20-3989-cv

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

DERRICK PALMER, KENDIA MESIDOR, BENITA ROUSE, ALEXANDER ROUSE, BARBARA CHANDLER, LUIS PELLOT-CHANDLER, AND DEASAHNI BERNARD,

Plaintiffs – Appellants,

v.

AMAZON.COM, INC. AND AMAZON.COM SERVICES, LLC,

Defendants – Appellees,

On Appeal from the United States District Court for the Eastern District of New York

BRIEF OF AMICI CURIAE NATIONAL EMPLOYMENT LAW PROJECT AND NEW YORK COMMITTEE FOR OCCUPATIONAL SAFETY AND HEALTH IN SUPPORT OF PLAINTIFFS-APPELLANTS

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RULE 26.1 CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rules of Appellate Procedure 29(a)(4)(A) and 26.1, Amici Curiae National Employment Law Project and New York Committee for Occupational Safety and Health state that they are non-profit corporations, that they have no parent corporations, and that no publicly held corporations own 10% or more of their stock.[†]

[†] Pursuant to Federal Rules of Appellate Procedure 29(a)(2) and 29(a)(4)(E), Amici certify that: (1) all parties have consented to the filing of this brief; and (2) no party's counsel authored this brief in whole or in part; no party or party's counsel contributed money intended to fund preparing or submitting this brief; and no person—other than Amici, their members, or their counsel—contributed money intended to fund preparing or submitting this brief.

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STATEMENT OF INTEREST OF AMICI

The National Employment Law Project ("NELP") is a non-profit legal organization with fifty years of experience advocating for the employment rights of workers in low-wage industries. NELP's areas of expertise include workplace health and safety. NELP's Worker Health & Safety Program Director, Deborah Berkowitz, is a former OSHA official and expert in the agency's enforcement and health and safety standards. NELP has collaborated closely with state and federal agencies, community-based worker centers, unions, and state policy groups, including in New York, and has litigated and participated as *amicus* in numerous cases addressing workers' health and safety rights under federal and state laws. NELP has submitted testimony to the U.S. Congress and state legislatures on numerous occasions on workplace health and safety.

The New York Committee for Occupational Safety and Health ("NYCOSH") is a non-profit membership organization of workers, over 170 unions and community-based organizations, workers' rights activists, and health and safety professionals. Founded in 1979 on the principle that workplace injuries, illnesses, and deaths are preventable, NYCOSH works to extend and defend every person's right to a safe and healthy workplace. NYCOSH is an expert in occupational safety and health, training more than 20,000 workers every year on health and safety protections and their rights on the job. Before the pandemic, NYCOSH interviewed

145 Amazon workers at the JFK8 Staten Island warehouse about their health and safety conditions, publishing an October 2019 report finding that workers experience harmful working conditions and a workplace culture that prioritizes line speeds over safety. NYCOSH has been an advocate for equitable workers' compensation since its founding and has lobbied New York legislators to protect the bargain embodied by the Workers' Compensation Law.

A ruling in favor of Amazon in this case would undermine Amici's longstanding policy goals, and those of close partners in community-based worker advocacy organizations across the Second Circuit.

SUMMARY OF ARGUMENT

This past June, with New York still reeling from the worst days of the COVID-19 pandemic, Amazon workers Derrick Palmer, Benita Rouse, and Barbara Chandler, along with their respective household members Kendia Mesidor, Alexander Rouse, and Luis Pellot-Chandler, sued Amazon.com, Inc. and Amazon.com Services, LLC, seeking injunctive relief that would require both companies to implement health and safety practices needed to prevent the spread of COVID-19 among workers at the Staten Island JFK8 facility and among their families. Amazon was—and still is—failing to comply with both New York law and state and federal public health guidance to prevent workplace spread of COVID-19.

The district court wrongly denied this badly-needed relief, invoking the "primary jurisdiction" doctrine to dismiss Plaintiffs' claims. J.A. 134–138. The district court also held that even if it had not declined to exercise jurisdiction, the workers' claim for forward-looking, injury-preventing injunctive relief was preempted by New York's Workers' Compensation Law. *Id.* at 144–146.

Amici submit this brief not to repeat arguments by the parties, but to provide the Court with additional legal and historical perspective on the Grand Bargain struck by New York's Workers' Compensation Law, along with real-world perspective on the significantly diminished enforcement activities of the

Occupational Safety and Health Administration ("OSHA") since 2016, particularly during the COVID-19 pandemic.

In holding that New York's Workers' Compensation Law preempted the Plaintiffs' New York Labor Law claim seeking forward-looking, injury-preventing injunctive relief to the extent it was based on past harm, the district court became the first state or federal court to hold that the Compensation Law bars a claim that seeks only forward-looking, injury-preventing injunctive relief. That holding ignored the text of the New York State Constitution's workers' compensation-authorizing amendment, the history and purpose of the Grand Bargain embodied by the Workers' Compensation Law, and the plain text of the statute. In reaching a novel issue of state law while sitting in diversity, the district court improperly altered the terms of the Grand Bargain in a manner that may distort established state law.

In declining jurisdiction over Plaintiffs' claims due to the existence and statutory mandate of OSHA, the district court failed to recognize that the agency had already determined to prioritize its limited and at times nonexistent enforcement activities for a narrowly defined set of health care workplaces during the pandemic. OSHA's decision left workers at workplaces like Amazon unable to rely on the agency to protect them. The OSHA statute implicitly recognizes that OSHA has limited enforcement capacity, even in the best of times, insofar as it permits private plaintiffs to pursue state law remedies to prevent workplace injuries through actions

like this one. The district court erred in declining jurisdiction when one of America's biggest corporations imperils the health and safety of Black, Latinx, and other low-paid workers of color, particularly in a context where OSHA's priorities have left those workers on their own.

