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Essentially Unprotected

Sherley E. Cruz*

“Injustice anywhere is a threat to justice everywhere. We are caught in an inescapable network of mutuality, tied in a single garment of destiny. Whatever affects one directly, affects all indirectly.”

—Dr. Martin Luther King, Jr.

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. 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 resulted in industry-wide COVID-19 outbreaks infecting almost sixty-thousand workers. By applying a critical race theory lens and telling 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 narratives that allow low-wage industries, like U.S. meatpacking plants, to place profits over the lives of Black and Brown workers. This Article concludes by highlighting the lessons learned and providing recommendations to safeguard low-wage workers beyond this critical moment in time.

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* © 2022 Sherley E. Cruz is an Assistant Professor at the University of Tennessee Knoxville College of Law (UTK) 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, and to my mother-in-law, Cherry Bailey, who passed away from COVID-19 during the writing of this Article. Thank you to the attendees of the 2020 Clinical Law Review’s Writers Workshop, the Latina Law Scholars Workshops, and the 2021 Equality Law Scholars’ Forum for their thoughtful feedback and invaluable insights and to my UTK mentors, Wendy Bach, Zack Buck, Michael Higdon, Lucy Jewel, and Joy Radice, for getting me to the finish line. An enormous thank you to my research assistants Katherine Sands, Taylor Blake, Samuel Pannell, Guy Tustin III, Alexandr Rudenco, and Samantha Buller-Young for their exceptional research and organizational skills. Eternal gratitude to my husband, Jerome Robinson, for his strength and support throughout this project.

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I. INTRODUCTION

As the United States struggled to reduce the spread of the COVID-19 virus, meat processing plants¹ penalized *essential workers* for taking sick days, lobbied to keep production lines open, and sped up already dangerously fast production lines. Plant managers placed bets on how many workers would contract the virus from the plant floors.² Meat processing workers became “essential” employees shortly after the virus hit the United States.³ As an “essential” industry, meat processing plants maintained full production capacity despite being COVID-19 hot beds.⁴ The essential commodity, however, was

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

2. See discussion *infra* subpart III.A.3.

3. Memorandum from Brandon Wales, Acting Dir. of the U.S. Dep’t of Homeland Sec. Cybersecurity & Infrastructure Sec. Agency, on Ensuring Essential Critical Infrastructure Workers’ Ability to Work During the COVID-19 Response (Dec. 16, 2020); *Guidance on the Essential Critical Infrastructure Workforce*, CYBERSECURITY & INFRASTRUCTURE SEC. AGENCY, <https://www.cisa.gov/publication/guidance-essential-critical-infrastructure-workforce> (last visited Mar. 23, 2022) (“CISA issued the guidance originally on March 19, 2020.”); see also Exec. Order No. 13917, 85 Fed. Reg. 26313, 2613-14 (May 1, 2020) (ordering meat plants to continue operation during the COVID-19 pandemic); Joshua Gallu & Jennifer Jacobs, *Trump Orders Meat Plants to Stay Open in Move Unions Slam (I)*, BLOOMBERG L. (Apr. 29, 2020), <https://news.bloomberglaw.com/trump-says-hes-issuing-order-for-tysons-unique-liability> (“Environmental Working Group called the order a potential death sentence At least [twenty] 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. Exec. Order No. 13917, 85 Fed. Reg. 26313, 26313 (May 1, 2020).

the tons of beef, pork, and chicken consumed by the American public, not the humans processing the meat. To provide the public with a steady supply of meat, the workers risked their lives working shoulder to shoulder without proper protective gear or the ability to take a sick day. These working conditions were not new. Low-wage workers, particularly those in industries that prey on vulnerable workers (like the meatpacking industry), have been disposable, replaceable labor long before the pandemic.⁵

At the start of the nationwide lockdown, most industries that did not rely on manual labor shut down or shifted to “remote” working models to try to contain the spread of COVID-19.⁶ Many low-wage essential workers, however, were not able to work remotely because packing groceries, filling warehouse orders, making deliveries, and processing meat require on-site labor.⁷ The meatpacking industry illustrates how systemic racism, entrenched racialized narratives, industry practices, and lack of oversight perpetuate a system where workers are dehumanized to maximize profits. By July of 2020, community spread from the meatpacking industry contributed to at least 8% of COVID-19 cases (amounting to 236,000 to 310,000 cases and up to 4,300 deaths due to community spread) in the United States.⁸ As of the fall of 2021, the top five meatpacking companies in the United States reported that almost 60,000 meatpacking workers had

5. Natalie Krebs, *Meatpacking Jobs are Attractive to Immigrants, COVID Made the Work Even Riskier*, WFYI (Dec. 29, 2021), <https://www.wfyi.org/news/articles/meatpacking-jobs-immigrants-covid> [<https://perma.cc/P77Q-HQXQ>].

6. *Guidance for Businesses and Employers Responding to Coronavirus Disease 2019 (COVID-19)*, CTR. FOR DISEASE CONTROL & PREVENTION (2020), <https://www.cdc.gov/coronavirus/2019-ncov/community/guidance-business-response.html> [<https://perma.cc/MG7Q-8M28>].

7. 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 INST. (Mar. 19, 2020, 1:15 PM), <https://www.epi.org/blog/black-and-hispanic-workers-are-much-less-likely-to-be-able-to-work-from-home/> [<https://perma.cc/C9C5-PE2J>]; see also Molly Kinder & Martha Ross, *Reopening America: Low-wage Workers Have Suffered Badly from COVID-19 so Policymakers Should Focus on Equity*, BROOKINGS INST. (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/> [<https://perma.cc/ZYQ9-7DPP>] (noting that low-wage workers are six times less likely to be able to work from home than high-income workers).

8. Charles A. Taylor et al., *Livestock Plants and COVID-19 Transmissions*, 117 PROC. NAT'L ACAD. SCIS. U.S. 31706, 31706 (2020) (“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.”).

contracted COVID-19.⁹ Most of the spread was 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.¹⁰ The intersection of race, socio-economics, and immigration status created an environment ripe for workplace exploitation.

Workers feared retaliation for speaking up about workplace safety.¹¹ They feared contracting a deadly virus while at work (and bringing it home to loved ones).¹² They feared being unable to make a living, so they went to work while sick despite the consequences.¹³ Their fears played into a system of racialized narratives where employers profit by supporting and perpetuating racial bias that

9. Memorandum from U.S. H.R. Select Subcomm. on the Coronavirus Crisis on Coronavirus Infections and Deaths Among Meatpacking Workers at Top Five Companies Were Nearly Three Times Higher than Previous Estimates (Oct. 27, 2021) (on file with author) [hereinafter Memo from Subcom. on the Coronavirus Crisis] (reporting accountings from Cargill, JBS, National Beef, Smithfield, and Tyson meat processing conglomerates revealed that rates of infections were much higher than previously reported to the public).

10. *UFCW Calls on USDS and White House to Protect Meatpacking Workers and America's Food Supply*, UFCW (Sept. 4, 2020), <http://www.ufcw.org/covidpacking> [<https://perma.cc/7FRP-2DVF>]; 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/> [<https://perma.cc/A933-BC3G>] (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 8 (2020) (“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. 6, 2020), <https://investigatamidwest.org/2020/04/16/tracking-covid-19s-impact-on-meatpacking-workers-and-industry/> [<https://perma.cc/NK5T-ZWZC>] (“Since April 2020, we have tracked at least 50,000 reported positive cases tied to meat and poultry processing facilities from at least 499 outbreaks in 38 states, and at least 260 reported worker deaths in at least 67 plants in 29 states.”).

11. Kate Payne, *Meatpacking Workers Are Struggling to Protect Themselves During the Pandemic*, NPR (May 5, 2020, 4:06 PM), <https://www.npr.org/2020/05/05/850964016/meatpacking-workers-are-struggling-to-protect-themselves-during-the-pandemic> [<https://perma.cc/JN9Q-3M7K>]; see also Michael Puente, *Meatpacking Workers' Dilemma: Quit Job or Face COVID-19 Risks*, NPR (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> [<https://perma.cc/5N5V-BKVN>] (“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.”).

12. Puente, *supra* note 11.

13. *Id.*; see also ABIGAIL B. LONG & NICOLE CIVITA, ESSENTIAL MEAT PROCESSING WORKERS BRIEFING BOOK (Johns Hopkins Berman Inst. of Bioethics & U. of Colo. Boulder eds., 2020) (describing meat processing workers’ need to continue to work despite fears of contracting the virus).

dehumanizes Black and Brown bodies.¹⁴ Beliefs that the workers can tolerate harsh working conditions give employers permission to loosen their moral compasses and lower the standard of care that is provided to meatpacking workers.

The Occupational Safety and Health Administration (OSHA), the federal agency whose mission is “to assure [the] . . . safe and healthful working conditions” for working people, failed to institute safety standards to protect meatpacking workers.¹⁵ While the lack of oversight was not new, the invisibility during a time when swift and stringent intervention could have saved tens of thousands of lives demonstrated the effect of decades of underfunding, political puppeteering, and catering to employer-friendly policies. OSHA received thousands of COVID-19 related workplace safety complaints, yet it did little to intervene to protect workers in the meat processing industry.¹⁶ Workers,

14. See Stephen M. Utych, *How Dehumanization Influences Attitudes Towards Immigrants*, 71 POL. RSCH. Q. 440, 440 (2018) (describing how dehumanizing language or denying human-like attributes to the “out” group creates negative attitudes towards immigrants whereby the group is devalued, and animal-like treatment or punishment is justified); David M. Markowitz & Paul Slovic, *Social, Psychological, and Demographic Characteristics of Dehumanization Towards Immigrants*, 117 PROC. OF THE NAT’L ACAD. OF SCIS. OF THE U.S. 9260, 9261-62 (2020) (finding that dehumanization (1) permits the “in” group to create distance from the “out” group, (2) perceives the “out” group as animals that can be treated like objects, (3) believes that the “out” group’s emotions or thoughts are not valued, or (4) perceives that the “out” group are not able to make cognitive decisions, which leads to negative social consequences for immigrants); Themal I. Ellawala, *Pulling the Trigger: Dehumanization of African Americans and Police Violence*, 2 SCHOLARLY UNDERGRADUATE RSCH. J. AT CLARK 1, 4 (2018) (finding that implicit dehumanization of young African-American youth makes it more likely that police will engage in violence towards them).

15. Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 (2018); see also *About OSHA*, U.S. DEP’T OF LABOR: OCCUPATIONAL SAFETY & HEALTH ADMIN., <https://www.osha.gov/aboutosha> [<https://perma.cc/69KW-V5JB>] (last visited Mar. 23, 2022) (“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 workers by setting and enforcing standards and by providing training, outreach, education and assistance.”); 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), <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).

16. Noam Scheiber, *OSHA Criticized for Lax Regulation of Meatpacking in Pandemic*, N.Y. TIMES (Sept. 17, 2021), <https://www.nytimes.com/2020/10/22/business/economy/osha-coronavirus-meat.html> [<https://perma.cc/J3HW-BWWG>] (describing lack of OSHA enforcement leading to devastating infections and deaths at meatpacking plants); see also Yeung & Grabell, *supra* note 15 (“[D]espite receiving thousands of complaints, OSHA has not prioritized essential workers like meatpackers in its COVID-19 enforcement efforts. Public health

advocates, unions, and communities called on OSHA to establish emergency COVID-19 workplace safety standards and issue citations.¹⁷ OSHA, however, only suggested guidance that employers could voluntarily comply with or freely reject.¹⁸ Without a mandate, the guidance was unenforceable. This was particularly troubling for low-wage industries, such as meat processing, where long-established economic exploitation and structural racism against people of color and immigrants protect the bottom line above all else.¹⁹

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.”).

17. *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 INT'L UNION (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> [https://perma.cc/L86N-JPYA] (condemning OSHA's 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 & Resources*, NAT'L EMP. L. PROJECT (Apr. 9, 2020), <https://www.nelp.org/publication/worker-safety-health-during-covid-19-pandemic-rights-resources/> [https://perma.cc/9SXV-RCW5] (describing how OSHA has failed to keep workers safe during the pandemic); Michael Grabell et al., *Millions of Essential Workers are Being Left Out of COVID-19 Workplace Safety Protections, Thanks to OSHA*, PROPUBLICA (Apr. 16, 2020, 7:52 PM), <https://www.propublica.org/article/millions-of-essential-workers-are-being-left-out-of-covid-19-workplace-safety-protections-thanks-to-osha> [https://perma.cc/HG5G-KEA9] (describing OSHA's failure to protect essential workers, including meat processing workers, from COVID-19).

18. *U.S. Dep't of Labor's OSHA and CDC Issue Interim Guidance to Protect Workers in Meatpacking and Processing Industries*, OSHA (Apr. 26, 2020), <https://www.osha.gov/news/newsreleases/national/04262020> [https://perma.cc/GY84-9W73] (providing voluntary/self-directed guidance to meat and poultry processing); see generally OCCUPATIONAL SAFETY & HEALTH ADMIN., *GUIDANCE ON PREPARING WORKPLACES FOR COVID-19* (2020) (“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.”).

19. See generally Seema Mohapatra & Ruqaiyah Yearby, *Systematic Racism, the Government's Pandemic Response, and Racial Inequities in COVID-19*, 70 EMORY L.J. 1419 (2021) (“[I]llustrat[ing] how systemic racism has resulted in racial inequities in COVID-19 infections and deaths through case studies in employment and health care.”). Mohapatra and Yearby have published a series of articles and essays examining how the disparate impact of health inequities and disproportionately high rates of COVID-19 infections and death among racial and ethnic minorities were the result of systemic and structural racism, governmental actions and inactions, and lack of access to resources. See also Sherita Hills Golden, *Coronavirus in African Americans and Other People of Color*, JOHNS HOPKINS MED. (Apr. 20, 2020), <https://www.hopkinsmedicine.org/health/conditions-and-diseases/coronavirus/covid19-racial-disparities> [https://perma.cc/7KDE-RVCR] (relaying the disproportionate impact that COVID-19 has had on communities of color); *Health Equity Considerations and*

To understand how meatpacking workers can be essential to the infrastructure of the country, and yet unworthy of basic workplace protections and dignity, this Article explores the narratives and counter-narratives of people of color and immigrants in the meatpacking industry. 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) provides a rich and complex illustration of how the policies and practices of the meatpacking industry have left low-wage workers essentially unprotected.²⁰ By unpacking the racially charged narratives that “normalize” the exploitation of meatpacking workers, this Article tells the story of the plight of low-wage workers and how employers have collaborated to maintain the status quo.²¹

Low-wage industries have subjected workers to dangerous working conditions and workplace discrimination for decades.²² The pandemic merely placed a spotlight on the issue. Part II of this Article tells the story of Saul Sanchez's tragic death to illustrate how employers

Racial and Ethnic Minority Groups, CTRS. FOR DISEASE CONTROL & PREVENTION (Nov. 30, 2021), <https://www.cdc.gov/coronavirus/2019-ncov/community/health-equity/race-ethnicity.html> [<https://perma.cc/N4KJ-MAUC>] (identifying factors that put ethnic and racial minorities at increased risk of getting sick and dying of COVID-19, such as discrimination; health care 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*, NPR (Sept. 23, 2020, 1:01 PM), <https://www.npr.org/sections/health-shots/2020/09/23/914427907/as-pandemic-deaths-add-up-racial-disparities-persist-and-in-some-cases-worsen> [<https://perma.cc/4HUN-NPY2>] (“Today, as the U.S. has surpassed 200,000 COVID-19 deaths, and reached nearly 7 million confirmed cases, racial data is more 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.”).

