No. 20-3989

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

DERRICK PALMER, KENDIA MESIDOR, BENITA ROUSE, ALEXANDER ROUSE, BARBARA CHANDLER, LUIS PELLOTCHANDLER, and DEASAHNI BERNARD,

Plaintiffs-Appellants,

v.

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

Defendants-Appellees.

Appeal from the United States District Court for the Eastern District of New York
(No. 1:20-cv-02468-BMC)

BRIEF OF AMICI CURIAE LAW PROFESSORS
IN SUPPORT OF APPELLANTS AND REVERSAL

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INTEREST OF AMICI CURIAE[1]

Amici curiae are eleven professors of law with expertise in civil procedure and federal courts. Amici have a strong interest in the proper application and development of the law in these areas, and they believe their expertise will be of value to the Court in assessing the district court's holding with respect to the primary jurisdiction doctrine. Affiliations are provided for identification purposes only.

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[1] All parties have consented to the filing of this brief. No counsel for any party authored this brief in whole or part. Apart from amici curiae, no person or organization, including parties or parties' counsel, contributed money intended to fund the preparation and submission of this brief.

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INTRODUCTION AND SUMMARY OF ARGUMENT

The plaintiffs in this case, employees at one of Amazon's large warehouse facilities in New York City and those employees' family members, allege state law claims arising from defendants' alleged failure to comply with state-law health and safety requirements during a deadly pandemic. Among other things, the plaintiffs seek declaratory relief that the defendants' workplace policies constitute a public nuisance under New York state tort law and that the defendants have violated their

duty under New York Labor Law § 200 to "provide reasonable and adequate protection to the lives, health and safety of all persons employed" at the facility. Ruling on the defendants' motion to dismiss, the district court stated that "courts are not expert in public health or workplace safety matters," and that the plaintiffs' state-law claims "go to the heart of [the] expertise and discretion" of the federal Occupational Safety and Health Administration (OSHA). A-137. On that basis, the court dismissed the claims "pursuant to the doctrine of primary jurisdiction," A-150, leaving the plaintiffs "to seek relief through [OHSA's] administrative and regulatory framework," A-138.

The district court incorrectly applied the primary jurisdiction to dismiss state-law claims arising from the defendants' allegedly unsafe working conditions. The court's holding relies on an expansive conception of primary jurisdiction that finds no warrant in the precedent of the Supreme Court or this Court. The doctrine of primary jurisdiction, however, is a narrow abstention doctrine under which a federal court stays a case, or dismisses it without prejudice, to provide an administrative agency the opportunity to address in the first instance an issue in the litigation when "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) (quoting *United States v. W. Pac. R.R. Co.*, 352 U.S. 59, 64 (1956)). Here, OSHA has not weighed in on the

workplace safety issues that the plaintiffs raise and apparently has no intent to do so, and its input is not required to adjudicate the plaintiff's state-law claims. The court's decision thus subverts Congress's statutory scheme: The OSH Act explicitly does not preempt state-law tort claims; OSHA is not tasked with resolving workplace safety concerns grounded in state law; and a plaintiff is not required to seek relief at OSHA before coming to court to assert state-law claims.

This Court should reverse the district court's decision with respect to its application of the primary jurisdiction doctrine as a basis for dismissing the public nuisance and New York Labor Law § 200 claims.

STATUTORY AND REGULATORY BACKGROUND

I. Federal and state occupational safety and health laws

The Occupational Safety and Health Act of 1970 (OSH Act) sets forth a framework to protect the wellbeing of employees in the workplace. The Act directs the Secretary of Labor to promulgate "occupational safety or health standard[s]" in furtherance of that aim. 29 U.S.C. § 655(a). It further authorizes the Secretary to issue "emergency temporary standards" if he or she determines that "employees are exposed to a grave danger … from new hazards" and the "emergency standard is necessary to protect employees from [the] danger." *Id.* § 655(c)(1). In addition to establishing the Secretary's regulatory authority, the OSH Act imposes a general duty that "[e]ach employer … furnish to each of his employees employment and a

place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm." *Id.* § 654(a)(1). OSHA has the authority to investigate and enforce statutory and regulatory violations through an administrative enforcement scheme, subject to judicial review. *Id.* §§ 657–660; *see* Delegation of Authority and Assignment of Responsibility to the Assistant Secretary for Occupational Safety and Health (Secretary's Order 1-2012), 77 Fed. Reg. 3912 (Jan. 25, 2012). The OSH Act does not provide a private right of action.

