

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF NEW YORK**

DERRICK PALMER, KENDIA MESIDOR,  
BENITA ROUSE, ALEXANDER ROUSE,  
BARBARA CHANDLER, and LUIS  
PELLOT-CHANDLER,

Plaintiffs,

v.

AMAZON.COM, INC. and AMAZON.COM  
SERVICES LLC,

Defendants.

Case No. 1:20-cv-02468-BMC

**AMICUS BRIEF OF THE OPEN SOCIETY POLICY CENTER,**  
**REP. NYDIA VELÁZQUEZ, SEN. CORY BOOKER,**  
**REP. GRACE MENG, REP. JERRY NADLER, REP. ADRIANO ESPAILLAT,**  
**REP. MAX ROSE, REP. ALEXANDRIA OCASIO-CORTEZ,**  
**SEN. BERNIE SANDERS, SEN. EDWARD MARKEY, REP. BARBARA LEE,**  
**REP. MARK POCAN, REP. JOSEPH P. KENNEDY III, REP. RO KHANNA,**  
**REP. PRAMILA JAYAPAL, REP. JESÚS G. “CHUY” GARCÍA,**  
**REP. ILHAN OMAR, AND REP. RASHIDA TLAIB**

## **TABLE OF CONTENTS**

TABLE OF AUTHORITIES.....	ii
INTEREST OF AMICI CURIAE.....	1
I. SUMMARY OF ARGUMENT.....	4
II. BACKGROUND .....	6
A. The COVID-19 Crisis in New York and the Workplace.....	6
B. OSHA’s Response to the COVID-19 Crisis.....	9
C. The JFK8 Facility and This Lawsuit.....	12
III. ARGUMENT.....	13
A. The OSH Act Preserved the Vital Role of State Law to Protect Workers and Their Communities.....	14
B. OSHA’s Actions Under the “General Duty” Clause Do Not Preclude Private Enforcement of State-Law Rights to Address the COVID-19 Crisis .....	18
C. This Court’s Equitable Powers are Well-Suited to Provide Relief to Plaintiffs and the Public .....	21
IV. CONCLUSION.....	23

## TABLE OF AUTHORITIES

	<b>Page(s)</b>
<b>Cases</b>	
<i>In re AFL-CIO</i> , No. 20-1158 (D.C. Cir.).....	11
<i>Banks v. Booth</i> , 1:20-cv-849 (D.D.C. April 19, 2020).....	21
<i>Desiano v. Warner-Lambert &amp; Co.</i> , 467 F.3d 85 (2d Cir. 2006).....	13
<i>Gade v. Nat’l Solid Wastes Mgmt. Ass’n</i> , 505 U.S. 88 (1992).....	5, 14, 15
<i>Gen. Elec. Co. v. Joiner</i> , 522 U.S. 136 (1997) .....	21
<i>Hecht Co. v. Bowles</i> , 321 U.S. 321 (1944).....	20
<i>Irwin v. St. Joseph’s Intercommunity Hosp.</i> , 665 N.Y.S.2d 773 (1997) .....	16
<i>Jensen v. Gen. Elec. Co.</i> , 82 N.Y.2d 77 (1993).....	21
<i>Lemon v. Kurtzman</i> , 411 U.S. 192 (1973).....	20
<i>Metro. Life Ins. Co. v. Massachusetts</i> , 471 U.S. 724 (1985).....	13
<i>New York v. Actavis PLC</i> , 787 F.3d 638 (2d Cir. 2015).....	21
<i>People v. Pymm</i> , 76 N.Y.2d 511 (1990).....	16
<i>Pratt &amp; Whitney Aircraft, Div. of United Techs. Corp. v. Sec’y of Labor</i> , 649 F.2d 96 (2d Cir. 1981).....	19
<i>Rice v. Santa Fe Elevator Corp.</i> , 331 U.S. 218 (1947).....	13

<i>Rural Community Workers Alliance v. Smithfield Foods Inc.</i> , 2020 WL 2145350 (May 5, 2020).....	18
<i>Sakellaridis v. Polar Air Cargo, Inc.</i> , 104 F. Supp. 2d 160 (E.D.N.Y. 2000).....	16
<i>Sec’y of Labor v. Arcadian Corp.</i> , No. 93-0628, 2004 WL 2218388 (Rev. Comm’n Sept. 30, 2004).....	19
<i>Steel Inst. of N.Y. v. City of New York.</i> , 716 F.3d 31 (2d Cir. 2013).....	14
<i>Taynarvis v. McDonald’s Corp.</i> , No. 2020-CH-04247 (Ill. Ct. Cl, Cook Cty.) .....	18
<i>United States v. W. Pac. R. Co.</i> , 352 U.S. 59 (1956).....	18

## **Statutes**

29 C.F.R. § 1903.13.....	10, 20
29 C.F.R. § 1903.14.....	10, 20
29 C.F.R. § 1910.132.....	18
29 C.F.R. § 1910.133.....	18
29 C.F.R. § 1910.134.....	18
29 C.F.R. § 1910.141.....	18
29 U.S.C. § 653.....	5, 14, 15
29 U.S.C. § 654.....	18
29 U.S.C. § 662.....	10
29 U.S.C. § 667.....	5, 15, 18
Judiciary Act of 1789 § 11, 1 Stat. 73, 78 (Sept. 24, 1789) .....	20
New York Labor Law § 200.....	14, 15

## **Other Authorities**

Andrew Cuomo, May 6 Daily Coronavirus Briefing (May 6, 2020), <a href="https://www.youtube.com/watch?time_continue=760&amp;v=0q2Swn_jb6s&amp;feature=emb_title">https://www.youtube.com/watch?time_continue=760&amp;v=0q2Swn_jb6s&amp;feature=emb_title</a> .....	7
--	---

Andrew Cuomo, Press Release (May 20, 2020), <a href="https://www.governor.ny.gov/news/amid-ongoing-covid-19-pandemic-governor-cuomo-announces-results-states-antibody-testing-survey">https://www.governor.ny.gov/news/amid-ongoing-covid-19-pandemic-governor-cuomo-announces-results-states-antibody-testing-survey</a> .....	8
Andy Newman, <i>10 Weeks Into New York Area's Lockdown, Who Is Still Getting Sick?</i> , N.Y. Times (May 28, 2020).....	7
Ctrs. for Disease Control & Prevention and Occupational Safety & Health Admin., Interim Guidance: Manufacturing Workers and Employees (May 12, 2020), <a href="https://www.cdc.gov/coronavirus/2019-ncov/community/guidance-manufacturing-workers-employers.html">https://www.cdc.gov/coronavirus/2019-ncov/community/guidance-manufacturing-workers-employers.html</a> ; .....	11
Ctrs. for Disease Control & Prevention and Occupational Safety & Health Admin., Interim Guidance: Meat and Poultry Processing (May 12, 2020), <a href="https://www.cdc.gov/coronavirus/2019-ncov/community/organizations/meat-poultry-processing-workers-employers.html">https://www.cdc.gov/coronavirus/2019-ncov/community/organizations/meat-poultry-processing-workers-employers.html</a> .....	11
Ctrs. for Disease Control & Prevention, COVID-19 How It Spreads, (May 22, 2020) <a href="https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/how-covid-spreads.html">https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/how-covid-spreads.html</a> .....	6
Ctrs for Disease Control & Prevention, COVID-19 Cases in the US (June 6, 2020) <a href="https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/cases-in-us.html">https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/cases-in-us.html</a> .....	6
Ctrs for Disease Control & Prevention, COVID-19, Racial and Ethnic Minority Groups (April 22, 2020), <a href="https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/racial-ethnic-minorities.html">https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/racial-ethnic-minorities.html</a> .....	8
Eboni G. Price-Haywood, et al., <i>Hospitalization and Mortality among Black Patients and White Patients with Covid-19</i> , New Eng. J. Med. 8 (May 27, 2020).....	8
<i>Five Ways to Monitor the Coronavirus Outbreak in the U.S.</i> , N.Y. Times (June 7, 2020).....	6
H.R. 2193 (Oct. 6, 1970).....	15
Letter from Sen. Elizabeth Warren, et al., to Scott S. Dahl, Inspector General, U.S. Dep't of Labor (May 27, 2020), <a href="https://www.warren.senate.gov/imo/media/doc/Letter%20to%20DOL%20IG%20requesting%20OSHA%20audit.pdf">https://www.warren.senate.gov/imo/media/doc/Letter%20to%20DOL%20IG%20requesting%20OSHA%20audit.pdf</a> .....	5
Monika McDermott, <i>The Fordham Poll - Black Americans Bear the Burden of Coronavirus</i> , Fordham Univ. (April 23, 2020), <a href="https://www.fordham.edu/info/29738/ma_in_elections_and_campaign_management_press_releases/11561/the_fordham_poll_-_black_americans_bear_the_burden_of_coronavirus">https://www.fordham.edu/info/29738/ma_in_elections_and_campaign_management_press_releases/11561/the_fordham_poll_-_black_americans_bear_the_burden_of_coronavirus</a> .....	9

