DENNY CHIN, Circuit Judge, concurring in part and dissenting in part:

I agree with the majority's holdings that (1) Plaintiffs' public nuisance and New York Labor Law ("NYLL") § 200 claims are not moot, (2) the primary jurisdiction doctrine does not apply to those claims, (3) § 11 of the New York Workers' Compensation Law does not preclude injunctive relief under NYLL § 200, and (4) COVID-19 sick leave payments are not "wages" under NYLL § 191. I respectfully dissent, however, from the majority's conclusion that the district court properly dismissed Plaintiffs' public nuisance claim. I would find that the harm Plaintiffs faced was different in kind -- not just degree -- from that faced by the community at large. Accordingly, I would conclude that Plaintiffs adequately pleaded special injury to support their public nuisance claim.

Under New York law, "[a] cause of action for public nuisance 'exists for conduct that amounts to a substantial interference with the exercise of a common right,' such as 'endangering' the 'health or safety of a considerable number of persons.'" *Benoit v. Saint-Gobain Performance Plastics Corp.*, 959 F.3d 491, 504 (2d Cir. 2020) (alterations omitted) (quoting *532 Madison Ave. Gourmet Foods, Inc. v. Finlandia Ctr., Inc.*, 96 N.Y.2d 280, 292 (2001)). "A 'public nuisance is actionable by a private person only if it is shown that the person suffered special

injury beyond that suffered by the community at large.'" *Id.* at 505 (quoting *532 Madison Ave. Gourmet Foods, Inc.*, 96 N.Y.2d at 292). "The injury must be different in 'kind,' not simply 'degree.'" *Id.* (quoting *532 Madison Ave. Gourmet Foods, Inc.*, 96 N.Y.2d at 294); *see Connecticut v. Am. Elec. Power Co., Inc.*, 582 F.3d 309, 367 (2d Cir. 2009) ("It is not enough that he has suffered the same kind of harm or interference but to a greater extent or degree."), *rev'd on other grounds*, 564 U.S. 410 (2011). As the majority acknowledges, however, a "[d]ifference in degree of interference cannot . . . be entirely disregarded in determining whether there has been difference in kind." Restatement (Second) of Torts § 821C, cmt. c.

The majority observes that because all New Yorkers faced the risk of contracting COVID-19, any injury suffered by Plaintiffs is one of a difference only in degree, not in kind. I disagree. Plaintiffs are not alleging that the generalized risk of contracting COVID-19 constitutes a public nuisance, but rather that Amazon's conduct created a public nuisance that disproportionately injured them. First, Plaintiffs faced heightened COVID-19 risks due to the conditions of their employment. Second, they risked financial losses if they dared to mitigate those conditions. The harms here -- employment conditions and financial losses -- are different in kind from those the public faced because

the community at large was not subjected to the conditions that the workers at JFK8 endured. The public at large did not even enter JFK8.

As alleged in the amended complaint (and assumed to be true for purposes of this appeal), Plaintiffs faced conditions that significantly increased their risk of contracting COVID-19 and were forced to face these heightened risks under threat of discipline or termination. Amazon's demanding productivity requirements at JFK8, an 840,000 square foot fulfillment center on Staten Island,[1] prevented workers from engaging in social distancing or basic hygiene and sanitation practices. *See, e.g.*, J. App'x at 108 ¶ 250 (workers "fear taking the time to clean their stations for fear it will result in a writeup for [productivity] issues); *id.* at 109 ¶ 253 (because of changes to employee break schedules, "bathroom lines and break rooms are more crowded during the break time").

Moreover, Amazon implemented a contact-tracing plan that was effectively inoperative, discouraged employees from informing their colleagues if they had tested positive, and penalized workers who raised concerns about the lack of COVID-19 safety protocols at the warehouse. *See, e.g.*, J. App'x at 111

[1] JFK8 operates 24 hours, seven days a week. On average, there are approximately 3,500 workers at one time, but during peak seasons around the holidays or Amazon Prime Day in July, this number can increase to 5,000 workers. *See* J. App'x at 88 ¶ 86; 127-28.

