

# 20-3989

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**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*

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On Appeal from the United States District Court  
for the Eastern District of New York  
No. 20-cv-2468, Judge Brian M. Cogan

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**BRIEF FOR DEFENDANTS-APPELLEES AMAZON.COM, INC.  
AND AMAZON.COM SERVICES, LLC**

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## **CORPORATE DISCLOSURE STATEMENT**

Defendant-Appellee Amazon.com, Inc. is the indirect parent company of Defendant-Appellee Amazon.com Services, LLC. Defendant-Appellee Amazon.com, Inc. is a publicly held corporation. Defendant-Appellee Amazon.com, Inc. does not have a parent company, and no publicly held corporation owns 10% or more of Defendant-Appellee Amazon.com, Inc.'s stock.

Dated: February 16, 2021

/s/ Jason C. Schwartz

Jason C. Schwartz

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## INTRODUCTION

Courts should not be the first-line regulators of workplace safety, especially during an unprecedented and evolving pandemic. The United States Department of Labor’s Occupational Safety and Health Administration (“OSHA”) has the expertise and authority to evaluate and balance workplace safety against the need for essential businesses to continue providing services during the pandemic. It has exercised that authority throughout the pandemic, and President Biden has reaffirmed OSHA’s role as the primary regulator of workplace safety by ordering OSHA to promulgate revised COVID-19 guidance and consider issuing a national COVID-19 standard. OSHA alone has the expertise and resources to conduct on-the-ground inspections of workplaces across the country and coordinate employers’ COVID-19 precautions.

Plaintiffs-Appellants are employees or family members of employees at JFK8, a massive fulfillment center operated by Defendants-Appellees Amazon.com, Inc. and Amazon.com Services, LLC (together, “Amazon”). Plaintiffs claim that in their view Amazon should do more to protect employees from COVID-19. Instead of availing themselves of OSHA’s primary jurisdiction, however, they filed this lawsuit asking the district court to dictate “safe” practices at JFK8 during an evolving pandemic—apparently based simply on a paper record, rather than an investigation of the facility. It is difficult to imagine a task less suited to the judiciary. The primary-jurisdiction doctrine exists for situations such as these.

Amazon is an essential business whose continued operation during the pandemic is critical to allowing people across the country to obtain the supplies necessary to sustain their lives, protect their health, and adhere to stay-at-home guidelines. It is a leader in COVID-19 safety, working with some of the world's leading experts, employing state-of-the-art safety processes well beyond government requirements and guidance, and even creating its own testing laboratories.

In this lawsuit, however, Plaintiffs bring claims alleging “public nuisance” and breach of New York Labor Law (“NYLL”) Section 200’s requirement to secure workplaces from physical danger, and seeking COVID-19 leave pay under NYLL Section 191, which sets forth statutory requirements for timely payment of wages. Plaintiffs ask for a sweeping injunction awarding them a variety of benefits above and beyond their terms of employment—essentially inviting the district court to assume OSHA’s role of workplace regulator at JFK8, wade deeply into the rapidly changing circumstances of COVID-19 workplace safety, and even manage JFK8’s day-to-day operations.

The district court correctly dismissed Plaintiffs’ claims under the primary-jurisdiction doctrine. Plaintiffs asked the district court to, for example, dictate Amazon’s productivity practices, set the amount of paid time off, and enumerate the number of air-conditioned breakrooms—even though the state Interim Guidance on which Plaintiffs purport to rely never even mentions those policies.

Plaintiffs' claims fail for other reasons as well. As a threshold matter, Plaintiffs lack standing to seek injunctive relief changing the terms of employment at JFK8. Plaintiffs fail to allege non-speculative facts that connect their asserted injury—exposure to COVID-19—to the specific productivity requirements, leave policies, and other human-resource practices at issue in this lawsuit. Plaintiffs also lack standing to seek injunctive relief prohibiting hypothetical future violations of a New York law that requires employers to pay employees for the time they are on quarantine leave. Moreover, many of their specific challenges are now moot in light of changes that they admit Amazon has already made in response to the pandemic.

Plaintiffs' claims also fail on the merits. The federal Occupational Safety and Health Act ("OSH Act") preempts Plaintiffs' Section 200 claim seeking sweeping injunctive relief. Further, Section 200 does not permit claims based on future harm.

Plaintiffs' common-law public-nuisance claim also fails. Private individuals may bring such claims only if they can allege an injury that is different in kind, not merely degree, from harms suffered by the public at large. The alleged "harm" in this case, the risk of contracting COVID-19, is the exact same kind of harm faced by everyone in the world during this pandemic. In any event, public-nuisance law does not govern the workplace-safety practices at a private warehouse.

As the district court correctly concluded, Employee-Plaintiffs' Section 200 and public-nuisance claims fail for the additional reason that New York's Workers'

Compensation Law precludes any judicial suit for workplace injury, no matter what relief the employee seeks.

Finally, Employee-Plaintiffs' Section 191 claims for untimely paid COVID-19 quarantine leave fail. Employee-Plaintiffs allege that they were owed quarantine-based sick leave under New York's COVID-19 Leave Law. As the district court concluded, however, Section 191's timing requirements apply only to "wages," not "benefits" such as quarantine leave, and thus Employee-Plaintiffs cannot assert a claim under that provision.

The Court should affirm the district court's judgment.

### **STATEMENT OF ISSUES**

1. Whether, as a threshold matter, Plaintiffs lack Article III standing to seek injunctive relief directing Amazon's COVID-19 workplace-safety policies at its JFK8 distribution center based on speculative allegations that those policies might increase their future risk of contracting a virus during a pandemic.

2. Whether, as the district court held, Plaintiffs' request for sweeping injunctive relief—which asks the district court to fashion, enforce, and supervise JFK8's workplace-safety practices—is subject to OSHA's primary jurisdiction because that agency has the technical expertise, resources, and primary responsibility to investigate and regulate allegedly unsafe workplace conditions.

3. Whether the district court correctly dismissed Plaintiffs’ NYLL Section 200 and public-nuisance claims on the alternative ground that neither claim allows private plaintiffs, who complain of the alleged risk of future harm, to seek injunctive relief dictating the day-to-day operations of an essential business during a pandemic.

4. Whether the district court correctly held that the plain terms of NYLL Section 191’s timing requirements for paying “wages” do not apply to quarantine-leave benefits.

### **STATEMENT OF THE CASE**

JFK8 is a large Amazon fulfillment center on Staten Island that employs several thousand employees. *See* JA-71, 88. It “runs twenty-four hours a day, seven days a week, and is larger than fourteen football fields.” JA-127–28.

Plaintiffs—four JFK8 employees and three of their family members—filed suit against Amazon in June 2020, months after the COVID-19 pandemic took hold in New York. ECF 1. The Complaint challenges Amazon’s wage, productivity, and leave policies, contending that they do not comply with New York’s Interim Guidance for the Wholesale Trade Sector. *See* N.Y. Dep’t of Health, *Interim Guidance*

*for the Wholesale Trade Sector* (June 26, 2020), <https://tinyurl.com/yb69p75y> (“Interim Guidance”).<sup>1</sup>

Plaintiffs claim that JFK8 is a “public nuisance” (Count I), and that Amazon violates NYLL § 200 by purportedly failing to provide a safe workplace (Count II). Employee-Plaintiffs also allege that Amazon violated NYLL § 191 by failing to pay quarantine benefits in a timely manner (Count III). Employee-Plaintiffs bring a putative class claim under Section 191 seeking an injunction against future untimely payments of quarantine benefits (Count IV).

Plaintiffs seek far-reaching equitable relief, requesting an eight-part injunction that would place operations at JFK8 under judicial supervision. JA-123–25. Their proposed injunction would mandate that Amazon:

- “Communicate clearly” to employees that they should consult a physician if they experience COVID-19 symptoms, that they should not attend work, that they will not face consequences for taking quarantine leave, and that they will be paid quarantine leave on their next paycheck;

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<sup>1</sup> Plaintiffs’ allegations of an unsafe workplace are meritless. Amazon has adopted state-of-the-art safety measures to protect its employees. Indeed, in March 2020, the New York City Sheriff’s Office conducted an unannounced inspection at JFK8, and then conducted a follow-up visit the next day. The officials concluded that complaints about JFK8’s compliance with COVID-19 guidelines were “baseless” and that Amazon’s health and safety measures go “above and beyond” compliance requirements; the officials accordingly reported that “there were absolutely no areas of concern.” ECF 44-20 (email from Lt. Derek Skuzenski, Ph.D., New York City Sheriff’s Office).

- “Continue” communicating to employees “in writing” that Amazon has suspended its productivity requirements;
- “Continue” suspending rate requirements and refrain from counting hand washing and bathroom breaks as “time off task” (“TOT”);
- Provide employees with “adequate” time and tools to clean and disinfect their workstations, and communicate “in writing” to all new employees that time spent cleaning workstations will not count as TOT;
- Ensure that employees “have access to air-conditioned break rooms”;
- Pay quarantined employees COVID-19 leave “on their next paycheck”;
- Either delegate contact-tracing “to the local health department” or an independent contractor, or “conform [Amazon’s contact-tracing] efforts to New York and CDC guidance”;
- “Allow workers immediate access to 48 hours of [paid time off] even if they have not yet accrued all 48 hours based on their amount of time working at Amazon.”

JA-123–25.

Although much of Plaintiffs’ requested injunctive relief involves their challenge to Amazon’s measuring of employees’ productivity rates, Plaintiffs acknowledge that Amazon stopped enforcing its pre-pandemic performance goals in March 2020, and that Amazon communicated this to employees at JFK8 through mass emails and on message boards throughout the facility. JA-106. Indeed, Plaintiffs abandoned their motion for a preliminary injunction and amended their Complaint when Amazon posted these communications in July 2020. ECF Nos. 6,

60, 63. Plaintiffs represented to the district court that “workers now know that, without fear of discipline, they can wash their hands, socially distance, and clean up after themselves.” ECF 60, at 3.<sup>2</sup>

The district court dismissed all of Plaintiffs’ claims. The court concluded that Plaintiffs’ public-nuisance and Section 200 claims are subject to OSHA’s primary jurisdiction because the claims and proposed relief “go to the heart of OSHA’s expertise and discretion.” JA-134–38. By contrast, “courts are not expert in public health or workplace safety matters, and lack the training, expertise, and resources to oversee compliance with evolving industry guidance.” JA-137. “No doubt,” the district court noted, “shutting down JFK8 completely during the pandemic while continuing to provide employees with pay and benefits would be the best protection against contagion at the workplace.” JA-136–37. But OSHA, rather than the courts, should be in charge of “striking a balance between maintaining some level of operations in conjunction with some level of protective measures.” JA-137.