Nat'l Emp't Law Project, <i>Worker Safety in Crisis</i> 2-3 (April 2020).....	10
N. Y. State Dep't of Health, Interim Guidance for the Wholesale Trade Sector During the COVID-19 Public Health Emergency (May 13, 2020), <a href="https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/WholesaleTradeMasterGuidance.pdf">https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/WholesaleTradeMasterGuidance.pdf</a> .....	11
Occupational Safety and Health Act of 1969: Hearings on H.R. 843, H.R. 3809, H.R. 4294, H.R. 13373 Before the Select Subcomm. on Labor of the H. Comm on Educ. & Labor, 91 <sup>st</sup> Cong. (1969) .....	15, 16, 17
Occupational Safety & Health Administration, Interim Enforcement Response Plan for Coronavirus Disease 2019 (COVID-19), <a href="https://www.osha.gov/memos/2020-04-13/interim-enforcement-response-plan-coronavirus-disease-2019-covid-19">https://www.osha.gov/memos/2020-04-13/interim-enforcement-response-plan-coronavirus-disease-2019-covid-19</a> .....	9
Occupational Safety & Health Administration, Updated Interim Enforcement Response Plan for Coronavirus Disease 2019 (COVID-19) (May 19, 2020), <a href="https://www.osha.gov/memos/2020-05-19/updated-interim-enforcement-response-plan-coronavirus-disease-2019-covid-19">https://www.osha.gov/memos/2020-05-19/updated-interim-enforcement-response-plan-coronavirus-disease-2019-covid-19</a> .....	9, 10
Occupational Safety & Health Administration, The Effect of Preemption on the State Agencies Without 18(b) Plans, CSP 01-03-004 (Mar. 3, 1981), <a href="https://www.osha.gov/enforcement/directives/csp-01-03-004">https://www.osha.gov/enforcement/directives/csp-01-03-004</a> .....	14
Occupational Safety & Health Administration, Field Ops. Manual, CPL 02-00- 164 (April 14, 2020) .....	19
Occupational Safety & Health Administration, Infectious Diseases SER Background Document, <a href="https://www.osha.gov/dsg/id/OSHA-2010-0003-0239.pdf">https://www.osha.gov/dsg/id/OSHA-2010-0003-0239.pdf</a> .....	19
Occupational Safety & Health Administration, Guidance on Preparing Workplaces for COVID-19, OSHA 3990-03 (March 9, 2020), <a href="https://www.osha.gov/Publications/OSHA3990.pdf">https://www.osha.gov/Publications/OSHA3990.pdf</a> .....	11
Scott Szymendra, <i>Occupational Safety and Health Administration (OSHA): Emergency Temporary Standards (ETS) and COVID-19</i> , No. R46288, Cong. Research Serv. (May 28, 2020).....	11

## **INTEREST OF AMICI CURIAE**

*Amicus* Open Society Policy Center (OSPC) is a non-partisan and non-profit 501(c)(4) organization that engages in advocacy on a wide array of civil rights and human rights issues, including on public health issues in the United States. In the wake of the COVID-19 pandemic, the Open Society Foundations, a non-profit 501(c)(3) organization affiliated with OSPC, has committed emergency resources to provide relief for the most vulnerable communities, with a particular focus on supporting workers and their families in New York City and other cities in the United States. The Public Health program at Open Society Foundations has long supported strategies to bolster the health of low-wage and other marginalized workers. OSPC has a strong interest in supporting plaintiffs' access to judicial remedies to prevent public health threats arising from lack of workplace protections, as well as in ensuring that Members of Congress can provide information to the court on public health and worker safety issues.

OSPC is joined in the brief by 17 Members of Congress who have witnessed, in each of their districts, the disastrous effects of the COVID-19 pandemic. The burden of the pandemic is especially great for *amici*'s constituents who are essential workers and the households of essential workers. The essential workers continue to work—and face elevated infection risks—despite the Stay at Home and other emergency orders that protect others. By providing key services that our communities need while COVID-19 remains a serious health threat, essential workers face elevated risks of serious illness and even death. And their children, spouses and partners, and other family members, who in many of *amici*'s districts are subject to mandatory Stay at Home orders, cannot escape infection risks if these workers are exposed in the workplace and bring COVID-19 into their homes.

*Amici* have a vital interest in protecting essential workers, their families, and the wider communities whose own health depend in large part on essential workers remaining safe and

healthy:

- In particular, the Defendants' workplace practices affect the health of essential workers, their families, and other community members in several of *amici*'s districts. The JFK8 warehouse at issue in this case is located in Representative Max Rose's district (NY-11). It employs workers from across New York City and New Jersey and is a hub for Defendants' deliveries throughout the New York City metropolitan area. This single warehouse is integrally linked via Defendants' delivery network to other facilities in *amici*'s districts—for example Defendants' Flex facility located in Representative Velázquez's district (NY-07) where packages from the JFK8 warehouse are funneled for delivery to end customers. Defendants' headquarters and a similar distribution center are located within Representative Jayapal's district (WA-07). Nearly all *amici* also have similar Amazon facilities located in their home districts. Although the Defendants have refused to disclose the number of COVID-19 infections and worker deaths tied to its facilities, media reports and reports by workers themselves indicate that unsafe practices and policies may be endangering other communities as well.
- *Amici* also have a profound interest in ensuring adequate legal protections and safeguards for essential workers in each and every jurisdiction. Given gaps in federal protections, state-law remedies play an important role, particularly during the present pandemic crisis. Several *amici* have sponsored or co-sponsored federal legislation to fill those gaps and ensure the rights and well-being of workers and



their families.<sup>1</sup> But legislative efforts take time to enact and implement while workers and their communities face urgent health risks now. *Amici* submit this brief to inform the Court that issuing emergency injunctive relief under state law does not impair federal protections and indeed complements federal remedies as Congress acts with urgency to broaden worker protections.

