20-3989

United States Court of Appeals
For the Second Circuit

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

Plaintiffs-Appellants,

v.

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

Defendants-Appellees.

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

BRIEF FOR RETAIL LITIGATION CENTER, INC. AS *AMICUS CURIAE* IN SUPPORT OF DEFENDANTS-APPELLEES AND AFFIRMANCE

MARK A. KNUEVE*
*Counsel of Record
BENJAMIN A. SHEPLER
DANIEL E. SHUEY
VORYS SATER SEYMOUR AND PEASE, LLP
52 E. Gay Street
Columbus, OH 43215
(614) 464-6387
maknueve@vorys.com

Counsel for Amicus Curiae
Retail Litigation Center, Inc.

RULE 26.1 CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rules of Appellate Procedure 29(a)(4) and 26.1, *Amicus Curiae* Retail Litigation Center, Inc. states that it is a non-profit corporation, that it has no parent corporations, and that no publicly held corporation owns 10% or more of its stock.

Dated: February 23, 2021

/s/ Mark A. Knueve
Mark A. Knueve

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STATEMENT OF INTEREST OF *AMICUS CURIAE*[1]

The Retail Litigation Center, Inc. ("RLC") is the only trade organization dedicated to representing the retail industry in the courts. The RLC's members include many of the country's largest and most innovative retailers. These retailers employ millions of workers, provide goods and services to tens of millions of consumers, and account for tens of billions of dollars in annual sales. The RLC seeks to provide courts with retail-industry perspectives on important legal issues impacting its members, and to highlight the potential industry-wide consequences of significant cases. Since its founding in 2010, the RLC has participated as an *amicus* in more than 150 judicial proceedings of importance to retailers, including cases such as this one involving workplace health and safety regulations.

The retail industry has been active on the front lines of the COVID-19 crisis, helping to make sure that American families have the food, medicine, goods and services they need to weather this crisis while ensuring that its employees and customers stay safe in the process. Groups like the RLC's sister association, the Retail Industry Leaders Association ("RILA"), have provided guidance and

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

resources to retailers, the public, and governments to help keep employees and customers safe. *See, e.g.*, RILA, A Blueprint for Shopping Safe, available at https://www.rila.org/coronavirus-resources-for-retailers/shop-safe; RILA, Resources for Retailers: Up-To-Date News & Info Site, available at https://www.rila.org/coronavirus-resources-for-retailers.

Although industry initiatives and education are important components of our nation's response to COVID-19, the RLC's members have a substantial interest in ensuring that formal workplace health and safety regulations and standards are developed thoughtfully under the expertise of the Occupational Safety and Health Administration ("OSHA") (and by states with OSHA's express approval) under the Occupational Safety and Health Act ("OSH Act") and that these regulatory schemes are then uniformly applied and enforced. OSHA not only has regulations in place that address COVID-19, but it has already conducted thousands of COVID-19 safety inspections and issued citations under those existing safety standards.

Here – among multiple other faulty theories – Plaintiffs sought to sideline OSHA's expertise and authority by asking the District Court to use a state tort statute as a vehicle for new court-created workplace health and safety standards for COVID-19. As Appellees state: "[i]t is difficult to imagine a task less suited to the judiciary." (Appellees Br. at 1.) Although the District Court correctly dismissed the case on other grounds, the Court's failure to hold that the OSH Act preempted Plaintiffs'

requested relief opens the door for future plaintiffs to use the judicial branch to create a patchwork of new health and safety standards in areas already regulated by OSHA. Such an ad hoc system of regulation by judicial rulemaking raises serious safety, operational, and constitutional concerns not only in the immediate context of COVID-19 and the pandemic, but in other areas of common OSHA regulation as well, such as safety training and hazard communications.

While the RLC fully supports the arguments set forth in Appellees' brief, it writes separately to urge the Court to clarify any doubt that may result by leaving the District Court's reasoning regarding OSHA preemption unaddressed. The RLC urges this Court to affirm the District Court's decision to dismiss Plaintiffs' case, and hold that dismissal was also proper because Plaintiffs' attempted use of state law is preempted by the OSH Act.

LEGAL ARGUMENT

A. The District Court properly dismissed the case, but also should have done so on preemption grounds.

1. The OSH Act preempts the use of state law to regulate worker health and safety in areas where a federal standard is already in effect.

