UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

DERRICK PALMER, KENDIA MESIDOR, BENITA ROUSE, ALEXANDER ROUSE, BARBARA CHANDLER, and LUIS PELLOT-CHANDLER, Plaintiffs, vs. AMAZON.COM, INC. and AMAZON.COM SERVICES LLC, Defendants.	Case No. 1:20-cv-2468-BMC **Oral Argument Requested**

DEFENDANTS' MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION

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PRELIMINARY STATEMENT

Plaintiffs' motion is not a serious effort to protect employees from COVID-19. Rather, Plaintiffs belatedly attempt to exploit the pandemic in order to advance their misplaced grievances with human-resources ("HR") policies. Months after the public health emergency arose, Plaintiffs (joined by French and U.S. labor unions) ask this Court for a preliminary injunction, not to impose new safety measures, but instead to order Amazon to modify its HR policies (such as to excuse tardiness to work caused by "public transportation-related delays") in ways that well exceed any legal requirements. Indeed, confirming that no good deed goes unpunished, Plaintiffs complain that Amazon no longer provides *unlimited* unpaid time off, which Amazon voluntarily instituted during the peak of the crisis. To justify the extraordinary relief they seek, Plaintiffs ask the Court to rely on "expert" speculation and unfounded complaints. The reality, as documented by law-enforcement officers who conducted independent inspections of the facility, is that Amazon has gone "above and beyond" compliance requirements, there are "absolutely no areas of concern," and complaints to the contrary are "completely baseless." Fitzgerald Decl., Ex. T, at 1, 3.

Since the inception of the COVID-19 crisis, Amazon, an essential business, has deployed cutting-edge measures to protect its employees that are grounded in science and meet or exceed official guidance. At its Staten Island fulfillment center ("JFK8"), the company implemented contactless thermal screening and state-of-the-art disinfectant "spraying," reconfigured the 20-acre facility to facilitate social distancing, implemented mandatory face-covering usage, installed more than 100 hand-sanitizing dispensers, and instituted rigorous contact tracing, among other safety measures. Amazon has procured more than 100 million face masks for its employees nationwide and spent more than $800 million on safety.

In addition to being factually baseless, Plaintiffs' claims are legally flawed. *First*, Plaintiffs attempt to bring within this Court's jurisdiction claims that federal law has committed to the expert

workplace health and safety agency, the Occupational Safety and Health Administration ("OSHA"). None of their grievances belongs in the first instance in federal court. *Second*, Plaintiffs' Section 200 claim is preempted by the Occupational Safety and Health Act of 1970 ("OSH Act"), barred by New York's workers' compensation statute, and fails on the merits given Amazon's extensive safety measures. *Third*, Plaintiffs' public-nuisance claim fails for multiple reasons: Plaintiffs lack a private right of action; nuisance law does not extend to working conditions at a private facility; and Amazon's employment policies are not the cause of the public's COVID-19 risk. Plaintiffs do not cite a single case supporting their remarkable assertion that the complained-of policies can ever constitute a public nuisance, much less a "paradigmatic" one. Mot. at 18. *Finally*, Plaintiffs cannot satisfy their heavy burden to obtain a preliminary injunction given their lengthy delay in filing suit and inability to demonstrate irreparable harm. Rather, immense disruption to Amazon and the essential services that it provides communities, and harm to the public would result were the Court, contrary to the facts and law, instead to adopt Plaintiffs' unprecedented request that it assume the role of dictating HR practices at JFK8.

BACKGROUND

A. Amazon's Extensive Safety and Health Measures.

Amazon is an essential business whose continued operation during the COVID-19 crisis is crucial to enabling people nationwide to obtain the supplies necessary to sustain their lives, protect their health, and adhere to stay-at-home guidelines. *See* MacDougall Decl. ¶ 15. Amazon's continued operation has allowed many—including those most at risk—to shelter safely at home, and has generated thousands of new jobs at a time when many workers have been displaced.

In providing this critical service, Amazon has prioritized its employees' safety. Since the inception of the pandemic, Amazon consulted with the world's foremost experts in epidemiology,

medicine, industrial hygiene, toxicology, and risk assessment and relied on this expert guidance to design and adopt industry-leading health and safety measures. *Id.* ¶¶ 16–23. The company has also leveraged its technological capabilities to develop innovative measures to mitigate COVID-19 risks, such as conducting "contact tracing" by reviewing closed-circuit video, in addition to interviewing the diagnosed associate. *Id*. ¶¶ 62–64. These efforts continue to grow and evolve: Amazon is building its own system to conduct regular COVID-19 testing of employees and piloting a social-distancing tracking system that uses artificial intelligence to provide associates with live feedback. *Id.* ¶¶ 74–77. Amazon spent more than $800 million in the first half of this year, and expects to spend all of this quarter's anticipated operating profit—approximately $4 billion—on COVID-related expenses and safety-measures. *Id.* ¶ 25.

JFK8 has been at the forefront of these efforts. Fitzgerald Decl. ¶ 11. It was among the first Amazon facilities to implement contactless thermal screening and 6-foot social distancing. *Id*. Amazon employs more than 5,000 people at JFK8 and has made more than 100 changes to the operations and layout of this massive facility—the size of 15 football fields—to protect employees. *Id.* ¶¶ 8–12. Amazon's measures go far beyond any federal, state, or local requirements, and the implementation of such measures has often *preceded* any governmental guidance. The measures implemented at JFK8 include:

(1) ***Enhanced Cleaning and Sanitization.*** Amazon has greatly increased its cleaning team and the frequency of cleaning and sanitization at JFK8; conducts daily disinfectant spraying—a deep cleaning practice used in hospitals and airplanes; and provides cleaning supplies to its JFK8 employees for use at their workstations. *Id.* ¶ 23–24, 26–27, Exs. C, D, E. Amazon also conducts one janitorial audit and two "Sanitation Supply" audits per shift at JFK8. *Id.* ¶¶ 21, 29.

(2) ***Temperature Checks.*** Amazon has conducted temperature checks of everyone entering

JFK8 using thermal cameras since March 29—more than a month before the CDC recommended that practice. MacDougall Decl. ¶¶ 35, 38, 41; *see* CDC, *Coronavirus Disease 2019 (COVID-19): Interim Guidance for Businesses and Employers to Plan and Respond to Coronavirus Disease 2019 (COVID-19)* ("*Interim Guidance*") (updated May 6, 2020), https://tinyurl.com/rbaoc55. No one with an elevated temperature can enter the facility. MacDougall Decl. ¶¶ 38–39.