20. See discussion *infra* Part II.

21. Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411, 2415 (1989) (explaining how 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 Derrick Bell, *White Superiority in America: Its Legal Legacy, Its Economic Costs*, 33 VILL. L. REV. 767, 767-78 (1988) (describing the effects of perceived white superiority on African Americans, racial injustice, and society as a whole); Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323, 325 (1987) (asserting that we need to hear the voices and lived experiences of people of color to help scholars better understand the law and “the elements of justice”); Patricia J. Williams, *Alchemical Notes: Reconstructing Ideals from Deconstructed Rights*, 22 HARV. C.R.-C.L. L. REV. 401, 409-13, 431 (1987); Leticia M. Saucedo, *The Employer Preference for the Subservient Worker and the Making of the Brown Collar Workplace*, 67 OHIO STATE L.J. 961, 971, 992, 1010-11 (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).

22. See discussion *infra* Part III.

manipulate the policies and practices of an industry and legal system at the expense of vulnerable workers. Part III describes the meatpacking industry and how the labor, working conditions, and racialized narratives have created a peripheral workforce that is widely exploited. Part IV illustrates how OSHA and workers' compensation (workers' comp), the two main systems for workplace safety, failed to protect meatpacking workers throughout the pandemic. Part V looks at alternative legal actions initiated by workers in the absence of traditional enforcement mechanisms. Part VI reflects on the lessons learned during the pandemic and makes recommendations for regulatory changes, increased transparency, and the use of counter-narratives to breakdown exploitative practices and safeguard low-wage workers moving forward. Part VII briefly concludes.

II. SAUL SANCHEZ

On Tuesday, April 7, 2020, Saul Sanchez died from COVID-19 related complications.²³ Saul worked as a low-level supervisor at a JBS Foods USA (JBS) meat processing plant in Greeley, Colorado for over thirty years and never missed a day of work.²⁴ He was the first Greeley JBS employee to die from the virus.²⁵ He left behind a wife, six

23. 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. (May 28, 2020, 6:35 AM), <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/> [<https://perma.cc/79LV-RVXT>]; see also *Obituary for Saul Sanchez*, GREELEY TRIB. (May 28, 2020, 6:36 AM), <https://www.greeleytribune.com/2020/04/12/obituary-for-saul-sanchez/> [<https://perma.cc/PG6S-UX25>] (“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.”).

24. JBS stands for the initials of its founder, Jose Batista Sobrinho. See Taylor Meek, *JBS-USA: Behind America's Leading Meat Producer Processor*, SENTIENT MEDIA (Aug. 29, 2019), <https://sentientmedia.org/jbs-usa/> [<https://perma.cc/MN96-QT36>]. JBS Food USA is a national meat processing company operated and headquartered in Greeley, Colorado. *Corporate Opportunities*, JBS FOODS, <https://jobs.jbsfoodsgorve.com/us/en/corporate-headquarters/> [<https://perma.cc/2XZ3-Y3JE>] (last visited Mar. 23, 2022); Meade, *supra* note 23; 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 AM), <https://www.coloradoan.com/story/news/2020/04/24/coornavirus-colorado-covid-19-jbs-greeley-worker-death/5168427002/> [<https://perma.cc/EUA2-S3CP>] (discussing the death of Saul Sanchez from COVID-19 and the circumstances surrounding his death).

25. Dillon Thomas, *Family of Saul Sanchez Blames JBS Plant After Coronavirus Death as Cases Increase*, CBS DENVER (Apr. 12, 2020, 11:00 PM), <https://denver.cbslocal.com/2020/04/12/coronavirus-saul-sanchez-jbs-greeley/> [<https://perma.cc/E4RT-NTB6>] (reporting that Saul Sanchez was the first Greeley JBS employee to die of COVID-19).

children, and thirteen grandchildren.²⁶ In 1972, Saul moved from Mexico to the United States to earn money to cover medical expenses for his youngest daughter who was suffering from kidney failure.²⁷ He eventually established roots in Greeley, Colorado where his family opened the first Mexican bakery and he worked his way up to a supervisory position at JBS.²⁸ Saul's youngest daughter would grow up to become a nurse in the hospital where he passed away from COVID-19.²⁹

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," which itself is the nation's second largest poultry processing company.³⁰ With over 300 production plants in more than 150 countries, Forbes Magazine has named JBS "the world's biggest [meat] producer."³¹ JBS's annual sales for 2020 exceeded thirty-five billion dollars. Despite their status as the world's leading meat processing plant, as of the fall of 2021, over 12,000 JBS meatpacking workers had contracted COVID-19.³² One of the world's

26. Meade, *supra* note 23; see also Udell, *supra* note 24 (describing effects of COVID-19 at the JBS meatpacking plant).

27. Associated Press, "We'll Never Do as Much as He Did": Immigrant Meatpacker in Greeley who Died from Coronavirus Left a Legacy of Compassion, COLORADO SUN (Nov. 13, 2021, 10:53 AM), <https://coloradosun.com/2020/11/13/saul-sanchez-greeley-coronavirus-death/> [<https://perma.cc/WU27-MKBT>] (noting that in Juarez, Saul managed fifteen pharmacies. He initially moved to Texas by himself, but his family joined him in 1976).

28. *Id.*

29. *Id.*

30. *Our Business*, JBS FOODS, <https://jbsfoodsgroup.com/our-business> [<https://perma.cc/HTV6-SXU8>] (last visited Mar. 23, 2022).

31. Andrew Wasley et al., *JBS: The Brazilian Butchers Who Took Over the World*, BUREAU OF INVESTIGATIVE JOURNALISM (July 2, 2019), <https://www.thebureauinvestigates.com/stories/2019-07-02/jbs-brazilian-butchers-took-over-the-world> [<https://perma.cc/2Y4B-MM22>] ("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 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 Blankfeld, *JBS: The Story Behind the World's Biggest Meat Producer*, FORBES (Apr. 21, 2011, 10:24 AM), <https://www.forbes.com/sites/kerenblankfeld/2011/04/21/jbs-the-story-behind-the-worlds-biggest-meat-producer/> [<https://perma.cc/8VRU-LCDM>].

32. Memo from Subcom. on the Coronavirus Crisis, *supra* note 9 (reporting that at least sixty-two JBS workers lost their lives to the virus); see also Chuck Murphy, *Meatpacking Giant JBS Battles New Coronavirus Outbreaks at Greeley Plant And Corporate Offices*, COLO. PUB. RADIO (Nov. 25, 2020), <https://www.cpr.org/2020/11/25/meatpacking-giant-jbs-battles-new-coronavirus-outbreaks-at-greeley-plant-and-corporate-offices/> [<https://perma.cc/YLT5-8Y3J>] (reporting that on April 3, 2020, the JBS Greeley plant reported 292 COVID-19 cases and six deaths from COVID-19).

biggest meat producers was also one of the world's biggest failures in protecting its workers from COVID-19.

JBS, like many other meat processing plants, values production over safety, profits over lives. The workplace culture enabled the rapid spread of COVID-19. Workers, like Saul, felt pressured to work while sick.³³ “[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 . . . that the statewide stay-at-home order ‘DOES NOT apply to us.’”³⁴ To incentivize work, JBS “promised to hand out free five-pound rolls of beef to employees at the end of their shifts, according to the posts.”³⁵

Co-workers continued to work at JBS although they exhibited virus-like symptoms.³⁶ Shortly after Saul was hospitalized with virus-related complications, the local hospital was inundated with dozens of sick JBS workers.³⁷ The influx of positive cases raised concerns about JBS’s “‘work while sick’ culture.”³⁸ Alarmed by the number of cases, the local public health department issued orders closing the plant so that JBS could get control of the COVID-19 outbreak.³⁹ At the health department’s request, JBS temporarily closed the plant and sent

33. Udell, *supra* note 24; *see also* Shelly Bradbury, *How Coronavirus Spread Through JBS's Greeley Beef Plant*, DENVER POST (July 12, 2020, 6:00 AM), <https://www.denverpost.com/2020/07/12/jbs-greeley-coronavirus-investigation/> [<https://perma.cc/5NA8-ML4R>] (explaining COVID-19's impact on workers at JBS).

34. Bradbury, *supra* note 33.

35. *Id.*

36. Udell, *supra* note 24.

37. *Id.*

38. *Id.* “[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*, ATLANTIC (Oct. 27, 2020), <https://www.theatlantic.com/politics/archive/2020/10/meatpacking-worker-says-jbs-didnt-take-covid-19-precautions/616842/> [<https://perma.cc/BD8R-7VY5>].

39. Udell, *supra* note 24; *see also* Khalil, *supra* note 38 (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 (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/> [<https://perma.cc/HY3P-YAU3>] (“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.”).

thousands of employees home to quarantine.⁴⁰ Just weeks after JBS decided to close its meat processing plants due to the rapid outbreaks of the virus, the Trump Administration issued an executive order that meat processing plants had to remain open to minimize disruption to American meat production.⁴¹

Prior to the pandemic, JBS (as well as other major meatpacking companies) had a history of workplace safety violations and citations.⁴²

40. 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/> [<https://perma.cc/4JD3-6NAS>]; 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.”); Sakas, *supra* note 39 (“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.”).

41. It is interesting to note that at the time of the order there was no immediate threat of a meat shortage. See U.S. DEP’T OF AGRIC., *COLD STORAGE FEBRUARY 2020 HIGHLIGHTS* (2020) (reporting that American meat providers had stockpiles of meat). Although the media raised concerns of shortages, there 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*, COUNTER (June 24, 2020, 5:34 PM), <https://thecounter.org/jbs-cargill-smithfield-tyson-record-pork-exports-china/> [<https://perma.cc/3HF8-ZKVJ>]; see also Letter from Elizabeth Warren, U.S. Sen. & Cory Booker, U.S. Sen., to Noel W. White, Chief Exec. Officer of Tyson Foods, Inc., Andre Nogueira, President and Chief Exec. Officer of JBS USA, David W. McKennan, Chief Exec. Officer of Cargill, & Kenneth M. Sullivan, President and Chief Exec. Officer of Smithfield Foods (June 22, 2020) (on file with author) (“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> [<https://perma.cc/E9EQ-4MEH>] (“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.”).

42. See U.S. Dep’t of Labor’s OSHA Cites JPS USA LLC in Greeley, Colo., for 20 Violations of Workplace Standards, OSHA (June 4, 2013), <https://www.osha.gov/news/news-releases/region8/06042013> [<https://perma.cc/7WJV-C98V>] (reporting 2013 OSHA citation and proposed fines of \$83,414 to JBS for twenty violations of workplace safety standards); *Violation Tracker Parent Company Summary: JBS*, GOOD JOBS FIRST, <https://violation-tracker.goodjobsfirst.org/parent/jbs> [<https://perma.cc/RPZ2-5UMS>] (last visited Mar. 23, 2022) (reporting that JBS and its subsidiaries have a history of 184 offense records and \$34,732,377 in fines since 2000).

Worldwide allegations against the company have included “high-level corruption, modern-day ‘slave labour’ practices, illegal deforestation, animal welfare violations and major hygiene breaches.”⁴³ In 2017, JBS’s holding company paid “one of the biggest fines in global corporate history,” \$3.2 billion in fines, for bribing hundreds of politicians.⁴⁴ On September 8, 2020, OSHA cited JBS for violating OSHA’s general duty clause by “failing to provide a workplace free from recognized hazards that can cause death or serious harm” and failing to provide injury and illness logs in a timely manner.⁴⁵ Despite having a track record of repeated serious workplace safety violations, hundreds of COVID-19 infections, and at least eight COVID-19 related deaths, OSHA only issued JBS one citation, which imposed the maximum penalty allowed for the violation: \$15,615.⁴⁶ The lack of enforcement throughout low-wage industries has led to public outcries for OSHA enforcement.⁴⁷

43. Wasley et al., *supra* note 31.

44. *Id.*; 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, 6:35 AM), <https://www.reuters.com/article/usbrazil-corruption-jbs/brazils-jf-agrees-to-pay-record-3-2-billion-fine-in-leniency-deal-idUSKBN18R1HE> (“J&F Investimentos, controlling 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.”).

45. *U.S. Department of Labor Cites JBS Foods Inc. for Failing to Protect Employees from Exposure to the Coronavirus*, OSHA (Sept. 11, 2020), <https://www.osha.gov/news/newsreleases/region8/09112020> [<https://perma.cc/qq36-lpek>]; see also Tom Polansek & P.J. Huffstutter, *OSHA Cites JBS, Smithfield Foods for Failing to Protect Employees from Coronavirus*, STAR TRIB. (Sept. 14, 2020, 5:55 PM), <https://www.startribune.com/osha-cites-jbs-smithfield-foods-for-failing-to-protect-employees-from-coronavirus/572407322/> [<https://perma.cc/287S-2L67>] (“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, *Eighth JBS Greeley Worker Dies Amid Coronavirus Outbreak at Meat Plant*, DENVER POST (May 18, 2020, 3:28 PM), <https://www.denverpost.com/2020/05/18/jbs-greeley-coronavirus-covid-death/> [<https://perma.cc/dx8h-4vel>] (reporting that Tin Aye, age sixty, was the eighth COVID-19 death at the JBS Greeley plant).

46. Yuegi Yang, *Meatpacker JBS Fined \$15,615 After Deadly COVID-19 Outbreak*, BLOOMBERG (Sept. 12, 2020, 11:54 AM), <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 Polansek & Huffstutter, *supra* note 45 (explaining that JBS spokesman Cameron Bruett claims the citations are without merit and “impose a standard that did not exist in March as we fought the pandemic with no guidance”).

47. Tonya Mosley, *U.S. Still Lags In COVID-19 Workplace Safety, Former OSHA Official Says*, NPR (Jan. 14, 2021, 5:07 AM), <https://www.npr.org/sections/coronavirus-live-updates/2021/01/14/956448224/u-s-continues-to-lag-in-covid-19-workplace-safety-former->

The story of Saul Sanchez is not an isolated incident. Across the country, tens of thousands of meat plant workers contracted COVID-19 and thousands died from community contact from the workers who contracted the virus due to unsafe working conditions.⁴⁸ Yet, despite cries for worker protection from all low-wage industries providing essential services (warehousing, grocery stores, delivery services, and meatpacking), OSHA refused to issue COVID-19 related safety mandates outside of the health care industry.⁴⁹ To date, OSHA has only issued one other citation (for approximately \$13,000) to a meat

osha-official-says [<https://perma.cc/89BL-QLYG>] (“‘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 Berkowitz, *supra* note 17 (describing a “toolkit” to workers on the job during the pandemic, “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, <https://elizabethwarren.com/action/essential-workers/call-for-bor> [<https://perma.cc/EQ65-5LSR>] (last visited Mar. 23, 2022) (providing instructions to demand that the House of Representatives pass Senator Warren and Representative Khanna’s Essential Workers Bill of Rights).