The District Court correctly set forth preemption law, but arrived at the wrong conclusion when it found that there was no preemption and that the OSH Act savings clause applied. (*See* Order, JA 140–44.) The District Court recognized that Plaintiffs were asking it to use NYLL § 200 to "create a regulatory scheme" through

injunction, but found that doing so would be in mere "tension" with the OSH Act. (Order, JA 140.) But not only would that injunction be in "tension" with the OSH Act, this Court should make it clear that it would be *preempted* by the OSH Act.

a. The OSH Act preempts any effort to use NYLL § 200 to substantively regulate an employer's response to COVID-19.

The OSH Act creates a comprehensive framework for regulating workplace health and safety. *See New York State Elec. & Gas Corp. v. Secy. of Labor*, 88 F.3d 98, 103 (2d Cir. 1996). While OSHA is the primary actor under this system, the OSH Act also provides an avenue for states to play a role under certain prescribed conditions. States can create and administer their own "State Plans" provided those Plans are approved by OSHA and offer at least as much protection as the OSHA safety standards. *See* 29 C.F.R. Part 1902. New York had a State Plan approved in 1973, but withdrew the plan two years later. (*See* Order, JA 141–42.)

The Supreme Court has established a framework for preemption analysis under the OSH Act. *See Gade v. Natl. Solid Wastes Mgt. Assn.*, 505 U.S. 88 (1992). In *Gade*, the Court held that "in the absence of the approval of the Secretary [of Labor], the OSH Act pre-empts all state law that 'constitutes in a direct, clear and substantial way, regulation of worker health and safety'" in areas already regulated by OSHA. *Id.* at 107 (quoting *Natl. Solid Wastes Mgt. Assn. v. Killian*, 918 F.2d 671, 679 (7th Cir.1990)). If a state wishes to regulate "an occupational safety or

health issue for which a federal standard is in effect," the only way to do so is for a state to submit a plan for OSHA approval. *Id.* at 107–08.

A plurality of the Court further reasoned that "nonapproved state regulation of occupational safety and health issues for which a federal standard is in effect is impliedly pre-empted as in conflict with the full purposes and objectives of the OSH Act." *Id*. at 98–99 (plurality); *see also id.* at 111 ("I agree with the Court that 'the OSH Act pre-empts all state occupational safety and health standards relating to any occupational safety or health issue with respect to which a Federal standard has been promulgated'" but under an express, not an implied, conflict theory) (J. Kennedy, concurring). This is true even if the state law is intended to "merely supplement the federal standard." *Id.* at 100–01 (plurality); *see id.* at 113 (reasoning that § 18(b) of the OSH Act "leave[s] little doubt" that "Congress intended to pre-empt supplementary state regulation" of an issue where a federal standard exists) (J. Kennedy, concurring).

Here, the District Court recognized that Plaintiffs' proposed injunction would use state law to "create a regulatory scheme," (Order, JA 144), and Plaintiffs make clear in their complaint that this new "regulatory scheme" was intended to regulate employee health and safety. (*See, e.g.*, Am. Compl., JA 123–25, ¶ 362(c) (requesting "injunctive relief to protect the workers"); *id*. at ¶ 362(c)(i) (requesting injunction ordering employer to "communicate clearly with workers" about health issues in

workplace); *id.* at ¶ 362(c)(iv) (requesting injunction ordering employer to "provide workers" time and tools to clean and disinfect "work stations"); *id.* at ¶ 362(c)(v) (requesting injunction ordering employer to "ensure that workers have access to air-conditioned break rooms" with social distancing capabilities).)

Moreover, Plaintiffs' proposed "regulatory scheme" would regulate health and safety issues already regulated by OSHA. OSHA has shown by both word and deed that it has standards in effect to regulate the response to COVID-19. By word, on its COVID-19 Regulations website, OSHA explicitly states that "OSHA requirements apply to preventing occupational exposure to SARS-CoV-2" and then details the most relevant standards, including those related to personal protective equipment, respiratory protection, and the General Duty clause, which OSHA has explained requires implementation of safety practices in response to COVID-19. *See* OSHA, *Regulations*, available at https://www.osha.gov/coronavirus/standards. President Biden recognized OSHA's regulation of this field in a recent Executive Order calling for consideration of revised guidance, standards, and enforcement efforts. *See* Executive Order on Protecting Worker Health and Safety (January 21, 2021), available at https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/21/executive-order-protecting-worker-health-and-safety/. OSHA then issued updated detailed guidance on COVID-19 and noted that it would continue to update its "guidance over time to reflect developments in science, best

practices, and standards." *See* OSHA, *Protecting Workers, Guidance on Mitigating and Preventing the Spread of COVID-19 in the Workplace*, available at https://www.osha.gov/coronavirus/safework.