The OSH Act includes several provisions reflecting that "[f]ederal regulation of the workplace was not intended to be all encompassing." *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 96 (1992) (plurality op.) (internal citation omitted). First, the OSH Act includes a savings clause providing that the Act 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) (emphasis added). Second, it contains a jurisdictional savings clause providing that the Act 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 standard is in effect under [29 U.S.C. § 655]." *Id.* § 667(a). Third, the Act empowers states to "preempt applicable Federal standards" and "assume responsibility for development and enforcement … of

occupational safety and health standards relating to any occupational safety or health issue with respect to which a Federal standard has been promulgated" by "submit[ting] a State plan for the development of such standards and their enforcement." *Id.* § 667(b); *see id.* § 667(c) (listing "conditions" for Secretary's "approval of [a State's] plan); *Steel Institute of N.Y. v. City of N.Y.*, 716 F.3d 31, 34 (2d Cir. 2013) ("If there is a federal standard in place, a state may submit a State plan for the Secretary's approval by which the state assumes responsibility for development and enforcement of occupational safety and health standards in the area covered by the federal standard." (cleaned up)).

In addition to federal law, New York law also provides protections for workers' safety and health. New York Labor Law Section 200 directs that "[a]ll places" of employment "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. Lab. Law § 200. Section 200 is "a codification of the common-law dut[ies] imposed upon" the employer to provide employees with a safe place in which to work under common law. *Rizzuto v. Wenger Contracting Co.*, 91 N.Y.2d 343, 352 (1998). In addition to that statutory duty, New York's common law retains causes of action in tort that apply in the context of workplace health and safety. *See, e.g.*, *Barreto v. Metro. Transp. Auth.*, 25 N.Y.3d 426, 434 (2015); *Rizzuto*, 91 N.Y.2d at 353.

II. OSHA's and New York's response to the pandemic

Workplaces present a serious risk of transmission of COVID-19. *See* Mark Larochelle, *"Is It Safe for Me to Go to Work?" Risk Stratification for Workers during the Covid-19 Pandemic*, N. Eng. J. Med., July 30, 2020, https://www.nejm.org/doi/full/10.1056/NEJMp2013413. Tens of thousands of Amazon employees have been infected. *See* Jeffrey Dastin, *Amazon reports over 19,000, or 1.44%, of U.S. frontline employees had COVID-19*, Reuters, Oct. 3, 2020, https://www.reuters.com/article/health-coronavirus-amazon-com-cases/amazon-reports-over-19000-or-1-44-of-u-s-frontline-employees-had-covid-19-idUSKBN26O08L. And OSHA has received more than 12,000 workplace complaints, while state authorities have received more than 41,000. *See* OSHA, COVID-19 Response Summary, https://www.osha.gov/enforcement/covid-19-data (last visited Jan. 12, 2021).

OSHA has no standard governing workplace exposure to infectious diseases and has never initiated the process for developing such a standard for workplaces like Amazon's. And it has never initiated the process for developing an infectious disease standard that would apply to workplaces such as Amazon's facilities.