¶ 280 (Amazon's contact tracing system consisted "entirely of reviewing surveillance footage to monitor the workplace contacts of workers diagnosed with COVID-19"); *id.* at 113 ¶ 290 (workers who tested positive were discouraged from telling their coworkers and were given no guidance on how to "monitor their health at home, quarantine when not at work, or to seek medical advice"). Though Amazon suspended the tracking requirements for the "total time off task" ("TOT") system in March 2020, workers were not informed until July 2020. *See id.* at 106 ¶¶ 232-33 (Amazon instructed managers "not to post the talking points [about the change in TOT rate enforcement] publicly"). Until then, the strict TOT system and the risk of termination forced Plaintiffs to continue working in conditions that rendered them particularly susceptible to COVID-19. *See, e.g.*, *id*. at 107 ¶ 238 (the TOT system "forced [workers] to work at a frenzied pace"); *id*. at 108 ¶ 245 (the productivity requirements "discourage[d] workers from leaving their workstations to wash their hands and from taking the time to wipe down their workstations").

Plaintiffs plausibly alleged that the threat of discipline or termination if they failed to meet their productivity requirements kept them confined to the hazardous environment inside JFK8. Warehouse workers were at

particular risk of contracting COVID-19. First, warehouses often contained thousands of employees working in "cramped or tight spaces" at high work rates and talking at elevated volumes to overcome the din of machinery. Br. of Amici Curiae Occupational Health Physicians et al. in support of Plaintiff-Appellants ("Br. of Amici Curiae") at 3-4. Such conditions increased the risk of transmission of an airborne virus such as COVID-19 because employees were discouraged from leaving their workstations to sanitize themselves after each potential exposure. *Id.* This heightened risk was exacerbated where, as here, workers were deprived of preventative safety measures and were unable to easily access sick leave, resulting in an increased risk of infecting their coworkers and families.

Plaintiffs lacked the autonomy to avoid the hazardous conditions arising from Amazon's conduct. And unlike many members of the public, Plaintiffs were not permitted to work remotely. If anything, because the demand for packages increased during the pandemic, they had even less flexibility in that respect. *See, e.g.*, J. App'x at 88 ¶ 87 (Amazon said it hired 175,000 new workers in April 2020, many of whom were "temporary workers hired to meet increased demand during the pandemic").

At the end of each nearly 11-hour shift working under these conditions, Plaintiffs would then take the increased risk of infection home to their families. While Amazon may have created an indirect harm to the public in the form of community spread, its practices directly endangered Plaintiffs in the workplace and further endangered the communities with whom Plaintiffs interacted. *See* Br. of Amici Curiae at 24. Plaintiffs Chandler and Bernard contracted COVID-19 while working at JFK8, and Chandler's cousin, with whom she lived, died during that time from the disease. The physical and emotional injuries that followed were distinct from those the community faced because they arose proximately from Amazon's conduct.

Plaintiffs also suffered economic harm not suffered by members of the public because they faced loss of pay and sick leave. *See, e.g.*, J. App'x at 92 ¶¶ 120-24 (workers felt "increased pressure to attend work while sick" because they feared losing the opportunity to accrue limited unpaid leave time); *id.* at 89 ¶ 98 (Amazon retaliated against workers who spoke out about workplace safety and COVID-19). New York courts have long recognized that economic harm can be a sufficient special injury for a private plaintiff to maintain a public nuisance claim. *See 532 Madison Ave. Gourmet Foods, Inc.*, 96 N.Y.2d at 293 (private right of

action where public nuisance "had a devastating effect on [plaintiffs'] ability to earn a living"). Further, "[o]n the matter of special damage . . . there is no requirement that there be directness of such damage, or that there be any particular quantum, before there is a right to a private remedy, such as injunction." *Graceland Corp. v. Consol. Laundries Corp.*, 180 N.Y.S.2d 644, 648 (1958), *aff'd*, 6 N.Y.2d 900 (1959). Defendants made it difficult for workers who tested positive for COVID-19 to obtain sick leave and allegedly did not pay the full amount of COVID-19 sick pay.

Constrained by the demanding requirements of the TOT system, Plaintiffs were faced with an unenviable choice: continue working in a dangerous and demanding work environment or avoid it to protect their health but face a high likelihood of losing their jobs. Although it is true, as the majority observes, that many New Yorkers suffered financial losses as a result of the pandemic, the losses Plaintiffs allege are different in kind because they resulted from Amazon's affirmative decisions not to implement any sufficient measures to mitigate the high risk of COVID-19 transmission inherent in warehouse work. *See, e.g.*, Br. of Amici Curiae at 7 (due to "certain environmental design characteristics that make social distancing difficult [in warehouses], . . . it [is] all

the more important that employers implement all mitigation measures to prevent COVID-19 infection.").

Plaintiffs have thus plausibly pleaded special injury that they faced a heightened risk of exposure to COVID-19 and threat of economic harm because of conditions at JFK8. Thus, I would hold that the lower court erred in dismissing Plaintiffs' public nuisance claim.