- Finally, while the threat of community-wide COVID-19 spread creates a public health risk generally, the risks are disproportionately borne by the most vulnerable: by low-income essential workers, the very young, the elderly, people with preexisting medical conditions, African American and Latinx communities, and by low-income communities that already lack access to local hospitals and healthcare. And while large corporations may be able to weather the economic consequences of prolonged shut-downs, small business owners with local businesses will face bankruptcy and ruin if continued COVID-19 outbreaks prolong business closures in their localities. *Amici* include the Chair of the House Committee on Small Business and members of the House Select Subcommittee on the Coronavirus Crisis; House Committee on Appropriations's Subcommittee on Labor, Health, Human Services, Education and Related Agencies; House Committee on Education and Labor's Subcommittee on Workplace Protections, House Committee on Oversight and Reform's Subcommittee on Economic and

---

<sup>1</sup> The Essential Workers Bill of Rights and the COVID-19 Every Worker Protection Act, for example, seek to safeguard essential workers against exposure to the coronavirus. Other legislation, such as Protecting the Right to Organize Act and Restoring Justice for Workers Act, would strengthen the rights of employees against retaliation by their employers, and protect their rights to unionize and confront unfair labor practices. The aims of these bills are the same as those being pursued in this matter – to protect the health and safety of workers.

Consumer Policy; House Committee on Energy & Commerce’s Subcommittee on Health; Senate Committee on Health, Education, Labor and Pensions; and Senate Committee on Small Business and Entrepreneurship . All of these committees have jurisdiction related to the COVID-19 Crisis, and many of them have addressed these disproportionate public harms that threaten constituents.

For all of these reasons, *amici* seek to ensure that the full range of legal remedies is brought to bear to fight COVID-19 in the workplace and the community, including worker-driven requests for immediate injunctive relief like the present case. *Amici* recognize that the Occupational Safety and Health Administration (“OSHA”) offers administrative expertise and can take enforcement action to protect workers from COVID-19-related risks. But OSHA’s jurisdiction is limited to the workplace, while the threat of COVID-19 does not stop at the workplace door, as the family-member plaintiffs in this case powerfully illustrate.

Congress therefore ensured that the OSHA statute would preserve the complementary, protective role of state law and the equitable powers of the federal courts. In the absence of a specific OSHA standard on infectious diseases, these crucial powers and separate legal safeguards are necessary to protect workers from the hazards of communicable diseases such as COVID-19. When actors like the Defendants create an imminent danger to members of the public, the courts have a responsibility to use their equitable authority to protect the community. *Amici* therefore urge this Court to grant a preliminary injunction to protect the Plaintiffs’ state statutory and common-law rights to be free from the preventable spread of disease.

## **I. SUMMARY OF ARGUMENT**

In less than six months, the COVID-19 pandemic has ravaged communities across the country and has particularly devastated the New York City region. To contain the virus, government authorities have ordered residents to stay home, work remotely, and limit contact

with others, while excepting “essential businesses” (and their “essential workers”) from certain restrictions. The employee plaintiffs in this lawsuit are all “essential workers” who cannot perform their work remotely—their physical presence in Amazon’s JFK8 warehouse is necessary to provide the necessities of daily life for remote workers, families that are sheltering at home, and other businesses and organizations in the community. Plaintiffs have identified several practices in the warehouse that promote the spread of the disease, including practices that limit the use of sick and personal leave; interfere with handwashing, sanitization, and social distancing; and limit workers’ knowledge of potential exposures. These practices put the employee plaintiffs at greater risk of coronavirus infection, as shown by the infections that have already spread through the facility. And when the employee plaintiffs go home at the end of a shift, their family members, some of whom join this lawsuit as plaintiffs, are also placed at significant risk of infection.

This Court plays an essential role in protecting both the employee and the family-member plaintiffs by enforcing their rights under common-law nuisance doctrine and state statutory law. The Defendants are likely to argue that the Court should invoke the primary-jurisdiction doctrine to rely on OSHA to address this matter, but there is no reason for the Court to stay its hand here. “Federal regulation of the workplace was not intended to be all encompassing.” *Gade v. Nat’l Solid Wastes Mgmt. Ass’n*, 505 U.S. 88, 96 (1992). The Occupational Safety and Health Act (“OSH Act”), from its first passage, ensured that state common-law and statutory protections would continue, except where specifically preempted by a specific OSHA standard. *See* 29 U.S.C. §§ 653(b)(4), 667(b). OSHA has not promulgated a relevant standard here. Moreover, OSHA has no responsibility or regulatory authority to protect non-employees, like the family-member plaintiffs, who are endangered by an employer’s policies.

The COVID-19 pandemic illustrates why the judicial forum is uniquely situated—and necessary now—to address workplace safety concerns with broader societal consequences. Since the onset of the pandemic, OSHA has made clear that it will conduct onsite inspections only of health care facilities, relying on employers’ voluntary compliance and self-reporting for other workplaces. Moreover, the only citation that the agency has issued related to the pandemic related to faulty recordkeeping. In fact, since President Trump’s March 13, 2020 declaration of a national emergency, the number of OSHA-issued citations has dropped by nearly seventy percent, despite thousands of essential workers contracting COVID-19 and multiple instances of community outbreaks tied to unsafe workplaces.<sup>2</sup> In contrast to this limited administrative capacity and effort, courts have long-recognized equitable powers under the common law to require private actors to end practices that cause harm to public health and safety. Plaintiffs here present evidence that specific company practices cultivate the spread of infection among Defendants’ employees, their family members, and the public. This Court is well-suited to evaluate such factual claims, weigh competing interests, and craft appropriate injunctive relief to prevent the disease from causing additional irreparable harm.

## **II. BACKGROUND**

### **A. The COVID-19 Crisis in New York and the Workplace**

Since the novel coronavirus that causes COVID-19 was first detected in the United States, it has caused devastation that would have previously seemed unimaginable. Almost 1.9

---

<sup>2</sup> *Amicus* Sen. Bernie Sanders, joined by other Senators, has requested an audit of OSHA’s limited enforcement efforts, requesting an explanation of why the agency has drastically reduced investigation and enforcement efforts despite growing worker illnesses and deaths. Letter from Sen. Elizabeth Warren, et al., to Scott S. Dahl, Inspector General, U.S. Dep’t of Labor (May 27, 2020), <https://www.warren.senate.gov/imo/media/doc/Letter%20to%20DOL%20IG%20requesting%20OSHA%20audit.pdf>.

million infections have been confirmed in the United States, and more than 109,000 Americans have died from the disease. Ctrs for Disease Control & Prevention (“CDC”), COVID-19 Cases in the US (June 6, 2020) <https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/cases-in-us.html>. The New York City metropolitan area has been struck particularly hard by the disease, with more than 38,000 deaths and more than 490,000 total confirmed cases. *Five Ways to Monitor the Coronavirus Outbreak in the U.S.*, N.Y. Times (June 7, 2020), <https://www.nytimes.com/interactive/2020/04/23/upshot/five-ways-to-monitor-coronavirus-outbreak-us.html>.

The virus spreads “very easily and sustainably,” through inhalation of airborne particles and contact with contaminated surfaces. CDC, COVID-19 How It Spreads, (May 22, 2020) <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/how-covid-spreads.html>. Thus, people are at particular risk of infection in enclosed, poorly ventilated spaces, where airborne virus particles can quickly accumulate. Apart from ventilation, public-health experts have recommended that people wear cloth face coverings, physically distance themselves at least six feet apart from others, and wash or sanitize their hands frequently. People who are experiencing COVID-19 symptoms should isolate themselves to the extent possible. However, the virus also spreads asymptotically, so precautions are necessary even if no one is experiencing symptoms nearby.

