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*Sherley E. Cruz**

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*Sherley E. Cruz is an Assistant Professor at the University of Tennessee Knoxville College of law where she teaches with the Advocacy Clinic. This Article is dedicated to my mother, Pastora Ramos, who worked as a line worker at manufacturing factories for over forty years after arriving to the United States from the Dominican Republic and to my mother-in-law, Cherry Bailey, who passed away from COVID-19 while writing this Article. Thank you to the attendees of the Clinical Law Review’s Writers Workshop, Sameer Ashar, JoNel Newman, Katherine Norton, Anne Shalleck, and Katherine Wallat for their thoughtful feedback and suggestions. Special thank you to the attendees of the Latina Law Scholars Workshop, particularly Alexander A. Boni-Saenz, Elizabeth M. Iglesias, Solangel Maldonado, Terry A Maroney, and Madeleine M. Plasencia their invaluable insights and comments. Thank you to my mentors Zack Buck, Lucy Jewel, and Michael Higdon, and my colleagues Joy Radice and Wendy Bach for getting me to the finish line. An enormous thank you to my research assistants Katherine Sands, Taylor Blake, Aryn Grasio, Kendall Jones, Samuel Pannell, Guy Tustin III, and Samantha Buller-Young for their exceptional research and organizational skills. And eternal gratitude to my husband, Jerome Robinson, for his strength and support throughout this project.

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ABSTRACT

Since the start of the COVID-19 pandemic, the American public has relied on “essential” low-wage workers to provide critical services and keep the public safe. Who has been protecting the workers? COVID-19 has exposed cracks that lead to serious gaps in workplace protections for low-wage workers. Decades of exploitative employer practices and neglect from the federal government have left frontline low-wage workers essentially unprotected. Many of these workers are people of color and recent immigrants who have been disproportionately impacted by the virus due to structural racism and socio-economic barriers. This is particularly true in the meatpacking industry, where a legacy of poor working conditions, exploitation, and lack of federal oversight has resulted in industry wide COVID outbreaks, thousands of infections, and over 200 deaths.

By applying a critical race theory lens and centering the story of the first worker to die after contracting COVID-19 at one of the world’s largest meatpacking plants, this Article unpacks the practices, policies, and frameworks that allow U.S. meatpacking plants to place profits over the lives of Black and Brown workers while the federal government turns a blind eye. How did these workers become disposal commodities? The lessons from the meat processing industry’s response to COVID-19 wield a narrative and counter-narrative that identify root causes and effective solutions for improving working conditions for all low-wage workers long after the pandemic.

INTRODUCTION

As the United States struggles to reduce the spread of the COVID-19 virus, meat processing plants¹ are penalizing “essential workers” for absences, speeding up already dangerous production lines, and betting on how many workers will contract the virus.² Meat processing workers became “essential” employees shortly after the virus hit the United States.³ The

¹ This Article uses the terms “meat packing” and “meat processing” interchangeably. I also refer to beef, pork, and poultry collectively as part of the “meat packing” or “meat processing” industry, unless otherwise specified.

² See *infra* section C “Protecting the Bottom Line Over Workers”.

³ CYBERSECURITY & INFRASTRUCTURE SECURITY AGENCY, GUIDANCE ON THE ESSENTIAL CRITICAL INFRASTRUCTURE WORKFORCE VERSION 4.0 (Aug. 18, 2020; updated Dec. 16, 2020), (PDF: *Guidance on the Essential Critical Infrastructure Workforce Version 4.0*, Cybersecurity & Infrastructure Security Agency (Aug. 18, 2020; updated Dec. 16, 2020) at 10, https://www.cisa.gov/sites/default/files/publications/ECIW_4.0_Guidance_on_Essential_C

essential commodity, however, was the tons of beef, pork, and chicken consumed by the American public, not the humans processing the meat. To provide the world with a steady supply of meat, the workers have been risking their lives by working shoulder to shoulder without proper protective gear or the ability to take a sick day. The processing plants, however, treat the meatpacking workers like disposable, replaceable labor. The designation of “essential” meant that the plants would remain open for business, despite the fact that they were springing up as COVID-19 hot beds throughout the country.⁴

Industries that did not rely on manual labor initially shut down or shifted to “remote” working models to try to contain the spread of COVID-19.⁵ However, many low-wage essential workers have not been able to work remotely because packing groceries, filling warehouse orders, making deliveries, and processing meat require on-site labor.⁶ Almost a year after the

ritical_Infrastructure_Workers_Final3_508_0.pdf) (“CISA issued the guidance originally on March 19, 2020; see also *Executive Order on Delegation Authority Under the DPA with Respect to Food Supply Chain Resources During the National Emergency Caused by the Outbreak of COVID-19* (Apr. 28, 2020), <https://www.whitehouse.gov/presidential-actions/executive-order-delegating-authority-dpa-respect-food-supply-chain-resources-national-emergency-caused-outbreak-covid-19/>; Joshua Gallu & Jennifer Jacobs, *Trump Orders Meat Plants to Stay Open in Move Unions Slam (1)*, BLOOMBERG L. (Apr. 29, 2020), <https://news.bloomberglaw.com/product-liability-and-toxics-law/trump-says-hes-issuing-order-for-tysons-unique-liability> (“Environmental Working Group called the order a potential death sentence. ... At least 20 workers in meat and food processing have died, and 5,000 meatpacking workers have either tested positive for the virus or were forced to self-quarantine, according to UFCW.”).

⁴ Delegation Authority Under the Defense Production Act with Respect to Food Supply Chain Resources During the National Emergency Caused by the Outbreak of COVID-19, Exec. Order No. 13917, 85 C.F.R. § 26313 (Apr. 28, 2020) <https://www.federalregister.gov/documents/2020/05/01/2020-09536/delegating-authority-under-the-defense-production-act-with-respect-to-food-supply-chain-resources>.

⁵ *Interim Guidance for Businesses and Employers Responding to Coronavirus Disease 2019 (COVID-19), May 2020: Plan, Prepare and Respond to Coronavirus Disease 2019*, CTRS. FOR DISEASE CONTROL & PREVENTION (Updated May 6, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/community/guidance-business-response.html>.

⁶ Elise Gould & Heide Shierholz, *Not Everybody Can Work from Home, Black and Hispanic Workers Are Much Less Likely to be Able to Telework*, ECON. POL’Y INSTITUTE, WORKING ECONS. BLOG (Mar. 19, 2020, 1:15 P.M.), <https://www.epi.org/blog/black-and-hispanic-workers-are-much-less-likely-to-be-able-to-work-from-home/>; see also Molly Kinder & Martha Ross, *Reopening America: Low-wage Workers Have Suffered Badly from COVID-19 so Policymakers Should Focus on Equity*, BROOKINGS (June 23, 2020), <https://www.brookings.edu/research/reopening-america-low-wage-workers-have-suffered-badly-from-covid-19-so-policymakers-should-focus-on-equity/> (noting that low-wage

initial wave of the pandemic, approximately 45,000 meatpacking workers have contracted COVID-19 due to inadequate personal protection equipment (PPE), the inability to take proper sanitation breaks, and the inability to work at a safe distance from each other.⁷ A recent study found that community spread from the meat packing industry has contributed to at least 8% of all of the COVID-19 cases (amounting to 236,000 to 310,000 cases and up to 4,300 deaths) in the United States.⁸ Workers fear retaliation for speaking up about workplace safety.⁹ They fear contracting a deadly virus while at work or worse, bringing it home to loved ones.¹⁰ They fear being unable to make a

workers are six times less likely to be able to work from home than high-income workers).

⁷ *UFCW Calls on USDS and White House to Protect Meatpacking Workers and America's Food Supply*, UFCW BLOG (Apr. 30, 2020, updated Sept. 4, 2020), <http://www.uncw.org/covidpacking>; see also Coral Beach, *Food Worker Advocates Say Lack of PPE Endangering Nation's Food Supply*, FOODSAFETYNEWS.COM (Apr. 15, 2020), <https://www.foodsafetynews.com/2020/04/food-worker-advocates-say-lack-of-ppe-endangering-nations-food-supply/> (reporting that virtually no personal protective equipment is available to workers along the food continuum, from plants to grocery stores); Mary Bauer & Maria Perales Sanchez, *Ripe for Reform: Abuses of Agricultural Workers in the H-2A Visa Program*, CENTRO DE LOS DERECHOS DEL MIGRANTE, INC. 8 (2020), <https://cdmigrante.org/wp-content/uploads/2020/04/Ripe-for-Reform.pdf> (“Overcrowded housing conditions, crowded transportation, and lack of access to handwashing facilities suggest that workers may be particularly vulnerable to exposure to viral infections, such as COVID-19.”); Sky Chadde, *Tracking COVID-19's Impact on Meatpacking Workers and Industry*, MIDWEST CTR. FOR INVESTIGATIVE REPORTING (Apr. 15, 2020, updated Feb. 19, 2021), <https://investigatamidwest.org/2020/04/16/tracking-covid-19s-impact-on-meatpacking-workers-and-industry/> (“As of Feb. 19, there have been at least 45,000 reported positive cases tied to meat and poultry processing facilities from at least 483 outbreaks in 38 states, and at least 240 reported worker deaths in at least 62 plants in 27 states.”) (last visited Feb. 26, 2021).

⁸ Our study suggests that, among essential industries, livestock processing poses a particular public health risk extending far beyond meatpacking companies and their employees. We estimate livestock plants to be associated with 236,000 to 310,000 COVID-19 cases (6 to 8% of total) and 4,300 to 5,200 deaths (3 to 4% of total) as of July 21.

Charles A. Taylor, Christopher Boulos, & Douglas Almond, *Livestock Plants and Covid-19 Transmissions*, PROCS. THE NAT'L ACAD. SCIS. THE U.S. (Dec. 15, 2020), <https://www.pnas.org/content/117/50/31706>.

⁹ Kate Payne, *Meatpacking Workers Are Struggling to Protect Themselves During the Pandemic*, NAT'L PUB. RADIO (May 5, 2020, 4:06 P.M. E.T.), <https://www.npr.org/2020/05/05/850964016/meatpacking-workers-are-struggling-to-protect-themselves-during-the-pandemic>; see also Michael Puente, *Meatpacking Workers' Dilemma: Quit Job or Face COVID-19 Risks*, NAT'L PUB. RADIO (May 14, 2020), <https://www.npr.org/local/309/2020/05/14/856162183/meatpacking-workers-dilemma-quit-job-or-face-c-o-v-i-d-19-risks> (“I'm afraid that some of our workers are not speaking up because of retaliation, ‘said Jesus Rivera, a case manager for Proteus, a national program that assists immigrant workers.”).

¹⁰ Michael Puente, *Meatpacking Workers' Dilemma: Quit Job or Face COVID-19 Risks*,

living, so they go to work while sick as well as while co-workers are sick.¹¹

The Occupational Safety and Health Administration (OSHA), the federal agency whose mission is “to assure the safe and healthful working conditions” for working people, has failed to institute safety standards to protect meatpacking workers.¹² OSHA has received thousands of COVID-related workplace safety complaints, yet it has barely intervened to protect workers in the meat processing industry.¹³ Workers, advocates, unions, and

NAT’L PUB. RADIO (May 14, 2020), <https://www.npr.org/local/309/2020/05/14/856162183/meatpacking-workers-dilemma-quit-job-or-face-c-o-v-i-d-19-risks>.

¹¹ Michael Puente, *Meatpacking Workers’ Dilemma: Quit Job or Face COVID-19 Risks*, NAT’L PUB. RADIO (May 14, 2020), <https://www.npr.org/local/309/2020/05/14/856162183/meatpacking-workers-dilemma-quit-job-or-face-c-o-v-i-d-19-risks>; see also Abigail B. Long & Nicole Civita, *Essential Meat Processing Workers Briefing Book*, JOHNS HOPKINS BERMAN INST. OF BIOETHICS & THE U. OF COLO. BOULDER (2020), <https://bioethics.jhu.edu/wp-content/uploads/2020/06/Essential-Meat-Processing-Workers-Briefing-Book-Final.pdf> (describing meat processing workers need to continue to work despite fears of contracting the virus).

¹² OSH Act of 1970, 29 U.S.C.S. § 651; see also *About OSHA*, UNITED STATES DEP’T OF LABOR: OCCUPATIONAL SAFETY & HEALTH ADMIN., <https://www.osha.gov/aboutosha> (“With the Occupational Safety and Health Act of 1970, Congress created the Occupational Safety and Health Administration (OSHA) to ensure safe and healthful working conditions for working men and women by setting and enforcing standards and by providing training, outreach, education and assistance.” (last visited Feb. 26, 2021)); Bernice Yeung & Michael Grabell, *They Warned OSHA They Were in “Imminent Danger” at the Meat Plant. Now They’re Suing the Agency*, PROPUBLICA (July 23, 2020, 1:06 PM), (describing a cause of action by meatpacking workers against the secretary of labor for “arbitrarily or capriciously” failing to counteract imminent dangers of COVID-19 infection) <https://www.propublica.org/article/they-warned-osha-they-were-in-imminent-danger-at-the-meat-plant-now-theyre-suing-the-agency> (describing a cause of action by meatpacking workers against the secretary of labor for “arbitrarily or capriciously” failing to counteract imminent dangers of COVID-19 infection).

¹³ Noam Scheiber, *OSHA Criticized for Lax Regulation of Meatpacking in Pandemic*, N.Y. TIMES (Oct. 22, 2020), <https://www.nytimes.com/2020/10/22/business/economy/osha-coronavirus-meat.html> (describing lack of OSHA enforcement leading to devastating infections and deaths at meatpacking plants); see also Bernice Yeung & Michael Grabell, *They Warned OSHA They were in “Imminent Danger” at the Meat Plant. Now they’re Suing the Agency*, PROPUBLICA (July 23, 2020, 1:06 P.M. EDT), <https://www.propublica.org/article/they-warned-osha-they-were-in-imminent-danger-at-the-meat-plant-now-theyre-suing-the-agency> (“[D]espite receiving thousands of complaints, OSHA has not prioritized essential workers like meatpackers in its COVID-19 enforcement efforts. Public health departments across the country have found themselves overwhelmed by the flood of cases linked to the meat industry, which has sometimes stymied the efforts of local officials to curb the spread of the virus.”).

communities have organized to push OSHA to establish emergency COVID-19 workplace safety standards and issue citations.¹⁴ OSHA, however, continues to only provide guidance that employers are free to voluntarily comply with, or reject.¹⁵ The guidance is unenforceable. This is particularly troubling for industries, such as meat processing, where long-established economic exploitation and structural racism against low-wage people of color and immigrants protect the bottom line above all else.¹⁶

¹⁴ *America's Largest Meatpacking Union Calls on White House for Real Accountability and Action to Protect Workers on Frontlines of COVID-19 Pandemic*, UNITED FOOD & COM. WORKERS (UFCW) INT'L UNION PRESS RELEASE (Sept. 12, 2020, updated Sept. 27, 2020), <http://www.ufcw.org/press-releases/americas-largest-meatpacking-union-calls-on-white-house-for-real-accountability-and-action-to-protect-workers-on-frontlines-of-covid-19-pandemic> (condemning OSHA lack of COVID-19 Safety standards for meat processing workers and issuance of minimal fines); *see also* Deborah Berkowitz, *Worker Safety & Health During COVID-19 Pandemic: Rights and Resources*, NAT'L EMP. L. PROJECT (Apr. 9, 2020), <https://www.nelp.org/publication/worker-safety-health-during-covid-19-pandemic-rights-resources/> (describing how OSHA has failed to keep workers safe during the pandemic); Michael Grabell, Bernice Yeung & Maryan Jameel, *Millions of Essential Workers are Being Left Out of COVID-19 Workplace Safety Protections, Thanks to OSHA*, PROPUBLICA (Apr. 16, 2020, 7:52 P.M. E.D.T.), <https://www.propublica.org/article/millions-of-essential-workers-are-being-left-out-of-covid-19-workplace-safety-protections-thanks-to-osha> (describing OSHA's failure to protect essential workers, including meat processing workers, from COVID-19).

¹⁵ *U.S. Department of Labor's OSHA and CDC Issue Interim Guidance To Protect Workers in Meatpacking and Processing Industries*, OSHA NAT'L NEWS RELEASE (Apr. 26, 2020), <https://www.osha.gov/news/newsreleases/national/04262020> (providing voluntary/self-directed guidance to meat and poultry processing); *see generally* DEP'T OF LABOR: OCCUPATIONAL SAFETY AND HEALTH ADMIN., OSHA 3990-03, GUIDANCE ON PREPARING WORKPLACES FOR COVID-19 (2020), <https://www.osha.gov/Publications/OSHA3990.pdf> ("This guidance is not a standard or regulation, and it creates no new legal obligations. It contains recommendations as well as descriptions of mandatory safety and health standards. The recommendations are advisory in nature, informational in content, and are intended to assist employers in providing a safe and healthful workplace.").

¹⁶ Sherita Hills Golden, *Coronavirus in African Americans and Other People of Color*, HOPKINS MED. (Apr. 20, 2020), <https://www.hopkinsmedicine.org/health/conditions-and-diseases/coronavirus/covid19-racial-disparities>; *see also* *Health Equity Considerations and Racial and Ethnic Minority Groups*, CTRS. FOR DISEASE CONTROL & PREVENTION (updated July 24, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/community/health-equity/race-ethnicity.html> (Last visited Nov. 17, 2020) (identifying factors that put ethnic and racial minorities at increased risk of getting sick and dying of COVID-19, such as discrimination; healthcare access and utilization; occupation; education, income, and wealth gaps; and housing); Daniel Wood, *As Pandemic Deaths Add Up, Racial Disparities Persist — And In Some Cases Worsen*, NAT'L PUB. RADIO (Sept. 23, 2020), <https://www.npr.org/sections/health-shots/2020/09/23/914427907/as-pandemic-deaths-add-up-racial-disparities-persist-and-in-some-cases-worsen> ("Today, as the U.S. has surpassed 200,000 COVID-19 deaths, and reached nearly 7 million confirmed cases, racial data is more

To understand how meatpacking workers can be essential to the infrastructure of the country, and yet unworthy of basic workplace protections and dignity, we need to look at the frameworks that created the current working conditions for low-wage workers. Why are people of color and immigrants particularly vulnerable to exploitation? By using narratives and exploring the experiences of people of color and immigrants in the meatpacking industry, specifically by telling the story of Saul Sanchez (one of the first workers to lose his life after contracting COVID-19 at one of the nation's largest meat processing plants), this Article unpacks the history, practices, and legal structures of one industry to illustrate the general plight of low-wage Black and Brown workers, and wields critical race theory to demonstrate how racialized narratives serve to "normalize" the exploitation of meat processing workers are common throughout other low-wage industries.¹⁷

Saul Sanchez's life in the meatpacking industry provides a rich and complex narrative of the practices and decisions by employers and the federal government that have led to the current dismal state of low-wage essential workers. Low wage industries have subjected workers to dangerous working conditions, pay that is below a living wage, and workplace discrimination for decades. Part I of this Article tells the story of Saul Sanchez's tragic death to illustrate how the industry and legal system has left meat processing workers unprotected against the deadly COVID-19 virus. Part II wields the theory of rationalized narratives to frame a labor history view of the lives and experiences of meatpacking workers to demonstrate how disparities and racialized narratives have perpetuated unsafe working conditions. Part III continues this critical analysis from a regulatory standpoint by describing how meatpacking workers and other low-wage workers have been left essentially unprotected by employers and the government long before the pandemic. Part IV turns from critical analysis to legal alternatives,

complete, and the trend is crystal clear: People of color get sick and die of COVID-19 at rates higher than whites and higher than their share of the population.").

¹⁷ Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411 (1989), <https://repository.law.umich.edu/mlr/vol87/iss8/10> (counter-stories challenge traditional wisdom and stock stories by asking the reader to "suspend judgment, listen for their point or message, and then decide what measure of truth they contain."); see also Leticia Saucedo, *The Employer Preference for the Subservient Worker and the Making of the Brown Color Workplace*, 67 OHIO STATE L. J. 961 (2006) (describing how assumptions regarding immigrants' work ethic, social status, limited English proficiency, education, and fears of deportation create assumptions about subservience that promote segregation of low-wage workforces by race and ethnicity and support the myth of unwanted jobs).

highlighting the various ways that workers, advocates, and community organizations are wielding counter-narratives by filing alternative causes of action in the absence of federal workplace enforcement to create safer working environments for workers. Part V concludes by looking forward and identifying ways that we can learn from this moment to protect not only meatpacking workers, but all low-wage workers well beyond the COVID-19 pandemic.

I. THE STORY OF SAUL SANCHEZ

On Tuesday, April 7, 2020, Saul Sanchez died from COVID-19 related complications.¹⁸ Sanchez worked as a low-level supervisor at a JBS meat processing plant, in Greeley, Colorado, for over thirty years and never missed a day of work.¹⁹ JBS is a goliath in the meat processing industry. It is one of the top beef and pork processing companies in the United States and a majority shareholder of “Pilgrim’s Pride” the nation’s second largest poultry processing company.²⁰ With over 300 production plants in more than 150 countries, Forbes magazine has named JBS “the World’s Biggest Meat Producer”.²¹ JBS annual sales for 2020 have already exceeded

¹⁸ Cuyler Meade, *Saul Sanchez, Beloved Father and Community Figure, First JBS Employee to Die from COVID-19, Laid to Rest in Solemn Ceremony*, GREELEY TRIB. (Apr. 15, 2020, 8:09 P.M., updated May 28, 2020, 6:35 A.M.), <https://www.greeleytribune.com/2020/04/15/saul-sanchez-beloved-father-and-community-figure-first-jbs-employee-to-die-from-covid-19-laid-to-rest-in-solemn-ceremony/>; see also *Obituary for Saul Sanchez*, GREELEY TRIB. (Apr. 12, 2020, 11:32 p.m., updated May 28, 2020, 6:36 a.m.), <https://www.greeleytribune.com/2020/04/12/obituary-for-saul-sanchez/> (“Saul loved God his co-workers at JBS but most of all he loved his family. He always had a smile and kind encouraging words for everyone. Saul was a man with a heart of gold [sic].”)

¹⁹ JBS is national meat processing company that is headquartered and has a processing plant in Greeley, Colorado. *Corporate Opportunities*, JBS, <https://jobs.jbssa.com/corporate-opportunities/> (last visited Feb. 19, 2021). See Cuyler Meade, *Saul Sanchez, Beloved Father and Community Figure, First JBS Employee to Die from COVID-19, Laid to Rest in Solemn Ceremony*, GREELEY TRIB. (Apr. 15, 2020, 8:09 P.M., updated May 28, 2020, 6:35 A.M.), <https://www.greeleytribune.com/2020/04/15/saul-sanchez-beloved-father-and-community-figure-first-jbs-employee-to-die-from-covid-19-laid-to-rest-in-solemn-ceremony/>; see also Erin Udell, *Before Coronavirus, He Was ‘Papa’ at his Greeley Meat Plant. Now, He’s a Cautionary Tale*, COLORADOAN (Apr. 24, 2020, 7:00 A.M. MT), <https://www.coloradoan.com/story/news/2020/04/24/coornavirus-colorado-covid-19-jbs-greeley-worker-death/5168427002/>.

²⁰ See *About JBS*, JBS (2021), <https://jbssa.com/about/> (last visited Feb. 19, 2021).

²¹ Andrew Wasley et al., *JBS: The Brazilian Butchers Who Took Over the World*, THE BUREAU OF INVESTIGATIVE JOURNALISM (July 2, 2019), <https://www.thebureauinvestigates.com/stories/2019-07-02/jbs-brazilian-butchers-took-over-the-world/> (“Meat is now the new commodity, controlled by just a handful of gigantic firms which together wield unprecedented control over global food production. The Bureau

\$35,000,000,000.²² Since the start of the pandemic, over 3,000 JBS workers have contracted COVID-19 and at least six from their Greeley Colorado headquarter facility have died from it.²³

Sanchez was the first Greeley JBS employee to die from the virus.²⁴ He left behind a wife, six children, and thirteen grandchildren.²⁵ Like many other

has been investigating the biggest of all: JBS, a Brazilian company which slaughters a staggering 13 million animals every single day and has annual revenue of \$50bn.”); *see also* Keren Blankfield, *JBS: The Story Behind the World's Biggest Meat Producer*, FORBES (Apr. 21, 2011, 10:24 A.M. EDT), <https://www.forbes.com/sites/kerenblankfeld/2011/04/21/jbs-the-story-behind-the-worlds-biggest-meat-producer/#5e092c377e82>.

