20-3989

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
No. 20-cv-2468, Judge Brian M. Cogan

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA & BUSINESS ROUNDTABLE AS *AMICI CURIAE* IN SUPPORT OF DEFENDANTS-APPELLEES

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rules 26.1 and 29(a)(4) of the Federal Rules of Appellate Procedure, the Chamber of Commerce of the United States of America states that it is not a publicly held corporation, does not issue stock, and has no parent corporation. Business Roundtable states that it is not a publicly held corporation, does not issue stock, and has no parent corporation.

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STATEMENT OF INTEREST OF *AMICI CURIAE*[1]

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, including New York.

Business Roundtable is an association of chief executive officers of over 200 leading U.S. companies that together have more than $7 trillion in annual revenues and more than 15 million employees. Business Roundtable was founded on the belief that businesses should play an active and effective role in the formulation of public policy, and Business Roundtable regularly participates in litigation as *amicus curiae* where important business interests are at stake.

Amici regularly file *amicus* briefs in cases involving issues of concern to the business community, including in this Court.[2] *Amici* and their members have a vital interest in the recurring issues raised by this case—in particular, the application of

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[1] Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E) and Local Rule 29.1(b), *Amici* affirm that no party or counsel for a party authored this brief in whole or in part and that no person other than *Amici*, their members, or their counsel has made any monetary contribution intended to fund the preparation or submission of this brief. All parties have consented to the filing of this brief.

[2] *See, e.g.*, *Laurent v. PricewaterhouseCoopers LLP*, 945 F.3d 739 (2d Cir. 2019); *Chevron Corp. v. Donziger*, 833 F.3d 74 (2d Cir. 2016); *U.S.S.E.C. v. Citigroup Glob. Markets, Inc.*, 752 F.3d 285 (2d Cir. 2014).

the primary-jurisdiction doctrine and the special-injury rule. An adverse ruling on either issue would subject businesses to a multiplicity of actions and disrupt the settled expectations on which employers and employees rely.

The law and sound public policy support applying 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 by administrative agencies—will result in inconsistent rulings and impose unnecessary costs on businesses, thereby preventing greater investment and reducing the quality of goods and services.

Amici's concerns are similar with respect to Plaintiffs' public-nuisance claim. That tort should be confined to its historically limited scope, which is enforced, in part, by the requirement that private plaintiffs demonstrate a "special" injury. Weakening or waiving compliance with this rule would invite more burdensome litigation against businesses, despite (and potentially in conflict with) concurrent regulatory oversight.

Amici respectfully urge the Court to enforce these longstanding and salutary limitations on plaintiffs' ability to bring suit and, accordingly, to affirm the district court's judgment.

INTRODUCTION

In inviting the district court—and now this Court—to superintend Amazon's operations through workplace-safety and public-nuisance claims, Plaintiffs' suit epitomizes several alarming litigation trends. Plaintiffs are increasingly asking courts to overstep their roles and ignore the distinct function played by administrative agencies. And as the Chamber has documented elsewhere,[3] courts are also being asked to expand the tort of public nuisance far beyond its historical reach. The district court correctly rejected both efforts in this case: it invoked the primary-jurisdiction doctrine rather than step into an area being managed by an administrative agency, and it dismissed Plaintiffs' purported nuisance claim. This Court should affirm.

The district court rightly concluded that primary jurisdiction applies. That decision advanced 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). The court's decision is also consistent with decisions by other federal courts. What's more, a contrary

[3] *See generally* U.S. Chamber Inst. for Legal Reform, *Waking the Litigation Monster: The Misuse of Public Nuisance* (2019), https://instituteforlegalreform.com/research/waking-the-litigation-monster-the-misuse-of-public-nuisance/ [hereinafter "*Waking the Litigation Monster*"].

decision would have made for bad public policy, creating uncertainty for Amazon and other businesses by undermining a predictable regulatory regime.

Even if the primary-jurisdiction doctrine did not bar consideration of Plaintiffs' claims, the district court correctly dismissed their public-nuisance claim because they failed to demonstrate a special injury due to their risk and fear of COVID-19 infection. Despite that such a risk and such a fear are as endemic as the virus itself, Plaintiffs nonetheless assert that their injury is "special." They are wrong. As the district court recognized, an injury is not special when it is "so general and widespread as to affect a whole community, or a very wide area within it." William L. Prosser, *Private Action for Public Nuisance*, 52 VA. L. REV. 997, 1015 (1966).

Plaintiffs' claimed injury—which millions of other people could also claim, JA-139—steps far over the permissible boundary. Indeed, a contrary ruling would have deprived the special-injury rule of all meaning, leaving it toothless. As with primary jurisdiction, the district court's dismissal of Plaintiffs' public nuisance claim is consistent with decisions by other courts as well as with sound public policy. This Court should likewise insist on rigorous adherence to the special-injury rule, confining the tort of public nuisance to its historical limits.

