

# Lack of Enforcement, Political Influence, and Meat and Poultry Processing Workers' Disproportionate Rates of COVID-19 Infections and Deaths

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## Introduction

The food and agriculture industry, which includes the meat and poultry processing industry, has the second highest percentage (21%) of essential workers in the United States.<sup>1</sup> Specifically, the meat and poultry processing industry employs an estimated 525,000 workers in 3,500 facilities nationwide.<sup>2</sup> As of October 23, 2020, approximately 48,629 meat and poultry processing workers had tested positive for COVID-19, and 245 had died based on data from twenty-three states.<sup>3</sup> Racial and ethnic minorities account for 87% of COVID-19 cases among meat and poultry processing workers, even though they only account for 50% of meat and poultry processing workers.<sup>4</sup>

The Occupational Safety and Health Administration (OSHA) recently issued two fines for meat and poultry processing plants with

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1. Celine McNicholas & Margaret Poydock, *Who Are Essential Workers? A Comprehensive Look at Their Wages, Demographics, and Unionization Rates*, ECON. POL'Y INST.: WORKING ECON. BLOG (May 19, 2020, 11:25 AM), <https://www.epi.org/blog/who-are-essential-workers-a-comprehensive-look-at-their-wages-demographics-and-unionization-rates> [https://perma.cc/UN9E-H98F].

2. Michelle A. Waltenburg et al., *Update: COVID-19 Among Workers in Meat and Poultry Processing Facilities—United States, April–May 2020*, 69 MMWR MORBIDITY & MORTALITY WKLY. REP. 887, 888 (2020), <https://www.cdc.gov/mmwr/volumes/69/wr/pdfs/mm6927-H.pdf>.

3. Leah Douglas, *Mapping Covid-19 Outbreaks in the Food System*, FOOD & ENV'T REPORTING NETWORK (updated Oct. 23, 2020, 12:00PM), <https://thefern.org/2020/04/mapping-covid-19-in-meat-and-food-processing-plants> (updated every weekday).

4. Waltenburg et al., *supra* note 2, at 888; Shawn Fremstad, Hye Jin Rho & Hayley Brown, *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/DLF9-FQND].

COVID-19 outbreaks. The Smithfield plant in Sioux Falls, South Dakota, was issued a fine of \$13,494 after 1294 employees tested positive, 43 were hospitalized, and 4 died of COVID-19.<sup>5</sup> Although this fine was the largest that OSHA could issue, it is a minuscule amount compared to the \$14 billion Smithfield made in net revenue in 2019.<sup>6</sup> The JBS plant in Greeley, Colorado, where 6 workers died and 290 were infected with COVID-19<sup>7</sup> (nearly two-thirds of all Colorado COVID-19 cases),<sup>8</sup> was also issued a fine. The fine was for \$15,615, which is infinitesimal compared to the \$51.7 billion it made in net revenue in 2019 and the \$280 million that it was fined for foreign bribery in 2020.<sup>9</sup>

Despite the fines, many meat and poultry plant processing workers continue to be harmed by the failure to enforce health and safety standards and political decisions influenced by meat and poultry trade associations.<sup>10</sup> Although the trade associations and individual corporations were requesting help securing masks, hand sanitizer, and cleaning materials initially, these efforts to stop the spread of COVID-19 were undermined by their actions to keep open facilities with COVID-19 outbreaks.<sup>11</sup> These actions influenced the government's response

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5. U.S. Department of Labor Cites Smithfield Packaged Meats Corp. for Failing to Protect Employees from Coronavirus, OCCUPATIONAL SAFETY & HEALTH ADMIN. (Sept. 10, 2020), <https://www.osha.gov/news/newsreleases/region8/09102020> [<https://perma.cc/B4QN-ASVG>] [hereinafter *OSHA Smithfield Citation*].

6. Kimberly Kindy, *More Than 200 Meat Plant Workers in the U.S. Have Died of Covid-19. Federal Regulators Just Issued Two Modest Fines*, WASH. POST (Sept. 13, 2020), [https://www.washingtonpost.com/national/osha-covid-meat-plant-fines/2020/09/13/1dca3e14-f395-11ea-bc45-e5d48ab44b9f\\_story.html](https://www.washingtonpost.com/national/osha-covid-meat-plant-fines/2020/09/13/1dca3e14-f395-11ea-bc45-e5d48ab44b9f_story.html) [<https://perma.cc/B2A2-EFLR>].

7. Patty Nieberg, *Colorado Workers Protest COVID-19 Fine Issued to Meat Plant*, AP NEWS (Sept. 16, 2020), <https://apnews.com/article/virus-outbreak-greeley-colorado-denver-f46d59db7b8d45898e975510cdd0ae0a>.

8. Shelly Bradbury, *How Coronavirus Spread Through JBS's Greeley Beef Plant*, DENVER POST (July 12, 2020), <https://www.denverpost.com/2020/07/12/jbs-greeley-coronavirus-investigation>.

9. Kindy, *supra* note 6; Sylvan Lane, *Owners of Meatpacker JBS to Pay \$280M Fine over Foreign Bribery Charges*, HILL (Oct. 14, 2020), <https://thehill.com/policy/finance/521070-owners-of-meatpacker-jbs-to-pay-280m-fine-over-foreign-bribery-charges>.

