New York Supreme Court

Appellate Division—First Department

THE PEOPLE OF THE STATE OF NEW YORK BY LETITIA JAMES, ATTORNEY GENERAL OF THE STATE OF NEW YORK,

Plaintiff-Respondent,

– against –

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

Defendants-Appellants.

Appellate Case No.: 2021-03934

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF DEFENDANTS-APPELLANTS

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New York County Clerk's Index No. 450362/21

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INTRODUCTION

This workplace-safety suit by the Office of the New York Attorney General ("OAG") illustrates two alarming litigation trends. First, plaintiffs are increasingly asking courts to overstep their roles and assume the distinct function played by administrative agencies. Second, plaintiffs are asking courts to give non-binding administrative guidance the force and effect of law. Both trends disrupt the regulatory certainty needed for businesses to operate. This Court should reject both efforts here and reverse the trial court.

The trial court erroneously declined to apply the primary-jurisdiction doctrine in an area committed to supervision by a federal administrative agency. That decision contradicts the doctrine's two principal rationales—promoting uniformity in a regulated field, and employing the specialized knowledge of agencies. *See United States v. W. Pac. R. Co.*, 352 U.S. 59, 63 (1956); *Palmer v. Amazon.com, Inc.*, 498 F. Supp. 3d 359, 370 (E.D.N.Y. 2020), *appeal filed*, No. 20-3989 (2d Cir. Nov. 24, 2020). And it is inconsistent with decisions by other courts that have addressed identical circumstances. What's more, the decision perpetuates bad public policy and creates uncertainty for Amazon and other businesses by undermining a predictable regulatory regime.

The trial court also wrongly turned non-binding administrative guidance issued without notice and comment (and now withdrawn) into legal obligations. In so doing, the court ignored basic principles of fair notice and undercut the regulatory certainty that is vital to business. The consequence of such a decision is that businesses must make the "painful choice" between risking enforcement of nonbinding guidance or implementing burdensome and costly compliance measures. *CSI Aviation Servs., Inc. v. U.S. Dep't of Transp.*, 637 F.3d 408, 412 (D.C. Cir. 2011).

INTEREST OF *AMICUS CURIAE*

The Chamber of Commerce of the United States of America (the "Chamber") is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases, like this one, that raise

issues of concern to the nation's business community, including in New York.[1]

The Chamber and its members have a vital interest in the recurring issues raised by this case—in particular, the application of the primary-jurisdiction doctrine and the enforceability of non-binding guidance. An adverse ruling on either issue would subject businesses to a multiplicity of actions and disrupt the settled expectations of employers and employees.

Both the law and sound public policy support this Court's exercise of the primary-jurisdiction doctrine here. Amazon is among the many essential businesses operating throughout the country that are critical to the country's physical and economic health. Subjecting these entities to private lawsuits—through which safety standards are determined piecemeal by plaintiffs and the courts rather than uniformly by administrative agencies—will result in inconsistent rulings and impose unnecessary costs on businesses. Such cost increases prevent greater investment and reduce the quality of goods and services, particularly when considered alongside the costs that business have

[1] *See, e.g.*, *Duncan v. Capital Region Landfills, Inc.*, 198 A.D.3d 1150 (3d Dep't 2021) (public nuisance and special injury); *Davies v. S.A. DUNN & COMPANY, LLC*, 200 A.D.3d 8 (3d Dep't 2021) (same); *Bermudez Chavez v. Occidental Chem. Corp.*, 35 N.Y.3d 492 (2020) (cross-jurisdictional tolling); *Verizon New York Inc. v. N.Y. State Pub. Serv. Comm'n*, 137 A.D.3d 66 (3d Dep't 2016) (trade secrets).

already incurred to keep employees safe and deliver essential products to customers. Defendants-Appellants Br. at 3.

The Chamber's concerns are similar with respect to non-binding guidance. When the government evades administrative procedure requirements by relying on non-binding guidance—and particularly when it then enforces such guidance through litigation—it violates due process, creates substantial regulatory uncertainty, and disrupts the essential activities of the nation's business community.