The district court also held in the alternative that Plaintiffs failed to state a public-nuisance claim. Plaintiffs’ allegations did not support a private action for

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<sup>2</sup> Although Amazon subsequently reinstated performance measures, current metrics are based on average productivity during September 2020 (when productivity goals were suspended), so employees have extra time to sanitize their work areas, wash their hands, and remain socially distant. *See* ECF 72. Employees also have the opportunity to explain whether pandemic-related safety precautions contributed to their performance issues. *Id.* at 2.

public nuisance because “[b]oth [their] concern and their risk present a difference in degree, not kind, from the injury suffered by the public at large.” JA-140.

Plaintiffs also failed to state a Section 200 claim. Any claim for past harm is barred by New York’s Workers’ Compensation Law (“NYWCL”), which is exclusive and in place of “any other liability whatsoever” for injuries suffered in the course of employment. JA-144 (quoting NYWCL § 11). That “broad language” also precludes Plaintiffs’ attempts to “thwart the purposes of the [NYWCL] and the trade-offs embodied in it” by seeking only prospective injunctive relief. JA-145–46. Nor can Plaintiffs maintain a Section 200 claim for risk of future exposure to COVID-19 because New York courts treat a Section 200 claim as “essentially a claim for common law negligence,” and “the threat of future harm does not provide a valid basis for a tort claim” under New York law. JA-146–47.

The district court concluded that the OSH Act does not preempt Plaintiffs’ Section 200 claim, but noted that Plaintiffs’ request that the court “create and enforce a scheme of workplace safety standards” “is in tension with the OSH Act” and creates the potential for “duplicative, and possibly counterproductive, regulation of workplace safety.” JA-143.

Finally, the district court held that Plaintiffs failed to state claims under Section 191 for allegedly underpaid quarantine benefits. JA-147–50. Quarantine-leave benefits are not “wages” for purposes of Section 191; instead, they “constitute[] a

benefit or wage supplement like vacation and holiday pay” to which Section 191 is inapplicable. JA-149. Accordingly, the district court dismissed Plaintiffs’ Section 191 claims with prejudice. JA-150.

### **SUMMARY OF ARGUMENT**

**I.** Plaintiffs lack Article III standing. They seek injunctive relief based on their alleged risk and fear of contracting COVID-19. These are generalized injuries that are not caused by any of Amazon’s policies and cannot be redressed by the relief that Plaintiffs request. Article III similarly precludes Plaintiffs’ claim for an injunction against Amazon’s hypothetical future failure to timely pay quarantine benefits based on the speculative possibility that Plaintiffs might someday qualify for those benefits yet fail to receive them on time.

Plaintiffs’ claims for injunctive relief regarding Amazon’s productivity policies independently are moot because Amazon stopped enforcing the policies they challenge months before this lawsuit was filed.

**II.** The district court correctly deferred to OSHA’s primary jurisdiction. Plaintiffs seek sweeping injunctive relief that would foist the court into the role of workplace-safety regulator at JFK8, making and enforcing a range of Plaintiffs’ desired human-resource policies, none of which appears in the non-binding Interim Guidance on which Plaintiffs purport to rely. Such technical and policy decisions

reside within the primary responsibility of the agency that Congress tasked with regulating workplace safety, not with federal courts that lack the agency's investigative powers, expertise, and resources. President Biden's recent order that OSHA issue revised COVID-19 guidance and consider a national COVID-19 standard confirms the correctness of the district court's decision to defer to OSHA to resolve Plaintiffs' claims in the first instance.

**III.** The district court correctly held in the alternative that Plaintiffs fail to state a Section 200 or public-nuisance claim.

**A.** Plaintiffs' Section 200 claim fails for two independent reasons. First, the OSH Act preempts Plaintiffs' attempt to use Section 200 to craft a state workplace-safety regime in an area subject to federal standards. Second, Plaintiffs' Section 200 claim based on alleged risk of future exposure to COVID-19 fails because a threat of future harm is insufficient to impose liability under New York law.

**B.** Plaintiffs' public-nuisance claim also fails for multiple independent reasons. Plaintiffs do not plausibly allege that potential exposure to COVID-19 is a unique harm to them, as opposed to a harm suffered by the entire community. At most, Plaintiffs allege that they are at greater risk than other New Yorkers, but that is a difference in degree rather than kind, and therefore is insufficient as a matter of law to allow them to bring a public-nuisance action. Nor does public-nuisance law govern the terms of employment at a private facility like JFK8.

C. Employee-Plaintiffs’ Section 200 and public-nuisance claims are also barred by Section 11 of the New York Workers’ Compensation Law, which provides that workers’ compensation “shall be exclusive and in place of any other liability whatsoever” for workplace injury. Plaintiffs attempt to plead around this bar by seeking injunctive relief, but Section 11 precludes employees from bringing judicial suits against their employers for workplace injury regardless of the relief sought.

IV. Finally, the district court correctly dismissed Employee-Plaintiffs’ Section 191 claims for quarantine benefits allegedly owed under New York’s COVID-19 Leave Law. Section 191 governs the timing of “wages,” not “benefits,” and, as Plaintiffs conceded below, quarantine leave is a benefit. Employee-Plaintiffs’ new arguments to the contrary rely on an interpretation of the frequently-asked-questions page of a State website that New York itself has rejected in its amicus brief in this case. Additionally, Section 191 applies only to wages that employers are contractually obligated to pay, and thus is inapplicable to statutorily required wages. In any event, Plaintiffs do not dispute that they never received a quarantine order from a government entity, and thus they were not entitled to quarantine benefits in the first place.

#### **STANDARD OF REVIEW**

The Court reviews the district court’s conclusion that Plaintiffs fail to state a claim *de novo*. *Gallop v. Cheney*, 642 F.3d 364, 368 (2d Cir. 2011). The Court may

“affirm the judgment on any basis that is supported by the record.” *Crawford v. Franklin Credit Mgmt. Corp.*, 758 F.3d 473, 482 (2d Cir. 2014).

This Court has explained that the standard of review for a district court’s primary-jurisdiction decision “is essentially *de novo*.” *Nat’l Commc’ns Ass’n, Inc. v. AT&T*, 46 F.3d 220, 222 (2d Cir. 1995). The Court has also, however, “emphasize[d] that primary jurisdiction is a discretionary doctrine.” *Tassy v. Brunswick Hosp. Ctr., Inc.*, 296 F.3d 65, 72 (2d Cir. 2002). The Circuits are split on whether review of a district court’s application of the primary-jurisdiction doctrine “is *de novo* or for an abuse of discretion, with the majority applying a deferential standard.” *Chlorine Inst., Inc. v. Soo Line R.R.*, 792 F.3d 903, 908 (8th Cir. 2015). Amazon respectfully preserves its argument that the appropriate standard is abuse of discretion, but the district court’s decision was correct under either standard.

## ARGUMENT

### **I. This Court Lacks Jurisdiction Over Plaintiffs’ Claims For Injunctive And Declaratory Relief.**

#### **A. Plaintiffs’ Claims Fail For Lack Of Article III Standing.**

Plaintiffs’ claims for injunctive and declaratory relief fail for lack of Article III standing.<sup>3</sup> To establish the “irreducible constitutional minimum” of standing, a

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<sup>3</sup> The court below declined to reach Amazon’s arguments that Plaintiffs’ claims were non-justiciable and that Plaintiffs failed to plausibly plead causation, *see* JA-147 n.21, but these arguments provide an independent basis on which to affirm the court’s judgment dismissing these claims without prejudice.

plaintiff must show: (1) “an injury in fact” that is “concrete and particularized and actual or imminent, not conjectural or hypothetical,” (2) that the injury “is fairly traceable to the challenged conduct of the defendant,” and (3) that it is “likely,” as opposed to merely speculative, that the injury will “be redressed by a favorable decision.” *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547–48 (2016). Plaintiffs cannot rely on allegations of past injury; instead, “the injury or threat of injury must be both real and immediate.” *Shain v. Ellison*, 356 F.3d 211, 215 (2d Cir. 2004) (alterations omitted). Plaintiffs’ claims for injunctive and declaratory relief fall far short of these requirements.

Plaintiffs’ public-nuisance and Section 200 claims are premised on generalized allegations of harm untethered to Amazon’s challenged practices and unredressable by courts. Plaintiffs assert that they suffer a risk of contracting COVID-19 due to “increased community spread at JFK8” and a “fear of contracting COVID-19 and infecting a family member.” JA-118–19. Of course, leaving one’s home and entering a public space during a pandemic arguably places one at increased risk of contracting the virus—but so do innumerable other activities that are part of everyday life. The risk of exposure to a virus during a pandemic and the resulting fear are common to society at large, not specific to employees at JFK8. These “generalized” injuries are “undifferentiated and common,” and insufficient to establish a “particularized” injury. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 573–75 (1992).

Plaintiffs also fail to show that any risk of exposure to COVID-19 is “fairly traceable to” the wage, productivity, and leave policies that they challenge. *Clapper v. Amnesty Int’l USA*, 568 U.S. 398, 409 (2013). Instead, Plaintiffs’ challenge “relies on a highly attenuated chain of possibilities,” *id.* at 410; for example, that an employee might ignore Amazon’s current productivity requirements (which take into account time needed for hygiene and health and safety measures) by not “tak[ing] the time to wash [his or her] workstation,” or by insufficiently “spread[ing] out” from other employees in the hallways or bathroom (in violation of Amazon’s social-distancing requirements), and another employee might contract COVID-19 as a result. JA-108–09.

Moreover, Plaintiffs acknowledge that “Amazon is not the source of COVID-19,” Br. 31, and they concede that it is everywhere in New York, *see* JA-81–82. Plaintiffs expose themselves to the risk of contracting COVID-19 in numerous ways outside of their employment at JFK8, including by taking “multiple forms of public transit,” and “interact[ing] with their families and with other members of the public as they undertake their day-to-day activities, like grocery shopping and using public transportation.” JA-89, 118. Given the risk of exposure inherent in these activities, the unavoidable risk of exposure to COVID-19 in any essential workplace, and the difficulty of tracing such sources of exposure, any argument that Plaintiffs’ alleged

exposure to COVID-19 is “fairly traceable” to the workplace policies that they challenge is “speculative” and insufficient to satisfy Article III’s standing requirements. *Clapper*, 568 U.S. at 414–15.