²² Tonya Mosley & Cassidy Rosenblum, *Do You Know Who Makes Your Meat? Inside JBS, The No.1 Meatpacker In The World*, WBUR (July 17, 2020), <https://www.wbur.org/hereandnow/2020/07/17/meat-packers-jbs-lawsuit-coronavirus>; *see also* Andrew Wasley, Alexandra Heal, Lucy Michaels, Dom Phillips, André Campos, Diego Junquiera, Claire Smith, & Rory Winters, *JBS: The Brazilian Butchers Who Took Over The World*, THE BUREAU OF INVESTIGATIVE JOURNALISM (Feb. 7, 2019), <https://www.thebureauinvestigates.com/stories/2019-07-02/jbs-brazilian-butchers-took-over-the-world> (“The scale of JBS’s operations today is stunning: the company employs more than 900,000 people globally, has revenues of \$50bn and has customers in 150 countries. In 2018, JBS slaughtered some 77,000 cattle, 116,000 pigs and 13.6 million poultry birds every day.”); Bob Sims & Erika Shaffer, *JBS sets earnings record in 2019*, MEAT & POULTRY (Mar. 27, 2020), <https://www.meatpoultry.com/articles/22838-jbs-sets-earnings-record-in-2019> (“Net income in the fourth quarter ended Dec. 31, 2019, totaled 2.4 billion reais (\$591 million).”).

²³ Chuck Murphy, *Meatpacking Giant JBS Battles New Coronavirus Outbreaks At Greeley Plant And Corporate Offices*, COLO. PUB. RADIO NEWS (Nov. 25, 2020), <https://www.cpr.org/2020/11/25/meatpacking-giant-jbs-battles-new-coronavirus-outbreaks-at-greeley-plant-and-corporate-offices/> (On April 3 2020 the JBS Greeley plant reported 292 COVID-19 cases and six deaths from COVID-19.).

The Food and Environmental Reporting Network (FERN) has maintained a regularly updated interactive map tracking the spread of COVID-19 at meatpacking plants, food processing facilities, and farms. FERN reports that as of January 8, 2020 at 12:00 p.m. ET, JBS facilities throughout the U.S. have reported a total of 3,074 confirmed COVID-19 cases and eighteen (18) COVID-19 deaths among employees. The January 8, 2020 data further indicates that in the meatpacking industry in the U.S. overall, at least 566 meatpacking facilities have had confirmed cases of Covid-19, at least 52,362 meatpacking workers have tested positive for Covid-19 and at least 266 meatpacking workers have died. *See also*, Leah Douglas, *Mapping Covid-19 Outbreaks in the food system*, FERN (Apr. 22, 2020) <https://thefern.org/2020/04/mapping-covid-19-in-meat-and-food-processing-plants/> (being updated every weekday since April 22, 2020).

²⁴ Dillon Thomas, *Family of Saul Sanchez Blames JBS Plant After Coronavirus Death as Cases Increase*, CBS DENVER (Apr. 12, 2020, 11:00 P.M.), <https://denver.cbslocal.com/2020/04/12/coronavirus-saul-sanchez-jbs-greeley/> (Reporting that Saul Sanchez was the first Greeley JBS employee to die of COVID-19).

²⁵ Cuyler Meade, *Saul Sanchez, Beloved Father and Community Figure, First JBS*

line workers at meat processing plants, Sanchez felt pressured to work while sick.²⁶ "...[H]undreds of workers at JBS were calling off and refusing to go to work even as a Facebook page for the JBS plant was urging workers to keep showing up, saying in a post on March 25 that the statewide stay-at-home order 'DOES NOT apply to us.'"²⁷ The company also promised to hand out free five-pound rolls of beef to employees at the end of their shifts, according to the posts.²⁸ Prior to falling victim to the virus, his co-workers had exhibited virus-like symptoms while on the job and his supervisor was hospitalized due to COVID.²⁸ Soon after Sanchez was hospitalized due to virus related complications, the local hospital was inundated with dozens of sick JBS workers.²⁹ The influx of positive cases raised concerns about the "work while sick" culture.³⁰ Alarmed by the number of cases, the local public

Employee to Die from COVID-19, Laid to Rest in Solemn Ceremony, GREELEY TRIB. (Apr. 15, 2020, 8:09 P.M., updated May 28, 2020, 6:35 A.M.), <https://www.greeleytribune.com/2020/04/15/saul-sanchez-beloved-father-and-community-figure-first-jbs-employee-to-die-from-covid-19-laid-to-rest-in-solemn-ceremony/>; see also Erin Udell, *Before Coronavirus, He was 'Papa' at his Greeley Meat Plant. Now, He's a Cautionary Tale*, COLORADOAN (Apr. 24, 2020, 7:00 A.M. MT), <https://www.coloradoan.com/story/news/2020/04/24/coornavirus-colorado-covid-19-jbs-greeley-worker-death/5168427002/>.

²⁶ Erin Udell, *Before Coronavirus, He was 'Papa' at his Greeley Meat Plant. Now, He's a Cautionary Tale*, COLORADOAN (Apr. 24, 2020), <https://www.coloradoan.com/story/news/2020/04/24/coornavirus-colorado-covid-19-jbs-greeley-worker-death/5168427002/>; see also Shelly Bradbury, *How coronavirus spread through JBS's Greeley beef plant*, DENVER POST (July 12, 2020, 6:00 a.m.), <https://www.denverpost.com/2020/07/12/jbs-greeley-coronavirus-investigation/>

²⁷ Shelly Bradbury, *How coronavirus spread through JBS's Greeley beef plant*, DENVER POST (July 12, 2020, 6:00 a.m.), <https://www.denverpost.com/2020/07/12/jbs-greeley-coronavirus-investigation/>

²⁸ Erin Udell, *Before Coronavirus, He was 'Papa' at his Greeley Meat Plant. Now, He's a Cautionary Tale*, COLORADOAN (Apr. 24, 2020, 7:00 A.M. MT), <https://www.coloradoan.com/story/news/2020/04/24/coornavirus-colorado-covid-19-jbs-greeley-worker-death/5168427002/>.

²⁹ Erin Udell, *Before Coronavirus, He was 'Papa' at his Greeley Meat Plant. Now, He's a Cautionary Tale*, COLORADOAN (Apr. 24, 2020, 7:00 A.M. MT), <https://www.coloradoan.com/story/news/2020/04/24/coornavirus-colorado-covid-19-jbs-greeley-worker-death/5168427002/>.

³⁰ Erin Udell, *Before Coronavirus, He was 'Papa' at his Greeley Meat Plant. Now, He's a Cautionary Tale*, COLORADOAN (Apr. 24, 2020, 7:00 A.M. MT), <https://www.coloradoan.com/story/news/2020/04/24/coornavirus-colorado-covid-19-jbs-greeley-worker-death/5168427002/>. "[Greeley JBS] offered a bonus for perfect attendance after reopening [post-shutdown due to COVID-19 outbreak]. [...] But it comes with serious risk. JBS hasn't instituted paid sick leave, instead providing surgical masks and face shields that employees aren't allowed to keep." Jahd Khalil, *The Pandemic's Toll on Meatpacking Workers*, THE ATLANTIC (Oct. 27, 2020), <https://www.theatlantic.com/politics/archive/2020/10/meatpacking-worker-says-jbs-didnt->

health department issued orders closing the plant so that JBS could get control of the COVID outbreak.³¹ At the health department's request, JBS temporarily closed the plant and sent thousands of employees home to quarantine.³² Just weeks after closing JBS due to the virus outbreak and despite the rise in outbreaks at meat processing plants throughout the country, the Trump administration issued an executive order that meat processing plants had to remain open to minimize disruption to American meat production.³³

take-covid-19-precautions/616842/.

³¹ Erin Udell, *Before Coronavirus, He was 'Papa' at his Greeley Meat Plant. Now, He's a Cautionary Tale*, COLORADOAN (Apr. 24, 2020, 7:00 A.M. MT), <https://www.coloradoan.com/story/news/2020/04/24/coornavirus-colorado-covid-19-jbs-greeley-worker-death/5168427002/>; see also Jahd Khalil, *The Pandemic's Toll on Meatpacking Workers*, THE ATLANTIC (Oct. 27, 2020), <https://www.theatlantic.com/politics/archive/2020/10/meatpacking-worker-says-jbs-didnt-take-covid-19-precautions/616842/> (explaining that the first Greeley JBS worker was hospitalized for COVID-19 on March 24, 2020, and JBS did not shut down until April 15, 2020, after the local health department ordered that it close); Michael Elizabeth Sakas, *Colorado Leads Nation For Most COVID-19 Deaths Connected To Meat Processing Plants, Sixth Greeley JBS Employee Dies*, COLO. PUB. RADIO NEWS (May 1, 2020), <https://www.cpr.org/2020/05/01/colorado-leads-nation-for-most-covid-19-deaths-connected-to-meat-processing-plants-sixth-greeley-jbs-employee-dies/> ("There have been 245 confirmed cases of COVID-19 at the Greeley plant, where many of the 6,000 employees are refugees or immigrants. It makes it one of the largest outbreaks in the state, second only to the Sterling Correctional Facility.").

³² Gosia Wozniacka, *Poor Working Conditions at Meatpacking Plants Have Long Put Workers at Risk. The Pandemic Makes It Much Worse*, CIVIL EATS (Apr. 17, 2020), <https://civileats.com/2020/04/17/poor-conditions-at-meatpacking-plants-have-long-put-workers-at-risk-the-pandemic-makes-it-much-worse/>; see also Jacey Fortin, *After Meat Workers Die of Covid-19, Families Fight for Compensation*, N.Y. TIMES (Oct. 6, 2020), <https://www.nytimes.com/2020/10/06/business/coronavirus-meatpacking-plants-compensation.html> ("Dozens of plants across the country have shut down temporarily — including the JBS plant in Greeley, which closed its doors for about two weeks before reopening on April 24 with new safety protocols."); Michael Elizabeth Sakas, *Colorado Leads Nation For Most COVID-19 Deaths Connected To Meat Processing Plants, Sixth Greeley JBS Employee Dies*, COLO. PUB. RADIO NEWS (May 1, 2020), <https://www.cpr.org/2020/05/01/colorado-leads-nation-for-most-covid-19-deaths-connected-to-meat-processing-plants-sixth-greeley-jbs-employee-dies/> ("The JBS plant was initially ordered to close for two weeks before it re-opened without testing all its employees for COVID-19 — something the White House and the company had promised to do.").

³³ It is interesting to note that at the time of the order there was no immediate threat of a meat shortage. See USDA Cold Storage February 2020 Highlights, available at: <https://downloads.usda.library.cornell.edu/usda-esmis/files/pg15bd892/sn00bg62q/tm70nd50r/cost0320.pdf>, (reporting that American meat providers had stockpiles of meat.) Although the media raised concerns of shortages, there

Prior to the pandemic, JBS (like many of its competitors in the meat packing industry) had a history of workplace safety violations and citations.³⁴ Worldwide allegations against the company have included “high-level corruption, modern-day ‘slave labour’ practices, illegal deforestation, animal welfare violations, and major hygiene breaches.”³⁵ In 2017, JBS’s holding company paid “one of the biggest fines in global corporate history,” \$3,200,000,000 in fines, for bribing hundreds of politicians.³⁶ Despite having

was no actual shortage of American-produced meat for either the domestic or foreign markets. Azure Gilman, *U.S. meat companies warned of shortages and an executive order kept them open. At the same time, they were exporting record amounts of pork to China*, THE COUNTER (June 24, 2020, 5:24 PM), <https://thecounter.org/jbs-cargill-smithfield-tyson-record-pork-exports-china/>; see also *Letter to meatpackers investigating manipulation of COVID-19 crisis, from Elizabeth Warren, United States Senator, and Cory Booker, United States Senator* (June 22, 2020), <https://www.warren.senate.gov/imo/media/doc/2020.06.22%20Letter%20to%20meatpackers%20investigating%20manipulation%20of%20COVID-19%20crisis.pdf> (“I am writing with concern about new reports that your companies sent massive amounts of pork and other meats to consumers in China while threatening the American public with an impending shortage of beef, pork, and chicken. All the while you put thousands of your workers in harm’s way to maintain production, dramatically increased prices for U.S. consumers, and successfully lobbied the President to sign an executive order designating your plants as critical infrastructure that allowed them to continue operating in an unsafe fashion.”); Michael Grabell & Bernice Yeung, *Emails Show the Meatpacking Industry Drafted an Executive Order to Keep Plants Open*, PROPUBLICA (Sept. 14, 2020, 2:43 PM), <https://www.propublica.org/article/emails-show-the-meatpacking-industry-drafted-an-executive-order-to-keep-plants-open> (“Just a week before the order was issued, the meat industry’s trade group drafted an executive order that bears striking similarities to the one the president signed.”).

³⁴ See *OSHA News Release – Region 8*, U.S. DEP’T OF LAB. (June 4, 2013), <https://www.osha.gov/news/newsreleases/region8/06042013> (reporting 2013 OSHA citation and proposed fines of \$83,414 to JBS for 20 violations of workplace safety standards); *Violation Tracker Parent Company Summary*, GOOD JOBS FIRST (2020), <https://violationtracker.goodjobsfirst.org/parent/jbs> (reporting that JBS and its subsidiaries have a history of 184 offense records and \$34,732,377 in fines since 2000).

³⁵ Andrew Wasley, Alexandra Heal, Lucy Michaels, Dom Phillips, André Campos, Diego Junquiera, Claire Smith, & Rory Winters, *JBS: The Brazilian Butchers Who Took Over The World*, THE BUREAU OF INVESTIGATIVE JOURNALISM (Feb. 7, 2019), <https://www.thebureauinvestigates.com/stories/2019-07-02/jbs-brazilian-butchers-took-over-the-world>.

³⁶ Andrew Wasley, Alexandra Heal, Lucy Michaels, Dom Phillips, André Campos, Diego Junquiera, Claire Smith, & Rory Winters, *JBS: The Brazilian Butchers Who Took Over The World*, THE BUREAU OF INVESTIGATIVE JOURNALISM (Feb. 7, 2019), <https://www.thebureauinvestigates.com/stories/2019-07-02/jbs-brazilian-butchers-took-over-the-world>; see also Ricardo Brito & Tatiana Bautzer, *Brazil’s J&F agrees to pay record \$3.2 billion fine in leniency deal*, REUTERS (May 31, 2017, 7:35 A.M.), <https://www.reuters.com/article/us-brazil-corruption-jbs/brazils-jf-agrees-to-pay-record-3-2-billion-fine-in-leniency-deal-idUSKBN18R1HE> (“J&F Investimentos, controlling

a track record of repeated serious workplace safety violations, hundreds of COVID infections, and at least eight COVID related deaths, on September 8, 2020, OSHA cited the company only for violating OSHA's general duty clause and for delays in reporting.³⁷ The fine was the maximum penalty allowed, \$15,615.³⁸ The lack of enforcement throughout low-wage industries has led to public outcries for OSHA enforcement.³⁹

shareholder of the world's largest meatpacker [JBS], agreed to pay a record-setting 10.3 billion real (\$3.2 billion) fine for its role in corruption scandals that threaten to topple President Michel Temer.”).

³⁷ OSHA News Release – Region 8: U.S. Department of Labor Cites JBS Foods Inc. for Failing To Protect Employees from Exposure to the Coronavirus, DEP'T OF LAB. (Sept. 11, 2020), <https://www.osha.gov/news/newsreleases/region8/09112020>; see also Tom Polansek & P.J. Huffstutter, OSHA cites JBS, Smithfield Foods for failing to protect employees from coronavirus, STAR TRIBUNE (Sept. 14, 2020, 5:55 P.M.), <https://www.startribune.com/osha-cites-jbs-smithfield-foods-for-failing-to-protect-employees-from-coronavirus/572407322/> (“The U.S. Labor Department has cited Smithfield Foods and JBS for failing to protect employees from the coronavirus, making them the first two major meatpackers to face a federal fine after outbreaks at slaughterhouses infected thousands of workers.”); Shelly Bradbury, Eight JBS Greeley Worker dies amid coronavirus outbreak at meat plant, THE DENVER POST (May 18, 2020, 3:28 P.M.), <https://www.denverpost.com/2020/05/18/jbs-greeley-coronavirus-covid-death/> (reporting that Tin Aye age 60 was the eight COVID-19 death at the JBS Greeley plant).

³⁸ Yuegi Yang, Meatpacker JBS Fined \$15,615 After Deadly Covid-19 Outbreak, BLOOMBERG (Sept. 12, 2020), <https://www.bloomberg.com/news/articles/2020-09-12/meatpacker-jbs-fined-15-615-after-deadly-coronavirus-outbreak> (“The fine levied against Smithfield drew outrage as inadequate from two senators, a former safety official and a major national union. OSHA said it was the maximum allowed by law.”); see also Tom Polansek & P.j. Huffstutter, OSHA cites JBS, Smithfield Foods for failing to protect employees from coronavirus, STAR TRIBUNE (Sept. 14, 2020, 5:55 P.M.), <https://www.startribune.com/osha-cites-jbs-smithfield-foods-for-failing-to-protect-employees-from-coronavirus/572407322/> (JBS spokesman Cameron Bruett claims the citations are without merit, said “a standard that did not exist in March as we fought the pandemic with no guidance.”).

³⁹ Tonya Mosley, U.S. Still Lags In COVID-19 Workplace Safety, Former OSHA Official Says, NAT'L PUB. RADIO MORNING EDITION (Jan. 14, 2021), <https://www.npr.org/sections/coronavirus-liveupdates/2021/01/14/956448224/u-s-continues-to-lag-in-covid-19-workplace-safety-former-osha-official-says> (“‘What keeps me up at night is that nine months after the beginning of the pandemic, that there are still no specific requirements that as a nation, every business that has employees has to implement to mitigate the spread of COVID-19,’ said [National Employment Law Project Worker Health and Safety Program Director Deborah] Berkowitz, a former chief of staff and senior policy adviser at OSHA under President Barack Obama.”); see also Deborah Berkowitz, Worker Safety & Health During COVID-19 Pandemic: Rights & Resources, NAT'L EMP. L. PROJECT (Apr. 9, 2020), <https://www.nelp.org/publication/worker-safety-health-during-covid-19-pandemic-rights-resources/> (a “toolkit” to workers on the job during the pandemic,

The story of Saul Sanchez is not an isolated incident. Over 200 meat plant workers have died from COVID, and thousands of others have been exposed to the virus due to unsafe working conditions⁴⁰. Yet, despite cries for worker protection from all low-wage industries providing essential services, such as warehousing, grocery stores, and delivery services, OSHA has refused to issue COVID-related safety mandates outside of the healthcare industry. To date, OSHA has only issued one other citation (for approximately \$13,000) to a meat processing plant for COVID safety violations.⁴¹ The Sanchez family have called the fines “insulting and laughable,” stating that the small fine, which was meant to penalize JBS for *all* of the COVID-19 infections and deaths at their plant, not just the death of Saul, is “what enables these companies not to care for their employees.”⁴² The family spent more money

“from frontline health care workers and emergency responders, to those working in supermarkets, delivery, pharmacies, factories, transportation, sanitation, and all other essential workplaces.”); *Call Your Representative: Stand with Essential Workers*, WARREN DEMOCRATS (2021), <https://elizabethwarren.com/action/essential-workers/call-for-bor> (providing instructions to demand that the House of Representatives pass Senator Warren and Representative Khanna’s Essential Workers Bill of Rights).

⁴⁰ While the actual points of contracting the virus or exposure to the virus is unknown, it is highly likely that the victims contracted the virus at work given the working conditions and the probability of contracting the virus at workplaces that are crowded and unable to maintain physical distancing. Jonathan W. Dyal, Michael P. Grant, & Kendra Broadwater, et al., *COVID-19 Among Workers in Meat and Poultry Processing Facilities*, CTRS. FOR DISEASE CONTROL & PREVENTION (May 8, 2020), <https://www.cdc.gov/mmwr/volumes/69/wr/mm6918e3.htm> (explaining that meatpacking facility challenges include structural and operational practices that make it difficult to maintain a 6-foot distance while working; the pace and physical demands of processing work making adherence to face covering recommendations difficult; worksites having difficulty adhering to the heightened cleaning and disinfection guidance recommended for all worksites to reduce SARS-CoV-2 transmission; and company incentives for employees to work ill); see also Mary Bauer and Maria Perales Sanchez, *Ripe for Reform: Abuses of Agricultural Workers in the H-2A Visa Program*, CENTRO DE LOS DERECHOS DEL MIGRANTE, INC. 8 (2020), <https://cdmigrante.org/wp-content/uploads/2020/04/Ripe-for-Reform.pdf> (“The living and working conditions described by workers make workers incredibly vulnerable to Covid-19. Workers live in overcrowded housing, are transported in crowded buses, work without the ability to take breaks for handwashing, and are for all practical purposes unable to practice social distancing while living and working in the United States.”); Leah Douglas, *Mapping Covid-19 outbreaks in the food system*, FERN (April 22, 2020), <https://thefern.org/2020/04/mapping-covid-19-in-meat-and-food-processing-plants/>.

⁴¹ See *OSHA News Release – Region 8*, OSHA (Sept. 10, 2020), <https://www.osha.gov/news/newsreleases/region8/09102020> (stating that OSHA cited Smithfield for \$13,494 for violations of the general duty clause for failure to protect employees from exposure to coronavirus).

⁴² Dillon Thomas, *‘It’s a Joke’: Family Reacts to \$15,000 Fine Against Greeley’s JBS Plant*, DENVER CBS LOCAL (Sept. 13, 2020, 11:56 P.M.), <https://denver.cbslocal.com/2020/09/13/saul-sanchez-jbs-greeley-fine-coronavirus/>.

on funeral expenses to bury him.⁴³

In a recent interview, Kim Cordova, the president of the United Food and Commercial Workers Union Local 7 highlighted how the outbreak of COVID-19 at the Greeley JBS Plant demonstrated the lack of regard for the lives of the meat processing workers because they are predominantly people of color and immigrants.⁴⁴ “If there were not this type of population in the plant, this would never happen. You would see riots in the street...[t]hey’re being treated like replaceable objects.”⁴⁵ This implicit (and sometimes explicit) bias is part of a racialized narrative regarding work ethic and resiliency and the physicality of their bodies that allows employers to exploit workers based on race and ethnicity.⁴⁶

Although JBS has claimed that the citation is without merit and it has provided increased safety measures, Erica Villegas, a contractor who was hired by JBS to screen employees for COVID-19, has stated that JBS was not interested in protecting their workers. As part of a whistleblower investigation, Villegas stated that “JBS did the minimum it could to keep their doors open...I did not get the impression JBS was interested in having a thorough or reliable screening program. It was all a show.”⁴⁷ “JBS would try to convince people that they were fine to go to work....”⁴⁸ Sarah-Jean Buck,

⁴³ Dillon Thomas, *‘It’s a Joke’: Family Reacts to \$15,000 Fine Against Greeley’s JBS Plant*, DENVER CBS LOCAL (Sept. 13, 2020, 11:56 P.M.), <https://denver.cbslocal.com/2020/09/13/saul-sanchez-jbs-greeley-fine-coronavirus/> (“Saul Sanchez’s family said the fine is less money than they spent to bury the patriarch of their family.”). At the time, at least 7 JBS employees had died from COVID. The \$15,000 fine is barely \$2,000 for each loss of life.

⁴⁴ Michael Elizabeth Sakas, *Colorado Leads Nations For Most COVID-19 Deaths Connected to Meat Processing Plants, Sixth Greeley JBS Employee Dies*, COLO. PUB. RADIO NEWS (May 1, 2020), <https://www.cpr.org/2020/05/01/colorado-leads-nation-for-most-covid-19-deaths-connected-to-meat-processing-plants-sixth-greeley-jbs-employee-dies/>.

⁴⁵ Michael Elizabeth Sakas, *Colorado Leads Nations For Most COVID-19 Deaths Connected to Meat Processing Plants, Sixth Greeley JBS Employee Dies*, COLO. PUB. RADIO NEWS (May 1, 2020), <https://www.cpr.org/2020/05/01/colorado-leads-nation-for-most-covid-19-deaths-connected-to-meat-processing-plants-sixth-greeley-jbs-employee-dies/>.

⁴⁶ See *infra* Part II.

⁴⁷ Cuyler Meade, *Whistleblowers: JBS’ COVID-19 Screen process encouraged employees to work while sick, discouraged accurate screening*, GREELEY TRIB. (Oct. 9, 2020, 3:25 A.M.), <https://www.greeleytribune.com/2020/10/06/whistleblowers-jbs-covid-19-screening-process-encouraged-employees-to-work-while-sick-discouraged-accurate-screening/>.

⁴⁸ Cuyler Meade, *Whistleblowers: JBS’ COVID-19 Screen process encouraged employees to work while sick, discouraged accurate screening*, GREELEY TRIB. (Oct. 9, 2020, 3:25 A.M.), <https://www.greeleytribune.com/2020/10/06/whistleblowers-jbs-covid-19-screening->

a licensed medical assistant also hired by JBS to screen employees for COVID-19 told investigators that “JBS’ actions incentivized workers to lie about symptoms so they would work while sick and get paid...[m]oreover, JBS encouraged us to not diagnose anyone with the virus so that they could work.”⁴⁹ The decision to go to work sick or lose a day of pay is not new to the pandemic. Many low-wage workers lack paid sick days and quality healthcare. The lack of paid leave, risk of job loss, and pressure to earn a living creates a “work while sick” culture where workers risk spreading illnesses or their own health out of fear of retaliation and economic need. The pandemic, however, has made the risk deadly.