ARGUMENT

I. The trial court erred in declining to apply the primary-jurisdiction doctrine.

The trial court erred in rejecting Amazon's request that it apply the primary-jurisdiction doctrine. (Record on Appeal ("R.") 31.) The application of primary jurisdiction here furthers the purposes of the doctrine, accords with decisions by other courts on COVID-19 safety measures, and promotes sensible public policy. This Court should reverse.

A. Application of primary jurisdiction in this case advances the purposes underlying the doctrine.

The doctrine of primary jurisdiction "is a prudential doctrine under which courts may, under appropriate circumstances, determine that the initial decisionmaking responsibility should be performed by the relevant agency rather than the courts." *Syntek Semiconductor Co., Ltd. v. Microchip Tech.*

Inc., 307 F.3d 775, 780 (9th Cir. 2002); *see also Wong v. Gouverneur Gardens Hous. Corp.*, 308 A.D.2d 301, 303 (1st Dep't 2003). The doctrine developed to promote "proper relationships between the courts and administrative agencies charged with particular regulatory duties." *W. Pac. R. Co.*, 352 U.S. at 63; *Guglielmo v. Long Island Lighting Co.*, 83 A.D.2d 481, 483–84 (2d Dep't 1981). It "serves as a judge-made tool for allocating power" between courts and agencies, Kathryn A. Watts, *Adapting to Administrative Law's* Erie *Doctrine*, 101 NW. U. L. REV. 997, 1026 (2007), and aims to "ensure that they 'do not work at cross-purposes,'" *Ellis v. Tribune Television Co.*, 443 F.3d 71, 81 (2d Cir. 2006) (citation omitted).

Two important rationales underlie the doctrine: (1) promoting uniformity in a regulated field and (2) employing the specialized knowledge of agencies. *W. Pac. R. Co.*, 352 U.S. at 63; *see also Pharm. Research & Mfrs. of Am. v. Walsh*, 538 U.S. 644, 673 (2003) (Breyer, J., concurring) (primary jurisdiction "seeks to produce better informed and uniform legal rulings by allowing courts to take advantage of an agency's specialized knowledge, expertise, and central position within a regulatory regime"). Courts have "highlighted the separate roles of court and agency, as well as the importance of the primary jurisdiction doctrine in maintaining a proper balance between the two." *Tassy v. Brunswick Hosp. Ctr., Inc.*, 296 F.3d 65,

68 (2d Cir. 2002). Primary jurisdiction "comes into play whenever enforcement of the claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body." *W. Pac. R. Co.*, 352 U.S. at 64.

That is the case here. Through this suit, the OAG seeks to oversee Amazon's COVID-19 workplace health and safety measures at two facilities in New York City. It alleges that Amazon's cleaning and disinfection practices failed to comply with non-binding administrative guidance, (R.139 ¶ 51), that its productivity policies have "hampered" safe practices, (R.142 ¶ 65), and that its "contract tracing" measures fall short, (R.143 ¶ 71). And it seeks various forms of relief, including permanent injunctions, damages for affected employees, statutory disgorgement, and attorney's fees. (R.7.) But Congress has placed these matters within the special competence of the U.S. Department of Labor's Occupational Safety and Health Administration ("OSHA"). *See* 29 U.S.C. § 651(b) (declaring that the "purpose and policy" of the OSH Act is "to assure so far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources"); *id.* § 657(a) (describing the authority of the Secretary of Labor). OSHA—rather than the courts—possesses the experience and authority to evaluate workplace conditions and assess safety concerns at Amazon

facilities. Applying primary jurisdiction here would promote the core principles underlying the doctrine at a time when those principles remain critical to responding to an evolving national emergency.