Plaintiffs similarly fail to allege a “non-speculative likelihood that [their] injury can be remedied by the requested relief.” *Coal. of Watershed Towns v. EPA*, 552 F.3d 216, 218 (2d Cir. 2008). Even if Plaintiffs obtained a broad injunction micromanaging day-to-day operations at JFK8, it is entirely “speculative” whether Plaintiffs would “be in any different position than they are now” with regard to their risk of exposure to COVID-19. *Id.* Indeed, Plaintiffs never explain in any remotely concrete way how their requested injunctive relief—such as that Amazon continue to communicate the suspension of its productivity requirements in writing (rather than verbally) and provide air-conditioned breakrooms (notwithstanding that air-conditioning would be turned off during the winter months when COVID-19 rates are rising), JA-123—would “remedy” their alleged risk of contracting COVID-19 at JFK8. *Steel Co. v. Citizens For A Better Env’t*, 523 U.S. 83, 107 (1998).

Plaintiffs also lack standing to pursue their claim for injunctive relief under Section 191’s requirement to timely pay wages. Plaintiffs asked the district court to enter an injunction dictating when Amazon must pay quarantine-leave benefits under New York’s COVID-19 Leave Law, JA-124, but they fail to allege any actual or imminent injury, *see Spokeo*, 136 S. Ct. at 1548. Rather, Plaintiffs allege only that

they are “concerned that *if* they become eligible for COVID-19 paid leave, Defendants will fail to pay them their earned wages for COVID-19 paid leave on a timely basis.” JA-122 (emphasis added). Plaintiffs’ asserted injury—hypothetical future untimely payments of quarantine benefits—rests on a “speculative chain of possibilities,” and therefore does not come close to a “certainly impending” injury that satisfies Article III. *Clapper*, 568 U.S. at 410.

**B. Plaintiffs’ Claims Regarding Amazon’s Productivity Policies Are Also Moot.**

Plaintiffs seek an injunction ordering Amazon to “refrain from counting handwashing and bathroom breaks against TOT requirements.” JA-124. But Plaintiffs acknowledge that in July 2020, Amazon confirmed to JFK8 employees that “time spent maintaining social distancing, handwashing, sanitizing workstations, and using the restroom would not be subject to feedback related to TOT.” JA-105. As a result, the request is moot because “the issues presented are no longer live.” *N.Y.C. Emps.’ Ret. Sys. v. Dole Food Co.*, 969 F.2d 1430, 1433 (2d Cir. 1992).

Similarly, although Plaintiffs seek an injunction requiring Amazon to “[c]ontinue the existing suspension of rate requirements,” JA-124, Amazon stopped enforcing its pre-pandemic rate requirements in March 2020—months before Plaintiffs filed this lawsuit—and “Amazon communicated” this “to all workers” at least

by July 2020. JA-106; ECF 60, at 1.<sup>4</sup> Thus, because the policies that Plaintiffs challenge “no longer exist[],” Plaintiffs’ requests for injunctive relief regarding those policies are moot. *Dean v. Blumenthal*, 577 F.3d 60, 64–65 (2d Cir. 2009).<sup>5</sup>

In sum, Plaintiffs’ claims are rooted in generalized fears shared by all citizens and not fairly traceable to Amazon’s JFK8 facility or redressable by the judgment they seek. Their claims regarding Amazon’s specific productivity policies are also moot. Federal courts lack subject-matter jurisdiction to adjudicate speculative grievances such as these. If Plaintiffs wish to pursue their speculative theories, federal courts are not the forum. Instead, they can present them to the regulator charged with overseeing workplace safety—OSHA.

## **II. The District Court Properly Dismissed Plaintiffs’ Public-Nuisance And Section 200 Claims Under The Primary-Jurisdiction Doctrine.**

Plaintiffs asked a federal court to assume the role of workplace-safety regulator at JFK8 and to fashion, enforce, and supervise a range of COVID-19 and other

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<sup>4</sup> Although Amazon implemented a new productivity policy starting in October 2020, *see* ECF 72, Amazon did not reinstate its pre-pandemic policy, as Plaintiffs suggest, Br. 12. Rather, Amazon’s revised productivity goals build in extra time for sanitation and are based on employees’ average productivity during September 2020—when productivity goals were temporarily suspended. *See* ECF 72.

<sup>5</sup> Any threat of future harm related to Plaintiffs’ complaints about inadequate air conditioning would be entirely “speculative and conjectural,” since the circumstances of the COVID-19 pandemic will be different by next summer. *Shain*, 356 F.3d at 216. And the evolving nature of the pandemic and the ongoing vaccination efforts could create additional mootness concerns.

workplace policies that are neither required nor even recommended by the flexible Interim Guidance on which Plaintiffs purport to rely. The district court rightly declined Plaintiffs' invitation. As the district court concluded, Plaintiffs' claims do not "simply require the application of law to disputed facts"; rather, they ask the district court to exercise "technical and policy expertise" by deciding how to "*adequately* protect the safety of [JFK8] workers during the COVID-19 pandemic." JA-136–37.

This is not the job of a federal court. Instituting Plaintiffs' preferred workplace policies would amount to regulation-by-injunction, making this the textbook case for the primary-jurisdiction doctrine. *See Kappelmann v. Delta Air Lines, Inc.*, 539 F.2d 165, 169 (D.C. Cir. 1976) (concluding that the primary-jurisdiction doctrine was particularly appropriate when plaintiffs seek "legislation by injunction"); *United States v. Philip Morris USA Inc.*, 686 F.3d 832, 838 (D.C. Cir. 2012) (noting that *Kappelmann* applied the primary-jurisdiction doctrine "because the requested injunction would in effect constitute a regulation covering one" business). Plaintiffs' Section 200 and public-nuisance claims fail for this reason.

The primary-jurisdiction doctrine is "a version of the administrative exhaustion requirement" under which a district court dismisses or stays a case to allow an administrative agency in the first instance to resolve issues that "have been placed within [its] special competence." *Goya Foods, Inc. v. Tropicana Prods., Inc.*, 846 F.2d 848, 851 (2d Cir. 1988). The doctrine "allocate[s] the law-making power over

certain aspects of commercial relations” by “transfer[ring] from court to agency the power to determine some of the incidents of such relations.” *United States v. W. Pac. R.R. Co.*, 352 U.S. 59, 65 (1956). “Recourse to the doctrine of primary jurisdiction is thus appropriate whenever 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).

“No fixed formula exists” for applying the doctrine. *W. Pac. R. Co.*, 352 U.S. at 64. “Rather, in every case the question is whether” the doctrine’s application will aid two purposes: “the desire for uniformity and the reliance on administrative expertise.” *Tassy*, 296 F.3d at 68. To answer this question, courts focus 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.” *Ellis*, 443 F.3d at 82–83. Courts also “balance the advantages of applying the doctrine against the potential costs resulting from complications and delay in the administrative proceedings.” *Id.* at 83.

As the district court correctly concluded, all of these factors support deferring to the primary jurisdiction of OSHA—the agency that Congress entrusted to address workplace safety.

**A. The First Two *Ellis* Prongs Support Deferring To OSHA Because Plaintiffs’ Claims Involve Technical And Policy Considerations Committed To OSHA’s Discretion.**

Plaintiffs’ workplace-safety claims “involve[] technical or policy considerations within [OSHA’s] field of expertise,” and questions regarding the adequacy of COVID-19-related workplace-safety matters are committed to OSHA’s rather than the courts’ “discretion.” *Ellis*, 443 F.3d at 83. Plaintiffs have asked the district court to craft out of whole cloth a series of regulations applicable to JFK8 alone. This is not the core competence of courts. OSHA—“the federal agency within the Department of Labor specifically charged with regulating health and safety in the workplace”—has “primary responsibility for setting and enforcing standards and providing research, information, education, and training to assure safe and healthful working conditions.” JA-135.

The D.C. Circuit recently made clear that OSHA is entitled to “considerable deference” in its response to COVID-19 because it has “regulatory tools ... at its disposal to ensure that employers are maintaining hazard-free work environments.” *In re AFL-CIO*, 2020 WL 3125324, at \*1 (D.C. Cir. June 11, 2020) (per curiam). Indeed, OSHA possesses investigative powers and resources that courts lack. The

agency has thousands of inspectors with the power to enter, examine, and investigate places of employment, and to require the testimony of witnesses and the production of evidence. 29 U.S.C. § 657(a)–(b). If an employee believes that a violation of a safety or health standard or an imminent danger exists at his or her workplace, he or she may request an inspection. *Id.* § 657(f)(1).

The Secretary of Labor may also issue citations and penalties to employers that violate a federal standard. *Id.* §§ 658–659. Those enforcement actions are then subject to review by the Occupational Safety and Health Review Commission (“OSHRC”)—a specialized body of administrative law judges and appellate commissioners whose decisions are reviewable by federal courts of appeals. *Id.* §§ 660–661.

Yet rather than turn to OSHA, Plaintiffs rushed into court, flanked by an army of amici, asking the district court to decide in the abstract what is and is not “safe” in a massive fulfillment center that provides essential services during an evolving pandemic. It is difficult to imagine a role less suited to federal courts. Plaintiffs’ failure to avail themselves of the administrative forum that has the investigative resources and expertise to address this complex environment is reason enough to reject these claims.

Plaintiffs argue (at 23) that the district court should have simply “h[e]ld Amazon” to the “New York Forward” Interim Guidance, but that argument does not

withstand scrutiny. To begin, that guidance document is not binding. It “ha[s] no legal effect but [is] merely explanatory.” N.Y. A.P.A. Law § 102(2)(b)(iv). To the extent that the Interim Guidance incorporates *federal* guidance, the U.S. Department of Health and Human Services Centers For Disease Control (“CDC”)’s COVID-19 guidance documents are “not binding” either. *United States v. Wragg*, 2020 WL 4015204, at \*8 n.12 (E.D. Pa. July 16, 2020).

Even if the Interim Guidance were binding, Plaintiffs’ “workplace safety claims [do not] simply require the application of law to disputed facts.” JA-136. Instead, they require specialized expertise and policy judgment. “The central issue in this case is whether Amazon’s workplace policies at JFK8 *adequately* protect the safety of its workers during the COVID-19 pandemic.” JA-136. Because the relief that Plaintiffs seek “involves detailed aspects of how Amazon regulates its workplace,” their claims “turn on factual issues requiring both technical and policy expertise.” JA-137.

Moreover, the relief that Plaintiffs seek bears little relationship to the Interim Guidance. Plaintiffs asked the district court to:

- freeze Amazon’s current productivity policies in place, JA-124, despite the Interim Guidance not even addressing productivity policies;
- force Amazon to give every employee “immediate access” to “48 hours of” paid time off, “even if [the employees] have not yet accrued” that time, JA-125, a request that appears nowhere in the guidance;

- establish policies governing when employees need “not attend work,” and mandate that Amazon “[c]ontinue” to communicate its internal productivity policies “in writing,” JA-123, even though the Interim Guidance (at 7) suggests only that entities “should” develop “a communications plan,” without dictating medium or content;
- mandate that Amazon “[e]nsure that workers have access to air-conditioned break rooms,” JA-124, despite the absence of any guidance on this topic;
- determine what constitutes an “adequate” amount of “time and tools” for employees to clean their workstations, JA-124, even though the Interim Guidance (at 6) speaks only generally about entities “provid[ing]” supplies and “encourag[ing]” their use; and
- prescribe Amazon’s contact-tracing practices, JA-124, even though the Interim Guidance (at 8) in no way counsels against Amazon’s contact-tracing method.