To limit the spread of the coronavirus, both the State of New York and New York City issued Stay at Home orders, closing many businesses and urging residents to limit their trips outside the home. *See* App’x (cataloguing Stay at Home orders from the States of New York and New Jersey, as well as New York City). These orders aimed to curb infections by limiting the person-to-person interactions through which the virus most efficiently spreads. Many New

Yorkers have learned to work remotely, increase their use of delivery services, and physically distance themselves from friends and family.

But for most to stay home, some must go to work. The orders exempt “essential workers,” including the warehouse-worker plaintiffs in this lawsuit, because they help to deliver food and other supplies. On the job, essential workers are placed at elevated risk of coronavirus infection, especially when in an indoor workplace not structured to permit social distancing and with limitations on workers’ ability to wash their hands or to stay home when sick.

When these essential workers return home from their shifts, the risk spreads to relatives who are staying at home in compliance with the State and City orders, including those who are at greater risk of serious disease and death. In fact, a recent survey of hospitalized patients in New York State showed that most of them had been staying at home prior to hospitalization. Andrew Cuomo, May 6 Daily Coronavirus Briefing at 12:40-14:00 (May 6, 2020), [https://www.youtube.com/watch?time\\_continue=760&v=0q2Swn\\_jb6s&feature=emb\\_title](https://www.youtube.com/watch?time_continue=760&v=0q2Swn_jb6s&feature=emb_title). Frontline doctors suspect that many of these patients are family members of essential workers and therefore put at greater risk. Andy Newman, *10 Weeks Into New York Area’s Lockdown, Who Is Still Getting Sick?*, N.Y. Times (May 28, 2020), <https://www.nytimes.com/2020/05/28/nyregion/ny-coronavirus-new-cases.html>.

The impact of this disease has been particularly acute for communities of color and for working-class and poor communities.<sup>3</sup> CDC, COVID-19, Racial and Ethnic Minority Groups

---

<sup>3</sup> Several *amici* represent districts which largely fall within these at-risk demographic categories. For example, in Rep. Velasquez’s district, NY-07, 22.5% of residents fall below the poverty line and the district is 39.8% Hispanic. U.S. Census Bureau, My Congressional District, <https://www.census.gov/mycd/?st=36&cd=07>. In Rep. Tlaib’s district, MI-13, 29.5% of residents fall below the poverty line, making it the third-poorest in the nation. U.S. Census Bureau, My Congressional District, <https://www.census.gov/mycd/?st=26&cd=13>.

(April 22, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/racial-ethnic-minorities.html>. In New York City, one study found that twenty-seven percent of low-income residents had been infected with the coronavirus, compared to nineteen percent of the general population. Andrew Cuomo, Press Release (May 20, 2020), <https://www.governor.ny.gov/news/amid-ongoing-covid-19-pandemic-governor-cuomo-announces-results-states-antibody-testing-survey>. In March, thirty-three percent of reported COVID-19 hospital patients were African-American, although African Americans represent approximately eighteen percent of the population in the communities those hospitals served. CDC, Racial and Ethnic Minority Groups; *see also* Eboni G. Price-Haywood, et al., *Hospitalization and Mortality among Black Patients and White Patients with Covid-19*, New Eng. J. Med. 8 (May 27, 2020) (finding that 76.9% of COVID-19 hospitalizations and 70.6% of in-hospital COVID-19 deaths were for Black patients in a health system where 31% of patients are Black). The disparity is driven in part by the overrepresentation of African Americans and Latinx among workers who are unable to work from home or take paid sick leave. According to a Fordham University study, thirty-two percent of Black Americans report that they are still physically going to work, compared to twenty-two percent of White Americans. Monika McDermott, *The Fordham Poll - Black Americans Bear the Burden of Coronavirus*, Fordham Univ. (April 23, 2020), [https://www.fordham.edu/info/29738/ma\\_in\\_elections\\_and\\_campaign\\_management\\_press\\_releases/11561/the\\_fordham\\_poll\\_-\\_black\\_americans\\_bear\\_the\\_burden\\_of\\_coronavirus](https://www.fordham.edu/info/29738/ma_in_elections_and_campaign_management_press_releases/11561/the_fordham_poll_-_black_americans_bear_the_burden_of_coronavirus).

#### B. OSHA's Response to the COVID-19 Crisis

OSHA has undertaken only limited enforcement actions with respect to COVID-19, and it has entirely declined to exercise regulatory authority in response to the pandemic. The agency first issued enforcement guidance regarding COVID-19-related hazards on April 13, a month

after the first reports of an American death from the disease. *See* Interim Enforcement Response Plan for Coronavirus Disease 2019 (COVID-19), <https://www.osha.gov/memos/2020-04-13/interim-enforcement-response-plan-coronavirus-disease-2019-covid-19>. Under this guidance, OSHA made clear that it generally would not undertake in-person investigations at workplaces outside the health-care sector. Instead, it would perform “non-formal” investigations for non-health-care workplaces, which consist of a written inquiry to the employer. *Id.* § II. An in-person investigation would follow only if there is a fatality or the employer fails to respond to that inquiry. *Id.*

More recently, OSHA issued updated enforcement guidance, which continues to reflect that the agency will not prioritize on-site inspections for non-healthcare workplaces, such as the Amazon JFK8 warehouse at issue in this litigation. OSHA, Updated Interim Enforcement Response Plan for Coronavirus Disease 2019 (COVID-19) (May 19, 2020), <https://www.osha.gov/memos/2020-05-19/updated-interim-enforcement-response-plan-coronavirus-disease-2019-covid-19>. In the event of a workplace-related death from COVID-19, the guidance instructs an Area Director to “prioritize resources and consider all relevant factors, . . . in determining whether to perform a non-formal phone/fax investigation instead of an on-site inspection,” noting that an on-site inspection “will be performed if/when resources become available.” *Id.* § II.<sup>4</sup> In a non-health-care workplace where no one has yet died, the memorandum

---

<sup>4</sup> OSHA entered the COVID-19 pandemic with limited resources for enforcement. Because it has failed to fill all of the inspector positions in its budget, the agency had only 862 inspectors in Fiscal year 2019—the fewest inspectors since 1975. Nat’l Emp’t Law Project, *Worker Safety in Crisis* 2-3 (April 2020). These inspectors are responsible for the inspection of more than 4.5 million workplaces. In recent years, the number of inspections have also dropped: since 2017, the agency has conducted an average of 32,610 inspections, compared to an average of more than 38,000 inspections each year from 2000 to 2016. Nat’l Emp’t Law Project, *Worker Safety in Crisis* at 4.



indicates that on-site inspection is particularly unlikely. *Id.* Instead, the agency will send a letter asking the employer to “investigate the alleged conditions and make any necessary corrections or modifications” and describe its efforts to the agency. *Id.* Att. 2. These self-investigations would not lead to a citation, as agency regulations provide for a citation only following an on-site inspection, not an informal investigation or employer self-report. *See* 29 C.F.R. § 1903.14(a) (establishing the review of an inspection report as the first step toward issuing a citation). Although the agency is authorized to seek injunctive relief to restrain “imminent dangers,” 29 U.S.C. § 662, such an injunction also requires as a predicate an on-site inspection, 29 C.F.R. § 1903.13. In the rare circumstance where an inspection does occur, the memorandum requires central review of any proposed citation before it may issue. Updated Interim Enforcement Response Plan, *supra*, Att. 4.