Deferring to OSHA would allow the agency room to deploy the "regulatory tools . . . at its disposal to ensure that employers are maintaining hazard-free work environments." *In re AFL-CIO*, 2020 WL 3125324, at *1 (D.C. Cir. June 11, 2020) (per curiam). Those tools include thousands of inspectors with the power to enter, examine, and investigate workplaces, and to require the production of evidence. 29 U.S.C. § 657(a)–(b). Employees may request workplace inspections from the agency, *id.* at § 657(f)(1), and the Secretary of Labor is empowered to issue citations and penalties for violations, *id.* §§ 658–659. OSHA's strategy for combatting COVID-19 in the workplace "pair[s] a broad arsenal of guidance materials with aggressive enforcement of existing standards to ensure that employers appropriately protect their employees." Dep't of Labor Br. 33, *AFT v. OSHA*, Dkt. 13-1, No. 20-73203 (9th Cir. Dec. 31, 2020). At the end of last year, it had conducted "more than 1,430 COVID-related inspections," issued "citations totaling more than $3,849,222 to 294 employers," and conducted over 11,427 COVID-19-related investigations. *Id.* at 11, 33.

Deferring to OSHA would also promote uniformity. It would help avoid an inconsistent patchwork of court-mandated rules, which would result if individual courts imposed their own workplace-safety standards. An environment of conflicting standards would be especially problematic for employers like Amazon that operate nationwide and perform vital services for the public.

B. The trial court's failure to apply the primary-jurisdiction doctrine contradicts precedent of this Court, and other courts faced with similar circumstances.

By refusing to defer to OSHA's special expertise on workplace safety, the trial court ignored the precedents of this Court. Those cases have applied the primary-jurisdiction doctrine when, as here, the dispute falls "peculiarly within the expertise of the agency." *See, e.g.*, *Davis v. Waterside Hous. Co.*, 274 A.D.2d 318, 319 (1st Dep't 2000). In *Davis*, for example, a group of tenants sought an injunction to prevent a building cooperative from withdrawing from a state housing program. *Id.* at 318. This Court applied primary jurisdiction and deferred to the Division of Housing and Community Renewal, noting that "the Legislature has specifically authorized that agency to administer questions relating to rent regulation," and that the issues raised in the cases constituted "questions routinely within DHCR's area of expertise." *Id.* at 319 (citations omitted).

Other decisions of this Court are similar and involve a variety of agencies and issues. In *Wong*, this court deferred to the expertise and oversight of the New York Department of Housing Preservation and Development with respect to the Mitchell-Lama state housing program. 308 A.D.2d at 304. In *Capers v. Giuliani*, this Court deferred to the Department of Labor's "expertise" in the "inherently technical" area of workplace safety. 253 A.D.2d 630, 633 (1st Dep't 1998) ("[R]eview by this Court without a prior agency determination will be inconsistent with sound principles of administrative review."). And in *Eli Haddad Corp. v. Cal Redmond Studio*, this Court found the housing law "issue raised [to be] within the special competence of the Loft Board." 102 A.D.2d 730 (1st Dep't 1984) ("[A]pplication of the doctrine of primary jurisdiction mandates a stay pending disposition of the issue at the administrative level.").

The trial court's decision also expressly contradicts the reasoning of cases examining similar circumstances during the COVID-19 pandemic. (*See* R.28–29.) For example, in a case identical to this one, the U.S. District Court for the Eastern District of New York considered the *same* claim arising out of the *same* factual allegations against the *same* defendant. The court concluded that primary jurisdiction applied and dismissed the case. *Palmer*, 498 F.

Supp. 3d at 370. In doing so, it advanced the twin purposes of the primary-jurisdiction doctrine.

