20-3989

United States Court of Appeals for the Second Circuit

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

Plaintiffs-Appellants,

v.

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

Defendants-Appellees.

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

BRIEF FOR STATE OF NEW YORK AS *AMICUS CURIAE*

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases **Page(s)**

Cases **Page(s)**

Cases **Page(s)**

Laws

Federal

State

Miscellaneous Authorities

Miscellaneous Authorities **Page(s)**

INTEREST OF AMICUS CURIAE

The State of New York submits this amicus curiae brief in support of plaintiffs-appellants. Plaintiffs are warehouse workers employed at a Staten Island fulfillment center by defendants-appellees Amazon.com and its affiliate, as well as the workers' family members. They allege that defendants' actions at the Staten Island facility violate certain safety and paid-leave requirements under New York law, including certain protections that the State Legislature adopted in response to the COVID-19 pandemic. The United States District Court for the Eastern District of New York (Cogan, J.) dismissed two of plaintiffs' state-law claims, based on the asserted primary jurisdiction of the federal Occupational Safety and Health Administration (OSHA), and otherwise concluded that all of plaintiffs' claims were deficient in any event, because they purportedly failed to state a claim under New York law.

The State of New York has a direct interest in this Court's resolution of these issues on appeal, all of which squarely implicate the meaning of New York's laws and the ability of various state actors to enforce such laws. Both the Attorney General of the State of New York and the New York State Department of Labor (DOL) investigate and

bring enforcement actions against employers for unlawful labor practices, unsafe working conditions, and other violations of the State's laws. Such enforcement has been particularly critical during the unprecedented COVID-19 pandemic, which has led the State to adopt several new policies protecting the health and welfare of workers and the public. Those policies, along with preexisting law, are crucial to ensuring the physical and economic well-being of the State's workers and residents. Indeed, the Attorney General is actively policing these protections, and has conducted, and is continuing to conduct, investigations of multiple employers, including defendants, concerning the employers' compliance with the State's laws and policies during the COVID-19 pandemic.

The district court's rulings here directly undermine those objectives. The court's primary-jurisdiction holding improperly displaces New York's workplace-safety requirements in favor of federal regulation by OSHA—even though OSHA has expressly *declined* to adopt national COVID-related safety standards and relied instead on state and local requirements. And the district court's holdings on the merits of plaintiffs' state-law claims misconstrue New York law and deprive it of much of its protective force. Contrary to the district court's reasoning, New York

Labor Law § 200 allows plaintiffs to seek prospective injunctive relief, and such relief is not barred by the compensation-exclusivity rule of New York Workers' Compensation Law; instead, those remedies were intended to work in tandem both to address past injuries and to prevent future injuries from occurring. The district court also erred in holding that DOL's guidance concerning paid leave during a quarantine period was not binding on employers: the New York State Legislature expressly said that employers "shall comply" with DOL's directives about how these benefits must be paid. In any event, if there were any uncertainty about the proper construction of these state laws and policies, this Court should certify those questions to the New York Court of Appeals rather than construing state law in a way that would altogether foreclose claims like the plaintiffs' here.

BACKGROUND

A. New York Labor Law § 200

At common law, employers have an affirmative duty "to provide a reasonably safe place for [employees] to work." *See Mautsewich v. United States Gypsum Co.*, 217 N.Y. 593, 597-98 (1916). This duty is "a continuing one, and is discharged only when the [employer] furnishes and maintains a place of that character." *Kreigh v. Westinghouse, Church, Kerr & Co.*, 214 U.S. 249, 255-56 (1909).

In 1921, the New York Legislature codified this common law duty in Labor Law § 200, now entitled "General Duty to Protect Health and Safety of Employees; Enforcement." N.Y. Labor Law § 200; *see Jock v. Fien*, 80 N.Y.2d 965, 967 (1992). The statute's "primary purpose" is "to regulate conduct." *Huston v. Hayden Bldg. Maint. Corp.*, 205 A.D.2d 68, 70-71 (2d Dep't 1994).