10. See, e.g., E-mail from Kathryn Graves Unger, Vice President, N. Am. Gov't Rels., Cargill, to Joby Young, Chief of Staff, U.S. Dep't of Agric. (Apr. 13, 2020 10:05:49 AM), [https://www.citizen.org/wp-content/uploads/2020-OSEC-04055-F\\_2nd-Interim\\_Item-1\\_Redacted.pdf](https://www.citizen.org/wp-content/uploads/2020-OSEC-04055-F_2nd-Interim_Item-1_Redacted.pdf) [<https://perma.cc/8TAP-ZSRA>] (scroll down to page 6); E-mail from Barb Masters, VP Regul. Policy, Food and Agric., Tyson Foods, to Mindy Brashears, Under Sec'y of Agric. for Food Safety, U.S. Dep't of Agric. (May 26, 2020, 10:49:16 AM), [https://www.citizen.org/wp-content/uploads/2020-OSEC-04055-F\\_2nd-Interim\\_Item-1\\_Redacted.pdf](https://www.citizen.org/wp-content/uploads/2020-OSEC-04055-F_2nd-Interim_Item-1_Redacted.pdf) [<https://perma.cc/8TAP-ZSRA>] (scroll down to page 4).

11. E-mail from Kathryn Graves Unger, Vice President, N. Am. Gov't Rels., Cargill, to Joby Young, Chief of Staff, U.S. Dep't of Agric. (Mar. 22, 2020, 3:48 PM), [https://www.citizen.org/wp-content/uploads/2020-OSEC-04055-F\\_2nd-Interim\\_Item-1\\_Redacted.pdf](https://www.citizen.org/wp-content/uploads/2020-OSEC-04055-F_2nd-Interim_Item-1_Redacted.pdf) [<https://perma.cc/8TAP-ZSRA>] (scroll down to page 30); E-mail from Julie Anna Potts, President & CEO, N. Am. Meat Inst., to Mindy Brashears, Under Sec'y of Agric. for Food Safety, U.S. Dep't of Agric. (Mar. 23, 2020, 2:39:50 PM), [https://www.citizen.org/wp-content/uploads/2020-OSEC-04055-F\\_2nd-Interim\\_Item-1\\_Redacted.pdf](https://www.citizen.org/wp-content/uploads/2020-OSEC-04055-F_2nd-Interim_Item-1_Redacted.pdf) [<https://perma.cc/8TAP-ZSRA>] (scroll down to page 96).

resulting in the issuance of an Executive Order that has been used to keep open or reopen plants with COVID-19 infections and the over-riding of state efforts to keep plants safe for workers.<sup>12</sup> This essay discusses how the failure to enforce health and safety standards and political decisions caused the unnecessary exposure of meat and poultry processing workers to COVID-19 in the workplace.

## I. Failures to Enforce Health and Safety Protections During COVID-19

The purpose of worker health and safety laws is to protect workers from being killed and otherwise harmed at work. During the COVID-19 pandemic, state health departments and OSHA have been in charge of regulating the health and safety of workers.<sup>13</sup> State health departments retain the primary public health power to enact laws to protect the health and safety of their citizens, while the Occupational Safety and Health Act of 1970 (OSH Act) provides authority to OSHA and twenty-two states with OSHA approved plans to regulate the health and safety of *most* workers.<sup>14</sup>

Under the OSH Act, employers must provide employees with personal protective equipment and develop a respiratory protection standard to prevent occupational disease.<sup>15</sup> Moreover, under OSHA's general-duty clause, employers must provide their employees with a place of employment, free from recognized hazards that are causing or likely to cause death or serious harm.<sup>16</sup> Despite their powers, some states with OSHA-approved plans and OSHA itself have failed to use these laws to protect worker health and safety as illustrated by the COVID-19 infections and deaths of meat and poultry processing workers.

For example, in mid-April 2020, 18.2% of Iowa meat and poultry processing plant workers were infected with COVID-19, the highest percentage of these workers infected by COVID-19 nationwide.<sup>17</sup> In fact, at one point in April, not only were 90% of all COVID-19 cases in

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12. See, e.g., E-mail from Julie Anna Potts, President & CEO, N. Am. Meat Inst., to Sonny Perdue, U.S. Sec'y of Agric., U.S. Dep't of Agric. (Apr. 3, 2020, 5:23 PM), [https://www.citizen.org/wp-content/uploads/2020-OSEC-04055-F\\_2nd-Interim\\_Item-1\\_Redacted.pdf](https://www.citizen.org/wp-content/uploads/2020-OSEC-04055-F_2nd-Interim_Item-1_Redacted.pdf) [<https://perma.cc/STAP-ZSRA>] (scroll down to page 63).

13. Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651–678 (2018); *Jacobson v. Massachusetts*, 197 U.S. 11(1905).