ARGUMENT

I. The district court correctly applied the primary-jurisdiction doctrine.

The district court correctly held that the doctrine of primary jurisdiction precluded its consideration of Plaintiffs' claims. JA-138. Its decision furthers the purposes of the doctrine, accords with decisions by other federal courts in similar circumstances, and promotes sensible public policy.

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). 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. 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) (quoting *Fulton Cogeneration Assocs. v. Niagara Mohawk Power Corp.*, 84 F.3d 91, 97 (2d Cir. 1996)).

Two principal 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.

While courts across the country "have resisted creating any fixed rules or formulas for [primary jurisdiction's] application," *Tassy*, 296 F.3d at 68, the test employed by this Court aims directly at promoting the uniformity and administrative-competence rationales of the doctrine, *Ellis*, 443 F.3d at 82–83. That test considers: (1) whether the question at issue is within the conventional experience of judges or whether it involves technical or policy considerations within the agency's particular field of expertise; (2) whether the question at issue is

particularly within the agency's discretion; (3) whether there exists a substantial danger of inconsistent rulings; and (4) whether a prior application to the agency has been made. *Id.*; s*ee also Baykeeper v. NL Indus., Inc.*, 660 F.3d 686, 691 (3d Cir. 2011) (same).

The district court carefully considered the *Ellis* factors and correctly concluded that they militated in favor of dismissal. *See* JA-137–38. This outcome advances the twin purposes of the primary-jurisdiction doctrine. As to promoting uniformity, the district court recognized the "risk of inconsistent rulings," given the "room for significant disagreement as to the necessity or wisdom of any particular workplace policy or practice." JA-137. That is especially so with respect to the "evolving situation" with COVID-19—"a dynamic and fact-intensive matter fraught with medical and scientific uncertainty." *Id.* "A determination by OSHA . . . would be more flexible and could ensure uniformity." JA-138. The district court's decision also paid proper deference to OSHA's administrative expertise. Plaintiffs' claims "turn on factual issues requiring both technical and policy expertise" and "go to the heart of OSHA's expertise and discretion." JA-137. The district court correctly recognized that, by contrast, "courts 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.*

B. The district court's exercise of the primary-jurisdiction doctrine is consistent with decisions in other cases alleging public nuisance.

The district court's decision faithfully follows precedents from this Court, which has applied the primary-jurisdiction doctrine when the dispute ran "to the heart" of the agency's "expertise and discretion."[4] It also aligns with other federal courts' decisions in purported nuisance cases where, as here, the relief sought could undermine or interfere with an agency's oversight. That is unsurprising, given that alleged public nuisances—which by definition present problems affecting the public at large—are uniquely suited to administrative regulation, and thus the application of primary jurisdiction.

For instance, in a case strikingly similar to this one, *Rural Community Workers Alliance v. Smithfield Foods, Inc.*, a court dismissed under the primary-

[4] *Ellis*, 443 F.3d at 92 ("[T]he district court should have invoked the primary jurisdiction doctrine and allowed the FCC to address this licensing matter in the first instance. Such an approach would have avoided the subsequent inconsistent rulings and allowed the FCC to exercise its expertise and discretion in deciding Tribune's waiver request."); *see also Golden Hill Paugussett Tribe of Indians v. Weicker*, 39 F.3d 51, 60 (2d Cir. 1994) ("[U]nder the present circumstances, the BIA is better qualified by virtue of its knowledge and experience to determine at the outset whether Golden Hill meets the criteria for tribal status. This is a question at the heart of the task assigned by Congress to the BIA and should be answered in the first instance by that agency."); *Danna v. Air France*, 463 F.2d 407, 412 (2d Cir. 1972) (applying primary jurisdiction to case involving reasonableness of airline fares because "the examination of these fare systems require[d] the exercise of an expertise more heavily concentrated in the Administrative and Executive branches than in the federal judiciary").

jurisdiction doctrine a public-nuisance claim seeking an injunction for safety measures related to COVID-19. 459 F. Supp. 3d 1228, 1241 (W.D. Mo. 2020). As the district court did here, 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.*; *cf.* JA-137 (noting the "room for significant disagreement" regarding policies). The court dismissed the case, concluding that the plaintiffs could "seek relief through the appropriate administrative and regulatory framework." 459 F. Supp. 3d at 1241.

