

20-3989

**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
No. 20-cv-2468, Judge Brian M. Cogan

**REPLY IN SUPPORT OF DEFENDANTS-APPELLEES
AMAZON.COM, INC. AND AMAZON.COM SERVICES LLC'S
MOTION FOR PARTIAL DISMISSAL FOR MOOTNESS**

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INTRODUCTION

In the district court and on appeal, Plaintiffs made the New York Forward guidance the foundation for their theories of liability under both Labor Law Section 200 and public-nuisance law. As relief, their Complaint seeks a wish-list of injunctive relief purportedly “required by applicable New York Forward guidance.” JA-123–24 ¶ 362(c)(i), (ii), (iv), (v); *see also id.* ¶ 362(c)(iii) (seeking relief “for as long as the minimum requirements of New York Forward remain in effect”); *id.* at JA-124–25 ¶ 362(c)(vii) (seeking to “conform [contact-tracing] efforts to New York and CDC guidance”). Now that the State has withdrawn this guidance, and the CDC has relaxed its masking and physical-distancing guidance for vaccinated persons, Plaintiffs pretend that the guidance is not the foundation of their injunctive claims. But their Complaint says the opposite: “This case is about” Amazon’s purported “failure to comply with New York law and ‘New York Forward’ minimum requirements.” *Id.* at JA71 ¶ 2. Plaintiffs attempt to cast the State’s withdrawal of the guidance as merely transitioning the guidance from mandatory to optional. But according to New York, the guidance is no longer in effect and exists only in an online archive. Plaintiffs’ claims based on it are moot.

Nor can Plaintiffs deny that the other core factual predicates underlying the Complaint also no longer exist. Plaintiffs do not dispute that there no longer is an emergency declaration in New York or that their preferred COVID-19 safety

measures are not recommended by any government at any level. Instead, Plaintiffs argue that the pandemic is ongoing and that there are still COVID-19 cases in New York. But Amazon never argued that the pandemic is over; it argued that the legal authorities on which Plaintiffs base their claims seeking injunctive relief have been withdrawn. The pandemic's ongoing threat is not a lawful basis for judicial intervention based on state-law claims purportedly enforcing state-law guidance that the State itself has rescinded. Whatever the current state of the pandemic, the point is that Plaintiffs' legal theory for relief—in their words, the “applicable standard of care” that they say New York law imposes on Amazon, Opp. 7—no longer exists.

Finally, Plaintiffs argue that the Court should vacate to deprive the district court's opinion of its “prospective precedential effect.” Opp. 12. But the Supreme Court has made clear that judicial opinions should remain on the books whenever possible because of the value they provide to the public. *U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship*, 513 U.S. 18, 27 (1994). Plaintiffs have not identified any equitable reasons why vacatur of the district court's without-prejudice dismissal is appropriate in these circumstances.

The Court should dismiss the portion of this appeal concerning Plaintiffs' Section 200 and public-nuisance claims (Counts I and II) for lack of subject-matter jurisdiction.

ARGUMENT

I. Plaintiffs Cannot Revive Their Section 200 And Public-Nuisance Claims By Changing Their Legal Theories.

Plaintiffs assert (at 6) that their Complaint and appellate briefing merely “referenced” the now-withdrawn New York Forward guidance. In reality, the guidance was the very basis of their claims. Distilling the lawsuit on the first page of their Complaint, Plaintiffs stated that “[t]his case is about Amazon’s failure to comply with New York [paid leave] law and ‘New York Forward’ minimum requirements for businesses . . . during the COVID-19 pandemic.” JA-71 (Complaint ¶ 2). They used nearly identical language in their appellate briefing. *See* Plaintiffs’ Br. 5.

Plaintiffs’ other allegations concerning their Section 200 and public-nuisance counts confirm as much. The public-nuisance count is based on “Amazon’s [purported] failure to comply with minimum basic health and safety standards at the JFK8 facility, including New York Forward minimum requirements.” JA-117 ¶ 325 (Complaint Count I). Likewise, the Section 200 count is based on Amazon’s purported “fail[ure] to adopt and adhere to New York’s minimum requirements.” *Id.* at JA120 ¶ 338 (Complaint Count II).

As Plaintiffs argued on appeal, their theory for “asserting claims under New York law”—*i.e.*, their theory of liability—is that “Amazon was [allegedly] flouting New York State’s minimum requirements for continued business operations during

the pandemic.” Plaintiffs’ Br. 1. Whereas Plaintiffs now say that the guidance merely “may be” “relevant” in discerning the pertinent standard of care, Opp. 8, Plaintiffs wrote in their Opening Brief before this Court that the guidance was “*the* standard of care Amazon owes its workers (under the NYLL § 200 claim) and the public generally (under the public nuisance claim),” Plaintiffs’ Br. 23 (emphasis added); *see also id.* at 13 (“Plaintiffs filed a complaint in the Eastern District of New York asserting that Amazon (1) was creating a public nuisance by failing to follow the New York Forward requirements and guidance from the CDC in the JFK8 facility”); *id.* at 39 (Section 200 claim is based on “Amazon’s failure to follow the New York Forward minimum requirements”). At oral argument, Plaintiffs reiterated that the courts should “look to public health guidance set by the State such as the New York Forward requirements as a standard of care against which Amazon’s conduct can be judged.”¹