14. Occupational Safety and Health Act., 29 U.S.C. §§ 651–678; *Quick Facts and Information About State Plans*, OCCUPATIONAL SAFETY & HEALTH ADMIN., <https://www.osha.gov/stateplans/approvedstateplans> [<https://perma.cc/96ZH-ZQ8C>]; *Jacobson*, 197 U.S. at 11.

15. 29 C.F.R. § 1910.134 (2019).

16. 29 U.S.C. § 654(a)(1).

17. Jonathan W. Dyal et al., *COVID-19 Among Workers in Meat and Poultry Processing Facilities—19 States*, 69 MMWR MORBIDITY & MORTALITY WKLY. REP. 557, 558 (2020), <https://www.cdc.gov/mmwr/volumes/69/wr/pdfs/mm6918e3-H.pdf> [<https://perma.cc/T43N-WLSG>].

Waterloo, Iowa (Black Hawk County) tied to the meat processing plant there, but Black Hawk County also had the most COVID-19 cases in Iowa.<sup>18</sup> But Iowa, a state with an OSHA-approved plan, twice declined assistance from the Centers for Disease Control and Prevention (CDC) to address these COVID-19 outbreaks.<sup>19</sup> By mid-May, Iowa still had the highest percentage of COVID-infected meat and poultry processing workers nationwide, with 1,784 meat processing plant workers infected.<sup>20</sup> The state cited Iowa Premium Beef Plant \$957 for a record-keeping violation, where 338 out of 850 workers tested positive for the virus, making it the first hotspot for COVID-19 in Iowa.<sup>21</sup> Yet, neither the state nor OSHA has cited any of these Iowa facilities for violations of the general duty standard for keeping the workplace free from recognized hazards that cause death or serious harm.<sup>22</sup>

OSHA has also failed to protect meat and poultry processing workers. Since 2005, OSHA has been developing an airborne infectious disease rule that would require employers to conduct a worksite-hazard assessment to determine how an airborne infectious disease can spread within the worksite or adopt specific measures to limit the spread of the airborne infectious disease in the worksite.<sup>23</sup> Although the rule was shelved in 2017,<sup>24</sup> OSHA still has the power to issue an emergency temporary standard (ETS) to address COVID-19, which would take immediate effect if it determines: “(A) that employees are exposed to grave danger from exposure to substances or agents determined to be toxic or physically harmful or from new hazards, and (B) that such emergency standard is necessary to protect employees from such danger.”<sup>25</sup>

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18. Donnelle Eller & Barbara Rodriguez, *Donald Trump's Keep-Open Order Creates Anxiety in Iowa City with a Meatpacking Plant, Relief for Farmers*, DES MOINES REG. (Apr. 29, 2020, 7:37 PM), <https://www.desmoinesregister.com/story/money/agriculture/2020/04/29/trump-order-reopen-meat-packing-plants-create-anxiety-waterloo-farmers-who-face-destroying-pigs/3047760001> [<https://perma.cc/85ZT-ALYE>].

19. Clark Kauffman, *State Medical Director: CDC Help 'Wasn't Needed' with Packing-Plant Outbreaks*, DES MOINES REG. (July 18, 2020, 8:41 AM), <https://www.desmoinesregister.com/story/news/2020/07/18/state-medical-director-cdc-help-wasnt-needed-packing-plant-outbreaks/5464288002> [<https://perma.cc/6G2Z-PJ6F>].

20. *Id.*

21. Ryan Foley, *Iowa Fines Beef Plant \$957 After Huge Coronavirus Outbreak*, ASSOC. PRESS (Sept. 24, 2020), <https://apnews.com/article/virus-outbreak-health-iowa-archive-iowa-city-b11ef8d6b6c97b2ddc38c9b81a2eb971>.

22. *See, e.g.*, Ryan J. Foley, *Iowa Finds No Violations at Tyson Plant with Deadly Outbreak*, ABC NEWS (June 23, 2020, 8:28 PM), <https://abcnews.go.com/Business/wireStory/iowa-finds-violations-tyson-plant-deadly-outbreak-71419502> [<https://perma.cc/JC47-VAHA>].

23. *Infectious Disease Rulemaking*, OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, <https://www.osha.gov/dsg/id> [<https://perma.cc/DXW3-Z8LZ>].

24. *Id.*

25. 29 U.S.C. § 655(c).

In March, members of Congress<sup>26</sup> and numerous unions<sup>27</sup> representing essential workers employed in the health care, food, and agricultural industries petitioned OSHA to issue an ETS. When OSHA denied the petition, the unions filed a petition with the Court of Appeals for the D.C. Circuit to force OSHA to issue an ETS.<sup>28</sup> Yet, in June 2020, that court ruled against the unions, stating that OSHA reasonably determined that an ETS was not necessary because of the regulatory tools that OSHA had to ensure that employers were maintaining hazard-free work environments.<sup>29</sup>

Instead of publishing an ETS, OSHA has partnered with the CDC to issue nonbinding worker health and safety guidance for meat and poultry processing workers.<sup>30</sup> The guidance recommends the creation of a COVID-19 assessment and control plan, which includes providing PPE and implementing social distancing.<sup>31</sup> The guidance also explicitly states that employers should “work with the appropriate state and local public health officials and occupational safety and health professionals,” to develop plans for operating and addressing COVID-19 outbreaks.<sup>32</sup> However, there are a plethora of problems with the guidance.