Although the "dynamic" circumstances of COVID-19, JA-137, make it especially ill-suited to regulation-by-litigation, courts regularly apply the primary-jurisdiction doctrine in cases alleging other nuisances. *See, e.g.*, *B.H. v. Gold Fields Mining Corp.* 506 F. Supp. 2d 792, 805 (N.D. Okla. 2007) (in nuisance case, 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); *Jones v. Halliburton Energy Servs., Inc.*, No. CIV-11-1322-M, 2016 WL 1212133 (W.D. Okla. Mar. 25, 2016)

(dismissing nuisance claim for injunctive relief against an oilfield services company where state environmental agency was investigating and remediating site and had entered a consent order with defendant); *Schwartzman, Inc. v. Atchison, Topeka & Santa Fe Ry. Co.*, 857 F. Supp. 838 (D.N.M. 1994) (staying nuisance claim for injunctive relief against facility where EPA and state environmental agency were undertaking efforts to investigate and remediate site and defendant had entered into consent order with EPA).

It is unremarkable that primary jurisdiction would apply in those cases—or this one. As further discussed below, *see* Part II.A *infra*, public nuisance arose as a gap-filling measure long before social legislation and comprehensive regulatory agencies. *See* William McRae, *The Development of Nuisance*, 1 U. FLA. L. REV. 27, 28, 35 (1948) (discussing the development of nuisance law in the 13th and 14th centuries). But the "blossoming [of] national and state regulation of activities and industries . . . displaced and precluded the tort's applicability, relegat[ing] it to such a minor role that it was not even included in the First Restatement of Torts published in 1939." *See Waking the Litigation Monster* at 3. While the Restatement (Second) of Torts reinvigorated the cause of action, because the subject matter of many public-nuisance claims falls within the technical and policy expertise of agencies, it often makes sense to defer to the agency, at least as a preliminary matter. So too here.

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

The district court's decision was correct not only as a matter of law but of sound policy, too. Affirmance would promote clarity and predictability—two qualities on which Amazon and other businesses normally rely, but which are especially vital as they endeavor to meet the essential services demanded by a struggling public.

A predictable regulatory scheme allows businesses to rationally allocate resources in a manner that aids long-term success and survival. In the face of uniform regulations, guidance, and enforcement, businesses know what to expect and can plan accordingly. By contrast, if plaintiffs' lawyers develop and enforce workplace-safety norms through conflicting laws, 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* Brian Dabson, et al., *Business climate and the role of development incentives*, Federal Reserve Bank of Minneapolis (June 1, 1996) ("A positive business climate is created by regulators who seek to work with business to achieve acceptable standards."), https://www.minneapolisfed.org/article/1996/business-climate-and-the-role-of-development-incentives.

Exercise of the primary-jurisdiction doctrine avoids such uncertainty—and is especially appropriate in a case like this one, concerning an "evolving situation" like "a pandemic for which there is no immediate end in sight." JA-137. As the district court recognized, "[c]ourt-imposed workplace policies could subject the industry to vastly different, costly regulatory schemes in a time of economic crisis." JA-137–38. While the district court's approach prevents plaintiffs from interfering with the policies and judgment of an expert agency through judicial second-guessing, a contrary approach would destabilize this carefully balanced regime. A business that complies with applicable regulations and guidance nonetheless would face uncertainty, because fulfilling its regulatory obligations would not preclude claims brought by private plaintiffs based on the same alleged deficiencies.[5] The result would be 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). As the district court concluded, "the risk of inconsistent rulings [would be] high." JA-137.

[5] Public nuisance likely would be plaintiffs' tort of choice in such circumstances, as it was for Plaintiffs here. *See* Part I.B *supra*; Part II.A *infra*. Failing to rigorously enforce the special-injury rule would dramatically expand the availability of public nuisance as a vehicle for challenging conduct—even conduct that complies with applicable regulations. *See* Part II.C *infra*.

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 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).

II. The district court properly dismissed Plaintiffs' public-nuisance claim.

The district court was also correct to conclude that, even if primary jurisdiction did not preclude its consideration of Plaintiffs' public-nuisance claim, dismissal still would be warranted. JA-138. The Court should affirm the district court's enforcement of the special-injury rule, which is critical to cabining the availability of public nuisance.

A. This case falls within a pattern of litigation seeking the expanded and unwarranted use of public nuisance as a cause of action.

As the Chamber has described elsewhere, enterprising plaintiffs and their lawyers have increasingly, and unjustifiably, turned to public nuisance as a theory of recovery. *See generally Waking the Litigation Monster*. These efforts threaten to stretch public nuisance far beyond its historical applications and proper use. This Court's acceptance of Plaintiffs' theory would encourage this worrisome trend.