By deed, OSHA has conducted more than 1,500 inspections, and issued hundreds of citations on COVID-19 safety matters. *See* OSHA, COVID-19 Response Summary, available at https://www.osha.gov/enforcement/covid-19-data#fed_inspections_open; OSHA, *Inspections with COVID-related Citations*, available at https://www.osha.gov/enforcement/covid-19-data/inspections-covid-related-citations. These citations include violations of the OSH Act General Duty Clause for failing to ensure adequate social distancing and/or failing to implement proper hygiene standards, *see id.* (citing violations of OSH Act of 1970 Section (5)(a)(1)). Plaintiffs' proposed injunction sought to regulate these very topics. (*See* Am. Compl., JA 123–25, ¶ 362.)

Thus, while Plaintiffs may disagree with OSHA's approach and response to COVID-19, they cannot credibly argue that COVID-19 is an "occupational safety or health issue with respect to which no standard is in effect." 29 U.S.C. § 667(a). As the District Court recognized, Plaintiffs asked the court to use NYLL § 200 to create a new scheme that would not only regulate occupational safety and health, but would regulate the subject matter that OSHA is already regulating. For that reason, the OSH Act preempts Plaintiffs' requested relief.

b. The OSH Act savings clause does not apply here.

The District Court relied in part on the OSH Act's savings clause in deciding that preemption did not apply. (Order, JA 142 (quoting 29 U.S.C. § 653(b)(4).) The savings clause provides that the OSH Act does not "enlarge or diminish or affect in any other manner the 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). Essentially, "Congress expressly carved out of its preemption rules state common law and statutory tort remedies." *Bus. for a Better N.Y. v. Angello*, 341 F. App'x 701, 705 (2d Cir. 2009).

The OSH Act's savings clause therefore permits a plaintiff to bring a tort claim against an employer **to seek damages for an injury** allegedly caused by a violation of state law. *See, e.g.*, *Atlas Roofing Co. v. Occupational Safety Comm'n*, 430 U.S. 442, 445 (1977) (stating "state statutory and common-law remedies for actual injury and death remain unaffected" by the OSH Act); *Irwin v. St. Joseph's Intercommunity Hosp.*, 236 A.D.2d 123, 129, 665 N.Y.S.2d 773 (1997) ("OSH Act's savings clause expressly preserves from preemption plaintiffs' right under Labor Law § 241(6) to seek damages for injuries arising during the course of plaintiff's employment").

But, the OSH Act preempts the application of state laws such as NYLL § 200

when those laws are used to regulate future behavior through the establishment of new workplace safety standards. As the District Court recognized, the New York Labor Laws are "primarily remedial in nature" while the OSH Act is "prophylactic in nature." (Order, JA 143 (citing *Irwin*, 236 A.D.2d at 130 and *Whirlpool Corp. v. Marshall*, 445 U.S. 1, 12 (1980).) Thus, Plaintiffs' attempts to use NYLL § 200 prophylactically to institute mandatory workplace safety and health standards through injunction – in areas already covered by existing OSHA standards (*see supra* at 7) – encroach upon the OSH Act and are not protected by the savings clause.

2. The District Court's opinion leaves the door open to unworkable future regulation by injunction and raises serious constitutional concerns.

Although the District Court exercised its discretion not to create a new safety and health regulatory scheme by injunction in this case, its analysis leaves the door open for a future court to do so. This Court should firmly close that door by holding that OSH Act preemption applies. Without clear instruction from this Court, other courts could use NYLL § 200 to craft any workplace health and safety regulations – including areas beyond COVID-19 such as safety training, hazard communications, and fall protection – that might seem like a good idea to a particular court at a particular time. Not only does the specter of courts devising occupational safety and health regimes by injunction ignore clear congressional intent, it would predictably lead to unworkable results while raising constitutional concerns.

a. Permitting regulation by injunction would lead to a patchwork of regulations that would be confusing for employees and costly for employers with no guarantee of increased workplace safety.