The district court's decision has left Amazon workers, their household members, and the public at large unprotected from the workplace spread of COVID-19 at the JFK8 facility, at the very moment that infections are surging across New York City past their mid-April peak.[1] This Court should act swiftly to protect these workers, reversing the district court's erroneous denial of jurisdiction and radical misreading of New York's Workers' Compensation Law.

[1] *New York City Coronavirus Map and Case Count*, N.Y. TIMES (accessed Jan. 18, 2021), https://www.nytimes.com/interactive/2020/nyregion/new-york-city-coronavirus-cases.html.

ARGUMENT

I. The District Court Misconstrued the Impact, Purpose, and History of the New York Workers' Compensation Statute.

A. The District Court Erred in Ignoring the New York State Constitution in Analyzing the Workers' Compensation Law.

The essential structure of New York's Workers' Compensation Law, N.Y. WORK. COMP. L. § 1 *et seq.*, and the "Grand Bargain" it struck,[2] was enacted in 1914 pursuant to a 1913 amendment of the New York State Constitution. Now codified as Article I, Section 18,[3] the amendment was adopted after the originally enacted statute was struck down by the Court of Appeals of New York as contrary to the New York State Constitution. Because the Workers' Compensation Law derives wholly from this grant of power by the State Constitution and fundamentally reflects the Grand Bargain it authorized, the district court erred in failing to account for the

[2] The term "Grand Bargain" has been used by scholars to describe the basic *quid pro quo* of workers' compensation, in which workers gave up the right to recover potentially higher common law tort damages for workplace injuries and deaths, in exchange for certain compensation administered on a no-fault basis. That compensation is presumptively deemed fair insofar as it is intended to cover the costs of medical expenses and lost wages for injuries that have already occurred. As discussed below, it is entirely a backward-looking remedial scheme. For more on the term's origins, *see* Emily A. Spieler, *(Re)assessing the Grand Bargain: Compensation for Work Injuries in the United States, 1900–2017*, 69 RUTGERS UNIV. L. REV. 891, 893 n.4 (2017).

[3] N.Y. CONST. Art. 1, § 18. This provision was formerly Article 1, § 19, but was renumbered by Constitutional Convention as Article 1, § 18 on Nov. 8, 1938, effective Jan. 1, 1939. *See* McKinney's N.Y. Const. Art. 1, § 18.

State Constitution in its analysis of the statute's impact on Plaintiffs' claim for forward-looking, injury-preventing injunctive relief.

New York's first-in-the-nation workmen's compensation law was adopted in 1910. N.Y. SESS. L. 1910, ch. 674. A mere nine months later, the Court of Appeals of New York struck it down on both state and federal constitutional grounds. *Ives v. S. Buffalo Ry. Co.*, 204 N.Y. 271, 317 (1911). That opinion both found the law was an unconstitutional taking of property without due process of law and that the Legislature could not adopt such a law under its general police power. *See id.* at 317 ("[I]n our view of the Constitution of our state the liability sought to be imposed upon the employers enumerated in the statute before us is a taking of property without due process of law, and the statute is therefore void."); *id.* at 300–17 (finding that the statute's invasion of property rights could not be justified as a valid exercise of the State's police power).

The *Ives* decision, combined with public outrage over the Triangle Shirtwaist Factory Fire that occurred the day after the decision was issued, ultimately lead voters to approve a state constitutional amendment in 1913 granting the Legislature the power to enact workers' compensation legislation. JOHN FABIAN WITT, THE ACCIDENTAL REPUBLIC: CRIPPLED WORKINGMEN, DESTITUTE WIDOWS, AND THE REMAKING OF AMERICAN LAW 175–77 (2004); *Shanahan v. Monarch Eng'g Co.*, 219 N.Y. 469, 478 (1916) ("The amendment to the Constitution was then adopted in

1913 in order to solve the question of legislative authority contrary to the [*Ives*] decision[.]"). The Legislature passed a new Workmen's Compensation Law pursuant to that amendment in March 1914. N.Y. SESS. L. 1914, ch. 41. One year later, the Court of Appeals upheld the law under the New York State Constitution. *Jensen v. Southern Pac. Co.*, 215 N.Y. 514, 523 (1915) ("[S]o far as the due process clause or any other provision of our State Constitution is concerned the amendment amply sustains the act.").[4]

While the amendment empowered the New York Legislature to enact a workers' compensation law despite the *Ives* decision, it also placed a constraint on the Legislature's power, only allowing it to enact a law that fell within the amendment's terms.[5] *See* Robert F. Williams, *Can State Constitutions Block the Workers' Compensation Race to the Bottom?*, 69 RUTGERS UNIV. L. REV. 1081,

[4] The Court of Appeals also rejected a federal constitutional challenge under the Fourteenth Amendment. *Jensen*, 215 N.Y. at 523–29. The U.S. Supreme Court also rejected a Fourteenth Amendment challenge to the law, upholding it as a valid exercise of state police power, in 1917. *N.Y. Cent. R. Co. v. White*, 243 U.S. 188, 206–09 (1917).

[5] The decision in *Ryder Truck Lines v. Maiorano*, 44 N.Y.2d 364, 370 (1978) (stating that the amendment "merely removes all constitutional constraints on the enactment of such a [workers' compensation] program by the Legislature" and "cannot be construed as prohibiting the adoption of the present or any other legislative provision."), is not to the contrary. In that case, the Court of Appeals simply rejected an argument that the Legislature was prevented from enacting brand-new remedies beyond the workers' compensation remedy. It did not address—and has not otherwise addressed—the amendment's implications as to the authority of judges to issue injunctions, which predated the amendment's enactment.

1095 (2017) ("[S]uch amendments *limit* the legislature's power so that workers' compensation statutes must comport with or fit within, the arguably limiting terms of these amendments.").