The tort of public nuisance originated in English law, and was imported into early American law, as a narrow mechanism for the government to abate conditions that impeded public roads and waterways. *See id.* at 3–5; Restatement (Second) of Torts § 821B cmt. a (Am. Law Inst. 1979). Strict principles guided the applicability of public nuisance, including requirements that a public right be involved, that there be a link to real property, and that the defendant proximately cause the harm and control the nuisance. The tort later evolved to allow private individuals to press claims for public nuisance, but only if their harm was "special" or different in kind from the injury to the public. Donald G. Gifford, *Public Nuisance as a Mass Products Liability Tort*, 71 U. CIN. L. REV. 741, 793, 800 (2003); *see also* Prosser, 52 VA. L. REV. at 999 (noting that the "seeds of confusion were [thereby] sown").

Public nuisance drifted farther from its roots when, in 1979, the Restatement (Second) of Torts expanded its definition to include an "unreasonable interference" with a public right. *Waking the Litigation Monster* at 6. Following that development, "enterprising plaintiffs sought to use the tort to address large-scale public policy issues in a way that had not been attempted before." *Id.* Indeed, in the years since, the plaintiffs' bar has been both creative and persistent in attempting to expand public nuisance to cover all manner of conduct, and to create liability where none exists. *See, e.g.*, Am. Tort Reform Ass'n, *The Plaintiffs'*

Lawyer Quest for the Holy Grail: The Public Nuisance "Super Tort" (2020) at 2–3, http://www.atra.org/wp-content/uploads/2020/03/Public-Nuisance-Super-Tort.pdf. They look for courts willing to strip public nuisance from its historic limits—including, as explained below, by watering down the special-injury rule. *See* Part II.B *infra*.

In recent decades plaintiffs have sought to use public nuisance to combat a wide range of purported social ills, from asbestos and tobacco to firearms and lead paint. They have advocated, among other things, that courts recognize a "public right" to be free from the threats of certain products or conditions. Many courts have refused to recognize such invented "rights" and have dismissed the plaintiffs' theories, noting that public nuisance (properly understood) cannot accommodate their claims or be used to sidestep compliance with the requirements of other, more appropriate causes of action. *See, e.g.*, *Tioga Pub. Sch. Dist. No. 15 v. U.S. Gypsum* Co., 984 F.2d 915, 920 (8th Cir. 1993) (noting that, as to asbestos claims, "[a]ll of the courts that . . . considered the issue . . . rejected nuisance as a theory of recovery"); *Detroit Bd. of Educ. v. Celotex Corp.*, 493 N.W.2d 513, 521 (Mich. Ct. App. 1992) ("[T]he public would not be served by neutralizing the limitation period by labeling a products liability claim as a nuisance claim."); *Texas v. Am. Tobacco Co.*, 14 F. Supp. 2d 956, 973 (E.D. Tex. 1997) (in tobacco suit, explaining that it was "unwilling to accept the State's invitation to expand a claim for public

nuisance beyond its grounding in real property"); *In re Lead Paint Litig.*, 924 A.2d 484, 494–95 (N.J. 2007) (concluding that "permit[ting] these complaints to proceed . . . would stretch the concept of public nuisance far beyond recognition and would create a new and entirely unbounded tort antithetical to the meaning and inherent theoretical limitations of the tort of public nuisance"); *City of Chi. v. Beretta U.S.A. Corp.*, 821 N.E.2d 1099, 1116 (Ill. 2004) (dismissing nuisance suit against gun manufacturers; noting that "there is [no] public right to be free from the threat that some individuals may use an otherwise legal product (be it a gun, liquor, a car, a cell phone, or some other instrumentality) in a manner that may create a risk of harm to another").

These cases exemplify the Eighth Circuit's prescient concern, raised nearly three decades ago, that expanding the availability of public nuisance would create "a monster that would devour in one gulp the entire law of tort." *Tioga Pub. Sch. Dist. No. 15*, 984 F.2d at 921. As a New York state court aptly explained more recently, "[g]iving a green light to a common-law public nuisance cause of action" in such circumstances would "likely open the courthouse doors to a flood of limitless, similar theories of public nuisance, not only against these defendants, but also against a wide and varied array of other commercial and manufacturing enterprises and activities." *People v. Sturm, Ruger & Co.*, 309 A.D.2d 91, 96 (N.Y. App. Div. 2003); *see also Celotex Corp.*, 493 N.W.2d at 521 (holding that

allowing a nuisance claim in asbestos cases "would significantly expand, with unpredictable consequences, the remedies already available to persons injured by products, and not merely asbestos products"). That court pointed out the dangerous simplicity of plaintiffs' strategy:

> All a creative mind would need to do is construct a scenario describing a known or perceived harm of a sort that can somehow be said to relate back to the way a company or an industry makes, markets and/or sells its non-defective, lawful product or service, and a public nuisance claim would be conceived and a lawsuit born. A variety of such lawsuits would leave the starting gate to be welcomed into the legal arena to run their cumbersome course, their vast cost and tenuous reasoning notwithstanding. Indeed, such lawsuits employed to address a host of societal problems would be invited into the courthouse . . . .