Months after the loss of their patriarch, the Sanchez family continues to fight for dignity and accountability for Sanchez’s death. Like many other workers who have contracted COVID on the job, they are fighting with the workers compensation system to cover Saul’s medical expenses and lost income while he was out of work due to the virus. In early October 2020, the Colorado Worker’s Compensation system denied the Sanchez family claims to worker compensation because they could not show that Saul contracted COVID-19 on the job.⁵⁰ The issue of proving that an employee contracted COVID-19 on the job has become hotly debated throughout all industries.⁵¹

process-encouraged-employees-to-work-while-sick-discouraged-accurate-screening/.

⁴⁹ Cuyler Meade, *Whistleblowers: JBS’ COVID-19 Screen process encouraged employees to work while sick, discouraged accurate screening*, GREELEY TRIB. (Oct. 9, 2020, 3:25 A.M.),

<https://www.greeleytribune.com/2020/10/06/whistleblowers-jbs-covid-19-screening-process-encouraged-employees-to-work-while-sick-discouraged-accurate-screening/>.

⁵⁰ Conor McCue, *Report: COVID-19 Related Workers’ Compensation Claims Denied by JBS*, DENVER CBS LOCAL (Oct. 1, 2020, 12:43 P.M.), <https://denver.cbslocal.com/2020/10/01/covid-workers-compensation-claims-denied-jbs-colorado/>; see also Jacey Fortin, *After Meat Workers Die of Covid-19, Families Fight for Compensation*, N.Y. TIMES (Oct. 6, 2020), <https://www.nytimes.com/2020/10/06/business/coronavirus-meatpacking-plants-compensation.html> (“Those denials, first reported by Reuters, offered a view of the difficulties faced by families of essential workers who have fallen ill or died because of the coronavirus, many of whom are struggling to cover medical or funeral costs.”).

⁵¹ Bryce Covert, *COVID-19 Workers’ Comp Claims are Being Held Up or Denied*, THE INTERCEPT (Sept. 7, 2020, 7:00 A.M.), <https://theintercept.com/2020/09/07/coronavirus-workers-compensation-claims-labor/> (“Employers and insurance companies are [. . .] insisting that employees, even those directly exposed to the virus, can’t prove that they got sick at work and claiming that they were infected outside the workplace.”); see also Lauren Weber, *Why So Many COVID-19 Workers’ Comp Claims Are Being Rejected*, WALL ST. J. (Feb. 14, 2021, 10:25 A.M. ET), <https://www.wsj.com/articles/why-so-many-covid-19-workers-comp-claims-are-being-rejected-11613316304> (“[Chicago Attorney Jose Rivero] has filed more than 30 workers’ compensation claims for people who said they contracted Covid-19 while on the job. In 10 of his cases, including one involving an employee at a meatpacking plant, the workers died. Every claim has been denied. The insurers that denied

Unable to find justice through the OSHA enforcement process and stalled by JBS denial of worker compensation claims, the Sanchez family along with dozens of impacted workers and survivors of JBS workers who have died after contracting COVID-19 at the plant, have turned to alternative litigation strategies and community organizing to raise awareness and improve working conditions at the plant.⁵² Grassroots organizations, like Latinos Unidos, have called for workers to organize and take a stance against the working conditions at JBS. As COVID deaths rose over the summer, the group issued announcements on Facebook urging the community to support JBS workers: “Attention protest warriors!!! We need to support JBS workers. Please go to JBS. JBS needs to know that workers have community support!!! JBS needs to pay and protect their workers!!!!”⁵³ Similar actions are taking place throughout the United States at warehouses, grocery stores, and

the claims have said it can't be proved that the workers were infected on the job.”); Melissa Bailey & Christina Jewett, *Families of Health Workers Killed by COVID Fight for Denied Workers' Comp Benefits*, KAISER HEALTH NEWS (Jul. 13, 2020), <https://khn.org/news/adding-to-covid-stress-families-of-health-workers-fight-for-denied-workers-comp-benefits/> (Legal experts say that “in some states COVID-19 falls into a long-standing category of diseases like a cold or the flu — conditions not covered by workers' compensation — with no plans to change that. Other states force workers to prove they caught the virus at work, rather than from a family member or in the community.”); see generally Josh Cunningham, *COVID-19: Workers' Compensation*, NAT'L CONF. OF STATE LEGISLATURES (Dec. 9, 2020), <https://www.ncsl.org/research/labor-and-employment/covid-19-workers-compensation.aspx> (stating that seventeen states and Puerto Rico have taken action to extend workers compensation coverage to include COVID-19 as a work-related illness and nine states have enacted legislation creating a presumption of coverage for various types of workers) (last visited Feb. 19, 2021).

⁵² Jacey Fortin, *After Meat Workers Die of Covid-19, Families Fight for Compensation*, N.Y. TIMES (Oct. 6, 2020), <https://www.nytimes.com/2020/10/06/business/coronavirus-meatpacking-plants-compensation.html>; see also Esther Honig & Ted Genoways, “*The Workers are Being Sacrificed*”: *As Cases mounted, Meatpacker JBS Kept People on Crowded Factory Floors*, MOTHER JONES (May 1, 2020), <https://www.motherjones.com/food/2020/05/meatpacking-coronavirus-workers-factory-jbs-tyson-smithfield-covid-crisis-sacrifice-outbreaks-beef/> (the median hourly income in 2018 for animal slaughtering and processing workers was \$13.76 or \$28,620 a year); Lindsay Fendt, *Meatpacking Giant JBS Denies Workers' Coronavirus Claims*, NAT'L PUB. RADIO: MORNING EDITION (Nov. 11, 2020, 5:04 A.M. ET), <https://www.npr.org/2020/11/11/933754519/meatpacking-giant-jbs-denies-workers-coronavirus-claims> (“JBS says [JBS Janitor Alfredo Hernandez's] infection was not work-related. And it denies responsibility for the infection of thousands of other workers at its plants across the country. Many states require workers claiming compensation to prove that their injury or illness occurred while they were on the job.”).

⁵³ Latinos Unidos of Greeley, FACEBOOK (July 13, 2020, 10:54 P.M.), <https://m.facebook.com/LatinosunidosofGreeley/posts/3542026335827051>.

delivery centers as low-wage workers call on the public to take action in support of workplace safety.⁵⁴

The Sanchez family continues to fight for justice for Saul. Their struggle for fairness and improved working has gained national media attention. The combination of strategic legal actions and community organizing has placed the working conditions of meat packing workers at the forefront of the fight against COVID-19. Continued attention and public scrutiny are needed to bring about industry-wide change and systemic improvements throughout the low-wage workforce.

II. WHO ARE THE MEAT PROCESSING WORKERS?

A. The Power of Narratives and Counter-Narratives

There is power in telling stories, especially the counter-narratives.⁵⁵ Public awareness of the working conditions of our nation's invisible workforce calls attention to the matter, supports workers organizing for change, and acts as a deterrence for bad employers. Saul's story needs to be told, but so do those of the countless other low-wage essential workers who have lost their lives to COVID-19 by going to work. The telling of narratives and counter narratives give us glimpses into the motivations behind action and inaction. The stories of the "dominant" or "ingroups" reveal the circumstances under which their privilege and "shared reality" appear normal.⁵⁶ The stories of the "outgroups" work to shatter the normalization of the "ingroup reality".⁵⁷ The images and the stories cannot disappear after the pandemic. We need to share the stories of workers to keep a spotlight on the workplace issues that will continue to plague low-wage workers in the fight

⁵⁴ See Erik Ortiz, *Target, Walmart workers and others plan 'sickout' protests over coronavirus safety*, MSNBC (May 1, 2020, 4:31 P.M. EDT), <https://www.nbcnews.com/news/us-news/target-walmart-workers-others-plan-sickout-protests-over-coronavirus-safety-n1195126>; Evan Sully, *A Fired Amazon Employee Led a Protest in Front of Jeff Bezos' \$165 Million Beverly Hills Mansion Over Workers' Wages and Job Protections*, BUS. INSIDER (Oct. 5, 2020, 5:44 P.M.), <https://www.businessinsider.com/amazon-protesters-visit-jeff-bezos-california-house-demand-wage-increase-2020-10>; *Kroger Workers Staging Weekly Protests Over Proposed Healthcare Cuts*, UNITED FOOD & COM. WORKERS LOCAL 400 (Oct. 7, 2020), <http://www.ufcw400.org/2020/10/07/kroger-workers-staging-weekly-protests-over-proposed-healthcare-cuts/>; Luis Feliz Leon, *The Essential Worker Strike Wave*, THE NEW REPUBLIC (Jan. 22, 2021), <https://newrepublic.com/article/161019/covid-essential-workers-strike> (detailing more than 1,000 frontline workers on strike in New York City).

⁵⁵ Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*.

⁵⁶ Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative* at 2412.

⁵⁷ Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative* at 2412.

for justice and dignity at work.

The following sections provide a narrative and counter-narrative framework and a critical analytical lens to explain why the story of Saul Sanchez is not an isolated incident, but rather the result of years of systemic and structural racism against people of color and immigrants in low-wage industries. COVID-19 has uncovered and challenged these narratives. By questioning the perceived reality, revealing universal vulnerabilities,⁵⁸ and identifying where interests converge and diverge, we can identify root causes of problems and develop more effective solutions.

B. The COVID-19 Pandemic Hits the United States

The coronavirus disease 2019 (COVID-19) is a respiratory illness that can result in serious health conditions, including death.⁵⁹ On January 31, 2020, the United States Secretary of Health and Human Services declared COVID-19 a public health emergency.⁶⁰ By March 11th, the World Health Organization declared the virus a global pandemic.⁶¹ According to the WHO and the U.S. Center for Disease Control (CDC), COVID-19 is a highly contagious virus that spreads by community contact through airborne droplets (coughs, sneezes, or spitting).⁶² The virus can be spread by

⁵⁸ Margaret Fineman, *The Vulnerable Subject and the Responsive State*, 60 EMORY L.J. 251, 266-269 (2010).

⁵⁹ *Symptoms of Coronavirus*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/coronavirus/2019-ncov/symptoms-testing/symptoms.html> (last updated Feb. 22, 2020) (last accessed Feb. 28, 2020).

⁶⁰ *Secretary Azar Declares Public Health Emergency for United States for 2019 Novel Coronavirus*, U.S. DEP'T HEALTH & HUMAN SERVICES (Jan. 31, 2020), <https://www.hhs.gov/about/news/2020/01/31/secretary-azar-declares-public-health-emergency-us-2019-novel-coronavirus.html>.

⁶¹ *WHO Director-General's Opening Remarks at the Media Briefing on COVID-19*, WORLD HEALTH ORG. (Mar. 11, 2020), <https://www.who.int/dg/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---11-march-2020> ; see also Bill Chappelle, *Coronavirus: COVID-19 Is Now Officially A Pandemic, WHO Says*, NPR: GOATS AND SODA: THE CORONAVIRUS CRISIS (Mar. 11, 2020, 12:30 PM), <https://www.npr.org/sections/goatsandsoda/2020/03/11/814474930/coronavirus-covid-19-is-now-officially-a-pandemic-who-says>.

⁶² *Coronavirus Disease (COVID-19) Advice for the Public*, WORLD HEALTH ORG. (last updated Feb. 16, 2021), <https://www.who.int/emergencies/diseases/novel-coronavirus-2019/advice-for-public> (“When someone coughs, sneezes, or speaks they spray small liquid droplets from their nose or mouth which may contain virus.”) (last visited Feb. 19, 2021); see also *How to Protect Yourself and Others*, CTRS. FOR DISEASE CONTROL & PREVENTION (last updated Feb. 4, 2021), <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/prevention.html> (“These droplets can land in the mouths or noses of people who are

symptomatic individuals, and by (unaware) asymptomatic persons.⁶³ This makes it very easy to spread in crowded work spaces like meat processing plants.

In early 2020, COVID-19 reached the United States.⁶⁴ On Friday, March 13th, the President of the United States declared a national emergency related to the virus.⁶⁵ Across the country, states issued “stay at home orders” identifying “essential workers” in accordance with the guidance provided by the U.S. Department of Homeland Security, Cybersecurity and Infrastructure Agency.⁶⁶ The federal guidance identified industries “critical” to American

nearby or possibly be inhaled into the lungs.”) (last visited Feb. 19, 2021).

⁶³ *Meat and Poultry Processing Workers and Employers: Interim Guidance from the CDC and Occupational Safety and Health Administration (OSHA)*, CTRS. FOR DISEASE CONTROL & PREVENTION (last updated Feb. 6, 2021), <https://www.cdc.gov/coronavirus/2019-ncov/community/organizations/meat-poultry-processing-workers-employers.html> (“Recent studies indicate that people who are not showing symptoms can spread the virus.”) (last visited Feb. 19, 2021). “One of the reasons Covid-19 has spread so swiftly around the globe is that for the first days after infection, people feel healthy. Instead of staying home in bed, they may be out and about, unknowingly passing the virus along. But in addition to these pre-symptomatic patients, the relentless silent spread of this pandemic is also facilitated by a more mysterious group of people: the so-called asymptomatics.” Emily Laber Warren, *Scientists Explore Why Some People are Able to Live with an Infection Unscathed*, SHOTS: HEALTH NEWS FROM NPR (Aug. 29, 2020, 6:00 AM ET), <https://www.npr.org/sections/health-shots/2020/08/29/906268526/scientists-explore-why-some-people-are-able-to-live-with-an-infection-unscathed>.

⁶⁴ *Timeline of WHO’s Response to COVID-19*, WORLD HEALTH ORG. (last updated Dec. 28, 2020), <https://www.who.int/news-room/detail/29-06-2020-covidtimeline> (last visited Feb. 19, 2021). See also Caroline Kantis, Samantha Kiernan, and Jason Socrates Bardi, *UPDATED: Timeline of the Coronavirus*, THINKGLOBALHEALTH (Jan. 15, 2021), <https://www.thinkglobalhealth.org/article/updated-timeline-coronavirus> (“January 21: United States confirms its first case in Washington state, a man who traveled to the Wuhan area.”)

⁶⁵ “NOW, THEREFORE, I, DONALD J. TRUMP, President of the United States, by the authority vested in me by the Constitution and the laws of the United States of America, including sections 201 and 301 of the National Emergencies Act (50 U.S.C. 1601 *et seq.*) and consistent with section 1135 of the Social Security Act (SSA), as amended (42 U.S.C. 1320b-5), do hereby find and proclaim that the COVID-19 outbreak in the United States constitutes a national emergency, beginning March 1, 2020.” Proclamation No. 9994, 85 Fed. Reg. 15337 (Mar. 13, 2020), <https://www.govinfo.gov/content/pkg/FR-2020-03-18/pdf/2020-05794.pdf>.

⁶⁶ A. Moreland, C. Herlihy, M.A. Tynan, et al., *Timing of State and Territorial COVID-19 Stay-at-Home Orders and Changes in Population Movement — United States, March 1–May 31, 2020*, 69 MORBIDITY & MORTALITY WEEKLY REP. 1198–1203 (Sept. 4, 2020), <https://www.cdc.gov/mmwr/volumes/69/wr/pdfs/mm6935a2-H.pdf>; see also Sarah Mervosh, Denise Lu, & Vanessa Swales, *See Which States and Cities Have Told Residents to Stay at Home*, N.Y. TIMES (Updated Apr. 20, 2020), <https://www.nytimes.com/interactive/2020/us/coronavirus-stay-at-home-order.html> (Interactive chart showing how stay-at-home directives began in California in mid-March

infrastructure that should remain open.⁶⁷ On April 28, 2020 (ironically, two days before International Workers' Day), then President Trump issued an executive order under the Defense Production Act to keep meat processing plants open.⁶⁸ Prior to the order, over a dozen major meat processing plants had temporarily shut down production due to rampant spread of COVID-19, thousands of infected workers, and dozens of COVID related deaths.⁶⁹

and spread around the United States).

⁶⁷ *Guidance on the Essential Critical Infrastructure Workforce: Ensuring Community and National Resilience in COVID-19 Response Version 4.0*, DEP'T OF HOMELAND SEC. CYBERSECURITY & INFRASTRUCTURE SEC AGENCY 3 (Aug. 18, 2020) https://www.cisa.gov/sites/default/files/publications/Version_4.0_CISA_Guidance_on_Essential_Critical_Infrastructure_Workers_FINAL%20AUG%2018v3.pdf ("While stopping the spread of the virus and protecting the most vulnerable among us rightfully remain national priorities, a degradation of infrastructure operations and resilience only makes achieving those missions more difficult. Recognizing this, CISA published guidance identifying Essential Critical Infrastructure Workers at the outset of the COVID-19 pandemic.") CISA issued the guidance originally on March 19, 2020, and published three additional updates to reflect the changing landscape of the nation's COVID-19 response. While earlier versions were primarily intended to help officials and organizations identify essential work functions in order to allow them access to their workplaces during times of community restrictions, Version 4.0 identifies those essential workers that require specialized risk management strategies to ensure that they can work safely." *Guidance on the Essential Critical Infrastructure Workforce*, DEP'T OF HOMELAND SEC. CYBERSECURITY & INFRASTRUCTURE SEC. AGENCY, <https://www.cisa.gov/publication/guidance-essential-critical-infrastructure-workforce> (last revised Aug. 25, 2020).

⁶⁸ Exec. Order No. 13917, 85 Fed. Reg. 26313 (Apr. 28, 2020), <https://www.federalregister.gov/documents/2020/05/01/2020-09536/delegating-authority-under-the-defense-production-act-with-respect-to-food-supply-chain-resources> (declaring that despite COVID-19 outbreaks, the meat and poultry food supply chain must be protected by keeping the plants operating); see also *Executive Order on the Food Supply Chain and the Defense Production Act: FAQs*, CONG. RES. SERV.: LEGAL SIDEBAR (May 1, 2020); see also *USDA To Implement President Trump's Executive Order on Meat and Poultry Processors*, U.S. DEP'T OF AGRIC. (April 28, 2020), <https://www.usda.gov/media/press-releases/2020/04/28/usda-implement-president-trumps-executive-order-meat-and-poultry> (statement by U.S. Secretary of Agriculture Sonny Perdue thanking President Donald J. Trump for signing the Executive Order to keep meat and poultry processing facilities open during the COVID-19 national emergency). International Workers' Day is celebrated on May 1st. *International Workers' Day*, DAYS OF THE YEAR <https://www.daysoftheyear.com/days/international-workers-day/> (explaining the history of International Workers' Day) (May 1st [. . .] was chosen for International Workers' Day to commemorate the Haymarket affair of May 4th, 1886 in Chicago, when an unidentified person threw a bomb at the police, who responded by opening fire on the workers, killing four of them. Today, International Workers' day is celebrated on every continent.") (last visited Feb. 21, 2021).

⁶⁹ Dan Charles, *Meat Processing Plants Suspend Operations After Workers Fall Ill*, NAT'L PUB. RADIO (Apr. 7, 2020), <https://www.npr.org/sections/coronavirus-live->

C. Who Are the Individuals Working the Meat Processing Lines?

Worker safety is not a “new” or “COVID-19 issue” for meat processing plants. Long before the COVID-19 pandemic, low wages, lack of benefits, and unequal bargaining power created an industry with some of the highest levels of workplace injuries, the lowest pay within the industrial sector, and enormous pressure to produce high volumes of product at any cost. Over a 100 years ago, Upton Sinclair’s *The Jungle* detailed the hazardous working conditions and exploitation of immigrant workers at Chicago meat processing plants.⁷⁰ For over twenty years, Human Rights Watch has issued detailed reports on the exploitative history and unsafe working conditions at meat processing plants.⁷¹ Decades of poor working conditions, lack of workplace safety protections or quality healthcare, and minimal federal oversight have snowballed into the perfect storm within the meat processing industry.⁷²

updates/2020/04/07/828873225/meat-processing-plants-suspend-operations-after-workers-fall-ill; see also Jacob Bunge, Jesse Newman, & Kirk Maltais, *Meat Companies Want to Reopen, but Officials Fear New Wave of Coronavirus Infections*, WALL STREET J. (Apr. 30, 2020), <https://www.wsj.com/articles/meat-companies-want-to-reopen-but-officials-fear-new-wave-of-coronavirus-infections-11588261811> (“If they reopen it will continue to spread”, said Jenna Link, health department administrator for Warren County, Ill., where Smithfield closed a pork plant linked to some of the rural county’s 57 cases.

⁷⁰ UPTON SINCLAIR, *THE JUNGLE* (Doubleday, Page & Co., 1906).

⁷¹ Human Rights Watch, *Blood Sweat, and Fear, Workers’ Rights in U.S. Meat and Poultry Plants*, HUM. RTS. WATCH (Jan. 24, 2005), <https://www.hrw.org/report/2005/01/24/blood-sweat-and-fear/workers-rights-us-meat-and-poultry-plants#>, (detailing how meat processing plant workers live in constant fear of retaliation and injury at work and the lack of protections and enforcement of health and safety regulations.); Matt McConnell, “*When We’re Dead and Buried, Our Bones Will Keep Hurting: Workers’ Rights Under Threat in US Meat and Poultry Plants*”, HUM. RTS. WATCH (Sept. 4, 2019) <https://www.hrw.org/report/2019/09/04/when-were-dead-and-buried-our-bones-will-keep-hurting/workers-rights-under-threat>, (update to 2004 HWR report detailing how conditions remain “dirty, demanding, and dangerous” and the continued failure of the U.S. government to protect the workers.).

⁷² Human Rights Watch, *Blood Sweat, and Fear, Workers’ Rights in U.S. Meat and Poultry Plants*, HUM. RTS. WATCH (Jan. 24, 2005), <https://www.hrw.org/report/2005/01/24/blood-sweat-and-fear/workers-rights-us-meat-and-poultry-plants#>, (detailing how meat processing plant workers live in constant fear of retaliation and injury at work and the lack of protections and enforcement of health and safety regulations.); Matt McConnell, “*When We’re Dead and Buried, Our Bones Will Keep Hurting: Workers’ Rights Under Threat in US Meat and Poultry Plants*”, HUM. RTS. WATCH (Sept. 4, 2019) <https://www.hrw.org/report/2019/09/04/when-were-dead-and-buried-our-bones-will-keep-hurting/workers-rights-under-threat>, (update to 2004 HWR report detailing how conditions remain “dirty, demanding, and dangerous” and the continued failure of the

While other low-wage industries have also experienced COVID-19 hotspots, the combination of a vulnerable workforce, racially charged narratives and stereotypes, and powerful corporate interests make meatpacking workers more susceptible to exposure to the virus at work.

- i. Today's Meatpacking Workers are Mostly People of Color Living in Low-wage Jobs

Meatpacking line-workers (the individuals who cut, slice, portion, and “process” the cuts of meat in an assembly line manner) are racially and ethnically diverse. Over half of meat processing workers are people of color or immigrants.⁷³ Foreign-born workers are more likely to work in low-wage essential jobs.⁷⁴ This is especially true for the meatpacking industry.

U.S. government to protect the workers.); *see also* AFL-CIO, IMMIGRANT WORKERS AT RISK: THE URGENT NEED FOR IMPROVED WORKER SAFETY AND HEALTH PROGRAMS (Aug. 2005), https://ecommons.cornell.edu/bitstream/handle/1813/88124/afl_cio17_ImmigrantWorkersatRisk.pdf?sequence=1&isAllowed=y

⁷³ Haley Brown, Shawn Fremstad, & Hye Jin Rhu, *Meatpacking Workers are a Diverse Group Who Need Better Protections* (Apr. 29, 2020), CTR. ECON. & POL'Y RES., <https://cepr.net/meatpacking-workers-are-a-diverse-group-who-need-better-protections/> (finding that over forty percent of meatpacking workers are Latinx, and approximately one-quarter are Black. The Center for Economics and Policy Research report used data from the American Community Survey Public Use Microdata Sample over a five-year period (2014 - 2018). The report defined “frontline meatpacking workers” as individuals working as butchers and other processing workers, packagers and machine operators, and other food processing workers as classified by the U.S. Census Bureau’s Standard Occupational Classification system. The actual number of immigrant workers is likely higher, as most surveys and reports do not account for undocumented workers who are less likely to self-identify or participate in surveys.) *See also* Jeffrey S. Passel & D’Vera Cohn, *U.S. Unauthorized Immigrant Total Dips to Lowest Level in a Decade: Methodology*, PEW RES. CTR. (Nov. 27, 2018), <https://www.pewresearch.org/hispanic/2018/11/27/unauthorized-immigration-estimate-methodology/> (describing residual estimation methodology used to calculate undocumented immigrants. “The number of potentially unauthorized immigrants typically exceeds the estimated number of unauthorized immigrants from the residual estimates by 20% - 35% nationally. So, to have a result consistent with the residual estimate of lawful and unauthorized immigrants, probabilistic methods are employed to assign lawful or unauthorized status to these potentially unauthorized individuals.”).