Beyond not issuing standards relating to workplace transmission of infectious diseases, OSHA has expressly declined to issue an emergency temporary standard or other occupational safety and health standards with respect to COVID-19. *See In re AFL-CIO*, No. 20-1158, 2020 WL 3125324 (D.C. Cir. June 11, 2020) (denying

petition for review of OSHA's rejection of workers' administrative petition for agency to issue emergency temporary standard pursuant to 29 U.S.C. § 655(c)(1)). Instead, in conjunction with the Centers for Disease Control, OSHA has issued non-binding "guidance" that "creates no new legal obligations" and offers "recommendations" that "are advisory in nature, informational in content, and are intended to assist employers in providing a safe and healthful workplace." OSHA, Guidance on Preparing Workplaces for COVID-19, OSHA 3990-03 2020, https://www.osha.gov/Publications/OSHA3990.pdf (last visited Jan. 10, 2021). As the acting head of OSHA has testified, this guidance is not "a substitute for enforcement." Testimony of Loren E. Sweatt, Principal Deputy Assistant Secretary, OSHA, Before the Subcommittee on Workforce Protections, Committee on Education & Labor, U.S. House of Reps., May 28, 2020, https://www.osha.gov/news/testimonies/05282020.

New York and other states have issued regulations and guidance in response to the pandemic to protect against workplace transmission and illness. Pursuant to the 29 U.S.C. § 667(b) jurisdictional savings clause, at least two states have adopted "State Plans" that contain emergency temporary standards addressing COVID-19 transmission. *See* COVID-19 Prevention—Emergency Temporary Standards, 8 Cal. Code of Regs. §§ 3205–3205.4 (Nov. 30, 2020); Emergency Temporary Standard—Infections Disease Prevention, SARS-COV-2 Virus That Causes COVID-10, 16 Va.

Admin. Code Ch. 220 (July 15, 2020). Pursuant to Executive Orders, the New York State Department of Economic Development (ESD) has issued guidance for specific industries identified as essential businesses. *See* ESD, N.Y. Forward, Statewide Guidelines, https://forward.ny.gov/statewide-guidelines. The State has directed that "[a]ll essential businesses that do not yet have issued industry Guidance must continue to comply with the guidance and directives for maintaining a clean and safe work environment issued by the Department of Health (DOH)." ESD, N.Y. Forward, Frequently Asked Questions (FAQ) on New York Forward and Business Reporting, https://esd.ny.gov/nyforward-faq. The New York State Department of Labor is accepting and investigating complaints by workers whose employers are not taking proper safety and health precautions. *See* N.Y.S. Dep't of Labor, Complaints Related to COVID-19 Regulations, https://labor.ny.gov/workerprotection/laborstandards/coronavirus-complaints.shtm. And the New York State Department of Health has issued guidance setting out protocols for essential personnel to return to work following COVID-19 exposure or infection. *See* N.Y.S. Dep't of Health, Protocols for Essential Personnel to Return to Work Following COVID-19 Exposure or Infection, Mar. 31, 2020, https://coronavirus.health.ny.gov/system/files/documents/2020/04/doh_covid19_essentialpersonnelreturntowork_rev2_033120.pdf. At the same time, New York statutes and common law setting forth duties for employers with respect to maintaining safe and healthy workplaces remain in force.

ARGUMENT

I. Primary jurisdiction is a narrow abstention doctrine that applies when an issue is committed to resolution in the first instance by an administrative agency.

Primary jurisdiction is a narrow exception to the federal courts' "virtually unflagging obligation ... to exercise the jurisdiction given them." *In re Joint Eastern and Southern District Asbestos Litig.*, 78 F.3d 764, 775 (2d Cir. 1996) (quoting *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976)); *see Cohens v. Virginia*, 6 Wheat. 264, 404 (1821) ("We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given."). "Primary jurisdiction applies where a claim is originally cognizable in the courts and comes into play whenever 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) (cleaned up). The "discretionary doctrine [is] used to fix forum priority when the courts and an administrative agency have concurrent jurisdiction over an issue." *Mrs. W. v. Tirozzi*, 832 F.2d 748, 758–59 (2d Cir. 1987) (citing *Far East Conference v. United States*, 342 U.S. 570, 574–75 (1952)); *Schiller v. Tower Semiconductor Ltd.*, 449 F.3d 286, 295 (2d. Cir. 2006) (stating that primary jurisdiction is a "prudential doctrine designed to allocate authority between courts and administrative agencies" (citation omitted)). When it applies, "the judicial

process is suspended pending referral of such issues to the administrative body for its views." *Western Pac. R.R. Co.*, 352 U.S. at 64.