(3) ***Protective Supplies.*** While JFK8 associates have always worn nitrile work gloves, JFK8 began distributing to all employees vinyl gloves on March 28 and face masks on April 5. Fitzgerald Decl. ¶¶ 37–38, Ex. I. All individuals are required to wear face coverings while on site, even while social distancing is being maintained. *Id.* ¶ 41.

(4) ***Social Distancing.*** Amazon dramatically reconfigured JFK8 to promote social distancing by shutting down every other workstation in the packing department; creating one-way walking paths; redesigning breakrooms and adding new ones to permit social distancing; and adding new exits and suspending exit screening to avoid crowding at the end of shifts. *Id.* ¶ 52, Exs. N, O, P. Amazon also replaced in-person trainings and meetings with virtual trainings, mobile applications, broadcasts to employee workstations, and emails. *Id.* ¶ 57. Amazon has staggered employees' shifts by 15-minute intervals to prevent crowding, and encouraged clocking-in virtually. *Id.* ¶ 55. An extensive educational campaign was coupled with these measures, including signage and directional and spatial markings throughout JFK8. *Id.* ¶ 60, Exs. R, S.

(5) ***Hand-Sanitizing Stations.*** Amazon encourages frequent hand washing, and to ensure that associates can quickly and easily clean their hands, Amazon installed more than 100 regularly refilled hand-sanitizer dispensers throughout JFK8. *Id.* ¶¶ 45, 47, Exs. L, M.

(6) ***Quarantine Procedures.*** Amazon instructs employees feeling sick to stay home and

to seek medical attention.[1] *Id.* ¶¶ 36, 63, Ex. G. If employees are diagnosed with COVID-19, per CDC guidance (https://tinyurl.com/rkr8m3j), they cannot return to work until 10 days since their test (if asymptomatic), or at least 10 days since they first experienced symptoms, they have no fever for 72 hours, and other symptoms have resolved (if symptomatic). MacDougall Decl. ¶ 60.

(7) ***Contact Tracing.*** When Amazon learns that an associate has been diagnosed with COVID-19, it "contact traces," per CDC guidance, to identify anyone who was within six feet of that associate for more than 15 minutes beginning 48 hours before (a) the first symptoms or (b) the laboratory test (if asymptomatic). *Id.* ¶ 64. *See* CDC, *Public Health Guidance for Community-Related Exposure* (June 5, 2020), https://tinyurl.com/t7fnvba. Amazon informs contact-traced employees and places them on paid leave for 14 days from their contact.[2] MacDougall Decl. ¶ 66. Amazon regularly notifies *all* associates at a facility about positive diagnoses.[3] *Id.* ¶ 61.

Amazon communicates its new safety measures, as well as policy and process changes, to employees through text messages, emails, posters, bulletins, scrolling messages on TVs in the facility, and explanatory video messages throughout the facility. Fitzgerald Decl. ¶ 13–17.

Amazon has also consistently encouraged employees to raise health and safety concerns. *Id.* ¶ 68. For example, associates can use the Voice of the Associate virtual whiteboard to ask

[1] Amazon instructs employees experiencing symptoms of COVID-19 not to contact Amcare, as Plaintiffs allege, *see* Compl. ¶ 100, but rather to seek care from their doctor. Fitzgerald Decl. ¶ 59; MacDougall Decl., Ex. I. Indeed, the Amcare clinic at JFK8 has been closed since April 14, and instead operates in a mobile capacity, with onsite medical representatives administering first aid as needed. Fitzgerald Decl. ¶ 59, Ex. Q.

[2] Amazon does not disclose the identity of the individual diagnosed with COVID-19, per guidance from the Equal Opportunity Employment Commission ("EEOC"). MacDougall Decl. ¶ 61; EEOC, *What You Should Know About COVID-19 and the Rehabilitation Act, and Other EEO Laws*, https://tinyurl.com/yb7c7qcl.

[3] Contrary to Plaintiffs' allegations, Compl. ¶ 173, Amazon often reaches out to local health authorities with updates, including to advise them of confirmed COVID-19 cases. Fitzgerald Decl. ¶ 67; MacDougall Decl. ¶ 69.

questions, express concerns, or make complaints, *id*. ¶ 69, a method that associates (including Plaintiff Chandler, *see* Chandler Decl. ¶ 64) have used to share their concerns throughout the pandemic, Fitzgerald Decl. ¶ 69. And since the last week of March, Amazon has conducted a daily opinion survey of JFK8 employees, asking whether they have been able to maintain social distancing, have sufficient supplies to sanitize their workstations, and have observed crowding in common areas. *Id*. ¶ 70. In response to employee feedback, Amazon began distributing pre-bagged cleaning supplies and increased the frequency of cleaning high-traffic areas and the allotment of work gloves at JFK8. *Id*. ¶ 71. Employees are also encouraged to voice their concerns directly to managers, human resources, an ethics-complaint hotline, and in other forums. *Id*. ¶ 68.

After the New York City Mayor dispatched Sheriff's Deputies to investigate complaints about JFK8, the Sheriff's Office conducted multiple inspections and found those complaints to be "baseless." *Id.* ¶¶ 73, 77, Ex. T. To the contrary, the Sheriff's Office concluded that Amazon's health and safety measures go "above and beyond" compliance requirements and pose "absolutely no areas of concern." *Id.*, Ex. T at 1.

B. Amazon's Wage, Attendance, and Productivity Policies During COVID-19

It is particularly telling, in light of Amazon's extensive safety measures, that Plaintiffs' primary focus is ***not*** on Amazon's safety measures, but rather on a select few wage, attendance, and productivity policies. Here, too, Amazon has gone above and beyond any legal requirements.

(1) ***Suspension of Productivity Policies.*** Beginning on March 18, JFK8 suspended all productivity-related performance management of associates. Stephens Decl. ¶ 11. Amazon made this decision to help mitigate COVID-19 risks by enabling associates to focus on social distancing, hand washing, station cleanliness, and other health and safety guidelines. *Id.* Amazon provided managers with talking points to explain this policy shift to associates. *Id.* ¶¶ 12–13, Exs. A, B.