Section 200 provides that all places of work "shall be so constructed, equipped, arranged, operated and conducted as to provide reasonable and adequate protection to the lives, health and safety of all persons employed therein." N.Y. Labor Law § 200(1). The statute further mandates that "[a]ll machinery, equipment, and devices in such places

shall be so placed, operated, guarded, and lighted as to provide reasonable and adequate protection to all such persons." *Id.*

In 1962, the Legislature amended § 200 to "strengthen enforcement procedures." *See* Sponsor's Mem. in Supp. of ch. 450, *in* 1962 *N.Y.S. Legislative Annual* 217. Specifically, the 1962 amendments authorized DOL to suspend "work in or occupancy" of unsafe areas, and "to prevent further use of any unsafe" equipment, which may be further enforced through "a court order enjoining continuance of a dangerous condition." *Id.* The law identified the availability of "a court injunction to peremptorily halt unusually dangerous activities" in the amendments as "an important implementation" of preexisting enforcement powers. *Id.* at 218.

The current version of § 200 maintains the availability of prospective relief directed at avoiding future injury. The statute authorizes DOL to inspect and identify "dangerous condition[s]" in work areas or equipment, and to prohibit work in such areas and the use of such equipment until "the dangerous condition has been corrected." N.Y. Labor Law § 200(2). The Attorney General is also empowered to "institute a proceeding to enjoin the use of [the dangerous] machinery, equipment, or device or to

enjoin further work in or occupancy of such [dangerous] area[s]." *Id.* § 200(3).

B. New York's COVID-19 Response

In the spring of 2020, the State Department of Health issued guidance implementing certain Executive Orders responding to the COVID-19 pandemic. *See, e.g.*, Exec. Order No. 202.8, 9 N.Y.C.R.R. § 8.202.8 (2020) (directing closures of non-essential businesses); Exec. Order No. 202.31, 9 N.Y.C.R.R. § 8.202.31 (2020) (permitting phased reopening); *see also* Ch. 23, § 2, 2020 N.Y. Laws (authorizing executive directives in response to COVID). The guidance was aimed at protecting the health and safety of workers, as well as the public at large, from the spread of COVID-19.[1] (Joint Appendix (J.A.) 82-83.) Under the "New York Forward" plan (J.A. 82), businesses could remain open (or reopen) only if they complied with certain "minimum requirements" set forth in the industry-specific COVID-related safety guidance issued by the State.

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[1] *See generally* State of New York, *New York Forward: A Guide to Reopening New York & Building Back Better* 56-58 (May 2020) (internet). For sources available on the internet, full URLs are provided in the Table of Authorities.

See, e.g., N.Y. Dep't of Health, *Interim Guidance for the Wholesale Trade Sector During the COVID-19 Public Health Emergency* 1 (June 26, 2020) (internet). These standards incorporated guidance from the U.S. Centers for Disease Control and Prevention. *See id.* at 3-6.

The New York Forward guidance specifically addressed warehouse operations like those at issue in this case. That guidance requires, among other things, that employers ensure that breaks are staggered so that workers can maintain social distancing; that high touch surfaces are frequently cleaned and sanitized; that workers have access to hand-washing, cleaning, and disinfecting supplies; and that, upon a "suspected or confirmed" COVID-19 case among staff, employers close off and thoroughly clean the affected workplace areas before permitting other workers to access the areas. *See id.* at 5-7. The guidance also requires employers to conduct certain minimum daily screening of employees, and to provide information to help the State and local health departments to facilitate contact tracing for employees and visitors who have been exposed to a person who tested positive for COVID-19. *See id.* at 8-9.

In March 2020, the State Legislature also enacted new laws to protect workers and the public. As relevant here, the paid quarantine

leave statute mandates that employees be provided with "at least fourteen days of paid sick leave during any mandatory or precautionary order of quarantine or isolation." *See* Ch. 25, § 1(1)(c), 2020 N.Y. Laws. The purpose of the law was to "alleviate[] the financial pressure for people that feel they must go to work sick," in order to encourage workers who have been directed to quarantine to stay home, thereby "curbing the spread" of COVID-19 and protecting public health. *See* Sponsor's Mem. in Supp. of ch. 25 (2020) (internet). The statute's sponsors explained that the statute was intended to "guarantee[] that New York employees have job-protected paid sick leave . . . *during* a mandatory or precautionary order of quarantine or isolation due to COVID-19." *See id.* (emphasis added).