A. As this Court has explained, the primary jurisdiction doctrine has a "narrow scope" and "applie[s] only when a lawsuit raises an issue … committed by Congress in the first instance to an agency's determination." *Goya Foods, Inc. v. Tropicana Products, Inc.*, 846 F.2d 848, 851 (2d Cir. 1988). "Whether there should be judicial forbearance hinges therefore on the authority Congress delegated to the agency in the legislative scheme." *Golden Hill Paugussett Tribe of Indians v. Weicker*, 39 F.3d 51, 59 (2d Cir. 1994) (citing *Ricci v. Chicago Mercantile Exch.*, 409 U.S. 289, 304 (1973)). The decision whether to abstain based on primary jurisdiction is discretionary and should turn on whether "the reasons for the existence of the doctrine are present and whether the purposes it serves will be aided by its application in the particular litigation." *Ellis v. Tribune Tel. Co.*, 443 F.3d 72, 82 (quoting *W. Pac. R.R. Co.*, 352 U.S. at 64).

The doctrine of primary jurisdiction serves two purposes. First, it fosters "uniformity and consistency in the regulation of business entrusted to a particular agency." *Goya*, 846 F.2d at 851 (quoting *Nader v. Allegheny Airlines, Inc.*, 426 U.S. 290, 303–04 (1976)) (cleaned up). Second, it "recognize[s] that, with respect to certain matters, 'the expert and specialized knowledge of the agencies' should be ascertained before judicial consideration of the legal claim." *Id.* (quoting *W. Pac.*

R.R., 352 U.S. at 64). "Courts seldom defer to an administrative agency where the issue is 'legal in nature and lies within the traditional realm of judicial competence.'" *Reed v. 1-800-Flowers.com, Inc.*, 327 F. Supp. 3d 539, 547 (E.D.N.Y. 2018) (quoting *Goya*, 846 F.2d at 851). Moreover, primary jurisdiction "does not require resort to an expensive and merely delaying administrative proceeding when the case must eventually be decided on a controlling legal issue wholly unrelated to determinations for the ascertainment of which the proceeding was sent to the agency." *Local Union No. 189, Amalgamated Meat Cutters & Butcher Workmen of N. Am., AFL-CIO v. Jewel Tea Co.*, 381 U.S. 676, 686 (1965) (cleaned up).

This Court has recognized that "[n]o fixed formula exists for applying the doctrine of primary jurisdiction," and its "[a]nalysis is on a case-by-case basis." *Ellis*, 443 F.3d at 82 (quoting *W. Pac. R.R. Co.*, 352 U.S. at 64; *Gen. Elec. Co. v. MV Nedlloyd*, 817 F.2d 1022, 1026 (2d Cir. 1987)). In light of the doctrine's purposes, the decision whether it applies and warrants abstention from deciding a case within a court's jurisdiction pending an administrative agency's action has "generally focused on four factors":

> (1) whether the question at issue is within the conventional experience of judges or whether it involves technical or policy considerations within the agency's particular field of expertise;
>
> (2) whether the question at issue is particularly within the agency's discretion;

(3) whether there exists a substantial danger of inconsistent rulings; and

(4) whether a prior application to the agency has been made.

Id. at 82–83 (citing *Nat'l Commc'ns Ass'n v. AT&T Co.*, 46 F.3d 220, 222 (2d Cir. 1995)). Those factors seek to capture "[t]he rationale behind the doctrine"—specifically, "a concern for maintaining uniformity in the regulation of an area entrusted to a federal agency [and] a desire for utilizing administrative expertise." *Id.* at 82 (citing *Texas & Pac. Ry. Co. v. Abilene Cotton Oil Co.*, 204 U.S. 426, 440 (1907); *Great Northern Ry. Co. v. Merchants' Elevator Co.*, 259 U.S. 285, 291 (1922)).