48. Memo from Subcom. on the Coronavirus Crisis, *supra* note 9 (reviewing records that include those of major meatpacking conglomerates: JBS, Tysons, Smithfield, Cargill, and National Beef accounting for at least 269 meatpacking workers between March 2020 and February 2021); see also Taylor et al., *supra* note 8. 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 et al., *COVID-19 Among Workers in Meat and Poultry Processing Facilities—19 States, April 2020*, 69 MORBIDITY & MORALITY WKLY REP. 557, 557-58 (2020) (explaining that meatpacking facility challenges include structural and operational practices that make it difficult to maintain a six-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 COVID-19 transmission; and company incentives for employees to work ill); see also BAUER & PERALES SANCHEZ, *supra* note 10, at 6 (“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/> [<https://perma.cc/MH3R-3VB9>].

49. Brown, *Senate Democrats Urge Trump Administration to Protect Food Supply, Essential Workers During COVID-19 Crisis*, SHERROD BROWN, U.S. SENATOR FOR OHIO (April 21, 2020), <https://www.brown.senate.gov/newsroom/press/release/brown-senate-democrats-urge-trump-administration-to-protect-food-supply-essential-workers-during-covid-19-crisis> [<https://perma.cc/7K8M-FBYH>].

processing plant for COVID-19 safety violations.⁵⁰ The Sanchez family have called the fines “insulting and laughable,” stating that the inconsequential fine, which was intended 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 to not care for their employees.”⁵¹ The family spent more money on funeral expenses to lay their patriarch to rest.⁵²

In a May 2020 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.⁵³ “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.’”⁵⁴ This implicit (and all too often explicit) bias is part of a racialized narrative regarding work ethic, resiliency, and the dehumanization of workers that allows employers to exploit workers based on race and ethnicity.⁵⁵

The Sanchez family continues to fight for justice for Saul.⁵⁶ Following his death, JBS (like many employers during the pandemic) denied the workers’ compensation claim that his surviving spouse filed on his behalf.⁵⁷ The family has persevered, and the story of Saul has gained national media attention.⁵⁸ The following sections provide narratives and counter-narratives that unpack why the death of Saul

50. See *U.S. Dep’t of Labor Cites Smithfield Packaged Meats Corp. for Failing to Protect Employees from Coronavirus*, OSHA (Sept. 10, 2020), <https://www.osha.gov/news/newsreleases/region8/09102020> [<https://perma.cc/7HFP-SRET>] (stating that OSHA cited Smithfield for \$13,494 for violations of the general duty clause for failure to protect employees from exposure to coronavirus).

51. Dillon Thomas, *‘It’s a Joke’: Family Reacts to \$15,000 Fine Against Greeley’s JBS Plant*, CBS DENVER (Sept. 13, 2020, 11:56 PM), <https://denver.cbslocal.com/2020/09/13/saul-sanchez-jbs-greeley-fine-coronavirus/> [<https://perma.cc/QA3L-HPAT>].

52. *Id.* (“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 seven JBS employees had died from COVID-19. The \$15,000 fine is barely \$2,000 for each loss of life. *Id.*

53. Sakas, *supra* note 39.

54. *Id.*

55. See discussion *infra* subpart III.A.

56. Lindsay Fendt, *‘We Don’t Want Other People to Suffer’: JBS Families Wait, Fight and Hope for Accountability*, CPR NEWS (Oct. 14, 2020), <https://www.cpr.org/2020/10/14/jbs-meatpacking-plant-coronavirus-cases-families-fight-for-accountability/> [<https://perma.cc/YP3F-4L5P>].

57. *Id.*

58. *Id.*

Sanchez was 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. By questioning the perceived reality, revealing universal vulnerabilities,⁵⁹ and identifying where interests converge and diverge, this Article looks at some of the root causes of workplace safety issues within in low-wage work.

III. THE MEAT PROCESSING INDUSTRY

In early 2020, the COVID-19 pandemic reached the United States.⁶⁰ On Friday, March 13, the United States declared the pandemic a national emergency.⁶¹ 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.⁶² The federal guidance identified industries “critical” to American infrastructure that should remain open.⁶³ On April 28, 2020 (ironically, two days before

59. Martha Albertson Fineman, *The Vulnerable Subject and the Responsive State*, 60 EMORY L.J. 251, 266-69 (2010).

60. *Listings of WHO's Response to COVID-19*, WORLD HEALTH ORG. (Jan. 29, 2021), <https://www.who.int/news/item/29-06-2020-covidtimeline> [<https://perma.cc/4BVU-3LQX>]; see also Caroline Kantis et al., *Updated: Timeline of the Coronavirus*, THINKGLOBALHEALTH (Dec. 29, 2021), <https://www.thinkglobalhealth.org/article/updated-timeline-coronavirus> [<https://perma.cc/TBC2-4HTY>] (“January 21: United States confirms its first case in Washington state, a man who traveled to the Wuhan area.”).

61. “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, 15337 (Mar. 18, 2020).

62. Amanda Moreland 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 WKLY REP. 1198, 1198 (2020); see also Sarah Mervosh, et al., *See Which States and Cities Have Told Residents to Stay at Home*, N.Y. TIMES (Apr. 20, 2020), <https://www.nytimes.com/interactive/2020/us/coronavirus-stay-at-home-order.html> (portraying an interactive chart that shows how stay-at-home directives began in California in mid-March and spread around the United States).

63. Memorandum from Christopher C. Krebs, Dir. of the U.S. Dep’t of Homeland Sec. Cybersecurity & Infrastructure Sec. Agency, on Ensuring Essential Critical Infrastructure Workers Ability to Work During the COVID-19 Response (Aug. 18, 2020) (“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.”); *Identifying Critical*

International Workers' Day), President Trump issued an executive order under the Defense Production Act to keep meat processing plants open.⁶⁴ Prior to the order, over a dozen major meat processing plants had temporarily shut down production due to the rampant spread of COVID-19, thousands of infected workers, and dozens of COVID-19 related deaths.⁶⁵

Throughout the pandemic, the meatpacking industry used its power to ensure that profits were protected.⁶⁶ Despite outbreaks of COVID-19 at meat processing plants throughout the United States, the

Infrastructure During COVID-19, CYBERSECURITY & INFRASTRUCTURE SEC. AGENCY, <https://www.cisa.gov/identifying-critical-infrastructure-during-covid-19> [<https://perma.cc/LH9E-LUYV>] (last visited Mar. 26, 2022) (“CISA issued the guidance originally on March 19, 2020 and published four additional updates to reflect the changing landscape of the Nation’s COVID-19 response. 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.”).

64. Exec. Order No. 13917, 85 Fed. Reg. 26313, 26313 (May 1, 2020) (declaring that, despite COVID-19 outbreaks, the meat and poultry food supply chain must be protected by keeping the plants operating); see also NINA M. HART, CONG. RSCH. SERV., LSB10456, EXECUTIVE ORDER ON THE FOOD SUPPLY CHAIN AND THE DEFENSE PRODUCTION ACT: FAQs 1-3 (2020) (providing information on what the executive order invoking the DPA for meat processing functionally does); *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> [<https://perma.cc/6TN7-5WM8>] (providing a statement by U.S. Secretary of Agriculture Sonny Perdue that thanks President 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/> [<https://perma.cc/62NT-SXKB>] (last visited Mar. 23, 2022) (describing that, in terms of history, “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”).

65. Dan Charles, *Meat Processing Plants Suspend Operations After Workers Fall Ill*, NPR (Apr. 7, 2020, 1:41 PM), <https://www.npr.org/sections/coronavirus-live-updates/2020/04/07/828873225/meat-processing-plants-suspend-operations-after-workers-fall-ill> [<https://perma.cc/GDM8-Z9GW>]; see also Jacob Bunge et al., *Meat Companies Want to Reopen, but Officials Fear New Wave of Coronavirus Infections*, WALL ST. J. (Apr. 30, 2020, 11:55 AM), <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 this week closed a pork plant linked to some of the rural county’s [fifty-seven] cases.”).

66. Tom Philpott, *Meatpackers “Prioritized Profits” Over Worker Safety During the Pandemic. A New Bill Would Force Them to Change*, MOTHER JONES (Dec. 3, 2021), <https://www.motherjones.com/food/2021/12/meatpackers-prioritized-profits-over-worker-safety-during-the-pandemic-a-new-bill-would-force-them-to-change/>.

meatpacking industry lobbied hard to keep plants open. Just days after Tyson Foods placed a full-page advertisement in the Washington Post calling on President Trump to open plants, Trump issued the executive order mandating that plants remain open to maintain the meat supply.⁶⁷ The industry's influence was evident in the final executive order, which closely resembled a draft proposed by the North American Meat Institute to the U.S. Department of Agriculture one week before the order went into effect.⁶⁸

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 100 years ago, Upton Sinclair's *The Jungle* detailed the hazardous working conditions and exploitation of Eastern European immigrant workers at Chicago meat processing plants.⁶⁹ For over twenty years, the Human Rights Watch has issued detailed reports on the exploitative history and unsafe working conditions at meat processing plants.⁷⁰ Decades of poor working conditions, lack of

67. Ben Lilliston, *Don't Grant Global Corporations Immunity Hold Them Accountable for COVID-19 Failures*, INST. FOR AGRIC. & TRADE POL'Y (Sept. 9, 2020), <https://www.iatp.org/blog/202009/dont-grant-global-meat-corporations-immunity-hold-them-accountable-covid-19-failures> [https://perma.cc/M4M4-R3WZ] (stating that the meatpacking industry abandoned their workers during the pandemic to continue to make a profit, despite knowledge of risks by resisting proactive measures and advocating for immunity); see also John H. Tyson, *Advertisements for Tyson, A Delicate Balance: Feeding the Nation and Keeping Our Employees Healthy*, WASH. POST (Apr. 27, 2020), https://www.washingtonpost.com/context/tyson-ad/86b9290d-115b-4628-ad80-0e679dcd2669/?itid=lk_inline_manual_2.

68. Grabell & Yeung, *supra* note 41 (“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.”).

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

70. *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> [https://perma.cc/PW9G-H9T3] [hereinafter *Blood, Sweat, and Fear*] (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> [https://perma.cc/U3JL-V8PG] (providing an update to the 2004 Human Rights Watch report and detailing how conditions remain “dirty, demanding, and dangerous” and the continued failure of the U.S. government to protect the workers).

workplace safety protections or quality health care, and minimal federal oversight have snowballed into the perfect storm within the meat processing industry.⁷¹ 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 allowed the meatpacking industry to create working environments that fostered dangerous working conditions.

A. Labor

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.⁷² Foreign-born workers are more likely to work in low-wage essential jobs.⁷³ This is especially true for the meatpacking

71. *Blood, Sweat, and Fear*, *supra* note 70 (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); McConnell, *supra* note 70 (providing an update to the 2004 Human Rights Watch Report detailing how conditions remain “dirty, demanding, and dangerous” and the continued failure of the U.S. government to protect the workers); AM. FED’N LAB. & CONG. INDUS. ORG., IMMIGRANT WORKERS AT RISK: THE URGENT NEED FOR IMPROVED WORKPLACE SAFETY AND HEALTH POLICIES AND PROGRAMS 13-18 (2005) [hereinafter IMMIGRANT WORKERS AT RISK].

72. Haley Brown et al., *Meatpacking Workers are a Diverse Group Who Need Better Protections*, CTR. FOR ECON. & POL’Y RSCH. (Apr. 29, 2020), <https://cepr.net/meatpacking-workers-are-a-diverse-group-who-need-better-protections/> [<https://perma.cc/Q9DF-W7J6>] (finding that over 40% of meatpacking workers are Latinx, and approximately one-quarter are African-American). 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). *Id.* 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. *Id.* 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. *Id.*; see also Jeffrey S. Passel & D’Vera Cohn, *U.S. Unauthorized Immigrant Total Dips to Lowest Level in a Decade*, PEW RSCH. CTR. (Nov. 27, 2018), <https://www.pewresearch.org/hispanic/2018/11/27/unauthorized-immigration-estimate-methodology/> [<https://perma.cc/4VCU-UA6E>] (“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.”).

73. *Labor Force Characteristics of Foreign-born Workers News Release*, U.S. BUREAU LAB. STAT. (May 18, 2020, 10:00 AM), <https://www.bls.gov/news.release/forbrn.htm> [<https://perma.cc/5EFQ-Q96F>] (last visited on Mar. 23, 2022) (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).

industry. Although the exact numbers are unknown, there is no question that the meatpacking industry employs a disproportionate number of immigrant workers (51.5%) compared to the national U.S. workforce (which is 17% immigrant).⁷⁴ The workers at Greeley JBS were mostly immigrants and refugees.⁷⁵ Saul was a U.S. citizen who had lived in the States for over thirty years.⁷⁶ While his citizenship afforded Saul's family an additional sense of security in telling his story and seeking justice, he still fell victim to an industry that regularly exploits its workers because of their immigration status.⁷⁷

The large number of immigrant workers makes the meatpacking workforce particularly vulnerable to workplace exploitation and underreporting of health and safety violations.⁷⁸ Center for Disease Control and Prevention (CDC) reports from April and May of 2020 found that racial disparities in health care, housing, and working conditions led to almost 87% of people of color in meat processing contracting COVID-19.⁷⁹ Studies have shown 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

74. Brown et al., *supra* note 72.

75. Robert Klemko & Kimberly Kindy, *He Fled Congo to Work in a U.S. Meat Plant. Then He—and Hundreds of His Co-Workers—Got the Coronavirus*, WASH. POST (Aug. 6, 2020), https://www.washingtonpost.com/national/he-fled-the-congo-to-work-in-a-us-meat-plant-then-he-and-hundreds-of-his-co-workers--got-the-coronavirus/2020/08/06/11e7e13e-c526-11ea-8ffe-372be8d82298_story.html [<https://perma.cc/Y3KZ-ZVNV>] (explaining how the United Food and Commercial Workers International Union Local 7 represents JBS workers and estimates that 70% of the workers are minorities and immigrants with limited English language skills).

76. Ester 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/>.

77. *Id.*

78. Jayesh M. Rathod, *Immigrant Lab. And the Occupational Safety and Health Regime*, 33 N.Y.U. REV. L. & SOC. CHANGE 479, 497 (2009) ("[I]njury and death rates for immigrant workers are likely undercounted. . . . With insecure immigration status, restricted ability to work, [fear of retaliation], [lack of information], or lack of marketable job skills, immigrant workers are less likely to report . . . or aggressively pursue [workplace injuries].") (citing COMM. ON EDUC. AND LAB. OF THE U.S. H.R., HIDDEN TRAGEDY: UNDERREPORTING OF WORKPLACE INJURIES AND ILLNESS 12 (2008) (detailing studies showing that immigrant workers are likely to underreport workplace injuries)).