In passing the OSH Act, "Congress sought to promote occupational safety and health while at the same time avoiding duplicative, and possibly counterproductive, regulation." *Gade*, 505 U.S. at 102 (plurality). Permitting regulation of occupational safety and health standards through state tort statute and injunction would be both duplicative and counterproductive. Furthermore, it would lead to employee confusion, unnecessarily increased and unfairly disparate employer burdens and no assurance of increased workplace safety.

Workplace safety is critical to the nation's leading retailers, who devote significant time, energy and resources every year to ensure that their workplaces comply with federal and state standards approved by OSHA. These efforts include developing, monitoring and enforcing compliance policies, as well as training and educating their workforces. Under the OSH Act, employers can be secure in the knowledge that their investment is made to comply with uniform standards[2] designed to increase workplace safety based on OSHA's expertise. Employers will

[2] As discussed above, the RLC recognizes that OSHA permits states to create and administer their own "State Plans," provided those Plans are approved by OSHA and offer at least as much protection as the safety standards promulgated by OSHA. *See* 29 C.F.R. Part 1902. In those instances, regulations must still meet certain standards and would be consistent throughout the state.

also know that their competitors are operating under the same rules and requirements.

Permitting regulation of occupational safety and health through state tort law and injunction would increase compliance costs, without the promise of any uniformity or effectiveness. Every new standard created by an injunction would require employers to create new policies and training, and could require physical modification of workplaces, even if the employer is already in compliance with OSHA standards on the same issue. Because injunctions can be imposed on a site-by-site basis, as Plaintiffs requested here, the increase in administrative burden and compliance costs could be significant.

Even more disturbing: employees could be confused as to what they are supposed to do if different requirements are implemented at different sites. It is commonplace for retail employees to work at multiple sites or to transfer between locations. For employees that work at multiple sites, one set of standards would apply when working at one site on a Monday and another set might apply when working at a different site on a Tuesday. Employees working at another retailer next door might be operating under different standards if courts regulated workplace safety at individual sites by injunction.

A judicially imposed patchwork of requirements would undermine the important public policy goal of ensuring equal and uniform safety protections for all

employees regardless of work locations. Worse, the employee confusion and incurred cost and effort would come with no confidence that the disparate standards created by injunction would protect anyone. Congress entrusted to OSHA (and its expertise) the power to gather facts and establish workplace safety standards and regulations in accordance with the Administrative Procedure Act (the "APA"). The APA-prescribed rulemaking process relies heavily on the input of interested parties (such as employees, employers, medical and safety experts, advocacy groups, states, and municipalities) to craft standards. *See Assn. of Flight Attendants-CWA, AFL-CIO v. Chao*, 493 F.3d 155, 158 (D.C. Cir. 2007). Judges do not have OSHA's expertise on workplace safety and health issues, and the process of obtaining an injunction vastly differs from the APA-prescribed rulemaking process. Thus, judicial regulation of workplace health and safety – while well-intentioned – could lead to less safe or unnecessarily inefficient workplaces.

Judicial rulemaking is especially problematic in a global pandemic, where workplace health and safety experts are constantly learning more about the disease and developing new best practices. If judges across the country impose their own health and safety standards based on their own understanding of the disease, it could hamstring an employer from implementing new and more effective safety practices and unnecessarily drain needed safety resources at a time when these resources are already stretched responding to the pandemic. It is extremely important to retailers,

whose employees have been on the front lines helping customers obtain food, medicine, goods and services, that OSHA continue to regulate workplace health and safety during this pandemic.

Simply put, requiring retailers or any employers to comply with a patchwork system of regulation-by-injunction is unworkable. Congress decided it was OSHA's responsibility to provide employers with a single set of regulations and the consistent guidance needed to efficiently and effectively establish a compliance program to protect employees and customers.

The District Court recognized all of this. In exercising its discretion to apply the primary jurisdiction doctrine, the District Court found that creating a new regulatory scheme through injunction would not have the benefit of OSHA's expertise, would lead to inconsistent rulings and standards, and could lead to vastly different and costly standards in a time of crisis. (Order, JA 137–38.) This reasoning, however, should have led the District Court to recognize that the OSH Act preempts Plaintiffs' requested relief here.

b. The District Court's failure to apply OSH Act preemption here raises constitutional concerns.