Primary jurisdiction is fundamentally different from preemption, but comparison of the two doctrines is helpful to elucidate the proper application of the primary jurisdiction doctrine. Preemption derives from the Supremacy Clause, which provides that federal law is "the supreme Law of the Land, ... anything in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const., art. VI, cl. 2. Pursuant to that constitutional principle, "Congress may consequently pre-empt, *i.e.*, invalidate, a state law through federal legislation." *Oneok, Inc. v. Learjet, Inc.*, 575 U.S. 373, 376 (2015). Preemption is thus Congress's exercise of its constitutional power to supplant substantive state law. And where Congress has manifested its intent to preempt state law, a federal statute or its implementing regulations may bar state-law claims. By contrast, the doctrine of primary

jurisdiction does not oust state law but allows a federal court to stay its hand while an administrative agency addresses the matter. The doctrine's "central aim" is not to override state law, but "to allocate initial decisionmaking responsibility between courts and agencies." *Ellis*, 443 F.3d at 81. When warranted, relying on the primary jurisdiction doctrine to dismiss without prejudice or stay a case is intended to allow the agency to exercise its authority and expertise, which can then inform the court's resolution of legal and factual issues. Congress's decision to restrict the preemptive effect of OSHA standards, *see supra* p. 5, and expressly to provide that the OSH Act does not "diminish or affect in any other manner" state-law liability, 29 U.S.C. § 653(b)(4), is strong evidence that application of the primary jurisdiction doctrine is unwarranted here.

B. Consistent with the principles that justify the primary jurisdiction doctrine, the Supreme Court and this Court have applied it only sparingly. The paradigmatic application of the doctrine of primary jurisdiction is when a court faces a *federal* claim that depends on a question of *federal* law, the resolution of which Congress has committed to a federal agency. For example, in *United States v. Western Pacific Railroad Co.*, the Supreme Court held that the district court should abstain in a case where the outcome depended on the interpretation and application of a regulatory classification. Three railroads sued the United States for allegedly paying it less than they were due for shipping munitions under rates set by federal law. The correct rate

depended on whether the cargo was properly categorized as "incendiary bombs" under regulations promulgated by the Interstate Commerce Commission. That question, the Court explained, depends on "a determination of the meaning of the term 'incendiary bomb' in [the regulation that] involves factors the adequate appreciation of which presupposes an acquaintance with many intricate facts of transportation." 352 U.S. at 66. Because "[i]t was the Commission and not the court which originally determined why incendiaries should be transported at a high rate," it was the Commission in the first instance that "should determine whether shipments of napalm gel bombs, minus bursters and fuses, meet those requirements." *Id.* at 68.

Similarly, in *Weinberger v. Bentex Pharmaceuticals, Inc.*, 412 U.S. 645 (1973), the Supreme Court explained that the "determination whether a drug is generally recognized as safe and effective within the meaning of [the federal Food, Dug, and Cosmetic Act] necessarily implicates complex chemical and pharmacological considerations." *Id.* at 654. Accordingly, "the District Court's referral of th[ose] issues to FDA was appropriate, as these are the kinds of issues peculiarly suited to initial determination by the FDA," and "[t]hreshold questions within the peculiar expertise of an administrative agency are appropriately routed to the agency, while the court stays its hand." *Id.* at 653–54.

Likewise, this Court has applied the doctrine when the claim depends on a question of federal law committed to resolution by a federal agency. *See, e.g.*, *Ellis*,

443 F.3d at 92–93 (FCC has primary jurisdiction over the question whether FCC regulations require a company to divest a television station); *Golden Hill Paugussett Tribe of Indians*, 39 F.3d at 60 (Bureau of Indian Affairs has primary jurisdiction over the question of federal recognition of tribal status). On the other hand, even when a case implicates an issue that falls within the ambit of a federal agency, this Court has not hesitated to retain jurisdiction when it "does not involve technical or policy considerations within the agency's particular field of expertise but instead simply requires [the court] to engage in an activity … that is the daily fare of federal judges." *Schiller*, 449 F.3d at 295 (question of statutory interpretation of Securities Exchange Act does not warrant application of primary jurisdiction).