The Legislature expressly delegated authority to DOL to administer these newly mandated quarantine leave benefits, directing DOL "to adopt regulations . . . and issue guidance to effectuate any of the provisions" of the statute, including the setting of "standards for the use, payment, and employee eligibility of sick leave pursuant to this act." *See* Ch. 25, § 1(5), 2020 N.Y. Laws. The statute further provides that employers "shall comply" with DOL's rules and directives on such matters. *See id.* The

paid quarantine leave law took effect immediately upon its enactment in March 2020. *See id.* § 2.

ARGUMENT

POINT I

THE PRIMARY JURISDICTION DOCTRINE DOES NOT WARRANT DISMISSAL OF PLAINTIFFS' STATE LAW CLAIMS

Plaintiffs here challenged Amazon's policies under New York Labor Law § 200(1), which requires employers to ensure that their facilities "provide reasonable and adequate protection to the lives, health and safety" of their employees. They alleged that Amazon's failure to abide by the minimum safety standards for warehouse operations contained in the New York Forward guidance, as well as its failure to comply with the new paid quarantine leave law, created unreasonably dangerous working conditions in violation of Labor Law § 200. (Joint Appendix (J.A.) 117-120.) Plaintiffs also alleged that these same failures by Amazon at the Staten Island facility caused and are causing increased community spread of COVID-19, thereby endangering public health and safety and creating a common law public nuisance. (J.A. 117-119.)

The district court correctly recognized that plaintiffs' state-law claims were not preempted by the federal Occupational Safety and Health Act (OSH Act). (J.A. 144.) But the court then erred in relying on the primary jurisdiction doctrine to dismiss plaintiffs' state-law claims in favor of (nonexistent) OSHA regulation in this area. Contrary to the district court's reasoning, there was no basis to subordinate New York law in favor of OSHA jurisdiction here. *See Tassy v. Brunswick Hosp. Ctr., Inc.*, 296 F.3d 65, 69 (2d Cir. 2002).

Primary jurisdiction is a prudential doctrine that "applies where a claim is originally cognizable in the courts," but "enforcement of the claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body." *United States v. Western Pac. R.R. Co.*, 352 U.S. 59, 63-64 (1956). In such circumstances, a court may decline to exercise jurisdiction over a claim in the first instance and instead refer a dispute to an administrative agency. *Id.* Such a referral is intended to promote "uniformity" and "reliance on administrative expertise" under circumstances where Congress intended a particular federal agency, rather than the federal

courts, to have a primary role in regulating a complex field. *See Tassy*, 296 F.3d at 68-69; *Western Pac. R.R. Co.*, 352 U.S. at 64.

The text of the OSH Act makes clear that Congress did not intend to vest OSHA with primary jurisdiction over workplace safety generally, let alone jurisdiction to resolve workplace safety disputes that arise under state laws. *See* 29 U.S.C. §§ 653(b)(4), 667(a). Indeed, as the Supreme Court has confirmed: the OSH Act's "[f]ederal regulation of the workplace was not intended to be all encompassing." *Gade v. National Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 96 (1992). To the contrary, the Act expressly provides that it does not "enlarge or diminish or affect in any other manner the common law or statutory rights, duties, or liabilities of employers and employees under any law with respect to injuries, diseases, or death of employees arising out of, or in the course of, employment." 29 U.S.C. § 653(b)(4). And the Act also does not "prevent any State agency or court from asserting jurisdiction under State law over any occupational safety or health issue with respect to which no [federal] standard is in effect." *Id.* § 667(a).