Permitting the regulation of occupational safety and health on a site-by-site basis through state tort law and injunction raises constitutional concerns that may properly be avoided by determining that the OSH Act preempts Plaintiffs' requested relief. *See Frisby v. Schultz*, 487 U.S. 474, 483 (1988) (instructing courts to interpret

statutes "to avoid constitutional difficulties"). Beyond the Supremacy Clause issues inherent in any preemption analysis, the District Court's decision also raises due process and separation of powers concerns.

From a due process perspective, retailers have a right to know the rules that will govern their conduct. *Brock v. Roadway Express, Inc.*, 481 U.S. 252, 265 (1987) (holding that when established procedure for enforcing statutory requirement was not followed, the regulated company was denied due process protection to which it was entitled); *Upton v. SEC*, 75 F.3d 92, 98 (2d Cir. 1996) (quoting *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972)) ("Due process requires that 'laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited.'")

The due process concerns here are both procedural and substantive. Procedurally, retailers have a right to have regulations enacted as Congress mandated, which is either in accordance with the APA or through the OSHA Emergency Temporary Standard process. *See* 29 U.S.C. § 655(b) and (c). The use of these procedures ensures that the regulated community and all members of the public (including employees, medical experts, and other stakeholders) have a chance to inform the regulations.[3] Substantively, employers have a right to know that when

[3] The Emergency Temporary Standard ("ETS") process has several due process protections not available when plaintiffs seek regulation by injunction. For example,

they make significant investments to comply with OSHA standards, they will not be exposed to a different set of judicially imposed standards on the same topic. *Gade*, 505 U.S. at 102 (plurality) (explaining Congress enacted the OSH Act to avoid duplicative regulations). Retailers and all employers need to understand what is required of them, and must be provided with notice and an opportunity to comply with properly enacted regulations, rather than be surprised by spur-of-the-moment regulation by injunction. *See N.Y. State Elec. & Gas Corp. v. Saranac Power Partners*, 267 F.3d 128, 131 (2d Cir. 2001) (substantive regulations that "create new law, right, or duties" must comply with the Administrative Procedure Act's ("APA") notice and comment provisions).

Separation of powers concerns also arise if courts regulate workplace safety and health by injunction, because that regulatory power is held by Congress and OSHA. As this Court has held, "principles of separation of powers mandate that the judiciary refrain from deciding questions consigned to the concurrent branches of the government." *In re Joint E. & S. Dist. Asbestos Litigation*, 891 F.2d 31, 35 (2d Cir. 1989) (citing *Caban v. United States*, 671 F.2d 1230, 1233 (2d Cir. 1982)). Here, Congress passed the OSH Act to regulate workplace safety and health issues and has empowered OSHA with the ability to set specific standards. *Chao*, 493 F.3d

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an ETS can be created only in very limited emergency situations. 29 U.S.C. § 655(c). Moreover, an immediate public comment period must follow entry of the ETS and the ETS must be replaced by a permanent standard within six months. *Id.*

at 158 (D.C. Cir. 2007). While courts may review the constitutionality or meaning of these regulations and standards, they may not create the standards. *See S.E.C. v. Citigroup Global Mkts., Inc.*, 673 F.3d 158, 163 (2d Cir. 2012) ("It is not, however, the proper function of federal courts to dictate policy to executive administrative agencies. 'Federal judges—who have no constituency—have a duty to respect legitimate policy choices made by those who do'" (quoting *Chevron, U.S.A., Inc. v. Natural Res. Defense Council, Inc.*, 467 U.S. 837, 866 (1984)); *Citizens for Clean Air, Inc. v. Corps of Engineers, United States Army*, 356 F. Supp. 14, 19 (S.D.N.Y. 1973) ("Federal regulation by injunction is not desirable" and if established legislative processes "accord with the standards of due process the courts should await their outcome no matter how desirable it might seem to get it over and done with.").

Thus, even if some parties are unhappy with the speed by which the legislative or regulatory process occurs, those parties and the courts must still follow the mandated process. Constitutional concerns arise when a court encroaches on the powers of the legislative and executive branches by regulating workplace safety and health by injunction. This Court therefore should apply preemption and construe OSHA and NYLL § 200 to avoid raising these foreseeable constitutional difficulties. *See Frisby*, 487 U.S. at 483.

B. This Court may consider, as an alternate ground for dismissal, whether the OSH Act preempted Plaintiffs' requested relief, and should do so here.