Under the amendment, nothing in the State Constitution shall be construed to limit the power of the legislature "to provide that the right of such [workers'] compensation, and the remedy therefor shall be exclusive of all other rights and remedies for injuries to employees or for death resulting from such injuries[.]" N.Y. CONST. Art. 1, § 18. In other words, the Legislature was given explicit power to enact the Grand Bargain, replacing the tort damages remedy for injuries and deaths that have already occurred with the workers' compensation remedy. But the amendment was not intended to give the Legislature unlimited power to eliminate rights or remedies to forward-looking, injunctive relief to prevent future injuries.

B. The New York Workers' Compensation Law Does Not—and Cannot, Under the State Constitution—Bar Forward-Looking, Injury-Preventing Injunctive Relief.

Article 1, § 18 of the New York State Constitution authorized the Legislature to substitute one remedy, the workers' compensation remedy, for the common law tort remedy for past injuries. This was the Grand Bargain's fundamental *quid pro quo*: workers gave up common law tort damages in return for certain compensation administered on a no-fault basis and intended to cover medical expenses and lost wages. *Orzechowski v. Warner-Lambert Co.*, 460 N.Y.S.2d 64, 65–66 (N.Y. App.

Div., 2d. Dep't 1983) (citing *Billy v. Consolidated Mach. Tool Corp.*, 51 N.Y.2d 152, 159 (1980); *O'Rourke v. Long*, 41 N.Y.2d 219, 222 (1976)). The Legislature implemented this constitutional provision by enacting the Workers' Compensation Law. Notably, the Legislature did not replace judges' pre-existing authority to issue injunctions with another remedy. Indeed, under the terms of Article 1, § 18, the Legislature cannot abolish or abrogate injunctive relief without replacing it with another remedy.

The Court of Appeals acknowledged this dynamic in an early case interpreting the Workers' Compensation Law and the amendment, *Warren v. Morse Dry Dock & Repair Co.*, 235 N.Y. 445, 448 (1923). The State Constitution still contained another provision, then-numbered Article 1, § 18, providing that the right of action for injuries resulting in death could not be abrogated.[6] In addition, the U.S. Supreme Court had held that state workers' compensation laws did not alter maritime court remedies. *Southern Pac. Co. v. Jensen*, 244 U.S. 205, 216–18 (1917).

[6] The provision states that "The right of action now existing to recover damages for injuries resulting in death, shall never be abrogated; and the amount recoverable shall not be subject to any statutory limitation." This provision was renumbered Article 1, § 16 by the 1938 Constitutional Convention, *see* N.Y. CONST. Art. 1, § 16, but had already been modified by passage of the 1913 workers' compensation amendment.

Judge Benjamin N. Cardozo, writing for the Court of Appeals in *Warren*, emphasized the limited power the Legislature was granted by the 1913 authorizing amendment—and which it exercised in passing the Workers' Compensation Law:

> The Workmen's Compensation Act does not lend itself to enforcement in the maritime courts. It does not lend itself to enforcement in the common-law courts according to common-law remedies. For these reasons it is inoperative to supplement or modify the maritime law (*Southern Pacific Co. v. Jensen, supra,* at p. 218). The result ensues, as to maritime torts, that the general right of action for injuries resulting in death remains what it was before the compensation act was passed. The legislature intended, in passing that act, not to abolish every remedy, but to substitute one remedy for another. It has no power, indeed, under the State Constitution (Art. I, § 18) to abrogate the right of action for injuries resulting in death, except by supplying to the dependents of employees a new form of compensation (Constitution, art. I, § 19). It may change the groups or classes of dependents (*Shanahan v. Monarch Engineering Co.,* 219 N. Y. 469). It may not say that those whom it classifies as dependents shall be left without a remedy. To the extent that the substitution of a new remedy is ineffective, the old one survives.

Warren, 235 N.Y. at 447–48. Thus the Court of Appeals acknowledged that while the 1913 amendment empowered the Legislature to "substitute one remedy for another," the Legislature has no power to eliminate other pre-existing rights of action or remedies "except by supplying . . . a new form of compensation." *Id.* Accordingly, because the Workers' Compensation Law did not provide compensation in the case of maritime torts resulting in death, it did not eliminate the old remedy. *Id.*

New York's Workers' Compensation Law does not provide any remedy to prevent future harm. Accordingly, it cannot operate, under the State Constitution, to eliminate the preexisting remedy—injunctive relief to prevent future harm—that Plaintiffs seek here.

C. The New York Workers' Compensation Law Was Enacted as a Backward-Looking Remedial Scheme, and Not As A Bar To Forward-Looking, Injury-Preventing Injunctive Relief.

It is well established that in enacting the Workers' Compensation Law, New York legislators and proponents of the Law were focused on providing a backward-looking, after-the-fact remedial scheme in response to the crisis of industrial accidents. *See generally* Robert F. Wesser, *Conflict and Compromise: The Workmen's Compensation Movement in New York, 1890s-1913*, 12 LAB. HIST. 345 (2001). There is simply no indication in the historical record that the New York Workers' Compensation Law was designed to prevent workplace accidents, nor to block workers from filing lawsuits seeking forward-looking, injury-preventing injunctive relief.

