No.

In the Supreme Court of the United States

SUSAN I. HEATH,
Proposed Representative of the
Estate of Henry A. Hurst, III, Deceased,
Petitioner,

v.

ECOHEALTH ALLIANCE, INC.,
Respondent.

On Petition for a Writ of Certiorari to the
Second Circuit Court of Appeals

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

When Petitioner's husband died of COVID-19 in Colorado, she brought a wrongful death action into federal court, alleging novel tort claims against the New York entity she judged in the best position to have protected her husband against SARS-CoV-2, the cause of COVID-19.

Petitioner alleged that in the course of furthering the goals of its National Institutes of Health (NIH) research grant, EcoHealth Alliance, Inc. knowingly funded risky gain-of-function research enhancing abnormally dangerous SARS viruses in a foreign lab beset by known biosafety issues, ultimately releasing SARS-CoV-2 and causing her vulnerable husband's death.

The Second Circuit affirmed dismissal of Petitioner's novel claims by contravening the doctrine established in *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938). It misapplied state substantive law and refused to certify a novel question implicating public health policy to the state's highest court.

QUESTION ONE: In a diversity action raising novel claims involving abnormally dangerous research activity, may a federal court determine the *negligence and strict liability claims* contrary to the substantive law of the State?

QUESTION TWO: Did the Second Circuit contravene *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938) by refusing to certify a novel question of New York law to the State's highest court where the issue involves public health policy reserved to the States under the U.S. Constitution?

LIST OF PARTIES

Petitioner is Susan I. Heath, the proposed representative of the Estate of Henry A. Hurst, III, a deceased citizen of the State of Colorado.

Respondent is EcoHealth Alliance, Inc., a nonprofit corporation organized under the laws of Massachusetts and headquartered in New York, New York.

CORPORATE DISCLOSURE STATEMENT

Petitioner is an individual.

LIST OF DIRECTLY RELATED CASES

Heath v. EcoHealth Alliance, No. 25-100-cv, United States Court of Appeals for the Second Circuit. Summary Order entered September 17, 2025.

Heath v. EcoHealth Alliance, No. 1:23-cv-08930, United States District Court for the Southern District of New York. Judgment entered December 19, 2024.

TABLE OF CONTENTS

TABLE OF CONTENTS
(continued)

TABLE OF CONTENTS
(continued)

TABLE OF APPENDICES

APPENDIX A

APPENDIX B

TABLE OF AUTHORITIES

CASES

TABLE OF AUTHORITIES
(continued)

TABLE OF AUTHORITIES
(continued)

TABLE OF AUTHORITIES
(continued)

TABLE OF AUTHORITIES
(continued)

TABLE OF AUTHORITIES
(continued)

OTHER AUTHORITIES

PETITION FOR A WRIT OF CERTIORARI

Petitioner Susan I. Heath, as proposed representative of the estate of Henry A. Hurst, III, deceased, respectfully petitions for a writ of *certiorari* to review a final judgment of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The unpublished summary opinion of the United States Court of Appeals for the Second Circuit in *Heath v. EcoHealth Alliance*, No. 25-100-cv is available at 2025 U.S. App. LEXIS 24022 and is reproduced at Appendix A. The opinion of the United States District Court for the Southern District of New York, No. 1:23-08930 (JLR) is available at 2024 U.S. Dist. LEXIS 231002, and is reproduced at Appendix B.

JURISDICTION

The Second Circuit's opinion was entered on September 17, 2025. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. CONSTITUTION, Amendment I

Congress shall make no law … abridging the … right of the people … to petition the Government for a redress of grievances.

U.S. CONSTITUTION, Amendment VII

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

U.S. CONSTITUTION, Amendment X

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

CONSTITUTION OF NEW YORK, Art. I, § 2

Trial by jury in all cases in which it has heretofore been guaranteed by constitutional provision shall remain inviolate forever …

INTRODUCTION

What we knew then

SARS coronaviruses are abnormally dangerous to humans. In 2012, seven years before the COVID-19 pandemic, the CDC of the Dept. of Health and Human Services (HHS) added SARS coronavirus (SARS-CoV) to the list of "biological agents and toxins that have the potential to pose a severe threat to public health and safety."

The CDC found SARS-CoV already associated with one of the most significant pandemics of the 21st century (2002–03). SARS-CoV exhibited high transmissibility and lethality and caused epidemics with significant mortality, accompanied by major economic and psychological impacts. Accordingly, as the virus "no longer circulate[d] in nature," CDC designated the virus a "select agent" subject to research facility reporting and strict biosafety plans.[1]

Just two years later, on October 17, 2014, the HHS paused all funding for new "gain-of-function" (GOF) research involving SARS-CoV in light of concerning biosafety incidences at federal research facilities.[2] HHS noted that GOF research is "research that improves the ability of a pathogen to cause disease," and halted funding for research intended to enhance the pathogenicity and/or transmissibility of SARS viruses in mammals via the respiratory route.[3]

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[1] 77 Fed. Reg. 61084 (October 5, 2012), 42 C.F.R. Part 73 (October 5, 2012).

[2] https://web.archive.org/web/20141020134118/http://www.phe.gov/s3/dualuse/Documents/gain-of-function.pdf

[3] Funding was reinstated December 17, 2017, because the NIH had designed a new "Framework" for funding decisions surrounding GOF for potential pandemic pathogens. https://web.archive.org/web/20200417075339/https://www.nih.gov/

What we know now

Beginning in 2014, EcoHealth Alliance, Inc. (EcoHealth), received an HHS grant award[4] to directly engage in the collection, transportation, and manipulation of bat SARS-CoV samples for pathogen enhancement via their partner and subcontractor laboratory at the Wuhan Institute for Virology in China (WIV).[5] In 2015, EcoHealth was conducting research with the WIV into creating a hybrid virus combining elements from two bat-borne coronaviruses, including the SARS-CoV which caused the 2002 pandemic. The mutated virus could more easily infect human cells, an unnatural modification because "almost all coronaviruses from bats have not [previously] been able to bind to the key human receptor."[6]

In 2016, concerned NIH officials added new award conditions to the EcoHealth/WIV grant, requiring that EcoHealth *stop* all experiments with any SARS-like chimeras showing evidence of

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about-nih/who-we-are/nih-director/statements/nih-lifts-funding-pause-gain-function-research

[4] Through the NIH and NIAID.

[5] EcoHealth's research project, No. 5R01AI110964, is described as "Understanding the Risk of Bat Coronavirus Emergence," *see* https://reporter.nih.gov/search/5QNtHtqAgUCNH7hAAueScQ/projects. Its 2015 abstract describing the research included "Test predictions of CoV inter-species transmission. Predictive models of host range (i.e. emergence potential) will be tested experimentally using reverse genetics, pseudovirus and receptor binding assays, and *virus infection experiments across a range of cell cultures from different species and humanized mice*." *See* https://reporter.nih.gov/search/5QNtHtqAgUCNH7hAAueScQ/project-details/8853810#details (emphasis added).

[6] Declan Butler, "Engineered bat virus stirs debate over risky research." *Nature* (2015). https://doi.org/10.1038/nature.2015.18787

enhanced viral growth greater than 1 log over the parental backbone strain, and report such evidence to NIAID, NIH, and the Wuhan Institutional Safety Committee.[7]

At the same time, it was widely know that the WIV labs operated with inadequate biosafety measures and had a history of frequent accidents. Safety concerns over WIV lab's practices were identified by U.S. Embassy officials in late 2017. From late 2017 to March 2018, health and science experts from the U.S. Embassy in Beijing made multiple visits to the WIV. The diplomats warned Washington that the lab's work to make bat coronaviruses infectious for humans, coupled with grave safety concerns, could result in the accidental unleashing of a new SARS-like pandemic.[8]

In a nearly two-years-late report submitted in August 3, 2021, EcoHealth reported that by mid-2019, WIV had infected transgenic mice with human ACE2 receptors with four strains of recombinant SARS-CoVs, and one variant exhibited enhanced viral growth — possibly greater than 1 log increase in viral activity — resulting in a mortality rate of 75%.

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[7] GAO-23-106119. "Federal Research: NIH could take additional actions to manage risks involving foreign recipients." (June 2023). https://www.gao.gov/assets/gao-23-106119.pdf

[8] Republicans of the House Permanent Select Committee on Intelligence, "In Focus: COVID-19 and the Wuhan Institute of Virology," May 19, 2021, quoting Josh Rogin, "In 2018, Diplomats Warned of Risky Coronavirus Experiments in a Wuhan Lab. No One Listened." *Politico*, March 8, 2021. https://intelligence.house.gov/uploadedfiles/covid-19_and_the_wuhan_institute_of_virology_19_may_2021.pdf; https://www.politico com/news/mag azine/2021/03/08/josh-rogin-chaos-under-heaven-wuhan-lab-book-excerpt-474322

This gain of function result was not immediately reported to NIH or NIAID.[9]

Beginning in the Fall of 2019, SARS-CoV-2, the identified cause of COVID-19, caused the death of millions world-wide, including Petitioner's husband.

"There is overwhelming circumstantial evidence … to support a [WIV] lab leak as the origination of COVID-19, while there is no substantive evidence supporting the natural zoonosis hypothesis."[10] The weight of the evidence, supported by evaluations from the State Department, the Office of the Director of National Intelligence, and the House Select Subcommittee on the Coronavirus Pandemic, supports the hypothesis that COVID-19 emerged as the result of a lab related accident at WIV, which was involved in genetic engineering of SARS-CoV as a subcontractor of EcoHealth.[11] The WIV has a track record of conducting this research at low BSL-2 safety levels, while SARS-CoV, a select agent, is

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[9] Interim RPPR of EcoHealth Alliance submitted 8/3/2021, https://www.nih.gov/sites/default/files/institutes/foia/20211020-risk-of-bat-emergence.pdf; Final Report of the Select Subcommittee on the Coronavirus Pandemic Committee on Oversight and Accountability, "After Action Review of the COVID-19 Pandemic: the Lessons Learned and a Path Forward." December 4, 2024, p. 62; https://oversight.house.gov/wp-content/uploads/2024/12/2024.12.04-SSCP-FINAL-REPORT-ANS.pdf; HHS Action Referral Memorandum 1/17/2025, p.7, ¶ 21, https://oversight.house.gov/wp-content/uploads/2025/01/ARM_EHA_1.17.2025_Redacted.pdf

[10] Republicans of the House Permanent Select Committee on Intelligence, "In Focus: COVID-19 and the Wuhan Institute of Virology," *supra* n. 8, at p. 13.

[11] Final Report of the Select Subcommittee on the Coronavirus Pandemic Committee on Oversight and Accountability, *supra* n. 9, at pp. 1–2.

required under U.S. regulations to be conducted under higher BSL-3 protocols.[12]

The situation at hand

On January 17, 2025, HHS issued an action referral memorandum detailing the failures of EcoHealth to fully report GOF research results obtained at WIV, to supply WIV laboratory notebooks, and to provide WIV safety-related records. HHS debarred EcoHealth from receiving further funding through May 14, 2029.