Sturm, Ruger & Co., 309 A.D.2d at 96; *see also Am. Tort Reform Ass'n*, *The Plaintiffs' Lawyer Quest for the Holy Grail* at 12 (describing the "public nuisance playbook").

And so the plaintiffs' bar presses on. Pending cases—frequently with municipalities serving as plaintiffs—seek to use public nuisance as a vehicle for tackling widespread harms such as data privacy breaches, opioid abuse, and vaping.[6] Other plaintiffs aim to address truly international problems, such as

[6] *See generally* U.S. Chamber Inst. for Legal Reform, *Mitigating Municipality Litigation: Scope and Solutions* (2019), https://instituteforlegalreform.com/research/mitigating-municipality-litigation-

climate change, *see, e.g.*, *City of New York v. BP P.L.C.*, 325 F. Supp. 3d 466, 475–76 (S.D.N.Y. 2018), *appeal pending*, No. 18-2188 (2d Cir. argued Nov. 22, 2019)—and, here, a global pandemic. Unless courts are vigilant about enforcing the limits of public nuisance in cases like this one, there will be no limits at all.

B. Plaintiffs' claim is precluded by the special-injury rule, the traditionally limited exception to the general rule barring private actions for public nuisance.

At issue in this case is one critical limitation on the use of public nuisance by private plaintiffs: the special-injury rule. Unlike in the case of a private nuisance (a claim not made here), only in limited circumstances may a private party bring a public-nuisance action. *See, e.g.*, *Copart Indus., Inc. v. Consol. Edison Co. of New York*, 41 N.Y.2d 564, 568 (1977) (characterizing a public nuisance as "an offense against the State . . . subject to abatement or prosecution by the proper governmental agency"). The special-injury rule reflects a principle that "has long been settled"—that "[a] public nuisance is actionable by private persons only if it is shown that the person suffered special injury beyond that suffered by the community at large." *Wheeler v. Lebanon Valley Auto Racing Corp.*, 303 A.D.2d 791, 793 (N.Y. App. Div. 2003) (citations omitted). A plaintiff's injury must be

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scope-and-solutions/; Am. Tort Reform Ass'n, *The Plaintiffs' Lawyer Quest for the Holy Grail* at 4–12.

different in kind, not simply in "degree," from that suffered by the public. *Benoit v. Saint-Gobain Performance Plastics Corp.*, 959 F.3d 491, 505 (2d Cir. 2020).

The district court correctly concluded here that the harm claimed by Plaintiffs—an increased risk and fear of COVID-19 infection, *see* JA-137—is not a special injury. "Both [P]laintiffs' concern and their risk present a difference in degree, not kind, from the injury suffered by the public at large and thus is not actionable in a private action for public nuisance." JA-140. As demonstrated below, the district court's enforcement of the special-injury rule is supported by history, case law, and sound public policy.

1. The special-injury requirement is a longstanding limitation on private plaintiffs' ability to bring a public nuisance action.

The special-injury rule has its origins in a 1535 King's Bench case holding that a private "action will *not* lie for a public nuisance, based on the concern that this would lead to duplicative recoveries." That case became notable for a dissenting opinion by Justice Fitzherbert musing that, in certain circumstances, private persons should "be allowed to sue for what would otherwise constitute a public nuisance." Thomas W. Merrill, *Is Public Nuisance a Tort?*, 4 J. TORT L. ii, 13–14 (2011) (discussing Y.B. Mich. 27 Hen. 8, f. 26, pl. 10 (1535)).[7] Justice

[7] *Compare id.* at 14 & n.58 (explaining that the "*Restatement* gives the wrong year for the decision (1536) and erroneously characterizes Fitzherbert's

Fitzherbert suggested that a private action might arise "where one man has suffered greater hurt or inconvenience than the generality have; but he who has suffered such greater displeasure or hurt can have an action to recover the damage which he has by reason of this special hurt." *See* Donald G. Gifford, *Public Nuisance As A Mass Products Liability Tort*, 71 U. CIN. L. REV. 741, 800 (2003) (quoting Y.B. Mich, 27 Hen. 8, f. 27 pl. 10 (1535)). Professor Merrill has convincingly shown that Justice Fitzherbert's point was not that a private party might have an action for public nuisance, only that a "public nuisance action does not preempt private tort liability."[8] Nonetheless, the first interpretation was incorporated into English law and passed into American common law as the "special injury" rule. *See generally* Denise E. Antolini, *Modernizing Public Nuisance: Solving the*

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opinion as the holding of the court"), *with* Restatement (Second) of Torts § 821C cmt. a.