79. Michelle A. Waltenburg et al., *Update: COVID-19 Among Workers in Meat and Poultry Processing Facilities—United States, April—May 2020*, 69 MORBIDITY & MORALITY WKLY. REP. 887, 891 (2020); 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> [<https://perma.cc/WBR5-BE82>] (discussing spread of COVID-19 in meat plants).

number of individuals working in dangerous industries.⁸⁰ 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.⁸¹ Immigrants working in meat processing plants are six times more likely to live in households where all members have limited English proficiency.⁸² Communication barriers make it more difficult to understand workplace safety rules or employers' duties, and fear of employer retaliation discourages immigrant workers from asserting workplace rights.

The following sections illustrate how the intersection of race, poverty, and industry norms results in employers who feel little obligation to provide safe working environments and workers who are unwilling risk their livelihood to demand safe workplaces.⁸³

1. Waves of Workers

While the demographics of the meatpacking line workers have shifted in waves throughout the years, there is a commonality that binds them together. The workers are typically from “new-comer” 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.⁸⁴

Throughout the 1800s, meatpacking workers were mostly of white Eastern European descent.⁸⁵ Unionization and the great migration north during the mid-twentieth century resulted in large

80. IMMIGRANT WORKERS AT RISK, *supra* note 71, at 1, 9-10; *see also* AM. FED’N LAB. & CONG. INDUS. ORG., DEATH ON THE JOB: THE TOLL OF NEGLECT: A NATIONAL AND STATE-BY-STATE PROFILE OF WORKER SAFETY AND HEALTH IN THE UNITED STATES 94 (29th ed. 2020) (explaining the effect of COVID-19 on minorities at meat processing plants).

81. COMM. ON EDUC. & LABOR OF THE U.S. H.R., HIDDEN TRAGEDY: UNDERREPORTING OF WORKPLACE INJURIES AND ILLNESS 12 (2008).

82. Brown et al., *supra* note 72 (“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.”).

83. *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, 278-92 (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).

84. Patricia Cohen, *Immigrants Keep an Iowa Meatpacking Town Alive and Growing*, N.Y. TIMES (May 29, 2017), <https://www.nytimes.com/2017/05/29/business/economy/storm-lake-iowa-immigrant-workers.html>.

85. WILLIAM G. WHITTAKER, CONG. RESEARCH SERV., RL33002, LABOR PRACTICES IN THE MEAT PACKING AND POULTRY PROCESSING INDUSTRY: AN OVERVIEW 3 (2006).

numbers of African Americans entering the meatpacking industry.⁸⁶ To stall worker organizing and create division among the workers throughout the early 1900s, meat processing plants recruited African Americans as strikebreakers.⁸⁷ At first, African Americans served as cheap labor who were resistant to union organizing efforts.⁸⁸ The “great migration” north of southern Black Americans from 1917 through the 1920s, however, solidified a shift in demographics, increasing the number of Black workers in the meatpacking industry to 20% by 1918.⁸⁹

By the 1930s, Black workers had become a large source of “cheap labor” and a “permanent” part of the meatpacking industry.⁹⁰ Over time, they led the way for union organizing and improved working conditions for all workers.⁹¹ From the 1930s through the 1960s, New Deal legislation and civil rights activism led to growing numbers of Black membership in the United Packinghouse Workers of America (UPWA) union.⁹² By uniting Black workers and white progressives in the fight for civil rights, the UPWA was the exception among predominantly white unions.⁹³ Solidarity between Black and white workers, in collaboration with local NAACP efforts, became a tool to improve working conditions for all workers.⁹⁴ 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).⁹⁵

Strife between two competing meat processing unions (the line workers versus the specialized butchers) led to a merger and eventually

86. *Meatpacking Industry Has a Long History of Reliance on Immigrant Laborer*, GREELEY TRIB. (May 13, 2020, 3:19 AM), <https://www.greeleytribune.com/2006/12/22/meat-packing-industry-has-a-long-history-of-reliance-on-immigrant-laborer/>.

87. WHITTAKER, *supra* note 85, at 8.

88. *Id.*

89. *Id.* at 11 (citing James R. Barrett, *Unity and Fragmentation: Class, Race, and Ethnicity on Chicago's South Side, 1900-1922*, 18 J. SOC. HIST. 37, 50 (1984)).

90. *Id.* (quoting SHELTON STROMQUIST, *SOLIDARITY & SURVIVAL: AN ORAL HISTORY OF IOWA LABOR IN THE TWENTIETH CENTURY* 101 (University of Iowa Press ed., 1933)).

91. *Id.* (quoting STROMQUIST, *supra* note 90, at 101).

92. *Id.* at 15-16.

93. *Id.* at 16 (quoting ROGER HOROWITZ, “NEGRO AND WHITE, UNITE AND FIGHT!” A SOCIAL HISTORY OF INDUSTRIAL UNIONISM IN MEATPACKING, 1930-90, 145 (Univ. of Ill. Press ed., 1997)).

94. *Id.* at 17.

95. 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. MIA. BUS. L. REV. 283, 300 (2010).

the creation of today's United Food and Commercial Workers (UFCW) union.⁹⁶ The decline of unions during the 1980s lead to a decline in the number of Black workers and a new wave of immigrant workers.⁹⁷ With each new wave of workers, exploitative industries, like meatpacking, take advantage of the workers' lack of knowledge about workers' rights, their need for stable employment, and their belief that working hard is a path to the "American dream."

During the 1980s, companies shifted from old school meatpacking yards to vast rural facilities and a new wave of workers entered the meatpacking workforce.⁹⁸ Plants relocated from urban to rural, non-union areas (poultry in the South and beef in the Midwest.⁹⁹ The meatpacking industry 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.¹⁰⁰ Union membership declined severely while job insecurity and lower wages became the norm.¹⁰¹ These new model meatpacking plants set the stage for a third shift in the meatpacking workforce, where immigrants,

96. WHITTAKER, *supra* note 85, at 19-20.

97. *Id.* at 31-32. (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 Bucknor, *Black Workers, Unions, and Inequality*, CTR. FOR ECON. & POL'Y RSCH. (Aug. 29, 2016), <https://www.cepr.net/report/black-workers-unions-and-inequality/> [<https://perma.cc/V4CG-K43N>] (explaining that unionization rates have been falling for African-American workers across sectors by noting that "[t]he 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").

98. Don Stull, *Refugees, Meatpacking, and Rural Communities*, OCM (Mar. 18, 2017), <https://competitivemarkets.com/refugees-meatpacking-and-rural-communities/> [<https://perma.cc/D6MD-VN63>].

99. William Kandel, *Meat-Processing Firms Attract Hispanic Workers to Rural Areas*, U.S. DEPT. OF AGRIC. ECON. RSCH. SERV. (June 1, 2006), <https://www.ers.usda.gov/amber-waves/2006/june/meat-processing-firms-attract-hispanic-workers-to-rural-america/> [<https://perma.cc/TYP9-B4D9>].

100. WHITTAKER, *supra* note 85, at 36-37 (citing HOROWITZ, *supra* note 93, at 277).

101. 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. 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> [<https://perma.cc/3YUB-HWY3>].

mostly Latinx workers, became the predominant (and most desired) plant workers.¹⁰²

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 meatpacking process and operate in non-union environments that pay low wages.¹⁰³ 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.¹⁰⁴ The move to the rural Midwest 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).¹⁰⁵ Meat processing companies started to recruit workers outside of 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.¹⁰⁶ Stereotypes and racialized narratives about the work ethic of immigrant workers supported the beliefs that they will tolerate poor working conditions and unsafe environments.¹⁰⁷

2. Peripheral Work

Meat processing work is often considered “peripheral labor.”¹⁰⁸ Unlike “primary jobs” that tend to have higher pay, workplace benefits,

102. Kandel, *supra* note 99 (“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-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.”).

103. WHITTAKER, *supra* note 85, at 27-28 (citing HOROWITZ, *supra* note 93, at 26).

104. *Id.* at 32.

105. *Id.* at 33-34 (citing Janet E. Benson, *Households, Migration, and Community Context*, 19 URB. ANTHROPOLOGY 9, 25 (1990) (referring to the “dead-end nature” of the work that caused workers to leave the job within five years)).

106. The impact regarding the presumption that immigrant workers have a strong work ethic is further discussed below. *Id.* at 40.

107. See discussion *infra* subpart III.A.3.

108. Charlotte S. Alexander, *Explaining Peripheral Labor: A Poultry Industry Study*, 33 BERKELEY J. EMPL. & LAB. L. 356-57 (2012).

some job security, and the possibility of promotion “up the corporate ladder,” peripheral jobs are characterized by low wages, high turnover rates, few benefits, and few to no opportunities to advance into a better position.¹⁰⁹ Peripheral labor markets 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 [the worker’s] control.”¹¹⁰ The work is dangerous and requires precision, but it is considered “un-skilled” labor conducted by individuals who are replaceable.¹¹¹ 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.¹¹²

Meatpacking plants maximize profits by maintaining a transient workforce.¹¹³ Many plants do not offer health care 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.¹¹⁴ High workforce turnover also

109. *Id.* at 357 (describing the labor market segmentation 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) (quoting Steve Striffler, *Inside a Poultry Processing Plant: An Ethnographic Portrait*, 43 LAB. HIST. 305, 306 (2002)).

110. *Id.* at 356.

111. *Id.* at 361-62 (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).

112. *Id.* at 364 (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 (Donald D. Stull et al. eds., 1995) (explaining that 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) (noting that technology has shifted the paradigm in some labor markets to maintain short-term, high turn-over environments rather than progressing towards long-term employment).

113. WHITTAKER, *supra* note 85, at 35 (quoting Christopher D. Cook, *Hog-Tied: Migrant Workers Find Themselves Trapped on the Pork Assembly Line*, PROGRESSIVE (Sept. 1999)).

114. *Id.* at 31-32 (citing Stull & Broadway, *supra* note 97, at 62) (referring to recent Mexican immigrants who move jobs between different agriculture centers and meat processing plants).

makes it more difficult to organize labor unions.¹¹⁵ Workers are committed to short-term “economic survival,” not long-term careers, pension plans, or quality health care.¹¹⁶ 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.¹¹⁷ This business model can also be found in industries that rely on immigrant workers, such as cleaning, construction, and domestic work.¹¹⁸ 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. 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.¹¹⁹

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.¹²⁰ Saul’s story serves as a reminder that not all meatpacking workers are transient. He worked at the plant for over thirty years and had achieved a supervisory role. His longevity at the company, status as a supervisor, and U.S. citizenship helped his family create a counter-narrative against the stereotypes that meatpacking workers are not invested in the work or that they are willing to stand idle against injustice. While many immigrant workers joined the fight to improve working conditions during the pandemic, a large number remained silent.

115. *Id.* at 35-36.

116. *Id.* (citing Benson, *supra* note 105, at 25).

117. Saucedo, *supra* note 21, at 978-81; *see also* Llezlie L. Green, *Outsourcing Discrimination*, 55 HARV. C.R.-C.L. L. REV. 915, 915, 918-22 (2020) (describing the development of business models that rely on racially discriminatory rhetoric as a necessity to condone discriminatory hiring practices); *see also* WHITTAKER, *supra* note 85, at 40 (citing David Griffith, *Consequences of Immigration Reform for Low-Wage Workers in the Southeastern U.S.: The Case of the Poultry Industry*, 19 URB. ANTHROPOLOGY & STUD. CULTURAL SYS. & WORLD ECON. DEV. 155, 165-68 (1990)).

118. JEFFREY S. PASSEL ET AL., SHARE OF UNAUTHORIZED IMMIGRANT WORKERS IN PRODUCTION, CONSTRUCTION JOBS SINCE 2007: IN STATES, HOSPITALITY, MANUFACTURING AND CONSTRUCTION ARE TOP INDUSTRIES 5, 9 (Pew Rsch. Ctr. ed., 2015).

119. COMM. ON EDUC. AND LAB. OF THE U.S. H.R., *supra* note 81.

120. *Blood, Sweat, and Fear*, *supra* note 70; *see also* McConnell, *supra* note 70 (describing strenuous and dangerous working conditions of meat processing plants and failure to properly regulate health).

On October 21, 2021, the Department of Homeland Security (DHS) issued a Worksite Enforcement Strategy policy that recognized the need to protect immigrant workers from “unscrupulous employers who exploit the vulnerability of undocumented workers” by violating wage and work-place safety laws.¹²¹ In the memorandum, DHS Secretary, Alejandro N. Mayorkas, asserted that improving working conditions for undocumented workers will effectively protect the American labor market.¹²² Mayorkas directed DHS to adopt policies and procedures that will: (1) impose severe consequences on employers who violate workplace rights of immigrants, (2) increase the willingness of immigrant worker to report and participate in investigations of workplace violations, and (3) create avenues for DHS to collaborate with federal and state agencies that regulate employer actions and workplace violations.¹²³ The plan recognized the “chilling” effect that worksite immigration raids have on undocumented immigrant communities. It calls for a redirection of resources that focuses on “exploitative employers” rather than the workers.¹²⁴ These policies have the potential to significantly improve the meatpacking and other low-wage industries that are plagued by a historic lack of enforcement resulting in no consequences for violators. Combating fears of retaliation and increasing the willingness to cooperate with investigations are key to improving working conditions for all workers.

3. Racialized Rhetoric

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.¹²⁵ Racially charged stereotypes about Latinx and Asian workers have

121. Memorandum from Alejandro N. Mayorkas, Sec’y of the Dep’t of Homeland Sec., for Tae D. Johnson, Acting Dir. of Immigr. & Customs Enforcement, Ur M. Jaddou, Dir. of U.S. Citizenship and Immigr. Servs. & Troy A. Miller, Acting Comm’r of U.S. and Border Prot., on Worksite Enforcement: The Strategy to Protect the Am. Lab. Mkt., the Conditions of the Am. Worksite, and Dignity of the Individual (Oct. 12, 2021).

122. *Id.*

123. *Id.* (calling on DHS to collaborate with the Department of Labor (DOL), Department of Justice (DOJ), Equal Employment Opportunity Commission (EEOC), National Labor Relations Board (NLRB), and state labor agencies to protect immigrant workers).

124. *Id.*

125. Green, *supra* note 117, at 928-30 (explaining that “racial realism” in low-wage industries creates problematic stereotypes that prefer immigrant workers and exclude African American workers).

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.¹²⁶

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.¹²⁷ The seemingly endless supply of low-wage immigrant 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.¹²⁸

During the height of the pandemic, Tyson Food managers engaged in a particularly offensive example of the disregard for the lives of meatpacking workers. With 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-19 at work.¹²⁹ The plant manager “organized a cash buy-in,

126. *Id.* (referring to the work of sociologist John Skrentny in identifying raced based strategies that employers use to make business decisions).