On May 5, 2025, President Trump signed Executive Order 14292 entitled "Improving the Safety and Security of Biological Research."[13] The Order recognized that "[d]angerous gain-of-function research has the potential to significantly endanger the lives of American citizens. If left unrestricted, its effects can include *widespread mortality*, …" (emphasis added). The Order ends federal funding of GOF research conducted by foreign entities in countries of concern, "(*e.g.,* China)." It explicitly recognizes that dangerous GOF research involves "scientific research on an infectious agent or toxin with the potential to cause disease by enhancing its pathogenicity or increasing its transmissibility" with the goals, *inter alia*, of "enhancing the harmful consequences of the agent or toxin, … increasing the stability, transmissibility, or the ability to disseminate the agent or toxin, [and] enhancing the susceptibility of a human host population to the agent or toxin."

Meanwhile, the Second Circuit Court of Appeals has uniquely defied the findings of the Executive and

[12] *Id.*, at p. 3.
[13] 90 Fed. Reg. 19611.

Legislative branches on a matter of great national importance, choosing to misread and mischaracterize allegations in a wrongful death suit to lend EcoHealth a type of judicial immunity for its GOF research at the WIV — despite the government's findings that EcoHealth's acts and omissions most likely caused COVID-19 and the death of millions, including Petitioner's husband.

STATEMENT OF THE CASE

In December of 2019, the novel SARS-CoV-2 coronavirus was first reported circulating in the United States, and the disease it caused was named COVID-19. Since that time, it has been revealed that SARS-CoV-2 is a man-made, lab-originated coronavirus arising from federally funded "gain of function" ("GOF") research conducted by the WIV, in partnership with EcoHealth, specifically to increase the transmissibility and/or virulence of pathogens such as viruses, and that it was released into the environment by WIV, which conducted the research in unsafe conditions.

EcoHealth and its then President Peter Daszak, Ph.D., received grant money for coronavirus GOF research from the National Institutes of Health ("NIH") and the National Institute of Allergy and Infectious Diseases ("NIAID"), then subcontracted with WIV to use taxpayer dollars to facilitate SARS-CoV-2 GOF research. EcoHealth violated the grant terms and conditions by knowingly contracting with and funding WIV despite its terrible biosafety record, and failing to report the potentially dangerous experiments conducted by the WIV to NIH and NIAID. In the course of this dangerous research,

WIV released the novel SARS-CoV-2, which rapidly circulated around the world.

In October 2021, Petitioner Susan Heath's husband Henry A. Hurst, III, died in Colorado from COVID-19 caused by EcoHealth's man-made SARS-CoV-2 virus. As representative of her husband's estate, she brought her wrongful death action, pursuant to New York Consolidated Laws, Estates Powers and Trusts § 5-4.1 and 28 U.S.C. § 1332, to the U.S. District Court for the Southern District of New York in October 2023, alleging alternative torts of negligence or strict liability against EcoHealth, whose ultrahazardous coronavirus research resulted in the WIV release of the deadly coronavirus which killed her husband.

EcoHealth moved to dismiss Petitioner's claims under Fed. R. Civ. P. 12(b)(6). The District Court granted the motion on the ground that Petitioner did not allege facts sufficient to support the existence of a duty of care owed Henry Hurst, nor to support a strict liability claim against EcoHealth. The Second Circuit Court of Appeals affirmed the District Court in a short summary order.

A short and plain statement and demand for a jury trial

Petitioner's complaint and the reasonable inferences drawn therefrom allege that EcoHealth engaged in abnormally dangerous gain-of-function coronavirus research at the WIV in Hubei province, China. EcoHealth funded WIV as its subcontractor for this GOF research from 2014–2019, while knowing that WIV was conducting that research under existing conditions of serious biosafety problems. EcoHealth knew that it had no oversight or way of knowing how safe the WIV labs were while

these risky experiments were taking place, and still funded the labs doing its research despite its lack of experimental supervision or control.

Petitioner specifically pled the facts which define EcoHealth's GOF research: "[g]ain of function research involves experimentation that is expected to increase the transmissibility and/or virulence of pathogens. [It] aims to make viruses more infectious and deadlier or more virulent, often to humans. Gain of function experiments are conducted to make viruses more contagious or deadly." This fact allows the reasonable inference that GOF research, even with biosafety guardrails in place, is intended to be abnormally dangerous to living organisms and humans in particular.

As a direct and proximate result of EcoHealth's negligence in funding the biosafety-deficient WIV with no oversight, the WIV released a deadly lab-made coronavirus which spread worldwide and caused the pain, suffering, and death of Hurst, Petitioner's husband.

Alternatively, because GOF research is an ultrahazardous or abnormally dangerous activity which creates a significant risk of physical harm despite the exercise of reasonable care, EcoHealth was strictly liable for death of Hurst.

Finally, Petitioner Heath demanded a jury trial.

The motion to dismiss in District Court

EcoHealth moved to dismiss under Rule 12(b)(6), and introduced a declaration opposing the facts alleged by Heath. EcoHealth's motion did *not* show that insufficient facts were alleged to state a claim for relief, but directly admitted to several facts, and tacitly admitted that other facts stated a claim for relief by simply *denying* or *disputing* the facts.

In its motion, EcoHealth (a) denied that WIV's coronavirus holdings and research included SARS-CoV-2 or a close progenitor, (b) denied that an incident or incidents occurred at WIV which resulted in releasing SARS-CoV-2 to the environment, (c) claimed that SARS-CoV-2 did not result from EcoHealth's GOF research, but from an intervening act of nature, (*i.e.,* it independently evolved to infect humans), (d) that EcoHealth merely studied zoonotic disease rather than engineered and caused it, (e) that the Wuhan lab was a safe and appropriate place to conduct GOF research, (f) that EcoHealth's research did not constitute a direct or proximate link in the causal chain of Hurst's death, and (g) that because EcoHealth's *goal* in increasing the transmissibility and lethality of coronavirus was to develop vaccines for coronaviruses that did not exist in nature (but were being created by EcoHealth in the WIV labs), the imagined benefit to society was "indisputably" greater than the real danger caused. Thus, EcoHealth had fair notice of Heath's claims and comprehended those claims; it simply denied them in a motion to dismiss rather than an answer

EcoHealth's defensive posture was that COVID-19 was a "natural" disaster — rather than a foreseeable man-made disaster resulting from the escape or release of SARS-CoV-2 from its GOF research activities.

The District Court's decision

The District Court disregarded the actual factual claims made, that the *GOF research itself* is abnormally dangerous, and instead found that the complaint (a) failed to allege that "funding" such research is "uncommon or inappropriate," and (b) failed to allege facts that supported a "high risk of

harm" resulted from "funding biomedical research." App. 23a–24a.

Because the *funding* of medical research *in general* is a common activity, the court reasoned, Petitioner must plead facts that show funding *medical research* is uncommon, or creates high risks of harm.

The District Court further reasoned that the alternate claims of negligence or strict liability required further support by either (a) an allegation that EcoHealth had direct control over the WIV lab, or (b) allegations showing that the risks at WIV could not have been eliminated by EcoHealth. App. 15a, App. 22a.

Finally, the District Court dismissed Petitioner's complaint with prejudice, allowing for no opportunity to amend to supply factual allegations it deemed missing.

Proceedings in the Second Circuit

Petitioner moved for summary reversal and certification of a question of law to New York's Court of Appeals, and incorporated into the motion, as a matter of judicial notice, the December 2024 final report of the House Select Subcommittee on the Coronavirus Pandemic concluding that that SARS-CoV-2 and COVID-19 likely originated from EcoHealth's subcontractor WIV.[14]

The question of law to be certified was whether, under New York substantive law, an entity engaging in clandestine GOF research which created an ultrahazardous virus (in the pursuit of creating a universal vaccine) was strictly liable, or liable under negligence principles, for the injuries resulting from

[14] See n. 11, *supra*.

that virus. The Second Circuit denied Petitioner's request for certification without comment in a footnote of its Summary Order. App. 7a.

Like the District Court, the Second Circuit panel recast the complaint, stating that it only "plausibly alleged" EcoHealth generally funded coronavirus research, and not that EcoHealth's funding was directed to WIV's GOF research. The Court then stated that "even assuming that harm to Heath was a foreseeable result of EcoHealth's conduct," foreseeability alone does not define duty, and that the allegation that EcoHealth "had no supervision nor control" over WIV "negate[d] any plausible inference that EcoHealth had 'actual control' of the Wuhan Institute's action such that EcoHealth was 'in the best position to protect against the risk of harm' to Heath's husband. App. 4a–5a. The Second Circuit concluded that the lack of "actual control" over subcontractor WIV equated to no duty to control WIV on the part of EcoHealth.

To deny any strict liability theory of recovery, the Second Circuit used the allegation of EcoHealth's lack of oversight to defeat the alternative strict liability claim "because it implicitly acknowledges that the risk of the coronavirus research at issue could be mitigated with the exercise of reasonable care." This, and "common usage and value to the community" of biomedical research *in general* negated strict liability. App. 6a.

The decision profoundly contravenes the *Erie* doctrine by wrongly construing New York's substantive tort law concerning the threshold matter of duty of care and by denying a novel tort claim of strict liability without certification to the highest court of New York, and in defiance of New York substantive law requiring a jury to weigh and decide

the tort factors applicable in strict liability.

As a result, Petitioner is denied access to the courts and to a jury trial, in violation of the *Erie* doctrine as well as the First and Seventh Amendments to the U.S. Constitution.

REASONS FOR GRANTING THE WRIT

The Second Circuit Court of Appeals, sitting in a diversity action over novel common-law tort claims, has entered a decision in a manner which departs from this Court's precedence for the consideration of motions to dismiss under Fed. R. Civ. P. 12(b)(6). Further, its complete failure to apply substantive state law in a case involving novel tort claims further departs so far from the principles of federalism as set forth by this Court in *Erie Railroad v. Tomkins*, 304 U.S. 64 (1938) that Petitioner was denied her due process right to a jury trial under both state law and the Seventh Amendment.

The supervision of this Court over the Second Circuit's wholesale departure from the precedents which guarantee a right to remedy is urgently needed, particularly concerning the highly and abnormally dangerous activity of the GOF research conducted by EcoHealth at WIV, now explicitly recognized as dangerous and the likely cause of COVID-19 by both the Executive and Legislative branches of the national government.

The Second Circuit refused to certify the novel question raised by Petitioner's tort claims to the New York Court of Appeals, in conflict with the Eleventh Circuit, which certified a case similar in many respects to the Supreme Court of Florida. This conflict, too, requires resolution and supervision by

this Court.

Petitioner's novel claim concerns the liability of entities engaged in enhanced pathogen research, which research has a real potential of affecting the life and health of the citizens of all States. Thus, the claim implicates the States' reserved power over the determination of public health policy, a power preserved by the *Erie* doctrine.

I. The Second Circuit resolved Petitioner's complaint in abrogation of Rule 8

Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007) altered the standard federal courts apply to motions to dismiss; as aptly summarized by the Seventh Circuit, a complaint "must provide[] enough information to enable an inference that the suit has sufficient merit to warrant putting the defendant to the burden of responding to at least a limited discovery demand." *In re Text Messaging Antitrust Litig.*, 630 F.3d 622, 625 (7th Cir. 2010). A claim is plausible under *Twombly* "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009), citing *Twombly* at 556.