Plaintiffs asked the district court to assess not a “pinpoint” legal matter, but an “abstract” technical question that should “be reviewed by an agency.” *Nat’l Commc’ns Ass’n*, 46 F.3d at 223. This sort of “regulation through an injunction,” *Kappelmann*, 539 F.2d at 174, is far outside courts’ “conventional experience,” and instead resides within agencies’ “field of expertise,” *Ellis*, 443 F.3d at 82.

Plaintiffs contend that deference to OSHA is inappropriate because the agency “deci[ded] to forego promulgation of a COVID-specific standard.” Br. 24–25. “This does not mean, however, that OSHA has abdicated its responsibilities during the pandemic.” JA-136. To the contrary, as the Department of Labor recently emphasized, OSHA has developed a “strategy” for combatting COVID-19 in the

workplace that “pair[s] a broad arsenal of guidance materials with aggressive enforcement of existing standards to ensure that employers appropriately protect their employees.” Dep’t of Labor Br. 33, *AFT v. OSHA*, Dkt. 13-1, No. 20-73203 (9th Cir. Dec. 31, 2020) (“DOL Br.”). “This includes conducting more than 1,430 COVID-related inspections and issuing citations totaling more than \$3,849,222 to 294 employers,” in addition to conducting over “11,427” COVID-19-related investigations. *Id.* at 11, 33.

What’s more, OSHA already imposes enforceable obligations on employers to protect workers from infectious diseases like COVID-19, such as obligations involving “respiratory protection” (29 C.F.R. § 29.134), personal protective equipment (*id.* §§ 1910.136, .133), and “sanitation” (*id.* § 1910.141). DOL Br. at 4. OSHA has also made clear that the OSH Act’s general-duty clause, 29 U.S.C. § 654(a)(1), applies to employers who fail to take preventative measures against COVID-19. DOL Br. at 31–32. And “OSHA has issued extensive guidance” involving COVID-19. *Id.* at 1; *see also* OSHA, *COVID-19 Publications*, <https://tinyurl.com/wxa7z2p>.

The propriety of deferring to OSHA is confirmed by President Biden’s recent Executive Order declaring that “[t]he Federal Government must take swift action to reduce the risk that workers may contract COVID-19 in the workplace.” Executive

Order on Protecting Worker Health and Safety § 1, ¶ 2 (Jan. 21, 2021), <https://tinyurl.com/y6lv6yq9> (“Executive Order”). The President directed the Secretary of Labor and head of OSHA to issue “revised guidance to employers on workplace safety during the COVID-19 pandemic,” to “consider whether any emergency temporary standards ... are necessary” and, if so, “issue them by March 15, 2021,” and to “launch a national program” regarding OSHA enforcement. *Id.* § 2(a)–(d).

Pursuant to the Executive Order, OSHA has issued guidance making clear that “[a]ll of OSHA’s standards that apply to protecting workers from infection remain in place,” including “requirements for PPE, respiratory protection, sanitation, protection from bloodborne pathogens,” and the requirement “under the General Duty Clause” to “provide a safe and healthful workplace that is free from recognized hazards that can cause serious physical harm or death.” OSHA, *Protecting Workers: Guidance on Mitigating and Preventing the Spread of COVID-19 in the Workplace* (Jan. 29, 2021) (“OSHA Guidance”), <https://tinyurl.com/28vzkp4y>. Given these federal-agency efforts, courts should be particularly reluctant to create new regulations for individual businesses under the guise of state law.

Unable to defeat the application of the primary-jurisdiction doctrine on its own terms, Plaintiffs argue that the doctrine does not apply to “common law theories of liability,” Br. 22. But Plaintiffs’ own authority forecloses that argument. In *Nader v. Allegheny Airlines, Inc.*, the Supreme Court made clear that the primary-

jurisdiction doctrine “may be appropriate” “[e]ven when common-law rights and remedies survive.” 426 U.S. 290, 303 (1976) (emphasis added). No matter the cause of action, the doctrine “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.” *W. Pac. R.R. Co.*, 352 U.S. at 64 (emphasis added).

Even less convincing is Plaintiffs’ argument that the primary-jurisdiction doctrine is inapplicable here because OSHA authorizes “private enforcement of workers’ rights under state law.” Br. 26. The OSH Act preserves only suits seeking “existing state statutory and common-law remedies for actual injury and death.” *Atlas Roofing Co., Inc. v. OSHRC*, 430 U.S. 442, 445 (1977). Plaintiffs seek nothing of the sort. By contrast, they have requested a sweeping injunction that would take over operations at JFK8, all on the basis of the alleged risk of future injury. Moreover, New York never “develop[ed] [its] own workplace health and safety standards” under 29 U.S.C. § 667(a), see *Irwin v. St. Joseph’s Intercommunity Hosp.*, 665 N.Y.S.2d 773, 777 (4th App. Div. 1997), so the OSH Act’s allowance for official state standards is irrelevant to Plaintiffs’ claims.

Plaintiffs further contend that OSHA is not relevant here because the Interim Guidance is not an occupational regulation. Br. 27 n.4. But the Interim Guidance is “directed at workplace safety” rather than the public at large. *Gade v. Nat’l Solid*

*Wastes Mgmt. Ass'n*, 505 U.S. 88, 107 (1992). Whereas the regulations in *Steel Institute of New York v. City of New York*, 716 F.3d 31 (2d Cir. 2013), “expressly excluded” workplace activity from their scope, *id.* at 38, the Interim Guidance addresses “owners/operators of wholesale trade businesses and their employees and contractors,” and is focused on workplace-safety practices, making only minimal references to customers and visitors. Interim Guidance at 1–9; JA-83–84. That the guidance may “also have a nonoccupational impact does not render it” a law of general applicability. *Gade*, 505 U.S. at 107.

**B. Deferring To OSHA Protects Uniformity.**

Deference to OSHA would also ensure uniformity, which is crucial in the context of an unprecedented “pandemic for which there is no immediate end in sight.” JA-137; *see also Rural Cmty. Workers All. v. Smithfield Foods, Inc.*, 459 F. Supp. 3d 1228, 1241 (W.D. Mo. 2020). If individual courts were to invade OSHA’s province by imposing their own workplace-safety standards, the nation’s employers would quickly become subject to an inconsistent patchwork of court-mandated rules. “Courts are particularly ill-suited to address this evolving situation and the risk of inconsistent rulings is high. Court-imposed workplace policies could subject the industry to vastly different, costly regulatory schemes in a time of economic crisis. A determination by OSHA, on the other hand, would be more flexible and could ensure uniformity.” JA-137–38.

The danger of inconsistent or conflicting standards is especially acute for essential employers such as Amazon, which perform services that are vital to the public. It is crucial that they continue to operate efficiently and without legal uncertainties that could impede the provision of vital services.

**C. Plaintiffs’ Failure To Seek Recourse With OSHA Before Filing Suit Does Not Prevent The Application Of The Primary-Jurisdiction Doctrine.**

Nothing prevents Plaintiffs—even now—from requesting that OSHA inspect JFK8 under 29 U.S.C. § 657(f), or from challenging any subsequent determination by OSHA in an administrative proceeding, *see* 29 C.F.R. § 1903.12. In similar circumstances, courts have been unwilling to allow litigants to short-circuit the administrative process by ignoring it, preemptively filing suit, and then hiding behind the fourth *Ellis* factor, which considers whether an application to the agency has been made. *See, e.g., Bernhardt v. Pfizer, Inc.*, 2000 WL 1738645, at \*3 (S.D.N.Y. Nov. 22, 2000) (highlighting that the fourth factor is not dispositive). “Because plaintiff[s] chose not to litigate this issue before [OSHA], the district court correctly avoided ruling on the merits of [their] claim[s].” *Heilweil v. Mount Sinai Hosp.*, 32 F.3d 718, 726 (2d Cir. 1994).

**D. The Advantages Of The Primary-Jurisdiction Doctrine Far Outweigh Any Costs Of Delay.**

Finally, “the advantages of applying the doctrine outweigh the potential costs of delay in the administrative proceedings.” JA-138. Plaintiffs decry the “delay” of

waiting for OSHA’s citation process, Br. 29, but a few months hardly qualifies as “delay” compared to the timeline of typical litigation. Indeed, OSHA can seek *immediate* relief where warranted. 29 U.S.C. §§ 658, 662. Administrative delay must be significant—such as “two to five years”—to be relevant. *Nat’l Commc’ns*, 46 F.3d at 225. Moreover, Plaintiffs cannot complain of delay given that they did not file suit until three months after the COVID-19 pandemic took hold in New York, they abandoned their request for a preliminary injunction, and they never complained to OSHA. *See* JA-138 (“[A]t least part of the responsibility for that delay lies with plaintiffs. Plaintiffs decided not to pursue emergency relief in this case and did not pursue a parallel track by applying to OSHA.”).

### **III. Plaintiffs Also Fail To State Section 200 And Public-Nuisance Claims.**

This Court can also affirm the district court’s dismissal of Plaintiffs’ Section 200 and public-nuisance claims on the alternative ground that Plaintiffs fail to state a claim.

#### **A. Plaintiffs Fail To State A Section 200 Claim.**

Section 200 provides that sites governed by New York’s Labor Law “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.” NYLL § 200(1). Section 200 claims are analyzed the same way as common-law negligence claims, *Haider v. Davis*, 827

N.Y.S.2d 179, 180 (2d App. Div. 2006), and their elements are: “(i) a duty owed to the plaintiff by the defendant; (ii) breach of that duty; and (iii) injury substantially caused by that breach,” *Pasternack v. Lab. Corp. of Am. Holdings*, 807 F.3d 14, 19 (2d Cir. 2015). Plaintiffs’ Section 200 claim fails because (1) the OSH Act preempts it, and (2) a Section 200 claim cannot be premised on a risk of future injury.

