20-3989-cv

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

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

Plaintiffs – Appellants,

v.

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

Defendants – Appellees,

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

REPLY BRIEF FOR PLAINTIFFS-APPELLANTS

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I. INTRODUCTION

Amazon's brief preemptively complains about the breadth of the injunctive relief Plaintiffs seek, injunctive relief that no court has yet issued. Meanwhile Amazon asks this court to make sweeping legal pronouncements right now—such as that "public-nuisance law does not govern conditions at a private business" no matter how dangerous they are, Br. for Defendants-Appellees ("Br.") 45-46, and that employees can never sue for workplace injury but may only petition OSHA to remedy unsafe conditions. Br. 51.

Amazon's policy arguments and overheated rhetoric obscure the fact that this appeal arises at the motion to dismiss stage, where allegations in the complaint must be taken as true and inferences must be resolved in Plaintiffs' favor. All Plaintiffs seek from this Court is the ability to continue pursuing their claims in a judicial forum, rather than being required to start from scratch to seek redress from an agency whose authorizing statute, the OSH Act, contemplates dual common-law and agency enforcement. This Court should either vacate the district court's opinion in its entirety, or vacate the portion deferring to OSHA's primary jurisdiction and certify the remaining state law questions to the New York Court of Appeals under Local Rule 27.2.

II. ARGUMENT

A. This Court Has Jurisdiction Over Plaintiffs' Claims for Injunctive and Declaratory Relief.

1. With Respect to Their Public Nuisance and § 200 Claims, Plaintiffs Have Alleged an Ongoing Concrete, Particularized Injury That Is Traceable to Amazon's Conduct and Redressable by the District Court.

Amazon appears to concede that fear of catching and spreading a contagious disease is a concrete injury for Article III purposes. Amazon instead challenges Plaintiffs' injuries-in-fact as insufficiently particularized, dismissing their allegations as generalized and undifferentiated. But Plaintiffs' complaint details, in hundreds of fact-filled paragraphs, the specific conditions at JFK8 that place Employee Plaintiffs at risk of contracting and spreading COVID-19, and that cause Household Plaintiffs to fear contracting COVID-19 from their Employee Plaintiff cohabitants. App. 88-120 ¶¶84-341.

Plaintiffs do not allege a fear of being exposed to the virus by "entering a public space," a fear "common to society at large." Br. 14. They specifically tie their fear of the disease to the ten-hour shifts Employee Plaintiffs spend inside the JFK8 fulfillment center, a private space made uniquely dangerous by Amazon's failure to follow state law. App. 88 ¶¶89-91; 119 ¶¶332-35; 120 ¶340.

Amazon next charges that Plaintiffs' fear of exposure to COVID-19 is not fairly traceable to the productivity and leave policies they challenge, Br. 15, citing *Clapper v. Amnesty International USA*, 568 U.S. 398, 409 (2013). But *Clapper*

was decided at the summary judgment stage, where the plaintiffs were required to adduce affidavits or other evidence to establish the elements of standing. *Id.* at 412. When a case is at the pleading stage, as here, Plaintiffs must simply allege specific facts supporting each element of their claim. *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016); *see also John v. Whole Foods Mkt. Grp., Inc.*, 858 F.3d 732, 736-37 (2d Cir. 2017) (establishing injury-in-fact at the pleading stage is "a low threshold" and general allegations must be presumed to "embrace those specific facts" necessary to support the claim). The complaint clearly alleges how each of the Amazon practices Plaintiffs challenge increases the risk of transmission of COVID-19 within JFK8 and beyond. App. 92-93 ¶¶125-128 (Amazon's leave policies cause workers to attend work when sick, exacerbating spread of the virus); 108-109 ¶¶245-256 (Amazon's productivity requirements increase risk of virus spread by preventing workers from washing their hands, sanitizing their work stations, and observing social distancing); 112 ¶¶282-284 (Amazon does not follow proper contact tracing protocols and discourages infected workers from telling others they may be at risk).

Finally, Plaintiffs' requested injunctive relief precisely targets each of the Amazon practices they identify as increasing transmission risk at the facility, satisfying redressability. *Compare* App. 123 ¶362(c)(i) (requiring clear communication of leave policies) *with* App. 92-93 ¶¶125-128 (alleging that

confusing leave policies cause workers to attend work sick); *compare* App. 123-24 ¶362(c)(ii)-(iv) (requiring continued relaxation of productivity policies, and communication of those relaxed policies to all workers) *with* App. 107 ¶¶236-240 (alleging that the relaxation of productivity requirements was not clearly communicated to workers, resulting in unsafe working conditions). Amazon charges that the degree to which these changes will reduce Plaintiffs' risk of infection is speculative, but any reduction in risk is sufficient. *Massachusetts v. EPA*, 549 U.S. 497, 526 (2007).