"[A]t the motion-to-dismiss stage, the Court assumes the truth of 'well-pleaded factual allegations' and 'reasonable inference[s]' therefrom." *NRA of Am. v. Vullo*, 602 U.S. 175, 181 (2024), citing *Iqbal*, at 678–679. Nevertheless, a court's *disbelief* of a complaint's allegations or even assessment that recovery is unlikely are not grounds for dismissal. *See Neitzke v. Williams*, 490 U.S. 319, 327 (1989); *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974).

But no standard enunciated by this Court has

ever countenanced whole-sale disregard of factual allegations and the reasonable inferences drawn therefrom in favor of a court's recharacterization of the allegations. Both the District Court and Second Circuit here suppressed reasonable inferences and sustained mischaracterizations of Petitioner's allegations.

The District Court, rather than considering the complaint as a whole, deeming factual allegations true and construing them in favor of Petitioner, recast the factual basis as generally "providing funding for research" rather than "funding WIV's risky gain-of-function work despite known biosafety failures." Alleged knowledge of risk plus an affirmative funding choice constituting negligence or strict liability was reframed by the court as merely "funding … medical research." App. 22a. By altering the funding of abnormally dangerous research to funding medical research, the District Court erroneously concluded the complaint lacked allegations supporting a claim that "funding" medical research is "uncommon or inappropriate." App. 23a.

Despite recognizing that the complaint alleged EcoHealth funded monies to the WIV "to conduct research into coronaviruses" and thereby "engaged in an abnormally dangerous activity," the Second Circuit mischaracterized this, again, as "generally funding coronavirus research." App. 6a. Employing this mischaracterization, the Second Circuit weighed just *one* of the six factors to establish strict liability under Restatement (Second) of Torts § 520 and denied strict liability because biomedical research has "common usage and value to the community." App. 6a.

The mischaracterization of Petitioner's allegations, and the construction of reasonable inferences

against her by the Second Circuit in order to dismiss her complaint violated her rights to due process and a jury trial to decide the facts underlying the complex relationship of NIH, EcoHealth, and WIV and EcoHealth's liability for the creation and release of the deadly SARS-CoV-2.

EcoHealth's admissions demonstrate it had fair notice of Petitioner's claim and its grounds

Fed. R. Civ. P. 8(a)(2) provides that a complaint must include only "a short and plain statement of the claim showing that the pleader is entitled to relief." Such a statement must simply "give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests." *Conley* v. *Gibson,* 355 U.S. 41, 47 (1957), see also *Swierkiewicz v. Sorema N.A.,* 534 U.S. 506, 512 (2002).

This goal of Rule 8 was met by Petitioner; EcoHealth admitted that EcoHealth took part in a government-funded research "collaboration" with WIV, the "subaward recipient" of EcoHealth's five-year grant. The motion simply *disputed* the facts as alleged by Petitioner, *see supra*.

EcoHealth also admitted in its motion that it was researching new coronaviruses in bats for over a decade to "identify high risk populations" to address "potential pandemics." It admitted to the project grant from NIH for "activity between EcoHealth Alliance and the WIV," to executing "appropriate agreements detailing the work that was to be performed by the WIV in connection with the Project" and that the WIV was chosen as a lab to research coronaviruses because its biosafety grades ranged from "BSL-2 to BSL-4 — the highest level of biosafety containment."

The meeting of Petitioner's allegations with on-

point denials demonstrates that EcoHealth was and is fully and fairly on notice of Petitioner's allegations and all reasonable inferences to be drawn therefrom, which form the grounds for the claim that WIV was conducting GOF research on behalf of EcoHealth in known unsafe labs and that WIV created SARS-CoV-2 and leaked the virus in the course of that dangerous research.

Second Circuit abrogated Rule 8(d) to dismiss alternate claim

The Second Circuit summarily dismissed Petitioner's strict liability claims because the negligence claim "implicitly acknowledge[s]" that exercise of reasonable care would reduce or eliminate the risk of the activity. App. 23a.

At the pleading stage, an appellate court may not use the assertion of one theory of recovery to defeat an alternative theory. Fed. R. Civ. P. 8(d)(2) permits "a party [to] set out two or more statements of a claim … alternatively or hypothetically, either in a single count … or in separate ones. If a party makes alternative statements, the pleading is sufficient if any one of them is sufficient." Further, Fed, R. Civ. P. 8(d)(3) provides that "[a] party may state as many separate claims or defenses as it has, regardless of consistency."

Petitioner was not required to elect either a negligence or strict liability theory of recovery at the pleading stage. Rule 8(d)(2) and 8(d)(3) expressly contemplate pleading in the alternative *regardless* of inconsistency. *See St. John's Univ., N.Y., v. Bolton*, 757 F. Supp. 2d 144, 184 (E.D.N.Y. 2010) ("Rule 8(d) ameliorates the uncertainty inherent in all litigation … by permitting plaintiffs to allege claims in the alternative, even if the legal theories underlying

those claims are technically inconsistent or contradictory.").

Thus, Petitioner's negligence claim against EcoHealth does not defeat her strict liability claim. *See Integrated Waste Servs., Inc. v. Akzo Nobel Salt, Inc.,* 113 F.3d 296, 301 (2d Cir. 1997) ("We doubt that ultrahazardous activity liability can be negated categorically by demonstrating that occasionally the same damage may also occur as a result of a defendant's negligence").

Finally, if the case were allowed to progress to trial, Petitioner would be able to test her theory of recovery by presenting the issue of whether EcoHealth's risk could be eliminated through the exercise of reasonable care as one of the factors to be considered under Restatement (Second) of Torts § 520, which is the province of the jury under New York substantive law. *See Doundoulakis v. Town of Hempstead*, 42 N.Y.2d 440 (1977), discussed *infra*.

II. The Second Circuit misapplied the framework for establishing "duty" under New York tort law

To state a claim for negligence under New York law, a plaintiff's allegations must establish a duty owed by the defendant to the plaintiff, a breach thereof, and injury proximately resulting therefrom. *Pasternack v. Lab'y Corp. of Am. Holdings*, 27 N.Y. 3d 818, 825 (2016).

Petitioner established all three prongs by alleging that EcoHealth, using NIH funds, funded subcontractor WIV to conduct GOF research on its behalf, knowing that WIV had biosafety problems, and that it would exercise no supervision or control over those biosafety conditions. EcoHealth

nevertheless subcontracted WIV, using funds from NIH, to carry on the research, which intentionally created a deadly coronavirus subsequently leaked from WIV. The virus spread worldwide, killing Health's husband.

It has long been established that negligence requires both a foreseeable danger of injury and conduct unreasonable in proportion to that danger. Duty begins with the general proposition that "[e]veryone owes to the world at large the duty of refraining from those acts that may unreasonably threaten the safety of others." *Palsgraf v. Long Is. R. R. Co.,* 248 N.Y. 339, 350 (1928). "The risk [of damage] *reasonably to be perceived defines the duty to be obeyed*, and risk imports relation; it is risk to another or to others within the range of apprehension." *Id.* at 344 (emphasis added). *See also Campbell v. Cunningham Natural Gas Corp.*, 298 N.Y.S. 200, 204 (Sup. Ct. N.Y. Cty. 1937) (existence of a duty depends on whether the risk to be guarded against is one which would normally be anticipated or foreseen).

EcoHealth, like all others, owes a duty to refrain from acts that unreasonably threaten others. If not for EcoHealth's funding and engagement of a lab it knew violated biosafety standards to carry on coronavirus enhancement for EcoHealth's benefit — and its concurrent failure or inability to control those biosafety conditions — no leak of the dangerous SARS-CoV-2 virus would have occurred. The risk of the potential leak of an enhanced pathogen under unsafe conditions is one that can normally be anticipated. The risk of an enhanced pathogen spreading through the world due to the forces of nature to infect and kill people is also normally foreseeable. Thus, the duty of EcoHealth to guard

against these risks is readily established under New York law.

"Foreseeability … determines the scope of the duty, once it is determined to exist." *Hamilton v. Beretta U.S.A. Corp.,* 96 N.Y.2d 222, 233 (2001). Since EcoHealth's duty was established by reasonable inference from Petitioner's allegations, the risk EcoHealth could foresee imported a relationship to "others within the range of apprehension," that is, all those who could be infected and die from the enhanced pathogen, a reasonably determinate class. EcoHealth's duty thus ran directly to the deceased Hurst.

The Second Circuit affirmed the District's Court's dismissal, however, on the ground that no duty to protect against the risk of harm was established since EcoHealth did not have "actual control" of WIV's actions, and thus it was not "in the best position to protect" against the risks.

A novel question with public health policy implications

Petitioner's suit raises a novel negligence claim involving the liability of a research company that contracts with and funds a laboratory to enhance pathogens known to be mortally dangerous to vulnerable members of the public.

Petitioner's novel claim necessarily involves considerations of public health policy, that is, how far the benefits to society of this type of biomedical research *outweigh* the pandemic and public health threats it poses.

Since no similar case has never been determined by New York's highest court, the Second Circuit erred by attempting to "fix the duty point" itself, relying heavily on *Hamilton, supra.*

Hamilton considered a novel claim certified to it by the Second Circuit. In 1995, several plaintiffs brought a diversity action against gun manufacturers in the U.S. District Court for the Eastern District of New York, seeking to hold the manufacturers liable for criminal misuse and sales of guns by unrelated third parties which occurred downstream of the manufacturers' sales to primary distributors. Following a jury trial in the district court, the manufacturers unsuccessfully moved for judgment as a matter of law, and then appealed to the Second Circuit.

Recognizing the issues raised had never before been addressed by New York, the Second Circuit certified the question "Whether the [manufacturers] owed plaintiffs a duty to exercise reasonable care in the marketing and distribution of the handguns they manufacture?" to the Court of Appeals. *Hamilton*, at 231–232.

The Court of Appeals observed that the case "challenges us to rethink traditional notions of duty, liability and causation. Tort law is ever changing; it is a reflection of the complexity and vitality of daily life." *Id.*, at 242. This supports the certification Petitioner requested, yet was denied.

In *Hamilton*, the New York Court of Appeals considered many theories of duty, and determined the question in the negative. In the course of such determination they noted that that "a duty may arise" where there is "a relationship [] between a defendant and a third-person tortfeasor that encompasses defendant's actual control of the third person's actions." *Id.*, at 233.

The Second Circuit applied this exact phrase to Petitioner's case, and found that since EcoHealth had no "actual control" over the WIV's actions, it had no

duty. Thus, the fact that EcoHealth *did not have control* over WIV was confused by the Second Circuit as equivalent to having *no duty to control*. Petitioner's claim is that EcoHealth had *a duty to control and supervise*, given the knowledge it had of the dangers of GOF research and the unsafe conditions of WIV.

