STATE OF NEW YORK
OFFICE OF THE ATTORNEY GENERAL

LETITIA JAMES
ATTORNEY GENERAL

DIVISION OF SOCIAL JUSTICE
LABOR BUREAU

July 9, 2020

By ECF

Hon. Brian M. Cogan
U.S. District Court for the Eastern District of New York
225 Cadman Plaza East
Brooklyn, New York 11201

Re: *Palmer v. Amazon.com, Inc.*, No. 1:20-cv-2468

Dear Judge Cogan:

I write on behalf of the State of New York in connection with the forthcoming pre-motion conference on defendants' proposed motion to dismiss the complaint. The State intends to file a motion seeking leave to file an amicus brief supporting denial of defendants' motion to dismiss, should the Court allow defendants' motion to be filed. I respectfully request that the Court allow for the filing of the State's motion in any briefing schedule this Court imposes with respect to defendants' motion to dismiss.

The State intends to argue in its amicus brief, as explained in more detail below, that there is no merit to defendants' contentions that plaintiffs' claims are (i) appropriate for dismissal under the primary jurisdiction doctrine, (ii) circumscribed by New York's Workers' Compensation Law, or (iii) preempted by federal law.[1] The State has a strong interest in rebutting defendants' arguments. Because federal preemption and the primary-jurisdiction doctrine can constrain state regulatory powers, the State has a general interest in preserving its long-standing authority to protect the health, welfare, and safety of employees through affirmative provisions of state law, and routinely submits amicus briefs in both state and federal courts to defend this authority. The State has authority to enforce Labor Law § 200 and related provisions through investigations and

[1] Defendants are likewise wrong to argue that there is no private right of action for public nuisance or Labor Law § 191 claims. *See Leo v. Gen. Elec. Co.*, 145 A.D.2d 291, 294-95 (2d Dep't 1989) (holding that commercial fishermen have standing to bring a public nuisance claim in connection with "the pollution of the waters from which they derive their living"); Labor Law § 198(1) (private right of action for unpaid wages). The State has limited enforcement resources and a strong interest in ensuring private actions remain available.

enforcement actions taken by the Office of the Attorney General (OAG) and the New York State Department of Labor. Indeed, the OAG is currently investigating multiple employers, including defendants, regarding their workplace policies and practices during the COVID-19 pandemic. Dismissal on the grounds outlined in defendants' pre-motion conference letter (ECF No. 36) could threaten the State's interests by unduly limiting the application of valid and vital state laws.

I. The Primary Jurisdiction Doctrine Does Not Apply to This Case.

The State intends to argue that primary jurisdiction is no basis to dismiss plaintiffs' public nuisance and Labor Law § 200 claims. The primary jurisdiction doctrine "applies where a claim is originally cognizable in the courts" but "requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body." *United States v. Western Pac. R.R. Co.*, 352 U.S. 59, 68 (1956). In such cases, a court may dismiss or suspend a proceeding "pending referral of such issues to the administrative body for its views." *Id.* "Whether the doctrine of primary jurisdiction applies in any particular situation depends on the extent to which Congress, in enacting a regulatory scheme, intend[ed] an administrative body to have the first word on issues arising in juridical proceedings." *United States v. Culliton*, 328 F.3d 1074, 1082 (9th Cir. 2003) (quotation marks omitted); *see also Golden Hill Paugussett Tribe of Indians v. Weicker*, 39 F.3d 51, 59 (2d Cir. 1994). In this Circuit, the inquiry involves five 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;
(4) whether a prior application to the agency has been made; and
(5) whether the "potential costs resulting from complications and delay in the administrative proceedings" outweigh any benefits to applying the doctrine.

Ellis v. Tribune Television Co., 443 F.3d 71, 82-83 (2d Cir. 2006). None of the *Ellis* factors support the application of the primary jurisdiction doctrine here.

First, both public nuisance and Labor Law § 200 claims are well within the conventional experience of judges. Second, defendants have identified no statutory provision showing that Congress intended to place the issues involved in this case "particularly within" the discretion of the Occupational Safety and Health Administration (OSHA). And although defendants assert that OSHA is "uniquely qualified to handle pandemic-related safety issues" (ECF No. 36 at 2), it is the States, rather than the federal government, that have been in the forefront of developing guidelines for the safe operation of workplaces during the COVID-19 pandemic. Third, this case does not risk undermining the uniformity of relevant OSHA rulings or even guidelines, which OSHA has not issued. By contrast, *Rural Community Workers Alliance v. Smithfield Foods*, 2020 WL 2145350 (W.D. Mo., May 5, 2020), *motion for reconsideration pending*, involved the operation during COVID-19 of meat-packing plants, an industry in which OSHA did issue specific guidance. Fourth, defendants have not identified a prior application to the agency. Finally, the public health risks attendant to any delay in the adjudication of the important issues raised in this case

substantially outweigh any hypothetical benefit in requiring plaintiffs to proceed before OSHA in the first instance.

II. New York's Workers' Compensation Law Does Not Bar Plaintiffs' Claims.

The State also intends to argue that New York's Workers Compensation Law does not provide the sole remedy – or indeed, apply at all – for claims that illegally hazardous conditions are likely to cause injury in the future, as opposed to claims for damages already sustained due to workplace injuries. Plaintiffs do not seek compensation for "disability or death from injury arising out of and in the course of the employment." N.Y. Workers' Comp. Law § 10(1) *see also id.* § 11 (benefits the sole source of "damages, contribution or indemnity"). Indeed, with the exception of plaintiff Barbara Chandler's claim for unpaid quarantine leave, plaintiffs seek no monetary compensation at all.

III. The Occupational Safety and Health Act Does Not Preempt Labor Law § 200.

Finally, the State intends to argue that the Occupational Safety and Health Act (OSH Act) does not preempt plaintiffs' Labor Law § 200 claim. The Supreme Court has recognized a presumption against preemption that is especially strong when States "exercise[] their police powers to protect the health and safety of their citizens." *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 475, 485 (1996). Here, the relevant federal statute embraces, rather than displaces, state authority in the area of workplace safety.

First, the OSH Act expressly provides that "[n]othing in this chapter shall prevent any State agency or court from asserting jurisdiction under State law over any occupational safety or health issue with respect to which no standard is in effect under section 655 of this title." 29 U.S.C. § 667(a). Section 667(a) is dispositive here because the federal government has not promulgated standards with respect to the COVID-related workplace safety issues involved in this complaint. Defendants' focus on the submission of a "state plan" (ECF No. 36 at 3) is therefore a red herring, because such plans are needed only to impose a State standard on an issue "with respect to which a Federal standard has been promulgated under section 655." 29 U.S.C. § 667(b)-(c); *see also Gade v. Natural Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 100-102 (1992) (plurality op.). Second, the OSH Act preserves "common law or statutory rights, duties, or liabilities of employers and employees under any law with respect to injuries, diseases, or death of employees arising out of, or in the course of, employment." 29 U.S.C. § 653(b)(4). That savings clause would encompass state-law workplace protections such as Labor Law § 200.

Accordingly, the State of New York respectfully requests that the Court allow for the filing of the State's motion for leave to file an amicus brief in any briefing schedule this Court imposes with respect to defendants' motion to dismiss.

Respectfully submitted,

/s/
Seth Kupferberg
Assistant Attorney General