2. With Respect to Their § 191 Claim, Employee Plaintiffs Have Alleged a Substantial Risk of Suffering Pecuniary Harm from Amazon's Failure to Timely Pay for All Quarantine Leave.

Employee Plaintiffs' concerns that Amazon will fail to promptly and accurately pay employees if they need to take leave under New York's paid leave law are based on the experiences of Plaintiffs Chandler and Bernard, not, as Amazon characterizes, speculation. Br. 16-17; App. 122-23 ¶¶359-361. After Chandler and Bernard attempted to take quarantine leave, Amazon failed to pay them on their next regular paycheck, as required. Instead, Chandler and Bernard received partial pay only after repeated phone calls over a span of many weeks. App. 97-103 ¶¶167-211. Notably, the allegations describing the Injunction Class's imminent injuries specifically allude to the fact that the class is "subject to the same pay policies as Plaintiffs Bernard and Chandler." App. 122-23 ¶¶359-361.

Nor are Employee Plaintiffs required to allege that the risk of needing to take quarantine leave and not being paid for it is "certainly impending." Br. 17 (citing *Clapper*, 568 U.S. at 410). The "certainly impending" standard is only one of two alternate formulations of imminent injury that the Supreme Court has endorsed. *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158 (2014). Plaintiffs also have standing when they allege a "substantial risk that the harm will occur." *Id.* (quoting *Clapper*, 133 S. Ct. 1146, 1150 n.5). Based on the complaint's plausible allegations of increased risk of COVID-19 spread at JFK8 and its detailed allegations regarding Amazon's past failures with respect to quarantine leave, Employee Plaintiffs' allegations that these failures will continue in the future and injure them can satisfy either the "substantial risk" or "certainly impending" standard.

3. Plaintiffs' Allegations Regarding Amazon's Productivity Policies Are Not Moot.

Amazon boldly asserts that Plaintiffs' claims regarding work-rate and Time Off Task ("TOT") are moot because Amazon suspended these requirements in March 2020, even though it never communicated that suspension directly to workers at JFK8 until July and reinstated productivity feedback in October. Br. 17-18; *see also* App. 131 n.6 (district court noting reinstatement of Amazon's productivity feedback). Amazon attempts to split hairs, arguing that the reinstated productivity feedback differs from pre-pandemic productivity feedback, but these

vague claims require further fact development. "A claim will not be found moot if the defendant's change in conduct is merely superficial or suffers from similar infirmities as it did at the outset." *Am. Freedom Def. Initiative v. Metro. Transp. Auth.*, 815 F.3d 105, 109 (2d Cir. 2016) (citations and alterations omitted).

Even before Amazon reinstated productivity feedback, Plaintiffs alleged that Amazon's communications about its relaxed productivity feedback were inadequate. Specifically, because information about relaxed requirements was only communicated in a couple of written bulletins, workers who did not read those bulletins or who began work at JFK8 after they appeared would not know about the policy. App. 106 ¶¶230-34; App. 109 ¶260. And managers continued to post rate goals on white boards after July 13, 2020, sending at best a mixed message about whether productivity feedback remained in place. App. 107 ¶240. The controversy over Amazon's productivity policies was still live on July 28, 2020 when Plaintiffs filed their amended complaint, and it is at least as live today now that Amazon has walked away from its temporary relaxation of those policies.

B. The Primary Jurisdiction Doctrine Does Not Apply to Plaintiffs' Public Nuisance and § 200 Claims.

Amazon describes Plaintiffs' requested relief in this case as "legislation by injunction," invoking *Kappelmann v. Delta Air Lines, Inc.*, 539 F.2d 165, 169 (D.C. Cir. 1976). But *Kappelman* was premised on the D.C. Circuit's recognition that Congress gave the Department of Transportation rulemaking authority for the

purpose of ensuring uniformity in interstate transportation of hazardous material. *United States v. Philip Morris USA Inc.*, 686 F.3d 832, 838 (D.C. Cir. 2012) (citing *Kappelman*, 539 F.2d at 170). Congress expressed no similar concern about uniformity when creating OSHA, as evidenced by the multiple provisions in the OSH Act protecting state common law claims and state safety standards from preemption.

Amazon also points to the breadth of OSHA's investigatory and inspection powers, Br. 21-22. But Plaintiffs do not need OSHA to conduct an inspection of JFK8, or use any of its technical expertise, to determine that Amazon's productivity and leave policies make the workplace unsafe. Amazon's employees already know this from their own firsthand experience, and several occupational health experts confirm it. *See* Occupational Health Physicians & Public Health Experts Br. 3-12.

For the same reason, Amazon's reminder that "[n]othing prevents Plaintiffs" from seeking an OSHA inspection "even now" is irrelevant. Br. 29. Just because Employee Plaintiffs *can* seek certain forms of relief from OSHA does not mean that they *must* do so before availing themselves of the courts. Neither the OSH Act nor the primary jurisdiction doctrine requires such exhaustion.