The Second Circuit's "no actual control equals no duty to control" formulation would simply allow any tortfeasor who engages an unsafe subcontractor to avoid liability by avoiding or refusing to exercise any supervision or control over that subcontractor. This contravenes New York substantive law.

In New York, one who employs an independent contractor to do work involving a special danger to others which the employer knows or has reason to know to be inherent in or normal to the work, or which special danger such employer has reason to contemplate when making the contract, "is subject to liability for physical harm caused to such others by the contractor's failure to take reasonable precautions against such danger." (Restatement [Second] of Torts § 427)." *Rosenberg v. Equitable Life Assurance Soc.,* 79 N.Y.2d 663, 669 (1992).[15] An employer negligently hiring an incompetent contractor is also subject to liability for the harm caused by the contractor. *See, e.g., Hesch v. Seavey*, 188 A.D.2d 808, 809-810 (3d Dep't 1992).

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[15] Restatement (Second) of Torts § 416, Comment (a) states that § 416 stands in "close relation" to § 427 and restates the "general rule" "that the employer remains liable for injuries resulting from dangers which he should contemplate at the time that he enters into the contract, and cannot shift to the contractor the responsibility for such dangers, or for taking precautions against them." This rule is invoked by Petitioner's allegations and reasonable inferences therefrom.

The Second Circuit failed to apply this substantive New York law in determining whether Petitioner's allegations were sufficient to sustain a negligence claim. If EcoHealth's duty to control under the circumstances alleged by Petitioner is uncertain under present tort law, then it is New York, not the Second Circuit, which should fix the duty point. The Second Circuit should have certified the novel question to the New York Court of Appeals as requested, to comply with the *Erie* doctrine.

III. The Second Circuit is precluded from ruling on the plausibility of Petitioner's strict liability claim

"There is no federal general common law." *Erie Railroad v. Tomkins*, 304 U.S. 64, 78 (1938). The *Erie* doctrine recognizes that neither Congress nor the federal courts have power under the U.S. Constitution to declare substantive rules of common law applicable in a State, including rules concerning torts.

The *Erie* doctrine is a binding principle requiring federal courts exercising diversity jurisdiction to apply state substantive law and federal procedure as articulated in the Federal Rules of Civil Procedure. In *Guaranty Trust Co. v. York*, 326 U.S. 99, 112 (1945), this Court stated that "the source of substantive rights enforced by a federal court under diversity jurisdiction, it cannot be said too often, is the law of the States." Thus, whenever that law is declared by the State's "legislature or its highest court, such law ought to govern in litigation founded on that law, whether the forum of application is a State or a federal court and whether the remedies be sought at law or … equity."

The Second Circuit denied Petitioner's claim to relief under the strict liability theory on two grounds. First, relying on its erroneous recharacterization of Petitioner's complaint as "alleg[ing] only that EcoHealth "generally fund[ed] coronavirus research," it concluded *a priori* that such activity was not abnormally dangerous. Second, the Circuit reasoned, in a circular fashion, that since Petitioner's alternative negligence claim *implies* that the research risk could be mitigated with reasonable care, the negligence assertion alone *defeated* the alternate strict liability assertion. On these premises, the Second Circuit summarily and erroneously concluded that the § 520 strict liability factors were met because biomedical research is of common usage and value to the community.

Aside from such defective reasoning, however, the Second Circuit panel, under the *Erie* doctrine, is precluded as a matter of law from deciding, on a motion to dismiss under Rule 12(b)(6), whether Petitioner made out a claim of strict liability. Whether an activity, no matter how labeled or described, is abnormally dangerous based upon relevant facts is, in New York, a decision made by a jury who has heard those facts. The controlling and substantive New York law is set forth in *Doundoulakis v. Town of Hempstead*, 42 N.Y.2d 440 (1977).

Doundoulakis preserves the right of a plaintiff to have his claim of strict liability decided by a jury rather than be preemptively dismissed. Following a trial, the *Doundoulakis* court pointed out that the facts necessary to a proper determination and weighing of the six factors suggested by the Restatement (Second) of Torts § 520 were not found in the record. Data on the gravity of the danger, the

extent to which the danger can be eliminated by reasonable care, the availability and costs of alternative methods were all lacking, despite the fact that the case itself strongly suggested strict liability as appropriate. New York's highest court ordered a new jury trial where the record was unsatisfactory to establish that the activity complained of was "abnormally dangerous," and stated that the plaintiffs were entitled to establish facts, at said trial, to show that there was "sufficient basis for recovery on a theory of strict liability." *Id.,* at 446, 448-449 (1977).

The Second Circuit repudiated the law of New York in violation of the *Erie* doctrine, and dismissed Petitioner's claim by expediently usurping the role of the jury in weighing relevant data against the Restatement factors to determine strict liability.

Moreover, the highest judicial authorities of the States agree that whether an activity is abnormally dangerous so as to invoke strict liability involves a question of law which must be determined on a *case by case* basis by weighing the *facts* of the case (usually, but not always, guided by the factors outlined in Restatement (Second) of Torts § 520). Here, where material facts are disputed, and the federal courts were presented with a mere motion to dismiss on threshold allegations, they nevertheless weighed the § 520 factors on their own determination of disputed facts to dismiss the complaint's strict liability claim.

States other than New York also entrust the evaluation of facts and the determination of a particular activity as abnormally dangerous to the jury. In Alabama, a finding of strict liability guided by the Restatement factors is normally for the jury, *see Harper v. Regency Development Co.,* 399 So. 2d

248, 253 (Ala. 1981). In Arkansas, a jury determines whether an activity is ultra-hazardous, *see Zero Wholesale Gas Co. v. Stroud*, 571 S.W.2d 74, 76-77 (Ark. 1978).

In *AVX Corp. v. Horry Land Co., Inc.,* 686 F. Supp. 2d 621, 629-630 (S.C. 2010), the U.S. District Court for the District of South Carolina held the matter of strict liability may be decided by jury in South Carolina under *Ravan v. Greenville County*, 434 S.E.2d 296, 304 (S.C. Ct. App. 1993). Thus, the federal court was *precluded* from determining ultrahazardous activity as a matter of law, as are the District Court and the Second Circuit here.

In Kansas, the determination of abnormally dangerous activity is decided by a court only when the facts are undisputed. If the facts are disputed, the question is to be determined by the jury. *See City of Neodesha v. BP Corp. N. Am.*, 287 P.3d 214, 231 (Kan. 2012) (trial court erred in overturning the jury's verdict). Similarly, in Wisconsin, when the facts are undisputed, the question of abnormally dangerous activity is decided by the court. *Grube v. Daun*, 570 N.W.2d 851, 856 (Wis. 1997).[16]

In determining the novel question of whether the GOF research engaged in by EcoHealth through its contractor WIV is subject to strict liability principles, the Second Circuit contravened the *Erie* doctrine and decided a question which must be submitted to the jury under New York substantive law.

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[16] In Indiana and Oregon, the determination is considered a "question of law" for the court, see *Erbrich Products Co. v. Wills,* 509 N.E.2d 850, 857 (Ind. Ct. App. 1987), *McLane v. Northwest Natural Gas Co.,* 467 P.2d 635, 637 (Ore. 1970).

IV. The *Erie* doctrine requires doubtful questions with public health policy implications be certified to the State's highest court

The Rules of the Court of Appeals, at § 500.27(a), provide that whenever it appears to any U.S. Court of Appeals "that determinative questions of New York law are involved in a cause pending before that court for which no controlling precedent of the Court of Appeals exists, the court may certify the dispositive questions of law to the Court of Appeals."[17] Correspondingly, the Second Circuit's Local Rule 27.2 permits that court to certify to the New York Court of Appeals "determinative questions of New York law [that] are involved in a case pending before [us] for which no controlling precedent of the Court of Appeals exists." *Doe v. Guthrie Clinic*, 710 F.3d 492, 497 (2d Cir. 2013).

In light of the Eleventh Circuit's certification of a similar question involving the liability of labs handling ultra-hazardous pathogens in *Stevens v. Barrette Memorial Institute*, 488 F.3d 896 (11th Cir. 2007), discussed further *infra*, Petitioner requested certification of the novel question concerning EcoHealth's liability to the New York Court of Appeals. The applicability of New York substantive law to the facts of Petitioner's case has never been resolved by the New York Court of Appeals. To resolve any doubt and set the Second Circuit's determination squarely on state substantive law under *Erie*, Petitioner requested certification to New York's highest court of a liability claim question: whether, in the absence of any statutory immunity,

[17] NYCRR § 500.27(a). The Rule also provides for certification to the Supreme Court of the United States.

an entity engaging in research which creates an ultrahazardous virus through gain of function manipulation is strictly liable, or liable under negligence principles, for resulting injuries.

The Second Circuit wrongly denied Petitioner's motion (via a bare footnote in its summary order), in conflict with its own established precedents.

The Second Circuit has deemed certification appropriate where "there are no clearly applicable [state law] precedents." *Baker v. Health Mgmt. Sys., Inc.,* 264 F.3d 144, 154 (2d Cir. 2001). In deciding whether to certify, the Second Circuit considers "(1) whether the New York Court of Appeals has addressed the issue; (2) whether the question is of importance to the state and may require value judgments and public policy choices; and (3) whether the certified question is determinative of a claim before us." *Walton v. Comfort Sys. USA (Syracuse), Inc.*, 155 F.4th 144, 162 (2d Cir. 2025), quoting *Barenboim v. Starbucks Corp.*, 698 F.3d 104, 109 (2d Cir. 2012) (internal quotation marks cleaned up). The "determinative of a claim" prong has also been stated as whether "the answer to the certified question will 'control the outcome of the case.'" *Article 13 LLC v. Ponce de Leon Fed. Bank*, 132 F.4th 586, 592 (2d Cir. 2024), citing *CIT Bank N.A. v. Schiffman*, 948 F.3d 529, 537 (2d Cir. 2020).

The Second Circuit denied certification of a novel question never before addressed by the New York Court of Appeals; a question indisputably determinative of the threshold matter of whether Petitioner's factual claims support either negligence or strict liability for entities conducting ultra-hazardous GOF research under New York tort law. The outcome of this case — whether Petitioner's allegations state a claim under New York

substantive law — depends upon the answer to this question.

Finally, whether a New York entity that deliberately and actively engaged in GOF research owed a duty to those likely to be injured or killed by contact with its enhanced pathogens is a question of profound implication for the public health policy of New York. As such, it should be decided by New York, to which is reserved the police power to make policy concerning the effect of such research on public health and safety.

"The police power under the American constitutional system has been left to the states. It has always belonged to them and was not surrendered by them to the general government, nor directly restrained by the constitution of the United States." *Shealey v. Southern Ry. Co.*, 120 S.E. 561, 562 (S.C. 1924). This Court has recognized repeatedly that States have the authority to decide public health policy for their territory. Indeed, "no one need doubt that the State[s] have a compelling interest in reducing the risk [of transmitting COVID-19]." *S. Bay United Pentacostal Church v. Newson*, 141 S. Ct. 716, 718 (2021).