**1. The OSH Act Preempts Plaintiffs’ Section 200 Claim.**

This Court can affirm the district court’s judgment on the ground that the OSH Act preempts Plaintiffs’ Section 200 claim.<sup>6</sup> The OSH Act provides that “[n]othing in this chapter shall 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 section 655 of this title.” 29 U.S.C. § 667(a). These provisions “pre-empt[] any state law or regulation that establishes an occupational health and safety standard on an issue for which OSHA has already promulgated a standard, unless the State has obtained the Secretary’s approval for its own plan.” *Gade*, 505 U.S. at 97 (plurality). New York has not done so. Any state law that has

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<sup>6</sup> Contrary to Plaintiffs’ suggestion (at 26), appellees are entitled to defend the district court’s judgment on any grounds, and affirming the district court’s judgment on the basis of OSH Act preemption would not expand the scope of the judgment. *See T.M. ex rel. A.M. v. Cornwall Cent. Sch. Dist.*, 752 F.3d 145, 167 n.9 (2d Cir. 2014).

the “actual effect” of “directly, substantially, and specifically regulat[ing] occupational safety and health is an occupational safety and health standard within the meaning of the Act.” *Id.* at 105, 107.

Federal law preempts Plaintiffs’ Section 200 claim because OSHA has promulgated numerous federal standards requiring employers to take safety measures against COVID-19. For example, Plaintiffs asked the district court to require Amazon to provide them with “adequate time and tools to clean and disinfect their work stations,” JA-124, but OSHA’s sanitation standard already requires employers to keep workplaces clean and to provide sufficient washing facilities, *see* 29 C.F.R. § 1910.141. OSHA has further emphasized that this and other standards apply to employers’ COVID-19 workplace-safety measures. *See* DOL Br. 4; *see also supra* at p. 25.

OSHA is also contemplating additional COVID-19 standards that would, if promulgated, further preempt duplicative state regulation of private-sector employees in states (such as New York) without a Secretary-approved plan. *See* Executive Order § 3(ii). Moreover, the OSH Act’s “General Duty Clause” requires employers to “furnish ... a place of employment ... free from recognized hazards that are causing or are likely to cause death or serious physical harm to [their] employees.” 29 U.S.C. § 654(a)(1). That requirement also extends to ensuring implementation of

safety practices in response to the COVID-19 pandemic. *See, e.g.*, OSHA Guidance, *supra* (discussing General Duty Clause in relation to COVID-19).

Plaintiffs protest that the OSH Act’s savings clause preserves their Section 200 claims from preemption. Br. 26. The provision they cite, however, applies only to state-law “rights, duties, or liabilities” regarding “injuries, diseases, or death of employees arising out of, or in the course of, employment.” 29 U.S.C. § 653(b)(4). As noted above, *see supra* at p. 27, this provision applies to garden-variety tort suits that seek recovery for “actual injury and death,” *Atlas Roofing*, 430 U.S. at 445, but Plaintiffs have brought no such claim. Rather, in “actual effect,” Plaintiffs’ claim is an attempt to craft a wide-ranging workplace-safety regime that “constitutes, in a direct, clear and substantial way, regulation of worker health and safety.” *Gade*, 505 U.S. at 107–08 (majority opinion). Plaintiffs cannot deploy Section 200 to regulate by injunction in an area governed by federal law or use state law as a back door to carry out the requirements of the OSH Act’s General Duty Clause, the enforcement of which is the sole prerogative of the Secretary of Labor. *See Donovan v. OSHRC*, 713 F.2d 918, 927 (2d Cir. 1983).

The district court “agree[d] [that] the plaintiffs’ claim under § 200 is in tension with the OSH Act and creates the potential for duplicative, and possibly counterproductive, regulation of workplace safety.” JA-143. The court further recognized the distinction between “[t]he vast majority of tort claims regarding workplace safety”—

which “seek damages for ‘injuries, diseases, or death of employees arising out of or in the course of, employment’ and thus easily fall within the OSH Act’s savings clause”—and Plaintiffs’ claim, which seeks to “enforce a scheme of workplace safety standards.” JA-143 (quoting 29 U.S.C. § 653(b)(4)).

Nevertheless, the district court declined to find OSH Act preemption in light of the “presumption that state and local regulation of matters related to health and safety are not preempted.” JA-144. But this presumption is merely an interpretive tool for determining Congressional intent, which is the “ultimate touchstone” in the preemption analysis. *Env'tl. Encapsulating Corp. v. City of New York*, 855 F.2d 48, 53 (2d Cir. 1988). The Supreme Court has already determined that Congress’s intent was to pre-empt “all” state “occupational safety and health standards relating to any occupational safety or health issue with respect to which a Federal standard has been promulgated,” regardless of any presumption. *Gade*, 505 U.S. at 105 (majority opinion) (quoting 29 U.S.C. § 667(b)) (emphasis added). The presumption against preemption cannot be used to undermine *Gade*’s clear instruction.<sup>7</sup>

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<sup>7</sup> The district court also relied on *People v. Pymm*, 76 N.Y.2d 511, 524 (1990), JA-144, but that case held only that general criminal laws are not “occupational safety and health standards” because they protect all citizens by deterring and punishing wrongful conduct instead of seeking to prevent workplace accidents. *Id.* at 521. Plaintiffs, by contrast, seek to impose a prophylactic safety regime directed at employees, and Section 200 protects employees alone, not “members of the general public.” *Mordkofsky v. V.C.V. Dev. Corp.*, 76 N.Y.2d 573, 576–77 (1990).

The “natural implication” of the OSH Act “is that state laws regulating the same issue as federal laws are not saved, even if they merely supplement the federal standard.” *Gade*, 505 U.S. at 100 (plurality). Here, Plaintiffs attempt to craft a workplace-safety regime for JFK8, regulating workplace policies that OSHA already governs through relevant standards and the General Duty Clause, thereby removing their claim from the scope of the savings clause.

**2. Plaintiffs Cannot State A Section 200 Claim Based On Risk Of Future Injury.**

Plaintiffs’ Section 200 claim fails for the additional reason that New York tort law does not allow liability based on “[a] threat of future harm”; rather, physical injury is necessary. *Caronia v. Philip Morris USA, Inc.*, 22 N.Y.3d 439, 446 (2013). This requirement “serves a number of important purposes,” including “defin[ing] the class of persons who actually possess a cause of action, provid[ing] a basis for the factfinder to determine whether a litigant actually possesses a claim, and protect[ing] court dockets from being clogged with frivolous and unfounded claims.” *Id.*

Plaintiffs seek an injunction to change Amazon’s workplace-safety practices going forward based on their alleged future risk of exposure to COVID-19. But, as the district court correctly concluded, under New York law, “the threat of future harm does not provide a valid basis for a tort claim.” JA-147. Indeed, COVID-19 conditions in New York—and the practices that Amazon has adopted in response—

have changed since this suit was filed, highlighting the difficulty of crafting a workplace regime by court order. *See Caronia*, 22 N.Y.3d at 452 (cautioning against “administer[ing] a program heavily dependent on scientific disciplines” where courts “lack the technical expertise”).

The district court did not “read an unwritten element into § 200,” as Plaintiffs contend. Br. 47–48. To the contrary, “[t]he requirement that a plaintiff sustain physical harm before being able to recover in tort is a fundamental principle of [New York State’s] tort system.” *Caronia*, 22 N.Y.3d at 446. Section 200, as a codification of New York common-law negligence, requires an “injury substantially caused” by Amazon’s alleged breach of its duty to provide a safe workplace. *Pasternack*, 807 F.3d at 19. Risk of future harm does not satisfy that requirement. *See Caronia*, 22 N.Y.3d at 446.

Plaintiffs also assert (at 49–50) that Section 200 requires no current injury because it is prophylactic. As a codification of New York common-law negligence, however, Section 200 is a fundamentally remedial “means of apportioning risks and allocating the burden of loss.” *Waters v. N.Y.C. Hous. Auth.*, 69 N.Y.2d 225, 229 (1987); *see also Irwin*, 665 N.Y.S.2d at 778 (NYLL § 241(6)—which requires “reasonable and adequate protection and safety to persons employed” at construction sites—is “primarily remedial in nature”). Consistent with Section 200’s remedial nature, “[t]he vast majority of tort claims” under the statute seek damages for injury.

JA-143. Plaintiffs' attempt to cram a panoply of ongoing workplace-safety standards into the statute does not transform it into a prophylactic law.

The cases Plaintiffs cite are not to the contrary. *Russin v. Louis N. Picciano & Son* stands merely for the proposition that a party with “no ability to control either plaintiff” or the cause of the injury cannot be held liable; it says nothing about injunctive relief for risk of injury. 54 N.Y.2d 311, 317 (1981). Similarly irrelevant is the fact that New York courts have described Section 200 as a “conduct-regulating” statute for the purposes of a choice-of-law analysis. *Huston v. Hayden Bldg. Maint. Corp.*, 617 N.Y.S.2d 335, 337 (2d App. Div. 1994). Whether or not a statute is loss-allocating or conduct-regulating for choice-of-law purposes simply does not answer whether a plaintiff must plead present injury to state a Section 200 claim.

Equally unavailing is *amicus* New York's argument that *the State* can obtain injunctive relief to prevent “dangerous condition[s]” in the workplace. N.Y. Br. 19 (citing NYLL § 200(2)–(3)). As New York itself admits, “the statute does not expressly address the question whether workers themselves may obtain injunctive relief,” and the State cites no precedent for its claim that injunctive relief is “available” to prevent future risk of injury. *Id.* That is because any such precedent would contravene the New York Court of Appeals' admonition that risk of future injury is “insufficient to impose liability against a defendant in a tort context.” *Caronia*, 22 N.Y.3d at 446. The State's authority to seek prospective injunctive relief—which

in any event is limited to unsafe conditions or machinery that the Labor Commissioner identifies, NYLL § 200(2), (3)—does not extend to a suit like this one brought by private plaintiffs.

Plaintiffs also assert that they have suffered previous harm and that the district court “improperly divided” their claim into separate forward- and backward-looking claims. Br. 39–41. But the fact that some Plaintiffs allege that they were injured in the past is beside the point—any claim for historical injury is barred by the New York Workers’ Compensation Law. *See infra* at pp. 47–54.

Equally infirm is Plaintiffs’ claim that, in similar negligence cases, New York courts have issued injunctive relief to prevent future harm. Br. 47. The cases Plaintiffs cite involved requests for equitable relief to remedy past injury—not to prospectively eliminate the risk of harm. *See Incorporated Vill. of Garden City v. Genesco, Inc.*, 2009 WL 3081724, at \*7 (E.D.N.Y. Sept. 23, 2009) (equitable relief to remediate polluted water); *Theofilatos v. Koleci*, 481 N.Y.S.2d 782, 784 (3d App. Div. 1984) (order that cost of new retaining wall be split between parties, where deterioration of previous wall damaged plaintiff’s property).

Accordingly, Plaintiffs cannot state a claim under Section 200 for risk of future injury.