As to uniformity, the court in *Palmer* gave appropriate deference to the "risk of inconsistent rulings," in light of the "room for significant disagreement as to the necessity or wisdom of any particular workplace policy or practice." *Id.* The court reasoned that the "evolving situation" with COVID-19—"a dynamic and fact-intensive matter fraught with medical and scientific uncertainty"—heightened this concern. *Id.* "A determination by OSHA," the court explained, "would be more flexible and could ensure uniformity." *Id.*

The Eastern District's decision also gave proper deference to OSHA's administrative expertise. It recognized that the plaintiffs' claims "turn[ed] on factual issues requiring both technical and policy expertise" and struck at "the heart of OSHA's expertise and discretion." *Id.* The court correctly recognized that courts, by contrast, "are not expert in public health or workplace safety matters, and lack the training, expertise, and resources to oversee compliance with evolving industry guidance." *Id.*

Similarly, in *Rural Community Workers Alliance v. Smithfield Foods, Inc.*, a court dismissed under the primary-jurisdiction doctrine a claim seeking an injunction for safety measures related to COVID-19. 459 F. Supp. 3d

1228, 1240 (W.D. Mo. 2020). As in *Palmer*, the court deferred to the "expertise and experience with workplace regulation" of OSHA, finding that its own "intervention . . . would only risk haphazard application" of regulatory guidance. *Id.* at 1241. The court dismissed the case, concluding that the plaintiffs could "seek relief through the appropriate administrative and regulatory framework." *Id.*

The fact is that courts have not hesitated to apply the primary-jurisdiction doctrine, irrespective of the plaintiff or the cause of action, so long as applying the doctrine would advance its purposes. *See, e.g.*, *Farmers Ins. Exch. v. Superior Ct.*, 826 P.2d 730, 744 (Cal. 1992) (applying primary jurisdiction in case brought by California Attorney General to enforce state law because the case "mandate[d] exercise of expertise presumably possessed by the Insurance Commissioner," and "risk[ed] . . . inconsistent application of the regulatory statute"); *B.H. v. Gold Fields Mining Corp.* 506 F. Supp. 2d 792, 805 (N.D. Okla. 2007) (staying claims for injunctive relief relating to a historic mining site, reasoning that any injunctive relief would "almost certainly conflict" with the Environmental Protection Agency's efforts at the site and that the matter fell "soundly within the EPA's expertise"); *Collins v. Olin Corp.*, 418 F. Supp. 2d 34 (D. Conn. 2006) (dismissing without prejudice nuisance claim for injunctive relief against municipal defendant where state

environmental agency was overseeing implementation of consent decree with defendant).

All of these cases, and especially *Palmer*, chart the appropriate course here. Rather than superintend workplace-safety requirements at Amazon facilities, the trial court should have deferred to OSHA on questions that "go to the heart" of its expertise and discretion. *See Wong*, 308 A.D.2d at 304; *Davis*, 274 A.D.2d at 319. That path would promote uniformity and flexibility in responding to workplace-safety concerns and avoid unnecessary judicial involvement in areas of administrative expertise. This is especially true in light of the still-unfolding COVID-19 pandemic—during which health and economic outlooks shift on a weekly basis—and the fact that Amazon stands among the essential businesses operating throughout the country that remain critical to the country's physical and economic health.

But the trial court here ignored those considerations, parting with *Palmer* and other court decisions. The trial court chose to exercise jurisdiction because, in the months since the *Palmer* decision, OSHA "has yet to weigh in." (R.28.) As the *Palmer* court observed, however, part of the problem is that Amazon employees have "chose[n] to pursue their claims in . . . court rather than apply for relief from OSHA." 498 F. Supp. 3d at 370.

Amazon employees remain free to trigger an OSHA inspection at any time, but they have made no effort so far to engage OSHA.