127. Saucedo, *supra* note 21, at 978-79 (describing how “[e]mployers target the newly arrived Latino population for the least desirable, often lowest paid jobs in the workplace, precisely because they perceive and anticipate subservience . . .”); *see also* Green, *supra* note 117, at 928-30 (describing the development of business models that rely on racially discriminatory rhetoric as a necessity to condone discriminatory hiring practices); WHITTAKER, *supra* note 85, at 40 (first quoting Griffith, *supra* note 117, at 165-73; and then citing Robert Lekachman, *The Specter of Full Employment*, HARPER’S, Feb. 1977, at 36-38).

128. Saucedo, *supra* note 21, at 978-79 (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* Green, *supra* note 117, at 931, 934 (first citing EDUARDO BONILLA-SILVA, *RACISM WITHOUT RACISTS* 123-49 (4th ed. 2014); and then citing 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)); WHITTAKER, *supra* note 85, at 34 (first citing Edna Bonacich, *A Theory of Ethnic Antagonism: The Split Labor Market*, 37 AM. SOCIO. REV. 547, 547-49 (Oct. 1972); then citing Roger Horowitz & Mark Miller, *Immigrants in the Delmarva Poultry Processing Industry: The Changing Face of Georgetown, Delaware and Environs* 5 (Julian Samora Rsch. Inst., Occasional Paper No. 37, 1999); then citing OTEY SCRUGGS, BRACEROS, “WETBACKS,” AND THE FARM LABOR PROBLEM: MEXICAN AGRICULTURAL LABOR IN THE UNITED STATES, 1942-1954 68 (Garland Publishing, Inc. eds., 1988); and then citing Shawn Zeller, *Inside Job*, GOV’T EXEC., Dec. 2001, at 47).

129. Complaint at 9, *Fernandez v. Tyson Foods, Inc.*, 509 F. Supp. 3d 1064 (N.D. Iowa 2020) (No. 6:20-cv-02079-LRR-KEM).

winner-take-all betting pool for supervisors and managers to wager how many employees would test positive for COVID-19.”¹³⁰ Managers at the Tyson Foods plant ordered sick workers to continue to work until they tested positive.¹³¹ They told supervisors to inform the workers they supervised that had to go to work, even if they had COVID-19 symptoms.¹³²

The workers were just commodities, disposable and replaceable bodies. The stereotype that meatpacking workers can continue to work despite exhibiting symptoms of the virus is illustrative of racialized narratives that propert the strength and physicality of Black and Brown bodies. The narrative is supported by a racialized belief in American society that Black and Brown bodies can handle the pain.¹³³ Embodied in this racialized, dehumanization narrative are stereotypes that Black and Brown bodies are better able to endure labor-intensive work, have higher tolerance for working in harsh conditions, and they can “work through” the pain.¹³⁴ Like the racialized narratives of work ethic,

130. *Id.*

131. *Id.* at 10.

132. *Id.* at 11.

133. Kelly M. Hoffman et al., *Racial Bias in Pain Assessment and Treatment Recommendations, and False Beliefs About Biological Differences Between Blacks and Whites*, 113 PROC. NAT’L ACAD. SCI. U.S. 4296, 4297 (2016) (describing how scientists, physicians, and slaveowners championed “[b]eliefs 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), <https://www.reuters.com/article/us-usa-immigration-hispanics-general-fea/hispanics-do-jobs-others-inu-s-want-stand-for-idUSN16496320070226> [<https://perma.cc/TF7P-JTT8>] (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”).

134. 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, the article highlights that “[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”); see also Utych, *supra* note 14, at 440-41 (describing how dehumanizing language or denying human-like attributes to the “out” group creates negative attitudes towards immigrants whereby the group is devalued and animal-like treatment or punishment is justified); Markowitz & Slovic, *supra* note 14, at 9260-62, 9267-68 (finding that dehumanization (1) permits the “in” group to create distance from the “out” group, (2) perceive

stereotyped beliefs about the strong physicality and high pain thresholds of Black and Brown bodies allow 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.

There is a false belief that Latinx and Asian immigrants are more willing work under dirty, cold, and bloody working conditions than their white counterparts.¹³⁵ It is much more likely that the terms of 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.

B. Conditions

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 10% live below the poverty line.¹³⁷ Their poverty rates are more than double that of all other low-income workers.¹³⁸ In 2019, meatpackers earned

the “out” group as animals that can be treated like objects, (3) believe that the “out” groups’ emotions or thoughts are not valued, or (4) perceive that the “out” group are not able to make cognitive decisions, which leads to negative social consequences for immigrants); Ellawala, *supra* note 14, at 3-4 (finding that implicit dehumanization of young Black youth makes it more likely that police will engage in violence towards them).

135. Saucedo, *supra* note 21, at 978-80.

136. WHITTAKER, *supra* note 85, at 41 (citing Michael J. Broadway, *Beef Stew: Cattle, Immigrants and Established Residents in a Kansas Beefpacking Town*, in *NEWCOMERS IN THE WORKPLACE*, 25, 25 (Louis Lamphere et al. eds., 1994); and then citing Benson, *supra* note 105, at 103-04).

137. Brown et al., *supra* note 72.

138. *Id.* (“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.”).

40% less than other manufacturing workers.¹³⁹ Over 15% do not have health insurance.¹⁴⁰ Economic and health disparities among low-wage workers existed before COVID-19, but the virus has exacerbated the consequences of choosing to “work-while-sick.”¹⁴¹

1. Forced Work

Low wages and lack of quality health care make the choice of working while sick a decision of economic necessity. The lack of paid sick days and punitive attendance policies make it nearly impossible for meatpacking workers to take days off when they are ill.¹⁴² 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.¹⁴³

139. McConnell, *supra* note 70 (“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.”).

140. Brown et al., *supra* note 72.

141. Nicole Greenfield, *COVID-19 Has Exposed the Gross Exploitation of Meatpacking Workers*, NRDC (October 30, 2020), <https://www.nrdc.org/stories/covid-19-has-exposed-gross-exploitation-meatpacking-workers> [<https://perma.cc/LC59-Z4F3>].

142. Deena Shanker & Jen Skierritt, *Tyson Reinstates Policy that Penalizes Absentee Workers*, BLOOMBERG (June 3, 2020, 1:03 PM), <https://www.bloomberg.com/news/articles/2020-06-03/tyson-reinstates-policy-that-penalizes-absentee-workers>.

143. SAMANTHA ARTIGA & MARIA DIAZ, HEALTH COVERAGE AND CARE OF UNDOCUMENTED IMMIGRANTS 5 (Kaiser Family Found. ed., 2019) (“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, 1:25 PM), <https://www.propublica.org/article/what-happens-if-workers-cutting-up-the-nations-meat-get-sick> [<https://perma.cc/5DJP-HXPQ>] (“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/> [<https://perma.cc/QYH7-QSRJ>] (“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.”).

A whistleblower investigation revealed that workers at Saul's Greeley JBS had little choice in working while sick.¹⁴⁴ As part of the investigation, Erica Villegas, a JBS contractor who was hired to screen employees for COVID-19, reported 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."¹⁴⁵ "JBS would try to convince people that they were fine to go to work . . ."¹⁴⁶ Sarah-Jean Buck, 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. . . . Moreover, JBS encouraged us to not diagnose anyone with the virus so that they could work."¹⁴⁷ 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 health care. 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.¹⁴⁸ The pandemic, however, has made the risk deadly.

The CDC recommended that workers experiencing COVID-19 symptoms or diagnosis should stay home.¹⁴⁹ 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 Sick Leave Act did not require employers with more than 500 employees to participate and employers with less than fifty employees could opt

144. Tony Kovalski, *Whistleblower Says COVID-19 Screening Process at JBS Plant Places Employees in Danger*, DENVER CHANNEL (Oct. 11, 2020), <https://www.thedenverchannel.com/news/investigations/whistleblower-says-covid-19-screening-process-at-jbs-plant-places-employees-in-danger>.

145. Cuyler Meade, *Whistleblowers: JBS' COVID-19 Screen Process Encouraged Employees to Work While Sick, Discouraged Accurate Screening*, GREELEY TRIB. (Oct. 9, 2020, 3:25 AM), <https://www.greeleytribune.com/2020/10/06/whistleblowers-jbs-covid-19-screening-process-encouraged-employees-to-work-while-sick-discouraged-accurate-screening/> [<https://perma.cc/QLD9-2E6A>].

146. *Id.*

147. *Id.*

148. Greenfield, *supra* note 141.

149. *Guidance for Business and Employers Responding to Coronavirus Disease 2019 (COVID-19)*, U.S. CTR. FOR DISEASE CONTROL PREVENTION (Mar. 8, 2021), <https://www.cdc.gov/coronavirus/2019-ncov/community/guidance-business-response.html> [<https://perma.cc/B3EJ-347F>] (encouraging employers to implement paid sick leave and limit penalizing absences).

out.¹⁵⁰ 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 requirements.¹⁵¹ The exemptions left low-wage essential workers, like Saul, who worked for large national corporations without critical work-place protections and benefits.¹⁵² Low-wage workers who did not already have paid leave and did not qualify for the COVID-19 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.¹⁵³ 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.¹⁵⁴ Since the start of the pandemic, the United Food and Commercial Workers Union, which represents meatpacking workers, has been advocating for fourteen sick days for workers with mixed results.¹⁵⁵ Some plants allowed workers to stay home, created more

150. Paid Leave Under the Families First Coronavirus Response Act, 85 Fed. Reg. 19326, 19326 (April 6, 2020) (to be codified at 29 C.F.R. pt. 86).

151. *Id.* Traditionally, FMLA only provides up to twelve weeks of unpaid leave; the extension of up to ten weeks of pay provided substantial financial assistance to workers with children. *Id.*

152. Alyssa Fowers & Shelly Tan, *The New Sick Leave Doesn't Protect the Workers Who Need it the Most*, WASH. POST (March 29, 2020), <https://www.washingtonpost.com/graphics/2020/national/sick-leave-workers-coronavirus/> [<https://perma.cc/93BG-6AQU>] (reporting 7.4 million essential workers are employed by large employers like national grocery stores, retail stores, fast food chains, and meatpacking 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).

153. *Id.* (citing JODY HEYMAN ET AL., *CONTAGION NATIONS: A STUDY COMPARING PAID SICK LEAVE POLICIES IN 22 COUNTRIES* 8 (Ctr. for Econ. & Pol'y Rsch. ed., 2009)).

154. Usha Ranji et al., *Coronavirus Puts a Spotlight on Paid Leave Policies*, KAISER FAM. FOUND. (Dec. 14., 2020), <https://www.kff.org/coronavirus-covid-19/issue-brief/coronavirus-puts-a-spotlight-on-paid-leave-policies/#> [<https://perma.cc/B49A-YFC7>] (explaining that among workers in private industry who have paid leave benefits “the average duration is seven days; 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”).

155. 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/ [<https://perma.cc/MZ6E-QAW3>] (“[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

flexible sick leave policies, or combined sick leave with short term disability to provide additional paid leave. Other companies have limited or revoked sick leave policies, forcing workers to choose between getting paid or caring for their health.¹⁵⁶ 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.¹⁵⁷

The lack of paid sick days is not limited to the meatpacking industry. Overall, only 30% of individuals working in the lowest wage industries (earning \$10.48/hour or less) have access to paid sick days.¹⁵⁸ 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, despite their exemption from providing paid pandemic leave because they are large employers.¹⁵⁹

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.”).

156. *Id.*

157. Polly Mosendz et al., *U.S. Meat Plants Are Deadly as Ever, With No Incentive to Change*, BLOOMBERG L. (June 18, 2020, 3:00 AM), <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, 10:33 AM), <https://www.businessinsider.com/few-safeguards-meat-plant-workers-live-in-fear-2020-5> [<https://perma.cc/4AM9-U6V2>] (describing how Greeley, Colorado, JBS employees were offered a \$600 bonus to keep working after finding out that coworkers had tested positive for COVID-19).

158. Gary Claxton & Larry Levitt, *Paid Sick Leave is Much Less Common for Lower-Wage Workers in Private Industry*, KAISER FAM. FOUND. (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/> [<https://perma.cc/3L5G-RC22>]; see also Adewale Maye, *Low-Wage Workers Least Likely to Have Paid Sick Days*, CTR. FOR L. & SOC. POL'Y (Nov. 21, 2019), <https://www.clasp.org/blog/low-wage-workers-least-likely-have-paid-sick-days> [<https://perma.cc/T76N-M738>] (reporting that in 2019 only 47% of low-wage workers had sick leave compared to 90% of high wage workers).

159. Amelia Lucas, *Restaurants Rethink Paid Sick-leave Policies as Coronavirus Outbreak Spreads*, CNBC (Mar. 11, 2020, 4:16 PM), <https://www.cnbc.com/2020/03/11/restaurants-reevaluate-paid-sick-leave-policies-as-coronavirusspreads.html> [<https://perma.cc/>

The “work-while-sick culture” within the meatpacking industry was a key factor in the spread of COVID-19. Workers felt pressured to go in while sick. Employers devalued the physical costs to workers based on racialized misbeliefs of worker resiliency. The industry kept production lines open—no matter the cost.

2. Profits Over Lives

In the middle of a pandemic that infected tens of thousands of meatpacking workers, the meatpacking industry blatantly risked the lives of workers to maximize profits. While experts encouraged plants to reduce the number of workers “on the line[s],” meat processing plants sought waivers to increase line production speeds beyond those established to protect worker safety and lobbied to escape liability from claims that workers contracted the virus on the job.¹⁶⁰

During the early stages of the pandemic, the CDC identified that busy production lines and close contact between workers “substantially” exposed workers to the spread of COVID-19.¹⁶¹ The CDC recommended that workers maintain physical distance between each other while on the line, during breaks, in changing rooms, and in community transportation vehicles.¹⁶² 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

CBG4-8KKD]; see also Johnny Diaz & Karen Zraick, *Walmart, Uber and Others Tweak Sick-Leave Policies as Coronavirus Spreads*, N.Y. TIMES (July 15, 2020), <https://www.nytimes.com/2020/03/11/business/new-sick-leave-policy.html> (discussing major companies expanding sick leave in response to COVID-19); Greenfield, *supra* note 141.

160. Grabell & Yeung, *supra* note 41; 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-front-line-workers-and-consumers> [<https://perma.cc/M8BZ-PC9B>] (reporting the USDA allowing beef plants to operate at a faster line speed during the COVID-19).

161. *Meat and Poultry Processing Workers and Employers, Interim Guidance from CDC and OSHA*, U.S. CTR. FOR DISEASE CONTROL & PREVENTION (June 11, 2021), <https://www.cdc.gov/coronavirus/2019-ncov/community/organizations/meat-poultry-processing-workers-employers.html> [<https://perma.cc/F377-AAQT>] [hereinafter *Meat & Poultry Interim Guidance*].