[8] Merrill, 4 J. TORT L. at 14 ("Correctly interpreted, what has come to be called private 'standing' to prosecute a public nuisance was therefore most likely an understanding about different causes of action. . . . English legal historians have recognized that this is the correct way to understand the point Fitzherbert was making. The most recent edition of Prosser's hornbook on Torts, edited by Page Keeton, also argues that this is the correct understanding."); *see also* 3 William Blackstone, *Commentaries on the Laws of England* 219–20 (1768) ("[N]o person . . . can have an action for a public nuisance. . . . Yet this rule admits of one exception; where a private person suffers some extraordinary damage, beyond the rest of the king's subjects, by a public nuisance: in which case he shall have a private satisfaction by action.").

Paradox of the Special Injury Rule, 28 ECOL. L.Q. 755 (2001); Gifford, 71 U. CIN. L. REV. at 800–06.

As the Restatement acknowledges, the rule "has persisted"—and "it is uniformly agreed that a private individual has no tort action for the invasion of the purely public right, unless his damage is to be distinguished from that sustained by other members of the public." Restatement (Second) of Torts § 821C cmt. a. As emphasized by Dean Prosser—the original reporter for the Restatement's sections on public nuisance—it is a very limited exception. More than fifty years ago, he explained that the special injury "must be particular to the plaintiff, or to a limited group in which he is included. When it becomes so general and widespread as to affect a whole community, or a very wide area within it, the line is drawn." 52 VA. L. REV. at 1015; *see also Burns Jackson Miller Summit & Spitzer v. Lindner*, 88 A.D.2d 50, 69 (N.Y. App. Div. 1982) (quoting *id.*), *aff'd*, 59 N.Y.2d 314 (1983); *NAACP v. AcuSport, Inc.*, 271 F. Supp. 2d 435, 498 (E.D.N.Y. 2003) (same); *532 Madison Ave. Gourmet Foods, Inc. v. Finlandia Ctr., Inc.*, 96 N.Y.2d 280, 293 (2001) (same).

2. Case law supports the district court's refusal to allow Plaintiffs to bypass the special-injury requirement.

The district court correctly recognized that Plaintiffs could not maintain their public nuisance claim because it is based on a "special" injury shared by many other—if not all—New Yorkers. Consistent with the historical limitations of the

special-injury requirement, New York law does not allow private actions for public nuisance founded on such allegations of diffuse harm.

Plaintiffs' alleged injury is not "special" at all. Their alleged harms—"that they have an increased risk of contracting COVID-19 and fear of the same because they work in conditions, or live with someone who does, that increase the risk of spread of COVID-19," JA-139—are "common" not just "to the New York City community at large," *id.*, but to nearly the entire global population. Indeed, "[P]laintiffs and the public risk exposing themselves to COVID-19 nearly anywhere in this country and the world." JA-140. To borrow Dean Prosser's formulation, if the limiting "line is drawn" when a special injury becomes "so general and widespread as to affect a whole community, or a very wide area within it," 52 VA. L. REV. at 1015, Plaintiffs' claim steps far over that line. It is no exaggeration to say that accepting Plaintiffs' theory would eviscerate the special-injury rule.

Expansive theories of special injury, not even as far-reaching as Plaintiffs', have been routinely rejected by New York courts, which have taken to heart Dean Prosser's observation and enforced his "line" in case after case. In *532 Madison Ave.*, for example, the Court of Appeals rejected a public-nuisance claim, stressing that a "public nuisance is actionable by a private person only if it is shown that the person suffered special injury beyond that suffered by the community at large." 96

N.Y.2d at 292. The Court of Appeals considered a consolidated appeal brought by large proposed classes of retailers, residents, and professionals located along a city block that closed following the collapse of a midtown Manhattan building. *Id.* at 286, 291. Quoting Dean Prosser, the Court of Appeals concluded that the retailers alleged no special injury because "every person who maintained a business, profession or residence" in the area "was exposed to similar economic loss during the closure periods." *Id.* at 294. Any other result, it reasoned, would lead to a "multiplicity of lawsuits" by everyone conceivably suffering "a wrong common to the public." *Id.* at 292 (quoting Restatement (Second) of Torts § 821C).

