New York Supreme Court

Appellate Division—First Department

Appellate Case No.: 2021-03934

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.

AMICUS CURIAE BRIEF ON BEHALF OF NATIONAL EMPLOYMENT LAWYERS ASSOCIATION/NY IN SUPPORT OF PLAINTIFF-RESPONDENT

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The National Employment Lawyers Association/New York ["NELA/NY"] respectfully submits this amicus curiae brief in support of the motion in the Appellate Division, First Department brought by Plaintiff-Respondent the Attorney General of the State of New York for Reargument and Leave to Appeal to the New York Court of Appeals [Dkt. No. 2021-03934]. This brief is authored by volunteer members of NELA/NY'S Amicus Committee and its designated NELA/NY member and is fully funded by NELA/NY. No party contributed to the drafting or funding of this brief.

INTEREST OF THE AMICUS CURIAE

NELA/NY is the New York affiliate of the National Employment Lawyers Association ["NELA"], a national bar association dedicated to the vindication of the rights of individual employees. NELA is the nation's only professional organization comprised exclusively of lawyers who represent individual employees. NELA has over 4.000 member attorneys and 69 state and local affiliates who focus their expertise on employment discrimination, employee compensation and benefits, and other issues arising out of the employment relationship. NELA/NY has more than 300 members statewide and is one of NELA's largest affiliates.

NELA/NY is dedicated to advancing the rights of individual employees to work in an environment that is free from discrimination, harassment, and

retaliation. Our members advance these goals by providing legal representation to employees who have been victims of discrimination and retaliation. NELA/NY has filed numerous *amicus* briefs in various courts in cases that raise important questions of employment law. The organization's aim is to highlight the practical effects of legal decisions on the lives of working people.

NELA/NY applauded the New York State Legislatures amendments to New York State's whistleblower statue, New York State Labor Law Section 740 ["NYLL 740" or "740"], which clarified certain provisions, including one relevant to this case, and provided additional protections [which are not relevant to this dispute]. While Plaintiff-Respondent's case brings important and viable claims regarding Labor Law §§ 200 and 215, NELA/NY respectfully seeks here to focus on NYLL 740, the state law whistleblower claim. This amicus brief does not recount the factual underpinnings of the case, but supports the Statement of the Case as set forth by the Plaintiff-Respondent in its Motion for Reargument and Leave to Appeal.

PRELIMINARY STATEMENT

NYLL 740 ["NYLL 740" or "740"] was enacted to further the deeply rooted interest of the State in protecting the public health and safety and encouraging employers to comply with laws, rules and regulations. Under the version of the Labor Law relevant to this action, whistleblowers must ultimately prove that the

violation alleged "creates and presents a substantial and specific to the public health or safety." NYLL 740[2][a]. The goal of this legislation has always been not only to protect the whistleblowers who raise these issues, but to protect the public health and safety. This is a deeply rooted interest, completely distinct from workers' rights to engage in concerted activity protected by administrative procedures through the NLRA.

While the present case was brought under the former New York State Whistleblower Law, all parties to this dispute are aware that the law has recently been dramatically broadened in scope.[1] By doing so, the Legislature made absolutely clear that there is a powerful State public policy interest in protecting those who raise issues of what they believe to be illegal or unsafe conduct in the workplace. If this Court accepts the argument that Labor Law 740 is pre-empted by the NRLA whenever more than one employee blows the whistle, the Court will be ignoring the previously articulated express public policy New York State, both in

[1] The law in effect as of January 26, 2022 ["Amended NYLL 740"], protects an employee from retaliation for reporting or opposing or refusing to engage in any activity, policy or practice of the employer "that the employee *reasonably believes* is in violation of law, rule or regulation OR that the employee *reasonably believes* poses a substantial and specific danger to the public health or safety. This reasonable belief standard and the disjunctive "OR" in place of "and" considerably broadens the scope of the protection by enabling private individual workers — who, after all, are members of the public — to accomplish the goal of making their workplaces safe, without suffering retaliation.

1984 and as recently articulated in the by Legislature in 2021 [effective as of January 26, 2022].