Plaintiffs-Appellants argue that Appellees did not cross-appeal from the District Court's finding that the OSH Act did not preempt the relief sought by Plaintiffs and imply that this Court cannot consider the issue on appeal. (Appellants Br., p. 26.) As Appellees correctly responded, they "are entitled to defend the district court's judgment on any grounds." (Appellees' Br., p. 31 n.6.) Indeed, Appellees did not have to file a cross-appeal in order to raise this alternative ground for dismissal, and this Court may consider the preemption issue.

Appellees obtained a judgment in their favor that dismissed Plaintiffs' entire complaint. "It is 'an inveterate and certain' rule that a party need not cross-appeal in order to assert an alternate ground based on the record to support a district court decree." *Int'l Trade Admin. v. Rensselaer Polytechnic Inst.*, 936 F.2d 744, 747 (2d Cir. 1991) (quoting *Massachusetts Mut. Life Ins. Co. v. Ludwig*, 426 U.S. 479, 480 (1976)). On appeal, Appellees and *Amicus* are arguing for *affirmance* of the District Court's judgment, and are simply arguing that a finding of preemption under the OSH Act is an alternative basis for the dismissal. No cross-appeal is necessary to make this argument. *See Jenkins v. City of New York*, 478 F.3d 76, 86 n.6 (2d Cir. 2007) (finding that no cross-appeal was needed to make alternative argument in support of trial court's dismissal of claims). Appellees could not cross-appeal from

a decision in their favor resulting in a full dismissal. *See Jenkins*, 478 F.3d at 86 n.6 ("a party may not appeal from a judgment or decree in his favor, for the purpose of obtaining a review of findings he deems erroneous which are not necessary to support the decree" (quoting *Int'l Trade Admin.*, 936 F.2d at 747)).

Thus, this Court may, and should, review the preemption issue as an alternate ground to support the District Court's order of dismissal. The Plaintiffs' novel theory of attempting to use state tort law and injunction to bypass OSHA and create health and safety regulations is likely to arise again within the Second Circuit and across the nation if left unreviewed. Other courts look to this Court for guidance, and – like it has in the past – this Court should provide that needed guidance on this important issue of preemption. *See Bedford Affiliates v. Sills*, 156 F.3d 416, 426 (2d Cir. 1998) (noting that although the district court had not decided whether CERCLA preempted state law because it would not alter the amount of damages, "[w]e believe the issue should be addressed" and holding that preemption applied), overruled on other grounds by *W.R. Grace & Co. -- Conn. v. Zotos Int'l, Inc.* 559 F.3d 85, 90 (2d Cir. 2009). As discussed above, the District Court incorrectly determined that the OSH Act does not preempt Plaintiffs' requested relief and a failure to correct that mistake could have significant negative consequences while it also raises serious constitutional concerns.

CONCLUSION

This Court may consider the alternate ground of preemption when reviewing the District Court's decision to dismiss Plaintiffs' case. The District Court should have found that the OSH Act preempts Plaintiffs' requested relief under NYLL § 200. Although the District Court showed restraint here and exercised its discretion in dismissing the case, there is no guarantee that future courts will do the same. This Court should clarify that federal courts have no authority to regulate occupational safety and health through state tort law and injunction in areas where federal standards are already in place. Without this clarification, future regulation by injunction could create an ad hoc system of regulation that would lead to unnecessarily increased and unfairly disparate burdens without assurance of increased workplace safety. This Court should affirm the District Court's dismissal of Plaintiffs' case and hold that the OSH Act preempts Plaintiffs requested relief under NYLL § 200.

Respectfully submitted,

/s/ Mark A. Knueve

Mark A. Knueve*
*Counsel of Record
Benjamin A. Shepler
Daniel E. Shuey
Vorys Sater Seymour and Pease, LLP
52 E. Gay Street
Columbus, OH 43215
(614) 464-6387
maknueve@vorys.com

Counsel for Amicus Curiae
Retail Litigation Center, Inc.

CERTIFICATE OF COMPLIANCE

This brief complies with the word limit of Fed. R. App. P. 29(a)(5) and Local Rule 29.1(c), because it contains 4441 words, excluding the items exempted under Fed. R. App. P. 32(f)

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

/s/ Mark A. Knueve
Mark A. Knueve

Counsel for Amicus Curiae
Retail Litigation Center, Inc.