162. *Id.*

United States Department of Agriculture (USDA) to increase the speed of their “kill” or evisceration lines.¹⁶³

Poultry plants knew that increasing the line speeds would require that workers to be “shoulder to shoulder” to complete tasks on time.¹⁶⁴ 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).¹⁶⁵ The NPIS maximum line speed rate was 140 birds per minute (bpm).¹⁶⁶ Imagine killing chickens at the pace of Michael Jackson’s *Beat It*.¹⁶⁷ In the petition, the Chicken Council proudly stated that the increased speed would not impact worker safety because the work would speed up during the first processing stage where chickens are eviscerated mostly by a highly automated process.¹⁶⁸ 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 at the second processing stage. To meet the increased production from faster processing, however, plants would need to maintain (if not increase) the number of employees on the lines following the automated processes.¹⁶⁹

163. Deborah Berkowitz & Shayla Thompson, *USDA Allows Poultry Plants to Raise Line Speeds, Exacerbating Risk of COVID-19 Outbreaks and Injury*, NAT’L EMP. L. PROJECT (June 17, 2020), <https://www.nelp.org/publication/usda-allows-poultry-plants-raise-line-speeds-exacerbating-risk-covid-19-outbreaks-injury> [<https://perma.cc/BD4K-P4VN>] (describing how the USDA granted requests of line speed waivers to fifteen major poultry producers despite histories of OSHA violations and COVID-19 outbreaks).

164. Dylan Matthews & Byrd Pinkerton, *How Chicken Plants Became More Dangerous Places to Work than Coal Mines*, VOX (Oct. 7, 2020, 8:37 AM), <https://www.vox.com/future-perfect/21502225/chicken-meatpacking-plant-future-perfect-podcast>.

165. 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, 83 Fed. Reg. 49048, 49048-49 (2018) (asserting that granting the waiver would not impair food safety, reduce cost, increase competitiveness with international market, and maintain current worker safety).

166. Modernization of Poultry Slaughter Inspection, Final Rule, 79 Fed. Reg. 49,566, 49,590-49,592, 49,635; see also 9 C.F.R. § 381.69(a) (stating that the maximum line speed for young chicken slaughter establishments is 140 birds per minute).

167. *Three Things You Should Know About Poultry Line Speeds*, UNITED FOOD & COM. WORKERS INT’L UNION (Sept. 8, 2020), <https://www.ufcw.org/three-things-you-should-know-about-poultry-line-speeds/> [<https://perma.cc/AWK6-CX4U>] [hereinafter *Poultry Line Speeds*].

168. 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, 83 Fed. Reg. at 49049.

169. *Id.*

As a result of the increased automation, plants have claimed that they could not implement physical distancing for meat processing workers.¹⁷⁰ To the contrary, the increased speed often placed more workers on the line to meet the faster production demands. This blatant disregard of the risk to workers demonstrates how the racialized narrative that their bodies can withstand harms permits employers to ignore safety precautions, particularly when there is little to no consequence, which will be explained in the next sections. This widespread disregard for the safety of workers is duplicated throughout low-wage industries such as agriculture, migrant farming, factory production, and the garment industries, where output is valued more than safety.

Meat processing plants claimed that they could not have predicted a pandemic like COVID-19, nor could they have protected workers from the unknown consequences.¹⁷¹ A report by ProPublica, however, uncovered that experts, governmental agencies, and White House officials had been warning the meatpacking industry of a COVID-19 like pandemic for over a decade.¹⁷² In 2006, the White House asked food and agricultural industries to create a plan in case of a pandemic.¹⁷³ They warned that should a pandemic hit, up to “40% of their workers might be absent due to illness, quarantine or fear.”¹⁷⁴ Trade associations created plans to respond to worker spread of viruses.¹⁷⁵ The Department of Labor recommended that companies with high-density work environments should stockpile masks.¹⁷⁶

Fears that a pandemic could have a detrimental impact on availability of meat prompted the industry to create plans to protect its most valuable commodity: the meat.¹⁷⁷ The workers were disposable and replaceable. Processing plants knew that a pandemic like COVID-

170. Complaint at 2-3, *Rural Cmty. Workers All. v. Smithfield Foods*, 449 F. Supp. 3d 1128 (W.D. Mo. 2020) (No. 5:20-cv-06063-DGK).

171. *Poultry Line Speeds*, *supra* note 167.

172. Michael Grabell & Bernice Yeung, *Meatpacking Companies Dismissed Years of Warnings but Now Say Nobody Could Have Prepared for COVID-19*, PROPUBLICA (Aug. 20, 2020, 6:00 AM), <https://www.propublica.org/article/meatpacking-companies-dismissed-years-of-warnings-but-now-say-nobody-could-have-prepared-for-covid-19> [<https://perma.cc/5Q5X-ZWTW>].

173. *Id.*

174. *Id.*

175. *Id.*

176. *Protecting Workers: Guidance on Mitigating and Preventing the Spread of COVID-19 in the Workplace*, OSHA (June 10, 2021), <https://www.osha.gov/coronavirus/safework> [<https://perma.cc/GR5L-7422>].

177. Grabell & Yeung, *supra* note 172.

19 was a distinct possibility. They had the time and the resources to take precautions that would adequately protect their workers in the case that a pandemic arose. They chose 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. The next section explains how OSHA—the federal agency created to protect workplace safety—failed low-wage workers during the pandemic.

IV. FAILED SAFETY NETS

From the lack of enforcement by OSHA to loopholes within the workers' compensation system, the pandemic has exposed holes in the social safety net for low-wage people of color and immigrants.

A. OSHA

On December 29, 1970, the Occupational Safety and Health Act (OSHA) created the federal agency charged with ensuring that all workers have a safe and healthy working environment.¹⁷⁸ OSHA is tasked with “the development and promulgation” of workplace safety and health standards.¹⁷⁹ 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.¹⁸⁰ Since its inception, however, OSHA has been undermined by severe underfunding and lack of bipartisan support.¹⁸¹ OSHA's enforcement power began to decline in the 1980s during the Reagan Administration deregulation era.¹⁸² Cuts in the budget greatly reduced the number of investigators, which hampered their ability to investigate and enforce workplace safety violations.¹⁸³ Lack of funding and political standing has led to an agency that continues to be severely underfunded,

178. MICHAEL C. DUFF ET AL., *OSHA'S NEXT 50 YEARS: LEGISLATING A PRIVATE RIGHT OF ACTION TO EMPOWER WORKERS* 3 (Ctr. for Progressive Reform ed., 2020).

179. 29 U.S.C. § 651 (2018).

180. Lauren Walter, *Four Decades of OSHA: A Timeline*, EHS TODAY (Apr. 27, 2011), <https://www.ehstoday.com/standards/osha/article/21907019/four-decades-of-osha-a-timeline> [<https://perma.cc/CD9A-U5M4>]; *Commonly Used Statistics*, OSHA, <https://www.osha.gov/data/commonstats> [<https://perma.cc/BM7U-TSQJ>] (last visited Mar. 23, 2022) (“Worker deaths in America are down on average, from about 38 worker deaths a day in 1970 to 15 a day in 2019.”).

181. See generally Rathod, *supra* note 78 (providing a thorough history and description of the role of OSHA and its development as an ineffective agency).

182. DUFF ET AL., *supra* note 178, at 3.

183. *Id.* at 4.

understaffed, and incapable of investigating and enforcing complaints.¹⁸⁴

At the start of former President Trump's Administration, the number of OSHA inspectors was at an all-time low.¹⁸⁵ 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.¹⁸⁶ Forty-two percent of OSHA's top leadership positions, such as the directors of enforcement, training, and whistleblowing, have remained vacant since 2016.¹⁸⁷ Studies predict that it would take 165 years for OSHA to conduct an inspection of every jobsite under its jurisdiction.¹⁸⁸

In addition to the reduction in investigative capacity, OSHA has also reduced public awareness about enforcement actions by decreasing press releases by more than 50%.¹⁸⁹ OSHA conducted more than 12,000 inspections during the fall and winter of 2019, yet only published eighty-four press releases.¹⁹⁰ Lack of publicity has a direct and negative impact on the deterrent influence of enforcement.¹⁹¹ As will be discussed later, reports show that public awareness of enforcement actions increases employer compliance and workers' willingness to complain about workplace violations.¹⁹²

OSHA's strategic agenda and priorities are framed by political interests, which often miss the voice of immigrants.¹⁹³ Unions provide major pushes behind new or better workplace safety regulations.¹⁹⁴ 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

184. Deborah Berkowitz, *Worker Safety in Crisis: The Cost of a Weakened OSHA*, NAT'L EMP. L. PROJECT (Apr. 28, 2020), <https://www.nelp.org/publication/worker-safety-crisis-cost-weakened-osh/> [<https://perma.cc/8KAR-J352>].

185. *Id.*

186. *Id.*

187. *Id.*

188. *Id.* (citing DEATH ON THE JOB: THE TOLL OF NEGLECT: A NATIONAL & STATE-BY-STATE PROFILE OF WORKER SAFETY & HEALTH IN THE U.S. 17 (28th ed. 2019)).

189. *Id.*

190. *Id.*

191. *Id.*; 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).

192. See discussion *infra* subpart VI.B.

193. Rathod, *supra* note 78, at 515-36.

194. *Id.* at 516-21.

and immigrants from unions through the twentieth century created another barrier to having their concerns voiced at OSHA.¹⁹⁵

Several systemic issues in OSHA's complaint and investigation process hinder immigrant workers' 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.¹⁹⁶ With minor exceptions, OSHA does not require employers to provide safety training or information in multiple languages or at low-literacy levels.¹⁹⁷ 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.¹⁹⁸

Workers do not have a private right of action to sue their employers for workplace injuries caused by violations of OSHA regulations.¹⁹⁹ Workers seeking redress for OSHA violations must go through the administrative complaint process.²⁰⁰ OSHA's lack of enforcement of violations of its COVID-19 recommendations has provided little incentive for employers to follow the guidance. This is particularly true in the meatpacking industry, where demand for meat-products sky-rocketed during the pandemic, incentivizing plants to increase production outputs with little regard for worker safety.²⁰¹

195. *Id.* at 519-20. (first citing Molly McUsic & Michael Selmi, *Postmodern Unions: Identity Politics in the Workplace*, 82 IOWA L. REV. 1339, 1346 nn.27-28 (1997); and then citing Krissah Williams, *Unions Split on Immigrant Workers*, WASH. POST (Jan. 27, 2007), <https://www.washingtonpost.com/wp-dyn/content/article/2007/01/26/AR20070126012601635.html> (explaining how the United Food and Commercial Union did not take a position on immigration until the 1990s at the request of the AFL-CIO, which was calling for an immigration amnesty program)).

196. *Id.* at 529-30 (noting the difficulty of interpreting technical terms and the lack of bilingual investigators in languages other than Spanish).

197. *Id.* at 530 (citing OFF. OF INSPECTOR GEN., *EVALUATION OF OSHA'S HANDLING OF IMMIGRANT FATALITIES IN THE WORKPLACE* (2003)).

198. *Id.* at 529-30.

199. See DUFF ET AL., *supra* note 178, at 6-7 (advocating for a private right of action for workers, as opposed to the current OSHA complaint system).

200. *Federal OSHA Complaint Handling Process*, OSHA, <https://www.osha.gov/worker/handling.html> (last visited Mar. 23, 2022) [<https://perma.cc/5U8U-D2TQ>] [hereinafter *Federal OSHA Complaint*].

201. See, e.g., Fatima Hussein, *USDA OKs Record Number of Poultry Line-Speed Waivers in April*, BLOOMBERG L. (Apr. 22, 2020, 2:33 PM), <https://news.bloomberglaw.com/safety/usda-oks-record-number-of-poultry-line-speed-waivers-in-april>.

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.²⁰² The “investigation” can take up to six months to complete.²⁰³ 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 does not follow-up with site visits. The process does not involve workers. After a worker files a COVID-19 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.

Despite thousands of complaints by workers, as of January 2021, OSHA has only issued two citations for COVID-19 related workplace safety violations at meat processing plants.²⁰⁴ 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 October 2021, more than 99,000 meat processing workers have contracted COVID-19, and at least 269 workers have died.²⁰⁵

On April 28, 2020, the U.S. Department of Labor issued a memo stating that employers who could not follow the OSHA and CDC guidelines could write a note explaining why they could not implement

202. *Federal OSHA Complaint*, *supra* note 200.

203. NAT'L COUNCIL FOR OCCUPATIONAL SAFETY & HEALTH, THE OSHA INSPECTION: A STEP-BY-STEP GUIDE 5 (n.d.) (“This material was produced under grant number SH20853SH0 from the Occupational Safety and Health Administration, U.S. Department of Labor.”).

204. DUFF ET AL., *supra* note 178 (discussing OSHA citations: one against JBS and another against Smithfield. OSHA has not issued COVID-19 citations in general. OSHA has only issued four additional COVID-19 citations, all of which were related to violations in nursing home facilities).

205. Memo from Subcom. on the Coronavirus Crisis, *supra* note 9 (reporting accountings from the top five meat processing conglomerates); *see also* Bernice Yeung & Michael Grabell, *After Hundreds of Meatpacking Workers Died from COVID-19, Congress Wants Answers*, PROPUBLICA (Feb 4, 2021, 5:00 AM) <https://www.propublica.org/article/after-hundreds-of-meatpacking-workers-died-from-covid-19-congress-wants-answers> [<https://perma.cc/U54R-73PG>] (estimating the death toll at over 250).

the guidelines.²⁰⁶ The memo provided that state and local governments could not require plants to shut down or impose stricter COVID-19 safety standards than those provided by the guidance.²⁰⁷ The memo went even further to protect employers' rights by stating that if employers acted in good faith to comply with the (voluntary) standards, the Department of Labor would consider requests by the employer to assist the employer in litigation should a worker sue them for workplace exposure to the virus.²⁰⁸

Except for the health care industry emergency temporary standards, OSHA has only issued voluntary "guidance" on COVID-19 workplace safety protocols and practices, including those for the meatpacking industry.²⁰⁹ 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.²¹⁰ 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

206. Kate O'Scannlain & Loren Sweatt, *Statement of Enforcement Policy by Solicitor of Labor Kate O'Scannlain and Principal Deputy Secretary for OSHA Loren Sweatt Regarding Meat & Poultry Processing*, U.S. DEP'T OF LAB. (Apr. 28, 2020), <https://www.dol.gov/newsroom/releases/osha/osha20200428-1> [<https://perma.cc/UM2G-UHBQ>].

207. *Id.*

208. *Id.*

209. "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." Occupational Safety & Health Admin., OSHA 3990-03, *Guidance on Preparing Workplaces for COVID-19* (2020); 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/> [<https://perma.cc/8RJN-K8HD>] ("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."); Letter from Richard Trumka, President of Am. Fed'n Lab. & Cong. Indus. Orgs., to Eugene Scalia, Sec. of Lab. (Mar. 6, 2020) (on file with author) (arguing that the current guidelines are not enough to protect workers).