Here, it is undisputed that OSHA has not promulgated any national safety standard in response to COVID-19, let alone one specific to

warehouse operations. *See In re Am. Fed'n of Labor & Cong. of Indus. Orgs.*, No. 20-1158, 2020 WL 3125324, at *1 (D.C. Cir. June 11, 2020) (dismissing challenge to OSHA's "decision not to issue an [emergency temporary standard] to protect working people from occupational exposure to [COVID-19]"). Instead, OSHA has expressly cited the various "non-OSHA public safety requirements enacted by federal, state, and local officials in response to the pandemic" as a reason *not* to enact such federal standards. *See* OSHA Resp. to Emergency Pet. at 16, *In re Am. Fed'n of Labor & Congress of Indus. Orgs*, No. 20-1158 (D.C. Cir. May 29, 2020). And OSHA has relied on state and local responses to the COVID-19 crisis because of its view that a uniform national standard would be unwise. As OSHA has explained, "the pandemic has had dramatically different impacts on different parts of the country," and "State and local requirements and guidance on COVID-19 are thus critical to employers in determining how to best protect workers." *See id.* at 32.

In the absence of any federal standard that would be applicable here to plaintiffs' COVID-related claims, and in light of OSHA's disclaimer of any need for uniformity, there was no basis for the district court to rely on the primary jurisdiction doctrine and refer this matter to OSHA in the

first instance. *See Astiana v. Hain Celestial Grp., Inc.*, 783 F.3d 753, 761 (9th Cir. 2015) ("Common sense tells us that even when agency expertise would be helpful, a court should not invoke primary jurisdiction when the agency is aware of but has expressed no interest in the subject matter of the litigation."). Congress chose to enact federal regulation of workplace safety in a specific manner: by conferring authority on OSHA to issue certain regulations, and then vesting such federal standards with carefully defined preemptive effect. *See Gade*, 505 U.S. at 96-97. When, as here, OSHA declines to exercise its authority, Congress expressly preserved the substantive effect of state laws and safety standards, 29 U.S.C. § 653(b)(4), as well as the jurisdiction of state courts and agencies, *id.* § 667(a), to resolve matters of workplace safety. The primary jurisdiction doctrine has no application under these circumstances.

The traditional factors this Court considers in determining whether to apply primary jurisdiction lead to the same result. Although "[n]o fixed formula exists for applying" the doctrine, *Western Pac. R.R. Co.*, 352 U.S. at 64, this Court has looked to: (1) whether the question at issue is within the conventional experience of judges or involves technical or policy considerations "particularly within the agency's discretion"; (2) whether

there exists a "substantial danger" of businesses being subject to inconsistent rules; (3) whether a prior application to the agency has been made; and (4) whether referral to the agency is supported by a balancing of "the advantages of applying the doctrine against the potential costs resulting from complications and delay in the administrative proceedings," *Ellis v. Tribune Television Co.*, 443 F.3d 71, 82-83 (2d Cir. 2006).

Each of these factors weighs against dismissal of plaintiffs' claims here. First, the claims presented in this case do not present issues that are so arcane or complex that they fall beyond the competence of federal judges and instead require OSHA's "technical or policy expertise," *National Commc'ns Ass'n, Inc. v. American Tel. & Tel. Co.*, 46 F.3d 220, 223 (2d Cir. 1995). To the contrary, courts routinely adjudicate tort claims under both the common law of public nuisance and New York Labor Law § 200.[2] And even if OSHA has general expertise over workplace safety, it has no expertise over interpreting or applying state laws or state-issued

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[2] *See, e.g.*, *State of New York v. Shore Realty Corp.*, 759 F.2d 1032, 1050-51 (2d Cir. 1985) (property owner liable for public nuisance for release of hazardous waste); *Gasperino v. Larsen Ford, Inc.*, 426 F.2d 1151, 1153 (2d Cir. 1970) (wrongful death action under Labor Law § 200); *Ross v. Curtis-Palmer Hydro-Elec. Co.*, 81 N.Y.2d 494, 505-06 (1993) (workplace injury claim under Labor Law § 200).

