

# 20-3989-cv

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IN THE  
**United States Court of Appeals**  
FOR THE SECOND CIRCUIT

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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

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**APPELLANTS’ OPPOSITION TO DEFENDANTS-APPELLEES’  
PARTIAL MOTION TO DISMISS APPEAL**

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## I. INTRODUCTION

Amazon's motion misapprehends both the legal framework of this appeal and the current state of the COVID-19 pandemic in New York City. Amazon frames its arguments in terms of mootness, but they are really arguments about the scope of proper injunctive relief that should be resolved by the district court in the first instance. The pertinent questions on this appeal are whether Amazon's policies as alleged in the Complaint have violated New York Labor Law § 200 or caused special harm to Plaintiffs. The governor's tweets about returning to "life as we know it," not to mention the number of people attending baseball games at Citi Field, have no bearing on this Court's ability to resolve those threshold legal questions.

Moreover, Amazon's rosy picture of the current state of the pandemic omits numerous crucial facts. The statistics it cites about vaccination rates focus on the percentage of adults who have received one dose of a COVID-19 vaccine, ignoring that two doses of the Pfizer and Moderna vaccines are needed to afford maximal protection, particularly against the quickly spreading Delta variant. Amazon also fails to mention increasingly concerning data on the effectiveness of vaccines in preventing transmission of the Delta variant. Finally, Amazon ignores the continuing inability of children under 12 to be vaccinated, including children who live with JFK8 workers, and the much lower vaccination rates among Black and

Latinx New Yorkers who make up a large proportion of the workforce at JFK8. Indeed, new COVID-19 cases were already rising again in New York when Amazon filed this motion and that increase has only continued in the ten days since, highlighting the pandemic's evolving nature and the presumptuousness of declaring victory prematurely.

Finally, Amazon misstates the law on mootness. While dwelling on details like whether the specific public health guidance promulgated by New York State earlier in the pandemic is mandatory or optional, Amazon refuses to contend with the only question that matters from a mootness perspective: whether there is any order the district court could issue that would remedy Plaintiffs' injuries and make JFK8 a safer place to work with respect to COVID-19. As long as the answer to that question remains yes, then this case is not moot. Whether any such order should issue (and what its parameters should be) is a question for the district court to answer in the first instance when the case returns to that court on remand. Amazon will have a chance to argue that no injunction should issue because of the reduced threat to workers and the public of COVID-19, but it should do so based on arguments about the balance of equities and the facts, not based on a misapplication of principles of mootness.

## II. ARGUMENT

### A. Plaintiffs' Claims for Declaratory and Injunctive Relief Based on Amazon's Violation of Labor Law § 200 and Creation of a Public Nuisance Are Not Moot.

Amazon offers two reasons that this Court should dismiss Plaintiffs' first two claims for declaratory and injunctive relief as moot: because the pandemic has improved in New York, largely due to high rates of vaccination; and because some emergency public health measures in New York have been rescinded or made voluntary. The first of these arguments runs aground on the facts, while the second misapprehends both Plaintiffs' Complaint and the governing law on mootness.

#### 1. The COVID-19 Pandemic Is Not Over or Close to Over, in New York or Anywhere Else.

Amazon begins its litany of "developments in the pandemic" by describing the CDC's May 13 guidance for people who are fully vaccinated. Motion at 4. But every other statistic it offers about New York State and City vaccination rates (Motion at 5, 7) mentions only those over 18 who have received at least one vaccine dose. For recipients of the Pfizer and Moderna vaccines, one dose does not equate to full vaccination, and would not trigger the CDC's recommendations for relaxing mask-wearing and social distancing.

Only 54% of New York City residents were fully vaccinated as of July 21, according to the New York City Department of Health.<sup>1</sup> This percentage is substantially lower than Amazon's cited statistics because it includes children, many of whom are still not eligible to be vaccinated.<sup>2</sup> This means that many JFK8 workers, even if they are vaccinated themselves, share homes with unvaccinated children.

And vaccination rates are lower still for Black and Latinx New Yorkers, who make up a large share of the workforce at JFK8. As of July 21, only 30% of Black New York City residents and 41% of Hispanic or Latinx New York City residents were fully vaccinated.<sup>3</sup> These figures are particularly striking in light of the fact that Black New Yorkers have comprised 21% of the state's death toll from

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<sup>1</sup> COVID-19, Data on Vaccines, NYC Health, <https://www1.nyc.gov/site/doh/covid/covid-19-data-vaccines.page#dosestrend> (last visited July 21, 2021). Pursuant to Federal Rule of Evidence 201(b), and as set forth in footnotes 2-7, Plaintiffs request that this Court take judicial notice of several facts concerning the current state of the coronavirus pandemic that are either generally known within the trial court's territorial jurisdiction or accurately and readily determined from sources whose accuracy cannot reasonably be questioned.