The combined practical effect of OSHA’s self-imposed enforcement limitations results in significant gaps in protection: OSHA has issued only one citation related to COVID-19—an “other than serious” citation for a nursing home’s failure to report employee hospitalizations. It has not sought any injunctive relief to restrain imminent dangers resulting from the virus.

OSHA’s regulatory efforts regarding COVID-19 have been similarly limited. A work-protection system that relies on self-certification and voluntary compliance by employers relies on clear and specific safety standards. But “[c]urrently, no OSHA standard directly covers exposure to airborne or aerosol diseases in the workplace.” Scott Szymendra, *Occupational Safety and Health Administration (OSHA): Emergency Temporary Standards (ETS) and COVID-19*, No. R46288, Cong. Research Serv., 7 (May 28, 2020). Members of Congress, the AFL-CIO, and a nurse’s union petitioned for OSHA to issue an Emergency Temporary Standard on COVID-19, but the agency rejected those petitions. It is currently defending against a mandamus

petition on the matter. *See In re AFL-CIO*, No. 20-1158 (D.C. Cir.). The agency did issue voluntary guidelines and suggestions for employers to protect their employees from infection, both generally and for meatpacking and manufacturing workplaces, but has not issued any guidance specific to warehouses. OSHA, Guidance on Preparing Workplaces for COVID-19, OSHA 3990-03 (March 9, 2020), <https://www.osha.gov/Publications/OSHA3990.pdf>; *see also* CDC & OSHA, Interim Guidance: Manufacturing Workers and Employees (May 12, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/community/guidance-manufacturing-workers-employers.html>; CDC & OSHA, Interim Guidance: Meat and Poultry Processing (May 12, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/community/organizations/meat-poultry-processing-workers-employers.html>. In the absence of federal standards, New York State has stepped in with specific guidance, alongside broader public-health guidance for employers. New York State Dep't of Health, Interim Guidance for the Wholesale Trade Sector During the COVID-19 Public Health Emergency (May 13, 2020), <https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/WholesaleTradeMasterGuidance.pdf>.

### C. The JFK8 Facility and This Lawsuit

This lawsuit concerns the JFK8 facility, a fulfillment center located in Staten Island, which is owned and operated by Amazon.Com Services LLC (“Amazon”). Amazon has kept the facility open as an “Essential Business,” bringing in between 3,500-5,000 workers on any given day.

Plaintiffs allege that Amazon failed to follow state and CDC guidelines to prevent transmission of COVID-19 at JFK8. Specifically, they assert that Amazon’s rigid monitoring of employees’ activities and use of time interfere with their ability to wash their hands, disinfect workstations, or maintain social distancing. Plaintiffs also allege that Amazon neither provides a

consistent supply of hand sanitizer or disinfecting wipes, nor does it adequately sanitize high-touch surfaces or surfaces recently touched by an individual diagnosed with COVID-19.

Additionally, Plaintiffs claim Amazon fails to adequately notify employees who have been exposed to a coworker with COVID-19 infection and discourages employees from sharing such information. Finally, they allege that Amazon has interfered with employees' ability to take sick and quarantine leave as required by New York law and mandated by company policy. When employees in the facility raised concerns about these practices, Plaintiffs allege that Amazon retaliated against them.

The health risks created by these alleged practices do not stop at the warehouse door. Plaintiffs allege that the Amazon employees bring the risk of exposure home with them at the end of their shift, to family members who are at greater risk of serious disease. One plaintiff came home to find her cousin and housemate dead, apparently due to COVID-19. Each day, workers must make the dangerous and fraught decision between their health and providing for themselves and their families.

Plaintiffs filed this lawsuit, seeking an injunction under New York Labor Law § 200 and common-law public nuisance, to protect the workers and community from transmission of the coronavirus. They seek clear guarantees that employees with COVID-19 symptoms should not attend work, including timely paid quarantine leave and corresponding time-management practices; additional time and supplies for handwashing; time and supplies to sanitize and disinfect the facility and particular work stations; and the use of the local health department or an independent professional to perform contact tracing in line with CDC guidance.

### **III. ARGUMENT**

Plaintiffs ask this Court to exercise its historic, equitable powers to protect them from harm. Their rights to protection under New York law are clearly contemplated under the OSH

Act, and the circumstances of the COVID-19 pandemic cry out for effective judicial intervention. The injunction they seek falls squarely within the core of judicial competence and should be granted.

A. The OSH Act Preserved the Vital Role of State Law to Protect Workers and Their Communities.

Plaintiffs' claims lie at the core of the state's judicial power, which this Court exercises in its diversity jurisdiction. "Historically, common law liability has formed the bedrock of state regulation." *Desiano v. Warner-Lambert & Co.*, 467 F.3d 85, 86 (2d Cir. 2006). Alongside that "bedrock" of common-law liability, states "traditionally have had great latitude under their police powers to legislate as 'to the protection of the lives, limbs, health, comfort, and quiet of all persons.'" *Metro. Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 756 (1985) (quoting *Slaughter-House Cases*, 83 U.S. 36, (1873)). Due to the states' traditional authority to exercise the police powers, courts "assum[e] that the historic police powers of the States were not to be superseded by the Federal Act." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). The OSH Act thus leaves wide berth for courts to enforce both the common-law tort of public nuisance and New York's statutory imposition of a duty for workplaces to be safe. N.Y. Labor Law § 200.

The OSH Act only rarely affects claims, like the public-nuisance claim, that generally protect the public, without regard to the status of any person as an employee. The plain language of the statute defines its scope: "This chapter shall apply *with respect to employment performed in a workplace*." 29 U.S.C. § 653(a). Because the Act is narrowly directed to the workplace, "[s]tate laws of general applicability . . . that regulate the conduct of workers and nonworkers alike" are preempted only if they conflict with specific OSHA standards. *Gade*, 505 U.S. at 107. (This is not the case here.) It makes no difference that "some laws of general applicability may have a 'direct and substantial' effect on worker safety;" so long as "they regulate workers simply

as members of the general public,” the Act will generally leave the law undisturbed. *Id.* OSHA itself has noted that “State enforcement of standards which on their face are predominantly for the purpose of protecting a class of persons larger than employees” are not preempted. OSHA, *The Effect of Preemption on the State Agencies Without 18(b) Plans*, CSP 01-03-004, (Mar. 3, 1981), <https://www.osha.gov/enforcement/directives/csp-01-03-004>.

As an example, the Second Circuit applied this rule to uphold New York City regulations governing the safe operation of construction cranes. *Steel Inst. of N.Y. v. City of New York*, 716 F.3d 31 (2d Cir. 2013). Although the court noted that the regulations “protect worker health and safety in a ‘direct, clear and substantial’ way,” *id.* at 37 (quoting *Gade*, 505 U.S. at 107), they were still laws “of general applicability” because they applied across the city and protected workers and non-workers alike. *Id.* at 38-39. Because they did not conflict with, but merely enhanced, the applicable OSHA standard, the crane regulations were allowed to stand. *Id.* at 40.

Even for statutes that directly regulate the workplace, Congress recognized the important role of state regulation and intervened to only a limited degree. When Congress passed the OSH Act, several states, including New York, had state statutes, common-law standards of liability, and worker’s compensation regimes that addressed safety in the workplace. *See, e.g.*, N.Y. Labor Law § 200. (In fact, the New York Industrial Commissioner testified to the House committee developing the Act about the New York occupational-safety laws, which include § 200—one of the provisions upon which Plaintiffs rely here. Occupational Safety and Health Act of 1969: Hearings on H.R. 843, H.R. 3809, H.R. 4294, H.R. 13373 Before the Select Subcomm. on Labor of the H. Comm on Educ. & Labor, 91<sup>st</sup> Cong. 486-515 (1969) (statement of Martin Catherwood). Congress recognized that some states’ protections were effective but sought to establish a nationwide floor for worker safety. H.R. 2193 at 3-4 (Oct. 6, 1970) (describing

workplace safety regimes in California and Pennsylvania).