safety requirements for businesses operating during the COVID-19 pandemic (such as that contained in the New York Forward guidance). (*See* J.A. 82-85, 120.) Deferring to OSHA is particularly inappropriate here in light of the district court's conclusion that state law and standards—rather than federal standards—control plaintiffs' COVID-related claims. (*See* J.A. 144 (finding no preemption).) *Compare Cuomo v. Clearing House Ass'n, LLC*, 557 U.S. 519, 529 (2009) (rejecting argument that "the State may not *enforce* its valid, non-pre-empted laws against national banks" (emphasis in original)), *with Rural Cmty. Workers All. v. Smithfield Foods*, 459 F. Supp. 3d 1228, 1240-41 (W.D. Mo. 2020) (deferring to OSHA consideration where, among other things, OSHA had issued applicable industry-specific guidelines and had already commenced investigative efforts).

Second, this case does not risk undermining the uniformity of any OSHA rulings because, as discussed, OSHA has declined to issue COVID-19 guidance and has instead chosen to rely on state and local measures.

Third, as the district court acknowledged (J.A. 138), no plaintiff has filed a complaint with OSHA concerning working conditions at Amazon's

Staten Island facility. *See Ellis*, 443 F.3d at 89 (disfavoring primary jurisdiction when "prior application to the agency is absent").

Finally, when OSHA has already made clear its view that state and local regulation is preferable to a uniform national standard, there are no benefits to deferring to OSHA's primary jurisdiction instead of proceeding to promptly adjudicate the important issues raised in this case. The district court thus erred in relying on primary jurisdiction to dismiss the plaintiffs' claims.

POINT II

THE DISTRICT COURT'S OTHER GROUNDS FOR DISMISSING PLAINTIFFS' STATE LAW CLAIMS LACK MERIT

A. The District Court's Grounds for Dismissing Plaintiffs' Labor Law § 200 Claims Were Invalid.

Plaintiffs here sought prospective injunctive relief to redress allegedly unsafe workplace conditions under New York Labor Law § 200. The district court dismissed plaintiffs' Labor Law § 200 claims on two grounds. First, the court held that the claims were barred by New York Workers' Compensation Law (WCL) § 11, which makes workers' compensation awards the exclusive remedy for obtaining damages for workplace injuries. Second, the court held that a Labor Law § 200 claim seeking

prospective injunctive relief could not be premised on a threat of future harm. Neither of these grounds was a proper basis for dismissing plaintiffs' state law claims.

Contrary to the district court's conclusion (J.A. 145-146), the compensation-exclusivity rule of WCL § 11 does not bar claims seeking to enjoin hazardous working conditions. The focus of the WCL is *monetary* compensation: the scheme was enacted to ensure that injured workers and their families could receive compensation without "the expenses of a protracted litigation," while protecting employers from "unbounded" damages awards. *See Shanahan v. Monarch Eng'g Co.*, 219 N.Y. 469, 477-78 (1916). To that end, the WCL establishes a comprehensive administrative scheme for determining and awarding damages to injured workers, and provides that monetary awards provided under this scheme "shall be exclusive and in place of any other liability whatsoever, to [the injured or deceased] employee" or "any person otherwise entitled to recover damages, contribution or indemnity . . . on account of [the employee's] injury or death." WCL § 11.

The "compensation exclusivity" rule of WCL § 11, *O'Rourke v. Long*, 41 N.Y.2d 219, 226 (1976), thus bars duplicative recovery of monetary

damages for past workplace injuries. But no New York court has ever construed this rule to foreclose prospective remedies aimed at preventing future injuries from demonstrated workplace hazards—remedies that had been long been available at common law, and that the New York Legislature has codified, including in statutes like Labor Law § 200. To the contrary, New York courts have held that the exclusivity provision of the Workers' Compensation Law does not bar actions against employers for claims that are "outside the scope of the Workers' Compensation Law." *Coley v. Ogden Mem'l Hosp.*, 107 A.D.2d 67, 68-69 (3d Dep't 1985). And the legislative history of WCL § 11 confirms the Legislature's intent to ensure a single source of limited monetary liability—not to preclude other nonmonetary forms of relief. *See generally Shanahan*, 219 N.Y. at 477-78 (discussing legislative aims of workers' compensation scheme and its history).