(2) ***Time Off Task.*** Amazon manages the activity of associates via the scanners that they use to scan items, bins, and packages. *Id.* ¶ 15. When more than five minutes elapses between activities on a scanner, that time is aggregated into a "time off task" ("TOT") total for the day. *Id.* TOT excludes, for example, paid breaks and lunch, which are automatically exempted, and visits to HR, work on special projects, and workflow problems at a station, which are exempted by a manager or HR. *Id.* ¶ 16. Only the associate in each process path with the highest total unresolved TOT in excess of 30 minutes during a shift is a candidate for coaching or other discipline, and even then Amazon will not take disciplinary action without a "seek to understand" conversation during which the associate has an opportunity to explain the excessive TOT totals. *Id.* ¶¶ 17–18.

Although bathroom, hand washing, or cleaning time outside of paid breaks is not automatically exempted from TOT totals (which would require burdening associates with informing managers every time they undertook these activities), associates are not subject to discipline for time they identify as spent on such activities. *Id.* ¶ 19. Indeed, associates have been encouraged to wash their hands and clean their workstations throughout the pandemic, and paid breaks have been extended by 10 minutes per shift to permit this activity. Fitzgerald Decl. ¶¶ 45–46. None of the Employee-Plaintiffs has received any TOT discipline this year. Stephens Decl. ¶ 20.

(3) ***Leave Policies.*** Amazon adjusted its leave policies to ensure that those who need to stay home due to COVID-19-related concerns may do so. Pursuant to a program established on March 11, six categories of qualifying employees have been afforded paid leave for up to 14 days, including those who are diagnosed with COVID-19, directed by Amazon to quarantine as a result of contact tracing, or caring for someone with COVID-19. Galindo Decl. ¶¶ 14–15. This paid leave—a program adopted *before* Governor Cuomo signed New York's emergency paid sick leave

law, *see* S8091, N.Y. Legis. Assemb., 2019–2020 (Mar. 18, 2020), https://tinyurl.com/y8qzengn—is over and above paid-time-off accruals under Amazon's standard policies. *Id.* ¶ 5. Amazon pays this "Special COVID Pay" promptly upon receipt of the required documentation. *Id.* ¶ 18. When an employee is unable to see a doctor but has symptoms consistent with COVID-19, Amazon Disability and Leave Services may waive documentation requirements. *Id.* ¶ 16. If leave exceeds 14 days, the employee may receive short-term disability benefits. *Id.* ¶ 9 n.1.[4]

Amazon's quarantine-leave policies were announced on Amazon's public "DayOne" blog and through on-site communications. Galindo Decl. ¶ 19. Amazon also encourages employees to take advantage of other time-off policies as needed. *Id.* ¶¶ 20, 29. Amazon offers multiple types of paid leave, including Paid Personal Time, vacation time, and New York statutory disability leave. *Id.* Amazon also provides unpaid time off, in many instances beyond what is required under federal and state law, including Medical and Personal Leaves of Absence and 20 hours of Unpaid Time ("UPT") each quarter usable in one-hour increments for any purpose.[5] *Id.* ¶¶ 21, 29.

Beginning on March 6, Amazon instituted a policy of unlimited UPT, allowing employees to come to work late, leave early, or be absent in the employee's sole discretion. *Id.* ¶¶ 22–23. Amazon resumed its normal UPT policy on May 1, after modifying its Personal Leave of Absence ("PLOA") unpaid leave program to ensure flexibility for those impacted by COVID-19. *Id.* ¶¶ 24–27. Associates can learn more about and apply for PLOA and other available leave via Amazon's "A to Z" employee portal. *Id.* ¶¶ 27–28, Ex. D.

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[4] Plaintiff Chandler was fully compensated (on April 10 and 17) for her 14 days of quarantine leave, and subsequently received all of the short-term disability payments she was due for her additional four days of leave. *See Id.* ¶¶ 4–13; *contra* Compl. ¶ 129.

[5] Discipline is not automatic if an employee's UPT balance falls below zero. *Id.* ¶ 21. Instead, HR first conducts a "seek to understand" conversation with the employee to determine the circumstances and assist, including through hardship accommodations. *Id.*; *contra* Compl. ¶ 88.

LEGAL STANDARD

A preliminary injunction is an "extraordinary and drastic remedy." *Sussman v. Crawford*, 488 F.3d 136, 139 (2d Cir. 2007).[6] Where, as here, plaintiffs seek a "mandatory injunction[]" that would "disrupt the status quo," they "must meet a heightened legal standard by showing a clear or substantial likelihood of success on the merits." *N. Am. Soccer League, LLC v. U.S. Soccer Fed'n, Inc.*, 883 F.3d 32, 37 (2d Cir. 2018). Plaintiffs must also establish: "a likelihood of irreparable harm in the absence of preliminary relief"; "that the balance of equities tips in the party's favor"; and "that an injunction is in the public interest." *ACLU v. Clapper*, 804 F.3d 617, 622 (2d Cir. 2015). "[U]nless the movant, by a *clear showing*, carries the burden of persuasion," a preliminary injunction should not issue. *Sussman*, 488 F.3d at 139.

ARGUMENT

I. Plaintiffs Cannot Show A Clear Or Substantial Likelihood Of Success On The Merits.

A. OSHA has primary jurisdiction.

This Court should decline to reach the merits because adjudicating Plaintiffs' workplace-safety claims would invade OSHA's primary jurisdiction. *See, e.g.*, *Rural Cmty. Workers All. v. Smithfield Foods, Inc.*, No. 5:20-CV-6063, 2020 WL 2145350, at *8–9 (W.D. Mo. May 5, 2020) (dismissing COVID-19-related state tort law claims because OSHA was "better positioned" to determine whether defendant was complying with OSHA guidance).

The doctrine of primary jurisdiction seeks to "promot[e] proper relationships between the courts and administrative agencies charged with particular regulatory duties." *Ellis v. Tribune Television Co.*, 443 F.3d 71, 81 (2d Cir. 2006). "Recourse to the doctrine of primary jurisdiction is thus appropriate whenever enforcement of [a] claim requires the resolution of issues which,

[6] All internal quotation marks and citations are omitted unless otherwise indicated.

under a regulatory scheme, have been placed within the special competence of an administrative body." *Id.* To determine whether the doctrine applies, courts consider 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.

Id. at 82–83. Here, the four-factor test weighs strongly in favor of deferring to the primary jurisdiction of OSHA—the agency that Congress entrusted to address workplace safety during the COVID-19 pandemic. And the fact that Plaintiffs have requested *remedies* that principally involve HR policies—and thus are far afield from their legal *claims* concerning workplace health and safety—does nothing to displace OSHA's primary jurisdiction over those claims.