ARGUMENT

POINT I

PREVENTING THE STATE COURT FROM CONSIDERING THIS CASE WOULD EVISCERATE THE PURPOSE OF NYLL 740, WHICH IS TO PROTECT THE PUBLIC HEALTH AND SAFETY

The primary purpose of NYLL 740 is to protect the public health and safety, by protecting from retaliation those employees who raise such concerns. The law accomplishes this end by protecting employees from retaliation[2] by employers, if they engage in whistleblowing activity. Such activity is defined as "disclos[ing] or threaten[ing] to disclose to a supervisor or public body an activity, policy or practice of the employer" or "object[ing] to, or refus[ing] to participate in any such activity, policy or practice." NYLL 740[2][a][1] and [3]. The statute's goal is to encourage employees to report hazards to supervisors and, if necessary, to public authorities, with the intended effect of offsetting the "frequent tendency of layers within organizations to screen out information which might cause embarrassment if it reached the top of the organization or the outside" [Richard A. Givens,

[2] Defined as "discharge, suspension, demotion, or other adverse employment action in the terms and conditions of employment." NYLL 740[1][e].

Practice Commentaries, McKinney's Cons. Laws of NY, Book 30, Article 20-C, Labor Law § 740, at 546 [1988]. See Addendum.

One need only examine the cases regarding "public health or safety" to further understand the import of NYLL 740 protection from retaliation as a safeguard of the public health and safety, and not just employment protection for whistleblowers.

Thus, many of the successful cases under NYLL 740 involve serious and dramatic threats to public health or safety that were reported by whistleblowers, who then suffered retaliation. For example, in *Rodgers v. Lenox Hill Hospital*, 211 A.D.2d 248 [First Dept. 1995], Rodgers, the director of the EMS Department at Lenox Hill Hospital reported [initially to his supervisor] the conduct of two paramedics that presented danger to the public health and safety. Specifically, the paramedics "pronounced a live woman dead without examining her or attempting resuscitation, … attempted to cover up a second call to the same location, … did not transport the critically ill patient to the closest hospital, and … engaged improper resuscitation." *Id.* at 252-53. Against the instruction of hospital officials, Plaintiff subsequently conducted and refused to stop his own investigation of the incident, "which [incident] became the subject of adverse publicity and an investigation by the New York State Department of Health and the New York City

EMS." *Id.* at 250. Plaintiff was fired without notice after he responded honestly to State investigators called into the hospital.

Plaintiff sued pursuant to NYLL 740. In affirming the lower court decision in Rogers's favor, the First Department explained: "The danger posed by the recurrence of a mishandled EMS call could hardly more clearly meet the required threat to public health and safety to satisfy the statute." *Id.* at 254.

Other successful NYLL 740 claims also involved whistleblowers who were punished for reporting life-threatening activity. In *Kraus v New Rochelle Hosp. Med. Ctr.,* 216 A.D.2d 360 [2d Dept 1995], the Plaintiff Director of Nursing sued under NYLL 740. She had reported a doctor's failure to properly document his patients' charts and to document and/or obtain informed consents for a potentially fatal procedure. After other negative events, e.g., vote of no confidence, being accused of engaging in "frightening actions," "witch hunts," and "irresponsible use of power by individuals in senior management," plaintiff was fired. *Id.* at 362-63. Ultimately, she recovered in court, and was reinstated. *Accord Underwood v Roswell Park Cancer Inst.*, 2017 WL 131740 2017 U.S. Dist. LEXIS 5689 [W.D.N.Y. 2017] [NYLL 740 claim sustained by urologist who reported that physicians in his department were failing to report complications and patient deaths]; *Leach v. Univ at Buffalo Pediatric Assoc.*, 2021 US Dist. LEXIS 1723129 [W.D.N.Y., Jan. 13, 2021, No. 15-cv-684[FPG] [upholding NYLL 740 claim

where plaintiff reported that notes of patient records created by cutting and pasting portions of old notes onto new notes, a process known as cloning, where such practice could result in wrong treatment and thereby lead to death, cardiac arrest, and hemorrhage in the infant patients].

Not all cases meeting the "public health or safety" prong involve potentially fatal conduct, but all involve the State's interest in protecting those who raise substantial and pressing public health and safety concerns. *See Calabro v. Nassau Univ. Med. Ctr.,* 424 F. Supp. 2d 465 [E.D.N.Y. 2006] [unsanitary conditions at medical center's loading dock raised issues of public health and safety]; *Villarin v. Rabbi Haskel Lookstein School*, 96 A.D.3d 1 [1st Dept. 2012] [motion to dismiss NYLL 740 claim denied where plaintiff, a school nurse, alleged that she was terminated after reporting an instance of suspected child abuse because failure to report child abuse satisfied the requirement of pleading a threat to public health or safety].