At the turn of the century, the United States was in the midst of an extraordinary industrial accident crisis. One of every 50 workers was "killed or disabled for at least four weeks each year because of a work-related accident," and "roughly one in every thousand Americans died in an accident each year." WITT,

supra, at 2–3. In more dangerous industries, both fatal and nonfatal accident rates were much higher. *Id.*

In 1909, the New York Legislature created the Wainwright Commission to study the problem of industrial accidents and make recommendations for legislative action. *See* Wesser, *supra*, at 350–52. The Commission's exhaustive study concluded that the fault-based liability system for industrial accidents was "fundamentally wrong and unwise and needs radical change," and recommended adoption of "a new system of workmen's accident compensation." REPORT TO THE LEGISLATURE OF THE STATE OF NEW YORK BY THE COMMISSION APPOINTED UNDER CHAPTER 518 OF THE LAWS OF 1909 TO INQUIRE INTO THE QUESTION OF EMPLOYERS' LIABILITY AND OTHER MATTERS, vol. 1, at 7 (1910), https://babel.hathitrust.org/cgi/pt?id=uc1.c2629875&view=1up&seq=1 (hereafter, "WAINWRIGHT COMMISSION REPORT").

The Commission stated that the proposed system would foreclose an employee's "right of action *at law*, save where the injury complained of results from serious or willful misconduct of the employer." WAINWRIGHT COMMISSION REPORT at 57 (emphasis added). The Commission's focus was "upon the consequences instead of upon the antecedent causes of industrial accidents." Walter Gellhorn & Louis Lauer, *Administration of the New York Workmen's Compensation Law--Part I*, 37 N.Y.U. L. REV. 3, 13 (1962). No mention is made in the Commission's report

of requiring employers to adopt preventative measures, nor of foreclosing civil actions seeking injunctive relief from employers to prevent future harm.[7] The Wainwright Commission's findings and recommendations, including its draft statute, heavily informed the Legislature's adoption of the 1910 Workmen's Compensation Law and the 1914 statute. *See* Wesser, *supra*, at 351–57.

As a general matter, the New York Workers' Compensation Law "focuses rather narrowly on the goal of providing support for injured workers," and did not "concern itself with measures of prevention" or otherwise create any affirmative duties to prevent injuries to workers. MARION G. CRAIN, ET AL., WORK LAW: CASES AND MATERIALS 933 (2015). To be sure, advocates of the workers' compensation system and legislators hoped that by requiring employers to pay compensation regardless of fault, employers would be incentivized to improve working conditions and prevent accidents in the future. WITT, *supra*, at 145 ("[T]he prevention-inducing effects of making employers bear at least a substantial share of the costs of accidents resounded through the compensation movement."). But the New York Workers' Compensation Law only created a backward-looking administrative remedy when accidents happen, and precluded employee actions for damages for their injuries whenever that administrative remedy is available.

[7] In fact, the Wainwright Commission was later given a separate mandate to "investigate the closely related problem of accident prevention." Wesser, *supra*, at 361.

Forward-looking, preventative relief of the type Plaintiffs seek here was simply not contemplated by workers, employers, or the Legislature when the 1914 Workers' Compensation Law was passed. To be sure, proponents of the Compensation Law were focused on eliminating lawsuits over workplace injuries that had already occurred, but their primary concern was "wasteful" litigation over the basis for fault and the appropriate amount of compensation. *See* WAINWRIGHT COMMISSION REPORT at 29–32.

Scholars have also acknowledged that workers' compensation laws generally do not affect workers' rights to seek forward-looking injunctive relief. *See* Alfred W. Blumrosen et al., *Injunctions Against Occupational Hazards: The Right to Work Under Safe Conditions*, 64 CAL. L. REV. 702, 712 (1976) ("Employer liability acts and workmen's compensation laws modified the common law only with respect to damages. The negligence complex remains the appropriate body of law if a worker seeks an injunction against continuing occupational hazards.") (footnote omitted). Similarly, courts in other states have recognized that workers' compensation statutes like New York's are meant to provide employees with monetary recompense for work-related injuries and do not bar forward-looking injunctive relief. *Shimp v. New Jersey Bell Telephone Co.*, 368 A.2d 408, 412 (N.J. Super. 1976); *Nelson v. United States Postal Service*, 189 F.Supp.2d 450, 460 (W.D. Va. 2002); *Conway v. Circus*

Circus Casinos, 8 P.3d 837, 876 (Nev. 2000); *Hicks v. Allegheny East Conf. Assoc. of Seventh-Day Adventists. Inc.*, 712 A.2d 1021, 1022 (D.C. Ct. App. 1998).

D. The District Court's Reading of the Exclusivity Provision Ignored the Plain Terms of the Statute, as Plaintiffs Do Not Seek an Injunction as Compensation for Past Injury.

The district court concluded that the exclusivity provision's phrase "any other liability whatsoever" swept in "suits for injunctive relief in addition to suits for damages," and that this reading was "further supported by the nature of the trade-offs embodied in the law." J.A. 145. But this reading—which the district court admitted was never previously arrived at or considered by a state court—ignores the plain terms of the statute, which provides that the workers' compensation remedy is the exclusive remedy for claims brought "on account of such injury or death or liability arising therefrom[.]" N.Y. WORK. COMP. L. § 11. Because Plaintiffs' New York Labor Law claim is not brought to compensate any past injury, but instead to prevent future injury, it is not covered by the plain terms of the exclusivity provision.

The district court implicitly acknowledged this statutory reality by construing Plaintiffs' New York Labor Law claim as two separate claims—one for past harm and one for future harm—and then holding that the Workers' Compensation Law only preempted the claim for past harm. J.A. 144–146. But Plaintiffs' claim documents past harm only as evidence that their forward-looking, injury preventing

injunctive remedy is needed. The injunction they seek is simply not intended to compensate them for any past harms.

By construing the claim in this manner, the Court effectively read the Workers' Compensation Law to preclude a claim that sought only forward-looking, injury-preventing relief. That reading is clearly at odds with the plain terms of the exclusivity provision, which does not apply except where workers seek a non-workers' compensation remedy as recompense for past injury.[8]

E. A Single Federal Judge Should Not Be Permitted to Fundamentally Alter the Terms of the Grand Bargain in New York State.