⁷⁴ *Labor Force Characteristics of Foreign-born Workers News Release*, U.S. BUREAU LAB. STAT. (May 15, 2020), <https://www.bls.gov/news.release/forbrn.htm> (finding that foreign born workers are more likely than U.S. born workers to work in industries that have been designated “essential” during the pandemic such as service, construction, transportation, and manufacturing) (last visited on February 21, 2021).

Although the exact numbers are unknown, there is no question that the meatpacking industry employs a disproportionate number of immigrant workers (51.1 percent) compared to the national U.S. workforce (which is 17 percent immigrant).⁷⁵ CDC reports from April and May of 2020 found that racial disparities in healthcare, housing, and working conditions led to almost eighty-seven percent of people of color in meat processing contracting COVID-19.⁷⁶ The large number of immigrant workers makes the meatpacking workforce particularly vulnerable to workplace exploitation and underreporting of health and safety violations.⁷⁷

It is clear that foreign-born workers are more likely to suffer workplace injuries or die at work due to language barriers, inadequate safety training, and a disproportionate number of individuals working in dangerous industries.⁷⁸ Fears of deportation, lack of knowledge about workplace rights, and the need to earn a living discourages many low-wage immigrant workers from complaining about working conditions.⁷⁹ Immigrants working in meat-processing plants are six times more likely to live in households where all members have Limited English Proficiency.⁸⁰ Communication barriers make

⁷⁵ Haley Brown, Shawn Fremstad, & Hye Jin Rhu, *Meatpacking Workers are a Diverse Group Who Need Better Protections*, CTR. ECON. & POL'Y RES. (Apr. 29, 2020), <https://cepr.net/meatpacking-workers-are-a-diverse-group-who-need-better-protections/>.

⁷⁶ Waltenburg, et. al., *Update: COVID-19 Among Workers in Meat and Poultry Processing Facilities – United States, April – May 2020*, CDC (July 7, 2020), <https://www.cdc.gov/mmwr/volumes/69/wr/mm6927e2.htm>; see also Stephanie Ebbs, *Meatpacking Facilities Still Present Challenge to Containing COVID-19*, CDC says, ABC NEWS, (July 30, 2020), <https://abcnews.go.com/Politics/cdc-meatpacking-facilities-present-challenge-covid-19/story?id=71651227>

⁷⁷ Jayesh M. Rathod, *Immigrant Labor and the Occupational Safety and Health Regime*, 33 N.Y.U. REV. L. & SOC. CHANGE 497 (2009). (Injury and death rates for immigrant workers are likely undercounted. Insecure immigration status, restricted ability to work, fear of retaliation, lack of information, or lack of marketable job skills, make immigrant workers less likely to report or aggressively pursue workplace injuries; and referring to *Hidden Tragedy: Underreporting of Workplace Injuries and Illness*, Comm. On Educ. & Labor, 110th Cong., (June 19, 2008) (Report of House Hearing detailing studies showing that immigrant workers are likely to underreport workplace injuries.)

⁷⁸ AFL-CIO, *Immigrant Workers at Risk: The Urgent Need for Improved Worker Safety and Health Programs* (2005), available at, https://ecommons.cornell.edu/bitstream/handle/1813/88124/afl_cio17_ImmigrantWorkersatRisk.pdf?sequence=1&isAllowed=y; see also AFL-CIO, *Death on the Job, State by State Profile of Worker Safety and Health in the United States*, (Oct. 2020), available at, https://aflcio.org/sites/default/files/2020-10/DOTJ2020_Final_100620_nb.pdf.

⁷⁹ *Hidden Tragedy: Underreporting of Workplace Injuries and Illness*, Comm. On Educ. & Labor, 110th Cong., (June 19, 2008)

⁸⁰ Haley Brown, Shawn Fremstad, & Hye Jin Rhu, *Meatpacking Workers are a Diverse Group Who Need Better Protections*, CTR. ECON. & POL'Y RES. (Apr. 29, 2020),

it more difficult to understand workplace safety rules or employers' duties and fear of employer retaliation discourages immigrant workers from asserting workplace rights. The intersection of race, poverty, and industry norms results in employers who feel less obligated to provide safe working environments and workers who are unwilling to demand safe workplaces.⁸¹

Many meat processing workers depend on each paycheck to meet their basic living needs. Economic necessity places enormous pressure to work while sick and endure conditions that most would not tolerate. Almost half of meatpacking workers live in low-income households (earning less than \$52,400 a year for a family of four) and over ten percent live below the poverty line.⁸² Their poverty rates are more than double that of all other low-income workers.⁸³ In 2019, meatpackers earned forty percent less than the other manufacturing workers.⁸⁴ Over fifteen percent do not have health insurance.⁸⁵ Economic and health disparities among low-wage workers

<https://cepr.net/meatpacking-workers-are-a-diverse-group-who-need-better-protections/> (“About one-quarter (25.1 percent) of these workers live in households in which all of the members (age 14 or older) have limited proficiency in English, over six times the rate for US workers overall.”).

⁸¹ See Jayesh M. Rathod, *Beyond the "Chilling Effect": Immigrant Worker Behavior and the Regulation of Occupational Safety & Health*, 14 EMP. RTS. & EMP. POL'Y J. 267 (2010) (discussing how, in addition to immigration status, factors that may influence worker behavior include economic status and economic security; language ability and literacy; workplace and traditional culture; gender, age, and experience; and worker resistance and autonomy).

⁸² Haley Brown, Shawn Fremstad, & Hye Jin Rhu, *Meatpacking Workers are a Diverse Group Who Need Better Protections*, CTR. FOR ECON. & POL'Y RES. (Apr. 29, 2020), <https://cepr.net/meatpacking-workers-are-a-diverse-group-who-need-better-protections/>.

⁸³ Haley Brown, Shawn Fremstad, & Hye Jin Rhu, *Meatpacking Workers are a Diverse Group Who Need Better Protections*, CTR. FOR ECON. & POL'Y RES. (Apr. 29, 2020), <https://cepr.net/meatpacking-workers-are-a-diverse-group-who-need-better-protections/> (“Nearly half of frontline meatpacking workers (45.1 percent) live in low-income families (below 200 percent of the federal poverty line, or less than \$52,400 for a family of four in 2020) and about one-in-eight (12.4 percent) have income below the poverty line. This compares to 20.6 percent of all workers from low-income families and 6.7 percent of all workers with income below the poverty level.”).

⁸⁴ Matt McConnell, *When We're Dead and Buried, Our Bones Will Keep Hurting: Workers' Rights Under Threat in US Meat and Poultry Plants*, HUM. RTS. WATCH (Sept. 4, 2019), <https://www.hrw.org/report/2019/09/04/when-were-dead-and-buried-our-bones-will-keep-hurting/workers-rights-under-threat> (“In 1983, wages for workers in the meat and poultry industry fell, for the first time, below the national average for manufacturing work; in 1985, they were 15 percent lower; in 2002, they were 24 percent lower; today, they are 44 percent lower. Workers earn, on average, less than \$15 an hour.”).

⁸⁵ Haley Brown, Shawn Fremstad, & Hye Jin Rhu, *Meatpacking Workers are a Diverse Group Who Need Better Protections*, CTR. FOR ECON. POL'Y RES. (Apr. 29, 2020),

existed before COVID-19, but the virus has exacerbated the consequences of choosing to “work while sick.”

D. Choosing Between the Virus and Getting Paid.

Low wages and lack of quality healthcare make the choice of working while sick a deliberate economic decision. The lack of paid sick days, and punitive attendance policies make it difficult for meat packing workers to take days off when they are ill.⁸⁶ The choice is even more daunting for the countless number of undocumented immigrant workers who avoid medical treatment for fear of deportation or inability to pay out-of-pocket costs due to lack of health insurance.⁸⁷

The Center for Disease Control and Prevention recommends that workers experiencing COVID-19 symptoms or diagnosis should stay home.⁸⁸ While some essential employees were able to get up to two weeks of paid sick leave through the Families First Coronavirus Response Act, the Emergency Paid

<https://cepr.net/meatpacking-workers-are-a-diverse-group-who-need-better-protections/>.

⁸⁶Deena Shanker and Jen Skierritt, *Tyson Reinstates Policy that Penalizes Absentee Workers*, Bloomberg, (June 2, 2020, updated June 3, 2020), available at: <https://www.bloomberg.com/news/articles/2020-06-03/tyson-reinstates-policy-that-penalizes-absentee-workers>.

⁸⁷Samantha Artiga & Maria Diaz, *Health Coverage and Care of Undocumented Immigrants*, KAISER FAMILY FOUNDATION (Jul. 15, 2019), <https://www.kff.org/racial-equity-and-health-policy/issue-brief/health-coverage-and-care-of-undocumented-immigrants/> (“Research shows that shifting immigration policies under the Trump administration are leading to substantially increased fears among the immigrant community, affecting undocumented immigrants as well as lawfully present immigrants and citizen children of immigrants. Growing reports suggest that these fears are causing families to turn away from utilizing programs and services for themselves as well as their children, who are primarily U.S. born citizens and may qualify for Medicaid and CHIP.”); see also Michael Grabell, *What Happens If Workers Cutting Up the Nation’s Meat Get Sick?*, PROPUBLICA (Mar. 28, 2020), <https://www.propublica.org/article/what-happens-if-workers-cutting-up-the-nations-meat-get-sick> (“Going to the doctor is not an option, [Koch Food worker Ramirez] said, because he doesn’t have health insurance and fears it could expose his immigration status.”); Sarah Grusin, *COVID-19: Exacerbating Old Barriers for Immigrants*, NAT’L HEALTH L. PROGRAM (July 30, 2020), <https://healthlaw.org/covid-19-exacerbating-old-barriers-for-immigrants/> (“A recent report revealed that one in five adults in immigrant families with children reported that they or a family member avoided a public benefit such as SNAP, Medicaid, CHIP, or housing subsidies for fear of risking their future green card status. To make matters worse, immigrant families also have to worry about whether they will run into Immigration and Customs Enforcement when seeking care.”).

⁸⁸*Guidance for Business and Employers Responding to Coronavirus-19 (COVID-19)*, U.S. CTR FOR DISEASE CONTROL, (updated Jan. 4. 2021), available at: <https://www.cdc.gov/coronavirus/2019-ncov/community/guidance-business-response.html> (encouraging employers to implement paid sick leave and limit penalizing absences.)

Sick Leave Act does not require employers with more than 500 employees to participate and employers with less than fifty employees may opt out.⁸⁹ The Emergency Family Medical Leave Expansion Act, which extended the traditional Family Medical Leave Act to provide up to ten weeks of paid leave for COVID-19 for individuals caring for children whose school or childcare was closed due to COVID-19 related closings, had similar enforcement restrictions.⁹⁰ The exemptions left low-wage essential workers who worked for large national corporations including meat processing workers, without critical work-place protection and benefits.⁹¹ Low-wage workers with children who did not already have paid leave and did not qualify for the COVID related leaves had to make difficult decisions. Did they go to work sick to earn the day's paycheck or risk losing their job if they received an unexcused absence?

While paid sick leave is universal in twenty-two countries, the United States does not guarantee workers paid sick time.⁹² The availability and terms of sick day policies differ from job to job and vary within industries. The average worker only has about seven paid leave days.⁹³ Since the start of the

⁸⁹ Paid Leave under the Families First Coronavirus Response Act, 85 F.R. 19326 (April 6, 2020), *Available at*, <https://www.federalregister.gov/documents/2020/04/06/2020-07237/paid-leave-under-the-families-first-coronavirus-response-act>

⁹⁰ Paid Leave under the Families First Coronavirus Response Act, 85 F.R. 19326 (April 6, 2020), *Available at*, <https://www.federalregister.gov/documents/2020/04/06/2020-07237/paid-leave-under-the-families-first-coronavirus-response-act> (traditionally, FMLA only provides up to twelve weeks of unpaid leave. The extension of up to ten weeks of paid was an enormous financial assistance for workers with children.)

⁹¹ Alyssa Fowers and Shelly Tan, *The new sick leave doesn't protect the workers who need it the most*, Washington Post, (March 29, 2020), *available at*: <https://www.washingtonpost.com/graphics/2020/national/sick-leave-workers-coronavirus/>, (reporting 7.4 million essential workers are employed by large employers like national grocery stores, retail stores, fast food chains, and meat packing plants were exempt from providing the two week paid COVID-19 leave, compared to the 1.3 million workers who work for eligible for the paid leave, and the 2.2 million who work for small employers who are also exempt.)

⁹² Alyssa Fowers & Shelly Tan, *The New Sick Leave Doesn't Protect the Workers Who Need It the Most*, WASH. POST (Mar. 29, 2020), <https://www.washingtonpost.com/graphics/2020/national/sick-leave-workers-coronavirus/> (referring to Jody Heymann, Hye Jin Rho, John Schmitt, & Alison Earle, *Contagion Nations: a Study Comparing Paid Sick Leave Policies in 22 Nations*, CTR. FOR ECON. & POL'Y RES. (May 2009), <https://cepr.net/documents/publications/paid-sick-days-2009-05.pdf>).

⁹³ Usha Ranji, Michelle Long, & Alina Salganicoff, *Coronavirus Puts a Spotlight on Paid Leave Policies*, KFF (Dec. 14, 2020), <https://www.kff.org/coronavirus-covid-19/issue-brief/coronavirus-puts-a-spotlight-on-paid-leave-policies/#> (Explaining that among workers in private industry who have paid leave benefits, "the average duration is seven days;

pandemic, the United Food and Commercial Workers Union, which represents meatpacking workers, has been advocating for fourteen sick days for workers with mixed results.⁹⁴ Some plants allow workers to stay home, others have made sick leave policies more flexible or combined sick leave with short term disability to provide additional paid leave, but other companies are limiting or revoking sick leave policies, forcing workers to choose between getting paid or caring for their health.⁹⁵ To make matters worse some companies, like JBS, have imposed policies that encourage workers to go to work sick by providing bonuses for consecutive days of work.⁹⁶

The lack of paid sick days is not limited to the meatpacking industry. Overall, only thirty percent of individuals working in the lowest wage (earning \$10.48/hour or less) industries have access to paid sick days.⁹⁷

however, one-quarter (25%) of workers have fewer than five days. For state and local government workers, the average is 11 days, and 9% have fewer than five days.”)

⁹⁴ “Director of Occupational Health and Safety at the United Food and Commercial Workers Union, Robyn Robbins, said sick leave policies vary tremendously. ‘There are 500 local unions around the country, and the UFCW has been pushing for 14 days’ sick leave, successfully bargaining for this in contracts. Some companies are using a combination of different ways to allow workers to stay home when sick, many suspending their normal sick leave policy and making them more flexible. Some companies use a combination of paid sick days and short-term disability so that workers can stay home to recover and then return to work in a safe way. But not all companies are doing this; a few are even revoking paid sick leave policies that were in place at the beginning of this crisis. This only will result in sick workers coming to work, because they have to in order to earn a living, and the virus will continue to spread, both inside plants, and outside in their communities. It is bad corporate policy.’” Nailah John & Linda Golodner, *Keeping meatpacking workers safe in the age of COVID-19: A view from the front lines*, NAT’L CONSUMER LEAGUE (June 10, 2020), https://nclnet.org/covid_meatpacking/.

⁹⁵ Nailah John & Linda Golodner, *Keeping meatpacking workers safe in the age of COVID-19: A view from the front lines*, NAT’L CONSUMERS LEAGUE (June 10, 2020), https://nclnet.org/covid_meatpacking/

⁹⁶ Polly Mosendz, Peter Waldman, & Lydia Mulvany, *U.S. Meat Plants Are Deadly as Ever, With No Incentive to Change*, BLOOMBERG L. (June 18, 2020), <https://news.bloomberglaw.com/daily-labor-report/u-s-meat-plants-are-deadly-as-ever-with-no-incentive-to-change> (describing JBS practice of offering workers free meat and cash incentives for attendance during the pandemic.); *see also* Haven Orecchio-Egresitz, *A work-while-sick culture and lack of safeguards at meat plants has employees fearing for their lives*, BUS. INSIDER (May 6, 2020, 11:33 A.M.), <https://www.businessinsider.com/few-safeguards-meat-plant-workers-live-in-fear-2020-5> (describing how Greeley, CO JBS employees were offered a \$600 bonus to keep working after finding out that coworkers had tested positive for COVID-19).

⁹⁷ Gary Claxton & Larry Levitt, *Paid Sick Leave is Much Less Common for Lower-Wage Workers in Private Industry*, KAISER FAMILY FOUNDATION (Mar. 10, 2020), <https://www.kff.org/coronavirus-covid-19/issue-brief/paid-sick-leave-is-much-less-common-for-lower-wage-workers-in-private-industry/>. *see also* Adewale Maye, *Low-Wage Workers Least Likely to Have Paid Sick Days*, Ctr. for L. & Social Pol’y (Nov. 21, 2019),

Shortly after the pandemic hit the United States, companies like Walmart, Chipotle Mexican Grill, Uber, and Starbucks recognized that their leave policies were insufficient and temporarily expanded paid leave days to protect workers, although they were exempt from providing paid pandemic leave because they are large employers.⁹⁸

While the “work while sick” culture within the meatpacking industry has been a key factor in the spread of COVID-19, racialized narratives and stereotypes of the “hard-working and resilient immigrant,” the socio-economic limitations of “living” on low-wages, and decades of neglect and lack of protections from the federal government have created a group of workers that are highly vulnerable to workplace exploitation.

E. Why are Low-wage People of Color Disproportionately Suffering?

The following sections describe racial and socio-economic characteristics that make low-wage people of color and immigrants particularly vulnerable to workplace exploitation. This section also explores the role of narratives and counter-narratives to unpack the motivations and implications behind employer actions and inactions.

i. Peripheral Work and the Legacy of Exploiting Low-wage Workers, People of Color, and Recent Immigrants

Meat processing work is often considered “peripheral labor.” Unlike “primary jobs” that tend to have higher pay, workplace benefits, some job security, and the possibility of promotion “up the ladder,” “peripheral” jobs are characterized by low wages, high turnover rates, few benefits, and few to no opportunities to advance into a better position.⁹⁹ Peripheral labor markets

<https://www.clasp.org/blog/low-wage-workers-least-likely-have-paid-sick-days> (reporting that in 2019 only 47% of low-wage workers had sick leave compared to 90% of high wage workers.).

⁹⁸ Amelia Lucas, *Restaurants Rethink Paid Sick-leave Policies as Coronavirus Outbreak Spreads*, CNBC (Mar. 11, 2020, 4:16 P.M. EDT), <https://www.cnbc.com/2020/03/11/restaurants-reevaluate-paid-sick-leave-policies-as-coronavirus-spreads.html>; *see also*, Johnny Diaz & Karen Zraick, *Walmart, Uber and Others Tweak Sick-Leave Policies as Coronavirus Spreads*, N.Y. Times (Mar. 11, 2020, updated July 15, 2020), <https://www.nytimes.com/2020/03/11/business/new-sick-leave-policy.html>

⁹⁹ Charlotte S. Alexander, *Explaining Peripheral Labor: A Poultry Industry Case Study*, 33 BERKLEY J. ENPL. & LAB. L. 353, 357 (2012) (describing the labor market segmentation

are not based on worker preference or skills, rather they are the result of systemic practices and policies based on “race, sex, socio-economic class, or other characteristics beyond their [the worker’s] control.”¹⁰⁰ The work is dangerous and requires precision, but it is considered “un-skilled” labor conducted by individuals who are replaceable.¹⁰¹ As a result, most meat processing plants invest little in their workforce, high turnover is a “welcomed” condition of employment, and worker exploitation is a typical cost-cutting measure.¹⁰²

A large and seemingly endless pool of recent immigrants creates a power imbalance where workers are less likely to report workplace violations and employers are more likely to disregard them.¹⁰³ The meat processing industry has long-established policies that promote and maintain a “second class” workforce that will endure (or are believed to endure) low wages, job insecurity, and dangerous working conditions.¹⁰⁴

While the demographics of the meatpacking line workers have shifted in waves throughout the years, there is a commonality that threads them

theory developed by economists Michael Piore, Peter Doeringer and others which create a “core” or “primary” labor market and a distinct “peripheral” or “secondary” labor market.).

¹⁰⁰ Charlotte S. Alexander, *Explaining Peripheral Labor: A Poultry Industry Case Study*, 33 BERKLEY J. EMPL. & LAB. L. 353, 356 (2012).

¹⁰¹ Charlotte S. Alexander, *Explaining Peripheral Labor: A Poultry Industry Case Study*, 33 BERKLEY J. EMPL. & LAB. L. 353, 361-62 (2012) (recognizing that the skills required to process meat are significant and require skill, yet society considers this sort of repetitive manual labor as unskilled or low skill.).

¹⁰² Charlotte S. Alexander, *Explaining Peripheral Labor: A Poultry Industry Case Study*, 33 BERKLEY J. EMPL. & LAB. L. 353 (2012) (explaining that high turnover gives employers the ability to offer low wages and employer-friendly terms and conditions of work while decreasing employers’ responsibility to provide benefits and dampening workers’ bargaining power); see also Robert A. Hackenberg, *Joe Hill Died for Your Sins: Empowering Minority Workers in the New Industrial Labor Force, in Any Way You Cut It: Meat Processing and Small-Town America* 231, (1995) (the food industry labor market has maintained a “peripheral” status despite enterprise advancements); Kenneth G. Dau-Schmidt, *Employment in the New age of Trade and Technology: Implications for Labor and Employment Law*, 76 Ind. L.J. 1, 8 (2001) (technology has shifted the paradigm in some labor markets to maintain short-term, high turn-over environments rather than progressing towards long-term employment.).

¹⁰³ *Hidden Tragedy: Underreporting of Workplace Injuries and Illness*, Comm. On Educ. & Labor, 110th Cong., (June 19, 2008)

¹⁰⁴ Human Rights Watch, *Blood Sweat, and Fear, Workers’ Rights in U.S. Meat and Poultry Plants*, HUM. RTS. WATCH (Jan. 24, 2005), <https://www.hrw.org/report/2005/01/24/blood-sweat-and-fear/workers-rights-us-meat-and-poultry-plants#>; see also Matt McConnell, “When We’re Dead and Buried, Our Bones Will Keep Hurting.” *Workers’ Rights Under Threat in US Meat and Poultry Plants*, HUM. RTS. WATCH (Sept. 4, 2019) <https://www.hrw.org/report/2019/09/04/when-were-dead-and-buried-our-bones-will-keep-hurting/workers-rights-under-threat>

together. The workers are typically from communities that are trying to enter a workforce, with little knowledge of workplace rights or an inability to complain about working conditions due to socio-economic, racial, cultural, or other factors. Throughout the 1800's, meatpacking workers were mostly of white Eastern European descent.¹⁰⁵ Unionization and the great migration north during the mid-twentieth century resulted in large numbers of Blacks entering the meatpacking industry. The decline of unions during the 1980's lead to a decline in the number of Black workers and a new wave of immigrant workers.¹⁰⁶ With each new wave of workers, exploitative industries, like meatpacking, take advantage of lack of knowledge about workers' rights, the need for stable employment, and the belief that working hard is a path to the "American dream."

- ii. Unionization Brought African Americans to "the Yard."

To stall worker organizing and create division among the workers throughout the early 1900's, meat processing plants recruited African Americans as strikebreakers.¹⁰⁷ At first, African Americans served as cheap labor who were resistant to union organizing efforts.¹⁰⁸ The "great migration" north of southern Black Americans from 1917 through the 1920's, however, solidified a shift in demographics, increasing the number of Black workers in

¹⁰⁵William G. Whittaker, *Labor Practices in the Meat Packing and Poultry Processing Industry: An Overview*, CRS Report for Congress No. RL33002, Cong. Research Serv. Reports 3 (2006), <https://digital.library.unt.edu/ark:/67531/metadc819383/>.

¹⁰⁶William G. Whittaker, *Labor Practices in the Meat Packing and Poultry Processing Industry: An Overview*, CRS Report for Congress No. RL33002, Cong. Research Serv. Reports 3 (2006), available at <https://digital.library.unt.edu/ark:/67531/metadc819383/>. (citing Donald D. Stull & Michael J. Broadway, *Killing Them Softly: Work in Meatpacking Plants and What it Does to Workers*, in *Any Way You Cut It: Meat Processing and Small Town America* 62 (1995)); see also Cherrie Buckner, *Black Workers, Unions, and Inequality*, Ctr. for Econ. & Pol'y Res. (Aug. 29, 2016), <https://www.cepr.net/report/black-workers-unions-and-inequality/> (explaining that unionization rates have been falling for Black workers across sectors. "The decline has been especially steep for those in the manufacturing sector, which has historically been a stronghold for union organizing. In 1983, 42.3 percent of Black workers in manufacturing were unionized, compared to only 13.3 percent in 2015.").