That alleged “standard of care” has been officially withdrawn. Mot. Ex. 5 (NY Forward Archived Guidance, *available at* <https://forward.ny.gov/archived->

¹ Here is the full exchange, starting at 24:52 of the oral argument audio:

Judge Jacobs: How would Judge Cogan be able to decide at any given time whether it is a necessary precaution that you use one mask or two masks or what kind of masks, or whether you should be six feet apart or three feet apart, or whether you should be treated differently if you are over sixty or over seventy? All these things are changing over time, they’re changing State by State How is Judge Cogan to be making these kinds of decisions? What’s his expertise?

industry-guidance). Thus, there is no longer a case or controversy concerning whether Amazon's current policies at JFK8 satisfy it. Plaintiffs assert that the guidance has merely been "conver[ted] . . . from mandatory to optional," Opp. 6, but that is incorrect. Amazon does not agree that the guidance was ever mandatory, but whatever its original status, it "is no longer in effect" at all. Mot. Ex. 5. Indeed, it is publicly available only in "[a]rchived" form. *Id.* While no law *prevents* a business from "continu[ing] to adhere to the State's archived guidance," *id.*, the government no longer recommends that employers such as Amazon follow that guidance, and hence Plaintiffs cannot establish the standard of care that they sought to adjudicate in this case.

Moreover, the remedy that Plaintiffs requested—to "hold Amazon to . . . the minimum requirements for business operation during the pandemic promulgated by New York's governor under the New York Forward initiative"—is no longer available. Plaintiffs' Br. 23. Plaintiffs concede that their theory of remedy must be "revise[d]" with the guidance withdrawn and "in light of the evolving circumstances of the pandemic." Opp. 10. In other words, they concede that in light of changed

Plaintiffs: That's where the court can look to public-health guidance set by the State such as the New York Forward requirements that we point to in the Complaint as a standard of care against which Amazon's conduct can be judged.

circumstances the district court cannot provide the relief they requested in their Complaint.

Faced with these insurmountable realities, Plaintiffs resort to attacking a strawman. They argue that the COVID-19 pandemic is not “over” and that not all JFK8 employees and family members are fully vaccinated, Opp. 3–5, but Amazon never argued that they were. Plaintiffs’ subjective assessment of the state of the pandemic as it exists today is irrelevant to the legal theory on which they based their Section 200 and public-nuisance claims (as pleaded, not as reimagined by Plaintiffs here). The Complaint alleges that New York is “the global epicenter of the pandemic,” that “some individuals seeking COVID-19 tests in New York and around the country are experiencing lengthy delays in receiving their test results,” and that a State executive order has “closed” “all non-essential businesses in the state.” JA-81–82 ¶¶ 56, 58, 60–61. Each of these allegations, of course, can no longer be presumed true. As federal courts recently have held, the fact that “[t]he public health situation has evolved in the months since” plaintiffs filed COVID-19 lawsuits may moot their claims. *Sprewell v. Federal Express Corp.*, No. 2:20-cv-11612-SVW-AGR (C.D. Cal. May 19, 2021), ECF No. 27, at 5–6 (dismissing a COVID-safety claim for injunctive relief because of “the rapidly changing public health situation and evolving understanding of appropriate safety practices”); *see also Martinez v. CoreCivic*, 2021 WL 2550319, at *7 (D.N.M. June 22, 2021) (similar).

Indeed, numerous courts across the country—including this Court—have recently held that COVID-related claims based on withdrawn or expired rules are now moot. For example, after Amazon filed its motion, this Court held that a challenge to the Governor’s temporary eviction moratorium is moot because the moratorium has expired. *36 Apt. Assocs., LLC v. Cuomo*, No. 20-2565, 2021 WL 3009153, at *1 (2d Cir. July 16, 2021). The Court adopted New York’s argument that the challenge was “now moot because that moratorium expired by its own terms during the pendency of this appeal.” Br. for Appellee at 1, *36 Apt. Assocs., LLC v. Cuomo*, No. 20-2565 (2d Cir. Feb. 4, 2021). Other circuits also consistently have held that lawsuits based on expired or withdrawn COVID rules are moot. *E.g., Spell v. Edwards*, 962 F.3d 175, 179 (5th Cir. 2020) (“Governor Edwards’s stay-at-home orders expired by their own terms. The plaintiffs’ request that we enjoin them is therefore moot.”); *Ramsek v. Beshear*, 989 F.3d 494, 499–500 (6th Cir. 2021) (“[T]he appeal of the preliminary injunction decision has been mooted by the Order’s withdrawal.”); *League of Indep. Fitness Facilities & Trainers, Inc. v. Whitmer*, 843 F. App’x 707, 709 (6th Cir. 2021) (“Because the challenged executive orders have been rescinded by Governor Whitmer, we cannot grant any effectual relief to the parties.”); *cf. Appellants’ Letter, Cnty. of Butler v. Governor of Pennsylvania*, No. 20-2936 (3d Cir. July 14, 2021) (Pennsylvania making similar argument).