First, Plaintiffs' workplace-safety claims clearly "involve[] technical or policy considerations within [OSHA's] field of expertise." *Id.* at 83. As the Department of Labor recently emphasized, OSHA has a "strategy for combatting the danger of COVID-19 in the workplace" that involves "enforcement of existing rules and statutory requirements" and "rapid, flexible guidance." ECF No. 36-1 (Dep't of Labor Br. 1, *In re AFL-CIO*, No. 20-1158 (D.C. Cir. May 29, 2020) ("DOL Br.")). OSHA "impose[s] enforceable obligations on employers to protect workers from COVID-19" involving "respiratory protection, [personal protective equipment], and sanitation." *Id.* at 21. And OSHA has made clear that the OSH Act's general-duty clause, 29 U.S.C. § 654(a)(1), also applies to "employers who fail to take preventative measure against COVID-19," DOL Br. 25. The agency's enforcement actions are subject to review by an independent administrative tribunal—the Occupational Safety and Health Review Commission ("OSHRC")—composed of specialized administrative law judges ("ALJs") and an appellate-review body. The tribunal's decisions are reviewable by federal courts of appeals. *See* 29 U.S.C.

§§ 660–661. OSHA has already "conducted over 4,000 investigations into COVID-19 related complaints[.]" DOL Br. 7. Finally, "OSHA has developed a broad collection of guidance materials" involving COVID-19. *Id.* at 5; *see also* OSHA, *COVID-19 Publications*, https://tinyurl.com/wxa7z2p.

Second, 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. Indeed, 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*, No. 20-1158, 2020 WL 3125324, at *1 (D.C. Cir. June 11, 2020) (per curiam). OSHA has determined that COVID-19-related "questions should be resolved by scientific discovery and political consensus, not by litigation," and has concluded that "tailored guidance and enforcement of the general duty clause and existing standards, plus robust legal protections for complaints, is the best approach for protecting workers at this time." DOL Br. 3, 34. OSHA's actions and pronouncements regarding COVID-19 workplace-safety issues belie the Congressional Amici's claim (ECF No. 11-1, at 19) that "OSHA has disavowed the use of its 'special competence' by choosing not to promulgate a standard."

Third, "deference to OSHA" here would "ensure uniform[ity]," which is crucial in the context of an unprecedented pandemic. *Smithfield*, 2020 WL 2145350, at *8; *cf. United States v. N.Y. City Hous. Auth.*, 347 F. Supp. 3d 182, 208 (S.D.N.Y. 2018) (the public interest is "disserve[d]" by an "unprecedented—judicial usurpation of responsibilities that Congress has expressly entrusted to [a federal agency]"). If individual courts invade the province of OSHA by issuing their own workplace-safety standards, the nation's employers would quickly become subject to an inconsistent patchwork of rules. This is in direct tension with the OSH Act-mandated

system of uniform standards and guidance established and enforced by OSHA and subject to review by technical ALJs at OSHRC and, ultimately, Article III judges in the courts of appeals.

Fourth, this Court should not permit Plaintiffs to frustrate the principle of primary jurisdiction by choosing not to invoke and exhaust the agency's process. Nothing precludes them (even now) from requesting that OSHA inspect their workplace under 29 U.S.C. § 657(f), or from challenging any determination by OSHA in an administrative proceeding, *see* 29 C.F.R. § 1903.12. And Plaintiffs' requests for changes to Amazon's HR policies can also be raised with other governmental agencies, such as by filing a Family and Medical Leave Act ("FMLA") complaint with the Secretary of Labor, 29 C.F.R. § 825.401, or filing a workplace complaint with the New York Commissioner of Labor, N.Y. Lab. Law § 196-a(a).[7] Courts have thus recognized that this fourth factor alone "is not dispositive," *Bernhardt v. Pfizer, Inc.*, Nos. 1:00-cv-4042, 4379, 2000 WL 1738645, at *3 (S.D.N.Y. Nov. 22, 2000), or else Plaintiffs could simply short-circuit the administrative process by preemptively filing suit.

This case presents exactly the sort of technical and scientific questions best committed to expert agencies. The core issues presented here implicate both policy judgments and discretionary enforcement decisions that are squarely within the competence of OSHA, not the courts. Moreover, the primary-jurisdiction doctrine applies with particular force in the preliminary-injunction context, because injunctive relief would constrain the flexibility of OSHA and Amazon to respond to events as they develop. Thus, the Court should defer to the primary jurisdiction of the agency that Congress put in charge of workplace safety—OSHA.[8]

[7] Indeed, OSHA's COVID-19 guidance to employers encompasses HR policies, such as sick leave, that Plaintiffs challenge here. *See* OSHA, *Guidance on Preparing Workplaces for COVID-19*, at 10–11, https://tinyurl.com/tqt5ead.

[8] Plaintiffs cite a state trial court oral order declining to defer under Illinois' primary-jurisdiction

B. The New York Workers' Compensation statute bars Employee-Plaintiffs' public-nuisance and Section 200 claims.

New York's Workers' Compensation remedial scheme is "exclusive" and "in place of *any other liability whatsoever*" for workplace injury. N.Y. Workers' Comp. Law § 11 (emphasis added). The statute thus provides "the entire field of remedy against an employer for industrial accident." *In re Babb*, 264 N.Y. 357, 361 (1934); *see also, e.g.*, *Cifolo v. Gen. Elec. Co.*, 305 N.Y. 209, 215 (1953); *LaLima v. Consol. Edison Co. of N.Y.*, 58 N.Y.S.3d 66, 68 (2d App. Div. 2017). Section 200 and public-nuisance claims are subject to this exclusivity bar. *See, e.g.*, *Bardere v. Zafir*, 477 N.Y.S.2d 131, 133 (1st App. Div.), *aff'd*, 63 N.Y.2d 850 (1984) (Section 200); *Acevedo v. Consol. Edison Co. of N.Y.*, 596 N.Y.S.2d 68, 71 (1st App. Div. 1993) (public nuisance). Any remedy sought by Employee-Plaintiffs for violations of those laws is thus precluded.

C. Plaintiffs are unlikely to succeed on their Section 200 claim.

Additionally, Plaintiffs' Section 200 claim is meritless because: (1) it is preempted by the OSH Act; (2) Amazon has not violated any duty to provide a safe workplace; and (3) Plaintiffs cannot demonstrate that Amazon caused them any cognizable injuries.