¹⁰⁷ William G. Whittaker, *Congressional Research Service Report for Congress No. RL33002*, *Labor Practices in the Meat Packing and Poultry Processing Industry: An Overview* 3 (2006), available at <https://digital.library.unt.edu/ark:/67531/metadc819383/>.

¹⁰⁸ William G. Whittaker, *Congressional Research Service Report for Congress No. RL33002*, *Labor Practices in the Meat Packing and Poultry Processing Industry: An Overview* 3 (2006), available at <https://digital.library.unt.edu/ark:/67531/metadc819383/>.

the meatpacking industry to twenty percent by 1918.¹⁰⁹ By the 1930's, Black workers had become a large source of "cheap labor" and a "permanent" part of the meatpacking industry.¹¹⁰ Over time, they led the way for union organizing and improved working conditions for all workers.¹¹¹ From the 1930's through the 1960's, New Deal legislation and civil rights activism led to growing numbers of Black membership in the United Packinghouse Workers of America (UPWA) union.¹¹² By uniting [B]lack workers and white progressives in the fight for civil rights, the UPWA was the exception among predominantly white unions.¹¹³ Solidarity between Black and white workers, in collaboration with local NAACP efforts, became a tool to improve working conditions for all workers.¹¹⁴ For a short period, meatpackers, including the Black line workers, earned "good" wages with benefits and job security similar to other areas of manufacturing (like automotive).¹¹⁵ Strife between two competing meat processing unions (the line workers versus the specialized butchers) led to a merger and eventually

¹⁰⁹ William G. Whittaker, *Congressional Research Service Report for Congress No. RL33002, Labor Practices in the Meat Packing and Poultry Processing Industry: An Overview 3* (2006), available at <https://digital.library.unt.edu/ark:/67531/metadc819383/>; Referring to Barrett, "Unity and Fragmentation: Class, Race, and Ethnicity on Chicago's South Side, 1900-1922", *Journal of History*, 50, (Fall 1984).

¹¹⁰ William G. Whittaker, *Congressional Research Service Report for Congress No. RL33002, Labor Practices in the Meat Packing and Poultry Processing Industry: An Overview 3* (2006), available at <https://digital.library.unt.edu/ark:/67531/metadc819383/> (quoting Shelton Stromquist, *Solidarity & Survival: An Oral History of Iowa Labor in the Twentieth Century*, 101 (Iowa City: University of Iowa Press, 1933)).

¹¹¹ William G. Whittaker, *Congressional Research Service Report for Congress No. RL33002, Labor Practices in the Meat Packing and Poultry Processing Industry: An Overview 3* (2006), available at <https://digital.library.unt.edu/ark:/67531/metadc819383/>; (quoting Shelton Stromquist, *Solidarity & Survival: An Oral History of Iowa Labor in the Twentieth Century*, 101 (Iowa City: University of Iowa Press, 1933)).

¹¹² William G. Whittaker, *Congressional Research Service Report for Congress No. RL33002, Labor Practices in the Meat Packing and Poultry Processing Industry: An Overview 3* (2006), available at <https://digital.library.unt.edu/ark:/67531/metadc819383/>.

¹¹³ William G. Whittaker, *Congressional Research Service Report for Congress No. RL33002, Labor Practices in the Meat Packing and Poultry Processing Industry: An Overview 3* (2006), available at <https://digital.library.unt.edu/ark:/67531/metadc819383/>, (quoting Roger Horowitz, "Negro and White, Unite and Fight!" – *A Social History of Industrial Unionism in Meatpacking, 1930-1990*, (Urbana: University of Illinois Press, 1997)).

¹¹⁴ William G. Whittaker, *Congressional Research Service Report for Congress No. RL33002, Labor Practices in the Meat Packing and Poultry Processing Industry: An Overview 3* (2006), available at <https://digital.library.unt.edu/ark:/67531/metadc819383/>

¹¹⁵ Khari Taustin, *Still in 'The Jungle' Labor Immigration, and the Search for a New Common Ground in the Wake of Iowa's Meatpacking Raids*, 18 U. MIAMI BUS. L. REV 283 (2010).

the creation of today's United Food and Commercial Workers (UFCW) union.¹¹⁶

During the 1980s, when companies shifted from old school meatpacking yards to vast rural facilities, a new wave of workers entered the meatpacking workforce. Plants relocated from urban to rural, non-union areas (poultry in the South and beef in the mid-west).¹¹⁷ They created a new workforce model that thrived on high worker turn-over and a lack of interest in unionization or, more likely, a lack of knowledge of the function of unions.¹¹⁸ Union membership declined severely while job insecurity and lower wages became the norm.¹¹⁹ This new breed of meatpacking plants set the stage for the exploitation of a second wave of workers, immigrant – mostly Latinx workers.¹²⁰

¹¹⁶ William G. Whittaker, *Congressional Research Service Report for Congress No. RL33002*, Labor Practices in the Meat Packing and Poultry Processing Industry: An Overview 3 (2006), available at <https://digital.library.unt.edu/ark:/67531/metadc819383/>

¹¹⁷William Kendall, *Meat-Processing Firms Attract Hispanic Workers to Rural Areas*, U.S.D.A. Econ. Research Serv. (June 6, 2006), <https://www.ers.usda.gov/amber-waves/2006/june/meat-processing-firms-attract-hispanic-workers-to-rural-america/>

¹¹⁸ William G. Whittaker, *Congressional Research Service Report for Congress No. RL33002*, Labor Practices in the Meat Packing and Poultry Processing Industry: An Overview 3 (2006), available at <https://digital.library.unt.edu/ark:/67531/metadc819383/>, referring to, Roger Horowitz, *"Negro and White, Unite and Fight!" – A Social History of Industrial Unionism in Meatpacking, 1930-1990*, (Urbana: University of Illinois Press, 1997).

¹¹⁹ The terms Latinx, Latino, and Hispanic are used interchangeably throughout this Article. When quoting a specific source, the term used by the source is kept. The terms (Latinx, Latino, and Hispanic) have different meanings. "Latinx" is the gender-neutral version of "Latino" and commonly refers to being of Latin American descent, while the term "Hispanic" commonly refers to people who share Spanish as a common language." See ¹¹⁹ Sherley Cruz, *Coding for Cultural Competency: Expanding Access to Justice with Technology*, 86 TENN. LAW REV. 347, 351 ft.18 (2019); See also, Lulu Garcia-Navarro, *Hispanic or Latino? A Guide for the U.S. Presidential Campaign*, NPR (Aug. 27, 2015, 2:18 PM), <https://www.npr.org/sections/parallels/2015/08/27/434584260/hispanic-or-latino-a-guide-for-the-u-s-presidential-campaign.>; See also Khari Taustin, *Still in 'The Jungle' Labor Immigration, and the Search for a New Common Ground in the Wake of Iowa's Meatpacking Raids*, 18 U. MIAMI BUS. L. REV 283 (2010); William G. Whittaker, *Congressional Research Service Report for Congress No. RL33002*, Labor Practices in the Meat Packing and Poultry Processing Industry: An Overview 3 (2006), available at <https://digital.library.unt.edu/ark:/67531/metadc819383/>.

¹²⁰ William Kendall, *Meat-Processing Firms Attract Hispanic Workers to Rural Areas*, U.S.D.A. ECON. RESEARCH SERV. (June 6, 2006), <https://www.ers.usda.gov/amber-waves/2006/june/meat-processing-firms-attract-hispanic-workers-to-rural-america/> ("Although meat-processing is situated within the broader U.S. manufacturing sector that has seen employment levels decline, changes in meat-processing itself—the organization of production, industrial concentration, and plant relocation—have increased demand for low-

iii. The Fall of Unions Contributed to a Third Wave of Immigrant Workers.

According to the leaders of the Iowa Beef Processors (IBP) [the “new breed” of] meatpacking plants needed “to take the skill out of every step” of the meat packing process and operate in non-union environments that pay low wages.¹²¹ The move to rural areas required hundreds of new workers. The local labor supply could not meet all of the demand and hiring from union shops required paying higher wages.¹²² The move to the rural mid-west also meant that the labor market became less Black (the Black workers that remained tended to be lower paid female workers rather than higher paid male workers).¹²³ Meat processing companies started to recruit workers outside of the local production areas (usually within the Latinx and Southeast Asian communities) to meet high production needs. Immigrant workers became an attractive workforce option because they were perceived to be more transient, less knowledgeable about workers’ rights, and more willing to work under dangerous conditions for low pay.¹²⁴ These stereotypes and racialized narratives about the work ethic of immigrant workers supported the beliefs

skilled workers. Foreign-born Hispanics have helped meet that demand. Between 1980 and 2000, the share of non-Hispanic Whites in the meat-processing workforce declined from 74 to 49 percent. In contrast, the share of Hispanics increased from 9 to 29 percent, with the foreign-born segment of the Hispanic meat-processing workforce increasing from 50 to 82 percent. Roughly 1 in 10 nonmetro Hispanics now works in meat processing.”)

¹²¹ William G. Whittaker, *Congressional Research Service Report for Congress No. RL33002, Labor Practices in the Meat Packing and Poultry Processing Industry: An Overview 3* (2006), available at <https://digital.library.unt.edu/ark:/67531/metadc819383/>, (referring to a quote in Roger Horowitz’s *Negro and White*, by Arden Walker, IBP Vice President for Industrial Relations (on page 261) and quotes from Newsweek Mar. 8, 1965 by Andy Anderson, co-founder of IBP.)

¹²² William G. Whittaker, *Congressional Research Service Report for Congress No. RL33002, Labor Practices in the Meat Packing and Poultry Processing Industry: An Overview 3* (2006), available at <https://digital.library.unt.edu/ark:/67531/metadc819383/>

¹²³ William G. Whittaker, *Congressional Research Service Report for Congress No. RL33002, Labor Practices in the Meat Packing and Poultry Processing Industry: An Overview 3* (2006), available at <https://digital.library.unt.edu/ark:/67531/metadc819383/>, referring to, Janet E. Benson, “*Household, Migration, and Community Context*,” *Urban Anthropology*, (spring/summer 1990) (referring to the “dead-end nature” of the work caused workers to leave the job within 5 years. See also CITE: most meat-plant workers last less than 12 months on the job.)

¹²⁴ The impact regarding the presumption that immigrant workers have a strong work ethic is further discussed below. See also William G. Whittaker, *Congressional Research Service Report for Congress No. RL33002, Labor Practices in the Meat Packing and Poultry Processing Industry: An Overview 3* (2006), available at <https://digital.library.unt.edu/ark:/67531/metadc819383/>

that they can tolerate poor working conditions and unsafe environments.¹²⁵

iv. Employers Cut Costs Through High Worker Turnover.

Competition drives the need to cut costs. To reduce costs, meatpacking plants often strive to maintain a transient workforce.¹²⁶ Many meat processing companies do not offer healthcare benefits or vacation time until workers meet a one-year anniversary. Low-wages and lack of health benefits combined with dangerous conditions and no hope for upward mobility give little incentive for workers to stay long-term and even less incentive for employers to invest in improving conditions that will raise the costs of production.¹²⁷ High workforce turnover also makes it more difficult to organize labor unions.¹²⁸ Workers are committed to short-term “economic survival” not long-term careers, pension plans, or quality healthcare.¹²⁹ Meat processing plants depend on the eventuality that immigrant workers will ultimately learn that they are entitled to workplace rights and move on to “better jobs,” thereby guaranteeing the need for replacement labor.¹³⁰ This

¹²⁵ *Infra D.* Racialized Rhetoric Segregates Ethnicities and Reinforces Worker Exploitation

¹²⁶ William G. Whittaker, *Congressional Research Service Report for Congress No. RL33002, Labor Practices in the Meat Packing and Poultry Processing Industry: An Overview 3* (2006), available at <https://digital.library.unt.edu/ark:/67531/metadc819383/> (quoting Christopher Cook, “Hog-Tied” *Migrant Workers Find Themselves Trapped on the Pork Assembly Line*,” *Progressive*, 32 (Sept. 1999)).

¹²⁷ William G. Whittaker, *Congressional Research Service Report for Congress No. RL33002, Labor Practices in the Meat Packing and Poultry Processing Industry: An Overview 3* (2006), available at <https://digital.library.unt.edu/ark:/67531/metadc819383/>, Referring to, Stull and Broadway, “*Killing Them Softly: Work in Meatpacking Plant and What it Does to Workers*,” in Donald D Stull, et al., *Any Way You Cut it*, 62. (Lawrence KS, University Press of Kansas, 1995) (referring to recent Mexican immigrants who move jobs between different agriculture centers and meat processing plants.)

¹²⁸ William G. Whittaker, *Congressional Research Service Report for Congress No. RL33002, Labor Practices in the Meat Packing and Poultry Processing Industry: An Overview 3* (2006), available at <https://digital.library.unt.edu/ark:/67531/metadc819383/>

¹²⁹ William G. Whittaker, *Congressional Research Service Report for Congress No. RL33002, Labor Practices in the Meat Packing and Poultry Processing Industry: An Overview 3* (2006), available at <https://digital.library.unt.edu/ark:/67531/metadc819383/>, referring to Janet E. Benson, “*Household, Migration, and Community Context*,” *Urban Anthropology*, 25 (spring/summer 1990)

¹³⁰ Leticia Saucedo, *The Employer Preference for the Subservient Worker and the Making of the Brown Color Workplace*, *OHIO STATE LAW JOURNAL*, vol. 67, no. 5 (2006). Available at: https://kb.osu.edu/bitstream/handle/1811/71059/OSLJ_V67N5_0961.pdf?sequence=1&isAllowed=y; see also, Llezlie Green, *Outsourcing Discrimination*, 55 *HARV. C.R.-C.L. L. REV.*

business model can also be found in the cleaning, construction, and domestic work industries. The model is founded on racial and ethnic biases in favor of a workforce that is believed to be hard-working, highly productive, eager to work for minimal pay, and unlikely to demand improved working conditions.

v. Racialized Rhetoric Segregates Ethnicities and Reinforces Worker Exploitation

Racially charged stereotypes about Latinx and Asian workers have created a narrative, and ultimately a business model, whereby employers justify the preference, and ultimate exploitation of immigrant workers based on stereotyped beliefs about strong work ethics and the ability to adapt to harsh working conditions.¹³¹ In fact, low-wage industries operate in the “darkest corner” of these racial narratives, or “racial realism,” where racialized stereotypes serve to “benefit” or “advantage” preferential hiring of Latinx and Asian workers and negatively impact the hiring of African Americans.¹³²

Throughout the meatpacking industry (and many other low-wage industries) there is a well-known preference of hiring Latinx and Asian immigrants because of the narrative that they “have superior work habits” and exhibit the “quintessential work ethic” when compared to Black and white counterparts.¹³³ The seemingly endless supply of low-wage immigrant

915 (describing the development of business models that rely on racially discriminatory rhetoric as a necessity to condone discriminatory hiring practices.); see also William G. Whittaker, *Congressional Research Service Report for Congress No. RL33002, Labor Practices in the Meat Packing and Poultry Processing Industry: An Overview*, 3 (2006), available at <https://digital.library.unt.edu/ark:/67531/metadc819383/> (referring to David Griffith, “Consequences of Immigration Reform for Low-Wage Workers in the Southeastern U.S.: The Case of the Poultry Industry”, 19 URBAN ANTHROPOLOGY & STUDIES OF CULTURAL SYS. & WORLD ECON. DEV., 165-168 (spring-summer 1990)).

¹³¹ Llezlie Green, *Outsourcing Discrimination*, 55 HARV. C.R.-C.L. L. REV. 915, 928-930 (2020) (referring to the work of sociologist John Skrentny identifying raced based strategies that employers use to make business decisions.)

¹³² Llezlie Green, *Outsourcing Discrimination*, 55 HARV. C.R.-C.L. L. REV. 915, 928-930 (2020) (Skrentny explains that “racial realism” in low-wage industries creates problematic stereotypes that prefer immigrant workers and exclude African American workers.)

¹³³ Leticia Saucedo, *The Employer Preference for the Subservient Worker and the Making of the Brown Color Workplace*, OHIO STATE LAW JOURNAL, vol. 67, no. 5, 978 - 979 (2006). Available at:

https://kb.osu.edu/bitstream/handle/1811/71059/OSLJ_V67N5_0961.pdf?sequence=1&isAllowed=y (describing how “[e]mployers target the newly arrived Latino population for the least desirable, often lowest paid jobs, precisely because they perceive and anticipate subservience...”); see also, Llezlie Green, *Outsourcing Discrimination*, 55 HARV. C.R.-C.L.

labor and belief in racialized narratives that these workers are resilient and thrive under harsh working conditions allows employers to justify the prevalence of low-wages, dangerous work environments, and unequal bargaining power.¹³⁴

Another related narrative is that, unlike Black and white Americans, Latinx and Asian immigrants are willing work under dirty, cold, and bloody working conditions.¹³⁵ However, it seems to be more likely that the terms of

L. REV. 915, 928-930 (2020), available at SSRN: <https://ssrn.com/abstract=3710265> (describing the development of business models that rely on racially discriminatory rhetoric as a necessity to condone discriminatory hiring practices.); *see also* William G. Whittaker, *Congressional Research Service Report for Congress No. RL33002, Labor Practices in the Meat Packing and Poultry Processing Industry: An Overview*, 3 (2006), available at <https://digital.library.unt.edu/ark:/67531/metadc819383/> (quoting anthropologist David Griffith who identified these racialized themes after interviewing meat packing plant managers and personnel directors in “*Consequences of Immigration Reform for Low-Wage Workers in the Southeastern U.S.: The Case of the Poultry Industry*,” in *Urban Anthropology*, 165-173 (spring-summer 1990) [referring to, Robert Lekachman, “*The Specter of Full Employment*,” *Harper’s*, 36-38 (Feb. 1977)]).

¹³⁴ Leticia Saucedo, *The Employer Preference for the Subservient Worker and the Making of the Brown Color Workplace*, OHIO STATE LAW JOURNAL, vol. 67, no. 5, 978 - 979 (2006). Available at: https://kb.osu.edu/bitstream/handle/1811/71059/OSLJ_V67N5_0961.pdf?sequence=1&isAllowed=y (describing how “[e]mployers target the newly arrived Latino population for the least desirable, often lowest paid jobs, precisely because they perceive and anticipate subservience...”); *see also* Llezlie Green, *Outsourcing Discrimination* (October 13, 2020). Harvard Civil Rights- Civil Liberties Law Review (CR-CL), Vol. 55, No. 3, 2020, Available at SSRN: <https://ssrn.com/abstract=3710265> (referring to Eduard Bonilla-Silva, *Racism without Racists*, 123-149 (4th ed. 2014) and Leticia Saucedo and Maria Cristina Morales, *Voices Without the law: The Border Crossing Stories and Workplace Attitudes of Immigrants*, 21 *Cornell J.L. & Pub. Pol’y*, 641, 642 (2012) (identifying that narratives of endurance, familial provider, and family order are often associated with Latinx male workers); *see also*, William G. Whittaker, *Congressional Research Service Report for Congress No. RL33002, Labor Practices in the Meat Packing and Poultry Processing Industry: An Overview* 3 (2006), available at <https://digital.library.unt.edu/ark:/67531/metadc819383/>, referring to Edna Bonacich, “*A Theory of Ethnic Antagonism: The Split Labor Market*,” *American Sociological Review*, 547-559 (Oct. 1972); and Roger Horowitz and Mark Miller, *Immigrants in the Delmarva Poultry Processing Industry: The Changing Face of Georgetown, Delaware and Environs*, 5 (East Lansing: Michigan State University, Julian Samora Research Institute, Jan. 1999), Occasional Paper No. 37; and Otey Scruggs, *Braceros, “Wetbacks,” and the Farm Labor Problem: Mexican Agricultural Labor in the United States, 1942-1954*”, 68 (New York: Garland Publishing, Inc., 1988); and Shawn Zeller, “*Inside Job*,” *The National Journal’s Government Executive*, 47 (Dec. 2001).

¹³⁵ Leticia Saucedo, *The Employer Preference for the Subservient Worker and the Making of the Brown Color Workplace*, OHIO STATE LAW JOURNAL, vol. 67, no. 5 (2006). Available at:

employment (low-wages, extreme pressure to work at high-speeds, low job security, and lack of union protection), not the working conditions, make meat processing jobs less desirable to workers who are aware of their rights and are able to exercise them without fear of retaliation or deportation.¹³⁶ These racialized narratives play a strong role in the treatment of immigrants as peripheral workers within low-wage industries, like meatpacking, and provide employers with a lack of incentive to improve working conditions or the terms of employment.

III. LACK OF PROTECTIONS FOR “ESSENTIAL” MEAT PROCESSING WORKERS

The following sections illustrate how structural and systemic racism have supported narratives that have left low-wage people of color and immigrants without basic on-the-job protections, even before workplaces became hotspots for COVID-19. From the lack of enforcement by OSHA to loopholes within the workers compensation system, the pandemic has exposed holes in the social safety net of low-wage people of color and immigrants.

A. OSHA Was Failing Low-Wage Workers Long Before COVID-19

On December 29, 1970, the Occupational Health and Safety Act created the federal agency charged with ensuring that all workers have a safe and healthy working environment, the Occupational Health and Safety Administration.¹³⁷ It cannot be denied that OSHA has improved working conditions for low-wage workers and saved thousands of lives through the enforcement of its standards and regulations.¹³⁸ OSHA is tasked with “the

https://kb.osu.edu/bitstream/handle/1811/71059/OSLJ_V67N5_0961.pdf?sequence=1&isAllowed=y.

¹³⁶ William G. Whittaker, *Congressional Research Service Report for Congress No. RL33002, Labor Practices in the Meat Packing and Poultry Processing Industry: An Overview 3* (2006), available at <https://digital.library.unt.edu/ark:/67531/metadc819383/>, referring to, Michael J. Broadway, “*Beef Stew: Cattle, Immigrants and Established Residents in a Kansas Beefpacking Town*” in Lamphere, *Newcomers in the Workplace*, 25 (1994); and Janet E. Benson, “*Household, Migration, and Community Context*,” *Urban Anthropology*, 103-104 (spring/summer 1990)

¹³⁷ Michael C. Duff, et al., *OSHA’S NEXT 50 YEARS: LEGISLATING A PRIVATE RIGHT OF ACTION TO EMPOWER WORKERS*, CENTER FOR PROGRESSIVE REFORM (July 2020) <https://cpr-assets.s3.amazonaws.com/documents/OSHA-Private-Right-of-Action-FINAL.pdf>

¹³⁸ U.S. Dep’t Lab., *Timeline of OSHA’s 40 Year History*, OCCUPATIONAL SAFETY &

development and promulgation” of workplace safety and health standards.¹³⁹ Since its inception, however, OSHA has been undermined by severe underfunding and lack of bipartisan support.¹⁴⁰ OSHA’s enforcement power began to decline in the 1980’s during the Reagan Administration deregulation era.¹⁴¹ Cuts in the budget greatly reduced the number of investigators, which hampered their ability to investigate and enforce workplace safety violations.¹⁴² Lack of funding and political standing has led to an agency that continues to be severely underfunded, understaffed, and incapable of investigating and enforcing complaints.¹⁴³

At the start of former President Trump’s Administration, the number of OSHA inspectors was at an all-time low.¹⁴⁴ During the first few years of the Trump administration, the agency lost over 8% of its inspectors, reducing its inspection capacity by 5,000 cases per year.¹⁴⁵ Forty-two percent of OSHA’s top leadership positions, such as the directors of enforcement, training, and whistleblowing, have remained vacant since 2016.¹⁴⁶ Studies predict that it would take 165 years for OSHA to conduct an inspection of every jobsite

HEALTH ADMINISTRATION, (2010) <https://www.osha.gov/osha40/timeline.html>.

Commonly Used Statistics, OCCUPATIONAL SAFETY & HEALTH ADMINISTRATION, <https://www.osha.gov/data/commonstats> (“Worker deaths in America are down-on average, from about 38 worker deaths a day in 1970 to 15 a day in 2019.”)

¹³⁹ 29 U.S.C § 651 (2020).

¹⁴⁰ See generally, Jayesh M. Rathod, *Immigrant Labor and the Occupational Safety and Health Regime*, 33 N.Y.U. REV. L. & SOC. CHANGE 497 (2009). (providing a thorough history and description of the role of OSHA and its development as an ineffective agency.)

