At the pleadings stage, Amazon needed only to allege "sufficient factual matter, accepted as true," to create a "plausible inference" that the bad-faith exception applies. *Iqbal*, 556 U.S. at 678. As then-District Judge Parker has explained, it is the "allegations" that matter. *Gubitosi v. Kapica*, 895 F. Supp. 58, 62 (S.D.N.Y. 1995); *accord Timmerman v. Brown*, 528 F.2d 811, 814 (4th Cir. 1975); *Reed v. Giarrusso*, 462 F.2d 706, 711 (5th Cir. 1972). And Amazon's "allegations" are more than "sufficient to survive a Fed. R. Civ. P. 12(b)(6) motion." *Gubitosi*, 895 F. Supp. at 62. It was thus "untimely [for the district court] to abstain under *Younger*" without giving Amazon the opportunity to "bear out [its] allegations of bad faith" in "subsequent discovery." *Id.*

CONCLUSION

The district court's judgment upended federalism by dismissing federal claims seeking to enforce a constitutional right in favor of a state proceeding barred by federal law. The issues before the district court were purely issues of federal law, and it is entirely necessary and appropriate for federal courts to decide those issues. Federal courts cannot decline the task out of a misguided sense of comity. For the

foregoing reasons, the district court's judgment should be reversed, and the case remanded with instructions to decide Amazon's request for declaratory and injunctive relief.

Dated: September 29, 2021

Respectfully submitted,

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Dated: September 29, 2021

/s/ Jason C. Schwartz
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I HEREBY CERTIFY that on this 29th day of September, 2021, a true and correct copy of the foregoing Brief was served on all counsel of record in this appeal via CM/ECF pursuant to Local Rule 25.1(h)(1) & (2).

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