**B. Plaintiffs Fail To State A Public-Nuisance Claim.**

Plaintiffs' public-nuisance claim fails for two independent reasons. First, Plaintiffs have not plausibly alleged a unique injury that would allow them to bring a private action. Second, public-nuisance law does not govern the terms of employment at a private facility.

**1. Plaintiffs Cannot Bring A Private Action For Public Nuisance Because They Do Not Allege Any Special Injury.**

“A public nuisance is a violation against the State and is subject to abatement or prosecution by the proper governmental authority.” *532 Madison Ave. Gourmet Foods, Inc. v. Finlandia Ctr., Inc.*, 96 N.Y.2d 280, 292 (2001). “[I]nvasions of rights common to all of the public should be left to be remedied by action by public officials.” *Burns Jackson Miller Summit & Spitzer v. Lindner*, 59 N.Y.2d 314, 334 (1983). The sole exception is where a plaintiff “suffered harm of a kind different from that suffered by other members of the public.” Restatement (Second) of Torts § 821C(1). The injury must be “different in kind,” not “merely in degree, to that which may be suffered by the public as a whole.” *Duffy v. Baldwin*, 124 N.Y.S.3d 110, 114 (3d App. Div. 2020). “When the injury claimed to be peculiar ... becomes so general and widespread as to affect a whole community, the injury is not peculiar and the action cannot be maintained.” *Burns*, 59 N.Y.2d at 334–35.

As the district court correctly held, this is not the rare case where a private plaintiff may bring a public-nuisance action. JA-139–40. The pandemic has had a

devastating impact on all New Yorkers, not just those who work at JFK8. JA-81–82. Plaintiffs allege that they are at risk of “[i]ncreased community spread at JFK8,” which, they say, will lead to “increased community spread” in New York City and beyond. JA-117–18. This is precisely the sort of alleged community-wide harm that New York law requires to be challenged, if at all, by the “proper governmental authority,” not private litigants in potentially overlapping and conflicting cases. 532 *Madison Ave.*, 96 N.Y.2d at 292. By definition, “community spread” is a harm suffered by the entire “community,” not a unique injury to employees at a particular facility.

Employee-Plaintiffs allege that their risk is greater because they are “directly exposed” to COVID-19 at JFK8, and that they suffer unique fear of contracting or passing on the virus. JA-118–19; Br. 34–36, 38. But everyone in New York who goes to work, the grocery store, or anywhere else risks being “directly exposed” to COVID-19. The physical, emotional, and financial harms visited on New York by the virus are common to the entire community, not unique to Plaintiffs.

In response, Plaintiffs compare JFK8 to a landfill or pig farm, and themselves to nearby homeowners. Br. 34–35. The analogy cannot withstand scrutiny. “Unlike the noxious landfill, a malarial pond, or a pigsty, JFK8 is not the source of COVID-19, emitting the virus from a single source into an otherwise healthy world.” JA-

139–40. Nobody can avoid the risk of exposure “simply by avoiding JFK8, its immediate surrounding area, and its employees.” JA-140. The virus poses a direct risk to everyone because it can travel to any public space, place of employment, or home, no matter how far away. At most, the Employee-Plaintiffs allege that they are more at risk than other New Yorkers. But that is a difference in degree, not kind, and insufficient to allow Plaintiffs to bring a private lawsuit raising a quintessentially public claim. *See 532 Madison Ave.*, 96 N.Y.2d at 293–94.

The Family-Member Plaintiffs are even harder to distinguish from the public at large. They allege that they “are at risk inside their own homes,” JA-119, because JFK8 employees might bring the virus back from work. That is the same kind of risk that all New Yorkers face when a family member interacts with others in the community, either by going to work, shopping at a grocery store, or having a service technician or other person visit their home. If there is any difference at all, it is again one of degree, not kind.

Plaintiffs contend that they have suffered financial losses, including “lost wages.” Br. 35–37. This argument fails at the gate because Plaintiffs never argued below that they suffered a special injury based on lost wages. *See* JA-118–19; ECF 68, at 13–14. Further, Plaintiffs’ public-nuisance claim seeks only declaratory and injunctive relief; Plaintiffs are not seeking to recover any purported financial loss arising from their alleged risk of exposure to COVID-19. JA-72, 119–20. Plaintiffs

therefore forfeited this argument. *See Wal-Mart Stores, Inc. v. Visa USA, Inc.*, 396 F.3d 96, 124 n.29 (2d Cir. 2005).

The argument also fails on its own terms. When “pecuniary damage is so general and widespread as to affect a whole community, or a very wide area within it,” a plaintiff may not use alleged economic loss to bypass the special-injury requirement. *532 Madison Ave.*, 96 N.Y.2d at 293; *see also* Restatement (Second) of Torts § 821C cmt. h (“If, however, the pecuniary loss is common to an entire community and the plaintiff suffers it only in a greater degree than others, it is not a different kind of harm and the plaintiff cannot recover for the invasion of the public right.”).

Here, Plaintiffs admit that “the New York economy has been hard-hit by the pandemic,” JA-82, and that increased community spread at JFK8 specifically will cause the public “financial harm,” JA-118. Plaintiffs’ asserted injury is, at most, a difference in degree, not kind, from the injury they allege to the community at large.

Plaintiff Barbara Chandler argues that she suffered a unique injury when she contracted COVID-19 at JFK8 and passed it on to her family members. Br. 36. This argument, too, is forfeited because Plaintiffs failed to raise it below. *See* JA-118–19; ECF 68, at 13–14; *Wal-Mart*, 396 F.3d at 124 n.29. Workers’ compensation exclusivity also bars Chandler from bringing a public-nuisance action based on an

“injury arising out of and in the course of employment, including diseases or infections which naturally and unavoidably result therefrom.” *Acevedo v. Consol. Edison Co. of New York, Inc.*, 596 N.Y.S.2d 68, 70–71 (1st App. Div. 1993); *see infra* at pp. 47–54.

Additionally Chandler’s new special-injury theory—that anyone who gets sick during a pandemic may bring a private action seeking to enjoin a public nuisance—fails on the merits. *See NAACP v. AcuSport, Inc.*, 271 F. Supp. 2d 435, 451 (E.D.N.Y. 2003). The alleged harm to the community at large—the risk of virus spread—is not different in kind from the harm of contracting the virus. Indeed, Plaintiffs allege that “[i]ncreased community spread at JFK8” “will result in disease and possibly death” throughout New York and therefore “interfere with the common public right to public health.” JA-118. Again, the threat that the pandemic poses to the health of New Yorkers is not unique to any of the Plaintiffs.

Plaintiffs rely on a Ninth Circuit decision applying California public-nuisance law to a claim against gun manufacturers that was brought by private plaintiffs who had been shot. *See Iletto v. Glock, Inc.*, 349 F.3d 1191, 1195, 1212 (9th Cir. 2003). In *Iletto*, the alleged harm to the public was not the physical injury that would result from being shot; rather, it was “danger, fear, inconvenience, and interference with the use and enjoyment of public places that affect the tenor and quality of everyday life.” *Id.* at 1212. Thus, the plaintiffs’ injuries were different in kind. Here, in

contrast, the alleged *public* harm is “disease and possibly death,” JA-118—*i.e.*, infection with COVID-19—which is the same kind of harm that Chandler allegedly suffered. JA-118. Moreover, in *Ileto* the plaintiffs had demonstrated that Glock’s challenged practices actually caused their injuries. 349 F.3d at 1196–98, 1212–13. Here, in contrast, Chandler has failed to allege facts demonstrating that she contracted COVID-19 at JFK8, let alone that the specific employment policies at issue in this lawsuit caused her to contract COVID-19. *See supra* at pp. 15–16.

Plaintiffs’ scattershot special-injury theories treat the requirement as a technicality that can be overcome through creative pleading and argument. But they ignore the rule’s important purposes, which include ensuring that private plaintiffs cannot usurp public authorities’ role in protecting the public at large and “the necessity of guarding against the multiplicity of lawsuits that would follow if,” as here, “everyone were permitted to seek redress for a wrong common to the public.” *532 Madison Ave.*, 96 N.Y.2d at 292.

Plaintiffs’ theory would allow every one of JFK8’s thousands of employees (and all of their family members) to bring suit. Everyone else who comes into contact with a JFK8 employee—say, on the bus or the ferry, JA-89—would also have their own actions. And this could be repeated for every essential employer in New York or anyone else who a plaintiff alleges is not doing enough to protect her from

the pandemic. That would allow private litigants to dictate the government's response to the pandemic in a series of competing lawsuits, all under a claim that is supposed to be the sole prerogative of "public officials." *Burns*, 59 N.Y.2d at 334.

## **2. Public-Nuisance Law Does Not Extend To The Terms Of Employment At JFK8.**

Plaintiffs' claims fail for the additional reason that public-nuisance law does not govern working conditions at a private business. Public-nuisance law applies to acts that "interfer[e] with the use by the public of a public place or endanger[] or injur[e] the property, health, safety or comfort of a considerable number of persons." *532 Madison Ave.*, 96 N.Y.2d at 292. The conduct "must damage or infringe upon the exercise of rights common to all people, such as interfering with the public's right to use a public place." *Haire v. Bonelli*, 870 N.Y.S.2d 591, 595 (3d App. Div. 2008).

This Court should not expand New York's public-nuisance law to govern workplace-safety measures at an essential business. Plaintiffs' allegation that Amazon should do more to protect employees from COVID-19 "during a global pandemic" is insufficient to make JFK8, or any other essential business, a "public nuisance." *Smithfield*, 459 F. Supp. 3d at 1244–45.

New York courts have cautioned against similarly novel and expansive public-nuisance theories that would "open the courthouse doors to a flood of limitless, similar theories" in cases brought "against a wide and varied array of ... commercial

and manufacturing enterprises and activities.” *People ex rel. Spitzer v. Sturm, Ruger & Co.*, 761 N.Y.S.2d 192, 196 (1st App. Div. 2003). It is especially inappropriate for a federal court exercising diversity jurisdiction to “adopt innovative theories that may distort established state law.” *City of Johnstown v. Bankers Standard Ins. Co.*, 877 F.2d 1146, 1153 (2d Cir. 1989).

Plaintiffs muster only a single case, from an Illinois trial court, supporting their remarkable theory that public-nuisance law applies to the minute details of an essential employer’s efforts to protect its employees during a pandemic. And even that case involved allegations of unsafe practices at a fast-food restaurant that bear no resemblance to Plaintiffs’ theories here. *See Massey v. McDonald’s Corp.*, 2020 WL 5700874 (Ill. Cir. Ct. June 24, 2020).