Thus, Congress explicitly provided for state law to coexist with the federal administrative scheme. Section 4(b)(4) of the Act provides:

Nothing in this Act shall be construed to supersede or in any manner affect any workmen's compensation law or to enlarge or diminish or affect in any other manner the common law or statutory rights, duties, or liabilities of employers and employees under any law with respect to injuries, diseases, or death of employees arising out of, or in the course of, employment.

OSH Act § 4(b)(4); 29 U.S.C. § 653(b)(4). The Act further provides, “Nothing in this Act 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 6.” OSH Act § 18(a); 29 U.S.C. § 667(a).<sup>5</sup>

In light of these provisions, courts have recognized that “[f]ederal regulation of the workplace was not intended to be all encompassing.” *Gade*, 505 U.S. at 96. In New York in particular, courts have held that the OSH Act’s 4(b)(4) savings clause allows state tort and criminal law to take full effect. “Congress intended State law statutory and common-law duties, rights and liabilities to survive, and that Congress was willing to tolerate any tension that resulted.” *People v. Pymm*, 76 N.Y.2d 511, 523-24 (1990) (holding that the Act did not preempt state criminal law for workplace deaths). As for statutory and common-law torts, the 4(b)(4) savings clause “expressly prevents the Act from affecting *in any manner* the statutory rights of employees *under any law* with respect to injuries arising during the course of employment.” *Irwin v. St. Joseph's Intercommunity Hosp.*, 665 N.Y.S.2d 773, 778 (1997); *accord Sakellaridis v. Polar Air Cargo, Inc.*, 104 F. Supp. 2d 160, 163-64 (E.D.N.Y. 2000).

Legislative history reveals that Congress’s goal with the savings clause was to protect

---

<sup>5</sup> Even for an issue on which a standard is in effect, the Act provides a mechanism for states to gain authority over the matter. 29 U.S.C. § 667(b)-(h).

states' careful balance of tort law and worker's compensation. Some members of Congress sought to use the OSH Act to create a private right of action, believing workers' compensation systems to be inadequate. Rep. O'Hara, the sponsor of one of the predecessor bills, suggested that instead of the regulatory regime, "we give [an injured] worker a right of action in Federal district court to collect damages over and above any workmen's compensation payment he might receive." Occupational Safety and Health Act of 1969: Hearings on H.R. 843, H.R. 3809, H.R. 4294, H.R. 13373 Before the Select Subcomm. on Labor of the H. Comm on Educ. & Labor, 91<sup>st</sup> Cong. 1206 (1969) (Statement of James O'Hara, member of the Select Subcomm. on Labor). *See also id.* at 1124 (Statement of Phillip Burton, member of the Select Subcomm. on Labor) ("I do think we should proceed, as I stated—go with the research, the training, the reporting, and granting the right to sue in tort to the workers and just let nature take its course."). However, insurance companies raised concerns about the risk of increased employer liability under the Act, leading the Nixon administration to promote the language that currently constitutes § 4(b)(4) to preserve existing state law remedies instead of creating a separate, new federal private right of action. *See* Occupational Safety and Health Act of 1969: Hearings on H.R. 843, H.R. 3809, H.R. 4294 and H.R. 13373 Before the Select Subcomm. on Labor of the H. Comm. on Educ. & Labor, 91<sup>st</sup> Cong., 1592-93 (letter of L.H. Silberman, Solicitor of Labor). Any attempt to use the OSH Act's statutory scheme to limit private enforcement of rights where a state has long provided remedies aside from worker's compensation, such as through N.Y. Labor Law § 200, would thus turn Congress's intent on its head; Congress intended through § 4(b)(4) to preserve such pre-existing state private rights of action, not to preclude or preempt them.

This plain-language reading of the OSH Act is reinforced by OSHA's limited enforcement scheme. Currently, OSHA has a limited number of inspectors available and has

severely curtailed in-person inspections of worksites, a scheme the agency has not claimed is sufficient—by itself—to guarantee worker or community safety or supplant state-law protections for avoiding preventable COVID-19-related illnesses and deaths.

B. OSHA’s Actions Under the “General Duty” Clause Do Not Preclude Private Enforcement of State-Law Rights to Address the COVID-19 Crisis

The OSH Act does not generally preempt or preclude lawsuits like the Plaintiffs’ here. In addition, nothing about the specific manner and means by which OSHA is responding to the COVID-19 crisis limits this Court’s equitable authority to grant relief to Plaintiffs.

As noted above, OSHA has not promulgated a standard that applies to COVID-19, or airborne infectious diseases more generally. Instead, the agency’s authority to protect workers from COVID-19 largely relies on the OSH Act’s “general duty clause,” which requires an employer to “furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees.” 29 U.S.C. § 654(a)(1).<sup>6</sup> However, when OSHA is proceeding under the general duty clause, no state-law actions are preempted. 29 U.S.C. § 667(a) (“Nothing 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.”).

Amazon may argue that the Court should defer to OSHA to address this issue under the

---

<sup>6</sup> OSHA has not promulgated a specific standard addressing the dangers of the coronavirus in the workplace. Several OSHA standards tangentially relate to protections from coronavirus infection, but none directly address employee needs for protection, let alone the specific claims presented in this lawsuit. OSHA’s standards on Personal Protective Equipment and eye and face protection provide no direction on what protective equipment must be provided. *See* 29 C.F.R. §§ 1910.132, 1910.133. The respiratory protection standard addresses airborne contaminants, not droplet-transmitted infections, 29 C.F.R. § 1910.134, and neither OSHA nor the Centers for Disease Control have recommended broad-based use of respirators in response to the disease. Finally, the sanitation standard provides only general requirements for clean workplaces, drinking water, and toilet facilities, without clear requirements for disinfecting surfaces or an ability for employees to wash or sanitize their hands. 29 C.F.R. § 1910.141.



“primary jurisdiction” doctrine, mirroring the arguments of other employers in lawsuits related to COVID-19 exposure in the workplace. *See Taynarvis v. McDonald’s Corp.*, No. 2020-CH-04247 (Ill. Ct. Cl., Cook Cty.); *Rural Cmty. Workers All. v. Smithfield Foods Inc.*, No. 5:20-cv-6063-DGK (W.D. Mo.). The primary jurisdiction 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,” and leads courts to withhold resolution of claims for the agency to take initial action. *United States v. W. Pac. R.R. Co.*, 352 U.S. 59, 64 (1956). The Illinois court correctly rejected this argument.<sup>7</sup> OSHA has disavowed the use of its “special competence” by choosing not to promulgate a standard. Waiting for the agency to act would effectively preempt Plaintiffs’ state-law claims through the backdoor, despite Congress’s clear instruction that state-law claims would *not* be preempted if there was no standard.

Even apart from Congress’s clear desire for state-law claims to go forward absent an OSHA standard, the absence of a standard imposes significant limitations on OSHA’s ability to respond speedily to COVID-19-related workplace hazards. In fact, in the course of a now-abandoned rulemaking process to establish an infectious-disease standard, OSHA acknowledged that the general duty clause does not “adequately protect workers with occupational exposure to infectious diseases.” *See* OSHA, Infectious Diseases SER Background Document, at 122-123, <https://www.osha.gov/dsg/id/OSHA-2010-0003-0239.pdf>.