<sup>2</sup> Centers for Disease Control and Prevention, COVID-19 Vaccines for Children and Teens, <https://www.cdc.gov/coronavirus/2019-ncov/vaccines/recommendations/adolescents.html> (last visited July 21, 2021) (noting that only one vaccine, Pfizer, is available to children between ages 12 and 17).

<sup>3</sup> COVID-19, Data on Vaccines, NYC Health, <https://www1.nyc.gov/site/doh/covid/covid-19-data-vaccines.page#nyc>

COVID-19, but have received only 12% of its administered vaccine doses.<sup>4</sup> Thus, to the extent that vaccines are allowing New Yorkers to return to their pre-pandemic lifestyles as Governor Cuomo's press releases and Amazon's motion suggest, Motion at 5, that return to normalcy is coming most slowly to those segments of the population on whom COVID-19 has already taken the greatest toll.

Furthermore, recent trends suggest that the pronouncements of victory over the pandemic in New York may have been exaggerated. In the June 24 executive order rescinding the state of emergency, Governor Cuomo observed that the number of new COVID cases in the state had dropped from a peak of nearly 11,000 per day to less than 300. Motion Exhibit 8. Just one month later, as of July 21, New York's number of new daily cases has climbed back to 1,038, a 192% increase over the last 14 days.<sup>5</sup>

Much of this accelerated spread can be attributed to the highly infectious Delta variant, which accounted for 83% of sequenced U.S. COVID-19 cases as of July 20, according to the CDC director.<sup>6</sup> In the context of the Delta variant's

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<sup>4</sup> Kaiser Family Foundation, Latest Data on COVID-19 Vaccinations by Race/Ethnicity, <https://www.kff.org/coronavirus-covid-19/issue-brief/latest-data-on-covid-19-vaccinations-race-ethnicity/> (last visited July 21, 2021).

<sup>5</sup> New York Times, New York Coronavirus Map and Case Count, <https://www.nytimes.com/interactive/2021/us/new-york-covid-cases.html> (last visited July 21, 2021).

<sup>6</sup> <https://www.cnbc.com/2021/07/20/delta-variant-now-accounts-for-83percent-of-all-sequenced-covid-cases-in-the-us-cdc-director-walensky-says.html> (last visited July 21, 2021).

growing dominance, Amazon’s emphasis on “at least one dose” statistics rings particularly hollow, as new research shows that one dose of the Pfizer vaccine is just 30% effective against the Delta variant, though the full two-dose regimen still affords significant protection.<sup>7</sup>

Plaintiffs do not offer these observations about the Delta variant to predict anything dire about the future. No doubt the trajectory of the pandemic will take additional twists and turns over the coming months. But Amazon cannot predict the future either, and the fact that June of 2021 was a particularly good month for New York during the pandemic does not deprive this Court of subject matter jurisdiction over Plaintiffs’ NYLL § 200 and public nuisance claims.

2. Plaintiffs’ Claims for Injunctive Relief Do Not Depend on the Continued Existence, or Mandatory Nature, of NY Forward or the New York State on Pause Executive Order.

The other part of Amazon’s mootness argument focuses on the lifting of the official state of emergency, codified as the New York State on Pause (“NYSOP”) executive order, and the conversion of the NY Forward guidelines from mandatory to optional. Amazon seems to suggest that because Plaintiffs referenced both the NYSOP order and the NY Forward guidance in their complaint and specifically

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<sup>7</sup> New England Journal of Medicine, Effectiveness of Covid-19 Vaccines against the B.1.617.2 (Delta) Variant, <https://www.nejm.org/doi/full/10.1056/NEJMoa2108891> (last visited July 21, 2021).

mentioned the latter in their prayer for injunctive relief, the district court can no longer provide any injunctive relief now that NY Forward has become optional.

But Plaintiffs' first two causes of action don't seek declaratory and injunctive relief for Amazon's violations of NYSOP or NY Forward. They assert violations of public nuisance and NYLL § 200, respectively. JA117-120. The reference to the NYSOP executive order merely provides factual background about the unfolding of the pandemic in New York, JA82 ¶¶60-61, while Amazon's actions are juxtaposed against the NY Forward guidance for the wholesale sector to demonstrate how Amazon's policies and practices fall below the applicable standard of care. JA 117-118 ¶¶326.

