



September 27, 2021

Clerk of Court
U.S. Court of Appeals for the Second Circuit
Thurgood Marshall Courthouse
40 Foley Square
New York, NY 10007

Re: Palmer, et al. v. Amazon.com et al., No. 20-3989

Dear Judges Chin, Jacobs and Nardini:

Pursuant to Federal Rule of Appellate Procedure 28(j), Plaintiffs-Appellants respond to Defendants-Appellees' correspondence dated September 14, 2021. The president's announcement of a forthcoming OSHA standard regarding vaccination in the workplace neither renders this action moot nor strengthens the case for primary jurisdiction.

The president's statement provides no date by which OSHA must promulgate a vaccination standard. When this appeal was being briefed in February, by contrast, an executive order required OSHA to promulgate any needed emergency temporary standard regarding COVID-19 by March 15, 2021—a deadline OSHA missed by over three months.¹ The prospect of forthcoming OSHA action does not moot this case, then or now.

Even assuming OSHA does promulgate a vaccination standard, its future is uncertain. Vaccination mandates enacted at the state level have faced court challenges temporarily enjoining their implementation.² Similar court challenges will surely ensue if and when OSHA issues any new vaccination standard.

Finally, Amazon's argument that being directed to issue a standard on vaccinations implicates OSHA's unique competence in a manner relevant to primary jurisdiction mischaracterizes the claims in this lawsuit and the

¹ <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/21/executive-order-protecting-worker-health-and-safety/>.

² Judge Extends Temporary Restraining Order on New York's Vaccine Mandate for Health Care Workers, Sept. 23, 2021, <https://www.jdsupra.com/legalnews/judge-extends-temporary-restraining-7322296/>.

actions of state regulators. This case is not about vaccinations, and any standard OSHA issues on that subject will have little if any overlap with the claims regarding productivity and leave policies at issue in this litigation.

Moreover, the New York Labor and Health Departments have issued their own detailed Airborne Infectious Disease Prevention Standard, which requires employers to promulgate workplace safety plans whenever an airborne infectious disease is declared (as occurred with COVID-19 on September 6).³ New York continues to take a strong interest in protecting its workforce from COVID-19 through a comprehensive approach including face coverings, physical distancing and removing infected workers from the workplace, leaving the district court with standards of care against which it can judge Amazon's conduct. Waiting for OSHA to promulgate a narrow standard on the topic of vaccines is unnecessary, and primary jurisdiction is inappropriate.

Sincerely,

Karla Gilbride
Counsel for Derrick Palmer, et al.

³ New York Department of Labor, NY HERO Act, <https://dol.ny.gov/ny-hero-act>.

CERTIFICATE OF COMPLIANCE

1. This letter complies with the type-volume limitation of Fed. R. App. P. 28(j) because the body of the letter contains 349 words.

2. This document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Office 2016 in Times New Roman 14 point.

Dated: September 27, 2021

/s/ Karla Gilbride

CERTIFICATE OF FILING AND SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Second Circuit by using the appellate CM/ECF system on September 27, 2021.