210. U.S. Department of Labor's *OSHA and CDC Issue Interim Guidance to Protect Workers in Meatpacking and Processing Industries*, OSHA (Apr. 26, 2020), <https://www.osha.gov/news/newsreleases/national/04262020> [<https://perma.cc/K2WZ-878C>] (providing voluntary/self-directed guidance to meat and poultry processing); see also Rathod, *supra* note 78, at 532-33 (referring to the limitations of OSHA's voluntary standards related to workplace violence in producing employer compliance and reducing workplace injuries).

voluntary. They are just advice.”²¹¹ 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.”²¹²

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.²¹³ 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 either mandating or not recommending workplace safety protocols.²¹⁴ It issued COVID-19 emergency temporary standards for the health care industry and has previously issued temporary standards for public health risks such as AIDS/HIV and the last airborne virus, the H1N1 virus (also known as “bird flu”).²¹⁵ Draft regulations for workplace protections related to airborne diseases have existed since the 2009

211. Angela Childers, *Failure to Follow Guidance May Lead to Meatpucker Liability*, BUS. INS. (May 6, 2020), <https://www.businessinsurance.com/article/20200506/NEWS06/912334417/Failure-to-follow-guidance-may-lead-to-meatpucker-liability-COVID-19-c> [<https://perma.cc/2XNB-C7RE>].

212. *Id.*

213. *Standards*, OSHA, <https://www.service-partners.com/wp-content/uploads/2020/05/OSHA-Standards-and-Directives.pdf> [<https://perma.cc/8S2C-QPQ7>] (last visited Mar. 23, 2022) (“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.”); *see also* Memorandum from Patrick J. Kapust, Acting Dir. of OSHA Directorate of Enforcement Programs, on the Updated OSHA Interim Enforcement Response Plan for Coronavirus Disease 2019 (COVID-19) (May 19, 2020) (on file with author).

214. *See* 29 U.S.C. § 655(c)(1) (2018) (“The Secretary shall provide, without regard to the requirements of chapter 5 of title 5, for an emergency temporary standard to take immediate effect upon publication. . . .”).

215. David Michaels, *What Trump Could Do Right Now to Keep Workers Safe from the Coronavirus*, ATLANTIC (Mar. 2, 2020), <https://www.theatlantic.com/ideas/archive/2020/03/use-osha-help-stem-covid-19-pandemic/607312/> [<https://perma.cc/9UF2-9JS2>]; *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-directive-for-h1n1-related-inspections> [<https://perma.cc/R5U2-PMEY>] (discussing plans by OSHA to implement a compliance directive that will enforce uniform procedures to protect health care workers).

H1N1 pandemic, but deregulation and lack of federal leadership have stalled the process of passing the bills into law.²¹⁶ The Biden Administration is demanding emergency standards and is investigating the lack of oversight over the meatpacking industry.²¹⁷

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.²¹⁸ Twenty-two states operate OSHA approved state health and workplace safety plans.²¹⁹ Under the state plans, participating states may create their own workplace safety regulations so long as they meet the minimum OSHA requirements.²²⁰ Local industries and politics have influenced which states have created COVID-19 workplace safety rules.²²¹ Kansas relaxed quarantine rules after pressure from local industries.²²² Virginia led the country in implementing the first set of statewide COVID-19 emergency workplace safety standards.²²³ As the nation waits for President Biden's Administration to take action, other states have followed in Virginia's path.²²⁴

216. *2009 H1N1 Pandemic (H1N1pdm09 Virus)*, CTRES. FOR DISEASE CONTROL & PREVENTION (June 19, 2019), <https://www.cdc.gov/flu/pandemic-resources/2009-h1n1-pandemic.html> [<https://perma.cc/HA5A-5WDF>] (showing that in 2019 the CDC published several reports following the tenth anniversary of the H1N1 pandemic); *see also Recommendations for Consideration by the Secretary of Labor on Pandemic-H1N1 Influenza Protection for the Federal Workforce*, OSHA, <https://www.cdc.gov/flu/pandemic-resources/2009-h1n1-pandemic.html> [<https://perma.cc/7XUH-JPAK>] (last visited Mar. 23, 2022) (discussing ways the federal government could have better handled the H1N1 Pandemic).

217. *See* discussion *infra* Part VI.

218. Sophie Quinton, *These States Aren't Waiting for the Fed to Create COVID-19 Related Worker Safety Rules*, PEW CHARITABLE TRS. (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> [<https://perma.cc/A4RS-TGY2>].

219. *See State Plans*, OSHA, <https://www.osha.gov/stateplans> (last visited Mar. 23, 2022) [<https://perma.cc/Y4T2-VWGL>].

220. *See* 29 U.S.C. § 667 (2018).

221. Amy Forliti, *Meatpacking Safety Recommendations Largely Unenforceable*, ABC NEWS (May 21, 2020, 1:50 PM), <https://abcnews.go.com/Health/wireStory/meatpacking-safety-recommendations-largely-unenforceable-70802416> [<https://perma.cc/6FBN-J3VB>].

222. *Id.*

223. *See* VA. DEP'T OF LAB. & INDUS., FINAL PERMANENT STANDARD FOR INFECTIOUS DISEASE PREVENTION OF THE SARS-CoV-2 VIRUS THAT CAUSES COVID-19 (2021); Makenzie D. Way et al., *Virginia Becomes First State to Pass Permanent Workplace Coronavirus Rules*, 11 NAT'L L. REV. 1, 1 (2021).

224. Quinton, *supra* note 218.

B. *Workers' Compensation*

Workers seeking monetary compensation and care for workplace injuries generally must file a workers' compensation (or workers' comp) insurance 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.²²⁵ While OSHA enforces workplace safety regulations, workers' comp insurance is typically the exclusive remedy for work related personal injury claims.²²⁶ 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.²²⁷ In theory, the system is supposed to provide the worker with quick financial assistance and medical care without a long legal battle, as well as save the employer money from having to defend a lawsuit. Workers' comp usually "does not cover routine community-spread illnesses like a cold or the flu" because it is difficult to demonstrate that the worker contracted the cold or flu at work.²²⁸

Months after the loss of their patriarch, Saul's family continued to fight for dignity and accountability for his death. They tried to seek benefits from the workers' compensation insurance to cover Saul's medical expenses and lost income while he was out of work due to the virus. In early October 2020, however, 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.²²⁹ The issue of proving that an employee

225. See *Workers Compensation*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/workers_compensation [<https://perma.cc/FG6C-FYRE>] (last visited Mar. 23, 2022).

226. See generally LEX K. LARSON, LARSON'S WORKERS' COMPENSATION § 1.01 (Matthew Bender ed., 2021) (discussing background of workers' compensation).

227. *Id.*

228. 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> [<https://perma.cc/9SKC-D99V>].

229. Conor McCue, *Report: COVID-19 Related Workers' Compensation Claims Denied by JBS*, CBS DENVER (Oct. 1, 2020, 12:43 PM), <https://denver.cbslocal.com/2020/10/01/covid-workers-compensation-claims-denied-jbs-colorado/> [<https://perma.cc/G6E4-Q76Q>]; see also Fortin, *supra* note 40 ("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.").

contracted COVID-19 on the job has become hotly debated throughout all industries.²³⁰

Whether the injury arises out of and occurs from the employment is a key factor in obtaining a workers' comp award.²³¹ How and where a worker contracted COVID-19 has proven to be a vexing problem. Contact tracing has been difficult to conduct. Given that information about how it spread was in flux during the early stages of the pandemic, it is difficult to determine where a person contracted the virus, and new variants 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.²³² The CDC, however, has recognized that meat processing plants are hotbeds for COVID-19 and issued guidance specifically aimed at stopping the spread of the virus at the plants.²³³

230. Bryce Covert, *COVID-19 Workers' Comp Claims are Being Held Up or Denied*, INTERCEPT (Sept. 7, 2020, 6:00 AM), <https://theintercept.com/2020/09/07/coronavirus-workers-compensation-claims-labor/> [<https://perma.cc/C9EH-SV3H>] ("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 AM 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 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 (July 13, 2020), <https://khn.org/news/adding-to-covid-stress-families-of-health-workers-fight-for-denied-workers-comp-benefits/> [<https://perma.cc/2RWB-RK8J>] ("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 Cunningham, *supra* note 228 (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).

231. Weber, *supra* note 230 ("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.").

232. McCue, *supra* note 229 (explaining 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 to demonstrate where, when, and how they contracted the virus).

233. *Meat & Poultry Interim Guidance*, *supra* note 161 (asserting that the work environment in meat and poultry plants "may contribute substantially to their potential exposures" to COVID-19).

Employers have lobbied for immunity from liability while workers have pushed for a presumption that they contracted the virus at work.²³⁴ 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.²³⁵ The burden then shifts to employers and insurance companies to prove that the employee did not contract the virus at work.²³⁶ Other states have expanded their definitions of illnesses eligible for workers' comp to include COVID-19.²³⁷ 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.²³⁸ The Colorado Legislature (Saul's home state) did not pass a bill to extend workers' compensation coverage to COVID-19.²³⁹

While identifying the exact origin of exposure may be difficult, meatpacking workers can point to a combination of factors that place them at high risk of contracting the virus at work. The working conditions in meat processing plants make them highly conducive to the spread of COVID-19.²⁴⁰ Workers stand shoulder to shoulder with each other on the lines, during breaks, and at the start and end of the work day when clocking in and out and changing into their uniforms.²⁴¹ They spend long hours working in close proximity to each other.²⁴² They are exposed to multiple communal 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.²⁴³ Meatpacking workers do not have the luxury of hour-long lunch breaks and the time it takes to take off and on their uniforms makes it difficult to leave and return to the plant with enough time to eat. As a result,

234. Ana Swanson & Alan Rappoport, *Businesses Want Virus Legal Protection. Workers are Worried*, N.Y. TIMES (June 12, 2020), <https://www.nytimes.com/2020/06/12/business/economy/cornoavirus-liability-shield.html>.

235. Cunningham, *supra* note 228.

236. *Id.*

237. *Id.*

238. *Id.*

239. See S.B. 20-216, 72nd Gen. Assem. 2nd Reg. Sess. (Colo. 2020).

240. *Meat & Poultry Interim Guidance*, *supra* note 161 (responding to COVID-19 outbreaks in meat processing plants by issuing updated guidelines because "their work environments—processing lines and other areas in busy plants where [workers] have close contact . . . may contribute substantially to their potential exposures" to COVID-19).

241. *Id.*

242. *Id.*

243. *Id.*

workers are inside the building from the start to end of eight to ten-hour shifts, which increases their exposure to the virus.²⁴⁴ 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.²⁴⁵

Despite claims that workers were 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.²⁴⁶ The meat processing industry and many other powerful industries heavily lobbied in support of the Liability Protection for Employers in a Declared Disaster or the Public Emergency Act.²⁴⁷ The Act provides immunity for businesses in operation during a disaster or public emergency from civil liability or professional discipline due to workers injured by the disaster or public emergency so long as the business complied with relevant rules or made a good faith effort to comply with the rules.²⁴⁸ The prospect of granting immunity to the meat processing industry is particularly concerning because of its history of workplace safety violations and worker exploitation.²⁴⁹ Under the OSHA voluntary compliance rules, the meat industry was able to request and receive permission to speed up production lines, add workers to already crowded workspaces, and claim that physical distancing was impractical due to the nature of the work. Immunity from claims that workers contracted COVID-19 on the plant floor would just be business as usual for an industry accustomed to skirting the rules to make a profit.

V. LEGAL ACTIVISM

The following sections describe how workers, advocates, and community organizations have turned to alternative forms of complaints and creative litigation strategies that rely on narratives and

244. *Blood, Sweat, and Fear*, *supra* note 70; *see also* McConnell, *supra* note 70.

245. *Meat & Poultry Interim Guidance*, *supra* note 161.

246. Lilliston, *supra* note 67.

247. *Liability Protection for Employers in a Declared Disaster or Public Emergency Act*, AM. LEGIS. EXCH. COUNCIL, <https://www.alec.org/model-policy/liability-protection-for-employers-in-a-declared-disaster-or-public-emergency-act/> [<https://perma.cc/SM4W-ED3R>] (last visited Mar. 23, 2022) [hereinafter *Liability Protection for Employers*]; *see also* Lilliston, *supra* note 67 (discussing attempts by major meatpacking corporations to lobby Congress for special immunity from their workers who die or contract COVID-19).

248. *Liability Protection for Employers*, *supra* note 247.

249. *See* discussion *supra* Part IV.

interest convergence theory to improve working conditions in the absence of OSHA enforcements.

The lack of COVID-19 safety mandates by OSHA, doubts regarding the availability of workers' compensation coverage, and reliance on voluntary compliance by employers have left low-wage workers seeking alternative venues for workplace safety claims. Meat processing workers are taking a "legal pluralist" approach to improve working conditions.²⁵⁰ They have filed common law claims, filed complaints with the Federal Trade Commission, and joined with grassroots organizations to place public pressure on the industry. They have leveraged the law and the power of counter narratives to create safer workplaces.²⁵¹ The litigation efforts have raised public awareness and placed pressure on employers to improve working conditions (or at least promise to make workplaces safe). JBS, Tyson Foods, and Smithfield Foods have each instituted some level of COVID-19 safety protocols following the filings of high-profile lawsuits. Community organizing has also helped improve COVID-19 related workplace safety and working conditions. Community-led actions have kept the issues of low-wage workers in the public eye, educated workers about their rights, and given workers a platform to effectuate change.

A. *Nuisance*

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 for the Western District of Missouri against Smithfield Foods.²⁵² The complaint alleged that Smithfield Foods's failure to protect its meatpacking workers from COVID-19 created a "public nuisance" that endangered workers and public health.²⁵³ At its core, this case depended on an interest-convergence argument that, while the workers do not matter, the communities in which they live do.²⁵⁴ Black and Brown meatpacking workers have contracted and died

250. Scott L. Cummings, *Hemmed In: Legal Mobilization in the Los Angeles Anti-Sweatshop Movement*, 30 BERKELEY J. EMP. & LAB. L. 1, 5 (2009).

251. *Id.*

252. Complaint at 1, Rural Cmty. Workers All. v. Smithfield Foods, 459 F. Supp. 3d 1228 (W.D. Mo. 2020) (No. 5:20-cv-06063-DGK).

253. *Id.* at 19 ("Smithfield's current operations constitute a public nuisance because they unreasonably interfere with the common public right to public health.").

254. Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 522-23 (1980) (identifying a theory of interest-convergence

from COVID-19 at alarming rates, but the issue is not a problem that warrants employer intervention until the virus (and death) spreads to the outside (mostly white) community. *Only then* is the problem a “nuisance.”

The plaintiffs sought an injunction ordering Smithfield to follow recommended CDC safety protocols. The plaintiffs complained that Smithfield Food was: (1) not providing sufficient personal protective equipment, (2) forcing workers to work in close proximity (shoulder to shoulder) with breaks that 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.²⁵⁵ The complaint alleged that, rather than implementing safety measures, Smithfield Foods was blaming “certain cultures” for community spread of the virus.²⁵⁶

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 court of law, resolve the matters in dispute.²⁵⁷

In a similar suit filed by McDonald’s workers in the Illinois Circuit Court of Cook County, the plaintiffs claimed that the work environment created a public nuisance because employees had to work in close proximity to each other and the public.²⁵⁸ They also claimed that McDonald’s was negligent by not providing adequate PPE or safety guidelines. 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’s. The court did not find that McDonald’s was negligent in creating unsafe working conditions because none of the plaintiffs had contracted COVID-19 and (like workers’ comp cases) the points of exposure were speculative. The

whereby a result is obtained by meeting the interests of both the in and out groups, in the case of desegregated schools, “[t]he interest of [B]lacks in achieving racial equality will be accommodated only when it converges with the interests of whites”).