Here, plaintiffs' requested remedy—an injunction that would direct defendants to comply with their affirmative obligation under Labor Law § 200 to provide safe working conditions—is not one that is available under the Workers' Compensation Law, which concerns only money damages for past workplace injuries. And construing WCL § 11 to bar

plaintiffs' Labor Law § 200 claim for equitable relief would not further the purposes underlying the workers' compensation scheme. There was thus no basis for the district court's holding that compensation exclusivity under New York's Workers' Compensation Law precluded plaintiffs' request for prospective injunctive relief here.

The district court also erred in separately holding that Labor Law § 200 could not provide relief for "the threat of future harm" at all. (J.A. 146-147.) The Legislature enacted § 200 for the "primary purpose" of "regulat[ing] conduct" so as to prevent injury—not merely for allocating liability after the fact. *Huston*, 205 A.D.2d at 70-71. And the plain text of § 200 expressly authorizes the State Commissioner of Labor and the Attorney General, in conjunction with the Labor Commissioner, to obtain prospective relief in order to prevent further "dangerous condition[s]" in the workplace. *See* N.Y. Labor Law § 200(2)-(3). While the statute does not expressly address the question whether workers themselves may obtain injunctive relief, there is no doubt that injunctive relief is available, and the legislative history of § 200 confirms that the ability to enjoin dangerous conditions—and thus to prevent future harm—was central to the worker protections codified in the statute, *see* Sponsor's

Mem. in Supp. of ch. 450, *supra*, at 218 (explaining that injunctive relief was necessary to "prevent an unscrupulous contractor who is willing to pay the fine" while "exposing his employees to unnecessary dangers").

Indeed, Labor Law § 200 simply codified a longstanding common law principle that, "[w]here an employer is under a common law duty to act, a court of equity may enforce an employee's rights by ordering the employer to eliminate any preventable hazardous conditions which the court finds to exist," *Shimp v. New Jersey Bell Tel. Co.*, 145 N.J. Super. 516, 524 (Super. Ct. Ch. Div. 1976). Courts across the country have accordingly granted injunctive relief directing employers to eliminate workplace hazards in order to prevent future harm.[3] As these cases have recognized, a plaintiff "should not be required to await the harm's fruition" and then be limited to retrospective money damages if prospective relief could have prevented any harm in the first place. *See Smith v. Western*

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[3] *See, e.g.*, *Smith v. Western Elec. Co.*, 643 S.W.2d 10, 13-14 (Mo. Ct. App. 1982) (reversing dismissal of complaint seeking injunction to limit exposure to secondhand smoke in the workplace); *Shimp*, 145 N.J. Super. at 529-31 (ordering employer to restrict smoking in plaintiff's work area); *see generally* Rhonda G. Hollander, *Injunctions Against Occupational Hazards: Toward a Safe Workplace Environment*, 9 B.C. Envtl. Aff. L. Rev. 133, 145-47 (1980).

Elec. Co., 643 S.W.2d 10, 13 (Mo. Ct. App. 1982); Sponsor's Mem. in Supp. of ch. 450, *supra*, at 218 ("use of injunctive proceedings" key to preventing fatal accidents). Nothing in the history of Labor Law § 200 or in the statute's text supports the district court's conclusion that the Legislature intended to foreclose longstanding equitable remedies available at common law. *See* Sponsor's Mem. in Supp. of ch. 450, *supra*, at 218 (emphasizing the importance of prospective injunctive remedies under § 200).

B. Employers Must Provide Paid COVID-19 Quarantine Leave as Directed by the State Department of Labor.

The district court also erred when it concluded that New York employers are not required to comply with DOL guidance in providing statutorily-mandated quarantine leave payments.