The Second Circuit has certified questions to the New York Court of Appeals where the question "implicates significant New York state interests in the disclosure of confidential medical information and in the liability of New York-based medical facilities." *Doe v. Guthrie*, at 494. Since it is New York's prerogative to set public health policy, it contravenes the *Erie* doctrine when the federal circuit decides a novel question, never before addressed by New York's highest court, which carries profound implications concerning a question of public health and the extent to which lab facilities

threatening the public health via research involving dangerous pathogens with a "broad zone of foreseeable risk" have a duty to protect members of the public from illness and death resulting from releases, losses, or leaks of dangerous pathogens into the world. The Second Circuit denied New York its appropriate, constitutional authority to decide these questions.

V. The Second Circuit's noncertification of a novel question concerning the liability of research labs handling ultrahazardous pathogens conflicts with the Eleventh Circuit

A wrongful death resulting from the possession and enhancement of dangerous pathogens (coronavirus) is a case of first impression for New York law and the Second Circuit. But it is not entirely novel for the nation. In *Stevens v. Barrette Memorial Institute*, 488 F.3d 896 (11th Cir. 2007), the Eleventh Circuit confronted substantially similar allegations: ultrahazardous pathogen research involving anthrax conducted with inadequate safeguards led to the death of an employee of American Media, Inc., who inhaled the anthrax from a letter sent by an unknown person in the fall of 2001. That Circuit, rather than dismissing the complaint's novel liability claims, certified the critical threshold question — whether laboratories handling ultra-hazardous pathogens owed a duty of reasonable care to members of the public to avoid unauthorized interception and dissemination of such materials — to the Florida Supreme Court. *Id.* at 903–904.

The Florida Supreme Court answered affirma-

tively, analyzing its holding in *McCain v. Florida Power Corp*., 593 So. 2d 500, 502-504 (Fla. 1992) to explain that the determination of the existence of a common law duty flowing from the general facts of the case depends upon an evaluation and application of the concept of foreseeability of harm to the circumstances alleged, a threshold question of law. Where conduct creates a "foreseeable zone of risk" including a *general threat of harm to others*, a legal duty is recognized to ensure that the underlying conduct is carried out reasonably. The greater the risk of harm to others created by the activity, the greater the duty to avoid injury to others. "[A]s the risk grows greater, so does the duty, because the risk to be perceived defines the duty that must be undertaken." *United States v. Stevens*, 994 So. 2d 1062, 1066-1067 (Fla. 2008) (internal citations omitted.) This "foreseeable zone of risk" test is similar to New York's. *See Palsgraf, supra.*

Guided by Restatement (Second) of Torts §§ 302, 302A and 302B, because those sections mirror its "foreseeable zone of risk" test, the Florida Supreme Court determined that a laboratory that manufactures, grows, tests or handles ultra-hazardous materials does owe a duty of reasonable care to members of the general public to avoid an unauthorized interception and dissemination of the materials. *United States v. Stevens*, at 1070. It is notable, too, that Justice Wells dissented in the application of negligence principles to the case, urging instead adoption of strict liability pursuant to Restatement of Torts § 519 to the ultrahazardous pathogen research at issue. *Id.* at 1071.[18]

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[18] Justice Wells also urged restatement of the duty of care as owing to those who the operators of the laboratory should recognize or foresee are likely to be injured by contact with the

This duty of care, based on the allegations of harm caused by an ultrahazardous pathogen stolen from the lab, was sufficient "to open the courthouse doors," while the complex factual pattern presented a unique challenge that must ultimately be resolved upon the facts as developed in the trial court. *Id.* at 1069.

Plaintiff Stevens was not deprived of his right of access to the courts, because the Eleventh Circuit took care to certify a novel and unresolved threshold question of the duty of care to the Florida court, where it belonged under the *Erie* doctrine and the State's exclusive power to regulate public health and safety.

By contrast, where a nearly identical fact pattern is alleged by Petitioner, involving ultrahazardous pathogen research, inadequate safety controls and oversight, a predictable pathogen escape, and death resulting from exposure to the pathogen, the Second Circuit mistakenly and wrongly predicted the resolution of the question, misapplying New York decisions and refusing to certify the novel question on duty of care to the highest court of the State.

The conflict between the Circuits is of national significance

The conflict between the Eleventh Circuit and the Second Circuit is not a minor one. It creates a patchwork of pathogen liability law precisely when uniform national standards are most needed. Maintaining and manipulating abnormally dangerous pathogens is conduct carried out by many labs, directly or through subcontracts, on a continuous basis. Those biological research institu-

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ultrahazardous material (as opposed to the general threat of harm to others). *Id.* at 1072.

tions are now encouraged to forum-shop, conducting dangerous experiments in jurisdictions offering a *de facto* judicial immunity (such as extended by the Second Circuit's misapplication of law coupled with its refusal to certify the question) while avoiding jurisdictions that require accountability. This undermines public safety and the deterrent function of tort law — both of which are under the jurisdiction of the State.

This Court's supervisory power is needed to ensure that the *Erie* doctrine is not applied in such patchwork fashion, and that petitioners to the courts are afforded a right to remedy for injuries sustained as a direct result of the carelessness of researchers conducting inherently dangerous research on pathogens. The courthouse doors must remain open, or Americans will be deprived of life without any remedy.

VI. Rights of access to the courts and jury trials are in danger

Petitioner Heath has a valid cause of action for the wrongful death of her husband Henry where that death was caused by the negligence or strict liability of another. Her cause of action is authorized by the statutes and the common law of New York, and a party to a lawsuit filed in New York is entitled to a jury trial. Art. VII, § 2 of New York's 1821 Constitution preserved trial by jury in all common law cases "in which it had been used heretofore," and asserted that such right "shall remain inviolate forever." New York's 1894 Constitution, as amended, affirms this right at Art. 1, §2: "Trial by jury in all cases in which it has heretofore been guaranteed by constitutional provision shall remain inviolate

forever."

The Seventh Amendment to the U.S. Constitution likewise guarantees that in "Suits at common law, the right of trial by jury shall be preserved."

When the initial determination of whether a claim of liability can only be established via a jury trial under New York law, denial of that claim without such trial is violative of both substantive and procedural due process. The Second Circuit's process and decision to the contrary leaves injured parties without a real remedy or access to a jury trial in cases of injury caused by abnormally dangerous pathogenic research and manipulation.

"The right to sue and defend in the courts is the alternative of force. ... It is one of the highest and most essential privileges of citizenship ... granted and protected by the federal constitution." *Chambers v. Baltimore & Ohio R.R. Co.*, 207 U.S. 142, 148 (1907). "The right of access to the courts is basic to our system of government, and it is well established today that it is one of the fundamental rights protected by the Constitution." *Ryland v. Shapiro*, 708 F.2d 967, 971 (5th Cir. 1983). *See also Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 52 (1989) (Congress cannot "conjure away the Seventh Amendment by mandating that traditional legal claims be ... taken to an administrative tribunal.").

In *Boddie v. Connecticut*, 401 U.S. 371, 380-81 (1971), this Court held "the State's refusal to admit these appellants to its courts ... must be regarded as the equivalent of denying them an opportunity to be heard upon their claimed right ... [and thus] ... a denial of due process."[19]

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[19] *See also Nanni v. Aberdeen Marketplace, Inc.*, 878 F.3d 447, 457 (4th Cir. 2017) ("a citizen's 'right to sue and defend in the

Clearly, the deprivation of a trial with a jury is a grievous violation of due process, a fundamental right unconstitutionally abridged herein by denying access at the pleading stage through mischaracterization of the complaint, misapplication of Federal Rules, misapplication of state law requiring access to a jury trial, and contravention of *Erie* principles favoring certification of novel questions implicating public health policy to the states' highest courts.

For the reasons noted above, this court should grant *certiorari* herein, reverse the decision of the Second Circuit, and remand this case for further proceedings.

CONCLUSION

The petition for a writ of *certiorari* should be granted.

Respectfully submitted,

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courts is one of the highest and most essential privileges of citizenship and is granted and protected by the Federal Constitution.'") and *Jackson v. Procunier*, 789 F.2d 307, 310-11 (5th Cir. 1986) ("'it is by now well established that access to the courts is protected by the First Amendment right to petition for redress of grievances.' ... Consequently, interference with access to the courts may constitute the deprivation of a substantive constitutional right, as well as a potential deprivation of property without due process").

Counsel for Petitioner

December 16, 2025

APPENDIX

TABLE OF CONTENTS

APPENDIX A

Case: 25-100, 09/17/2025, DktEntry: 55.1

25-100-cv
Heath v. EcoHealth All.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 17 th day of September, two thousand twenty-five.

PRESENT: RAYMOND J. LOHIER, JR.,
WILLIAM J. NARDINI,
MARIA ARAÚJO KAHN,
Circuit Judges.

SUSAN I. HEATH, PROPOSED REPRESENTATIVE OF THE ESTATE OF HENRY A. HURST, III, DECEASED,
Plaintiff-Appellant,

v. No. 25-100-cv

ECOHEALTH ALLIANCE,
Defendant-Appellee.[*]

———————————————————

FOR APPELLANT:	PATRICIA FINN, Patricia Finn Attorney, P.C., Pearl River, NY
FOR APPELLEE:	JUAN OLIVO-CASTRO (Andrew N. Krinsky, Nels T. Lippert, Michael J. Grudberg, Jessica Russo, on the brief), Tarter Krinsky & Drogin LLP, New York, NY
FOR AMICI CURIAE LEGAL ADVOCATES FOR SAFE SCIENCE AND TECHNOLOGY, INC., DR. MARC LIPSTICH, AND DR. FILIPPA LENTZOS:	William B. Adams, Quinn Emanuel Urquhart & Sullivan, LLP, New York, NY

Appeal from a judgment of the United States District Court for the Southern District of New York (Jennifer L. Rochon, Judge).

[*] The Clerk of Court is directed to amend the caption as set forth above.

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of the District Court is AFFIRMED.

Plaintiff Susan Heath appeals from a December 19, 2024 judgment of the United States District Court for the Southern District of New York (Rochon, J.) dismissing her complaint against Defendant EcoHealth Alliance ("EcoHealth"), a nonprofit scientific organization. Heath brought negligence and strict liability claims under New York law against EcoHealth, alleging that EcoHealth bears responsibility for the creation and leak of the virus that causes COVID-19 and that led to her husband's tragic death from COVID-19 in 2021. We assume the parties' familiarity with the underlying facts and the record of prior proceedings, to which we refer only as necessary to explain our decision to affirm.

"We review de novo a district court's dismissal of a complaint pursuant to Rule 12(b)(6) [of the Federal Rules of Civil Procedure], construing the complaint liberally, accepting all factual allegations in the complaint as true, and drawing all reasonable inferences in the plaintiff's favor." Vaughn v. Phoenix House N.Y. Inc., 957 F.3d 141, 145 (2d Cir. 2020) (quotation marks omitted); see Fed. R. Civ. P. 12(b)(6). In reviewing a dismissal under Rule 12(b)(6), we consider "the facts alleged in the complaint, documents attached to the complaint as exhibits, and documents incorporated by reference in the complaint." DiFolco v. MSNBC Cable L.L.C., 622 F.3d 104, 111 (2d Cir. 2010).