And to the extent the trial court treated the lack of a pending administrative proceeding as dispositive, that was error. To start, that sort of reasoning inappropriately elevates a single consideration—whether the agency has already been directly engaged—above the core aims of promoting uniformity and employing the specialized knowledge of agencies. *Palmer* rightly rejected that same argument, explaining that "the other factors overwhelmingly support applying primary jurisdiction." *Id.*

What is more, this Court has expressly held that agency inaction is "not a proper basis" for refusing to apply primary jurisdiction. *Wong*, 308 A.D.2d at 305. In *Wong*, a tenant-shareholder in a cooperative housing corporation sought to enjoin the corporation's termination of her tenancy. *Id.* at 301. Because the matter raised several issues "squarely within the technical expertise of" New York's Department of Housing Preservation and Development ("HPD"), the Court concluded that "deference to administrative review [was] appropriate." *Id.* at 304. As here, no application had been made to the agency in question. Answering the tenant's argument that the agency's inaction counseled against the exercise of primary jurisdiction, the Court explained: "the fact that HPD had not yet scheduled an administrative hearing

is not a proper basis for [the] Supreme Court's exercise of jurisdiction." *Id.* at 305. That was especially true because "it was plaintiff's resort to a judicial forum which effectively forestalled HPD's continued prosecution of the administrative proceeding." *Id.* (citing *Davis*, 274 A.D.2d at 319). The same reasoning applies here. Even as some courts have considered the lack of a "prior application" to the agency as a factor against dismissing in favor of agency's primary jurisdiction, *see Palmer*, 498 F. Supp. 3d at 368 (citing *Ellis*, 443 F.3d at 82–83), this Court has not. And it should not do so here.

C. Sound policy reasons support application of primary jurisdiction here.

The trial court's decision was incorrect not only as a matter of law, as discussed above, but also as a matter of policy. Reversal would promote clarity and predictability, which are especially vital to Amazon and other businesses as they endeavor to meet the demand for essential services in a recovering economy.

A predictable regulatory scheme allows businesses to rationally allocate resources in a manner that aids long-term success and survival. With uniform regulations, guidance, and enforcement, businesses know what to expect and can plan accordingly. By contrast, if plaintiffs' lawyers and politically motivated state attorneys general develop and enforce a patchwork of workplace-safety norms through litigation, businesses face overwhelming

uncertainty. In that environment, businesses must constantly be on the lookout for additional costs, wasted investments, unexpected demands, and protracted legal battles. Resources that otherwise could be devoted to growth and development must be saved to protect against the unexpected. *See, e.g.*, *AT&T Inc. v. F.C.C.*, 452 F.3d 830, 836 (D.C. Cir. 2006) (noting that "regulatory uncertainty . . . in itself may discourage investment and innovation" (citation omitted)); *see also* Matthew R. A. Heiman, *The GDPR and the Consequences of Big Regulation*, 47 PEPP. L. REV. 945, 953 (2020) (concluding that the "regulatory uncertainty" created by the European Union's General Data Privacy Regulation "will stifle commercial investment while increasing legal and compliance costs"); Benjamin K. Sovacool, Christopher Cooper, *State Efforts to Promote Renewable Energy: Tripping the Horse with the Cart?*, 8 SUSTAINABLE DEV. L. & POL'Y 5, 9 (2007) (observing in the context of renewable energy that "a more predictable regulatory environment decreases utility litigation and compliance costs").

Exercise of the primary-jurisdiction doctrine avoids such uncertainty. And it is especially appropriate in a case like this one, concerning an evolving situation like the ongoing pandemic. As the *Palmer* court recognized, "[c]ourt-imposed workplace policies could subject the industry to vastly different, costly regulatory schemes in a time of economic crisis." 498 F.

Supp. 3d at 370. The trial court's decision in this case threatens such costs. Its approach interferes with the policies and judgment of an expert agency through judicial second-guessing, and destabilizes a carefully balanced regime. A business that complies with applicable regulations and guidance gains little certainty, because fulfilling its regulatory obligations does not preclude claims brought by private plaintiffs based on the same alleged deficiencies. The result is an increase in unnecessarily overlapping and potentially contradictory efforts by courts and regulators. *See* F. William Brownell, *State Common Law of Public Nuisance in the Modern Administrative State*, 24 NAT. RES. & ENV'T 34, 36 (Spring 2010).