In enacting the paid quarantine leave law, the Legislature authorized DOL to administer the new benefit—and specifically "to adopt regulations . . . and issue guidance" setting "standards for the use, payment, and employee eligibility." Ch. 25, § 1(5), 2020 N.Y. Laws. Pursuant to this express grant of authority, DOL determined that quarantine leave must be paid on the same schedule and in the same manner as regular wages: that is, "leave payments should be made in the

paycheck for the applicable pay period for the leave." *See* State of New York, *New York Paid Family Leave COVID-19: Frequently Asked Questions: Benefits* (internet).

This determination by DOL reasonably effectuates the Legislature's intent that workers who are subject to quarantine will be provided their regular pay "*during* a mandatory or precautionary order of quarantine or isolation." *See* Sponsor's Mem. in Supp. of ch. 25, *supra* (emphasis added). Here, the receipt of uninterrupted pay while quarantined is integral to the statute's goal to "alleviate[] the financial pressure for people that feel they must go to work sick," in order to reduce the spread of COVID-19 by infected workers to other members of the public. *Id.*

Where, as here, DOL has exercised an expressly delegated function "to fill in the details and interstices" of a "broadly articulated" legislative policy, *Matter of LeadingAge New York, Inc. v. Shah*, 32 N.Y.3d 249, 263 (2018), and "crafted a rule within the scope of [its] authority, that rule has the force of law and represents the policy choice of this State," *State Farm Mut. Auto Ins. Co. v. Mallela*, 4 N.Y.3d 313, 321 (2005). Indeed, the Legislature expressly provided that DOL's determinations as to "standards for the use [and] payment" of paid quarantine leave are

binding on employers. *See* Ch. 25, § 1(5), 2020 N.Y. Laws ("Employers shall comply with regulations promulgated by the commissioner of labor" in effectuating "any of the provisions of this act.").

The district court thus erred when it stated that employers did not have to comply with DOL's guidance about the required timing and manner of making these quarantine leave payments. (J.A. 149-150.) The premise of the district court's erroneous conclusion was its mistaken belief that DOL was relying on a separate statute, Labor Law § 191, as the source of its authority for its guidance on quarantine leave payments, because DOL's guidance stated that the new leave benefits "are subject to the frequency of pay requirements of Section 191 of the Labor Law." (J.A. 149.) As relevant here, Labor Law § 191 sets the required frequency of wage payments for workers, and provides that manual laborers' wages must be paid "weekly and not later than seven calendar days after the end of the week in which the wages are earned." Starting from that premise, the district court concluded that DOL's guidance was improper because quarantine leave payments do not qualify as "wages" under Labor Law § 191.

The district court misconstrued DOL's guidance. The source of DOL's authority to determine the timing and manner of quarantine leave payments is the Legislature's newly enacted COVID-19 legislation. DOL's guidance referred to Labor Law § 191 not as a separate source of authority, but rather as a shorthand to explain that the new quarantine leave payments should be made on the same schedule and in the same manner as wages subject to Labor Law § 191: namely, the new payments must be included "in the paycheck for the applicable pay period for the leave." *See* State of New York, *New York Paid Family Leave COVID-19, supra*. It is thus irrelevant whether the new leave payments are "wages" for purposes of Labor Law § 191. What matters here is whether the Legislature delegated authority to DOL under the newly enacted statute to administer quarantine leave payments. For the reasons explained above, the Legislature unquestionably did so.

DOL's directive on the timing of the newly-enacted quarantine leave benefits is not inconsistent with any relevant prior agency guidance, as the district court mistakenly believed (J.A. 149-150). In particular, the March 2010 DOL opinion letter the district court cited did not purport to interpret any aspect of Labor Law § 191, nor did it opine

generally on the appropriate timing for sick leave payments. *See* Letter from Jeffrey G. Shapiro, Associate Att'y, N.Y. Dep't of Labor (Mar. 11, 2010) (internet). Rather, in response to an inquiry about "whether employers are required to pay" a salaried employee "a full day's pay for days in which such employees works less than a full day," DOL opined that since no law required providing paid sick leave, there was "no 'correct' or prescribed method" for administering such discretionary benefits. *See id.* at 1-2. That opinion—issued a decade ago in the context of a distinct statutory scheme which did not mandate sick leave benefits—in no way conflicts with DOL's current determination that the quarantine leave recently enacted by the Legislature must be promptly paid to workers on the same schedule as wages would be under Labor Law § 191.