First, the guidance is not mandatory.<sup>33</sup> Thus, some OSHA officials have referred complaints regarding the failure to implement health and safety protections noted in the guidance to local health departments or stated that all they can do is “contact an employer and send an advisory letter outlining the recommended protective measures.”<sup>34</sup> Second, the guidance fails to recommend testing of all workers after identification of an infected worker, which is necessary to track all worker

26. Alex Gangitano, *Democrats Press OSHA Official on Issuing an Emergency Temporary Standard*, HILL (May 28, 2020, 1:12 PM), <https://thehill.com/homenews/house/499943-democrats-press-osh-official-on-issuing-an-emergency-temporary-standard> [<https://perma.cc/8MGC-F8BR>].

27. *A Petition to Secretary Scalia for an OSHA Emergency Temporary Standard for Infectious Disease*, AFL-CIO (Mar. 6, 2020), <https://aflcio.org/statements/petition-secretary-scalia-osh-emergency-temporary-standard-infectious-disease> [<https://perma.cc/T7Z4-VWHL>].

28. See Emergency Petition for a Writ of Mandamus, and Request for Expedited Briefing and Disposition at 32, *In re Am. Fed’n of Lab. & Cong. of Indus. Orgs.*, No. 20-1158, 2020 WL 3125324 (D.C. Cir. June 11, 2020), [https://www.eenews.net/assets/2020/05/21/document\\_ew\\_05.pdf](https://www.eenews.net/assets/2020/05/21/document_ew_05.pdf) [<https://perma.cc/WS3X-4TS5>].

29. *In re Am. Fed’n of Lab. & Cong. of Indus. Orgs.*, 2020 WL 3125324, at \*1.

30. *Meat and Poultry Processing Workers and Employers: Interim Guidance from the Occupational Safety and Health Administration*, CTRES. FOR DISEASE CONTROL & PREVENTION (July 9, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/community/organizations/meat-poultry-processing-workers-employers.html> [<https://perma.cc/DB7F-GZ4Y>] [hereinafter *OSHA Guidance*].

31. *Id.*

32. *Id.*

33. *Id.*

34. Maria Perez, *Workers Are Getting Sick and Dying, but OSHA Won’t Crack Down on Businesses That Fail to Follow COVID-19 Guidelines*, MILWAUKEE J. SENTINEL (Apr. 15, 2020, 8:44 AM), <https://www.jsonline.com/story/news/2020/04/15/osh-wont-crack-down-businesses-dont-meet-covid-19-guidance/2987618001> [<https://perma.cc/V5LG-JG3P>].

infections as well as to prevent the spread of COVID-19. For example, after nearly two dozen workers were hospitalized, Tyson Foods tested all the workers.<sup>35</sup> The testing showed that 1000 workers were positive for COVID-19, including many who did not show any symptoms. Hence, without testing, the number of workers infected would not have been known, and asymptomatic workers would have continued to spread the disease. Since then, Tyson has tested almost every worker at its twenty facilities, which some have argued has allowed it to slow COVID-19 from spreading throughout its facilities.<sup>36</sup>

Finally, the guidance was issued long after severe industry outbreaks occurred.<sup>37</sup> For example, on March 30, 2020, the federal government was aware that the Canadian meat processing plant Olymel had to shut down because of COVID-19 infections, yet the CDC and OSHA guidance for meat and poultry processing workers was not issued until April 28.<sup>38</sup> This failure to issue guidance was exacerbated by the failure of meat and poultry processing plants to shut down once workers were infected with COVID-19, as illustrated by the Smithfield plant in Sioux Falls, South Dakota.

On April 16, 2020, it was announced that the Smithfield meat processing plant in Sioux Falls, South Dakota, had 735 COVID-19 infections, making it the largest COVID-19 hotspot at that point.<sup>39</sup> Yet, the first case of COVID-19 detected in the plant was on March 24, 2020, twenty-three days before the announcement.<sup>40</sup> The plant did not totally halt production until April 14, and by that time it had become the COVID-19 hotspot for the entire state.<sup>41</sup> The South Dakota Department of Health and the CDC completed an inspection of the facility on

35. Dan Charles, *How Widespread Coronavirus Testing Helped Meatpacking Plants Slow Outbreaks*, NPR (June 22, 2020), <https://www.npr.org/sections/health-shots/2020/06/22/879774584/how-widespread-coronavirus-testing-helped-meatpacking-plants-halt-outbreaks> [https://perma.cc/WV85-SUMU].