That is not an environment in which businesses thrive. Fortunately, it is one that courts can help avoid by applying the primary-jurisdiction doctrine. As the U.S. Supreme Court counseled over seventy years ago, "[u]niformity and consistency in the regulation of business entrusted to a particular agency are secured . . . by preliminary resort . . . to agencies that are better equipped than courts by specialization, by insight gained through experience, and by more flexible procedure." *Far E. Conference v. United States*, 342 U.S. 570, 574–75 (1952). This Court should heed that wisdom and reverse the trial court's decision here.

II. The trial court erred by permitting the OAG to enforce non-binding agency guidance.

The trial court also erred by transforming non-binding guidance issued by the Centers for Disease Control ("CDC") and the New York State Department of Health ("NYSDOH") into binding legal authority. The CDC promulgated this guidance in the early days of the pandemic, and the NYSDOH guidance largely incorporates its content by reference. (R.8.) It stipulates measures for facility maintenance, contract tracing, social distancing, and hand-washing. (R.8–9.) In accepting the OAG's arguments, the trial court allowed the CDC and NYSDOH guidance to stand in as the "standard" for "reasonable and adequate" health protection under New York Labor Law ("NYLL") § 200. (R.29–30 (OAG asked the court "to determine the appropriateness of Amazon's workplace safety protocol, with NYSDOH and CDC guidance as the suggested minimum standard")); (R.34 ("That the Attorney General asserts that CDC and NYSDOH guidance should inform what is 'reasonable and adequate' does not invalidate her § 200 claim.")); (R.135–138 ¶¶ 32–42 (referencing the CDC guidance 22 times)).

The trial court's countenance of that approach—whereby non-binding administrative guidance supplies an operable "reasonableness" standard for a state-law enforcement action—subverts administrative procedure for any law like NYLL § 200 containing a general reasonableness requirement. *See, e.g.*,

45 U.S.C. § 152; N.Y. Pub. Serv. Law § 65; N.Y. Workers' Comp. Law § 300.2. It allows the government to impose binding rules without the procedural safeguards of notice and comment, and destabilizes the predictable business environment on which regulated entities depend.

A. Procedural requirements ensure predictability and fairness in regulatory enforcement.

Both state and federal administrative law draws a basic distinction between legislative and non-legislative rules. "[L]egislative rules" are "issued through the notice-and-comment process" and "have the 'force and effect of law.'" *Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 96 (2015) (quoting *Chrysler Corp. v. Brown*, 441 U.S. 281, 302–03 (1979)). Non-legislative rules, on the other hand, are issued without notice-and-comment procedures and "do not have the force and effect of law." *Id.* at 97 (internal quotation marks omitted); *UCP-Bayview Nursing Home v. Novello*, 2 A.D.3d 643, 645 (2d Dep't 2003) ("[E]xplanatory statement[s] . . . ha[ve] no legal effect standing alone."); *see also* 5 U.S.C. § 553(b)(A); N.Y. A.P.A. Law § 102(2)(b)(iv).

This distinction is important. When administrative agencies enact binding regulations that direct private conduct, "[n]otice and comment gives affected parties fair warning of potential changes in the law and an opportunity to be heard on those changes." *Azar v. Allina Health Servs.*, 139

S. Ct. 1804, 1816 (2019); *see Home Care Ass'n of New York State Inc. v. Dowling*, 218 A.D.2d 126, 129 (3d Dep't 1996) (observing that the "mere existence of deadlines for agency action" does not justify "dispensing with . . . notice and comment provisions"). Indeed, in the early days of our Republic, rules impacting private conduct were enacted "only by [the people's] elected representatives in a public process." *Gundy v. United States*, 139 S. Ct. 2116, 2134 (2019) (Gorsuch, J., dissenting).