Plaintiffs’ other cases are inapposite, either because they involved public-health authorities (not private plaintiffs) seeking to shut down (or tear down) facilities that were public nuisances under applicable law, *St. Louis Cnty. v. House of Pain Gym Services*, 2020 WL 2615746, at \*1 (E.D. Mo. May 22, 2020); *Meeker v. Van Rensselaer*, 15 Wend. 397, 397–99 (N.Y. Sup. Ct. 1836), or because the conditions for the spread of disease originated on the defendant’s property or were otherwise under its control, *Birke v. Oakwood Worldwide*, 169 Cal. App. 4th 1540, 1548 (2009); *Roth v. City of St. Joseph*, 147 S.W. 490, 491 (Mo. Ct. App. 1912).

Plaintiffs do not seek to shut down JFK8, which undisputedly is an essential business that is helping the public survive the pandemic. Instead, they seek to have a federal district court control JFK8's day-to-day operations, including determining appropriate versus inappropriate performance-management standards, the method by which performance standards should be communicated, and which areas of the site should be air conditioned. But "the plain fact [is] that courts are the least suited, least equipped, and thus the least appropriate branch of government to regulate and micro-manage" the response to a pandemic. *Sturm, Ruger & Co.*, 761 N.Y.S.2d at 199. None of the authorities cited by Plaintiffs justifies, let alone requires, federal courts to adopt Plaintiffs' drastic expansion of New York public-nuisance law.

**C. The New York Workers' Compensation Law Bars Employee-Plaintiffs' Section 200 And Public-Nuisance Claims.**

Even if Plaintiffs could otherwise state claims for violations of Section 200 and public-nuisance law, New York's Workers' Compensation Law would independently bar both claims.

**1. The Plain Text Of The Statute Bars Plaintiffs' Claims.**

Section 11 of the Workers' Compensation statute provides that an employer's obligation to pay workers' compensation "shall be exclusive" and "in place of any other liability whatsoever" for workplace injury. NYWCL § 11. By its plain terms, Section 11 bars Employee-Plaintiffs' Section 200 and public-nuisance claims, which

are premised on alleged workplace injury, because neither cause of action “provide[s] for an exception to the exclusivity of workers’ compensation.” *Caballero v. First Albany Corp.*, 654 N.Y.2d 866, 869 (3d App. Div. 1997) (Section 200); *Acevedo*, 596 N.Y.S.2d at 70–71 (a “private action for public nuisance” is subject to the “clear mandate” of workers’ compensation exclusivity, because that exclusivity broadly encompasses “any accidental injury arising out of and in the course of employment, including diseases or infections”).

Employee-Plaintiffs argue that their claims evade Section 11 because they seek injunctive relief rather than damages. But as the district court recognized, Section 11’s plain text “protect[s] employers from *suit*,” JA-145–46 (emphasis added), regardless of remedy sought. “It is difficult to imagine a broader phrase than ‘any other liability whatsoever.’” JA-145. Section 11 thus bars any claim by an employee that seeks to make an employer “liable” for workplace injury. The term “liability” encompasses claims for injunctive relief because, when Section 11 was enacted in 1914, the term “liable” meant to be bound in law “or equity.” Black’s Law Dictionary (2d ed. 1910); *see also* Black’s Law Dictionary (4th ed. 1951) (“liability” is a “broad legal term” that is “of the most comprehensive significance”).

Accordingly, the New York Court of Appeals explained that the statute “covers the entire field of remedy against an employer for industrial accident.” *In re Babb*, 264 N.Y. 357, 361 (1934). “[L]iability,” as this Court has observed, is “quite

differentiated from a mere duty to pay damages”; instead, it is the “opposite of immunity.” *Krenger v. Pa. R. Co.*, 174 F.2d 556, 559 (2d Cir. 1949). Workers’ compensation exclusivity thus means that “no suit against an employer may be maintained” for workplace injury. *Burlew v. Am. Mut. Ins. Co.*, 63 N.Y.2d 412, 416 (1984). Section 11 bars the entire “cause of action” for public nuisance when based on alleged workplace injury. *Acevedo*, 596 N.Y.S.2d at 71.

“This reading is further supported by the nature of the trade-offs embodied in” the NYWCL. JA-145. The statute was a “quid pro quo,” *WMATA v. Johnson*, 467 U.S. 925, 931 (1984), in which “both classes, employer and employee, gained benefits and made concessions,” *Shanahan v. Monarch Eng’g Co.*, 219 N.Y. 469, 478 (1916). Section 10 grants workers guaranteed compensation for workplace injury; in exchange, Section 11 grants employers immunity from workplace-injury suits, including the “avoidance of litigation” and associated “expense.” *Noreen v. William Vogel & Bros.*, 231 N.Y. 317, 321 (1921); *see also* JA-145 (part of employers’ benefit of the bargain was “reducing the costs and risks of litigation”).

“In exchange for the ‘security’ of receiving fixed benefits,” the district court explained, “the employee has been asked to pay a price in the form of the loss of his common-law right to sue his employer in tort.” JA-145–46. “Allowing plaintiffs to avoid preemption by seeking only injunctive relief” would “thwart the purposes of the statute and the trade-offs embodied in it.” JA-146.

The statutory history further confirms this reading. The state constitutional amendment allowing workers' compensation contemplated that the statutory compensation would be “*exclusive of all other rights and remedies for injuries to employees.*” *Shanahan*, 219 N.Y. at 474. Accordingly, when enacted in 1914, Section 11 provided that Section 10 liability “shall be exclusive.” *Id.* at 474. Then, in 1916 New York added the phrase “and in place of any other liability whatsoever.” Laws of New York, 1916 vol. I 2035. This broad language—added to a statute that already made compensation the “exclusive” remedy—“dictates a broad interpretation” of the term “liability.” *Greenberg v. Sutter*, 661 N.Y.S.2d 933, 934 (Sup. Ct. 1997).

Finally, statutory structure supports the district court's reading. Section 10—the section immediately preceding Section 11—repeatedly uses the narrower term “compensation.” The legislature could have continued using that word in Section 11 by “substituting [‘liability’] with ... ‘payment of compensation’ or some [similar] phrase,” JA-145, but it did not. The switch to the broader terms “remedy” and “liability” indicates that the Assembly used those terms “intentionally.” *DHS v. MacLean*, 574 U.S. 383, 391 (2015).

## **2. Employee-Plaintiffs' Counterarguments Lack Merit.**

Employee-Plaintiffs argue that their claims evade Section 11 because they seek injunctive relief rather than damages. First, Plaintiffs insist that the phrase

“damages, contribution, or indemnity,” located *elsewhere* in Section 11, “qualif[ies]” the plain meaning of “liability.” Br. 43–44. In fact, that phrase simply modifies the list of persons who are subject to the statutory bar: injured employees, their representatives and relatives, and “any person otherwise entitled to recover damages, contribution, or indemnity” on account of that injury. NYWCL § 11. That says nothing about the *sorts of claims* those persons are barred from bringing.

Similarly, the *ejusdem generis* canon, on which Plaintiffs rely, is inapplicable. *See* Br. 44. That canon applies only “where general words are accompanied by a specific enumeration of persons or things,” and provides that “the general words should be limited to persons or things similar to those specifically enumerated.” *City of New York v. Beretta USA Corp.*, 534 F.3d 384, 401 (2d Cir. 2004). Here, the Section 11 term “liability” does not belong to a list at all, much less a list of specific kinds of liability that could narrow the meaning of the all-encompassing phrase “any other liability whatsoever.”

Plaintiffs protest that the district court’s interpretation would make it “impossible for a court to prospectively correct unsafe workplace practices.” Br. 41. But Section 11 does not preclude judicial relief for unsafe workplaces; it simply prevents *employees* (and those standing in their shoes) from suing for workplace injury. OSHA may pursue enforcement actions for workplace-safety violations, and employees may petition OSHA if they think an unsafe workplace exists. As for

employees’ inability to sue, that is simply the “price” employees paid in exchange for “[f]ixed compensation [that] is guaranteed.” JA-145. Indeed, while the NYWCL was being debated, a New York Labor Commissioner remarked that “a principal merit of ... compensation law[s]” is precisely that “questions of industrial safety ... cease al[]most altogether to be subject to judicial determination.” *Accident Liability Reform Advocated*, N.Y. Times (Apr. 9, 1911), <https://tinyurl.com/14g4qb29>.

Next, Plaintiffs argue that Section 11 does not apply because “the Workers’ Compensation Board has no power to issue injunctions.” Br. 41–42. But the “exclusive reach of § 11” is “not dependent” on whether the Board can provide the relief that plaintiff seeks. *Acevedo*, 596 N.Y.S.2d at 71. Likewise, it does not matter whether Plaintiffs seek “compensation for ... disability or death from injury.” Br. 43 (quoting NYWCL § 10). Section 10 details what employees *receive* in the workers’ compensation bargain—compensation—not what they *relinquish*—the right to sue their employers. A bargain’s quid need not mirror its quo.

Plaintiffs contend that the statute’s purpose is to prevent “duplicative recoveries” and “large damages verdicts.” Br. 42–43. But that is not the statute’s *sole* purpose. As explained above, the legislature’s broader goal was to relieve employers from the burden of litigating suits involving workplace injury. *See Weiner v. City of New York*, 19 N.Y.3d 852, 854 (2012) (Section 11 “precludes suits against an employer for injuries in the course of employment”). In any event, it is “the provisions

of our laws rather than the principal concerns of our legislators by which we are governed.” *Oncale v. Sundowner Offshore Servs. Inc.*, 523 U.S. 75, 79 (1998). Section 11’s text refers to “all other liability whatsoever,” not merely damages suits.

The cases Plaintiffs rely on (at 44–45) are inapposite. Several concerned causes of action that, unlike here, are exempted from workers’ compensation exclusivity. *See Hanford v. Plaza Packaging Corp.*, 727 N.Y.S.2d 407, 408 (1st App. Div. 2001) (“intentional” misconduct); *Kondracke v. Blue*, 716 N.Y.S.2d 533, 536 (4th App. Div. 2000) (human-rights law); *Conroy v. Inc. Vill. of Freeport*, 984 N.Y.S.2d 819, 823 (Sup. Ct. 2014) (“the Labor Law statute excepts the acts alleged in the complaint from [the Section 11] bar”).