36. *Id.*

37. Ruqaiyah Yearby, *Protecting Workers that Provide Essential Services, in ASSESSING LEGAL RESPONSES TO COVID-19*, at 193, 194–95 (2020), [https://static1.squarespace.com/static/5956e16e6b8f5b8c45f1c216/t/5f445e5ca7b21825e9add2b3/1598316124697/Chp26\\_COVIDPolicyPlaybook-Aug2020.pdf](https://static1.squarespace.com/static/5956e16e6b8f5b8c45f1c216/t/5f445e5ca7b21825e9add2b3/1598316124697/Chp26_COVIDPolicyPlaybook-Aug2020.pdf); Memorandum from Michael Grant, Ctrs. for Disease Control, Nat'l Inst. for Occupational Safety & Health et al., to Joshua Clayton, S. Dak. Dep't of Health, *Strategies to Reduce COVID-19 Transmission at the Smithfield Foods Sioux Falls Foods Pork Plant 1*, 15 (Apr. 22, 2020), [https://covid.sd.gov/docs/smithfield\\_recs.pdf](https://covid.sd.gov/docs/smithfield_recs.pdf) [https://perma.cc/8B2H-8Z9Z].

38. E-mail from Julie Anna Potts, President & CEO, N. Am. Meat Inst., to Mindy Brashears, Under Sec'y of Agric. for Food Safety, U.S. Dep't of Agric. (Mar. 30, 2020, 3:01:22 PM), [https://www.citizen.org/wp-content/uploads/2020-OSEC-04055-F\\_2nd-In-terim\\_Item-1\\_Redacted.pdf](https://www.citizen.org/wp-content/uploads/2020-OSEC-04055-F_2nd-In-terim_Item-1_Redacted.pdf) [https://perma.cc/8TAP-ZSRA] (scroll down to page 274).

39. Mia Jankowicz, *The South Dakota Slaughterhouse Linked to More Than Half the State's Coronavirus Cases Had Offered Employees a \$500 "Responsibility Bonus" to Come to Work in April*, BUS. INSIDER (Apr. 16, 2020), <https://www.businessinsider.in/poli-tics/news/the-south-dakota-slaught%E2%80%A6sponsibility-bonus-to-come-to-work-in-april/articleshow/75181409.cms> [https://perma.cc/E8N4-NBBW].

40. Memorandum from Michael Grant et al., *supra* note 37, at 1.

41. *Id.* at 1–2.

April 22.<sup>42</sup> Although the CDC noted in its report that its recommendations were discretionary, Smithfield continuously emailed the U.S. Department of Agriculture (USDA) to use the CDC's findings as support for reopening the plant, even as employee test results were still pending, an OSHA investigation was being conducted, and the South Dakota governor was trying to get Smithfield to comply with state health and safety laws.<sup>43</sup> In response to these emails from Smithfield, the USDA issued a letter dated May 6, 2020, stating that the facility should be reopened.<sup>44</sup> The facility in fact did reopen on May 6, even though the OSHA citation and notification of the penalty letter for the plant shows that COVID-19 infections continued to spread throughout the plant until June 16.<sup>45</sup> The USDA was able to exert its power to usurp the authority of OSHA and the state as a result of the President's executive order.<sup>46</sup>

## II. Executive Order 13917

By April, the CDC documented 4913 COVID-19 cases and 20 deaths among meat and poultry processing workers based on data reported from nineteen states, showing that meat and poultry processing workers were particularly susceptible to COVID-19 infection at facilities.<sup>47</sup> Instead of addressing these health and safety problems by following their own guidance and implementing preventative measures such as requiring workers to stay at least six feet apart and installing Plexiglass barriers, meat and poultry trade associations sent a letter dated April 17, 2020, to the President asking for assistance in keeping plants

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42. *Id.* at 1.

43. E-mail from Michael P. Skahill, Vice President, Gov't Affs., Smithfield Foods, to Mindy Brashears, U.S. Dep't of Agric. (May 6, 2020, 9:00:00 PM), [https://www.citizen.org/wp-content/uploads/2020-OSEC-04055-F\\_2nd-Interim\\_Item-1\\_Redacted.pdf](https://www.citizen.org/wp-content/uploads/2020-OSEC-04055-F_2nd-Interim_Item-1_Redacted.pdf) [<https://perma.cc/8TAP-ZSRA>] (scroll down to page 256); E-mail from Michael P. Skahill, Vice President, Gov't Affs., Smithfield Foods, to Mindy Brashears, U.S. Dep't of Agric. (May 5, 2020, 4:58:14 PM), [https://www.citizen.org/wp-content/uploads/2020-OSEC-04055-F\\_2nd-Interim\\_Item-1\\_Redacted.pdf](https://www.citizen.org/wp-content/uploads/2020-OSEC-04055-F_2nd-Interim_Item-1_Redacted.pdf) [<https://perma.cc/8TAP-ZSRA>] (scroll down to page 321); E-mail from Keira Lombardo, Exec. Vice President, Corp. Affs. and Compliance, Smithfield Foods, to Joby Young, Chief of Staff, U.S. Dep't of Agric. (Apr. 20, 2020, 6:30:41 PM), [https://www.citizen.org/wp-content/uploads/2020-OSEC-04055-F\\_2nd-Interim\\_Item-1\\_Redacted.pdf](https://www.citizen.org/wp-content/uploads/2020-OSEC-04055-F_2nd-Interim_Item-1_Redacted.pdf) [<https://perma.cc/8TAP-ZSRA>] (scroll down to page 272).