The Grand Bargain embodied in New York's Workers' Compensation Law remains one of the landmark achievements of twentieth-century American law. That does not mean it is perfect; indeed, the workers' compensation system is frequently criticized by employers, workers, and government experts. *See, e.g.*, U.S. DEP'T OF LAB., DOES THE WORKERS' COMPENSATION SYSTEM FULFILL ITS OBLIGATIONS TO

[8] To the extent that the Court finds the text of the exclusivity provision could plausibly support the reading of both the district court and that of Plaintiffs/Amici, it should adopt the reading of Plaintiffs/Amici, thus avoiding "interpreting a presumptively valid statute in a way that will needlessly render it unconstitutional" under the terms of Article 1, § 18 of the New York State Constitution (as discussed in Parts I.A–B above). *Overstock.com, Inc. v. N.Y. State Dep't of Taxation & Fin.*, 20 N.Y.3d 586, 593 (2013). The Second Circuit has recognized the New York State constitutional avoidance canon is similar to the federal one. *See 1256 Hertel Ave. Assocs., LLC v. Calloway*, 761 F.3d 252, 260 n.5 (2d Cir. 2014); *see also id.* at 261 (recognizing that "[t]he constitutional-doubt canon is justified partly by a presumption that legislatures are cognizant and respectful of constitutional limitations . . . . ").

INJURED WORKERS? (2016), https://www.documentcloud.org/documents/3121896-Labor-Department-Workers-Comp-Report-2016.html. But its fundamental *quid pro quo*, in which workers gave up common law damages for injuries that they experienced in return for certain compensation, should not be altered at the whims of a single federal district court judge—particularly where no state court has ruled on the issue in the first instance.

The question of whether the Workers' Compensation Law's exclusivity provision bars claims seeking only forward-looking, injury-preventing injunctive relief has not, to date, been addressed by New York's highest court. It is not apparent that any New York court has had the opportunity to address this question. The district court itself acknowledged that the New York Court of Appeals "has not considered" whether the exclusivity provision "preempts a suit for injunctive relief." J.A. 145.

Yet the district court went ahead and ruled on this important state law question anyway—effecting a novel expansion of the terms of the Grand Bargain in New York—despite sitting in diversity jurisdiction. It did so without considering the state constitutional context, or the opinion of the state's highest court that the Legislature "intended, in passing [the Workmen's Compensation] act, not to abolish every remedy, but to substitute one remedy for another." *Warren*, 235 N.Y. at 447–48.

The district court ignored this Court's instruction that federal courts in diversity jurisdiction should not "adopt innovative theories that may distort

established state law." *City of Johnstown, N.Y. v. Bankers Std. Ins. Co.*, 877 F.2d 1146 (2d Cir. 1989) (citations omitted). It did so even though a decision on this ground was not necessary considering its dismissal under the doctrine of primary jurisdiction. This was error, as one district judge sitting in diversity should not be permitted to alter the terms of the Grand Bargain in New York.

II. OSHA Directed its Limited Resources to Health Care Workplaces, Underscoring Why Plaintiffs Should be Able to Pursue Private, State-Law Claims Seeking Forward-Looking, Injury-Preventing Injunctive Relief.

A. Recent Staffing Changes Have Weakened OSHA's Enforcement Capacity.

OSHA enforcement capacity, rarely sufficient in the best of times to protect all workers, has been weakened by recent staffing changes at both the inspector and leadership level. These staffing changes, which have undercut the agency's ability to protect workers, make it all the more urgent for Plaintiffs to be able to pursue injunctive relief under state law during the current COVID-19 public health emergency.

As of January 2020, OSHA had a total of 862 inspectors to cover millions of workplaces, the lowest number of on-board inspectors in the previous 45 years.[9] At this staffing level, it would take the agency 165 years to inspect each workplace

[9] NAT'L EMP. L. PROJECT, WORKER SAFETY IN CRISIS: THE COST OF A WEAKENED OSHA, at 2–3 (Apr. 2020), https://s27147.pcdn.co/wp-content/uploads/Worker-Safety-Crisis-Cost-Weakened-OSHA.pdf.

under its jurisdiction just once. In addition, 42 percent of the agency's top leadership career positions have not been filled, leaving the agency without the expertise and direction necessary to fulfill its mandate.[10]

The decrease in the number of OSHA inspectors has led to a precipitous drop in the overall number of inspections conducted. The number of OSHA inspections conducted during the three-year period between the start of Fiscal Year 2017 and the end of Fiscal Year 2019 is thousands of inspections per year lower than any three-year period from 2001 to 2016.[11] In addition, more complex resource-intensive investigations—such as those involving heat levels, musculoskeletal disorders, and chemical exposures—and high-penalty "significant cases" have also sharply declined since 2016.[12]

The decline in OSHA inspectors has left America's workplaces less safe, even before the COVID-19 pandemic. OSHA's inspection policies require the agency to conduct inspections following reports of a work-related fatality or catastrophe (defined as more than three workers hurt). Since 2016, OSHA has experienced the highest levels of required inspections as a result of a workplace fatality or catastrophe in over a decade.[13]

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[10] *Id.* at 3.

[11] *Id.*

[12] *Id.* at 4.

[13] *Id.* at 5.