255. Complaint at 2, *Rural Cmty. Workers All.*, 459 F. Supp. 3d 1228 (No. 5:20-cv-06063-DGK).

256. *Id.* at 2-3.

257. *Rural Cmty. Workers All. v. Smithfield Foods*, 459 F. Supp. 3d 1228, 1245-46 (W.D. Mo. 2020).

258. *Massey v. McDonald’s Corp.*, No. 2020 CH 04247, 2020 WL 5700874, at *3 (Ill. Cir. Ct. June 24, 2020).

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.²⁵⁹ In *Palmer v. Amazon.com, Inc.*, the United States District Court for the Eastern District of New York 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 claims.²⁶⁰ 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 public awareness by exposing that working conditions that were already bad have been made worse by the pandemic.

B. *Deceptive Practices*

On July 30, 2020, two food protection non-profit groups, Venceremos and Food & Water Watch, filed a complaint against Tyson Foods before the United States Federal Trade Commission (FTC).²⁶¹ In addition to false statements about working with "independent" family owned farms, the complaint alleged that Tyson Foods engaged in false and deceptive advertising by claiming that it provided safe working environments.²⁶² The petitioners alleged that Tyson Foods'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.²⁶³ The complaint further alleged that

259. *Palmer v. Amazon.com Inc.*, 498 F. Supp. 3d 359, 364 (E.D.N.Y. 2020).

260. See Robert Iafolla, *McDonald's Can't Get Early Exit From Virus Worker Safety Cases*, BLOOMBERG L. (June 3, 2020), <https://news.bloomberglaw.com/daily-labor-report/mcdonalds-cant-get-early-exit-from-virus-worker-safety-case>; see also JACQUELINE CAMPBELL, UPDATE: COVID-19 EXPOSURE CLAIMS 1, 3-4 (Fowler, Hirschel, McNulty, & Spaulding LLP ed., 2020) (discussing numerous COVID-19 exposure cases that involve public nuisance claims); Vin Gurreiri, *COVID Suits Test Public Nuisance Claim in Workplace Cases* (June 9, 2020, 9:50 PM), <https://www.law360.com/articles/1281347/covid-suits-test-public-nuisance-claim-in-workplace-cases> [<https://perma.cc/K7B5-R77T>] (relaying exposures to COVID-19 that involve public nuisance claims).

261. Sam Bloch, *Consumer Groups Challenge "Deceptive" Tyson Ads that Brag About Worker Safety*, COUNTER (July 30, 2020, 1:13 PM), <https://thecounter.org/consumer-groups-challenge-tyson-ads-worker-safety-covid-19/> [<https://perma.cc/GJP3-TLQU>].

262. See 15 U.S.C. § 41 (2018); see also Bloch, *supra* note 261 (detailing the complaint's allegations that Tyson Foods misled the public by claiming to have independent family farms and a safe workplace).

263. Bloch, *supra* note 261.

Tyson Foods benefited from these false statements because consumers are very interested in purchasing products that are created humanely.²⁶⁴ The petitioners claimed that Tyson Foods deceived the public for decades by falsely stating that they provide safe working conditions, and that COVID-19 has only made the conditions worse.²⁶⁵

This case is still pending. It is unclear whether the petitioners will be able to establish that consumers materially relied on Tyson Foods's claims about worker safety when choosing to purchase Tyson products.²⁶⁶ Following the lawsuit, Tyson Foods launched a "new initiative" to prevent the spread of COVID-19 at poultry processing plants.²⁶⁷ Under Tyson Foods's "new initiative," the company promised to increase testing through daily and random screenings of workers performed by a new, expanded medical staff of doctors and nurses.²⁶⁸ The use of on-site health care workers, however, is self-serving for employers who can then keep all their "dirty laundry" in-house. In-house health care providers are hired by the company and report to the company, thereby creating an incentive to resolve the problem within the company. Tyson, like most other major meat processing plants, is exempt from most of the COVID-19 related paid leave requirements because the pay is limited to companies with less than 500 employees.²⁶⁹ For workers who fear losing a day's work or getting fired due to an extended illness, having on-site health care workers can create additional stress and cause workers to hide symptoms to avoid being sent home without pay.²⁷⁰

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 Foods encouraged

264. *Id.*

265. *Id.*

266. *See id.*; *see also*, Jenny Splitter, *Tyson Foods Accused of False Advertisements in New Federal Trade Commission Complaint*, FORBES (July 30, 2020, 7:20 AM), <https://www.forbes.com/sites/jennysplitter/2020/07/31/tyson-foods-ftc-complaint/7dc6428d> [<https://perma.cc/52DW-KWZJ>] (describing complexities in identifying why consumers make purchasing choices).

267. Bloch, *supra* note 261.

268. *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> [<https://perma.cc/G7NJ-KY4F>].

269. *See* discussion *supra* subpart III.B.

270. Grabell, *supra* note 143 (describing workers' reluctance to report COVID-19 symptoms to the employer for fear of missing work without pay).

workers to “work while sick” and fear of lost wages discouraged workers from seeking the in-house medical assistance), and Tyson Foods 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 Foods 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 Foods to conduct significant damage control of public opinion by keeping workers from seeking outside care for diagnosis of the virus.

VI. DISRUPTING EXPLOITATION

COVID-19 has created a moment where racialized narratives are being disrupted to expose powerful counter-narratives that reveal the plight of low-wage workers. Saul’s story provides us with a powerful illustration of this. The outbreak of the virus throughout the meatpacking industry created an urgent call to action to end decades of unsafe working conditions and exploitation of low-wage people of color. This disruption has unearthed an intricate system of institutionalized racism. Stories like Saul’s have raised national awareness of the working conditions of some of America’s most exploited workers.

The following sections draw on the lessons learned during this pandemic to and identify opportunities for improving workplace safety for all low-wage workers.

A. *Glimmers of Hope*

A new White House administration offers hope for renewed focus on dignity, justice, and safety for low-wage workers. Within days of being in office, President Biden reversed the previous administration’s efforts to increase line speeds at poultry plants.²⁷¹ 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

271. *OIRA Conclusion of EO 12866 Regulatory Review*, OFF. OF INFO. & REGUL. AFFS., <https://www.reginfo.gov/public/do/eoDetails?rrid=131373> [<https://perma.cc/BF4Q-C9VL>] (last visited Mar. 23, 2022); see also Dave Jamieson, *Joe Biden Halts Trumps Plan to Speed Up Processing Lines in Poultry Plants*, HUFFPOST (Jan. 26, 2021), https://www.huffpost.com/entry/biden-trump-poultry-plants_n_600f6be7c5b600a2796248fe [<https://perma.cc/5NS7-N8EU>] (discussing President Biden’s striking down of an order from former President Trump that would allow faster line speeds in poultry plants).

congressional panel has launched an investigation into the hundreds of COVID-19 related deaths within the meatpacking industry.²⁷² The visibility of the stories and the vulnerability of the workers has prompted the new administration act to protect low-wage workers.

On January 21, 2021, President Biden issued an Executive Order on Protecting Worker Health and Safety.²⁷³ 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.²⁷⁴ It directs 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.²⁷⁵ While the order does not provide mandatory standards, a movement towards nationalized recommendations will help eliminate the guessing game for employers and provide some mechanisms to hold them accountable.

B. *Transparency*

OSHA is long overdue for an overhaul. From the need for more inspectors to increasing the size of penalties for and creating more protections against retaliation, the agency is failing to protect low-wage workers.²⁷⁶ 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

272. Yeung & Grabell, *supra* note 205.

273. *Executive Order on Protecting Worker Health and Safety*, WHITE HOUSE (Jan. 21, 2021), <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/21/executive-order-protecting-worker-health-and-safety/> [<https://perma.cc/F6LZ-72TD>].

274. *Id.*

275. *Id.*

276. Rathod, *supra* note 78, at 536-58 (proposing recommendations to improve OSHA investigations, enforcement, transparency, and protections for immigrant workers).

more transparency regarding OSHA enforcement actions.²⁷⁷ A recent report found that publicity regarding OSHA violations and citations led to a significant increase in employer compliance and reduction in workplace injuries.²⁷⁸ 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.²⁷⁹ Publicizing data on investigations and enforcement actions allows the public to identify workplace safety trends and gaps in worker protection.²⁸⁰

The October 27, 2021, memorandum by the Select Subcommittee on the Coronavirus Crisis demonstrates the need for transparency, public information, and employer reporting requirements regarding workplace safety.²⁸¹ The subcommittee's investigation uncovered that COVID-19 infections and deaths at the top five U.S. meat processing plants were almost three times higher than estimates derived from publicly available data.²⁸² The memorandum acknowledges that the number of infections is likely even larger because many of the companies did not have consistent reporting practices.²⁸³ "The lack of any uniform reporting requirements on coronavirus infections and deaths by employers or state and local health organizations has left the public in the dark as to the precise extent of the harm"²⁸⁴ Without consistent reporting requirements or policies that provide the public with information about the number of infections, meat processing plants were able to keep the true extent of the crisis hidden.²⁸⁵ Only after reviewing almost 150,000 pages of unpublished data and reports

277. See, e.g., Jayesh M. 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).

278. Berkowitz, *supra* note 184; see also Johnson, *supra* note 191 (reporting that publicizing OSHA violations leads to improvements in workplace health and safety).

279. Berkowitz, *supra* note 184; see also Johnson, *supra* note 191 (finding that OSHA would need to conduct 210 inspections to achieve the same level of compliance a public press release could induce).

280. Rathod, *supra* note 78, at 538-41.

281. Memo from Subcom. on the Coronavirus Crisis, *supra* note 9.

282. *Id.*

283. *Id.*

284. *Id.*

285. *Id.*; see also Leah Douglas, *COVID-19 Cases Appear to be Slowing at Meat Plants. But Companies aren't Releasing Test Results*, FERN (July 27, 2020), https://thefern.org/ag_insider/covid-19-cases-appear-to-be-slowing-at-meat-plants-but-companies-arent-releasing-test-results/ [<https://perma.cc/YWR7-2UTM>] (noting that JBS, Smithfield, and Tyson have delayed, only partially produced, or declined to publicly release reports related to COVID-19 infections and deaths).

that were requested by a special congressional committee is the public gaining awareness of the true extent of COVID-19 infections at meat processing plants.²⁸⁶ Reporting requirements need to be part of continuing efforts to alert the public of workplace violations. Underestimating the extent of workplace safety issues prevents timely interventions and disincentivizes pro-active protections by shielding employers from public pressure to do the right thing.

C. *The Power of Narratives*

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, turned to alternative litigation strategies, story-telling, and community organizing to raise awareness and improve working conditions at the plant.²⁸⁷ Grassroots organizations, like Latinos Unidos, called for workers to organize and take a stance against the working conditions at JBS. As COVID-19 deaths rose over the summer of 2020, 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!!!!”²⁸⁸ Similar actions took place throughout the United States at warehouses, grocery stores, and delivery centers as low-wage

286. Memo from Subcom. on the Coronavirus Crisis, *supra* note 9; *see also* Douglas, *supra* note 285 (noting that JBS, Smithfield, and Tyson have delayed, only partially produced, or declined to publicly release reports related to COVID-19 infections and deaths).

287. Fortin, *supra* note 40; *see also* Honig & Genoways, *supra* note 76 (explaining that 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*, NPR (Nov. 11, 2020, 5:04 AM), <https://www.npr.org/2020/11/11/933754519/meat-packing-giant-jbs-denies-workers-coronavirus-claims> [<https://perma.cc/M222-LPZX>] (“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.”).

288. Latinos Unidos of Greeley, *Attention Protest Warriors!!!*, FACEBOOK (July 13, 2020, 10:54 PM), <https://m.facebook.com/LatinosunidosofGreeley/posts/3542026335827051> [<https://perma.cc/NCL4-P54K>].

workers shared their stories and called on the public to take action in support of workplace safety.²⁸⁹

There is power in telling stories, especially the untold counter-narratives of marginalized communities.²⁹⁰ Raising awareness of the working conditions of our nation's invisible workforce calls attention to the matter, supports worker organizing, and acts as a deterrent for bad employers. Saul's story needs to continue to be told, as do the stories of countless low-wage essential workers who contracted COVID-19 due to unsafe workplaces. The telling of narratives and counter narratives gives 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.²⁹¹ Turning the attention to the stories of the "outgroups" helps shatter the normalization of the "ingroup reality."²⁹² The devastating images and stories of the low-wage workers who lost their lives to COVID-19 cannot disappear after the pandemic. Sharing the counter-narratives of low-wage workers forces the injustices and indignities into the light where they are not easily ignored.

289. See Erik Ortiz, *Target, Walmart Workers and Others Plan 'Sickout' Protests Over Coronavirus Safety*, MSNBC (May 1, 2020, 4:31 PM), <https://www.nbcnews.com/news/us-news/target-walmart-workers-others-plan-sickout-protests-over-coronavirus-safety-n1195126> [<https://perma.cc/JT59-S8J2>]; 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. 6, 2020), <https://www.businessinsider.com/a-fired-amazon-employee-led-a-protest-in-front-of-jeff-bezos-165-million-beverly-hills-mansion-over-workers-wages-and-job-protections/articleshow/7850430.cms>; *Kroger Workers Staging Weekly Protests Over Proposed Healthcare Cuts*, UNITED FOOD & COM. WORKERS LOC. 400 (Oct. 7, 2020), <http://www.ufcw400.org/2020/10/07/kroger-workers-staging-weekly-protests-over-proposed-healthcare-cuts/> [<https://perma.cc/BNJ8-ZFQQ>]; Luis Feliz Leon, *The Essential Worker Strike Wave*, NEW REPUBLIC (Jan. 22, 2021), <https://newrepublic.com/article/161019/covid-essential-workers-strike> [<https://perma.cc/ZY4V-RM4Y>] (detailing more than 1,000 front line workers on strike in New York City).

290. Delgado, *supra* note 21, at 2414-15 (asserting that 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"); Bell, *supra* note 21, at 767-68, 773-77 (discussing the history of African-Americans being legally discriminated against and having their rights sacrificed to maintain White superiority and White property rights); Matsuda, *supra* note 21, at 325 (explaining that we need to hear the voices and lived experiences of people of color can help scholars better understand the law and "the elements of justice"); Williams, *supra* note 21, at 409-13, 431.

291. Delgado, *supra* note 21, at 2412.

292. *Id.*

VII. CONCLUSION

Decades of structural racism and inequalities have created working environments where low-wage workers have no choice but to work under unsafe 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 learn from this critical moment to create change and redirect history. We cannot continue to ignore the plight 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 create a better future. This is a moment to share the stories of those who have been working in the shadows and take steps towards disrupting the structures that support the systemic exploitation of low-wage people of color.