1. The OSH Act preempts Plaintiffs' Section 200 claim.

The OSH Act preempts state laws relating to occupational safety or health where a federal standard governs that subject. *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 102 (1992) (plurality). Under the Act, states may "assume responsibility" for "occupational safety and health standards" only by submitting a plan to the Secretary of Labor. 29 U.S.C. § 667(b). But New York has submitted a plan only for *public*-sector employees. *See* OSHA, *New York State Plan*,

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doctrine, ECF No. 28, at 5, but the plaintiffs there were not "asking th[e] Court to create any safety regulations"; rather, they were alleging that existing "regulations are not being followed." ECF No. 28-3, at 52. Moreover, the Illinois primary-jurisdiction doctrine does not apply to public-nuisance suits. *Id.* No such limitation exists for the federal primary-jurisdiction doctrine.

https://tinyurl.com/y7cghkox; N.Y. Lab. Law § 27-a. Thus, because federal standards apply, the OSH Act preempts New York workplace safety standards for *private* employers like Amazon.

Plaintiffs cannot use Section 200 to circumvent OSHA's determinations about the appropriate standards. *See, e.g.*, 29 C.F.R. § 1910.141 (providing sanitization requirements); *id.* § 1910.134 (addressing airborne contaminants). OSHA has made clear that its standards govern employers' operations in response to COVID-19. Letter from Secretary of Labor Eugene Scalia to Richard L. Trumka, President, AFL-CIO (Apr. 30, 2020) ("Scalia Letter"), https://tinyurl.com/y73tq7vp; DOL Br. 21–23. And even if Plaintiffs' requests fell outside the scope of specific existing OSHA standards, they still would be preempted by the OSH Act's "general duty clause," which requires employers to provide a safe workplace, including with respect to COVID-19. 29 U.S.C. § 654(a)(1); *see also* Scalia Letter; DOL Br. 21–24. Indeed, the plain language of Section 200 makes clear that it purports to regulate the same subject matter as the OSH Act's general-duty clause. *Compare* N.Y. Lab. Law § 200(1), *with* 29 U.S.C. § 654(a).

The Secretary of Labor has "sole responsibility" to enforce rights under the OSH Act. *Jacobsen v. N.Y. City Health and Hosps. Corp.*, No. 1:12-cv-7460, 2013 WL 4565037, at *7 (S.D.N.Y. Aug. 28, 2013).[9] Plaintiffs cannot displace these requirements and usurp the Secretary's authority by invoking the parallel provisions of Section 200 to craft a new state-law standard for private employers when New York State has not done so. *See Gade*, 505 U.S. at 102.[10]

[9] In their opposition to Amazon's extension motion, Plaintiffs relied on inapposite cases that do not involve Section 200. *See* ECF No. 28, at 5 (citing cases). None of their cited cases remotely suggests that a plaintiff can fashion a novel workplace-safety regime through injunctive relief in conflict with the exclusive responsibility of the Secretary of Labor.

[10] The OSH Act's savings clause, which excludes from preemption state laws providing compensation for "injuries, diseases, or death of employees" arising from employment, 29 U.S.C. § 653(b)(4), cannot salvage Plaintiffs' claims. Plaintiffs seek no such compensation, the exclusive remedy for which is New York's Workers' Compensation Law. *See supra* § I.B.

2. Amazon has taken extensive measures to protect workers from COVID-19.

Even if cognizable, Plaintiffs' Section 200 claim is factually baseless. Such claims are analyzed under negligence standards, *Kaczmarek v. Bethlehem Steel Corp.*, 884 F. Supp. 768, 774 (W.D.N.Y. 1995), and Plaintiffs cannot demonstrate that Amazon violated a duty of care by providing an unsafe workplace. As described above, Amazon has instituted rigorous measures to protect employees. *See supra* at 2–8. These measures meet—and often exceed—the non-binding state and federal guidelines on which Plaintiffs rely. *See, e.g.*, CDC, *Interim Guidance*, https://tinyurl.com/rbaoc55 (providing "guidance [that] may help prevent workplace exposures to COVID-19"). Indeed, Amazon implemented many of its responses to COVID-19 *before* government authorities prescribed similar policies. *See* Fitzgerald Decl. ¶ 38, 41–42, 62; MacDougall Decl. ¶ 41. Amazon's proactive approach to protecting employees is further confirmed by the Sheriff's Office's assessment that JFK8's safety measures go "above and beyond the current compliance requirements" and pose "absolutely no areas of concern." Fitzgerald Decl., Ex. T. at 1.

Moreover, even Plaintiffs' unfounded complaints about workplace policies do not describe a violation of Section 200. Plaintiffs claim that Amazon's TOT and productivity policies prevent workers from washing their hands and socially distancing. Mot. at 12–14. But, as explained above, *see supra* at 7, employee time away from work for hand washing or restroom breaks is not subject to TOT or productivity discipline, and Amazon even extended paid breaks by 10 minutes per shift to facilitate such activities. Plaintiffs' conclusory allegation that workers are "discourage[d] from taking quarantine leave," Mot. at 8–11, is inconsistent with Amazon's quarantine-leave policy, which was communicated to workers through online and on-site channels, has been regularly utilized, and permits leave when needed consistent with New York law. *See*

Galindo Decl. ¶¶ 9 n.1, 14–19. Plaintiffs also complain that Amazon "reverted to its original unpaid leave policy" after providing employees unlimited unpaid leave in March and April. Mot. at 10. But there is no basis for enjoining Amazon simply because it did not indefinitely continue to allow associates to show up late, leave early, or not show up at all as they please, especially since Amazon continues to provide generous paid and unpaid leave options beyond those required by the FMLA and New York law. *See* Galindo Decl. ¶¶ 24–30.

Plaintiffs also claim that Amazon failed to "pay workers for quarantine leave on their next paycheck." Mot. at 25. But Amazon promptly provides paid time off to quarantined employees, *see* Galindo Decl. ¶¶ 14–18, and beyond Plaintiff Chandler's meritless individual claim, there is no allegation that any Amazon employee has been deprived of quarantine pay.[11] The quarantine-leave law on which Plaintiffs rely, moreover, provides no private right of action for timeliness of payment. *See* 2020 N.Y. Sess. Laws Ch. 25. Plaintiffs cannot obtain through Section 200 what that leave law does not provide directly.