The staffing changes that have limited the agency's enforcement capacity hurt Black, Latinx, and other workers of color the most, as they are more likely to work in dangerous jobs because of both racist barriers to employment and occupational segregation within industries and workplaces.[14] In December 2019, the Bureau of Labor Statistics reported that Black and Latinx workers suffered higher fatality rates than other workers.[15] The Bureau found that the number of Black workers killed on the job in 2018 increased 16 percent, from 530 to 615, the highest total since 1999.[16]

B. During the COVID-19 Pandemic, OSHA Has Directed Its Limited Resources to Focus on Health and Emergency Care Workers.

During the COVID-19 pandemic, OSHA has chosen to direct its limited resources to focus on a narrow set of health and emergency care workers—leaving workers in other industries unable to depend on the agency's assistance in preventing workplace spread of COVID-19. The agency's decision to deprioritize non-health care workplaces in its COVID-19 enforcement underscores why Plaintiffs must be

[14] *See generally* Seth A. Seabury et al., *Racial And Ethnic Differences In The Frequency Of Workplace Injuries And Prevalence of Work-Related Disability*, 36 HEALTH AFFAIRS 266, 270–72 (2017) (finding non-Hispanic Black workers and foreign-born Hispanic workers worked in jobs with the highest injury risk, even after adjustment for education and sex).

[15] U.S. Bureau of Lab. Stat., Census of Fatal Occupational Injuries News Release (Dec. 17, 2019), https://www.bls.gov/news.release/archives/cfoi_12172019.htm.

[16] *Id.*

able to pursue injury-preventing injunctive relief under state law during the current public health emergency.

In April 2020 and again in May 2020, the agency implemented a directive stating that COVID-19-related complaints from sectors other than health and emergency care should in most circumstances only trigger a letter to the employer stating that OSHA was not conducting an inspection and requesting that the employer investigate itself and respond to OSHA with a description of any corrective action taken.[17] The agency in April further directed that onsite inspections should be prioritized for investigations of fatalities and imminent danger exposures in health care workplaces.[18] In both April and May, the agency prioritized the use of

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[17] OSHA, Memorandum for Regional Administrators and State Plan Designees, Interim Enforcement Response Plan for Coronavirus Disease 2019 (COVID-19), at Attachment 1, Part II (Apr. 13, 2020), https://www.osha.gov/memos/2020-04-13/interim-enforcement-response-plan-coronavirus-disease-2019-covid-19 (hereafter "OSHA April 2020 Memo") ("All other formal complaints alleging SARS-CoV-2 exposure, where employees are engaged in medium or lower exposure risk tasks (*e.g.*, billing clerks), will not normally result in an on-site inspection. In such cases, Area Offices will use the non-formal procedures for investigating alleged hazards."); OSHA, Memorandum for Regional Administrators and State Plan Designees, Updated Interim Enforcement Response Plan for Coronavirus Disease 2019 (COVID-19), at Attachment I, Part II (May 19, 2020), https://www.osha.gov/memos/2020-05-19/updated-interim-enforcement-response-plan-coronavirus-disease-2019-covid-19 (hereafter "OSHA May 2020 Memo") ("All other formal complaints alleging SARS-CoV-2 exposure, where employees are engaged in medium or lower exposure risk tasks (*e.g.*, billing clerks), might not result in an on-site inspection, depending on the discretion of the AD where non-formal procedures can sufficiently address the alleged hazards.").

[18] *See* OSHA April 2020 Memo, *supra* note 17, at Attachment 1, Part II ("Fatalities and imminent danger exposures related to COVID-19 will be prioritized for

inspections for alleged exposures to confirmed or suspected COVID-19 patients during aerosol-generating procedures without adequate personal protective equipment.[19] In both April and May, Area Directors for the agency were instructed that health and emergency care workplaces would be the focus of "any inspection activities in response to COVID-19-related complaints/referrals and employer-reported illnesses."[20]

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inspections, with particular attention given to healthcare organizations and first responders.").

[19] *See* OSHA April 2020 Memo, *supra* note 17, at Attachment 1, Part II ("During this outbreak, formal complaints alleging unprotected exposures to COVID-19 for workers with a high/very high risk of transmission, such as a fatality that is potentially related to exposures to confirmed or suspected COVID-19 patients while performing aerosol-generating procedures without adequate PPE in a hospital, may warrant an on-site inspection."); OSHA May 2020 Memo, *supra* note 17, at Attachment 1, Part II ("During this pandemic, formal complaints alleging unprotected exposures to COVID-19 for workers with a high/very high risk of transmission, such as a fatality that is potentially related to exposures to confirmed or suspected COVID-19 patients while performing aerosol-generating procedures without adequate PPE in a hospital, should warrant an on-site or remote inspection.").

[20] *See* OSHA April 2020 Memo, *supra* note 17, at Attachment 1, Part II ("Facilities identified in Section I, above, as having high and very high exposure risk jobs, such as hospitals, emergency medical centers, and emergency response facilities, will typically be the focus of any inspection activities in response to COVID-19-related complaints/referrals and employer-reported illnesses."); OSHA May 2020 Memo, *supra* note 17, at Attachment 1, Part II ("Facilities identified in Section I, above, as having high and very high exposure risk jobs, such as hospitals, emergency medical centers, and emergency response facilities, will frequently be the focus of any inspection activities in response to COVID-19-related complaints/referrals and employer-reported illnesses.").

As a result, though federal OSHA received over 12,000 COVID-19-related complaints by the end of 2020,[21] it only conducted 301 onsite inspections that resulted in COVID-19-related citations by that time.[22] Most of these inspections appear to have occurred at health care workplaces.[23]

OSHA has also declined to issue an emergency temporary standard that would require employers to implement COVID-19-specific practices and policies to protect workers, a further example of the agency's priorities. Instead, the agency has issued non-binding COVID-19-specific guidance, which employers are not required to implement.[24]

OSHA's priorities have also been reflected in the agency's record for investigating and resolving COVID-19-related whistleblower complaints. According to an analysis by the National Employment Law Project, of the 1,744

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[21] OSHA, *COVID-19 Response Summary* (updated Jan. 19, 2021), https://www.osha.gov/enforcement/covid-19-data#fed_inspections_open.

[22] OSHA, *Inspections with COVID-related Citations* (updated Dec. 31, 2020), https://www.osha.gov/enforcement/covid-19-data/inspections-covid-related-citations.