44. E-mail from Mindy Brashears, Under Sec'y of Agric. for Food Safety, U.S. Dep't of Agric., to Ken Sullivan, CEO, Smithfield Foods (May 6, 2020, 2:45:58 PM), [https://www.citizen.org/wp-content/uploads/2020-OSEC-04055-F\\_2nd-Interim\\_Item-1\\_Redacted.pdf](https://www.citizen.org/wp-content/uploads/2020-OSEC-04055-F_2nd-Interim_Item-1_Redacted.pdf) [<https://perma.cc/8TAP-ZSRA>] (scroll down to page 10); E-mail from Michael P. Skahill, Vice President, Gov't Affs., Smithfield Foods, to Mindy Brashears, Under Sec'y of Agric. for Food Safety, U.S. Dep't of Agric. (May 6, 2020, 6:29:53 PM), [https://www.citizen.org/wp-content/uploads/2020-OSEC-04055-F\\_2nd-Interim\\_Item-1\\_Redacted.pdf](https://www.citizen.org/wp-content/uploads/2020-OSEC-04055-F_2nd-Interim_Item-1_Redacted.pdf) [<https://perma.cc/8TAP-ZSRA>] (scroll down to page 306).

45. *OSHA Smithfield Citation*, *supra* note 5.

46. Exec. Order No. 13917 of April 28, 2020, 85 Fed. Reg. 26,313 (May 1, 2020).

47. Dyal et al., *supra* note 17, at 558.

open.<sup>48</sup> One day later, the North American Meat Institute sent a draft executive order to the President to use to keep food processing, production, and supply companies open.<sup>49</sup>

On April 28, 2020, President Donald Trump issued Executive Order 13917, which included language from the draft executive order, such as a focus on the risk of meat shortages and the need to keep open meat and poultry processing facilities.<sup>50</sup> Alluding to the powers granted by the Defense Production Act of 1950, the President delegated authority to the USDA to regulate and ensure that meat and poultry processing facilities stayed open or reopened during the COVID-19 pandemic to ensure no meat shortages.<sup>51</sup>

Although the Executive Order argued that meat and poultry production would be “scarce” and “essential to the national defense,” it did not stop meat exports.<sup>52</sup> In fact, the USDA noted in mid-June that “the total pork exports to mainland China in April reached their highest monthly total since the agency began keeping track 20 years ago.”<sup>53</sup> As of July 2, beef (five percent) and poultry (fourteen percent) production were up compared to a year ago.<sup>54</sup> Moreover, the Executive Order noted that completely closing meat and poultry processing facilities to address COVID-19 infections and deaths was inconsistent with the OSHA/CDC joint guidance. However, the guidance provided recommendations for preventing the spread of COVID-19, including a recommendation to work with state and local officials who retained the authority to stop the spread of COVID-19 based on their public health powers.<sup>55</sup>

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48. E-mail from Dale Moore, Exec. Vice President, Am. Farm Bureau Fed’n, to Joby Young, Chief of Staff, U.S. Dep’t of Agric. (Apr. 18, 2020, 12:49:23 PM), [https://www.citizen.org/wp-content/uploads/2020-OSEC-04055-F\\_2nd-Interim\\_Item-1\\_Redacted.pdf](https://www.citizen.org/wp-content/uploads/2020-OSEC-04055-F_2nd-Interim_Item-1_Redacted.pdf) [<https://perma.cc/8TAP-ZSRA>] (scroll down to page 122); E-mail from Julie Anna Potts, President & CEO, N. Am. Meat Inst., to Stephen Censky, Deputy Sec’y of Agric., U.S. Dep’t of Agric. (Apr. 20, 2020, 1:33:56 PM), [https://www.citizen.org/wp-content/uploads/2020-OSEC-04055-F\\_2nd-Interim\\_Item-1\\_Redacted.pdf](https://www.citizen.org/wp-content/uploads/2020-OSEC-04055-F_2nd-Interim_Item-1_Redacted.pdf) [<https://perma.cc/8TAP-ZSRA>] (scroll down to page 359).

49. E-mail from Julie Anna Potts, President & CEO, N. Am. Meat Inst., to Stephen Censky, Deputy Sec’y of Agric., U.S. Dep’t of Agric. (Apr. 21, 2020, 9:07:11 AM), [https://www.citizen.org/wp-content/uploads/2020-OSEC-04055-F\\_2nd-Interim\\_Item-1\\_Redacted.pdf](https://www.citizen.org/wp-content/uploads/2020-OSEC-04055-F_2nd-Interim_Item-1_Redacted.pdf) [<https://perma.cc/8TAP-ZSRA>] (scroll down to page 354).

50. *Id.*

51. Exec. Order 13917, *supra* note 46, 85 Fed. Reg. at 26,314.

52. *Id.*

53. Michael Corkery & David Yaffe-Bellany, *As Meat Plants Stayed Open to Feed Americans, Exports to China Surged*, N.Y. TIMES (June 23, 2020), <https://www.nytimes.com/2020/06/16/business/meat-industry-china-pork.html> [<https://perma.cc/8UW6-2A7J>] (stating that the “[meat] industry publicly lobbied the Trump administration to intervene with state and local officials or risk major meat shortages across American grocery stores”).