When legislatures began delegating substantive authority in the 20th century "to unrepresentative agencies," *Batterton v. Marshall*, 648 F.2d 694, 703 n.47 (D.C. Cir. 1980), Congress enacted the Administrative Procedure Act (APA). It sought to remedy agencies' "distance from the elective process" by restoring "direct lines to the public voice" through "public participation in the rulemaking process." *U.S. Dep't of Lab. v. Kast Metals Corp.*, 744 F.2d 1145, 1152 & n.11 (5th Cir. 1984) (quoting S. Doc. No. 248, 79th Cong., 2d Sess. 19–20 (1946)) (brackets and ellipsis omitted). States, including New York, followed suit by enacting their own similar APAs. *See, e.g.*, *Home Care Ass'n of New York State Inc. v. Dowling*, 218 A.D.2d 126, 129 (3d Dep't 1996) (citing NYLaw RevComm, Report and Recommendations Relating to an Administrative Procedure Act, 1966 Legis

Doc, No. 65(A), at 15) (noting that New York modeled its state APA on the federal APA).

In addition to providing a measure of democratic accountability,[2] notice and comment improves the quality of agency decision making. Because "[e]very act of the Governor or any executive branch agency is a balancing act between different societal interests," *LeadingAge New York, Inc. v. Shah*, 32 N.Y.3d 249, 288 (2018) (Wilson, J., dissenting in part), hearing from the public affords regulators "a chance to avoid errors and make a more informed decision," *Allina Health Servs.*, 139 S. Ct. at 1816; *see also Prometheus Realty Corp. v. New York City Water Bd.*, 30 N.Y.3d 639, 649 (2017) (Rivera, J., dissenting) ("[N]otice and comment requirements . . . encourage public participation."). Such process becomes even more important as federal and state agencies move to regulate a growing swath of the economy through rules addressing complex issues relating to the environment, consumer protection, financial services, healthcare, and other activities. In today's regulatory

[2] Notice and comment is not a perfect substitute for democratic accountability. But by affording the public an opportunity to have a say before new obligations are imposed, and by allowing the public notice that such obligations are under consideration, notice and comment promotes accountability, "fairness," and "mature consideration of rules of general application." *Chrysler Corp.*, 441 U.S. at 303 (internal quotation marks omitted).

environment, an agency undoubtedly benefits from the opportunity "to educate itself before adopting a final order." *City of Arlington, Tex. v. FCC*, 668 F.3d 229, 245 (5th Cir. 2012) (citation omitted). And agencies often modify their proposals in response to comments they receive through the rulemaking process.

When agencies fail to avail themselves of the viewpoints of interested (and impacted) groups, they increase the risk of unintentional errors and unintended consequences. The New York Legislature recognized this when it "wisely forbade major, binding executive actions in the form of regulations without notice and comment," "precisely so [different societal] interests could be weighed." *LeadingAge New York*, 32 N.Y.3d at 288. And Congress, for its part, conditioned agencies' exercise of legislative authority on the procedures it believed would "afford safeguards to private interests." *Kast Metals Corp.*, 744 F.2d at 1152 n.11 (quoting S. Doc. No. 248, 79th Cong., 2d Sess. 19–20 (1946)); *see also Chrysler Corp.*, 441 U.S. at 303 ("[A]gency discretion is limited not only by substantive, statutory grants of authority, but also by the procedural requirements [of the APA]."). Agencies are obligated to comply with those procedures.

Non-legislative rules, by contrast, "do not have the force and effect of law" and so "the notice-and-comment requirement 'does not apply.'" *Perez*,

575 U.S. at 96–97 (quoting 5 U.S.C. § 553(b)(A)). Because these rules "do not directly guide public conduct," legislatures have determined that "the administrative burdens of public input proceedings" are not required. *Kast Metals Corp.*, 744 F.2d at 1153; *see also Carver v. State*, 26 N.Y.3d 272, 297 (2015) (Abdus-Salaam, J., dissenting) (observing that administrative guidance "carries considerably less weight" than legislative rules because "it comes in the form of a document that has not been issued as 'a formal adjudication or notice-and-comment rule-making'" (quoting *Christensen v. Harris County*, 529 U.S. 576, 587 (2000))). Agencies may properly use non-legislative rules to provide interpretive guidance and "advise the public of the agency's construction of the statutes and rules which it administers," *Shalala v. Guernsey Mem'l Hosp.*, 514 U.S. 87, 99 (1995) (internal quotation marks omitted), but never to impose binding obligations. "Being in nature hortatory, rather than mandatory, interpretive rules never can be violated." *Drake v. Honeywell, Inc.*, 797 F.2d 603, 607 (8th Cir. 1986).