Far from a "sweeping injunction that would take over operations at JFK8," Br. 27, the injunctive relief sought is targeted to remedying a few discrete leave

and productivity policies that the complaint closely ties to the risk of virus spread. Amazon argues that certain aspects of that requested relief are more specific than what the NY Forward minimum standards require. Br. 23-24. This might be a good argument for Amazon to make on the merits, but it is unrelated to primary jurisdiction. Amazon does not state, for example, that OSHA would be able to grant the leave- and productivity-related relief that Plaintiffs seek. Amazon instead seems to argue that because it is an essential business, it should be able to operate without the "legal uncertainties" of regulation or judicial supervision. Br. 29. The prudential primary jurisdiction doctrine should not be used to create such an enforcement vacuum.

C. Plaintiffs State a NYLL § 200 Claim.

1. The OSH Act Does Not Preempt Plaintiffs' NYLL § 200 Claim.

New York Labor Law § 200 is not preempted by the OSH Act.[1] In passing the OSH Act, Congress "expressly saved two areas from federal pre-emption." *Gade v. Nat'l. Solid Wastes Mgmt. Ass'n.*, 505 U.S 88, 96 (1992). If either

[1] Plaintiffs dispute that the Court may reach the question of OSH Act preemption, because "in the absence of a cross-appeal, [an appellate court cannot] chang[e] a dismissal without prejudice to a dismissal with prejudice." *Standard Inv. Chartered, Inc. v. Nat'l Ass'n of Sec. Dealers, Inc.*, 560 F.3d 118, 126 (2d Cir. 2009). The district court dismissed Plaintiffs' § 200 claim without prejudice under the doctrine of primary jurisdiction. App. 151. But if Amazon successfully asserts OSH Act preemption, that would result in a dismissal with prejudice, "enlarg[ing] its rights under a judgment on appeal without taking a cross-appeal." *Standard Inv. Chartered, Inc.*, 560 F.3d at 126.

exception applies here, the Court should reject Amazon's preemption arguments. Both carveouts from preemption apply.

First, the OSH Act declares that nothing in the Act shall be interpreted to supersede or otherwise affect "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). Section 653(b)(4) expressly preserves state tort and statutory claims like NYLL § 200, which is "a codification of the common-law duty of property owners and general contractors to provide workers with a safe place to work." *Rocha v. GRT Constr. of New York*, 44 N.Y.S.3d 149, 149 (2d App. Div. 2016) (internal quotation and citation omitted); *see also Businesses for a Better New York v. Angello*, 341 F. App'x 701, 706 (2d Cir. 2009).[2]

Congress was clearly aware of state law health and safety schemes when considering the OSH Act in 1970, as numerous states had long-standing statutory schemes that touched on workplace safety. Section 200 had been in effect for 61 years prior to the passage of the OSH Act and served to codify the common law

[2] Amazon admits that "garden-variety tort suits" are not preempted, Br. 33, but argues that Plaintiffs' § 200 claim is "an attempt to craft a wide-ranging workplace safety regime." *Id.* Elsewhere, however, Amazon argues that § 200 claims are analyzed in the same way as common-law negligence claims. Br. 30-31. Regardless of the purported novelty of Plaintiffs' claims, at the pleading stage their allegations are sufficient to state a § 200 claim that Amazon has breached its duty to provide a safe workplace.

duty to furnish a safe place to work. *See Peloso v. City of New York*, 210 A.D. 265, 268-69 (App. Div. 1924). And yet Congress expressly included the savings clause in 29 U.S.C. § 653(b)(4). The "case for federal preemption is particularly weak where Congress has indicated its awareness of the operation of state law in a field of federal interest and has nonetheless decided to stand by both concepts and to tolerate whatever tension there is between them." *Bonito Boats, Inc. v. Thunder Craft Boats*, 489 U.S. 141, 166-67 (1989). The savings clause in 29 U.S.C. § 653(b)(4) should be the final word on Amazon's preemption argument.[3]

Second, the OSH Act provides a path for state agencies and courts to "assert[] jurisdiction under State law over any occupational safety or health issue with respect to which no standard is in effect under section 655 of this title." *Id.* § 667(a). To date, OSHA has expressly declined to promulgate an occupational standard relating to COVID-19. *In re Am. Fed'n of Labor*, No. 20-1158, 2020 WL 3125324, at *1 (D.C. Cir. June 11, 2020). Amazon argues that OSHA "has promulgated numerous federal standards requiring employers to take safety

[3] Amazon's unsupported claim that the OSH Act's general duty clause preempts Plaintiffs' § 200 claim (Br. 32-33) deserves short shrift. That argument is inconsistent with the express language in the OSH Act permitting workers to bring state law claims in cases where employers breach their duties to workers. Furthermore, this argument reads 29 U.S.C. § 667(a) out of the Act entirely. Under Amazon's reading, all state laws regarding workplace safety and health would be preempted whether or not OSHA had promulgated a standard on the question at issue, but § 667(a) of the Act expressly "preserv[es] . . . state authority in the absence of a federal standard." *Gade*, 505 U.S. at 100.

measures *against COVID-19*." (Br. 32 (emphasis added)). But it cites only to general sanitation controls that make no mention of COVID-19. Br. 32.