¹⁴¹ Michael C. Duff, et al., OSHA’S NEXT 50 YEARS: LEGISLATING A PRIVATE RIGHT OF ACTION TO EMPOWER WORKERS, CENTER FOR PROGRESSIVE REFORM (July 2020), at 3 <https://cpr-assets.s3.amazonaws.com/documents/OSHA-Private-Right-of-Action-FINAL.pdf>

¹⁴² Michael C. Duff, et al., OSHA’S NEXT 50 YEARS: LEGISLATING A PRIVATE RIGHT OF ACTION TO EMPOWER WORKERS, CENTER FOR PROGRESSIVE REFORM (July 2020), at 4 <https://cpr-assets.s3.amazonaws.com/documents/OSHA-Private-Right-of-Action-FINAL.pdf>

¹⁴³ Deborah Berkowitz, *Worker Safety in Crisis: The Cost of a Weakened OSHA*, NATIONAL EMPLOYMENT LAW PROJECT (NELP) (April 2020) <https://www.nelp.org/publication/worker-safety-crisis-cost-weakened-osha/>

¹⁴⁴ Deborah Berkowitz, *Worker Safety in Crisis: The Cost of a Weakened OSHA*, NATIONAL EMPLOYMENT LAW PROJECT (NELP) (April 2020) <https://www.nelp.org/publication/worker-safety-crisis-cost-weakened-osha/>

¹⁴⁵ Deborah Berkowitz, *Worker Safety in Crisis: The Cost of a Weakened OSHA*, NATIONAL EMPLOYMENT LAW PROJECT (NELP) (April 2020) <https://www.nelp.org/publication/worker-safety-crisis-cost-weakened-osha/>

¹⁴⁶ Deborah Berkowitz, *Worker Safety in Crisis: The Cost of a Weakened OSHA*, NATIONAL EMPLOYMENT LAW PROJECT (NELP) (April 2020) <https://www.nelp.org/publication/worker-safety-crisis-cost-weakened-osha/>

under its jurisdiction.¹⁴⁷

In addition to the reduction in investigative capacity, OSHA has also reduced public awareness about enforcement actions by decreasing press releases by more than fifty percent.¹⁴⁸ OSHA conducted more than 12,000 inspections during the fall and winter of 2019 yet only published eighty-four press releases.¹⁴⁹ Lack of publicity has a direct and negative impact on the deterrent influence of enforcement.¹⁵⁰ As will be discussed later, reports show that public awareness of enforcement actions increases employer compliance and workers' willingness to complain about workplace violations.¹⁵¹

i. OSHA is Ill-Equipped to Protect Immigrant Workers

OSHA's strategic agenda and priorities are framed by political interests, which often miss the voice of immigrants.¹⁵² Unions provide major pushes behind new or better workplace safety regulations.¹⁵³ Their political power makes it more difficult for non-union worksites like grocery stores, warehouses, retail, and some meat processing plants to have a seat at the table. Systemic exclusion of people of color and immigrants from unions through the twentieth century created another barrier toward having their concerns voiced at OSHA.¹⁵⁴

¹⁴⁷ Deborah Berkowitz, *Worker Safety in Crisis: The Cost of a Weakened OSHA*, NATIONAL EMPLOYMENT LAW PROJECT (NELP) (April 2020) <https://www.nelp.org/publication/worker-safety-crisis-cost-weakened-osha/> (referring to AFL-CIO report)

¹⁴⁸ Deborah Berkowitz, *Worker Safety in Crisis: The Cost of a Weakened OSHA*, NATIONAL EMPLOYMENT LAW PROJECT (NELP) (April 2020) <https://www.nelp.org/publication/worker-safety-crisis-cost-weakened-osha/>

¹⁴⁹ Deborah Berkowitz, *Worker Safety in Crisis: The Cost of a Weakened OSHA*, NATIONAL EMPLOYMENT LAW PROJECT (NELP) (April 2020) <https://www.nelp.org/publication/worker-safety-crisis-cost-weakened-osha/>

¹⁵⁰ Deborah Berkowitz, *Worker Safety in Crisis: The Cost of a Weakened OSHA*, NATIONAL EMPLOYMENT LAW PROJECT (NELP) (April 2020) <https://www.nelp.org/publication/worker-safety-crisis-cost-weakened-osha/>; see also Matthew S. Johnson, *Regulation by Shaming: Deterrence Effects of Publicizing Violations of Workplace Safety and Health Laws*, 110 AM. ECON. REV. 1866, 1866 (2020) (discussing the same).

¹⁵¹ See *infra* Section IV B, *The Power of Public Awareness*.

¹⁵² Jayesh M. Rathod, *Immigrant Labor and the Occupational Safety and Health Regime*, 33 N.Y.U. REV. L. & SOC. CHANGE 497, 515-536. (2009).

¹⁵³ Jayesh M. Rathod, *Immigrant Labor and the Occupational Safety and Health Regime*, 33 N.Y.U. REV. L. & SOC. CHANGE 497, 516-521. (2009).

¹⁵⁴ Jayesh M. Rathod, *Immigrant Labor and the Occupational Safety and Health Regime*, 33 N.Y.U. REV. L. & SOC. CHANGE 497, 519. (2009). (the United Food and Commercial

Several systemic issues in OSHA's complaint and investigation process hinder immigrant's ability to place complaints and assist with investigations. The lack of bilingual investigators makes it difficult for workers with limited English proficiency to communicate with investigators.¹⁵⁵ With minor exceptions, OSHA does not require employers to provide safety training or information in multiple languages or at low-literacy levels.¹⁵⁶ The inability to communicate, lack of understanding of workplace protections rules, and general apprehension regarding involvement with government agencies creates a lack of trust in investigators and government agencies. Without trust, immigrant workers are less likely to complain about workplace safety violations or participate in inspections.¹⁵⁷

ii. A Hands-Off Policy Places Employers in Control of Investigations

Workers do not have a private right of action to sue their employers for workplace injuries caused by violations of OSHA regulations.¹⁵⁸ Workers seeking redress for OSHA violations must go through the administrative complaint process.¹⁵⁹ OSHA's lack of enforcement of violations of its COVID-19 recommendations has provided little incentive for employers to

Union did not take a position on immigration until the 1990's at the request of the AFL-CIO, which was calling for an immigration amnesty program. Also referring to Molly McUsic & Michael Selmi, *Postmodern Unions: Identity Politics in the Workplace*, 82 IOWA L. REV. 1339, 1346 nn.27-28 (1997) and Krissah Williams, *Unions Split on Immigrant Workers*, WASH. POST, Jan. 27, 2007).

¹⁵⁵ Jayesh M. Rathod, *Immigrant Labor and the Occupational Safety and Health Regime*, 33 N.Y.U. REV. L. & SOC. CHANGE 497, 529-530. (2009). (noting the difficulty of interpreting technical terms and the lack of bilingual investigators in languages other than Spanish.)

¹⁵⁶ Jayesh M. Rathod, *Immigrant Labor and the Occupational Safety and Health Regime*, 33 N.Y.U. REV. L. & SOC. CHANGE 497, 530. (2009). (referring to OFFICE OF INSPECTOR GEN., U.S. DEP'T OF LABOR, EVALUATION OF OSHA'S HANDLING OF IMMIGRANT FATALITIES IN THE WORKPLACE, REPORT NO. 21-03-023-10-001 (2003).)

¹⁵⁷ Jayesh M. Rathod, *Immigrant Labor and the Occupational Safety and Health Regime*, 33 N.Y.U. REV. L. & SOC. CHANGE 497, 529-530. (2009).

¹⁵⁸ See Michael C. Duff, et al., *OSHA'S NEXT 50 YEARS: LEGISLATING A PRIVATE RIGHT OF ACTION TO EMPOWER WORKERS*, CTR. PROGRESSIVE REFORM (July 2020) (advocating for a private right of action for workers, as opposed to the current OSHA complaint system) <https://cpr-assets.s3.amazonaws.com/documents/OSHA-Private-Right-of-Action-FINAL.pdf>.

¹⁵⁹ *Federal OSHA Complaint Handling Process*, US DEP'T OF LAB.-OSHA, <https://www.osha.gov/as/opa/worker/handling.html>.

follow the guidance. This is particularly true in the meat packing industry, where demand for product has sky-rocketed and plants are rushing to increase production needs with little regard for worker safety.¹⁶⁰

Filing a workplace safety complaint does not prompt quick changes. The process is slow and relies on employer self-reporting. When a worker files a COVID-19 complaint with OSHA, the agency “opens” an investigation.¹⁶¹ The “investigation” can take up to six months to complete.¹⁶² It consists of OSHA sending the bad-acting employer a letter describing the allegations, providing them with relevant language from OSHA and CDC guidance, and asking the employer to respond with a description of efforts it is taking to remedy the situation. OSHA is not following-up with site visits. The process does not involve workers. After a worker files a COVID safety complaint, the process becomes employer driven. Workers are left in the dark about the process. This can be incredibly discouraging for workers who were brave enough to take the risk to report their employer. It also creates further distrust about the process because they are not engaged in investigation, leading to more under-reporting.

B. OSHA Has Not Issued Mandates or Engaged in Enforcement

Despite thousands of complaints by workers from dozens of industries, as of January 2021, OSHA has only issued two citations for COVID-19 related workplace safety violations at meat processing plants.¹⁶³ The enforcement (or lack thereof) is in stark contrast to the claims of workplace exposure and contraction of the virus at meatpacking plants. As of January 2021, more than 39,000 meat processing workers have contracted COVID-19 and at least 200 workers have died.¹⁶⁴

¹⁶⁰ See, e.g., Fatima Hussein, *USDA OKs Record Number of Poultry Line-Speed Waivers in April*, BLOOMBERG L. (Apr. 22, 2020) <https://news.bloomberglaw.com/daily-labor-report/usda-oks-record-number-of-poultry-line-speed-waivers-in-april>.

¹⁶¹ *Federal OSHA Complaint Handling Process*, US DEP'T OF LAB.-OSHA, <https://www.osha.gov/as/opa/worker/handling.html>.

¹⁶² THE OSHA INSPECTION: A STEP-BY-STEP GUIDE, NAT'L COUNCIL FOR OCCUPATIONAL SAFETY & HEALTH, https://www.osha.gov/sites/default/files/2018-12/fy10_sh-20853-10_osa_inspections.pdf.

¹⁶³ Michael C. Duff, et al., OSHA'S NEXT 50 YEARS: LEGISLATING A PRIVATE RIGHT OF ACTION TO EMPOWER WORKERS, THE CENTER FOR PROGRESSIVE REFORM (discussing OSHA citations: one against JBS and another against Smithfield. OSHA has not issued COVID citations in general. It has only issued four additional COVID citations, all of which were related to violations in nursing home facilities).

¹⁶⁴ Bernice Young & Michael Grabell, *After Hundreds of Meatpacking Workers Died from COVID-19, Congress Wants Answers*, PROPUBLICA (Feb. 4, 2021, 5:00 a.m. EST) <https://www.propublica.org/article/after-hundreds-of-meatpacking-workers-died-from->

On April 28, 2020, the U.S. Department of Labor issued a memo stating that employers who found that the OSHA and CDC guidelines were not feasible could write a note explaining why they could not implement the guidelines and that state and local governments could not require that plants shutdown or impose stricter COVID safety standards than those provided by the guidance.¹⁶⁵ Except for the healthcare industry emergency temporary standards, OSHA has only issued voluntary “guidance” on COVID-19 workplace safety protocols and practices, including those for the meatpacking industry.¹⁶⁶ Meat processing plants have long histories of workplace safety violations and inherently unsafe working conditions, yet OSHA expects them to voluntarily follow the suggested guidance, notwithstanding the lack of a mandate or enforcement.¹⁶⁷ When asked about the force behind the OSHA guidelines, Debbie Berkowitz—the worker and safety program director of the National Employment Law Project—replied that “[t]he measures are comprehensive – but they are voluntary. They are just advice....”¹⁶⁸

covid-19-congress-wants-answers (estimating the death toll at over 250)

¹⁶⁵ Available at: <https://www.dol.gov/newsroom/releases/osha/osha20200428-1>

¹⁶⁶ “This guidance is not a standard or regulation, and it creates no new legal obligations. It contains recommendations as well as descriptions of mandatory safety and health standards. The recommendations are advisory in nature, informational in content, and are intended to assist employers in providing a safe and healthful workplace.”

OSHA, OSHA 3990-03 2020, GUIDANCE ON PREPARING WORKPLACES FOR COVID-19 (2020), <https://www.osha.gov/sites/default/files/publications/OSHA3990.pdf>; see also Lisa Held, *OSHA Faulted for Not Doing More to Protect Workers from COVID-19*, CIVIL EATS (June 16, 2020), <https://civileats.com/2020/06/16/osha-faulted-for-not-doing-more-to-protect-workers-from-covid-19/> (“Since COVID-19 emerged, the agency has resisted calls to create an enforceable coronavirus-specific standard. Instead, OSHA has merely issued voluntary guidance for employers.”); see also *A Petition to Secretary Scalia for an OSHA Emergency Temporary Standard for Infectious Disease*, AM. FED’N LAB.-CONG. INDUS. ORGS. (Mar. 6, 2020), <https://aflcio.org/statements/petition-secretary-scalia-osha-emergency-temporary-standard-infectious-disease> (arguing that the current guidelines are not enough to protect workers).

¹⁶⁷ U.S. Dep’t of Labor, *Meat and Poultry Processing Workers and Employers Interim Guidance from CDC and Occupational Safety and Health Administration*, OCCUPATIONAL SAFETY & HEALTH ADMINISTRATION, (updated July 9, 2020), (providing voluntary/self-directed guidance to meat and poultry processing) <https://www.osha.gov/news/newsreleases/national/04262020>; see also Jayesh M. Rathod, *Immigrant Labor and the Occupational Safety and Health Regime*, 33 N.Y.U. REV. L. & SOC. CHANGE 497, 532-533. (2009) (referring to the limitations of OSHA’s voluntary standards related to workplace violence in producing employer compliance and reducing workplace injuries.)

¹⁶⁸ Angela Childers, *Failure to follow guidance may lead to meatpacker liability*, Business Insurance (May 6, 2020), <https://www.businessinsurance.com/article/00010101/NEWS06/912334417/Failure-to->

Foreshadowing the deaths that would follow, Berkowitz further stated that “[w]ithout OSHA requirements to implement these basic safety measures, the disease will continue to spread in the workplace and out into the community.”¹⁶⁹

Employers have no incentive to comply with the guidelines because it is highly unlikely that OSHA will visit the jobsite, issue a citation, or ensure that the company provide better protections. OSHA has confirmed that on-site inspections will be rare because it does not want to interfere with business practices during a time when advice and understanding about COVID-19 is constantly changing.¹⁷⁰ Months later, OSHA has yet to play a true enforcement role in the protection of low-wage workers against the spread of the virus.

OSHA has the power to issue an emergency temporary standard.¹⁷¹ It issued COVID-19 emergency temporary standards for the healthcare industry and has previously issued temporary standards for public health risks such as AIDS/HIV and the last airborne virus, the H1N1 virus (a/k/a “the bird flu”).¹⁷² Draft regulations for workplace protections related to airborne

follow-guidance-may-lead-to-meatpucker-liability.

¹⁶⁹ Angela Childers, *Failure to follow guidance may lead to meatpucker liability*, Business Insurance (May 6, 2020), <https://www.businessinsurance.com/article/00010101/NEWS06/912334417/Failure-to-follow-guidance-may-lead-to-meatpucker-liability>.

¹⁷⁰ *Regulations*, OSHA, https://www.osha.gov/coronavirus/standards#temp_enforcement_guidance (“OSHA recognizes that employers in many sectors may experience challenges in complying with certain provisions of the agency’s standards as a result of the COVID-19 pandemic, including where those standards require the use of certain types of PPE (e.g., respirators) or provision of medical surveillance and training to workers. Accordingly, OSHA is providing enforcement flexibilities for specific provisions of certain standards and requirements to address these challenges and help ensure the continued protection of worker safety and health.”) (last visited Mar. 3, 2021); *see also Updated OSHA Interim Enforcement Response Plan for Coronavirus Disease 2019 (COVID-19)*, Memorandum from Patrick J. Kapust, Acting Director, OSHA Directorate of Enforcement Programs to OSHA Regional Administrators, State Plan Designees (May 19, 2020), <https://www.osha.gov/memos/2020-05-19/updated-interim-enforcement-response-plan-coronavirus-disease-2019-covid-19>.

¹⁷¹ *See* OSH Act of 1970, Occupational Safety and Health Standards, 29 U.S.C. 655, s. 6 (c)(1) (stating that “The Secretary shall provide, without regard to the requirements of chapter 5, title 5, Unites States Code, for an emergency temporary standard to take immediate effect upon publication...”)

¹⁷² David Michaels, *What Trump Could Do Right Now to Keep Workers Safe from the Coronavirus*, THE ATLANTIC (Mar. 2, 2020), <https://www.theatlantic.com/ideas/archive/2020/03/use-osha-help-stem-covid-19-pandemic/607312/>. *See also*, Laura Walter, *OSHA Prepares to Release Compliance Directive for H1N1-Related Inspections*, EHS TODAY (Oct. 16, 2009) <https://www.ehstoday.com/health/article/21909737/osha-prepares-to-release-compliance->

diseases have existed since the 2009 H1N1 pandemic, but deregulation and lack of federal leadership have stalled the process of passing the bills into law.¹⁷³ The Biden Administration is demanding emergency standards and is investigating the lack of oversight over the meatpacking industry.¹⁷⁴

C. State and Local Authorities Fill OSHA's Absence

Due to the lack of OSHA enforcement, state and local governments created their own COVID-19 workplace safety rules to protect all workers, not just those in low-wage industries.¹⁷⁵ Twenty-two states operate OSHA approved state health and workplace safety plans.¹⁷⁶ Under the state plans, participating states may create their own workplace safety regulations so long as they meet the minimum OSHA requirements.¹⁷⁷ Local industries and politics have influenced which states have created COVID-19 workplace safety rules.¹⁷⁸ Kansas relaxed quarantine rules after pressure from local industries.¹⁷⁹ Virginia led the country in implementing the first set of statewide COVID-19 emergency workplace safety standards.¹⁸⁰ As the

directive-for-h1n1-related-inspections.

¹⁷³ CENTER FOR DISEASE CONTROL, 2009 H1N1 PANDEMIC REPORT (2019), available at <https://www.cdc.gov/flu/pandemic-resources/2009-h1n1-pandemic.html> (ironically, in 2019 the CDC published several reports following the 10th anniversary of the H1N1 pandemic); see also Recommendations for Consideration by the Secretary of Labor on Pandemic-H1N1 Influenza Protection for the Federal Workforce, CTRS. FOR DISEASE CONTROL & PREVENTION (2009) available at <https://www.cdc.gov/flu/pandemic-resources/2009-h1n1-pandemic.html>.

¹⁷⁴ *Infra* Section V Seizing the Moment to Make Change

¹⁷⁵ *These States Aren't Waiting for the Fed to Create COVID-19 Related Worker Safety Rules*, PEW, (Aug. 19, 2020, updated Sept., 21, 2020) <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2020/08/19/these-states-arent-waiting-for-the-feds-to-create-covid-19-worker-safety-rules>.

¹⁷⁶ See OSHA State Plans, available at, <https://www.osha.gov/stateplans>

¹⁷⁷ See OSH Act s. 18.

¹⁷⁸ Amy Forliti, *Meatpacking Safety Recommendations Largely Unenforceable*, ASSOCIATED PRESS (ABC News), (May 21, 2020) <https://abcnews.go.com/Health/wireStory/meatpacking-safety-recommendations-largely-unenforceable-70802416>.

¹⁷⁹ Amy Forliti, *Meatpacking Safety Recommendations Largely Unenforceable*.

¹⁸⁰ See FINAL PERMANENT STANDARD FOR 16VAC2022, VA DEP'T LAB. & INDUS. (Jan. 13, 2021) <https://www.doli.virginia.gov/wp-content/uploads/2021/01/Final-Standard-for-Infectious-Disease-Prevention-of-the-Virus-That-Causes-COVID-19-16-VAC25-220-1.27.2021.pdf>; *Virginia Becomes First State to Pass Permanent Workplace Coronavirus Rules*, THE NAT'L L. REV., (Jan. 28, 2021) <https://www.natlawreview.com/article/virginia-becomes-first-state-to-pass-permanent-workplace-coronavirus-rules>

nation waits for President Biden's administration to take action, other states have followed in Virginia's path.¹⁸¹

D. Workers' Compensation May Not Cover COVID-19 Injuries

Workers seeking monetary compensation and care for workplace injuries generally must file a workers' compensation insurance (workers' comp) claim. Workers' Comp is an important safety net for low-wage workers who typically cannot afford out of pocket insurance costs, who may have little to no health insurance coverage, and who are not provided with paid sick leave.¹⁸² While OSHA enforces workplace safety regulations, workers' comp insurance is typically the exclusive remedy for work related personal injury claims.¹⁸³ Workers' comp provides an employee with monetary compensation and medical care while they are out of work due to a workplace injury in exchange for employer immunity.¹⁸⁴ In theory, the system is supposed to provide the worker with quick financial assistance and medical care without a long legal battle and saves the employer money from having to defend a lawsuit. Workers' comp usually "does not cover routine community spread illnesses like the cold or the flu" because it is difficult to demonstrate that the worker contracted the cold or flu at work.¹⁸⁵

Whether the injury arises out of and occurs from the employment is a key factor in obtaining a workers' comp award.¹⁸⁶ This is an issue with COVID-19. Contact tracing has been difficult to conduct, the information about how it spread was in flux during the early stages of the pandemic, and new variants

¹⁸¹ These States Aren't Waiting for the Fed to Create COVID-19 Related Worker Safety Rules, PEW.

¹⁸² See CORNELL LAW SCHOOL, *Workers Compensation*, LEGAL INFO. INST. https://www.law.cornell.edu/wex/workers_compensation.

¹⁸³ See 1 Lex K. Larson, *Larson's Workers' Compensation* § 1.01 (Matthew Bender, Rev. Ed.)

¹⁸⁴ See 1 Lex K. Larson, *Larson's Workers' Compensation* § 1.01 (Matthew Bender, Rev. Ed.)

¹⁸⁵ Josh Cunningham, *COVID-19: Workers' Compensation*, NAT'L CONF. STATE LEGISLATURES (Dec. 9, 2020), <https://www.ncsl.org/research/labor-and-employment/covid-19-workers-compensation.aspx>.

¹⁸⁶ Josh Cunningham, *COVID-19: Workers' Compensation*, NAT'L CONF. STATE LEGISLATURES (Dec. 9, 2020), <https://www.ncsl.org/research/labor-and-employment/covid-19-workers-compensation.aspx>; see also Lauren Weber, *Why So Many Covid-19 Workers' Comp Claims Are Being Rejected*, Wall St. J. (Feb. 14, 2021), <https://www.wsj.com/articles/why-so-many-covid-19-workers-comp-claims-are-being-rejected-11613316304> ("In many workers' compensation cases, carriers said individuals were most likely infected in their off hours, while workers' attorneys said their clients' Covid-19 cases were directly linked with unsafe job environments.").

pose an additional wrinkle in the source of the spread. In Saul's case, JBS claimed that his family could not demonstrate that he contracted COVID-19 at work. The CDC, however, disagrees with JBS and has issued guidance specifically aimed at meat packing plants in an effort to stop at-work spread of the virus.

Employers are seeking immunity from liability while workers seek a presumption that they contracted the virus at work. Some states have passed legislation that creates a presumption that COVID-19 infections by employees who actively interact with the public or co-workers are work-related.¹⁸⁷ The burden then shifts to employers and insurance companies to prove that the employee did not contract the virus at work.¹⁸⁸ Other states have expanded their definitions of eligible illnesses to include COVID-19.¹⁸⁹ If COVID-19 is not considered work-related, employees will need to show that the employer was grossly negligent or intentionally created a work environment that caused the employee to contract the virus at work to receive workers' comp.¹⁹⁰ In Colorado, a bill to extend workers' compensation coverage to COVID-19, but that is of no help to the Sanchez family as JBS claims that the company is just following a decision issued by a third-party claim administrator according to the Colorado Workers' Compensation Act.¹⁹¹

The work environment of meat processing plants make them highly

¹⁸⁷ Josh Cunningham, *COVID-19: Workers' Compensation*, NAT'L CONF. OF STATE LEGISLATURES (Dec. 9, 2020), <https://www.ncsl.org/research/labor-and-employment/covid-19-workers-compensation.aspx> (last visited Feb. 19, 2021).

¹⁸⁸ Josh Cunningham, *COVID-19: Workers' Compensation*, NAT'L CONF. OF STATE LEGISLATURES (Dec. 9, 2020), <https://www.ncsl.org/research/labor-and-employment/covid-19-workers-compensation.aspx> (last visited Feb. 19, 2021).

¹⁸⁹ Josh Cunningham, *COVID-19: Workers' Compensation*, NAT'L CONF. OF STATE LEGISLATURES (Dec. 9, 2020), <https://www.ncsl.org/research/labor-and-employment/covid-19-workers-compensation.aspx> (last visited Feb. 19, 2021).

¹⁹⁰ Josh Cunningham, *COVID-19: Workers' Compensation*, NAT'L CONF. OF STATE LEGISLATURES (Dec. 9, 2020), <https://www.ncsl.org/research/labor-and-employment/covid-19-workers-compensation.aspx> (last visited Feb. 19, 2021).