But Plaintiffs noted in their opening brief that nothing in their legal theory turned on the NY Forward parameters being binding or mandatory. Appellants' Opening Br. at 24 ("Nonmandatory guidelines are perfectly good evidence of the accepted method of doing things safely.") (internal quotations omitted). Nor does Plaintiffs' requested injunctive relief map directly onto the NY Forward guidelines; indeed, Amazon spent time in its answering brief arguing to this Court about that very mismatch. Appellee Br. at 23-24 ("[T]he relief that Plaintiffs seek bears little relationship to the interim [NY Forward] guidance.").

Moreover, the parameters of Plaintiffs' proposed injunctive relief are not part of this appeal. This Court is not being asked to review the appropriateness of

already-issued injunctive relief. It is being asked to review whether the district court properly invoked the primary jurisdiction doctrine and whether it correctly decided a number of questions of state law.

Many of Amazon's arguments appear to boil down to whether the district court should grant injunctive relief tied to the details of NY Forward given NY Forward's now-voluntary status. The status of NY Forward may be relevant to the district court's assessment of the standard of care, and the extent of community spread may be relevant to the district court's assessment of what kind of injunction may be appropriate. But the relevant question for mootness purposes is not whether the district court *should* order an injunction but rather whether the district court *can* redress Plaintiffs' injuries by issuing an injunction. *Knox v. Serv. Employees Int'l Union*, 567 U.S. 298, 307 (2012) ("A case becomes moot only when it is impossible for a court to grant any effectual relief whatever to the prevailing party." (citations and internal quotations omitted)). Because the district court can still grant effectual relief to Plaintiffs here by requiring Amazon to change its practices at JFK8, the question of whether it should do so must be directed to the district court in the first instance.

Amazon cites *New York City Employees' Retirement System v. Dole Food Co.* ("NYCERS") for the proposition that the issues presented by Plaintiffs' appeal are no longer live. Motion at 10-11. But nothing about the evolving pandemic

situation, or the downgrading of the NY Forward guidance from mandatory to optional, has deprived Plaintiffs of a legally cognizable interest in the issues presented by this appeal, such as whether they have plausibly alleged special harm resulting from Amazon's practices at JFK8 or whether New York's Workers' Compensation Law bars their claims for injunctive relief.

By contrast, the facts of *NYCERS*, and the cases it cites, demonstrate what impossibility of judicial redress actually looks like. In *NYCERS*, the pension fund, a Dole shareholder, had sought and received an injunction requiring information about a NYCERS-sponsored proposal to be included in Dole's proxy statement in advance of its annual shareholder meeting. 969 F.2d 1430, 1431-32 (2d Cir. 1992). Because Dole did not seek to stay the injunction, but mailed the statement out with NYCERS' desired language included, no future court action could claw the mailing back or change its contents, rendering the controversy moot. *NYCERS*, 969 F.2d at 1433. This Court analogized the situation in *NYCERS* to earlier cases where intervening events made it impossible for courts to grant effectual relief, such as *Jefferson v. Abrams*, 747 F.2d 94, 96 (2d Cir. 1984), where the court could no longer alter the position of candidates' names on the ballot because the election had already occurred, or *S.R. Mercantile Corp. v. Maloney*, 909 F.2d 79, 81 (2d Cir. 1990), where the court could not prevent disclosure of certain documents by the government because the documents had already been disclosed.

*NYCERS*, *Jefferson* and *Maloney* all involved discrete events whose occurrence made it impossible for a court to redress the plaintiff's alleged injury. Here, Plaintiffs have been injured and continue to be injured by Amazon's leave, rate and time-off-task policies at JFK8, which violate Amazon's duty to maintain a safe workplace and which create a public nuisance by spreading COVID-19 within the community while subjecting JFK8 workers and their family members to special harms. There are certainly injunctions the district court can issue that would remedy Plaintiffs' injuries by altering the specific leave, rate and time-off-task policies they challenge. No intervening events like the election in *Jefferson* or the mailing of the proxy statement in *NYCERS* have rendered judicial relief impossible.

On remand, Plaintiffs may well revise the injunctive relief they seek in light of the evolving circumstances of the pandemic. Amazon may still argue that even such scaled-back injunctive relief is unwise, or unnecessary, or unduly meddlesome. Ultimately the district court can answer those questions on a full record based on the state of the pandemic at that time. But nothing that has happened since this case was filed in June of 2020, or since the appeal was argued this past May, has made it impossible for a court to grant any effectual relief whatever. *Knox*, 567 U.S. at 307. This appeal is not moot.