Finally, Plaintiffs fail in their attempt to distinguish this case from prior mooted lawsuits that “involved discrete events whose occurrence made it impossible for a court to redress the plaintiff’s alleged injury.” Opp. 10. Plaintiffs argue that this case is different because “[o]n remand, Plaintiffs may well revise the injunctive relief they seek.” *Id.* But a plaintiff cannot satisfy Article III’s requirement of a live case or controversy—including redressability—simply by promising to identify some new means of redressability at some point in the future. *See Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992) (“[t]he party invoking federal jurisdiction bears the burden” of establishing Article III requisites to suit). The injury the Complaint alleges—exposure to COVID-19 during a state of emergency that prompted the New York Forward guidance—also no longer exists. Courts “permit[] suits for prospective relief to go forward despite abatement of the underlying injury only in the exceptional situation[]” when the injury is capable of repetition yet evading review. *Lewis v. Cont’l Bank Corp.*, 494 U.S. 472, 481 (1990) (internal quotation marks omitted). Plaintiffs do not argue that this exceptional circumstance is present here, nor could they.²

² In other litigation pending before this Court, New York State officials have taken the position that improvements in the State’s pandemic response, increased testing capabilities, and the availability of effective vaccines all make “the possibility that the State will revert” to prior COVID-19 restrictions “theoretical and speculative.” Br. for Defendants-Appellees 26–28, *Dark Storm Indus. LLC v. Cuomo*, No. 20-2725 (2d Cir. Mar. 29, 2021) (citation omitted). This Court also has declined to maintain challenges to rescinded COVID-19 restrictions for which there is no

II. Plaintiffs Offer No Equitable Reasons For Vacatur.

As Amazon has explained, because the district court dismissed Plaintiffs' Section 200 and public-nuisance claims without prejudice, there is no reason to vacate under the *Munsingwear* doctrine. Plaintiffs concede that the decision whether to vacate is a matter of this Court's discretion, and that the public interest informs that decision. Opp. 11, 13.

Here, the equities counsel against vacatur. "[T]he public interest" "demands" that the district court's ruling be left undisturbed because, like all judicial opinions, it is "presumptively correct" and "valuable to the legal community as a whole." *U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship*, 513 U.S. 18, 26–27 (1994); *see also id.* at 26 (emphasizing the presumption that judicial opinions "should stand"). Indeed, the district court designated the opinion for publication in the Federal Supplement, thus recognizing its importance. *See Palmer v. Amazon.com, Inc.*, 498 F. Supp. 3d 359 (E.D.N.Y. 2020).

Moreover, it has long been foreseeable that Plaintiffs' injunctive counts would become moot given the constantly evolving nature of the pandemic. But instead of seeking preliminary relief or amending their Complaint in light of evolving

"reasonable expectation of recurrence." *36 Apt. Assocs., LLC v. Cuomo*, 2021 WL 3009153, at *2 (2d Cir. July 16, 2021) (non-precedential) (quoting *Russman v. Bd. of Educ. of Enlarged City Sch. Dist. of City of Watervliet*, 260 F.3d 114, 120 (2d Cir. 2001)).

circumstances, Plaintiffs *withdrew* their motion for a preliminary injunction and then chose to appeal the district court's rulings. That their injunctive counts became moot during the pendency of their appeal was foreseeable, and does not counsel in favor of vacatur.

Plaintiffs' only response is to cite a Supreme Court case vacating a court of appeals opinion because of the opinion's "prospective precedential effect." Opp. 12 (citing *Camreta v. Greene*, 563 U.S. 692, 713 (2011)). But the Supreme Court's concern with leaving an appellate court opinion on the books does not extend to district court opinions, which do not establish binding precedent. *See Liberian Cmty. Ass'n of Conn. v. Lamont*, 970 F.3d 174, 189 (2d Cir. 2020). Plaintiffs suggest that vacatur would "strip the decision below of its binding effect," Opp. 13 (alteration omitted), but vacatur is not needed for that purpose because "district court opinions" are "'non-precedential' decisions" that do not bind other district courts, *Liberian Cmty.*, 970 F.3d at 189 (alteration omitted).

Vacatur therefore is unwarranted. The district court's decision should remain on the books because of the value that it provides to the public. *U.S. Bancorp*, 513 U.S. at 27.

CONCLUSION

The Court should dismiss as moot Plaintiffs' appeal of the district court's dismissal of their Section 200 and public-nuisance claims.

Dated: July 30, 2021

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that:

1. This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 27(d)(2), because, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f), it contains 2,413 words, as determined by the word-count function of Microsoft Word.

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

Dated: July 30, 2021

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