Even if OSHA were to issue an emergency temporary standard ("ETS") relating to COVID-19, such a standard would not result in preemption of § 200, which sits firmly within the savings clause of 29 U.S.C. § 653(b)(4). Amazon may argue that such a standard would preempt certain aspects of New York Forward, but New York Forward is not a workplace health and safety regime. It is a set of rules, promulgated by New York state, to ensure that businesses do not contribute to the spread of COVID-19 among the public generally. Businesses must comply with the scheme in their capacity as employers and when they service customers. It is a law of "general applicability" that regulates the conduct of workers and non-workers alike, and it "would generally not be preempted," even if OSHA had promulgated a standard on a given issue. *Gade*, 505 U.S. at 107; *see also Steel Inst. of New York v. City of New York*, 832 F. Supp. 2d 310, 324 (S.D.N.Y. 2011) ("there can be no 'field preemption' if State law is one of general applicability within the meaning of *Gade*").

Furthermore, even if New York Forward were preempted by a future ETS, that would not mean that Plaintiffs' § 200 claims should be determined at the pleadings stage to be preempted, because § 200 still establishes a general duty of care independent of New York Forward.

2. Plaintiffs Need Not Plead Physical Injury to State a NYLL § 200 Claim.

Assuming, arguendo, that § 200 codifies a common-law negligence claim, including the injury element of such a claim, Plaintiffs have sufficiently alleged past and ongoing injury to state a claim for relief. *See* App. 120 ¶¶339-40 (allegations of physical, pecuniary and emotional injuries resulting from Amazon's breach). Nothing in § 200 forecloses Plaintiffs from seeking injunctive relief to redress their ongoing harm.

Amazon's argument to the contrary relies on an overbroad reading of *Caronia v. Philip Morris USA, Inc.*, 22 N.Y. 3d 439 (2013). As discussed in Plaintiffs' opening brief (Pls. Br.) at 47, *Caronia* does not foreclose a NYLL § 200 claim from seeking prospective relief, even if § 200 requires a Plaintiff to allege that they have *already* experienced injury.

If the plaintiff establishes the elements of the claim, including preexisting and ongoing injury, the court has the inherent authority to issue equitable remedies, including an injunction. *See Smith v. W. Electric Co.,* 643 S.W.2d 10, 13 (Mo. Ct. App. 1982) (holding that employee stated a claim for violation of common-law duty to provide a safe workplace and noting that "Plaintiff should not be required to await the harm's fruition before he is entitled to seek an inadequate remedy"); *Hillside Prop. Owners Ass'n, Inc. v. Salanter Akiba Riverdale Acad.*, 338 N.Y.S.2d 482, 484 (1972) (reversing dismissal of claims seeking injunctive relief to prevent

future damages and holding that it would "defy common sense" to "defer trial of the issues presented to a future date, for possible future abatement"); *see also Porter v. Warner Holding Co.*, 328 U.S. 395, 398 (1946) ("Unless otherwise provided by statute, all the inherent equitable powers of the District Court are available for the proper and complete exercise of that jurisdiction.").

A court's exercise of its equitable authority to order injunctive remedies in the face of violations of NYLL § 200 is consistent with the statute's purpose. Here, the statute establishes a "general duty to protect health and safety of employees." NYLL § 200. To prevent those workers from seeking protection from those harms would undermine the statute's purpose.[4] And although Amazon argues that § 200 is "primarily remedial," Br. 36, the same case on which it bases that conclusion recognizes the important regulatory purposes of the scheme because it ensures compliance with those requirements. *See Irwin v. St. Joseph's Intercommunity Hosp.*, 665 N.Y.S.2d 773, 779 (1997).[5]

[4] That the state may post a notice advising of unsafe conditions (enforceable via suit for injunctive relief) is not inconsistent with the availability of injunctive relief in court to restrain unsafe conditions in a suit brought by either private plaintiffs or the state. *See* Br. 37.

[5] That courts have described § 200 as a conduct-regulating statute in the choice-of-law context is not irrelevant. *See* Br. 37. To the contrary, it supports Plaintiffs' position that the statute is a prophylactic one pursuant to which a plaintiff may seek injunctive relief. *Huston v. Hayden Bldg. Maint. Corp.*, 617 N.Y.S.2d 335, 337 (2d App. Div. 1994).