54. Jacob Bunge, *Coronavirus Surge Tests Safeguards for Meatpacking Workers*, WALL ST. J. (July 2, 2020, 3:52 PM), <https://www.wsj.com/articles/coronavirus-surge-tests-safeguards-for-meatpacking-workers-11593719573> [<https://perma.cc/LW37-MDAB>].

55. OSHA Guidance, *supra* note 30.



Since the Executive Order, the USDA has used its power to undermine states' authority to keep open or reopen many meat and poultry processing plants, which has been associated with high rates of COVID-19 infections and deaths of meat and poultry plant workers.<sup>56</sup>

### III. Harm Caused by the Order

On March 26, 2020, the USDA sent an email to a meat and poultry association stating that it was working with the Food and Drug Administration to develop guidelines for social distancing in food plants, which it requested state and local health departments follow.<sup>57</sup> However, the USDA *emphasized* that

the jurisdiction of health issues will be *left* to the local health departments. The requirements might change in areas of increased illness and/or if there is a confirmed illness in the processing facility. If there are illnesses they may require more stringent social distancing recommendations and/or quarantines. *We will rely on them (health departments) to make the best decisions based on public health.*<sup>58</sup>

After the Executive Order, the USDA's stance changed as it worked to keep open and reopen meat and poultry processing plants with COVID-19 outbreaks, even if state and local health departments were trying to use their public health powers to close facilities in order to slow the spread of COVID-19.<sup>59</sup>

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56. E-mail from Ashley Peterson, Nat'l Chicken Council, to Mindy Brashears, Under Sec'y of Agric. for Food Safety, U.S. Dep't of Agric. (Apr. 29, 2020, 2:19:21 PM), [https://www.citizen.org/wp-content/uploads/2020-OSEC-04055-F\\_2nd-Interim\\_Item-1\\_Redacted.pdf](https://www.citizen.org/wp-content/uploads/2020-OSEC-04055-F_2nd-Interim_Item-1_Redacted.pdf) [<https://perma.cc/8TAP-ZSRA>] (scroll down to page 214); E-mail from Keira Lombardo, Exec. Vice President, Corp. Affs. and Compliance, Smithfield Foods, to Mindy Brashears, Under Sec'y of Agric. for Food Safety, U.S. Dep't of Agric. (May 6, 2020, 9:14:40 PM), [https://www.citizen.org/wp-content/uploads/2020-OSEC-04055-F\\_2nd-Interim\\_Item-1\\_Redacted.pdf](https://www.citizen.org/wp-content/uploads/2020-OSEC-04055-F_2nd-Interim_Item-1_Redacted.pdf) [<https://perma.cc/8TAP-ZSRA>] (scroll down to page 256); E-mail from Ashley Peterson, Nat'l Chicken Council, to Mindy Brashears, Under Sec'y of Agric. for Food Safety, U.S. Dep't of Agric. (May 15, 2020, 7:28:39 AM), [https://www.citizen.org/wp-content/uploads/2020-OSEC-04055-F\\_2nd-Interim\\_Item-1\\_Redacted.pdf](https://www.citizen.org/wp-content/uploads/2020-OSEC-04055-F_2nd-Interim_Item-1_Redacted.pdf) [<https://perma.cc/8TAP-ZSRA>] (scroll down to page 179); E-mail from Mindy Brashears, Under Sec'y of Agric. for Food Safety, U.S. Dep't of Agric., to Julie Anna Potts, President & CEO, N. Am. Meat Inst. (May 15, 2020, 9:53:34 AM), [https://www.citizen.org/wp-content/uploads/2020-OSEC-04055-F\\_2nd-Interim\\_Item-1\\_Redacted.pdf](https://www.citizen.org/wp-content/uploads/2020-OSEC-04055-F_2nd-Interim_Item-1_Redacted.pdf) [<https://perma.cc/8TAP-ZSRA>] (scroll down to page 271); E-mail from Mindy Brashears, Under Sec'y of Agric. for Food Safety, U.S. Dep't of Agric., to Michael P. Skahill, Vice President, Gov't Affs., Smithfield Foods (May 6, 2020, 6:43:24 PM), [https://www.citizen.org/wp-content/uploads/2020-OSEC-04055-F\\_2nd-Interim\\_Item-1\\_Redacted.pdf](https://www.citizen.org/wp-content/uploads/2020-OSEC-04055-F_2nd-Interim_Item-1_Redacted.pdf) [<https://perma.cc/8TAP-ZSRA>] (scroll down to page 306).

57. E-mail from Mindy Brashears, Under Sec'y of Agric. for Food Safety, U.S. Dep't of Agric., to Julie Anna Potts, President & CEO, N. Am. Meat Inst. (Mar. 26, 2020, 6:59 PM), [https://www.citizen.org/wp-content/uploads/2020-OSEC-04055-F\\_2nd-Interim\\_Item-1\\_Redacted.pdf](https://www.citizen.org/wp-content/uploads/2020-OSEC-04055-F_2nd-Interim_Item-1_Redacted.pdf) [<https://perma.cc/8TAP-ZSRA>] (scroll down to page 252).

58. *Id.* (emphasis added).