Significantly, in prior successful cases brought under NYLL 740, the court has not raised the specter of NLRA pre-emption, even where, as in *Kraus*, it was undisputed that the plaintiff was acting on the behalf of others, such as her subordinates. See also *Arazi v. Cohen Bros. Realty Corp.*, 2022 U.S. Dist. LEXIS 56549, 2022 WL 912940 [S.D.N.Y. March 28, 2022m No. 1:20-cv-8837[GHW]

[denying defendant's motion to dismiss 740 claim brought by the three plaintiff-employees of the same employer].

POINT II

LABOR LAW 740 IS NOT PRE-EMPTED BY THE NLRA BECAUSE IT PROTECTS DEEPLY ROOTED STATE INTERESTS

It has long been recognized the Court "cannot declare pre-empted all local regulation that touches or concerns in any way the complex interrelationships between employees, employers, and unions; obviously, much of this is left to the States." *Metro. Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 757, 105 S. Ct. 2380, 2398 [1985], *quoting Motor Coach Employees v. Lockridge*, 403 U.S. 274, 289 [1971]; *Fort Halifax Packing Co. v. Coyne*, 492 U.S. 1, 21 [1987]["[P]re-emption should not be lightly inferred in this area, since the establishment of labor standards falls within the traditional police power of the State."]; *see also Ass'n of Car Wash Owners Inc. v. City of New York*, 911 F.3d 74 [2d Cir. 2018] [inter alia, vacating the district court's order granting plaintiff's motion for summary judgment as to NLRA preemption before the completion of discovery]].

The key question as to whether a state statute is preempted by the NLRA is whether the activity regulated was merely peripheral to the federal concerns, or where the states' need to regulate certain conduct was so obvious that one would not infer that Congress meant to displace the states' power. *Healthcare Ass'n of*

N.Y. State v. Pataki, 471 F.3d 87, 95 [2d Cir. 2006], citing *San Diego Building Trades Council v. Garmon,* 359 U.S. 236, 243-44 [1959]].

In order to analyze whether a statute is pre-empted by the NLRA, the court must "begin by identifying whether any specific provision of sections 7 or 8 of the NLRA actually or arguably prohibits or protects the conduct that is the subject of state regulation. Next, [the Court] must decide whether the controversy is identical to one that the aggrieved party could bring [or induce its adversary to bring] before the NLRB. If not, the State's action could still be preempted, but only if there is a strong showing that the State has interfered with the protections offered by section 7 or 8 of the NLRA. Finally, we consider whether the regulated conduct touches interests 'deeply rooted in local feeling and responsibility,' so that the State's action should not be preempted despite affecting conduct 'arguably' protected by the NLRA." *Healthcare Ass'n of N.Y. State v. Pataki*, 471 F.3d at 96 [internal citations omitted].

In the present case, it is undisputed that no provision of section 7 or 8 of the NLRA prohibits or protects employees who report to their supervisors or to governmental entities conduct that violates the public health and safety and is unlawful. Reporting dangerous and unlawful activity to superiors and to the government is not identical conduct to that protected by the NLRA. Finally, and most significantly, NYLL 740 protects deeply rooted state interests.

Thus, in his Practice Commentaries on Labor Law Section 740, Richard Givens analyzed NYLL 740 in light of the *Garmon* doctrine and concluded that Garmon preemption should not apply. He noted that "[*Garmon*] preemption is inapplicable where state remedies are directed to a traditional and specific local concern such health and safety . . . and do not interfere with federal administrative processes" Richard A. Givens, Practice Commentaries, McKinney's Cons Laws of NY, Book 30, 1988 Pocket Part, Art 20-C, Labor Law § 740 at 581, in Addendum t Brief.

The New Jersey Supreme Court, faced with a case very similar to the present case, held that its whistleblower protection act [CEPA] was not pre-empted by the NLRA because the evidence needed to prove a CEPA claim was different from that required to prove a claim under NLRA. It reasoned:

> It appears that what is explicit in the Section 301 preemption context can be regarded as implicit in the NLRA realm: factual overlap does not drive the preemption analysis; the proofs do.
>
> In our view, a similar approach here shows enough of a gap between the proofs in Puglia's CEPA action and an unfair-labor-practice dispute to elude *Garmon* preemption. See Archibald Cox, Recent Developments in Federal Labor Law Preemption, 41 Ohio St. L.J. 277, 285 [1980] ["The more widely the applicable state substantive law differs from the federal law, the greater will be the differences in the proof required to make a case for judicial relief."]. Puglia's CEPA claim would center on whether he engaged in whistleblowing activity and whether that activity played a role in his termination. The NLRA claim would instead focus on whether Puglia engaged in concerted activity aimed at the conditions of his employment. Yet concerted activity would play no role in a CEPA action. Because we cannot say

> that the two are "identical," we conclude that the risk of infringing on the Board's primary jurisdiction in this case does not demand preemption

[*Puglia v. Elk Pipeline, Inc.*, 226 N.J. 258, 294-95, 141 A.3d 1187, 1208 [2016]]. The exact same distinction applies to the present case.