Furthermore, it is not at all clear that NYLL § 200 requires Plaintiffs to plead preexisting injury. Although the statute sounds in negligence, it has a distinctly prophylactic purpose. *See* N.Y. Lab. L. § 200(1) ("All places to which this chapter applies *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 or lawfully frequenting such places.") (emphasis added). Thus, even if Employee Plaintiffs had not sufficiently pled past harm resulting from Amazon's conduct, their § 200 claims should still not be dismissed.

D. Plaintiffs State a Claim for Public Nuisance.

Amazon fails to respond to the central allegation in this case: it is Amazon's operation of the JFK8 facility in violation of state public health guidelines—not COVID-19 *itself*—that is a public nuisance. This claim does not involve a novel use of public nuisance law: Plaintiffs allege that Amazon's JFK8 facility is a source of harmful emissions, spewing dangerous substances into the surrounding community. *See Fresh Air for the Eastside, Inc. v. Waste Mgmt. of N.Y., L.L.C.*, 405 F. Supp. 3d 408, 420 (W.D.N.Y. 2019) (denying motion to dismiss public nuisance claim against landfill "emitting noxious odors and excess fugitive emissions"). But here, instead of pollutants or chemicals, the substance at issue is a deadly virus.

Amazon, not surprisingly, disputes this characterization of its conduct. But whether Amazon's conduct amounts to a public nuisance is not a question that should be resolved on a motion to dismiss, particularly in light of the "permissive" standard courts apply when assessing public nuisance pleadings. *See Connecticut v. Am. Elec. Power Co.*, 582 F.3d 309, 370 (2d Cir. 2009), *rev'd on other grounds*, 564 U.S. 410 (2011). The relevant question at this stage is not whether Amazon is in fact spewing COVID-19 like a polluting factory. The question is whether Plaintiffs have plausibly pled that Plaintiffs experience "special harm" from Amazon's conduct such that they can seek redress for Amazon's alleged violations.

1. Plaintiffs Plausibly Allege Special Harm.

Amazon's alleged conduct increases risk of spreading COVID-19 into the environment, and it strains healthcare resources by causing the spread of disease among workers, their family members, and the public. In this way, Amazon's conduct during the COVID-19 pandemic interferes with a public right.

But not every member of the public can sue Amazon for public nuisance. Plaintiffs, Amazon employees and family members, can bring suit because they plausibly allege special harm in the form of the direct and distinct risks and harms Amazon's conduct causes them. App. 118-19 ¶¶331-35. If Amazon were emitting COVID-19 into the air around JFK8, the immediate landowners could bring public

nuisance claims. *Fresh Air for the Eastside*, 405 F. Supp. 3d at 444 ("Compared to individuals who do not own property or reside nearby and are merely affected by the Landfill's impact on public spaces, Plaintiffs' alleged injuries constitute a 'special injury.'"). But Plaintiffs assert even stronger allegations of special harm because Amazon's conduct causes them direct emotional, physical, and pecuniary harms. Pls.' Br. 35-37. Members of the public can exercise discretion to minimize the risks posed to them by Amazon's conduct by choosing not to have close contact with Amazon workers. But Plaintiffs are at the whim of Amazon and its decision to follow or ignore public health guidance. *Id.*; *see also Fresh Air for the Eastside*, 405 F. Supp. 3d at 444.[6]

Amazon argues, and the district court agreed, that Plaintiffs did not allege special harm because, in essence, COVID-19 is everywhere. App. 140; Br. 40. But Courts in New York recognize that special harm may occur even where the

[6] Even if the alleged special harm were only an increased risk of contracting COVID-19 (which it is not), that allegation is sufficient at the pleading stage because the difference in risk Plaintiffs experience as a direct result of Amazon's alleged failure to abide by public health guidance is so great as to constitute a difference in kind, and not merely of degree. *C.f. Am. Elec. Power Co.*, 582 F.3d at 369 (concluding that land trusts "will suffer harms different in kind from the harms suffered by other members of the public, including individual landholders" because of the magnitude of their land ownership); *Farmer v. D'Agostino Supermarkets, Inc.*, 544 N.Y.S.2d 943 (Sup. 1989) (recognizing special injury to plaintiff homeless people from defendant supermarket's refusal to accept recycled cans as required by state statute because plaintiffs' "livelihood is impaired," and noting that a contrary ruling would "ignore the huge disparity in economic position between the homeless and others in our city").

nuisance caused by the defendant's conduct contributes to a broader public health crisis that may have many different causes and contributors. *See, e.g.*, *Am. Elec. Power Co.*, 582 F.3d at 316 (upholding public nuisance claims against power companies that plaintiffs alleged were "substantial contributors" to elevated levels of carbon dioxide); *Stock v. Ronan*, 313 N.Y.S.2d 508 (Sup. 1970) (plaintiff, who was at increased risk from air pollution due to his diseased lung, could maintain nuisance action against bus terminal operator for allowing idling motors in terminal through which he commuted); *Meeker v. Van Rensselaer*, 15 Wend. 397 (N.Y. Sup. Ct. 1836) (crowded tenement house tending to breed disease may be public nuisance, "*especially* during the prevalence of a [communicable] disease") (emphasis added)).