In *Burns Jackson*, the Court of Appeals similarly refused to acknowledge a "general and widespread" special injury. 59 N.Y.2d at 334–35. There, a putative class of businesses alleged that lost profits and added expenses supported a private action for public nuisance following a city-wide transit strike. *Id.* But the Court of Appeals saw through the asserted special injury, noting that the alleged damages overlapped completely with those "suffered by every person, firm and corporation conducting his or its business or profession in the City of New York." *Id.* at 334. Thus, "the injury [was] not peculiar and the action [could not] be maintained." *Id.* at 335; *see also Wheeler*, 303 A.D.2d at 793–94 (rejecting public nuisance claim by residents of the neighborhoods surrounding a speedway because all "those

persons residing within a two-mile radius" experienced the excessive noise in the same way).[9]

The district court's rejection of Plaintiffs' theory of public nuisance is consistent with this settled authority. As *532 Madison Ave.*, *Burns Jackson*, and *Wheeler* instruct, Plaintiffs' fear and risk of COVID-19 infection simply cannot sustain an action for public nuisance because it is "common to the entire community" and is, by its widespread nature, "public" rather than "special." JA-139–40.

3. Sound policy considerations support rigorous adherence to the special-injury rule.

The result reached by the district court is supported not only by history and case law, but by sound public policy as well. Numerous considerations counsel in favor of limiting the circumstances in which a public-nuisance action is available

[9] New York courts are hardly alone in refusing private actions for public nuisance founded on general, widespread special injury; state courts around the country have followed a similar approach. *See, e.g.*, *Nebraska Innkeepers, Inc. v. Pittsburgh-Des Moines Corp.*, 345 N.W.2d 124, 130 (Iowa 1984) (finding that alleged damages in nuisance action brought against a steel contractor after an essential bridge failed, hindering commutes and customer patronage, were "*public* in nature rather than *special*"); *Town of Rome City v. King*, 450 N.E.2d 72, 78 (Ind. Ct. App. 1983) (rejecting public nuisance action against the operation of a sewage pumping station that emitted noises and odors, allegedly interfering with the comfortable enjoyment of a family's property, because the family experienced "no particular injury" different from the general population of residents).

to a private plaintiff—especially where, as here, the alleged harm affects large numbers of people.

First, enforcing the special-injury rule prevents a multiplicity of actions. Allowing a "special injury" on the grand scale asserted by Plaintiffs would contradict the historical rationale for imposing the special-injury requirement in the first place: "if one person shall have an action for this, by the same reason every person shall have an action, and so [the defendant] will be punished a hundred times on the same case." *See* Gifford, 71 U. CIN. L. REV. at 796 (quoting Y.B. Mich, 27 Hen. 8, f. 27 pl. 10. (1535)). Such a sweeping form of special injury would allow a "multiplicity of actions"—here, potentially numbering not just in the hundreds, but the millions. *See* Restatement (Second) of Torts § 821C cmt. a ("[I]t is essential to relieve the defendant of the multiplicity of actions that might follow if everyone were free to sue for the common wrong . . . ."). The district court's decision is in keeping with the consensus view of courts nationwide—that, in order to prevent runaway liability, private actions for public nuisance cannot rest on allegations of widespread special injury.[10]

[10] *See, e.g.*, *S. Cal. Gas Leak Cases*, 441 P.3d 881, 892 (Cal. 2019) ("[P]ublic nuisance is usually not privately actionable because 'it would be unreasonable to multiply suits by giving every man a separate right of action.'" (quoting 4 Blackstone, *Commentaries* 167)); *Hale v. Ward Cty.*, 848 N.W.2d 245, 251–52 (N.D. 2014) (quoting favorably the comment to the Restatement (Second) of Torts § 821C that "it is essential to relieve the defendant of [a] multiplicity of actions"); *Armory Park Neighborhood Ass'n v. Episcopal Cmty. Servs. in Arizona*,

Second, diffuse harms allegedly affecting large numbers of people should be resolved by the executive and legislative branches through public policy—not by the judicial branch, through private actions for public nuisance. The comments to the Restatement acknowledge this salutary reason for rigorously enforcing the special-injury rule: "Redress of . . . wrong to the entire community is left to its duly appointed representatives." Restatement § 821C cmt. a. Large-scale issues "are better dealt with by the legislative and executive branches, which, unlike courts, are uniquely capable of balancing all of the competing needs and interests in play." *Waking the Litigation Monster* at 32. Weakening the special-injury rule—and allowing potentially millions of private plaintiffs, JA-139, to use public nuisance to redress their alleged harms—violates that principle. Accordingly, courts frequently reject plaintiffs' attempts to remake public policy through public-nuisance actions; air pollution, for instance is a frequent target of such suits, which, as here, involve large numbers of plaintiffs and diffuse harms.[11]

712 P.2d 914, 918 (Ariz. 1985) (special injury is "meant to relieve defendants and the courts of the multiple actions that might follow if every member of the public were allowed to sue for a common wrong"); *Akau v. Olohana Corp.*, 652 P.2d 1130, 1133 (Haw. 1982) ("The purpose of the [special injury] rule is to prevent a multiplicity of actions and frivolous suits.").