¹⁹¹ Conor McCue, *Report: COVID-19 Related Workers' Compensation Claims Denied by JBS*, DENVER CBS LOCAL (Oct. 1, 2020, 12:43 P.M.), <https://denver.cbslocal.com/2020/10/01/covid-workers-compensation-claims-denied-jbs-colorado/> (The family's attorney, Britton Morrell, explained that the next step would be to schedule a hearing before an administrative law judge, where the burden of proof would be on the employee).

susceptible to the spread of COVID-19.¹⁹² Workers work shoulder to shoulder with each other on the lines, during breaks, and at the start and end of the work day when they clock in and out and change into their uniforms.¹⁹³ They spend long hours working in close proximity to each other.¹⁹⁴ Workers are exposed to multiple surfaces and work spaces that can be contaminated by the virus such as the meat processing tools, locker room benches, workstations, and break and meal areas.¹⁹⁵ Meatpacking workers do not have the luxury of hour long-lunch hours and the time it takes to put on and off their uniforms makes it difficult to leave the plant. As a result, the workers are inside the building from the start to end of eight to ten-hour shifts, which increases their exposure to the virus.¹⁹⁶ Workers also often share transportation to and from work or use public transportation, which places them at risk by being an enclosed space with multiple people for an extended period of time.¹⁹⁷ Identifying the exact origin of exposure may be difficult,

¹⁹² *Meat and Poultry Processing Workers and Employers: Interim Guidance from the CDC and Occupational Safety and Health Administration (OSHA)*, CTRS. FOR DISEASE CONTROL & PREVENTION (last updated Feb. 6, 2021), <https://www.cdc.gov/coronavirus/2019-ncov/community/organizations/meat-poultry-processing-workers-employers.html> (in response to COVID-19 outbreaks in meat processing plants, the CDC issued updated guidelines because “their work environments – processing lines and other areas in busy plants where they [workers] have close contact ... may contribute substantially to their potential exposures [to COVID-19].”)

¹⁹³ *Meat and Poultry Processing Workers and Employers: Interim Guidance from the CDC and Occupational Safety and Health Administration (OSHA)*, CTRS. FOR DISEASE CONTROL & PREVENTION (last updated Feb. 6, 2021), <https://www.cdc.gov/coronavirus/2019-ncov/community/organizations/meat-poultry-processing-workers-employers.html> (listing “distinctive factors” within the meatpacking industry that increase worker’s exposure to COVID-19.)

¹⁹⁴ *Meat and Poultry Processing Workers and Employers: Interim Guidance from the CDC and Occupational Safety and Health Administration (OSHA)*, CTRS. FOR DISEASE CONTROL & PREVENTION (last updated Feb. 6, 2021), <https://www.cdc.gov/coronavirus/2019-ncov/community/organizations/meat-poultry-processing-workers-employers.html>

¹⁹⁵ *Meat and Poultry Processing Workers and Employers: Interim Guidance from the CDC and Occupational Safety and Health Administration (OSHA)*, CTRS. FOR DISEASE CONTROL & PREVENTION (last updated Feb. 6, 2021), <https://www.cdc.gov/coronavirus/2019-ncov/community/organizations/meat-poultry-processing-workers-employers.html>

¹⁹⁶ Human Rights Watch, *Blood Sweat, and Fear, Workers’ Rights in U.S. Meat and Poultry Plants* HUM. RTS. WATCH (Jan. 24, 2005), <https://www.hrw.org/report/2005/01/24/blood-sweat-and-fear/workers-rights-us-meat-and-poultry-plants#>; see also, Matt McConnell, “*When We’re Dead and Buried, Our Bones Will Keep Hurting: Workers’ Rights Under Threat in US Meat and Poultry Plants*,” HUM. RTS. WATCH (Sept. 4, 2019) <https://www.hrw.org/report/2019/09/04/when-were-dead-and-buried-our-bones-will-keep-hurting/workers-rights-under-threat>.

¹⁹⁷ *Meat and Poultry Processing Workers and Employers: Interim Guidance from the*

however, meatpacking workers can point to a combination of many factors that place them at high risk of contracting the virus at work.

E. Protecting the Bottom Line Over Workers

In the middle of a pandemic that has infected tens of thousands of meatpacking workers and has killed over two hundred of them, the meatpacking industry is risking the lives of workers to maximize profits. Meat processing plants are seeking waivers to increase line production speeds beyond those established to protect worker safety.¹⁹⁸ They are betting on the numbers of workers who will be exposed to COVID-19 at the plants.¹⁹⁹ The industry is strongly supporting nation-wide efforts to insulate all employers from personal injury claims arising out of workplace related COVID-19 infections.²⁰⁰

i. Black and Brown Bodies Can Handle It

a. Betting on COVID

CDC and Occupational Safety and Health Administration (OSHA), CTRS. FOR DISEASE CONTROL & PREVENTION (last updated Feb. 6, 2021), <https://www.cdc.gov/coronavirus/2019-ncov/community/organizations/meat-poultry-processing-workers-employers.html>

¹⁹⁸ Michael Grabell & Bernice Yeung, *Emails Show the Meatpacking Industry Drafted an Executive Order to Keep Plants Open*, PROPUBLICA (Sept. 14, 2020), <https://www.propublica.org/article/emails-show-the-meatpacking-industry-drafted-an-executive-order-to-keep-plants-open>; see also Claire Kelloway, *USDA Continues to Lift Meat Processing Line Speed Limits During Pandemic, Threatening Frontline Workers and Consumers*, FOOD & POWER (Apr. 9, 2020) <https://www.foodandpower.net/latest/2020/04/09/usda-continues-to-lift-meat-processing-line-speed-limits-during-pandemic-threatening-frontline-workers-and-consumers>

¹⁹⁹ Vanessa Romo, *Tyson Managers Suspended After Allegedly Betting If Workers Could Contract COVID*, NATIONAL PUBLIC RADIO, (Nov. 19, 2020), available at: <https://www.npr.org/2020/11/19/936905707/tyson-managers-suspended-after-allegedly-betting-if-workers-would-contract-covid>; see also, Laurel Wamsley, *Tyson Foods Fires 7 Plant Managers Over Betting Ring on Workers Getting COVID-19*, NATIONAL PUBLIC RADIO (Dec. 16, 2020).

²⁰⁰ Lee Fang, *Meat Industry Campaign Case Flows to Officials Seeking to Quash COVID-19 Lawsuits*, *The Intercept*, (July 24, 2020); Available at, <https://theintercept.com/2020/07/24/meat-industry-coronavirus-lawsuits/>; See also, Eric Schollosser, *America's Slaughterhouses Aren't Just Killing Animals*, THE ATLANTIC, (May 12, 2020), Available at, <https://www.theatlantic.com/ideas/archive/2020/05/essentials-meatpacking-coronavirus/611437/>. (describing the meatpacking industries history of supporting efforts to avoid paying workers' compensation.)

Despite over 1,000 infections and at least five deaths, plant managers at Tyson Food's largest pork processing plant were caught betting on how many employees would catch COVID at work.²⁰¹ The plant manager "organized a cash buy-in, winner-take-all betting pool for supervisors and managers to wager how many employees would test positive for COVID-19."²⁰² As discussed above, low-wage workers often have no choice but to go to work while sick.²⁰³ Managers at the Tyson plant ordered sick workers to continue to work until they tested positive.²⁰⁴ They told supervisors to inform the workers they supervised that had to go to work, even if they had COVID symptoms.²⁰⁵

The workers were just commodities. Disposable, replaceable commodities. The stereotype that meatpacking workers can continue to work despite exhibiting symptoms of the virus is illustrative of racialized narratives about the supposed physicality of Black and Brown bodies. There is an ingrained racialized belief in American society that that Black and Brown bodies can handle the pain.²⁰⁶ Embodied in this racialized narrative are stereotypes that Black and Brown bodies are better able to endure labor-

²⁰¹ OSCAR FERNANDEZ V. TYSON FOODS, INC., TYSON FRESH MEATS, INC., JOHN H. TYSON, NOEL W. WHITE, DEAN BANKS, STEPHEN R. STOUFFER, TOM BROWER, TOM HART, CODY BRUSTKERN, JOHN CASEY, AND BRET TAPKEN, Case No. 6:20-cv-02079-LRR-KEM, (Nov. 11, 2020), Available at, <https://www.law360.com/articles/1330634/attachments/0>

²⁰² Fernandez v. Tysons Food Inc., et. al., Case No. 6:20-cv-02079-LRR-KEM, p.9, paragraph 73.

²⁰³ *Supra*, Working While Sick

²⁰⁴ Fernandez v. Tysons Food Inc., et. al., Case No. 6:20-cv-02079-LRR-KEM, p.10, paragraph 81.

²⁰⁵ Fernandez v. Tysons Food Inc., et. al., Case No. 6:20-cv-02079-LRR-KEM, p.11, paragraph 82.

²⁰⁶ Kelly M. Hoffman, Sophie Trawalter, Jordan R. Axt, & M. Norman Oliver, *Racial Bias in Pain Assessment and Treatment Recommendations, and False Beliefs About Biological Differences Between Blacks and Whites*, PROCS. OF THE NAT'L ACAD. OF SCIS. OF THE U.S. v. 113(16): 4296-4301, 4297 (Apr. 19, 2016), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4843483/pdf/pnas.201516047.pdf> (describing how scientists, physicians, and slaveowners championed "beliefs that blacks and whites are fundamentally and biologically different" to justify slavery and inhumane medical research on Black people); see also Andrea Hopkins, *Hispanics do jobs others in U.S. "won't stand for"*, REUTERS (Feb. 25, 2007) (describing some stereotypes that "work in Hispanic workers' favor" where Latinx worker are "[c]riticized on one hand for taking jobs from unemployed Americans or for working too cheaply, Latinos are complimented on the other for doing work others won't do -- a tightrope where stereotypes seem to work both for and against them.").

intensive work, have higher tolerance for working in harsh conditions, and they can “work through” the pain.²⁰⁷ Like the racialized narratives of work ethic, stereotyped beliefs about the strong physicality and high pain thresholds of Black and Brown bodies allows employers to place workers in harmful working environments. Managers can avoid feelings of guilt or mistreatment because they believe that the bodies of the workers were made to handle harsh conditions.

b. Speeding Up the Production Lines

Another illustration of how racialized narratives are used to justify the placing Black and Brown bodies in highly stressful and physically demanding work environments is the movement to increase the speed of production lines beyond those established by the New Poultry Inspection System. The U.S. Center for Disease Control has identified that busy production lines and close contact between workers “substantially” exposes workers to the spread of COVID-19.²⁰⁸ It recommends that workers maintain physical distance between each other while on the line, during breaks, in changing rooms and in community transportation vehicles.²⁰⁹ Despite the recommendations of the CDC (or maybe in spite thereof), while poultry processing plants were becoming hotspots, they were also requesting and receiving waivers from the Food and Safety Inspection Service (FSIS) of the United States Department of Agriculture (USDA) to increase the speed of their “kill” or evisceration lines.²¹⁰

²⁰⁷ Linda Villarosa, *How False Beliefs in Physical Racial Difference Still Live in Medicine Today*, N.Y. Times (Aug. 14, 2019), <https://www.nytimes.com/interactive/2019/08/14/magazine/racial-differences-doctors.html> (detailing how myths and misconceptions about pain tolerance, exploited by pro-slavery advocates, remain rooted in modern-day medicine, “[t]hey believed that black people had large sex organs and small skulls — which translated to promiscuity and a lack of intelligence — and higher tolerance for heat, as well as immunity to some illnesses and susceptibility to others. These fallacies, presented as fact and legitimized in medical journals, bolstered society’s view that enslaved people were fit for little outside forced labor and provided support for racist ideology and discriminatory public policies.”).

²⁰⁸ *Meat and Poultry Processing Workers and Employers*, Interim Guidance from C.D.C and OSHA, (updated Feb. 6, 2021), available at <https://www.cdc.gov/coronavirus/2019-ncov/community/organizations/meat-poultry-processing-workers-employers.html>

²⁰⁹ *Meat and Poultry Processing Workers and Employers*, Interim Guidance.

²¹⁰ *USDA Allows Poultry Plants to Raise Line Speeds, Exacerbating Risk of COVID-19 Outbreaks and Injury*, National Employment Law Project Policy Brief, (June 2020), available at: <https://www.nelp.org/publication/usda-allows-poultry-plants-raise-line-speeds-exacerbating-risk-covid-19-outbreaks-injury/> (describing how the USDA granted

In 2017, the National Chicken Council submitted a petition to FSIS requesting that it grant a waiver to all the Council's "young chicken slaughter establishments," permitting them to establish their own line speeds without the "arbitrary" restrictions of the New Poultry Inspection System. (NPIS)²¹¹ The NPIS maximum line speed rate was 140 bpm (or birds per minute).²¹² Imagine killing chickens at the pace of Michael Jackson's *Beat It*.²¹³ In the petition, the Chicken Council proudly stated that the increase would not impact worker safety because the speed would increase in the first processing stage where chickens are eviscerated mostly by a highly automated process.²¹⁴ The processing that involves intense manual labor (trimming, deboning, and cutting the birds into pieces) does not happen until the second stage. Poultry plants would not increase the speed of the second line. Rather, they would need to increase the number of employees to meet the increase demand produced by the faster killing station.²¹⁵

The poultry plants knew that increasing the line speeds would require more workers during a stage of the processing that has always been described as working "shoulder to shoulder." They claimed they could not implement physical distancing at the plants.²¹⁶ Instead, they placed more workers on the line to meet the faster production demands, knowing that close proximity to others would place workers at risk of contracting COVID. This blatant disregard of the risk to Black and Brown bodies demonstrates how the

requests of line speed waivers to 15 major poultry producers despite histories of OSHA violations and COVID outbreaks.)

²¹¹ See Petition to Permit Waivers of the Maximum Line Speed Rate for Young Chicken Slaughter Establishments under the New Poultry Inspection System and *Salmonella* Initiative Program (Sept. 1, 2017) available at: file:///C:/Users/scrudz6/Downloads/FSIS-2017-0045-0001_content.pdf (the petition claimed that granting the waiver would not impair food safety, reduce cost, increase competitiveness with international market, and maintain current worker safety.)

²¹² US Dep't of Agric., Food Safety & Inspection Serv., *Modernization of Poultry Slaughter Inspection, Final Rule*, 79 Fed. Reg. 49,566, 49,590-49,592, 49, 635; see also 9 C.F.R. s. 381.69(a).

²¹³ *Three Things You Should Know About Poultry Line Speeds*, UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION (UFCW), (Nov. 16, 2017), available at, <https://www.ufcw.org/three-things-you-should-know-about-poultry-line-speeds/>

²¹⁴ See Petition to Permit Waivers of the Maximum Line Speed Rate for Young Chicken Slaughter Establishments under the New Poultry Inspection System and *Salmonella* Initiative Program, 10 (Sept. 1, 2017) available at: file:///C:/Users/scrudz6/Downloads/FSIS-2017-0045-0001_content.pdf

²¹⁵ *Chicken Council Petition to Permit Waivers of Maximum Line Speeds* at 10.

²¹⁶ Complaint, Rural Community Workers Alliance v. Smithfield Foods, No. 5:20-cv-06063-DGK (W.D. Mo. 2020) <https://www.publicjustice.net/wp-content/uploads/2020/04/Missouri-Smithfield-Workers-Complaint-.pdf>.

racialized narrative that their bodies can withstand harms permits employers to disregard safety precautions. This disregard for the safety of workers is duplicated throughout low-wage industries in agriculture, migrant farming, factory production, and the garment industries.

ii. Avoiding Liability at Hotspots

Despite claims that workers are safe at meat processing facilities and arguments that workers are not catching the virus “on the line,” meat processing plants are seeking immunity against worker claims of contracting COVID-19 on the job.²¹⁷ The meat processing industry and many other powerful industries are lobbying hard in support of the Liability Protection for Employers in a Declared Disaster or the Public Emergency Act.²¹⁸ The Act provides immunity for anyone who operates during a disaster or public emergency from civil liability or professional discipline, so long as the person complied with relevant rules or made a good effort to comply with the rules.²¹⁹ Immunity from liability in the meatpacking industry is particularly concerning because of its history of workplace safety violations and worker exploitation.²²⁰ The industry is not complying with voluntary OSHA or CDC guidance. Why would it make any effort if OSHA is not enforcing the guidance and workers will not be able to sue for injuries?

From a worker’s perspective, there would be a chilling-effect on the reporting of violations of COVID-19 safety rules and guidance because employers would not be held accountable. Many low-wage workers already fear retaliation; why would they risk complaining about lack of protections if employers will not be held accountable? At a time when we need workers to step up and speak up because OSHA is not monitoring workplace safety, immunity and lack of accountability would likely lead to silence.

From a racialized narrative perspective, the ability to escape the

²¹⁷ *Don’t grant global meat immunity, hold them accountable for covid-19 failures*, Institute for Agriculture and Trade Policy, available at: <https://www.iatp.org/blog/202009/dont-grant-global-meat-corporations-immunity-hold-them-accountable-covid-19-failures>

²¹⁸ *Liability Protection for Employers in a Declared Disaster or Public Emergency Act*, American Legislative Exchange Council (ALEC), (last visited: Feb. 27, 2021), available at: <https://www.alec.org/model-policy/liability-protection-for-employers-in-a-declared-disaster-or-public-emergency-act/>; see also, *Don’t grant global meat immunity, hold them accountable for covid-19 failures*, Institute for Agriculture and Trade Policy, available at: <https://www.iatp.org/blog/202009/dont-grant-global-meat-corporations-immunity-hold-them-accountable-covid-19-failures>

²¹⁹ Public Emergency Act, ALEC.

²²⁰ *Infra*.

consequences of their actions or inactions reinforces workplace cultures where Black and Brown workers are commodities with no rights to complain about mistreatment or injuries. Yet again, employers are able to hide behind the protection of immunity to ignore the complaints of workers due to a stereotypical belief that their bodies can endure harsh working conditions. Under the narrative, employers can justify dismissing workplace safeguards because of stereotypes that Black and Brown bodies will recover; Black and Brown bodies can survive harmful circumstances; Black and Brown bodies are built to withstand all that is thrown at them, even if it is a deadly virus.

iii. Meat Processing Plants Ignored the Warnings

Meat processing plants have repeatedly stated (in the news and as a legal defense) that they could not have predicted a pandemic like COVID-19, nor could they have protected themselves (or the workers) from the unknown.²²¹ A report by Propublica, however, uncovered that experts, the government, and white house officials had been warning the meatpacking industry of a COVID-19 like pandemic for over a decade.²²² In 2006, the white house asked food and agricultural industries to create a plan in case of a pandemic.²²³ They warned that should a pandemic hit, up to “40% of their workers might be absent due to illness, quarantine, or fear.”²²⁴ Trade associations created plans to respond to worker spread of viruses.²²⁵ The Department of Labor recommended that companies with high-density work environments should stockpile masks.

²²¹ *Three Things You Should Know about Poultry Line Speeds*, UFCW Blog, (Nov. 16, 2017, updated Sept. 8, 2020), available at: <https://www.ufcw.org/three-things-you-should-know-about-poultry-line-speeds/>.

²²² Michael Grabel and Bernice Young, *Meatpacking Companies Dismissed Years of Warnings but Now Say Nobody Could Have Prepared for COVID-19*, Propublica, (Aug. 20, 2020), available at: <https://www.propublica.org/article/meatpacking-companies-dismissed-years-of-warnings-but-now-say-nobody-could-have-prepared-for-covid-19>.

²²³ Michael Grabel and Bernice Young, *Meatpacking Companies Dismissed Years of Warnings but Now Say Nobody Could Have Prepared for COVID-19*, Propublica, (Aug. 20, 2020), available at: <https://www.propublica.org/article/meatpacking-companies-dismissed-years-of-warnings-but-now-say-nobody-could-have-prepared-for-covid-19>.

²²⁴ Michael Grabel and Bernice Young, *Meatpacking Companies Dismissed Years of Warnings but Now Say Nobody Could Have Prepared for COVID-19*, Propublica, (Aug. 20, 2020), available at: <https://www.propublica.org/article/meatpacking-companies-dismissed-years-of-warnings-but-now-say-nobody-could-have-prepared-for-covid-19>.

²²⁵ Michael Grabel and Bernice Young, *Meatpacking Companies Dismissed Years of Warnings but Now Say Nobody Could Have Prepared for COVID-19*, Propublica, (Aug. 20, 2020), available at: <https://www.propublica.org/article/meatpacking-companies-dismissed-years-of-warnings-but-now-say-nobody-could-have-prepared-for-covid-19>.

Given the country's fear that the pandemic would have a detrimental impact on availability of meat, the industry created plans to protect its most valuable commodity, the meat.²²⁶ The workers were disposable and replaceable. Without meat there would be no product. They knew that a pandemic was inevitable. They had the time and the resources to adequately protect their workers. They choose not to, and nobody forced them to do otherwise, even in the midst of a pandemic. The system was broken before the pandemic and continues to be broken at the cost of hundreds of lives.

IV. LEGAL ALTERNATIVES BEYOND OSHA

The following section sections describe how workers, advocates, and community organizations have turned to alternative forms of complaints and creative litigation strategies that wield narrative theory and interest convergence theory to improve working conditions in the absence of OSHA enforcements.

A. Lack of OSHA Enforcement Leads to Alternative Courses of Action

The lack of COVID-19 safety mandates by OSHA, questions about workers compensation coverage, and the reliance on voluntary compliance by employers has left low-wage workers to seek alternative venues for workplace safety claims. Meat processing workers are taking a “legal pluralist” approach to improve working conditions.²²⁷ They have filed common law claims, complaints with the Federal Trade Commission, and joined with grassroots organizations to place public pressure on the industry. Meat processing workers are creatively taking advantage of the multiple and intersecting ways in which both employee and employer activities are legally regulated to leverage the power of law and the persuasion of narratives to create safer workplaces.²²⁸

²²⁶ Michael Grabel and Bernice Young, *Meatpacking Companies Dismissed Years of Warnings but Now Say Nobody Could Have Prepared for COVID-19*, Propublica, (Aug. 20, 2020), available at: <https://www.propublica.org/article/meatpacking-companies-dismissed-years-of-warnings-but-now-say-nobody-could-have-prepared-for-covid-19>.

²²⁷ Scott L. Cummings, *Hemmed In: Legal Mobilization in the Los Angeles Anti-Sweatshop Movement*, 30 BERKELEY J. EMP'T & LAB. L. 1, 5 (2009).

²²⁸ Scott L. Cummings, *Hemmed In: Legal Mobilization in the Los Angeles Anti-Sweatshop Movement*, 30 BERKELEY J. EMP'T & LAB. L. 1, 5 (2009).

i. Spread of COVID-19 at Meat Processing Plants Presents a Nuisance to Public Health

On April 23, 2020, the Rural Community Workers Alliance and an anonymous meat production line worker filed a complaint in the United States District Court of Missouri against Smithfield Foods.²²⁹ The complaint alleged that Smithfield's failure to protect its meatpacking workers from COVID-19 created a public nuisance that endangers workers and public health.²³⁰ The case presents an interest-convergence argument.²³¹ Black and Brown bodies can contract COVID-19 and even die from it within the walls of the plant, but if the virus (and death) spreads to the outside (mostly white) community then it becomes a problematic nuisance.

The plaintiffs sought an injunction ordering Smithfield to follow recommended CDC safety protocols. The plaintiffs complained that Smithfield was (1) not providing sufficient personal protective equipment, (2) forcing workers to work in close proximity (shoulder to shoulder) and breaks did not allow for social distancing, (3) not providing adequate opportunities for personal hygiene, (4) discouraging workers from missing work (even if experiencing COVID-19 symptoms), and (5) failing to implement a testing and contact tracing plan.²³² Rather than implementing safety measures, the complaint alleges that Smithfield was blaming "certain cultures" for community spread of the virus.²³³

On May 5, 2020, the Court granted Smithfield's Motion to Dismiss on the grounds that the primary-jurisdiction doctrine required that OSHA, not a

²²⁹ Complaint, Rural Community Workers Alliance v. Smithfield Foods, No. 5:20-cv-06063-DGK (W.D. Mo. 2020) <https://www.publicjustice.net/wp-content/uploads/2020/04/Missouri-Smithfield-Workers-Complaint-.pdf>.

²³⁰ Complaint at 19, Rural Community Workers Alliance v. Smithfield Foods, No. 5:20-cv-06063-DGK (W.D. Mo. 2020) <https://www.publicjustice.net/wp-content/uploads/2020/04/Missouri-Smithfield-Workers-Complaint-.pdf> ("Smithfield's current operations constitute a public nuisance because they unreasonably interfere with the common public right to public health.").

²³¹ Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 522-523 (1980), (identifying a theory of interest-convergence whereby a result is obtained by meeting the interests of both the in and out groups, in the case of desegregated schools, "the interests of blacks in achieving racial equality will be accommodated only when it converges with the interests of whites.")