**B. If This Court Does Grant Amazon’s Partial Motion to Dismiss, The Corresponding Portions of the District Court’s Opinion Should Be Vacated.**

While this Court may exercise discretion in deciding whether or not to vacate an unreviewable district court opinion, vacatur is the “established practice.” *United States v. Munsingwear, Inc.*, 340 U.S. 36, 39 (1950); *see also Bragger v. Trinity Cap. Entmt. Corp.*, 30 F.3d 14, 17 (2d Cir. 1994) (describing the court’s “duty to vacate the judgment appealed from” when mootness occurred by happenstance).

The circumstances that might lead an appellate court to depart from this practice only occur where the mootness is caused, at least in part, by actions of the party who lost below and who may be using vacatur as a means of “collateral attack” on a judgment it should instead challenge through direct appellate review. *U.S. Bancorp Mortg. Co. v. Bonner Mall P’ship*, 513 U.S. 18, 27 (1994). In other words, if the appellant does something to moot the case with an intent to “wash[] away” the opinion below, *id.*, the equitable exception to the standard practice of *Munsingwear* vacatur is triggered. *See Hassoun v. Searls*, 976 F.3d 121, 131 (2d Cir. 2020) (describing the intent or motivation of appellant’s voluntary actions that caused mootness as the key to determining whether appellant has “forfeited the benefits of vacatur” (internal citations and quotations omitted)). But here, even if the increased vaccination rates and expiration of the NYSOP order rendered this

case moot—which they did not—none of these changed circumstances were caused by Plaintiffs’ actions, let alone actions taken for the purpose of deliberately mooting their own case.

Amazon argues that the *Munsingwear* practice does not apply because the dismissal of the first two claims was without prejudice and will have no res judicata effect on the parties. But *Munsingwear* does not speak only of vacating unreviewable opinions in moot cases to remove their preclusive effect; it speaks more broadly of removing their “legal consequences.” *Munsingwear*, 340 U.S. at 40.

In *Camreta v. Greene*, 563 U.S. 692 (2011), the Supreme Court noted that one of the “legal consequences” *Munsingwear* vacatur avoids is an opinion’s prospective precedential effect. *Id.* at 713 (recognizing “necessity” of vacatur because the “legally consequential opinion” of the court below established Constitutional rights, affecting the behavior of government officials). In *Camreta*, there was no risk of the lower court opinion having preclusive effect on the parties, as the minor plaintiff in the original action had moved across the country and was about to turn eighteen. *Id.* at 711. Because she could no longer be subjected to the challenged conduct within the jurisdiction that issued the opinion—a warrantless interview about child abuse—there was no chance of future litigation between the same parties over the same course of conduct. But the Supreme Court still held that

the “normal rule” of vacatur should apply, to “strip[] the decision below of its binding effect” and “clear[] the way for relitigation” of the issue. *Id.* (citations and internal quotations omitted). *See also Hassoun*, 976 F.3d at 134 (finding vacatur inappropriate where there were “no legal consequences of the court’s opinion for the parties, in terms of preclusion *or even precedent*” emphasis added)).

Moreover, in deciding whether to vacate an unreviewable opinion under *Munsingwear*, the Supreme Court has instructed courts to weigh the “public interest,” not just the rights of the litigants to the current appeal. *U.S. Bancorp*, 513 U.S. at 26; *see also Nat’l Black Police Ass’n v. District of Columbia*, 108 F.3d 346, 353-54 (D.C. Cir. 1997) (granting vacatur so that a district court opinion on a “matter of great significance and current public interest does not remain in force unreviewed”). Here, the district court ruled on several questions of New York state law on which there is little or no existing guidance from either state or federal courts, and reached a conclusion about the ability of workers’ compensation law to bar claims for injunctive relief that is at odds with the law in a host of other states and contrary to the position taken by New York’s Attorney General. Allowing such legal issues of public importance to escape any judicial review, through no fault of Plaintiffs, would serve neither the public interest nor the ends of equity.

This Court should dismiss Amazon’s motion and decide this appeal on its merits. But at a minimum it should “clear[] the way for relitigation” of these

consequential issues in another case by vacating the opinion below. *Camreta*, 563 U.S. at 713.

### III. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that this Court deny Amazon's motion to partially dismiss this appeal. In the alternative, if the motion is granted, Plaintiffs request that the Court vacate the portions of the district court's November 2, 2020 opinion that dismissed counts I and II of Plaintiffs' First Amended Complaint.

Dated: July 23, 2021  
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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 3,113 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: July 23, 2021

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