Where, by contrast, the plaintiffs' claims arise under *state* law, not *federal* law, the doctrine of primary jurisdiction seldom applies. Thus, in *Nader v. Allegheny Airlines, Inc.*, 426 U.S. 290 (1976), the Supreme Court rejected the application of primary jurisdiction to a state common-law claim of fraudulent misrepresentation. The Court explained that "it may be appropriate to refer specific issues to an agency for initial determination" prior to the adjudication of "common-law rights and remedies," such as when a common law cause of action turns on the agency's interpretation of a filed tariff. *Id.* at 304 (citing *Southwestern Sugar & Molasses Co. v. River Terminals Corp.*, 360 U.S. 411, 417–418 (1959); *Western Pac. R.R. Co.*, 352 U.S. at 66–67). However, the Court explained, "[r]eferral of the

misrepresentation issue to the [agency] cannot be justified by the interest in informing the court's ultimate decision with … expert and specialized knowledge [because] [t]he action brought by petitioner does not turn on … a determination that could be facilitated by an informed evaluation of the economics or technology of the regulated industry." *Id.* at 305. The Court relied on the narrow scope of the doctrine of primary jurisdiction as applied to state-law claims: Where "[t]he standards to be applied in an action for fraudulent misrepresentation are within the conventional competence of the courts[,] the judgment of a technically expert body is not likely to be helpful in the application of these standards to the facts of this case." *Id.* at 305–06.

The courts of appeals continue to respect the doctrine's limited scope in cases arising under state law. For example, in *Ryan v. Chemlawn Corp.*, 935 F.2d 129 (7th Cir. 1991), a personal injury suit arising from injuries caused by pesticides, the Seventh Circuit reversed a decision dismissing the case based on the primary jurisdiction doctrine because the "state common law causes of action and remedies [] are not dependent on any EPA provisions." *Id.* at 132. The court reasoned that "there are thousands of state and federal tort cases brought each year alleging an automobile design or safety defect that are decided in the courts and not by the National Highway Safety and Transportation Board." *Id.* Analogously, it "fail[ed] to see how this claim is any different from the thousands of other personal injury

suits filed annually alleging a design defect or an inherently unsafe product that are regularly decided in the courts." *Id*. at 132; *see also Tassy v. Brunswick Hosp. Ctr.*, 296 F.3d 65, 70–71 (2d Cir. 2002) ("Because the issues involved [in state-law claim for wrongful termination] 'are neither beyond the conventional expertise of judges nor within the special competence of' the [state agency], the primary jurisdiction doctrine does not apply." (quoting *Fulton Cogeneration Assocs. v. Niagara Mohawk Power Corp.*, 84 F.3d 91, 97 (2d Cir. 1996))).

The few cases that apply the doctrine of primary jurisdiction to state-law claims also acknowledge the limits of the doctrine. In *Astiana v. Hain Celestial Group, Inc.*, 783 F.3d 753 (9th Cir. 2015), for example, the Ninth Circuit held that primary jurisdiction justified staying a claim that labeling food as "natural" violated state false advertising law because "[o]btaining expert advice from [FDA] would help ensure uniformity in administration of the comprehensive regulatory regime established by [federal law]." *Id.* at 761. In so holding, the court recognized a litany of limitations, explaining that "[n]ot every case that implicates the expertise of federal agencies warrants invocation of primary jurisdiction." *Id.* Furthermore, even where primary jurisdiction might otherwise be justified because of the role the state cause of action plays in a comprehensive federal regulatory framework, "courts must also consider whether invoking primary jurisdiction would needlessly delay the resolution of claims." *Id.*

II. The district court's dismissal based on primary jurisdiction was inconsistent with the cases of the Supreme Court and this Court.