Amazon relies on *Burns Jackson Miller Summit & Spitzer v. Lindner*, 59 N.Y. 2d 314, 334-35 (1983) for the proposition that when harm "becomes so general and widespread as to affect a whole community, the injury is not peculiar and the action cannot be maintained." *See* Br. 39. In *Burns Jackson*, however, the whole community was affected in the same way *by the defendants' actions*—an unauthorized transit strike. *Id.* Plaintiffs do not allege that Amazon has caused this pandemic and need not show special harm from COVID-19 relative to the public generally. They allege that Amazon's specific actions in violation of state law pose

distinct risks and harms to the public during the pandemic, and also plausibly allege that Amazon's actions cause them special harm.

Members of the public may be at risk of contracting COVID-19—through community spread at the grocery store, for example. But Plaintiffs uniquely bear the risks associated with Amazon's allegedly tortious misconduct. Amazon's failure to abide by the public health requirements set out in New York Forward, not the general risks posed to members of the public by COVID-19, exposes Plaintiffs—JFK8 workers and their family members—to a unique set of harms, including the decision not to see a dying family member. Pls.' Br. 36. And as employees subject to Amazon's policies, or family members who live with those employees, Plaintiffs cannot avoid these harms without risking their livelihoods.

Plaintiffs also allege specific pecuniary and physical injuries, which typically constitute special harm sufficient to assert private claims for a public nuisance. Barbara Chandler alleges, for example, that she contracted COVID-19 at JFK8 and then brought the virus home to a family member who died.[7] App. 73 ¶4. Chandler does not assert that "anyone who gets sick during a pandemic may bring a private action seeking to enjoin a public nuisance." Br. 43. But when a private

[7] This argument is not barred by workers' compensation exclusivity, Br. 42-43, because Chandler does not seek damages arising from these injuries. Plaintiffs merely rely on these facts to support the argument that they have alleged special harm.

entity violates state public health law, thereby meaningfully exacerbating the spread of a virus among the public, that is a public nuisance. And when that conduct causes physical injury to an employee who had no choice but to subject herself to dangers posed by her work and who now experiences the ongoing trauma of having brought the virus home to a family member who died of COVID-19, she has standing to sue for redress. *See Ileto v. Glock*, 349 F.3d 1191, 1212 (9th Cir. 2003).

As for pecuniary harm, in contrast to the widespread economic losses suffered by the public at large, *see* App. 82, and the financial harm likely to occur as a result of community spread, *see* App. 119, Plaintiffs experience economic losses directly tied to Amazon's conduct, including its refusal to maintain a safe work environment. Some plaintiffs missed work without pay (for as long as they could afford it) to protect themselves and others, App. 95 ¶148; 97 ¶167, and were later underpaid by Amazon for COVID-19 leave. These specific losses do not affect the "whole community," *Burns*, 59 N.Y. 2d at 335.

Plaintiffs did not waive the argument that they suffered special harm from financial loss in addition to the risk of COVID-19. Those injuries are two sides of the same coin. Plaintiffs suffered special harm precisely because, unlike members of the public who can avoid a nuisance without significant personal cost, Plaintiffs faced the choice between their "livelihoods" and increased risk of transmission of

COVID-19. *See* App. 7 (Plaintiffs' counsel explaining that what distinguishes the employee-Plaintiffs' harm from that of the public is that "the livelihoods of the workers are at stake"). This remains a daily dilemma. Every time a JFK8 employee has to decide to go to work for an employer that flouts New York's COVID-19 safety protocols, or to miss work because of Amazon's practices, they are sacrificing safety for money or vice versa. Unlike ordinary New Yorkers, when the Employee Plaintiffs took the time necessary to properly wash their hands and clean their workstations, they risked financial ruin. In the end, Plaintiffs have for months suffered both increased risk of transmission and financial injury as a result of Amazon's practices. *See, e.g.*, Pls.' Br. 35-37.

2. There Is No Prohibition on Public Nuisance Claims Originating in the Workplace.

Amazon's suggestion that Plaintiffs may not pursue their public nuisance claim because the conditions that give rise to their claims arose in their workplace is a strawman. Br. 45. A public nuisance claim lies where there is "some interference with a public right." *American Elec. Power Co.*, 582 F.3d at 369 (quoting Restatement (Second) of Torts, § 821B).