I. Negligence

To state a claim for negligence under New York law, a plaintiff's allegations must establish "(1) a

duty owed by the defendant to the plaintiff, (2) a breach thereof, and (3) injury proximately resulting therefrom." *Pasternack v. Lab'y Corp. of Am. Holdings*, 27 N.Y.3d 817, 825 (2016) (quotation marks omitted). It is well established that "without a duty running directly to the injured person there can be no liability in damages, however careless the conduct or foreseeable. the harm." *Landon v. Kroll Lab'y Specialists, Inc.*, 22 N.Y.3d 1, 6 (2013) (cleaned up). "A duty may arise, however, where there is a relationship either between defendant and a third-person tortfeasor that encompasses defendant's actual control of the third person's actions, or between defendant and plaintiff that requires defendant to protect plaintiff from the conduct of others." *Hamilton v. Beretta U.S.A. Corp.*, 96 N.Y.2d 222, 233 (2001). "The key … is that the defendant's relationship with either the tortfeasor or the plaintiff places the defendant in the best position to protect against the risk of harm." *Id.*

Heath contends that EcoHealth owed a duty to her late husband because it "actively created the risk by engineering [gain-of-function]-enhanced viruses and targeted [Heath's husband] for its research." Appellant's Br. 38. The allegations in her complaint fail to support this claim. To support her negligence claim, Heath alleges that EcoHealth "fund[ed] monies to the Wuhan Institute [o]f Virology [the "Wuhan Institute"]," App'x 6 ¶ 18, over which EcoHealth "had no supervision nor control," App'x 5 ¶ 15. The Wuhan Institute in turn allegedly "created a deadly coronavirus that leaked from its laboratory and spread worldwide," killing Heath's husband. App'x 6 ¶ 18. These allegations negate any plausible inference that EcoHealth had "actual control" of the Wuhan Institute's actions such that EcoHealth was

"in the best position to protect against the risk of harm" to Heath's husband. *Hamilton*, 96 N.Y.2d at 233. Because the complaint does not allege any other relationship between EcoHealth and Heath or her husband, we conclude that Heath failed to demonstrate that EcoHealth had any "duty running directly to the injured person," dooming her negligence claim. *532 Madison Ave. Gourmet Foods, Inc. v. Finlandia Ctr., Inc.*, 96 N.Y.2d 280, 289 (2001).

Urging a contrary conclusion, Heath argues that "EcoHealth's direct engagement in pathogen enhancement inherently created a foreseeable risk of viral escape and harm, establishing a duty under New York law." Appellant's Br. 38. But even assuming that harm to Heath was a foreseeable result of EcoHealth's conduct, which is itself doubtful, "[f]oreseeability, alone, does not define duty — it merely determines the scope of the duty once it is determined to exist." *Hamilton*, 96 N.Y.2d at 232; *see also Moore Charitable Found. v. PJT Partners, Inc.*, 40 N.Y.3d 150, 161 (2023) (observing that the duty requirement "is necessary to avoid exposing defendants to unlimited liability to an indeterminate class of persons conceivably injured by any negligence in a defendant's act, even if some of those persons' injuries might be characterized as foreseeable" (quotation marks omitted)). Because the allegations in the complaint do not plausibly support any duty owed by EcoHealth to Heath's husband, the District Court correctly dismissed Heath's negligence claim.

II. Strict Liability

Heath's claim that EcoHealth is strictly liable for her husband's death fares no better. The complaint alleges that EcoHealth, "in funding monies [to] the Wuhan Institute … to conduct research into coronaviruses, engaged in an abnormally dangerous activity" that rendered it strictly liable for any injuries flowing from that conduct. App'x 7 ¶ 25. But the only activity EcoHealth is plausibly alleged to have engaged in is generally funding coronavirus research. Indeed, as the District Court properly found, the complaint does not even allege that EcoHealth's "funding was directed to the [Wuhan Institute]'s gain-of- function research," App'x 176, the very research Heath contends on appeal constituted an "abnormally dangerous activity," Appellant's Br. 5. Moreover, Heath's negligence claim, which is premised on EcoHealth's lack of oversight, implicitly acknowledges that the risk of the coronavirus research at issue could be mitigated with the exercise of reasonable care. "In light of the common usage and value to the community" of biomedical research, "as well as the ability to eliminate the risk with the exercise of reasonable care," the District Court correctly dismissed Heath's strict liability claim under New York law.[1] See *Vacation Vill. Homeowners Ass'n, Inc. v. Town of Fallsburg*, 225 N.Y.S.3d 398, 405 (3d Dep't 2024); *see also Doundoulakis v. Town of Hempstead*, 42 N.Y.2d 440, 448 (1977).

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[1] Because we affirm the District Court's dismissal of all of Heath's claims for failure to state a claim, we also affirm the District Court's denial of leave to amend because the proposed amendment would be futile. *See Rukoro v. Federal Republic of Germany*, 976 F.3d 218, 227–28 (2d Cir. 2020).

CONCLUSION

We have considered Heath's remaining arguments and conclude that they are without merit. For the foregoing reasons, the judgment of the District Court is AFFIRMED.[2]

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk of Court

s/*Catherine O'Hagan Wolfe*

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[2] Heath filed a motion seeking summary reversal or, in the alternative, certification of a question to the New York Court of Appeals. Dkt. No. 20; see also Dkt. Nos. 23, 24. That motion was referred to the merits panel, Dkt. No. 25, and is denied.

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SUSAN I. HEATH, Proposed Representative of the Estate of Henry A. Hurst, III, Deceased, *Plaintiff*, -against- ECOHEALTH ALLIANCE, *Defendant*.	Case No. 1:23-cv-08930 (JLR) **OPINION AND ORDER**

JENNIFER L. ROCHON, United States District Judge:

Susan I. Heath ("Heath" or "Plaintiff"), the proposed representative of the Estate of Henry A. Hurst, III, brings this suit alleging negligence and strict liability claims against Defendant EcoHealth Alliance ("Defendant" or "EHA"). Plaintiff alleges that Defendant was negligent and should be held strictly liable for its subgrant of research funds to the Wuhan Institute of Virology ("WIV") because the WIV created a deadly coronavirus that leaked from its laboratory, causing the worldwide COVID-19 pandemic and subsequent death of her husband. Defendant moves to dismiss the Complaint in its entirety. For the reasons that follow, the Court GRANTS Defendant's motion.

BACKGROUND

I. Factual History[1]

Plaintiff is a Colorado resident and the widow of Henry A. Hurst, III ("Hurst"). Dkt. 2 ("Compl.") ¶ 1. Defendant is a nonprofit organization headquartered in New York, New York. Compl. ¶ 2.[2] Defendant

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[1] Unless otherwise stated, the following facts are taken from the Complaint or documents attached to the Complaint, and are assumed true for purposes of this motion. *See Humphries v. Mitsubishi Chem. Am., Inc.,* No. 23-cv-06214 (JLR), 2024 WL 4711296, at 1 n*1 (S.D.N.Y. Nov. 7, 2024); *DeLuca v. AccessIT Grp., Inc.,* 695 F. Supp. 2d 54, 60 (S.D.N.Y. 2010) (extrinsic documents may be considered part of the pleadings if, among other things, they are "attached to the complaint"). Plaintiff and Defendant each attach numerous documents to their motion to dismiss briefing, *see* Dkt. 31; Dkts. 37-1, 37-2, 37-3, 37-4, 37-5, 37-6, 37-7, 37-8, 37-9, 37-10, 37-11; Dkt. 38-1, the vast majority of which the Court does not consider. *See Trahan v. Lazar*, 457 F. Supp. 3d 323, 341 (S.D.N.Y. 2020) (courts determining the adequacy of a claim under Rule 12(b)(6) are "generally limited to 'facts stated on the face of the complaint,'" though they may consider extrinsic documents if they are (1) attached to the complaint, (2) incorporated by reference into the complaint, or (3) integral to the complaint (quoting *Goel v. Bunge, Ltd.,* 820 F.3d 554, 559 (2d Cir. 2016)))

[2] The Court has an obligation to ensure that it has subject matter jurisdiction. *See Behrens v. JPMorgan Chase Bank, N.A.*, 96 F.4th 202, 206-07 (2d Cir. 2024) ("[F]ederal courts must ensure that they do not lack subject-matter jurisdiction, even if the parties fail to identify any jurisdictional defect … ."); *Tounkara v. Republic of Senegal*, No. 21-cv-08027 (LAK), 2023 WL 2692434, at *1 n.1 (S.D.N.Y. Mar. 29, 2023) ("A federal court has an independent obligation to resolve an issue of subject matter jurisdiction regardless of whether it was raised by the parties."). Although Plaintiff does not plead the appropriate citizenship of Defendant in citing only to its headquarters location, Compl. ¶ 2, Defendant has confirmed that it is incorporated in Massachusetts with its principal place

received grant money from the National Institutes of Health ("NIH") and National Institute of Allergy and Infectious Diseases ("NIAID"). Compl. ¶¶ 3, 4, 13. Between 2014 to 2019, the NIH and NIAID, through Defendant, provided some of that funding to the WIV. Compl. ¶ 13. In 2019, more than $76,000 was allocated to the WIV. *Id*. In 2019, the WIV was researching coronaviruses, including through a type of research called "gain-of-function research," which is expected "to increase the transmissibility and/or virulence of pathogens." Compl. ¶ 12.

Plaintiff alleges that COVID-19 leaked from the WIV lab in September 2019. Compl. ¶ 11. In 2021, Hurst contracted COVID-19 and subsequently passed away on October 11, 2021. Compl. ¶ 18; Dkt. 2-1 at 1.

II. Procedural History

Plaintiff initiated this action on October 11, 2023. *See generally* Compl. On March 11, 2024, Defendant moved to dismiss the Complaint pursuant to Federal Rule of Civil Procedure ("Rule") 12(b)(6), Dkt. 30 ("Br."), and filed one declaration in support of the motion to dismiss, Dkt. 31. The parties completed briefing on May 13, 2024. *See* Dkt. 37 ("Opp."); Dkt. 38 ("Reply"). Plaintiff filed a number of exhibits in support of her opposition. *See* Dkts. 37-1, 37-2, 37-3, 37-4, 37-5, 37-6, 37-7, 37-8, 37-9, 37-10, 37-11. Defendant filed one exhibit in support of its reply. *See* Dkt. 38-1.

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of business in New York. Dkt. 31 ("Daszak Decl.") ¶ 3. The Court therefore has jurisdiction over this matter under 18 U.S.C. § 1332(a)(1)

LEGAL STANDARD

Under Rule 12(b)(6), "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 554, 570 (2007)). "In deciding a motion to dismiss, the Court must 'accept[] all factual allegations as true and draw[] all reasonable inferences in the plaintiff's favor.'" *Castillo v. Altice U.S.A., Inc.*, No. 23-cv-05040 (JLR), 2023 WL 8650270, at *2 (S.D.N.Y. Dec. 14, 2023) (alterations in original) (quoting *DiFolco v. MSNBC Cable L.L.C.*, 622 F.3d 104, 110-11 (2d Cir. 2010)). However, a complaint must allege "more than a sheer possibility that a defendant has acted unlawfully" and more than "facts that are 'merely consistent with' a defendant's liability." *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 557). "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Taylor v. Bronx Parent Housing Network*, No. 21-cv-04890 (JLR), 2023 WL 3996620, at *2 (S.D.N.Y. June 14, 2023) (quoting *Iqbal*, 556 U.S. at 678).