²³² Complaint at 2, Rural Community Workers Alliance v. Smithfield Foods, No. 5:20-cv-06063-DGK (W.D. Mo. 2020) <https://www.publicjustice.net/wp-content/uploads/2020/04/Missouri-Smithfield-Workers-Complaint-.pdf>.

²³³ Complaint at 2-3, Rural Community Workers Alliance v. Smithfield Foods, No. 5:20-cv-06063-DGK (W.D. Mo. 2020) <https://www.publicjustice.net/wp-content/uploads/2020/04/Missouri-Smithfield-Workers-Complaint-.pdf>.

court of law, resolve the matters in dispute.²³⁴ In a similar suit filed by McDonald's workers, the plaintiffs claimed that work environment created a public nuisance because employees had to work in close proximity to each other and the public.²³⁵ They also claimed that McDonalds was negligent by not providing adequate PPE or safety guidelines. In this case, after a four-day evidentiary hearing, the Court found that the work environment was a public nuisance because of the lack of physical distancing and contact with the public. The Court avoided the question of first jurisdiction, by resting its decision on McDonald's compliance with state guidelines, not OSHA. The Court did not find that McDonald's was negligent in creating unsafe working conditions because none of the plaintiffs had contracted COVID and (the issue is similar to workers comp cases) and the points of exposure were speculative. The Court did, however, order McDonald's to provide COVID-19 safety trainings and enforcement of a mask policy. Amazon warehouse workers have filed similar public safety suits without success.²³⁶ In the Amazon case, the Court again found that OSHA was best suited to review and resolve the matter.

While the results of these cases have been mixed, the business world is closely monitoring them. From Bloomberg Law to small management side law firms, all eyes have been on COVID-19 public nuisance claims²³⁷ The lawsuits are prompting industries to provide workers with PPE and improve sanitation protocols to try to make the claims moot. The cases have also raised

²³⁴ Rural Cmty. Workers Alliance v. Smithfield Foods, 459 F. Supp. 3d 1228 (W.D. Mo. 2020),

<http://courtweb.pamd.uscourts.gov/courtwebsearch/mowd/o6VBHFsDkv.pdf>.

²³⁵ Massey v. McDonald's Corp., et al., Cir. Ct. of Cook Cnty. Ill. No. 2020 CH 04247, (filed May 19, 2020). See Court Order issued June 24, 2020, available at: <https://images.law.com/contrib/content/uploads/documents/292/69750/McDonalds-ruling-6.24.20.pdf>

²³⁶ Palmer et al. v Amazon.com Inc., U.S. District Court, Eastern District of New York, No. 20-02468 Order and Memorandum, (Nov., 2. 2021), available at <https://law.justia.com/cases/federal/district-courts/new-york/nyedce/1:2020cv02468/448693/73/>

²³⁷ See *McDonalds Can't Get Early Exit From Virus Worker Safety Cases*, Bloomberg Law (June 3, 2020) <https://news.bloomberglaw.com/daily-labor-report/mcdonalds-cant-get-early-exit-from-virus-worker-safety-case>; see also, Jacqueline Campbell, *Examining Liability for COVID-19 Exposure Claims* (Summer 2020) available at, <https://fhmslaw.com/wp-content/uploads/2020/06/Update-on-COVID-19-Exposure-Claims-W1098366xD599F.pdf>; see also: Vin Gurreiri, *COVID Suits Test Public Nuisance Claim in Workplace Cases*, (June 9, 2020), available at, <https://www.law360.com/articles/1281347/covid-suits-test-public-nuisance-claim-in-workplace-cases>

public awareness by exposing that working conditions that were already bad have been made worse by the pandemic.

ii. Reliance on Rarely Used Emergency Case Provisions

Desperate to get OSHA to mandate COVID-19 safety protections, on July 22, 2020, three line-workers from Maid-Rite, a meat processing plant that produces food for schools, universities, nursing homes, and the military, anonymously filed a complaint in a Pennsylvania federal court against OSHA.²³⁸ The complaint claimed that OSHA failed to protect meatpacking workers who were in imminent danger of contracting COVID-19 at work.²³⁹ In an unprecedented move, the workers relied on a rarely used provision of the Occupational Safety and Health Act to sue the Secretary of Labor, Eugene Scalia, for “arbitrarily or capriciously” failing to prevent imminent dangers to meat packing workers.²⁴⁰ The complaint alleged that the failure to protect workers at this particular plant is a symptom of a larger issue of the overall failure to protect meat processing workers from COVID-19.²⁴¹

COVID-19 was spreading quickly at the Maid-Rite plant. During an interview with Propublica, a worker described that “[a]bout half the plant is out sick.”²⁴² By publicly sharing the devastation and seizing the moment of

²³⁸ *Jane Does I, II, III et al. v. Scalia et al*, case no. 3:20-cv-01260 (filed July 22, 2020), available at, <https://www.law360.com/cases/5f18bebb0a5d042c97467b>

²³⁹ *Jane Does I, II, III et al. v. Scalia et al*, case no. 3:20-cv-01260 (filed July 22, 2020), available at, <https://www.law360.com/cases/5f18bebb0a5d042c97467b> See also, Bernice Yeung and Michael Grabell, *They Warned OSHA They Were in “Imminent Danger” at the Meat Plant. Now They’re Suing the Agency*, Propublica Report, (July 23, 2020) <https://www.propublica.org/article/they-warned-osha-they-were-in-imminent-danger-at-the-meat-plant-now-theyre-suing-the-agency>

²⁴⁰ OSHA Act of 1970, Sec. 13, https://www.osha.gov/pls/oshaweb/owadisp.show_document?p_id=3367&p_table=OSHA CT. See also Complaint at 1, *Jane Does v. Scalia*, No. 3:20-cv-01260 (M.D. Pa. 2020) <https://www.documentcloud.org/documents/7000971-Doe-v-OSHA.html>.

²⁴¹ Complaint at 7-8, *Jane Does v. Scalia*, No. 3:20-cv-01260 (M.D. Pa. 2020), (“OSHA’s seeming refusal to protect so-called essential workers— many of whom are low-wage workers, immigrants, and people of color—from the imminent dangers they face caused by Maid-Rite’s failure to expend the resources necessary to protect its employees is part of a pattern.”).

²⁴² Bernice Yeung and Michael Grabell, *They Warned OSHA They Were in “Imminent Danger” at the Meat Plant. Now They’re Suing the Agency*, Propublica Report, (July 23, 2020) <https://www.propublica.org/article/they-warned-osha-they-were-in-imminent-danger-at-the-meat-plant-now-theyre-suing-the-agency>. Prior to filing the federal lawsuits, a different set of workers had filed an anonymous complaint with OSHA alleging the lack of protections and requirements to work “elbow-to-elbow”. OSHA responded to the complaint by asking Maid-Rite to investigate the allegations and provide a response. Maid-Rite replied

universal vulnerability that the pandemic has exposed, these lawsuits counter the narrative that Black and Brown bodies are indestructible.²⁴³ Like the workers at JBS, the Respondents claimed that Maid-Rite issued penalties for missing work due to COVID-19 and provided incentives to work even if individuals were experiencing COVID-19 symptoms.²⁴⁴ As expected, OSHA only sent a letter to Maid-Rite informing them that they would not be making an on-site inspection and asking the company to investigate the matter and address the allegations.²⁴⁵ As of the date of the filing of the complaint, Maid-Rite had not improved the working conditions.²⁴⁶

While the case was pending in federal court, OSHA issued a letter stating that it had concluded its investigation of the Maid-Rite matter and would not be issuing a citation.²⁴⁷ Maid-Rite, in-turn, has filed a motion to dismiss the case for mootness.²⁴⁸ The case is still pending before federal court, however,

to the complaint by stating that they could not provide line workers with six (6) feet of physical distancing, but that they gave line workers masks, staggered breaks and deep cleaned the jobsite. Following the Maid-Rite letter, OSHA closed the case and did nothing further. Not knowing about the first complaint, the three Respondents filed their own complaint against Maid-Rite with OSHA. Complaint at 4, *Jane Does I, II, III v. Eugene Scalia*, No. 3:20-cv-01260 (M.D. Pa. 2020), <https://www.documentcloud.org/documents/7000971-Doe-v-OSHA.html>.

²⁴³ See Margaret Fineman, *The Vulnerable Subject and the Responsive State*, 60 EMORY L.J. 251, 266-269 (2010). (“There are also external threats to our bodily well-being that are difficult to eliminate or even substantially decrease. We may suffer or succumb to diseases that are random or the result of pandemics or other biologically based catastrophes.”)

²⁴⁴ Complaint at 29-30, *Jane Does I, II, III v. Eugene Scalia*, No. 3:20-cv-01260 (M.D. Pa. 2020), <https://www.documentcloud.org/documents/7000971-Doe-v-OSHA.html>.

²⁴⁵ Letter from Mark Stelmack, Wilkes-Barre Area Director of OSHA, to Dave Hollander, Maid-Rite Specialty Foods, Inc. (May 21, 2020) (<https://www.documentcloud.org/documents/7000167-DOL-Correspondence-Maid-Rite.html>).

²⁴⁶ The Complaint alleges that Maid-Rite continues to violate its duty to provide a workplace that is free from hazards that are likely to cause death or serious harm to workers. It has failed to provide face coverings, workers cannot be physically distance, poor sanitation, created incentives for workers to work while sick, failed to inform workers of potential exposures to the virus, and rotating-in workers from other facilities in ways that increase risk of exposure to the virus.

Complaint at 2-3, *Jane Does I, II, III v. Eugene Scalia*, No. 3:20-cv-01260 (M.D. Pa. 2020), <https://www.documentcloud.org/documents/7000971-Doe-v-OSHA.html>

²⁴⁷ See OSHA Letter Ending Maid-Rite Investigation, (Dec. 2, 2020), available at, https://www.law360.com/dockets/download/5fc8091d8ad8be0674a52476?doc_url=https%3A%2F%2Fecf.pamd.uscourts.gov%2Fdoc1%2F15517452086&label=Case+Filing

²⁴⁸ See *Maid-Rite Suggestion of Mootness*, (Jan. 1, 2021). https://www.law360.com/dockets/download/5ffdde689a927f01e4cece22?doc_url=https%3

it will likely be dismissed for mootness because OSHA investigated and chose not to issue a citation. The lawsuit prompted Maid-Rite to address COVID-19 safety conditions at the plants by improving sanitation protocols and providing PPEs to employees.²⁴⁹ Workers and advocates continue to be dismayed by the lack of enforcement by OSHA and its refusal to issue a citation.²⁵⁰ OSHA's inaction creates doubt within the worker community that the agency will step in to help them next time. If the agency did not step in to protect workers during the pandemic, why would workers trust the agency to help them against everyday workplace violations? OSHA's inaction discourages workers from complaining about future workplace safety violations, especially when each complaint places workers at risk of retaliation or placing themselves on the radars of other government agencies.²⁵¹

iii. Alleging Deceptive Practices

On July 30, 2020, two food protection non-profits groups, Venceremos and Food & Water Watch, filed a complaint against Tyson Foods before the United States Federal Trade Commission (FTC).²⁵² In addition to false statements about working with "independent" family owned farms, the

A%2F%2Fecf.pamd.uscourts.gov%2Fdoc1%2F15517496133&label=Case+Filing

²⁴⁹ OSHA Investigation Letter to Maid-Rite (Dec. 2, 2020), available at, https://www.law360.com/dockets/download/5fc8091d8ad8be0674a52476?doc_url=https%3A%2F%2Fecf.pamd.uscourts.gov%2Fdoc1%2F15517452088&label=Exhibit%28s%29+Maid+Rite+Hazard+Alert+Letter+12-01-2020

²⁵⁰ Justice at Work letter to the Court (Feb. 21, 2021), available at, https://www.law360.com/dockets/download/602e6d489aac40008c210729?doc_url=https%3A%2F%2Fecf.pamd.uscourts.gov%2Fdoc1%2F15517538341&label=Case+Filing

²⁵¹ Rebecca Smith, Ana Avendaño, and Julie Martínez Ortega, *Iced Out, How Immigration Enforcement Has Interfered with Workers' Rights*, AFL-CIO, AM. RTS. WORK EDUC. FUND, NAT'L EMP'T L. PROJECT, (2009), available at, https://www.jwj.org/wp-content/uploads/2013/12/icedout_report.pdf (describing how the rise in immigration raids at workplaces and cooperation between ICE, employers, and other government agencies has had a chilling effect on workers' willingness to enforce their workplace rights and complain about violations.); see also, *Immigration Raids at Mississippi Plants Provokes Concerns about Worker Health and Safety*, OCCUPATIONAL HEALTH & SAFETY ONLINE, (Aug., 12 2019) <https://ohsonline.com/articles/2019/08/12/immigration-raid-at-mississippi-plants-provokes-concerns-about-worker-health-and-safety.aspx?admgarea=news&m=1>, (describing the chilling-effect of workplace immigration raids on safety violation complaints.)

²⁵² Venceremos and Food and Water Watch v. Tyson Foods, Inc., COMPLAINT FOR ACTION TO STOP FALSE OR DECEPTIVE ADVERTISING, (July 20, 2020), https://foodandwaterwatch.org/sites/default/files/tyson_labor_ftc_complaint_7.30.2020_filed.pdf.

complaint alleged that Tyson engaged in false and deceptive advertising by claiming that it provided safe working environments.²⁵³ The Petitioners alleged that Tyson's advertisements and public claims that their chicken is processed under safe working conditions that are free from dangers and injuries to workers were false and deceptive.²⁵⁴ The complaint further alleged that Tyson benefited from these false statements because consumers are very interested in purchasing products that are created humanely.²⁵⁵ The Petitioners claimed that Tyson deceived the public for decades by falsely stating that they provide safe working conditions and that COVID-19 has only made the conditions worse.²⁵⁶

This case is still pending. It is unclear whether the petitioners will be able to establish that consumers materially relied on Tyson's claims about worker safety when choosing to purchase Tyson products.²⁵⁷ Following the lawsuit, Tyson launched a "new initiative" to prevent the spread of COVID-19 at poultry processing plants.²⁵⁸ Under Tyson's "new initiative," the company promised to increase testing by conducting daily and random screenings of workers performed by a new expanded medical staff of doctors and nurses.²⁵⁹ The use of on-site healthcare workers however is self-serving for employers who can then keep all their "dirty laundry" in-house. In-house healthcare providers are hired by the company and report to them. There is an incentive to resolve the problem within the company. Tyson, like most of the other major meat processing plants is exempt from most of the COVID related paid leaves because the pay is limited to companies with less than 500

²⁵³ See 15 U.S.C. § 41; *see also*, COMPLAINT FOR ACTION TO STOP FALSE OR DECEPTIVE ADVERTISING at 6.

²⁵⁴ COMPLAINT FOR ACTION TO STOP FALSE OR DECEPTIVE ADVERTISING at 13-14.

²⁵⁵ COMPLAINT FOR ACTION TO STOP FALSE OR DECEPTIVE ADVERTISING at 26.

²⁵⁶ COMPLAINT FOR ACTION TO STOP FALSE OR DECEPTIVE ADVERTISING at 6, 19-20.

²⁵⁷ COMPLAINT FOR ACTION TO STOP FALSE OR DECEPTIVE ADVERTISING (the complaint refers to studies and reports on consumer behavior, actual consumers who claim reliance on Tyson's claims when making purchasing decisions.); *see also*, Jenny Splitter, *Tyson Foods Accused of False Advertisements in New Federal Trade Commission Complaint*, FORBES, (Jul. 30, 2020), available at: <https://www.forbes.com/sites/jennysplitter/2020/07/31/tyson-foods-ftc-complaint/?sh=3528989e30ff>, (describing complexities in identifying why consumers make purchasing choices.)

²⁵⁸ Jenny Splitter, *Tyson Foods Accused of False Advertising in New Federal Trade Commission Complaint*, FORBES (July 31, 2020), <https://www.forbes.com/sites/jennysplitter/2020/07/31/tyson-foods-ftc-complaint/?sh=35e72a3130ff>.

²⁵⁹ *Tyson Foods Launches New Nationwide COVID Monitoring Strategy: Expands Health Staff*, TYSON FOODS (July 30, 2020), <https://www.tysonfoods.com/news/news-releases/2020/7/tyson-foods-launches-new-nationwide-covid-monitoring-strategy-expands>

employees.²⁶⁰ For workers who fear losing a day's work or getting fired due to an extended illness, having on-site healthcare workers can create additional stress and cause workers to hide symptoms to avoid being sent home without pay.²⁶¹

Keeping the health concerns "in-house" serves as a form of interest convergence. The workers get some level of screening against the virus (and theoretically protection from co-workers who are identified as sick, although in practice Tyson encouraged workers to "work while sick" and fear of lost wages discouraged workers from seeking the in-house medical assistance); and Tyson gains control of the narrative regarding the outbreak of the virus because the COVID-19 cases are handled internally and quietly by their own medical care providers. While Tyson may have been motivated by financial and social pressure to protect its workers, an extra incentive exists. Providing in-house screening and medical providers allows Tyson to conduct significant damage control of public opinion because the workers do not have to seek outside care for diagnosis of the virus.

V. HOPE OF A WORKERS' RIGHTS RENAISSANCE²⁶²

COVID-19 has created a moment where racialized narratives are being ruptured, exposing an effective counter-narrative. The rapid spread of the virus through the meatpacking industry has exposed decades of unsafe working conditions and exploitation of low-wage people of color and immigrants. In this rupture, advocates have made visible shared vulnerability, the universal harms of continued racialized subordination, and the ways in which the interests of exploited workers of color and the majority converge. It is precisely at such moments that significant change is possible.

The change in the White House administration offers hope for a renewed focus on dignity, justice, and safety for low-wage workers. Within days of being in office, President Biden reversed the previous

²⁶⁰ See *infra* Choosing Between the Virus and Getting Paid section II C.

²⁶¹ Michel Grabell, *What Happens If Workers Cutting up the Nations Meat Get Sick*, PROPUBLICA, (Mar. 28, 2020) <https://www.propublica.org/article/what-happens-if-workers-cutting-up-the-nations-meat-get-sick>, (describing workers' reluctance to report COVID symptoms to the employer for fear of missing work without pay.)

²⁶² Sherley Cruz, 'A Renaissance for Labor Issues': Social Media Help People to Apply for Unemployment, NATIONAL PUBLIC RADIO, (June 4, 2020), available at: <https://www.npr.org/2020/06/04/869952376/-a-renaissance-for-labor-issues-social-media-help-people-to-apply-for-unemployme?fbclid=IwAR0YaB7ZSRoA0b5WYqsLWpmZkFGq0fBI71sR5aTH2A-zbypqDKrnBZ9kYi4> (describing how this moment has created an opportunity to improve working conditions beyond the pandemic.)

administrations' efforts to increase line speeds at poultry plants.²⁶³ Slowing down the lines reduces the need for more workers to be on the line and gives workers more space to physically distance from each other. A congressional panel has launched an investigation into the hundreds of COVID-19 related deaths within the meatpacking industry.²⁶⁴ The visibility of the stories and the clear vulnerability of the workers has prompted the new administration to take action to protect low-wage workers.

On January 21, 2021, President Biden issued an Executive Order on Protecting Worker Health and Safety.²⁶⁵ The order seeks to ensure the safety of all workers and recognizes that many of the essential workers who risked their lives during the pandemic are predominantly people of color and immigrants.²⁶⁶ The Order directed several mandates at OSHA including issuing revised COVID-19 guidance; consideration of emergency temporary standards on COVID-19; review and replacement of enforcement efforts; focus on workers at serious risk of danger; creation of a multi-lingual community education and outreach campaign; review of state plans related to COVID-19; and coordination between the relevant government agencies.²⁶⁷ While the order does not provide mandatory standards, a movement towards nationalized recommendations will help eliminate the guessing game for employers and provide mechanisms to hold them accountable.

OSHA is long overdue for an over-haul. From the need for more inspectors to increasing the size of penalties and creating more protections against retaliation, the agency is failing to protect low-wage workers.²⁶⁸

²⁶³ Office of Information and Regulatory Affairs Office of Management and Budget, Executive Order 12866 Regulatory Review (order withdrawn on Jan. 22, 2021), *available at*: <https://www.reginfo.gov/public/do/eoDetails?rrid=131373>; *See also*, Dave Jamieson, *Joe Biden Halts Trumps Plan to Speed Up Processing Lines in Poultry Plants*, HUFFINGTON POST (Jan. 26, 2021), *available at*: https://www.huffpost.com/entry/biden-trump-poultry-plants_n_600f6be7c5b600a2796248fe.

²⁶⁴ Bernice Young, *After Hundreds of Meatpacking Workers Died From COVID-19, Congress Wants Answers*, PROPUBLICA, (Fed. 4, 2021); *Available at*, <https://www.propublica.org/article/after-hundreds-of-meatpacking-workers-died-from-covid-19-congress-wants-answers>.

²⁶⁵ *Executive Order on Protecting Worker Health and Safety*, U.S. WHITE HOUSE (Jan. 21, 2021), *available at*: <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/21/executive-order-protecting-worker-health-and-safety/>

²⁶⁶ *See Executive Order on Protecting Worker Health and Safety*.

²⁶⁷ *See Executive Order on Protecting Worker Health and Safety*.

²⁶⁸ Jayesh M. Rathod, *Immigrant Labor and the Occupational Safety and Health Regime*, 33 N.Y.U. REV. L. & SOC. CHANGE 497, 536-558 (2009). (proposing recommendations to improve OSHA investigations, enforcement, transparency, and protections for immigrant

While the Biden Administration is proposing steps in the right direction, the effectiveness of OSHA still poses a problem. There are some small steps that the agency can take now to help protect low-wage workers.

Increased transparency and community outreach would place employers and workers on notice of duties and responsibilities and increase trust with vulnerable workers. Scholars have long called for more transparency regarding OSHA enforcement actions.²⁶⁹ A recent report found that publicity regarding OSHA violations and citations led to significant increase in employer compliance and reduction in workplace injuries.²⁷⁰ In fact, the increased employer compliance and increased worker awareness of rights and employer responsibilities following a single press release has the deterrent effect of 210 inspections.²⁷¹ Publicizing data on investigations and enforcement actions allows the public to identify workplace safety trends and gaps in worker protection.²⁷²

In the absence of OSHA enforcement, workers need to continue to collectively file lawsuits against employers that are risking the lives workers for profits. Even when the lawsuits fail, the litigation raises public awareness and places pressure on employers to improve working conditions (or at least promise to make workplaces safe). JBS, Tyson, and Amazon instituted some level of COVID-19 safety protocols following the filings of high-profile lawsuits. Community organizing has also help improve COVID-19 related workplace safety and working conditions. Community led actions have kept the issues low-wage workers in the public eye, educated workers about their rights, and given workers a platform to effectuate change.

VI. CONCLUSION

“Injustice anywhere is a threat to justice everywhere. We are caught in

workers).

²⁶⁹ See, e.g., Jayesh Rathod, *Danger and Dignity: Immigrant Day Laborers and Occupational Risk*, 46 SETON HALL L. REV. 813, 852–53 (2016) (discussing the beneficial effects of employer-employee transparency).

²⁷⁰ Deborah Berkowitz, *Worker Safety in Crisis: The Cost of a Weakened OSHA*, NAT’L EMP’T L. PROJECT (Apr. 28, 2020), <https://www.nelp.org/publication/worker-safety-crisis-cost-weakened-osh/>; see also Matthew S. Johnson, *Regulation by Shaming: Deterrence Effects of Publicizing Violations of Workplace Safety and Health Laws*, 110 AM. ECON. REV. 1866, 1866 (2020)

²⁷¹ Deborah Berkowitz, *Worker Safety in Crisis: The Cost of a Weakened OSHA*, NELP (Apr. 28, 2020), <https://www.nelp.org/publication/worker-safety-crisis-cost-weakened-osh/>; see also Matthew S. Johnson, *Regulation by Shaming: Deterrence Effects of Publicizing Violations of Workplace Safety and Health Laws*, 110 AM. ECON. REV. 1866, 1866 (2020)

²⁷² Jayesh M. Rathod, *Immigrant Labor and the Occupational Safety and Health Regime*, 33 N.Y.U. REV. L. & SOC. CHANGE 497, 538-541 (2009).

an inescapable network of mutuality, tied in a single garment of destiny. Whatever affects one directly, affects all indirectly.” – Dr. Martin Luther King, Jr.

Meat processing workers are not dying by the hundreds because of the pandemic. They are dying because of decades of structural racism and inequalities have created working environments where low-wage workers have no choice but to work in unsafe working conditions. Saul’s story serves as a reminder of how an exploitative industry can use racialized narratives and systemic inequalities to maximize profits at the cost of workers lives. We need to seize this moment to create change and redirect history. We cannot continue to ignore the plights of low-wage workers and people of color. We have the ability to choose to rise out of this pandemic with awareness of our past to better the future. It is a moment to recognize the consequences of racial inequities to provide justice and dignity to all workers.

* * *