3. Plaintiffs' claim fails for lack of causation.

As Plaintiffs admit, "New York became the global epicenter of the pandemic" in March 2020. Compl. ¶ 41. That "dozens" of employees at a facility of 5,000 workers allegedly contracted COVID-19, Mot. at 23, does not come close to showing that JFK8 is amplifying risk to workers in a city with more than 214,000 confirmed cases, NYC Health, *COVID 19: Data* (July 7, 2020),

[11] Having been paid all her quarantine wages, *see* Galindo Decl. ¶¶ 4–13, Chandler focuses on the timing of payment, *see* ECF No. 28, at 2. But Chandler was paid promptly, *see* Galindo Decl. ¶ 9, and delay is not actionable in any event. *Hussain v. Pakistan Int'l Airlines Corp.*, No. 1:11-CV-932, 2012 WL 5289541, at *3 (E.D.N.Y. Oct. 23, 2012) (Section 191 "contains no provision for private recovery for violations of its provisions regarding frequency of payment"). Moreover, to the extent that neither Chandler nor any other Plaintiff has been shown to actually have been subject to a "mandatory or precautionary order of quarantine or isolation," the New York COVID-19 leave law does not apply. *See* 2020 N.Y. Sess. Laws Ch. 25.

https://tinyurl.com/tp8uwld. Plaintiffs concede that "many workers [at JFK8] take multiple forms of public transit to get to work," and ride public buses that are often "fill[ed] to capacity." Compl. ¶¶ 65–68. Plaintiffs "interact 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." Compl. ¶¶ 16, 186. Plaintiff Kendia Mesidor works at a store that is open to the public. ECF No. 6-4, at 2 (Mesidor Decl.). Palmer participated in two protests, during which he failed to abide by Amazon's social-distancing rules. ECF No. 6-3, at 15–16. In light of the risks of infection inherent in these activities and in simply living and working in New York during the pandemic, any claim that Amazon's practices increase COVID-19-contraction risks is speculative at best. *Cf. United States v. Santiago*, No. 1:92-cr-563, 2020 WL 2475068, at *3 (E.D.N.Y. May 13, 2020) (Cogan, J.) ("[A]s it stands, New York remains a hotbed for the spread of the virus, and thus living with [defendant's] sister does not necessarily materially decrease the probability of defendant contracting it."). And because Plaintiffs cannot show that any of the items on their injunction wish list would eliminate (or even reduce) the risk of infection, their request for relief here is doubly speculative. *See Castillo v. Amjack Leasing Corp.*, 924 N.Y.S.2d 156, 157 (2d App. Div. 2011) ("[L]iability may not be imposed upon a party who merely furnishes the condition or occasion for the occurrence of the event but is not one of its causes.").

Plaintiffs' "expert" declarations do nothing to buttress Plaintiffs' allegations. Plaintiffs' experts have not visited JFK8 or reviewed Amazon's procedures, instead basing their opinions on Plaintiffs' limited, self-serving, and inaccurate accounts of Amazon's practices. *See, e.g.*, ECF Nos. 6-9, ¶ 8; 6-10, at 8 ¶¶ 50–57. Indeed, one expert, Dr. Melissa Perry, submitted a declaration in *Smithfield*—involving a different company in a completely different industry—that is similar to the declaration she submitted here. *Compare* ECF No. 6-11, *with Smithfield*, ECF No. 35-2. The

Smithfield court found Dr. Perry's opinions "of limited value" and noted that they were "more of a good-faith speculation than an evidence-based conclusion," in part because "there [was] no evidence that Dr. Perry reviewed the policies and procedures at the . . . Plant in forming her opinion." *Smithfield*, 2020 WL 2145350, at *5. So too here.

Plaintiffs' experts notably fail to offer any reliable analysis or empirical evidence to substantiate their conclusions, instead asserting in conclusory fashion that Amazon's practices are insufficient. *See, e.g.*, ECF No. 6-10, at 8 ¶¶ 50–57. These assertions are contradicted by Amazon's declarants who are directly familiar with JFK8's actual policies and practices. Plaintiffs' speculative expert declarations cannot support the unprecedented injunction they seek. *See, e.g.*, *Abdullah v. City of New York*, 612 N.Y.S.2d 597, 598 (2d App. Div. 1994) (dismissing Section 200 claim where expert's testimony was speculative).

D. Plaintiffs are unlikely to succeed on their public-nuisance claim.

Plaintiffs' public-nuisance claim is similarly deficient: (1) Plaintiffs lack authority to bring the claim, as they suffered no special injury; (2) employment policies at JFK8 do not involve a public right; and (3) Plaintiffs cannot meet the high bar to show causation.

1. Plaintiffs cannot bring a private action for public nuisance.

This is *not* the rare case where a private plaintiff can bring a public-nuisance action. "A public nuisance is a violation against the State." *532 Madison Ave. Gourmet Foods, Inc. v. Finlandia Ctr., Inc.*, 96 N.Y.2d 280, 292 (N.Y. 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 private plaintiff has "the right to recover damages," which is possible only if she has "suffered harm of a kind different from that suffered by other members of the public." Restatement (Second) of Torts

§ 821C(1) ("Restatement"). This exception is unavailable for two reasons.

First, "[a] public nuisance is actionable by a private person only if it is shown that the person suffered special injury beyond that suffered by the community at large." *532 Madison Ave.*, 96 N.Y.2d at 292. Here, none of the Plaintiffs can show a special risk of contracting COVID-19. They allege a risk of "community spread," Compl. ¶ 185, which is by definition a risk to the entire community. Plaintiffs attempt to distinguish their harm from that of other New Yorkers because they suffer "stress and anxiety" as a result of working at JFK8. Mot. at 20–21. But there is no record basis to conclude that Plaintiffs are more anxious than *everyone else in New York City*. And even if Plaintiffs could show that they are especially at risk or anxious about the pandemic, those are differences of degree, not of kind, and therefore are insufficient to establish a unique injury. *See 532 Madison Ave.*, 96 N.Y.2d at 293–94.

Second, the Employee-Plaintiffs do not and cannot seek damages in light of New York's Workers' Compensation statute's exclusivity bar. *See supra* § I.B.; *see also Acevedo*, 596 N.Y.S.2d at 71. Because a private plaintiff cannot "maintain a proceeding to enjoin [or] abate a public nuisance" unless she has "the right to recover damages," the Employee-Plaintiffs are precluded from pursuing a public-nuisance injunction here. *See* Restatement § 821C(2)(a).