The district court improperly dismissed the plaintiffs' state-law public nuisance and New York Labor Law § 200 claims arising from the defendants' failure to provide employees with reasonable and adequate safety and health protections, defying the limits found in the cases of the Supreme Court and this Court. As an initial matter, "[t]he threshold issue in determining whether [the primary jurisdiction] doctrine applies is whether both the court and an agency have jurisdiction over the same issue." *Golden Hill Paugussett Tribe of Indians*, 39 F.3d at 59 (citing *Ricci*, 409 U.S. at 299–300). Here, although OSHA has authority to issue a standard to address workplace safety regarding COVID-19, it is the district court—*not* OSHA—that indisputably has authority to adjudicate the plaintiffs' nuisance and § 200 claims—as the court recognized. *See* A-142 (citing *Atlas Roofing Co. v. Occupational Safety & Health Review Comm'n*, 430 U.S. 442, 445 (1977) ("existing state statutory and common-law remedies for actual injury and death remain unaffected" by the OSH Act); *Tufariello v. Long Island R.R. Co*., 458 F.3d 80, 86 & n.7 (2d Cir. 2006) (noting that the OSH Act does not preclude a negligence action for harm caused by the employer's failure to provide hearing protection)). Importantly, the OSH Act 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). That express preservation of state law embodies Congress's determination that courts, and not OSHA, have authority to adjudicate these state-law claims.

Courts have decades of experience adjudicating these types of state-law claims, which fall within the heartland of judicial expertise. *See, e.g.*, *Cammon v. City of New York*, 95 N.Y.2d 583, 590 (2000) (permitting claim for violation of New York Labor Law § 200 to proceed); *Copart Indus., Inc. v. Consol. Edison Co. of New York*, 41 N.Y.2d 564, 568 (1977) (a public nuisance "is actionable by the individual person or persons whose rights have been disturbed"). And the issue of compliance with *New York* workplace health and safety requirements is not within OSHA's authority. OSHA does not set New York law, and New York workplace safety and health requirements may exceed federal requirements—especially where, as here, OSHA has already declined to issue federal requirements. *See In re AFL-CIO*, 2020 WL 3125324. For the same reason, there is no risk of inconsistent rulings. The defendants' compliance with New York's workplace safety and health laws would not interfere with their compliance with federal standards, where OSHA has stated that it will not issue federal standards with respect to COVID-19. "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." *Astiana*, 783 F.3d at 761.

Moreover, "primary jurisdiction is not required when a referral to the agency would significantly postpone a ruling that a court is otherwise competent to make." *Id.* (citing *Amalgamated Meat Cutters*, 381 U.S. at 686). Here, the plaintiffs' claims are based on grave risks to their health during a devastating pandemic that claims thousands of lives daily. The urgency of this crisis warrants the most expeditious resolution of their claims. As the Supreme Court has explained, "the doctrine of primary jurisdiction is not a doctrine of futility" that "require[s] resort to an expensive and merely delaying administrative proceeding when the case must eventually be decided on a controlling legal issue wholly unrelated to determinations for the ascertainment of which the proceeding was sent to the agency." *Amalgamated Meat Cutters*, 381 U.S. at 686 (cleaned up). Particularly given OSHA's affirmative decision not to issue relevant standards and the slow pace of federal rulemaking, there is no warrant to delay resolution of the plaintiffs' state law claims.

CONCLUSION

For the foregoing reasons and the reasons stated in the brief of plaintiffs-appellants, the district court's decision should be reversed with respect to its dismissal of plaintiffs-appellants' state-law claims on the basis of primary jurisdiction.

Dated: January 19, 2021

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The brief complies with Fed. R. App. P. 32(a)(5) and (6); it was prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Times New Roman. This brief contains 4,960 words, excluding the portions exempted by Fed. R. App. P. 32(a)(7)(B)(iii), if applicable.

/s/
Allison M. Zieve

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Second Circuit on January 19, 2021, by using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/
Allison M. Zieve