---

<sup>7</sup> The Missouri court did apply the primary-jurisdiction doctrine, in part based on OSHA guidance for meatpacking facilities for which there is no analogue in the warehousing industry. Order Granting Def.’s Mot. Dismiss, *Rural Cmty. Workers All. v. Smithfield Foods Inc.*, 2020 WL 2145350 at \*7-\*9 (May 5, 2020). Moreover, the Missouri court’s analysis reflects a misunderstanding of the limitations of OSHA’s current self-reporting approach to enforcement, as discussed in this brief.

One of the limitations of general-duty enforcement is that OSHA must meet several evidentiary burdens. It must show that either the employer itself or others in the industry recognize that a practice is hazardous. “[T]o be a recognized hazard, the dangerous potential of the condition or activity being scrutinized either must be known by the employer or known generally in the industry.” *Pratt & Whitney Aircraft, Div. of United Techs. Corp. v. Sec’y of Labor*, 649 F.2d 96, 101 (2d Cir. 1981). Although the coronavirus itself is undeniably a hazard that causes harm in the workplace, employers are unlikely to admit the “dangerous potential” of their practices that contribute to increased exposure to the virus. Moreover, in a general-duty context, OSHA can only identify hazards and describe feasible means of abating the hazard; it cannot direct an employer to use a particular means of abatement. *Sec’y of Labor v. Arcadian Corp.*, No. 93-0628, 2004 WL 2218388 (Rev. Comm’n Sept. 30, 2004); OSHA, Field Ops. Manual, CPL 02-00-164, Ch. 4 § III.B.2 (April 14, 2020), [https://www.osha.gov/sites/default/files/enforcement/directives/CPL\\_02-00-164\\_1.pdf](https://www.osha.gov/sites/default/files/enforcement/directives/CPL_02-00-164_1.pdf).

Thus, even under normal conditions, OSHA would face challenges in addressing the new hazards presented by COVID-19 with the dispatch that these hazards self-evidently require. But as detailed above, OSHA is not facing normal conditions. OSHA has the fewest inspectors in decades, and it has relied on this limitation as a basis to reduce onsite inspections. Yet without an onsite inspection, the agency cannot seek an injunction to prevent imminent danger or issue a citation. 29 C.F.R. §§ 1903.13; 1903.14(a).

With OSHA limited by its prior personnel decisions and the inherent difficulties of general-duty enforcement, state law protections become even more paramount. Plaintiffs cannot—and should not be required to—wait for an overburdened agency to address their claims when state law provides a means for them to seek judicial redress.

C. This Court's Equitable Powers are Well-Suited to Provide Relief to Plaintiffs and the Public

While OSHA has limited capacity to ensure a safe workplace to the employee plaintiffs and no authority to protect the family-member plaintiffs, this Court has the authority and competence to grant relief to both sets of plaintiffs. Federal district courts have considered requests for equitable relief since Congress first created them. *See* Judiciary Act of 1789 § 11, 1 Stat. 73, 78 (Sept. 24, 1789). In conferring these injunctive powers, Congress gave the district courts “the instrument for nice adjustment and reconciliation between the public interest and private needs as well as between competing private claims.” *Hecht Co. v. Bowles*, 321 U.S. 321, 329-30 (1944). In other words, “equitable remedies are a special blend of what is necessary, what is fair, and what is workable.” *Lemon v. Kurtzman*, 411 U.S. 192, 200 (1973).

Plaintiffs’ lawsuit calls on this particular expertise of the Court. They contend that Amazon, through its specific actions at the JFK8 facility, is placing them at increased risk of infectious disease, thereby creating a public nuisance and denying their right to a safe workplace under N.Y. Labor Law § 200. They request an injunction requiring the Defendants to adopt appropriate time, leave, and sanitation practices to limit the spread of the disease, as well as science-based contact tracing so that employees can know if they may have been exposed. Such claims are classic requests for equitable relief. *See Jensen v. Gen. Elec. Co.*, 82 N.Y.2d 77, 90 (1993) (“The most fertile field in tort for the injunction is *nuisance*.”) (quoting Hanbury, *Modern Equity*, at 604 [4th ed 1946] [emphasis in original]); *cf.* Order, *Banks v. Booth*, 1:20-cv-849 (D.D.C. April 19, 2020), ECF No. 48 (ordering sanitation practices at the D.C. jail to combat the spread of COVID-19).

The Defendants may argue that the scientific or technical evidence in this case makes it too complex for judicial resolution, but that argument overstates the calculus needed to

determine appropriate relief and underestimates this Court's abilities. *See Town of Windsor v. Avery Dennison Corp.*, 2012 WL 677971 (S.D.N.Y. Mar. 12, 2012) (rejecting a similar argument to defer resolution of a public-nuisance claim under the primary-jurisdiction doctrine). For *Daubert* motions and other matters, this Court regularly must call upon resources at its disposal to weigh claims of a technical nature. *See Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 149 (1997) (Breyer, J., concurring) (describing judicial success in evaluating scientific and technical claims). Moreover, there is a scientific and technical consensus, represented by CDC guidance and OSHA's own recommendations, on what workplace measures will limit the spread of the virus. The Plaintiffs seek only an injunction requiring such measures be taken by an employer that, to date, has failed to do so voluntarily. There is no reason to delay the resolution of Plaintiffs' claims.

In considering the motion for an injunction, this Court will consider whether Plaintiffs' "establish (1) irreparable harm; (2) either (a) a likelihood of success on the merits, or (b) sufficiently serious questions going to the merits of its claims to make them fair ground for litigation, plus a balance of the hardships tipping decidedly in favor of the moving party; and (3) that a preliminary injunction is in the public interest." *New York v. Actavis PLC*, 787 F.3d 638, 650 (2d Cir. 2015) (internal quotation marks omitted). While *amici* defer to the Plaintiffs on the merits, they submit that an injunction clearly satisfies the irreparable-harm and public-interest prongs. There could be no harm more irreparable than death, and we are still learning what longstanding consequences will appear for those who do survive the disease. The public interest is clearly served by limiting the spread of this disease to the greatest extent possible.

As for potential hardship to Defendants, the record illustrates the extensive degree to which Amazon exercises its vast technological expertise and capacity to monitor employees'

activities and organize the work process at JFK8 nearly down to the millisecond. This capacity could be redeployed to provide adequate safeguards to limit the spread of the coronavirus, but Plaintiffs' declarations show that instead, the workplace has been managed in a way that actively contributes to the virus's spread. This situation calls out for the Court's intervention to require Amazon to use its ingenuity to put in place work processes that offer the basic protections necessary to limit the danger of COVID-19 to not only Amazon's workforce, but to those who live with that workforce, and to the broader community.

#### **IV. CONCLUSION**

Essential workers and those who live with them are bearing a disproportionate share of the risk as our society tries to function amid the coronavirus pandemic. At the least, their sacrifice deserves in return a societal commitment that the risks they bear will not be further increased by failure to assure proper safety and health protections as they work. Where employers do not provide such protections and where OSHA cannot or will not require them, this Court must use its equitable powers to assure those protections are in place. Absent such judicial intervention, more workers will contract the disease, irreparably harming themselves and the broader society whose needs put those workers and their families in harm's way. *Amici* implore the Court to exercise its authority to prevent such an injustice by issuing an injunction requiring Amazon to provide the requested protections to the Plaintiffs.