A facility spewing pollution is not immune from the law of public nuisance just because it is also a workplace. Here, Plaintiffs allege that Amazon's conduct facilitates spread of COVID-19 at JFK8, which in turn spreads beyond the facility and into the larger community, interfering with the public health. *See 532 Madison*

Ave. Gourmet Foods, Inc. v. Finlandia Ctr., Inc., 96 N.Y.2d 280, 292 (2001) (nuisance "may arise from varying types of conduct"); *Copart Indus., Inc. v. Consol. Edison Co. of New York*, 41 N.Y.2d 564, 569 (1977) ("nuisance, as a general term, describes the consequences of conduct, the inconvenience to others, rather than the type of conduct involved").

E. Workers' Compensation Exclusivity Does Not Bar Plaintiffs' Claims for Injunctive Relief.

New York's Workers' Compensation Law ("NYWCL") was not designed to keep workers, like Employee Plaintiffs, from seeking an injunction in court to correct unsafe workplace practices and prevent an injury from taking place. As Plaintiffs and *amici* have explained at length, the statute's text, history, purpose, and structure make clear that NYWCL § 11, the statute's exclusivity provision, bars only retrospective claims for damages—not equitable claims for prospective relief. *See* Pls.' Br. 41-45; New York Br. 16-21; Nat'l Employment Law Project Br. 6-19.

Read in full, NYWCL § 11 makes workers' compensation benefits exclusive of "any other liability whatsoever" to an employee or other persons "entitled to recover damages, contribution or indemnity . . . on account of [] injury or death." While Amazon zeroes in on the statute's use of the term "liability," Br. 48-49, it is well established that "words to be interpreted are not considered in isolation." *King v. Time Warner Cable Inc.*, 894 F.3d 473, 477 (2d Cir. 2018). And read altogether,

the "liability" at issue in NYWCL § 11 is delimited to liability for retrospective "damages" claims arising from work-related "injury or death." *See also id.* § 10 (statute provides "compensation for [employees'] disability or death from injury"). Forward-looking claims for injunctive relief do not fall within the provision's plain text.

Amazon's effort to re-calibrate the careful "balance" struck by the NYWCL, *Gonzales v. Armac Indus., Ltd.*, 81 N.Y.2d 1, 9 (1993), similarly depends on lifting lines out of context. For example, the Court of Appeals of New York did describe the NYWCL as helping employers "avoid[] [] litigation." Br. 49 (quoting *Noreen v. Vogel & Bros.*, 231 N.Y. 317, 321 (1921)). But it also stated that in enacting this law, the New York Legislature had only exercised its power under the State constitution to "curtail the right of an injured party to maintain an action to recover damages for an injury *sustained*." *Noreen*, 231 N.Y. at 321 (emphasis added); *see also Acevedo v. Cons. Edison Co. of N.Y., Inc.*, 596 N.Y.S.2d 68, 71 (App. Div. 1993) (stating that the "exclusive reach of § 11" extends to actions for "recovery at law"). The NYWCL does not provide employers with unbounded "immunity" from suits regarding workplace safety. *Contra* Br. 49. None of the cases that Amazon cites stands for the proposition that the NYWCL precludes claims for injunctive relief.

As Amazon's own authority explains, the "quid pro quo" at the heart of the NYWCL concerns monetary recoveries for retrospective injuries: Injured employees received "compensation in the amount fixed by the statute" even where the employer was "free from fault"; in turn, employers escaped liability for "compensation beyond the statutory provision" even where "grievous[ly]" at fault and where the extent of injury exceeded "the compensation provided by the statute." *In re Babb*, 264 N.Y. 357, 361 (1934). Section 11 thus prevents employees entitled to NYWCL benefits from obtaining "compensation beyond the statutory provision" in the form of a court-ordered damages award. *See also Werner v. State*, 441 N.Y.S.2d 654, 657 (1981) (describing the "purpose" of NYWCL § 11 as "foreclose[ing] the possibility of duplicative recoveries). Yet § 11 may not be stretched further, to bar Employee Plaintiffs' equitable claims, without distorting the workers' compensation scheme.

F. New York's Leave Law Payments are Subject to NYLL § 191's Frequency of Pay Provisions.

Plaintiffs have demonstrated that, in dismissing their NYLL § 191 claim, the district court mistakenly equated sick pay provided at an employer's discretion with the payment of wages mandated by the Leave Law. *See* Pls.' Br. 52-54. Amazon does little to rescue the district court's flawed reasoning.

Rather than meaningfully distinguish leave law payments from wages subject to § 191, Amazon mischaracterizes Plaintiffs' and *amicus* New York's

arguments. Before the district court, Plaintiffs argued that leave law payments constitute "legally obligated wage replacements," ECF 68, at 20, not "benefits or wage supplements" as defined by NYLL § 198-c. Contrary to Amazon's representations, Br. 55, Plaintiffs have not shifted this position on appeal. *See, e.g.*, Pls.' Br. 51 (describing leave law payments as "wage replacement[s]").