[11] *See, e.g.*, *Native Village of Kivalina v. ExxonMobil Corp.*, 696 F.3d 849, 858 (9th Cir. 2012) (affirming dismissal of public nuisance claims regarding greenhouse gases; noting that "the solution . . . must rest in the hands of the legislative and executive branches of our government, not the federal common law"); *Diamond v. Gen. Motors Corp.*, 20 Cal. App. 3d 374, 383 (Div. 4, 1971)

Not only does judicial deference to the political branches respect the separation of powers, it appropriately recognizes the inherent limitations of courts. In matters of "policy, informed assessment of competing interests is required," and courts are ill-suited to striking the proper balance. *Am. Elec. Power Co. v. Connecticut*, 564 U.S. 410, 427 (2011). Agencies are simply "better equipped" to make policy judgments regarding diffuse harms. *Far E. Conference*, 342 U.S. at 574–75. *See, e.g.*, *State ex rel. Norvell v. Ariz. Pub. Serv. Co.*, 510 P.2d 98, 105 (N.M. 1973) (rejecting a public nuisance claim against a power plant; noting that "nothing before us is made to appear that the trial court could solve the mercury problem either more quickly or better than the Agency"); Charles H. Moellenberg, Jr., et al., *No Gap Left: Getting Public Nuisance Out of Environmental Regulation and Public Policy*, 7 Expert Evidence Report (BNA) No. 18, at 483 (Sept. 24, 2007) ("The battle in the public nuisance courtroom resembles a public policy debate, not the traditional role of courts to mete out individualized justice.").

(rejecting public nuisance pollution claim because "[t]hese issues are debated in the political arena and are being resolved by the action of those elected to serve in the legislative and executive branches of government"). *Cf. City of New York*, 325 F. Supp. 3d at 475–76 ("To litigate such an action for injuries from foreign greenhouse gas emissions in federal court would severely infringe upon the foreign-policy decisions that are squarely within the purview of the political branches of the U.S. Government.").

Third, given existing regulation of facilities like Amazon's, allowing plaintiffs to bring private actions for public nuisance would be unnecessary, confusing, and costly not just for businesses but for the wider community. As the district court correctly noted, OSHA "has the primary responsibility for setting and enforcing standards and providing research, information, education, and training to assure safe and healthful working conditions"—as well as "broad prosecutorial discretion to carry out its enforcement responsibilities." JA-135. For the reasons explained in connection with the primary-jurisdiction doctrine, *see* Part I.C *supra*, it is "altogether fitting" that New York should look solely to an "expert agency" to provide that oversight, *cf. Am. Elec. Power Co.*, 564 U.S. at 428.

This system of regulation precludes the need for public-nuisance suits. They are simply "not needed to fill gaps where the legislative and executive branches have already balanced the relevant considerations and implemented comprehensive regulatory schemes." *Waking the Litigation Monster* at 2. Nor would it be sensible public policy to allow nuisance litigation to play that role. That is because "an overlapping public nuisance regime in the administrative state creates potential for conflict and confusion." *Brownell*, 24 NAT. RES. & ENV'T at 36. *Cf. In re Lead Paint Litig.*, 924 A.2d at 494 ("[W]ere we to agree . . . that there is a basis sounding in public nuisance for plaintiffs' assertions, we would be creating a remedy entirely at odds with the pronouncements of our Legislature.").

Allowing private plaintiffs alleging diffuse harms to remake policy through public-nuisance actions—notwithstanding the existence of applicable regulation, and despite the absence of a special injury—would also generate "administrative costs . . . sufficiently large . . . that *all* persons may be worse off in differing degrees." Epstein, *Nuisance Law: Corrective Justice and its Utilitarian Constraints*, 8 J. LEGAL STUD. at 79. Exposure to unpredictable, unnecessary, and costly litigation would detract from businesses' ability to devote resources to regulatory compliance and remediation, making the public "worse off." *Id*. Indeed, reliance on regulation instead of litigation reflects the understanding that the latter is "so expensive as to be self-defeating" when it comes to addressing harms like those alleged by Plaintiffs. *Id.*

CONCLUSION

The Court should uphold the district court's applications of the primary-jurisdiction doctrine and special-injury rule, and affirm its dismissal of this case.

Dated: February 23, 2021

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume requirements of Local Rules 29.1(c) and 32.1(a)(4)(A), which are permitted by Federal Rule of Appellate Procedure 32(e), because, according to Microsoft Word's word-count function, this brief contains 6,973 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f).

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Dated: February 23, 2021

By: *Elbert Lin*
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CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of February, 2021, I electronically filed the foregoing with the Clerk of Court for the United States Court of Appeals for the Second Circuit by using the appellate CM/ECF system. I further certify that all participants in the case are registered CM/ECF users, who will be served by the appellate CM/ECF system.

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