Dated:

Respectfully submitted,

/s/ \_\_\_\_\_  
Richard F. Griffin, Jr.\*  
Joshua Rosenthal  
Bredhoff & Kaiser, P.L.L.C  
805 15<sup>th</sup> Street, NW  
Ste. 1000  
Washington, D.C.  
(202)-842-2600  
[rgriffin@bredhoff.com](mailto:rgriffin@bredhoff.com)

[jrosenthal@bredhoff.com](mailto:jrosenthal@bredhoff.com)

Cecelia C. Chang  
A. Azure Wheeler\*\*  
Kelsey S. Feehan\*\*  
Natasha Arnpriester\*\*  
Amrit Singh  
James A. Goldston\*\*  
Open Society Justice Initiative  
on behalf of Open Society Policy Center  
224 West 57th Street  
New York, New York 10019  
T: (212) 548 0600  
Fax: (212) 548 4662

*\*Pro Hac Vice application pending*  
*\*\* Admitted in New York, but not to the U.S.*  
*District Court for the Eastern District of*  
*New York*

## **Appendix: Stay at Home Orders**

### **New York State**

- N.Y. Exec. Order No. 202.3 (Mar. 16, 2020),  
[https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/EO\\_202.3.pdf](https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/EO_202.3.pdf)
- N.Y. Exec. Order No. 202.4 (Mar. 16, 2020),  
<https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/EO%20202.4.pdf>
- N.Y. Exec. Order No. 202.5 (Mar. 18, 2020),  
[https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/EO\\_202\\_5.pdf](https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/EO_202_5.pdf)
- N.Y. Exec. Order No. 202.6 (Mar. 18, 2020),  
<https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/EO202.6.pdf>
- N.Y. Exec. Order No. 202.7 (Mar. 19, 2020),  
<https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/EO%20202.7.pdf>
- N.Y. Exec. Order No. 202.8 (Mar. 20, 2020),  
[https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/EO\\_202.8.pdf](https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/EO_202.8.pdf)
- N.Y. Exec. Order No. 202.10 (Mar. 23, 2020),  
[https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/EO\\_202.10.pdf](https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/EO_202.10.pdf)
- N.Y. Exec. Order No. 202.11 (Mar. 27, 2020),  
[https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/EO\\_202\\_11.pdf](https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/EO_202_11.pdf)
- N.Y. Exec. Order No. 202.13 (Mar. 29, 2020),  
[https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/EO\\_202.13.pdf](https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/EO_202.13.pdf)
- N.Y. Exec. Order No. 202.14 (Apr. 7, 2020),  
[https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/EO\\_202.14\\_final.pdf](https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/EO_202.14_final.pdf)
- N.Y. Exec. Order No. 202.28 (May 7, 2020),  
<https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/EO202.28.pdf>
- N.Y. Exec. Order No. 202.31 (May 14, 2020),  
[https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/EO\\_202.31.pdf](https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/EO_202.31.pdf)

### **New York City**

- N.Y.C. Emergency Exec. Order No. 99 (Mar. 15, 2020),  
<https://www1.nyc.gov/assets/home/downloads/pdf/executive-orders/2020/eeo-99.pdf>
- N.Y.C. Emergency Exec. Order No. 100 (Mar. 16, 2020),  
<https://www1.nyc.gov/assets/home/downloads/pdf/executive-orders/2020/eeo-100.pdf>
- N.Y.C. Emergency Exec. Order No. 101 (Mar. 17, 2020),  
<https://www1.nyc.gov/assets/home/downloads/pdf/executive-orders/2020/eeo-101.pdf>
- N.Y.C. Emergency Exec. Order No. 102 (Mar. 20, 2020),  
<https://www1.nyc.gov/assets/home/downloads/pdf/executive-orders/2020/eeo-102.pdf>
- N.Y.C. Emergency Exec. Order No. 103 (Mar. 25, 2020),  
<https://www1.nyc.gov/assets/home/downloads/pdf/executive-orders/2020/eeo-103.pdf>
- N.Y.C. Emergency Exec. Order No. 104 (Mar. 30, 2020),

- <https://www1.nyc.gov/assets/home/downloads/pdf/executive-orders/2020/eo-104.pdf>
- N.Y.C. Emergency Exec. Order No. 105 (Apr. 4, 2020),  
<https://www1.nyc.gov/assets/home/downloads/pdf/executive-orders/2020/eo-105.pdf>
- N.Y.C. Emergency Exec. Order No. 106 (Apr. 9, 2020),  
<https://www1.nyc.gov/assets/home/downloads/pdf/executive-orders/2020/eo-106.pdf>
- N.Y.C. Emergency Exec. Order No. 107 (Apr. 14, 2020),  
<https://www1.nyc.gov/assets/home/downloads/pdf/executive-orders/2020/eo-107.pdf>
- N.Y.C. Emergency Exec. Order No. 108 (Apr. 19, 2020),  
<https://www1.nyc.gov/assets/home/downloads/pdf/executive-orders/2020/eo-108.pdf>
- N.Y.C. Emergency Exec. Order No. 109 (Apr. 24, 2020),  
<https://www1.nyc.gov/assets/home/downloads/pdf/executive-orders/2020/eo-109.pdf>
- N.Y.C. Emergency Exec. Order No. 110 (Apr. 29, 2020),  
<https://www1.nyc.gov/assets/home/downloads/pdf/executive-orders/2020/eo-110.pdf>
- N.Y.C. Emergency Exec. Order No. 111 (May 4, 2020),  
<https://www1.nyc.gov/assets/home/downloads/pdf/executive-orders/2020/eo-111.pdf>
- N.Y.C. Emergency Exec. Order No. 112 (May 9, 2020),  
<https://www1.nyc.gov/assets/home/downloads/pdf/executive-orders/2020/eo-112.pdf>
- N.Y.C. Emergency Exec. Order No. 113 (May 14, 2020),  
<https://www1.nyc.gov/assets/home/downloads/pdf/executive-orders/2020/eo-113.pdf>
- N.Y.C. Emergency Exec. Order No. 114 (May 19, 2020),  
<https://www1.nyc.gov/assets/home/downloads/pdf/executive-orders/2020/eo-114.pdf>

## **New Jersey**

- N.J. Exec. Order No. 103 (Mar. 9, 2020), <https://nj.gov/infobank/eo/056murphy/pdf/EO-103.pdf>
- N.J. Exec. Order No. 104 (Mar. 16, 2020),  
<https://nj.gov/infobank/eo/056murphy/pdf/EO-104.pdf>
- N.J. Exec. Order No. 105 (Mar. 19, 2020),  
<https://nj.gov/infobank/eo/056murphy/pdf/EO-105.pdf>
- N.J. Exec. Order No. 107 (Mar. 21, 2020),  
<https://nj.gov/infobank/eo/056murphy/pdf/EO-107.pdf>
- N.J. Exec. Order No. 108 (Mar. 21, 2020),  
<https://nj.gov/infobank/eo/056murphy/pdf/EO-108.pdf>
- N.J. Exec. Order No. 110 (Mar. 25, 2020),  
<https://nj.gov/infobank/eo/056murphy/pdf/EO-110.pdf>
- N.J. Exec. Order No. 118 (Apr. 7, 2020), <https://nj.gov/infobank/eo/056murphy/pdf/EO-118.pdf>
- N.J. Exec. Order No. 122 (Apr. 8, 2020), <https://nj.gov/infobank/eo/056murphy/pdf/EO-122.pdf>