C. To the Extent There Is Any Uncertainty About the Meaning of State Law, Those Questions Should Be Resolved by the New York Court of Appeals.

If this Court has any doubt about the resolution of the state-law issues here, it should certify those questions to the New York Court of Appeals.

Three criteria inform whether to certify a state-law issue to New York's highest court: (1) whether that court has previously "addressed the issue," (2) the importance of the question to the State and whether its resolution depends on "public policy choices," and (3) whether the question "is determinative" of the appeal. *Berman v. City of New York*, 770 F.3d 1002, 1005 (2d Cir. 2014) (quotation marks omitted). All three factors would support certification here.

First, our research has not uncovered any decision from the New York Court of Appeals or the intermediate appellate courts that has squarely considered whether private claims for injunctive relief under Labor Law § 200 may be maintained, or whether the compensation-exclusivity rule of the Workers' Compensation Law bars such claims. Nor has a New York court yet considered whether employers must comply with DOL's guidance on the timing of quarantine leave payments. This

absence of appellate authority makes it difficult for this Court "to predict how the Court of Appeals would resolve" the relevant questions and counsels in favor of certification. *Penguin Grp. (USA) Inc. v. American Buddha*, 609 F.3d 30, 42 (2d Cir. 2010); *see also Allstate Ins. Co. v. Serio*, 261 F.3d 143, 153 (2d Cir. 2001).

Second, the scope of available remedies under Labor Law § 200 implicates important "value judgments and policy choices" that will affect workers throughout the State—and may affect government enforcement actions by the Attorney General and DOL as well. *Schoenefeld v. State of New York*, 748 F.3d 464, 470 (2d Cir. 2014). The Legislature enacted Labor Law § 200 to protect workers from workplace injuries, and WCL § 11 reflects "a delicate balance" between worker and employer interests. *See Osterweil v. Bartlett*, 706 F.3d 139, 143 (2d Cir. 2013). Likewise, the Legislature enacted the paid quarantine leave law, and delegated authority to State DOL to administer that leave, to deal with the pressing demands of the unprecedented COVID-19 pandemic. The state courts should have the opportunity to consider any disputed questions of state law here in light of the important state policies at issue.

Third, a ruling from the New York Court of Appeals would definitively resolve whether plaintiffs may maintain their Labor Law § 200 claim or their claim concerning defendants' compliance with the State's new paid quarantine leave law—or "at least materially change the nature of the problem." *See Osterweil*, 706 F.3d at 143 (quoting *Bellotti v. Baird*, 428 U.S. 132, 147 (1976)). Both the scope of plaintiffs' Labor Law claim and the scope of DOL's authority here turn entirely on state-law questions that the New York Court of Appeals can address.

Certification would also serve critical federalism interests in this case. As this Court has explained, certification is "particularly favored" where a question touches on "matters at the heart of state sovereignty"—including, here, the power to enact laws that regulate employment relationships and protect public health and safety. *See Tunick v. Safir*, 209 F.3d 67, 77 (2d Cir. 2000). The New York Court of Appeals should be permitted to construe the relevant state statutes in the first instance, "using the interpretive tools, presumptions, and standards" that it deems proper, *Serio*, 261 F.3d at 152.

CONCLUSION

This Court should vacate the dismissal of the amended complaint.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a) of the Federal Rules of Appellate Procedure, William P. Ford, an employee in the Office of the Attorney General of the State of New York, hereby certifies that according to the word count feature of the word processing program used to prepare this brief, the brief contains 5,487 words and complies with the typeface requirements and length limits of Rules 29 and 32(a)(5)-(7) and Local Rules 29.1 and 32.1.

/s/ *William P. Ford*