DISCUSSION

Plaintiff brings both negligence and strict liability claims against Defendant. *See* Compl. ¶¶ 11-20, 21-25. Defendant seeks to dismiss both claims. See Br. at 1-2. The Court will address choice of law before considering the substantive claims.

I. Choice of Law

While the parties do not brief choice of law, they both appear to agree that New York law applies. *See* Br. at 1; Opp. at 12. "In diversity actions, federal courts follow the choice-of-law rules of the forum state to determine the controlling substantive law." *Feldman Law Grp. P.C. v. Liberty Mut. Ins. Co.*, 819 F. Supp. 2d 247, 255 (S.D.N.Y. 2011) (footnote omitted), aff'd, 476 F. App'x 913 (2d. Cir. 2012) (summary order). "However, where the parties have agreed to the application of the forum law, their consent concludes the choice of law inquiry." *PetEdge, Inc. v. Garg*, 234 F. Supp. 3d 477, 486 (S.D.N.Y. 2017) (quoting *Am. Fuel Corp. v. Utah Energy Dev. Co.*, 122 F.3d 130, 134 (2d Cir. 1997)). If "[t]he parties' briefs assume that New York substantive law governs the issues … such implied consent is … sufficient to establish the applicable choice of law." *Arch Ins. Co. v. Precision Stone, Inc.*, 584 F.3d 33, 39 (2009) (quoting *Golden Pac. Bancorp v. FDIC*, 273 F.3d 509, 514 n.4 (2d Cir. 2001)).

Because the parties' briefs rely on and indicate their assent to the application of New York law and the Court has not identified a strong countervailing public policy, the Court will apply New York law to the negligence and strict liability claims at issue here. *See PetEdge*, 234 F. Supp. 3d at 486 (applying New York law where party implicitly consented by citing exclusively to New York law).

II. Plaintiff's Negligence Claim (Count I)

Plaintiff alleges that Defendant negligently funded the WIV and that Defendant's negligence caused the WIV to "create[]" COVID-19, which

ultimately led to the death of her husband. See Compl. ¶¶ 14-16, 18. Specifically, Plaintiff claims that Defendant was negligent because at the time Defendant funded money to the WIV, it (1) knew or should have known that the WIV was conducting research, including gain-of-function research, into coronaviruses; (2) knew or should have known that there were serious biosafety problems at the WIV; and (3) knew or should have known that Defendant lacked oversight and knowledge of the safety of WIV laboratories. Compl. ¶ 14.

A. Legal Standard

The elements of a negligence claim under New York law are "(i) a duty owed to the plaintiff by the defendant; (ii) breach of that duty; and (iii) injury substantially caused by that breach." *Generation Next Fashions Ltd. v. JP Morgan Chase Bank, N.A.*, 698 F. Supp. 3d 663, 682 (S.D.N.Y. 2023) (quoting *Pasternack v. Lab'y Corp. of Am. Holdings*, 807 F.3d 14, 19 (2d Cir. 2015)). "Whether a defendant owes a duty of care to a plaintiff 'is a question of law that the Court may properly determine on a motion to dismiss.'" Id. (quoting *Qube Films Ltd. v. Padell*, No. 13-cv-08405 (AJN), 2014 WL 3952931, at *7 (S.D.N.Y. Aug. 12, 2014)).

B. Plaintiff Has Not Stated a Claim for Negligence

Defendant argues that the negligence claim should be dismissed because (1) Plaintiff's claims about the origin and spread of COVID-19 are inconsistent and implausible; (2) Plaintiff has not alleged facts that support the existence of a duty of

care owed to Plaintiff or Hurst; and (3) Plaintiff has failed to establish causation. Br. at 5-13. The Court need only address Defendant's second argument because "[i]f the defendant owes no duty to the plaintiff, then the action must fail." *Infant ex rel. Stringer v. Bay Shore Union Free Sch. Dist.*, No. 23-cv-03217 (DLI), 2024 WL 4362601, at *4 (S.D.N.Y. Sept. 30, 2024) (quoting *Darby v. Compagnie Nat'l Air France*, 753 N.E.2d 160, 162 (N.Y. 2001)).

"While [a] legislature can create a duty by statute, in most cases duty is defined by the courts, as a matter of policy." *Buchanan ex rel. Buchanan v. Hesse*, 521 F. Supp. 3d 348, 356 (S.D.N.Y. 2021) (alteration in original) (quoting *Lauer v. City of New York*, 733 N.E.2d 184, 187 (N.Y. 2000)), *aff'd*, No. 21-649, 2022 WL 829163 (2d Cir. Mar. 21, 2022) (summary 6 order). Under New York law, courts generally "fix the duty point by balancing factors, including the reasonable expectation of parties and society generally, the proliferation of claims, the likelihood of unlimited or insurer-like liability, disproportionate risk and reparation allocation, and public policies affecting the expansion or limitation of new channels of liability." *Hamilton v. Beretta U.S.A. Corp.*, 750 N.E.2d 1055, 1060 (N.Y. 2001) (quoting *Palka v. Servicemaster Mgt. Servs. Corp.*, 634 N.E.2d 189, 193 (N.Y. 1994)).

New York courts have been cautious in extending liability to defendants for their failure to control the conduct of others. *See Hamilton*, 750 N.E.2d at 1061; *SUEZ Water N.Y. Inc. v. E.I. du Pont de Nemours & Co.*, 578 F. Supp. 3d 511, 552 (S.D.N.Y. 2022) ("New York courts are reluctant to impose a duty of care when there is little expectation that the defendant could prevent the actions of a third party." (citation omitted)). However, a duty may arise where there is

a relationship between a defendant and the third party that "encompasses defendant's actual control of the third person's actions," or "between defendant and plaintiff that requires defendant to protect plaintiff from the conduct of others," such as in a relationship between master and servant, parent and child, or common carriers and their passengers. *Hamilton*, 750 N.E.2d at 1061. "The 'key' consideration critical to the existence of a duty in these circumstances is 'that the defendant's relationship with either the tortfeasor or the plaintiff places the defendant in the best position to protect against the risk of harm'; and that 'the specter of limitless liability is not present because the class of potential plaintiffs to whom the duty is owed is circumscribed by the relationship.'" *In re N.Y.C Asbestos Litig.*, 840 N.E.2d 115, 119 (N.Y. 2005) (quoting *Hamilton*, 750 N.E.2d at 1061).

These principles are dispositive here and require dismissal of Plaintiff's negligence claim. Plaintiff's harm arises from the conduct of a third party, the WIV, which was allegedly conducting gain-of-function research in laboratories experiencing "serious biosafety problems," and whose research allegedly created COVID-19 and led to Hurst's death. Compl. ¶¶ 11-12, 14, 18. Plaintiff does not plead that Defendant had any control over the WIV's activities. In fact, Plaintiff pleads just the opposite — that Defendant had "no oversight and no way of knowing how safe the laboratories were where these risky experiments were taking place." Compl. ¶ 14(c). The Complaint does not allege that, once Defendant allocated funding to WIV, it had the "authority or ability — contractual or otherwise — to dictate or suggest what was done with the" funding or in the WIV's laboratories. *SUEZ Water*, 578 F. Supp. 3d at

553. While the Complaint alleges that Defendant provided money to the WIV, it does not even allege that Defendant directed the money to gain-of-function research. *See* Compl. ¶¶ 12-15. Nor does Plaintiff allege facts that would support a relationship between her (or her deceased husband) and Defendant that would require Defendant to protect Plaintiff's husband from the conduct of others. *See generally id*. And while Plaintiff argues in her opposition that her deceased husband and "society as a whole" had a "reasonable expectation" that gain-of-function research would be conducted safely, Opp. at 14, she has not demonstrated that her husband or society as a whole expected that Defendant, who provided some funds to the WIV, would control or had the ability to control the actions of the WIV.

Hamilton is instructive. In that case, the relatives of people killed by handguns sued handgun manufacturers alleging negligence, among other claims. *Hamilton*, 750 N.E.2d at 1058-59. The New York Court of Appeals found that the handgun manufacturers had no duty to the plaintiffs, rejecting the plaintiffs' argument that the manufacturers had a duty of care based on their "purported ability to control marketing and distribution of their products" since the "social benefit" of finding such a duty would be outweighed by its "costs and burdens." *Id*. at 1063. The Court emphasized its concerns that imposing such a duty would create an indeterminate class of plaintiffs and defendants, that the pool of plaintiffs was "very large — potentially, any of the thousands of victims of gun violence," and that the connection between the manufacturers and the eventual victims was too tenuous. *Id*. at 1061-62. Here, too, the "social benefit" of imposing a duty on Defendant would be

outweighed by the costs and burdens of imposing a duty. There is a high likelihood that claims against Defendant (and other funders of research related to the coronavirus) would proliferate, particularly since the group of potential claimants is not defined, and instead would reach every person who suffered a loss from the death of a loved one due to COVID-19. *See In re September 11 Litig.*, 280 F. Supp. 2d 279, 293 (S.D.N.Y. 2003) (considering whether claims would proliferate based on whether the claimants were "known and circumscribed by those 'who have, as a result of the[] events,'" suffered the same sort of harm (quoting *532 Madison Ave. Gourmet Foods, Inc. v. Finlandia Ctr. Inc.*, 750 N.E.2d 1097, 1103 (N.Y. 2001))). The remote connection between Defendant's allocation of funding to the WIV and Plaintiff's husband's eventual death from COVID-19 would also create the risk of widespread, insurer-like liability, since the class of potential plaintiffs is so large and undefined. As a result, the Court concludes that the burdens of imposing a general duty of care on Defendant outweigh any social benefit, particularly as Plaintiff has alleged no facts that would permit the Court to conclude that Defendant is "in the best position to protect against the risk of harm," *Hamilton*, 750 N.E.2d at 1061.

Indeed, New York courts that have considered similar claims against EHA have dismissed complaints where, as here, plaintiffs failed to allege that EHA had direct dealings with any of the plaintiffs. In *McKinnis v. EcoHealth Alliance*, plaintiffs brought claims against EHA and some of its employees based on the serious health consequences and deaths resulting from contracting COVID-19 during the worldwide pandemic. See generally Decision & Order, *McKinnis*, No.

034252/2022 (N.Y. Sup. Ct. Sept. 15, 2023), Dkt. 116. The court dismissed the negligence claims, reasoning that the defendants did not owe the plaintiffs any duty because plaintiffs made "no claim that any of the [d]efendants had direct dealings with any of the [p]laintiffs," and plaintiffs sought to extend a duty "notwithstanding that they are no different from any other person in the world who became infected with the COVID-19 virus." *Id*. at 7-8. The court emphasized that finding a duty "would undoubtedly result in a proliferation of claims; there would be a high likelihood of unlimited or insurer-like liability on [d]efendants; … there would exist negative public policy considerations including the chilling of scientific research necessary for the prevention of, or cure for, future pandemics," and "the class of potential plaintiffs would include over 770 million people." *Id*. at 8.