The *Puglia* Court, in support of its holding, emphasized that New Jersey's interest in CEPA ran "deep" [*id.*]. The same must be said of New York's interest in NYLL 740. It was enacted by the State Legislature in 1984 with the strong support of the New York Department of Labor, which pointed out that whistleblowers serve "an important public function" and that the bill would "protect activity in the public interest" [Two-page Letter from Lee O. Smith, Deputy Commissioner of Labor to Gerald Crotty, Counsel to the Governor[3] dated July 9, 1984, in Addendum]. The Governor's Office of Employee Relations also strongly supported approval of the law, noting that it "represents further advancement in the responsiveness of the law to the evolution of the protection of societal interests" [*see* two-page Memorandum from Joseph Bress, General Counsel in the Governor's Office of Employee Relations to Gerald Crotty, dated July 11, 1984 in Addendum]]. The Attorney General clearly tied the law to New York's interest, stating that the bill "will protect the welfare of the people of this state" [*see* two-

[3] The Governor in 1984 was Mario M. Cuomo.

page Memorandum for the Governor Robert Abrams, Attorney General, dated July 13, 1984, in Addendum].

Just last year, the State re-emphasized the strong local interest in protecting whistleblowers via the mechanism of NYLL 740, by passing legislation [*supra*, n.1 and accompanying text] that significantly broadened the statute's scope and enhanced its remedies.

Upon signing the new legislation Governor Hochul stated:

> If we've learned anything from the pandemic, it's that protecting workers must be part of our overall economic recovery efforts. . . . This legislation ensures that employees can speak out on dangerous or illegal business practices that endanger their health and well-being. No worker should have to endure poor working conditions, so I'm proud to further protect working New Yorkers by preventing workplace retaliation

[New York State, Governor Hochul Signs Legislation Protecting Employees from Retaliation, available at https://www.governor.ny.gov/news/governor-hochul-signs-legislation-protecting-employees-retaliation#:~:text=Governor%20Kathy%20Hochul%20today%20signed,prior%20to%20this%20bill's%20enactment [accessed June 30, 2022]].

Assembly Member Michael Benedetto, the long-time Assembly sponsor of the legislation, told the press, "This is a good day for the workers of New York. People will be free to report wrong doing they see or suspect is occurring at their worksites without having fear of being retaliated against" [*id.*]. And Senate Sponsor Jessica Ramos, the Chair of the Senate Labor Committee, stated, "By signing this bill, Governor Hochul is taking a significant step to signal to workers

that we have their backs, and their health, dignity, and safety at work are of paramount importance" [*id.*].

Thus, less than a year ago, both the Executive Branch and the Legislative Branch glowingly emphasized the importance of NYLL 740 to the state's overall goals. There can be no stronger evidence of the State's deeply rooted local interest in protecting whistleblowers who report wrongdoing in their workplaces.

CONCLUSION

The purposes and proofs of the NLRA and NYLL 740 do not overlap. NYLL 740 is broad, remedial legislation that plays a locally critical role in protecting New York workers from retaliation — demotion, suspension, termination or other adverse employment action — for reporting employers' illegal and unsafe activities to management and to governmental entities. NYLL 740 does not regulate the myriad complexities in the employer-employee relationship, nor does it differentiate between the complaint of a single worker or those of several. Neither does NYLL 740 attempt to regulate employee organizing. Rather it regulates employer actions by prohibiting retaliatory discharge based on employee reports of unlawful and dangerous conduct. Preemption would eliminate the ability of the State to enforce the statute, thereby undermining the State's police power to protect the health and safety of its citizens.

For the foregoing reasons, we respectfully request that this Court grant the State of New York's motion for leave to appeal to the Court of Appeals and accept this brief on behalf of NELA/NY as amicus curiae.

Dated: New Rochelle, New York
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Respectfully submitted,

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