The trial court's decision throws a wrench in this well-defined administrative structure by giving non-legislative rules the force and effect of law. Under its reasoning, any of the many federal and state statutes that contain a reasonableness standard, *see, e.g.*, 45 U.S.C. § 152; N.Y. Pub. Serv. Law § 65; N.Y. Workers' Comp. Law § 300.2, provide carte blanche for

administrative agencies to publish binding obligations on their own terms—free from public accountability. That approach disregards the important safeguards imposed by the federal and state APAs, *see LeadingAge New York,* 32 N.Y.3d at 288; *Perez*, 575 U.S. at 97; *Chrysler Corp.*, 441 U.S. at 302–03, and undermines our constitutional system and the rule of law, *see FCC v. Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012) ("A fundamental principle in our legal system is that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required." (citations omitted)).

B. Selective enforcement of non-binding guidance creates regulatory uncertainty and fosters government abuse.

If courts do not rein in selective government enforcement of non-binding guidance like the OAG's attempt here, regulated industries will be left guessing whether certain guidance documents carry the force of law. This state of uncertainty puts businesses in a lose-lose position and provides an opening for abusive government tactics.

Businesses waste resources when courts fail to enforce strict lines between legislative and non-legislative rules. On the one hand, regulated entities taking a conservative stance must implement costly compliance measures for all manner of facially non-binding guidance. That sort of blind compliance makes little sense when obligations are unclear, particularly if a

regulated entity disagrees with an agency's informal opinion.[3] And the allocation of excessive compliance costs inevitably detracts from an entity's ability to effectively meet clearly-defined legal obligations—not to mention the demands of its core business.

On the other hand, regulated entities that opt not to chase adherence with every conceivable administrative guideline face substantial costs when the government decides to elevate guidance to law. This could come in the form of statutory penalties enforced through the courts or settlement in the face of extreme liability. Either way, regulated parties must pay for violations that they cannot predict, and that the government may enforce on a whim.

The public interest requires courts to reject such abusive tactics. *See Damus v. Nielsen*, 313 F. Supp. 3d 317, 342 (D.D.C. 2018) ("The public interest is served when administrative agencies comply with their obligations under the APA."). Insisting on compliance with federal and state APAs helps

[3] While agencies may attempt to assuage this fear through representations of non-enforcement, experience suggests caution about such representations. *See Appalachian Power Co. v. E.P.A.*, 208 F.3d 1015, 1020–21, 1023 (D.C. Cir. 2000) (observing that disclaimers of enforceability are "a charade, intended to keep the proceduralizing courts at bay") (quoting Robert A. Anthony, *Interpretative Rules, Policy Statements, Guidances, Manuals, and the Like—Should Federal Agencies Use Them to Bind the Public?*, 41 DUKE L.J. 1311, 1361 (1992); Peter L. Strauss, Comment, *The Rulemaking Continuum*, 41 DUKE L.J. 1463, 1485 (1992)).

ensure that regulatory obligations are clear and transparent, and prevents businesses from needlessly wasting resources. This Court should not condone government tactics, like those endorsed by the trial court, that subvert core procedural requirements of administrative law and foster an unpredictable regulatory environment.

CONCLUSION

For the reasons discussed above, the Court should reverse.

Dated: December 13, 2021

Respectfully submitted,

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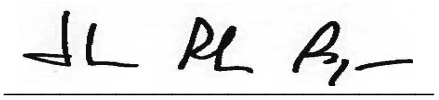

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