[23] *See id.*

[24] *See, e.g.*, OSHA, *Guidance on Preparing Workplaces for COVID-19*, OSHA 3990-03 2020, at 2 (2020), https://www.osha.gov/Publications/OSHA3990.pdf ("This guidance is not a standard or regulation, and it creates no new legal obligations. It contains recommendations as well as descriptions of mandatory safety and health standards. The recommendations are advisory in nature . . . ."); Bruce Rolfson, *Labor Chief Defends OSHA's Virus Actions in Response to AFL-CIO*, BLOOMBERG LAW (Apr. 30, 2020), https://news.bloomberglaw.com/safety/labor-chief-defends-oshas-virus-actions-in-response-to-afl-cio.

COVID-19-related retaliation complaints filed by workers from the beginning of the pandemic through August 9, 2020, only 348 complaints—just one in five—were docketed for investigation.[25] Only 35 complaints—just two percent—were resolved in that period, though it is unclear if these complaints were resolved in a manner beneficial to workers because OSHA does not make the terms of these resolutions public.[26] Most of the complaints—54 percent—were dismissed or closed without investigation.[27]

The recent consequences of OSHA's limited capacity and priorities have been dire. A study of OSHA complaints nationwide from January 16 to September 18, 2020 found a strong correlation between the number of OSHA complaints and the COVID-19 mortality rate 16 days later.[28] Put another way, an increase in the number of OSHA complaints during this time frame predicted a corresponding increase in the number of COVID-19 deaths 16 days later. The complaints, almost all of which did not result in an inspection, were followed by outbreaks and COVID-related

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[25] Deborah Berkowitz & Shayla Thompson, Nat'l Emp. L. Project, *OSHA Must Protect COVID Whistleblowers Who File Retaliation Complaints*, at 1 (Oct. 8, 2020), https://s27147.pcdn.co/wp-content/uploads/OSHA-Must-Protect-COVID-Whistleblowers-Who-File-Retaliation-Complaints-v2.pdf.

[26] *Id.*

[27] *Id.*

[28] William P. Hanage et al., *COVID-19: US Federal Accountability for Entry, Spread and Inequities—lessons for the future*, 35 EURO. J. OF EPIDEMIOLOGY 995, 997–1000 & Fig. 1 (Nov. 2, 2020), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7604229/pdf/10654_2020_Article_689.pdf.

deaths.[29] Black, Latinx, and American Indian/Native American people have faced an increased risk of contracting COVID-19, being hospitalized, and dying from the virus; according to the study, these racial inequities have increased over time, especially among Latinx and American Indian/Native American populations.[30] The authors conclude that "the evidence suggests that ineffective national policies and responses, especially as compared to those of other wealthy nations or compared to the intricate preparation and planning by previous administrations of both parties, have been driving the terrible toll of COVID-19 and its inequities in the US."[31]

OSHA's decisions have left workers in warehouses—including Amazon workers—unable to rely on the federal agency for protection.[32] This has had serious consequences for Amazon workers. In October, after months of resisting

[29] *Id.* at 1000.

[30] *Id.* at 1001.

[31] *Id.* at 1003.

[32] Some state OSHA plan agencies, including Cal/OSHA, have conducted inspections of Amazon warehouses, at least two of which have resulted in citations. Suhauna Hussain, *Amazon warehouses in Hawthorne and Eastvale are fined for coronavirus safety violations*, L.A. TIMES (Oct. 9, 2020), https://www.latimes.com/business/story/2020-10-09/amazon-warehouses-in-southern-california-are-being-cited-by-cal-osha. But where federal OSHA has jurisdiction over workplaces, as it does in New York for private sector workers, it has not conducted any inspections of Amazon warehouses, and does not appear to have done so for any other warehouses.

disclosure,[33] including a request from twelve state attorneys-general,[34] Amazon publicly stated that nearly 20,000 workers nationwide had been infected with COVID-19.[35] While Amazon has not updated its October disclosure to account for the more recent fall wave of infections, at least one recent outbreak was so severe that it forced the closure of an Amazon warehouse in New Jersey, despite Amazon's general policy of keeping warehouses open amid outbreaks.[36]

Other indicators suggest that outbreaks at warehouses may be worsening, imperiling workers at Amazon and similar employers. For example, Los Angeles County—currently one of the epicenters of the virus nationwide—recently reported that the largest increase in workplace outbreaks is occurring among "general

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[33] Lesley Stahl, *Examining Amazon's Treatment of Its Workers*, 60 MINUTES (May 10, 2020), https://www.cbsnews.com/news/amazon-workforce-safety-60-minutes-2020-05-10/ (Amazon operations executive refuses to state the number of cases among workers, claiming is "not a particularly useful number").

[34] Letter to John Mackey & Jeffrey P. Bezos re: State Attorneys General COVID-19 Leave and Health and Safety Inquiry, at 2 (May 11, 2020), https://www.mass.gov/doc/letter-to-amazon-whole-foods-worker-protections/download.

[35] Matt Day et al., *Amazon Says Almost 20,000 Workers Had Covid-19 in 6 Months*, BLOOMBERG (Oct. 1, 2020), https://www.bloomberg.com/news/articles/2020-10-01/amazon-says-almost-20-000-workers-had-covid-19-during-pandemic.