Neither has the State of New York disclaimed that leave law payments are "wages" subject to § 191's frequency-of-pay provisions. *Contra* Br. 57. The brief submitted by *amicus* New York merely underlines Plaintiffs' point that Amazon is obliged to follow the New York Department of Labor's interpretation of the Leave Law, *see* Pls.' Br. 52 (citing *Samiento v. World Yacht Inc.*, 10 N.Y.3d 70, 79 (2008)), regardless of the Court's interpretation of the scope of § 191. *Amicus*' argument in no way undermines Plaintiffs' position that because leave law payments constitute "wages," § 191 applies on its own terms. And either way, Amazon's failure to follow § 191's frequency-of-pay requirements violates the law. New York Br. 25.

To the extent Amazon does attempt a legal argument, it cites to a litany of cases standing for the uncontroversial proposition that § 191 does not entitle Plaintiffs to more wages than their employment contracts provide. *See* Br. 59-60. In *Tierney v. Capricorn Inv'rs, LP*, 592 N.Y.S.2d 700 (1st App. Div. 1993), Amazon's key case, the court held that the plaintiff could not use the Labor Law to

"recover compensation over and above the compensation set forth in [his] Employment Agreement." *Id.* at 702. Plaintiffs, by contrast, seek only timely payment of their agreed-upon wages, as § 191 requires.

Amazon also misplaces reliance on the Leave Law's use of the term "benefits." True, the Leave Law provides for "certain employee benefits" in addition to "sick leave," making workers eligible for family leave benefits and disability benefits while quarantined due to COVID-19. N.Y. Senate Bill S8091. But that does not transform wage replacements mandated by the statute into "benefits or wage supplements" provided at the discretion of an employer, as defined by NYLL § 198-c(8). *See id.* (defining this term of art to include items like "reimbursement for expenses; health, welfare and retirement benefits; and vacation, separation or holiday pay"); *see generally* Pls.' Br. 52-54.

Finally, Amazon claims that Plaintiffs have no rights under the Leave Law because they lacked formal "orders of quarantine." Br. 60. But Plaintiffs Chandler and Bernard each tested positive for COVID-19 and showed documentation of their results to Amazon. *See* App. 95 ¶¶150-51, 98 ¶¶168-71. Plaintiffs thus met the criteria for a governmental order of quarantine.[8] Indeed the Leave Law was designed to keep COVID-19 positive workers, like Plaintiffs Chandler and

[8] New York State, "Obtaining an Order of Quarantine," available at http://docs.paidfamilyleave.ny.gov/content/main/forms/PFLDocs/obtain-order-of-quarantine.pdf.

Bernard, at home. Amazon is not excused from complying with the Leave Law because—in March or April of 2020 when New York City was besieged with COVID-19 infections—Plaintiffs neglected to provide yet another confirmatory piece of paper.

Indeed, Amazon's insistence on a formal "order of quarantine" raises factual questions, such as what Amazon communicated to its employees regarding the types of Leave Law documentation that it required, and whether it was feasible to expect Plaintiffs to obtain a formal "order of quarantine" from a local health authority at the time. *See, e.g.*, New York State Department of Labor, "New York Paid Family Leave COVID-19: Frequently Asked Questions" (acknowledging that local health authorities were not always "[]able to immediately provide . . . [an] order of quarantine or isolation" to eligible employees).[9] These questions may not be resolved without further fact-finding. And at the motion to dismiss stage, all reasonable inferences must be drawn in favor of Plaintiffs. *See Excevarria v. Dr Pepper Snapple Grp, Inc.*, 764 F. App'x 108, 109 (2d Cir. 2019). Amazon instead asks this Court to draw inferences against Plaintiffs based on material outside the pleadings, which would be inappropriate given the procedural posture of this case.

[9] Available at https://paidfamilyleave.ny.gov/new-york-paid-family-leave-covid-19-faqs.

III. CONCLUSION

For the foregoing reasons and the reasons discussed in Plaintiffs' opening brief, Plaintiffs respectfully ask this Court to vacate the district court's dismissal order in its entirety, or to vacate the portion regarding primary jurisdiction and certify all questions of state law to the New York Court of Appeals.

Dated: March 2, 2021
New York, NY

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure because it contains 6, 359 words, excluding the parts of the brief exempted by Rule 32(f).

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

Dated: March 2, 2021

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Karla Gilbride, certify under penalty of perjury, that on March 2, 2021, I electronically filed the document entitled Reply Brie of Plaintiffs-Appellants with the Clerk of the Court for the United States Court of Appeals for the Second Circuit by using the CM/ECF System.

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

DATED this 2nd day of March, 2021.

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