The other cases are from out of state and do not apply the NYWCL, which has its own unique text and statutory history. *See Shimp v. N.J. Bell Tel. Co.*, 145 N.J. Super. 516, 524 (Ch. Div. 1976) (provision barred employee from any other “Compensation”); *Amalgamated Transit Union Local 1277 v. L.A. Cnty. Metro. Transp. Auth.*, 132 Cal. Rptr. 2d 207, 213–14 (2003) (provision barred actions “at law for damages”). And they are devoid of persuasive reasoning. *See Conway v. Circus Circus Casinos, Inc.*, 8 P.3d 837 (Nev. 2000) (no reasoning); *Nelson v. USPS*, 189 F. Supp. 2d 450, 460 (W.D. Va. 2002) (failing to consider statutory text); *Hicks v. Allegheny E. Conf. Ass’n of Seventh-Day Adventists, Inc.*, 712 A.2d 1021, 1021–

22 (D.C. Ct. App. 1998) (resting conclusion on same misapplication of *ejusdem* canon as Plaintiffs advance here).

**IV. The Court Should Affirm The District Court’s Dismissal Of Employee-Plaintiffs’ Section 191 Claims.**

The Court should also affirm the district court’s dismissal of Employee-Plaintiffs’ claims under NYLL § 191 for allegedly untimely paid quarantine-leave benefits under New York’s COVID-19 Leave Law.<sup>8</sup> Plaintiffs’ claims fail for four independent reasons.

First, Plaintiffs on appeal have fundamentally changed their position, and therefore have waived their argument that paid quarantine leave constitutes “wages” rather than “benefits.” Second, as the district court correctly determined, Section 191 governs the timing for payment of *wages*, not *benefits* such as quarantine leave. Third, Section 191 applies only to contracted-for wages, not wages required by a statute such as the Leave Law. Fourth, Plaintiffs are not entitled to seek relief under the Leave Law because, as they concede, they never received the required quarantine order from the relevant government entity.

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<sup>8</sup> Plaintiffs do not challenge the district court’s dismissal of their Section 191 claims concerning hazard pay. *See* ECF 68, at 21–22. Thus, that challenge is waived. *See Pettaway v. Nat’l Recovery Sols., LLC*, 955 F.3d 299, 305 n.2 (2d Cir. 2020).

**A. Plaintiffs Have Waived Their Argument On Appeal By Changing Position.**

At the outset, Plaintiffs' argument that the Leave Law payments are not "benefits" is waived. Below, Plaintiffs conceded that Leave Law payments are "benefits," JA-85, 96, 102, contending (contrary to the statutory text) that they still qualified as "wages" for purposes of Section 191 because that statutory term "'includes benefits or wage supplements' as defined in § 198-c," ECF 68, at 20. But now Plaintiffs take the opposite position, arguing that Leave Law payments are "wages plain and simple." Br. 53–54. "[W]here a party has shifted his position on appeal and advances arguments available but not pressed below, waiver will bar raising the issue on appeal." *Wal-Mart*, 396 F.3d at 124 n.29. Plaintiffs have thus waived the argument that quarantine pay is not a "benefit" akin to sick leave.

**B. Section 191 Governs Wages Alone, Not Benefits Like Quarantine Leave.**

Plaintiffs' argument also founders on the merits. They have brought suit for untimely paid COVID-19 benefits under Section 191, but that statute unambiguously does not apply to benefits. *See Cavalotti v. Daddy's BBQ, Inc.*, 2018 WL 5456654, at \*15 (E.D.N.Y. Sept. 8, 2018) ("'[W]ages' for purposes of NYLL § 191 specifically excludes benefits and wage supplements."). Specifically, Section 191 sets out timing requirements for the payment of "wages." NYLL § 191. The term "wages" "includes benefits or wage supplements as defined in section [198-c]," "except for

*the purposes of section* [ ] [191].” *Id.* § 190 (emphasis added). Thus, for purposes of Section 191, “benefits” are not “wages.”

Section 198-c(2), in turn, defines “benefits or wage supplements” as including “reimbursement for expenses; health, welfare and retirement benefits; and vacation, separation or holiday pay.” Thus, Section 191 does not apply to benefits such as “sick pay.” *Crawford v. Coram Fire Dist.*, 2015 WL 10044273, at \*5 (E.D.N.Y. May 4, 2015); *see also Sosnowy v. A. Perri Farms, Inc.*, 764 F. Supp. 2d 457, 476 (E.D.N.Y. 2011) (holding that “sick day payments” are “benefits [or] wage supplements” and thus excluded from Section 191).

Section 191 therefore does not apply to the COVID-19 Leave Law, S. 8091 (N.Y. 2020), which requires employers to pay sick-leave benefits to employees that are quarantined due to COVID-19. Here, as the district court correctly recognized, “COVID-19 leave is a form of paid sick leave,” and is thus a “benefit” not governed by Section 191. JA-148. Indeed, the plain text of the COVID-19 Leave Law makes clear that it “provid[es] requirements for *sick leave* and the provision of certain *employee benefits* when such employee is subject to a mandatory or precautionary order of quarantine or isolation due to COVID-19.” S. 8091 (N.Y. 2020) (emphases added). The State of New York agrees that the Leave Law provided for quarantine “benefits.” N.Y. Br. 24. Section 191 therefore does not apply here.

In support of their argument that COVID-19 leave constitutes “wages” rather than “benefits,” Plaintiffs chiefly rely on the “Frequently Asked Questions” (“FAQs”) page on a New York State website, which asserts without explanation that “[t]he paid sick leave payments are subject to” Section 191’s requirements. *New York Paid Family Leave COVID-19: Frequently Asked Questions*, <https://on.ny.gov/2VCCDQD>. As discussed above, however, the “plain language” (JA-150) of Section 191 demonstrates that it does not apply to sick-leave benefits such as Leave Law payments. “[W]hen an interpretation is contrary to the plain meaning of the statutory language,” New York courts “typically decline[] to enforce an agency’s conflicting application thereof.” *Raritan Dev. Corp. v. Silva*, 91 N.Y.2d 98, 100 (1997).

Moreover, the FAQ is not entitled to deference because it conflicts with past NYDOL guidance. As the district court noted, the NYDOL has consistently held that paid sick leave is a “benefit[]” and that there is “‘no ‘correct’ or prescribed method’ of provision or payment.” JA-149–50 (quoting NYDOL, *Request for Opinion, Personal/Sick/Vacation Policy* (Mar. 11, 2010), <https://on.ny.gov/33pXXhh>).

In any event, *amicus* New York has now rejected Plaintiffs’ interpretation of the FAQ, confirming that the Leave Law is not subject to Section 191. N.Y. Br. 24. New York says that the FAQ is *not* guidance regarding Section 191; rather, New York argues, the FAQ merely references Section 191 as “a shorthand to explain that

the new quarantine leave payments should be made on the same schedule and in the same manner as wages subject to Labor Law § 191.” *Id.* The FAQ is thus irrelevant to the question “whether the new leave law payments are ‘wages’ for purposes of Labor Law § 191,” and irrelevant to the resolution of Plaintiffs’ Section 191 claims. *Id.*<sup>9</sup>

Plaintiffs next argue that applying Section 191 as written will “undermine the Leave Law.” Br. 52. To the contrary, the district court’s decision respects the statute’s plain text. The Assembly “passed the COVID-19 leave law presumably well aware that sick leave is not covered by a private right of action under § 191,” leaving enforcement to New York’s Department of Labor. JA-150. The Assembly could have included a private right of action in the Leave Law or provided that Section 191 governed Leave Law benefits, but it did neither.

Moreover, the district court’s opinion is entirely consistent with the purposes of Section 191 and the Leave Law: “The time for providing a benefit or wage supplement can vary greatly depending on the nature of the promised benefit or wage supplement”; accordingly, “it would be burdensome to force employers to provide

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<sup>9</sup> New York’s interpretation of its FAQ is consistent with its plain terms as well. The FAQs simply tell underpaid employees to “file a complaint with the” NYDOL. *New York Paid Family Leave COVID-19: FAQs*, <https://on.ny.gov/2VCCDQD>. Nowhere do they purport to allow employees to bypass these procedures and bring a private action to enforce the Leave Law, let alone an action under Section 191 that would be inconsistent with the plain language of the statute.

promised benefits and wage supplements within section 191’s strict wage payment intervals.” Scott A. Lucas, *Labor Law Article 6: A Misunderstood Law That Fully Protects All Employees’ Wages*, 80 Alb. L. Rev. 1355, 1372 n.140 (2017). This is especially true of benefits that, as here, require verification by the employer, which might be impossible before the next pay period. See S. 8091 (N.Y. 2020) (requiring that an employee obtain “a mandatory or precautionary order of quarantine or isolation issued by the state of New York, the department of health, local board of health, or any governmental entity duly authorized to issue such order due to COVID-19”).

**C. Section 191 Does Not Apply To Statutorily Mandated—Rather Than Contractually Promised—Payments.**

Plaintiffs’ claims fail for the additional reason that Section 191 applies only to contractually obligated payments, not to payments that a *statute* (such as the Leave Law) requires. Thus, a plaintiff cannot bring a Section 191 claim at all absent an “enforceable contractual right to” unpaid wages. *Tierney v. Capricorn Inv’rs, LP*, 592 N.Y.S.2d 700, 703 (1st App. Div. 1993); *see also Simas v. Merrill Corp.*, 2004 WL 213013, at \*2 (S.D.N.Y. Feb. 4, 2004) (“Failure to establish a contractual right to wages necessarily precludes a statutory claim under New York’s labor law.”); *Gallegos v. Brandeis Sch.*, 189 F.R.D. 256, 258 (E.D.N.Y. 1999) (plaintiffs cannot bring a claim under Section 191 unless they have “an enforceable contractual right to those wages”); *Myers v. Hertz Corp.*, 624 F.3d 537, 545 n.1 (2d Cir. 2010). Thus,

Plaintiffs' argument (at 52–54) that “benefits” under Section 191 do not include statutorily obligated—as opposed to contractually obligated—benefits is a non sequitur because Section 191 does not govern statutorily obligated payments in any event.

**D. The Leave Law Has No Application To Plaintiffs' Claims Because They Never Obtained The Required Quarantine Order.**

The Court can also affirm the district court's judgment because Plaintiffs never obtained an “order of quarantine” from a governmental entity, as the Leave Law requires. S. 8091 (N.Y. 2020); *see* ECF 68, at 19 n.10 (conceding the point by arguing that Plaintiffs “would” qualify for such an order). Thus, even setting aside all of the other legal flaws in Plaintiffs' attempt to seek quarantine-leave benefits under the Leave Law in a Section 191 action, they would still fail to state a claim that they were entitled to quarantine leave under the plain terms of the Leave Law itself.

## CONCLUSION

This Court should affirm the district court's judgment.

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## CERTIFICATE OF COMPLIANCE

I certify that:

1. This brief complies with the type-volume limitation of Second Circuit Rule 32.1(a)(4)(A), which is authorized by Federal Rule of Appellate Procedure 32(e), because, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f), it contains 13,998 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: February 16, 2021

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