[36] Matt Day, *Amazon Closes New Jersey Warehouse After Rise in Covid Cases*, BLOOMBERG (Dec. 21, 2020), https://www.bloomberg.com/news/articles/2020-12-21/amazon-closes-new-jersey-warehouse-after-rise-in-covid-cases.

worksites," which include warehouses, manufacturing facilities, and logistics companies.[37]

Amazon's policies may be suppressing public awareness of outbreaks at its workplaces. A recent news report revealed that Amazon is requiring workers in one Oregon warehouse—which has been the site of one of the largest workplace outbreaks in that state—to sign a non-disclosure agreement (NDA).[38] It is unclear whether such NDAs (or other gag rules) are being required at other Amazon warehouses nationwide; if so, they may be chilling Amazon employee speech related to COVID-19-related hazards, including by limiting employees from alerting coworkers and community members to outbreaks.[39]

OSHA's recent priorities have also left workers in other industries unable to rely on the federal agency for protection—most notably in meat and poultry

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[37] Cty. of L.A. Public Health News Release, Workplace Outbreaks Surge as Public Health Ramps Up COVID-19 Vaccination Capacity 281 New Deaths and 14,564 New Confirmed Cases of COVID-19 in Los Angeles County (Jan. 13, 2021), http://publichealth.lacounty.gov/phcommon/public/media/mediapubhpdetail.cfm?prid=2912.

[38] Tess Riski, *Workers Risking the COVID-19 Outbreak at Amazon's Troutdale Warehouse Signed a Strict Confidentiality Agreement*, WILLAMETTE WEEK (Dec. 2, 2020), https://www.wweek.com/news/business/2020/12/02/workers-risking-the-covid-19-outbreak-at-amazons-troutdale-warehouse-signed-a-strict-confidentiality-agreement.

[39] *See* Josh Eidelson, *Covid Gag Rules at U.S. Companies Are Putting Everyone at Risk*, BLOOMBERG BUSINESSWEEK (Aug. 27, 2020), https://www.bloomberg.com/news/features/2020-08-27/covid-pandemic-u-s-businesses-issue-gag-rules-to-stop-workers-from-talking.

processing. At a poultry plant in Kansas City, 371 workers tested positive in the months after a worker filed an OSHA complaint; the agency relied on a written response from the company instead of sending inspectors to investigate the facility.[40] According to a Centers for Disease Control and Prevention ("CDC") report published last July, among the 23 states reporting COVID-19 outbreaks in meat and poultry processing facilities in May and June, 16,233 people were infected in 239 facilities, and 86 of these people died.[41] Among cases where race and ethnicity were reported, 87 percent were racial or ethnic minorities.[42] More recent data estimates the number of meat and poultry workers infected from COVID 19 at over 53,000.[43] Yet OSHA conducted very few inspections of meat processing plants.[44]

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[40] Matt Flener, *Exclusive: OSHA Never Visited Missouri Poultry Facility After COVID-19 Complaints*, KMBC NEWS (Aug. 20, 2020), https://www.kmbc.com/article/exclusive-osha-never-visited-missouri-poultry-facility-after-covid-19-complaints/33660429.

[41] Michelle A. Waltenburg, et al., CDC, *Update: COVID-19 Among Workers in Meat and Poultry Processing Facilities—United States, April—May 2020*, 69 MORBIDITY & MORTALITY WEEKLY REPORT 887, 887–88 (July 10, 2020), https://www.cdc.gov/mmwr/volumes/69/wr/pdfs/mm6927e2-H.pdf.

[42] *Id.* at 887.

[43] Leah Douglas, *Mapping Covid-19 outbreaks in the food system*, FOOD & ENV'T REPORTING NETWORK (updated Jan. 19, 2021), https://thefern.org/2020/04/mapping-covid-19-in-meat-and-food-processing-plants.

[44] *See* Noam Scheiber, *OSHA Criticized for Lax Regulation of Meatpacking in Pandemic*, N.Y. TIMES (Oct. 22, 2020), https://www.nytimes.com/2020/10/22/business/economy/osha-coronavirus-meat.html.

COVID-19 outbreaks in workplaces fuel community spread, particularly among Black, Latinx, and other communities of color, showing that OSHA's decisions have consequences far beyond the workplace. A recent study published by the National Academy of Sciences estimated livestock plants "to be associated with 236,000 to 310,000 COVID-19 cases (6 to 8% of total) and 4,300 to 5,200 deaths (3 to 4% of total) as of July 21."[45]

Even a new OSHA leadership will not be able to repair OSHA's diminished enforcement capacity, nor entirely reorient its COVID-19 priorities, overnight. The agency's COVID-19 response will be especially limited by its low staffing levels, including its record-low number of on-board inspectors, for the foreseeable future. Implicit in the OSHA statute's preservation of state law remedies, 29 U.S.C. § 653(b)(4), is a real-world assessment: OSHA will always have limited enforcement capacity, even in the best of times, and especially in the worst of times. That is why it is critical that the statute permits private plaintiffs to pursue state law remedies to prevent workplace injuries through actions like this one—and why the Court must reject the use of the "primary jurisdiction" doctrine to vitiate Congress's preservation of these state law remedies.

[45] Charles A. Taylor et al., *Livestock plants and COVID-19 transmission*, 117 PNAS 31706, 31706 (Dec. 15, 2020), https://www.pnas.org/content/pnas/117/50/31706.full.pdf.

CONCLUSION

It is not too late for this Court to act to save lives. With COVID-19 infections in New York surging past their mid-April peak and vaccine distribution severely limited, Plaintiffs—and other JFK8 workers and their families—still badly need forward-looking, injury-preventing injunctive relief from this Court. For all the reasons explained above, Amici urge swift reversal of both the district court's erroneous denial of jurisdiction and its radical misreading of New York's Workers' Compensation Law.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the word limit of Fed. R. App. P. 29(a)(5) because it contains 6,967 words, excluding the items exempted under Federal Rule of Appellate Procedure 32(f).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this brief was prepared in a proportionally spaced typeface in 14-point Times New Roman.

Dated: January 19, 2021
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CERTIFICATE OF SERVICE

I, Hugh Baran, certify that on January 19, 2021, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the Second Circuit by using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: January 19, 2021
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