59. E-mail from Mindy Brashears, Under Sec'y of Agric. for Food Safety, U.S. Dep't of Agric., to Keira Lombardo, Exec. Vice President, Corp. Affs. and Compliance, Smithfield Foods (May 6, 2020, 9:15:50 PM), <https://www.citizen.org/wp-content>

One day after the Executive Order was issued, the USDA was already receiving requests to overrule health department decisions to require testing of employees working at a facility with a COVID-19 outbreak because the positive results would force meat and poultry plants to close.<sup>60</sup> By May 5, 2020, citing the powers granted under the Executive Order, the USDA Secretary issued a letter requesting a clear timetable for the resumption of operations for any plants closed since May 1 that included written documentation of their operations and health and safety protocols based on the CDC/OSHA guidance.<sup>61</sup> However, as mentioned above, the guidance did not mandate testing of workers, which many states were requiring. Testing of workers is essential to stopping the spread of COVID-19, given that many workers with the virus are asymptomatic, which is why some state health departments were requiring testing. In the letter, the USDA disregarded the need for testing, the state's public health power to order testing, and its prior statements that it would rely on health departments to make the best decisions based on public health.

After its letter, the USDA continued to receive emails from meat and poultry trade associations requesting assistance with state and local health departments wanting to close facilities due to COVID-19 outbreaks, requiring all employees be tested, and implementation of a six-foot physical distancing requirement. The USDA never deferred to the state health departments requirements again and even intervened to open up the Smithfield Kane County, Illinois, meat processing plant that had closed because of a COVID-19 outbreak.<sup>62</sup> Since the Executive Order, the USDA's letter, and the USDA's interventions, COVID-19 infections and deaths in meat and poultry processing facilities have skyrocketed.

On July 10, 2020, the CDC issued an updated meat and poultry processing facility report with data through May 31, 2020, showing that, in the one month since the Executive Order was issued, the number of COVID-19 infections more than tripled and the number of

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/uploads/2020-OSEC-04055-F\_2nd-Interim\_Item-1\_Redacted.pdf[https://perma.cc/8TAP-ZSRA] (scroll down to page 256).

60. E-mail from Ashley Peterson, Nat'l Chicken Council, to Mindy Brashears, Under Sec'y of Agric. for Food Safety, U.S. Dep't of Agric. (Apr. 29, 2020, 2:19:21 PM), [https://www.citizen.org/wp-content/uploads/2020-OSEC-04055-F\\_2nd-Interim\\_Item-1\\_Redacted.pdf](https://www.citizen.org/wp-content/uploads/2020-OSEC-04055-F_2nd-Interim_Item-1_Redacted.pdf) [https://perma.cc/8TAP-ZSRA] (scroll down to page 214).

61. E-mail from Michael Cole, Senior Advisor to the CEO, Smithfield Foods, to Mindy Brashears, Under Sec'y of Agric. for Food Safety, U.S. Dep't of Agric. (May 6, 2020, 5:45:59 PM), [https://www.citizen.org/wp-content/uploads/2020-OSEC-04055-F\\_2nd-Interim\\_Item-1\\_Redacted.pdf](https://www.citizen.org/wp-content/uploads/2020-OSEC-04055-F_2nd-Interim_Item-1_Redacted.pdf) [https://perma.cc/8TAP-ZSRA] (scroll down to page 348).

62. E-mail from Michael P. Skahill, Vice President, Gov't Affs., Smithfield Foods, to Shawna Newsome, U.S. Dep't of Agric. (May 8, 2020, 4:22:20 PM), [https://www.citizen.org/wp-content/uploads/2020-OSEC-04055-F\\_2nd-Interim\\_Item-1\\_Redacted.pdf](https://www.citizen.org/wp-content/uploads/2020-OSEC-04055-F_2nd-Interim_Item-1_Redacted.pdf) [https://perma.cc/8TAP-ZSRA] (scroll down to page 119).

deaths quadrupled.<sup>63</sup> Specifically, there were 16,233 confirmed cases of COVID-19 infections for meat and poultry processing workers and 86 COVID-19 related deaths in 239 facilities.<sup>64</sup> Of the 9,919 (61%) cases with racial and ethnic data, 56% of COVID-19 cases occurred in Latinos, 19% occurred in non-Hispanic Black, 13% in non-Hispanic whites, and 12% in Asians.<sup>65</sup> Yet, even the CDC acknowledged that the actual numbers of COVID-19 infections and deaths for meat and poultry processing workers were *probably higher* because only twenty-three states submitted data and “only facilities with at least one laboratory-confirmed case of COVID-19 among workers were included.”<sup>66</sup>

### **Conclusion**

Meat and poultry processing workers’ COVID-19 infections and deaths increased significantly throughout the pandemic as a result of the failure to implement and enforce health and safety protections. These problems were exacerbated by political decisions to keep these facilities open, rather than to ensure that workers were protected. As a result, many workers died unnecessarily. To address this problem, the USDA, OSHA, and states need to actively enforce health and safety standards, without influence from meat and trade associations and companies.

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63. See Waltenburg et al., *supra* note 2, at 887.

64. *Id.*

65. *Id.* at 888.

66. *Id.* at 889.