2. Plaintiffs cannot show that Amazon is interfering with any public right.

Plaintiffs' claim does not implicate any cognizable public right. "To constitute a public nuisance, the offending party's actions 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). But JFK8 "is private property," *Monaghan v. Roman Catholic Dioceses of Rockville Ctr.*, 85 N.Y.S.3d 475, 478 (2d App. Div. 2018), and has been closed to members of the public since the onset of the pandemic, Fitzgerald Decl. ¶ 56. The

terms of employment for workers at a lone private facility—no matter the size—are not "common to all people." *See Haire*, 870 N.Y.S.2d at 595. The risk that workers will contract COVID-19 "during a global pandemic" is insufficient to make JFK8, or any other essential business, a "public nuisance." *Smithfield*, 2020 WL 2145350, at *11.[12]

Plaintiffs argue that Amazon's wage, leave, and productivity policies are "a paradigmatic public nuisance." Mot. at 18. This Court should not accept Plaintiffs' invitation to be the first to hold that HR policies can somehow be deemed a "public nuisance." Plaintiffs cite no authority for this remarkable contention, and we are aware of none. The best Plaintiffs can muster in support is their baseless and hyperbolic claim that JFK8 and its employees are "disease-breeding." Mot. at 19 (citing cases). But *Birke v. Oakwood Worldwide* involved a challenge to second-hand smoke in "the outdoor common areas" of an apartment complex. 169 Cal. App. 4th 1540, 1548 (2009). In *Roth v. City of St. Joseph*, the defendant obstructed a creek, leading to stagnant water adjacent to the plaintiff's land. 147 S.W. 490, 491 (Ks. Ct. App. 1912). *Meeker v. Van Rensselaer* involved an "extremely filthy," overcrowded boarding house with "putrid stagnant water" that Albany's "board of health" ordered torn down during a cholera epidemic. 15 Wend. 397, 397 (N.Y. Sup. Ct. 1836). JFK8 is hardly a "putrid stagnant" breeding ground for infection, nor is it an acute source of potential disease during the current worldwide pandemic. To the contrary, JFK8 is an essential business helping the public survive the pandemic, and public officials have *praised* Amazon for its groundbreaking efforts to protect workers. *See* Fitzgerald Decl., Ex. T. at 1, 3. Unlike in *Birke*, *Roth*, and *Meeker*, the risk to the public comes from a virus that has already spread around the globe—not a health risk somehow uniquely exacerbated by Amazon's HR policies.

[12] Even if a private employer could be subject to a nuisance cause of action in these circumstances, such an action would then be preempted by the OSH Act. *See supra* § I.C.

New York's Appellate Division has cautioned against claims like these for good reason: Expansive public-nuisance theories 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). "[C]ourts are the least suited, least equipped, and thus the least appropriate branch of government to regulate and micro-manage" Amazon's extensive and groundbreaking safety measures in response to the pandemic. *Id.* at 199.

3. Plaintiffs cannot show actual or proximate cause.

Plaintiffs also cannot prove by "clear and convincing evidence" that JFK8 exacerbates the spread of COVID-19 in New York. *See Sturm, Ruger & Co.*, 761 N.Y.S.2d at 202 ("[A]t some point, a party is simply too far removed from the nuisance to be held responsible for it."). As explained above, Amazon has implemented extensive and pioneering measures to protect workers. The *Smithfield* court rejected a public-nuisance claim based on the same theory as Plaintiffs' because the employer there had "implemented substantial health and safety measures to protect Plant workers." *See* 2020 WL 2145350, at *11. Moreover, Plaintiffs cannot show that working at JFK8—as opposed to any other activities—caused their risk of exposure. *See supra* at 16–17; *Miranda v. Bomel Constr. Co.*, 187 Cal. App. 4th 1326, 1336–37 (2010) (plaintiffs could not establish that defendant caused their exposure to fungal spores that cause "Valley Fever," where the spores were "endemic to a large portion of California"); *cf. Santiago*, 2020 WL 2475068, at *3 (Cogan, J.). Accordingly, Plaintiffs' public-nuisance claim is unlikely to succeed.

II. Plaintiffs Have Not Demonstrated Irreparable Harm.

Plaintiffs must also demonstrate that "absent a preliminary injunction they will suffer an injury that is neither remote nor speculative, but actual and imminent, and one that cannot be

remedied if a court waits until the end of trial." *Freedom Holdings, Inc. v. Spitzer*, 408 F.3d 112, 114 (2d Cir. 2005). Plaintiffs have not established any actual and imminent irreparable injury.

First, Plaintiffs' delay in filing suit "undercuts" their claim that any harm is irreparable. *Tough Traveler, Ltd. v. Outbound Prods.*, 60 F.3d 964, 968 (2d Cir. 1995). "[C]ourts in this Circuit typically decline to grant preliminary injunctions" after delays of "more than two months." *Coscarelli v. ESquared Hosp. LLC*, 364 F. Supp. 3d 207, 222 (S.D.N.Y. 2019). Here, "[t]he conditions of which [P]laintiffs complain, assuming the complaints are accurate, have been going on for months." Minute Order (June 18, 2020). Plaintiffs waited to seek preliminary relief until June 3 even though New York declared a state of emergency on March 7 and the virus peaked here on April 14.[13] Some of Plaintiffs' complaints relate to alleged practices dating back to March that Plaintiffs admit have since changed. *See* ECF No. 6-3, at 3 ("I was never able to secure a mask from Amazon until the week of April 6, 2020, when it provided masks at the front of the building for all workers."). Because their "failure to act sooner" reveals a lack of "urgency," Plaintiffs' delay "alone" should "preclude" preliminary relief. *Tough Traveler*, 60 F.3d at 968; *cf. Silber v. Barbara's Bakery, Inc.*, 950 F. Supp. 2d 432, 442 (E.D.N.Y. 2013) ("[A] months-long delay . . . suggests that a plaintiff . . . is merely seeking preliminary relief as a commercial strategy.").