Similarly, in *Vega v. EcoHealth Alliance, Inc.*, the court dismissed negligence claims brought against EHA because plaintiffs had not established that EHA owed them a duty. Decision & Order at 9, 13, *Vega*, No. 603152/2023 (N.Y. Sup. Ct . Dec. 5, 2023), Dkt. 41.

The court in *Vega* also noted that "[p]laintiffs and EcoHealth had no connection to one another, or had the same connection as EcoHealth had with every other person on Earth," and that plaintiffs' attempts to hold EHA liable for the acts of a third party, the WIV, by trying to "tie EcoHealth to [the] WIV's alleged failure to follow proper precautions" were unavailing, since there were "too many gaps in their theory to make that work." *Id*. at 9. So too here. Plaintiff has not demonstrated any connection between herself (or the deceased) and Defendant, nor has she demonstrated that Defendant was involved

in any alleged failures by the WIV. For the same reasons set forth in McKinnis and Vega, extending such a duty to Defendant simply because it funded research by the WIV would result in the proliferation of claims, create a high likelihood of insurer-like liability, and risk the chilling of scientific research.

Plaintiff's citation to *Baker v. Saint-Gobain Performance Plastics Corp.*, 232 F. Supp. 3d 233 (N.D.N.Y. 2017), *aff'd in part, appeal dismissed in part*, 959 F.3d 70 (2d Cir. 2020) (per curiam) does not alter this Court's conclusion. Plaintiff argues that *Baker* supports her claim that imposing liability on Defendant would be sensible public policy, since a research organization should not be able to "contribute to the spread of a deadly virus … and not be held accountable." Opp. at 15. The Court disagrees with Plaintiff's characterization of *Baker*. *Baker* involved negligence claims brought against defendant-manufacturers whose facilities directly discharged PFOA, a chemical substance, into the surrounding groundwater. *See* 232 F. Supp. 3d at 236-38, 243. The court found that the defendants had a duty not to pollute plaintiffs' drinking water, reasoning in part that it is "sensible public policy to require that manufacturers avoid polluting the drinking water of the surrounding community" and that society has a "reasonable expectation that manufacturers avoid contaminating the surrounding environment." *Id.* at 245-46. The facts of the instant case differ significantly from *Baker*. While *Baker*'s defendants were manufacturers directly responsible for the discharge of PFOA into the water, here, Plaintiff seeks to hold Defendant responsible for the alleged acts of the WIV, a third party, to which Defendant provided some funding for research. The *Baker* defendants had control over the method of

disposal that ultimately caused the contamination of the water supply. *Id.* at 243. Here, Plaintiff has not alleged any facts that Defendant controlled, or was positioned to control, the acts of the WIV or how it carried out its research, or even that Defendant's funding contributed to gain-of-function research. As a result, the facts of Baker do not persuade the Court that it would be "sensible public policy" to find that Defendant was responsible for the acts of a third-party recipient of research funds.

As a result of Plaintiff's failure to plead facts that support that Defendant had a duty of care sufficient to support a claim of negligence, the Court dismisses Count I.

III. Plaintiff's Strict Liability Claim (Count II)

Plaintiff also brings a strict liability claim against Defendant, alleging that Defendant, "in funding monies [to] the [WIV] to conduct research into coronaviruses, engaged in an abnormally dangerous activity, and is liable for the resulting harm to the Plaintiff's deceased husband … regardless of any care taken by [Defendant] to prevent it" because "the harm is the type of risk which makes the activity abnormally dangerous in the first place." Compl. ¶ 25.

A. Legal Standard

"One who carries on an ultrahazardous or abnormally dangerous activity is strictly liable for the harm inflicted by the activity." *Abbatiello v. Monsanto Co.*, 522 F. Supp. 2d 524, 531 (S.D.N.Y. 2007); *see also Quattlander v. Ray*, No. 18-cv-03229 (CS), 2021 WL 5043004, at *7 (S.D.N.Y. 2021)

(same). Under New York law, courts look to the six-factor test drawn from the Restatement (Second) of Torts and consider the:

> (a) existence of a high degree of risk of some harm to the person, land or chattels of others; (b) likelihood that the harm that results from it will be great; (c) inability to eliminate the risk by the exercise of reasonable care; (d) extent to which the activity is not a matter of common usage; (e) inappropriateness of the activity to the place where it is carried on; and (f) extent to which its value to the community is outweighed by its dangerous attributes.

Doundoulakis v. Town of Hempstead, 368 N.E.2d 24, 27 (N.Y. 1977) (quoting Restatement (2d) of Torts § 520); Quattlander, 2021 WL 5043004, at *7 (same). No one factor is determinative. *See Doundoulakis*, 368 N.E.2d at 27; *Town of New Windsor v. Avery Dennison Corp.*, No. 10-cv-08611 (CS), 2012 WL 677971, at *12 (S.D.N.Y. Mar. 1, 2012) (same) (citing Restatement (2d) of Torts § 520 cmt. f).

B. Plaintiff Has Not Stated a Claim for Strict Liability

Defendant argues that the Court must dismiss the strict liability claim because (1) it is incompatible with her claim for negligence and (2) Plaintiff has not pleaded facts that could support a claim that Defendant engaged in an abnormally dangerous activity. Br. at 14-16. Without reaching the question of incompatibility, the Court agrees that Plaintiff has not pleaded facts that state a claim for strict liability.

Looking to the strict liability factors, Plaintiff has not pleaded facts that support a claim that Defendant's funding of biomedical research had a high risk of harm or that there was a great likelihood of harm resulting from that funding. Plaintiff argues in her brief that gain-of-function research creates a high risk of harm. See Opp. at 19. But the Complaint does not claim that Defendant was engaged in gain-of-function research or even that its funding was directed to the WIV's gain-of-function research. Rather, it alleges that the WIV's research "includ[ed] gain of function research" and that Defendant provided funding to the WIV. Compl. ¶¶ 11, 13. Even if the Court construed Plaintiff's Complaint as alleging that Defendant funded WIV's gain-of-function research, Plaintiff pleads no facts that support a plausible claim that providing *funding* for this type of medical research created a high risk of harm or that there was a great likelihood that harm would result. While Plaintiff argues in her opposition brief that there is a high likelihood of harm resulting from a virus leaking from a laboratory, Opp. at 19-20, she does not explain why the activity that Defendant actually engaged in — funding coronavirus research — would have created a high likelihood of a laboratory leak.

Plaintiff also has not demonstrated an inability to eliminate risks associated with funding coronavirus research, even assuming there were such risks. Shifting the analysis back to a lab leak risk, Plaintiff claims in her brief that the risk of a lab leak could not have been eliminated. Opp. at 20. But the Complaint does not contain any factual allegations that support a plausible claim that the risk of a lab leak could not have been eliminated by the exercise of reasonable care. Compl. ¶ 14(b) (only conclusorily

alleging that there were "serious" biosafety problems at the WIV laboratories); Decision & Order at 10, *McKinnis*, No. 034252/2022, Dkt. 116 (dismissing plaintiff's strict liability claim because allegations that defendant "performed certain government funded coronavirus scientific research, allegedly under unsafe conditions, or co-authored an article about the origins of Coronavirus-19 with the purpose of misleading the public" were "not abnormally dangerous" and there was not "a high degree of risk that people will be injured because of scientific research or that the harm from scientific research will be great," particularly since "laboratory accidents are rare" and "a laboratory is an appropriate place to carry on scientific research"). More importantly, though, Plaintiff ignores that Defendant did not run the lab but instead allegedly provided some funding for research. The Complaint contains no factual allegations that support a plausible claim that funding coronavirus research is intrinsically dangerous irrespective of the exercise of due care. Instead, Plaintiff's allegations of negligence against Defendant "implicitly acknowledge that the exercise of reasonable care would reduce or eliminate the risk of the activity at issue." *Hill v. Norlite, LLC*, No. 21-cv-00439 (BKS), 2022 WL 1452480, at *7 (N.D.N.Y. May 9, 2022). Indeed, in *Vega*, the court dismissed the strict liability claim brought against EHA, in part because "Plaintiffs [had] not established that the risks could not have been avoided by use of reasonable care." Decision & Order at 11, Vega, No. 603152/2023, Dkt. 41.

Plaintiff has further not pleaded any facts that support a plausible claim that funding medical research (even gain-of-function research) is uncommon or inappropriate. And finally, Plaintiff

has not pleaded facts sufficient to support a claim that the value to the community of funding biomedical research is outweighed by its dangerous attributes, especially given that Defendant's funding to the WIV was facilitated by a grant from the NIH and the NIAID. Compl. ¶ 13.

In sum, Plaintiff has not alleged facts sufficient to state a plausible claim that Defendant's funding of biomedical research related to the coronavirus was an abnormally dangerous activity. Thus, the Court will dismiss the strict liability claim in Count II.

IV. Leave to Amend

Plaintiff seeks leave to amend to change her status from proposed representative of Hurst's estate to personal representative. Opp. at 22. She does not request leave to amend the substance of her Complaint. The Court denies Plaintiff's request.

Rule 15(a) provides that courts "should freely give leave [to amend] when justice so requires." Fed. R. Civ. P. 15(a); *see Farrell v. City of New York*, No. 23-cv-04329 (JLR), 2024 WL 3849333, at *7 (S.D.N.Y. Aug. 16, 2024). "Nonetheless, 'it is within the sound discretion of the district court to grant or deny leave to amend.'" *Farrell*, 2024 WL 3849333, at *7 (quoting *Kim v. Kimm*, 884 F.3d 98, 105 (2d Cir. 2018)). The Court may deny leave to amend if, among other reasons, "the amendment would be futile." *Goodman v. Goodman*, No. 21-cv-10902 (GHW) (RWL), 2022 WL 17826390, at *21 (S.D.N.Y. Dec. 21, 2022) (citation omitted), report and recommendation adopted, 2023 WL 1967577 (S.D.N.Y. Feb. 12, 2023).

Given the Court's foregoing findings on the Defendant's motion to dismiss, granting Plaintiff leave to amend to change her status to personal

representative would be futile. Plaintiff's claims fail to state a claim regardless of whether Plaintiff amends her Complaint to change her status to personal representative. *See Page v. U.S. Agency for Glob. Media*, 797 F. App'x 550, 556 (2d Cir. 2019) (summary order) (affirming decision denying leave to amend where proposed amendments would not cure deficiencies in pleading). Therefore, leave to amend is denied.

CONCLUSION

Defendant's motion to dismiss is GRANTED. Plaintiff's request to amend the Complaint to change her status from proposed representative to personal representative is DENIED. The Complaint is dismissed with prejudice. The Clerk of Court is directed to terminate the motion at Dkt. 30 and close the case.

DATED: December 19, 2024.
New York, New York

SO ORDERED.

s/*Jennifer Rochon*
JENNIFER L. ROCHON
United States District Judge