Second, Plaintiffs' asserted irreparable injury is too speculative to support a preliminary injunction. *See, e.g.*, *Smithfield*, 2020 WL 2145350, at *10 ("risk" of "exposure" to "COVID-19" at plant was insufficient to establish irreparable harm); *Valentine v. Collier*, 956 F.3d 797, 801 (5th Cir. 2020) (same for prison); *cf. Santiago*, 2020 WL 2475068, at *3 (Cogan, J.). "[N]o one can guarantee health for essential workers—or even the general public—in the middle of this global

[13] *See* Cindy Shultz, *New York Appears to Be 'Past the Plateau' of Virus Cases, Cuomo Says*, N.Y. Times (Apr. 18, 2020), https://tinyurl.com/y7q3moew.

pandemic." *Smithfield*, 2020 WL 2145350, at *10.

Third, as explained above, Amazon has implemented extensive procedures to minimize the risk of contracting COVID-19. *See supra* at 2–8. Plaintiffs cannot show that they will suffer irreparable injury "after accounting for the[se] protective measures." *Valentine*, 956 F.3d at 801.

Fourth, Plaintiffs cannot show irreparable harm because they have "adequate remed[ies] at law." *Deferio v. City of Syracuse*, 770 F. App'x 587, 591 (2d Cir. 2019). Worker's compensation is specifically designed to remedy workplace injury. *See supra* § I.B. Plaintiffs also ignore the many regulatory structures presently in place to address the harms they allege. *See, e.g.*, *Lutheran Med. Ctr. v. Thompson*, 520 F. Supp. 2d 414, 419 (E.D.N.Y. 2007) (plaintiffs have not demonstrated that they have "no adequate remedy at law" unless they have "exhaust[ed] administrative remedies"). Plaintiffs may seek relief from federal, state, or city agencies. *See supra* § I.A (OSHA); U.S. DOL, *How to File a Complaint*, https://tinyurl.com/ycjhpyou; N.Y. Dep't of Labor, *Complaints Related to COVID-19 Regulations*, https://tinyurl.com/ycg8b737; New York City Consumer Affairs, *File Workplace Complaint*, https://tinyurl.com/yabevlmu; Fitzgerald Decl., Ex. T. at 1, 3 (Sheriff). These legal options preclude injunctive relief.

III. The Balance Of Harms And Public Interest Weighs Against An Injunction.

The balance of harms and public interest weighs heavily against granting an injunction here. "Injunctive relief is wholly unnecessary" when defendants have already taken remedial action to rectify the harms alleged. *Burndy Corp. v. Teledyne Indus., Inc.*, 748 F.2d 767, 774 (2d Cir. 1984); *see also Smithfield*, 2020 WL 2145350, at *10. As shown above, Amazon has implemented state-of-the-art health and safety measures at JFK8, often well in advance of guidance from the relevant officials. For example, Plaintiffs ask that this Court order Amazon to "delegate contact tracing to the local health department or an independent trained professional or

conform its own contact tracing to CDC guidance." Mot. at 25. But Plaintiffs have offered no evidence that local authorities have the desire, capacity, or ability to take over Amazon's efforts here,[14] and in fact Amazon's procedures—developed in consultation with some of the world's foremost experts—already meet or exceed CDC guidelines. MacDougall Decl. ¶¶ 16–23, 33, 34, 39, 41, 58, 60, 63–64, 68. Plaintiffs' requested relief would thus only "interfere[] with the rapidly changing and flexible system-wide approach that [Amazon] has used to respond to the pandemic so far." *Valentine*, 956 F.3d at 803.

Moreover, Amazon is an essential business that provides a public service during this unprecedented pandemic. Healthcare and other front-line workers, as well as families and citizens under quarantine, rely on Amazon for the timely delivery of essential goods. And Plaintiffs' proposed injunction would risk harm to employees by displacing Amazon's innovative, science-based, and evolving response to the pandemic with an unwieldy injunction. An injunction's burden "in terms of time, expense, and administrative red tape" would be "too great while [Amazon] must respond in other ways to the crisis." *Id*. A mandatory injunction "would saddle" Amazon with significant burdens and harm the public interest by "strip[ping] away" Amazon's "discretion to allocate scarce resources necessary to fight the pandemic" and to deliver goods to those in need. *Swain v. Junior*, No. 20-11622, 2020 WL 3167628, at *12 (11th Cir. June 15, 2020).

IV. Plaintiffs' Proposed Injunction Is Overbroad.

Finally, Plaintiffs' proposed 12-part "injunction is overbroad" because (1) many of the requests already have been implemented, (2) the injunction "seeks to restrain [Amazon] from

[14] *See* Sharon Otterman, *N.Y.C. Hired 3,000 Workers for Contact Tracing. It's Off to a Slow Start*, N.Y. Times (June 21, 2020), https://tinyurl.com/y9z2v62s.

engaging in legal conduct," and (3) Plaintiffs' requests are "not fairly the subject of" their causes of action. *City of New York v. Mickalis Pawn Shop, LLC*, 645 F.3d 114, 144–45 (2d Cir. 2011).

Requests 1–7, which seek changes to Amazon's leave policies and communications, are moot because Amazon already substantially complies with the standards Plaintiffs invoke: Amazon has afforded qualifying employees paid leave since March 11—a policy that it communicated online, as well as through on-site communications; it instituted a policy of unlimited UPT during the crisis's peak, from March 6 to May 1; and it continues to offer associates the full range of paid and unpaid leave options and encourages them to contact HR if they are feeling sick or otherwise exposed to an individual who may be sick. *See* Galindo Decl. ¶¶ 14–30.

Amazon also largely complies with the substance of Plaintiffs' requests involving employee health, TOT policies, facility cleaning, and contact tracing. *See* Mot. at 25 (requests 8–12); *see also supra* at 2–8. And the relief sought is unnecessary because Amazon instructs symptomatic employees not to enter Amcare (which is now closed), but rather to seek care from their doctor; it has installed more than 100 sanitizing stations and given employees extended time to wash their hands; it has significantly increased its cleaning team and conducts daily disinfectant sprays; and it has instituted a state-of-the-art contact-tracing program. *See supra* at 2–8. Because these policies meet or exceed CDC guidelines and fully comply with applicable laws and regulations, the requests are "wholly unnecessary." *Burndy Corp.*, 748 F.2d at 774.

Finally, there is a fundamental disconnect between Plaintiffs' claims—which are premised on workplace health and safety—and their requested remedies, which are focused on HR policies. Accordingly, this Court should decline Plaintiffs' invitation to wade into workplace-policy matters that are "not fairly the subject of litigation." *Mickalis*, 645 F.3d at 145.

This Court should deny all of Plaintiffs' requests.

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