IN THE UNITED STATES DISTRICT COURT
FOR WESTERN DISTRICT OF MISSOURI

RURAL COMMUNITY WORKERS ALLIANCE and JANE DOE; *Plaintiffs*, v. SMITHFIELD FOODS, INC. AND SMITHFIELD FRESH MEATS CORP., *Defendants*.	Case No. 5:20-cv-06063-DGK

PLAINTIFFS' SUGGESTIONS IN OPPOSITION TO DEFENDANTS' POST-HEARING SUPPLEMENTAL BRIEF

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Statutes

Other Authorities

I. Introduction.

Plaintiffs seek emergency relief under Missouri tort law to abate a public nuisance and enforce Smithfield's duty to provide a safe workplace. Smithfield's claim that there is "no emergency at this moment" because there are no reported cases of COVID-19 at the Milan plant (the "Plant") is startling to say the least. Dkt. No. 46, at 1. Smithfield appears to suggest, as it did at the preliminary injunction hearing, that this Court cannot act until Plaintiffs become sick. Tr. 53:7-23 (Exhibit A). Smithfield suggests no harm is imminent notwithstanding its *admitted* ongoing failure to comply with Centers for Disease Control ("CDC") guidance regarding the operation of meat packing facilities, *see* Dkts. Nos. 29-5 & 32-4, the ongoing national tragedy due to spread of COVID-19 at meat packing plants,[1] and the fact that Plaintiffs' expert concludes that spread is "inevitable" if Smithfield continues on its present course, Dkt. No. 35-2 ¶¶ 10 (Perry Decl.) ¶ 10. Indeed, as of yesterday, Sullivan County, Missouri, has reported its first confirmed case of COVID-19. Exhibit B. This Court is not helpless in the face of this imminent harm. To prevent further spread of the virus, Plaintiffs seek an injunction to address three aspects of Smithfield's continued non-compliance with CDC guidance. *See infra* Section I.

One purpose of the public nuisance doctrine is to enjoin a vector before it spreads disease. Restatement (Second) of Torts § 821B cmt. g ("[T]he threat of communication of smallpox to a single person may be enough to constitute a public nuisance because of the possibility of an epidemic."); *see also State ex rel. Schmitt v. Henson*, No. ED 107970, 2020 WL

[1] CDC, Morbidity and Mortality Weekly Report, *COVID-19 Among Workers in Meat and Poultry Processing Facilities — 19 States*, April 2020, at 2 (May 1, 2020), www.cdc.gov/mmwr/volumes/69/wr/pdfs/mm6918e3-H.pdf (identifying nearly 4,913 cases among meatpacking workers during an 8-day period in April).

1862001, at *54 (Mo. App. Apr. 14, 2020); *Birke v. Oakwood Worldwide*, 169 Cal. App. 4th 1540, 1548-53 (2009); *Roth v. City of St. Joseph*, 147 S.W. 490, 491 (Mo. App. 1912).

Likewise, Missouri's right to a safe workplace ensures "a court of equity may enforce an employee's rights by ordering the employer to eliminate any preventable hazardous condition which the court finds to exist." *Shimp v. New Jersey Bell Tel. Co.*, 368 A.2d 408, 410 (N.J. Super. Ch. Div. 1976); *see also Smith v. W. Elec. Co.*, 643 S.W.2d 10, 13 (Mo. App. 1982) (relying on *Shimp* to articulate Missouri right to a safe workplace); *Conway v. Circus Circus Casinos, Inc.*, 8 P.3d 837, 840-41 (Nev. 2000) (allowing an employee to seek injunctive relief for "exposure to noxious fumes"). Plaintiffs have a right to be protected from the known, imminent harm, not just to be compensated for their injuries after they occur.

In relying on primary jurisdiction and preemption, Smithfield makes an unprecedented assertion of federal power: that the Secretary of Agriculture—who has no expertise in worker safety[2]—"is now in charge" and thus Plaintiffs have *no forum* in which they can bring *any claim* that Smithfield is exposing them and the larger community to known hazards in direct contravention of state law and federal recommendations. Dkt. No. 46, at 3-9. To gin up this argument, Smithfield relies on the same stalking horse it has turned to throughout, claiming Plaintiffs "threaten[] the continued functioning of the national meat and poultry supply chain." *Id.* at 3.

In reality, Plaintiffs only ask Smithfield to implement the CDC guidance that every relevant state and federal agency acknowledges is necessary to keep employees healthy and the Plant operational. *See id*. Smithfield's real concern is not that Plaintiffs' request interferes with state or federal authority, but that Smithfield wishes to be free from "continual monitoring." *Id.*

[2] USDA Brief & Reply, *UFCW v. USDA*, No. 19-2660, Dkt. Nos. 16 & 24 (D. Minn.).

at 12. If Smithfield is working to come into compliance with that guidance, as it claims, then such an order would impose minimal burden. If Smithfield is failing to comply, then the order is a necessary step.

The Plant's purported enlistment under the DPA should, if anything, suggest that Smithfield bears more responsibility to continue operating and continue operating safely, even if that means making changes for the sake of the public health that may cost them money. Smithfield cannot continue to place the nation at risk through selective compliance.

II. Plaintiffs' Requested Relief Is Narrow and Urgently Needed.

Plaintiffs' requested injunction is "detail[ed]," unlikely to change, and relies on the expertise of "agencies tasked" with determining "workplace safety decisions," just as Smithfield insists is necessary. Dkt. No. 46, at 11-12. The Missouri Department of Health and Senior Services has established the standard of care under state law, which is the same standard of care in the Executive Order, and the same standard of care that has been present throughout: Open businesses, must act "[i]n accordance with the guidelines from the President and the [CDC]." Dkt. No. 29-1, at 1 (Apr. 3, 2020 Stay At Home Order).[3]

Smithfield has already made some changes in the wake of this lawsuit, and, as a result, Plaintiffs' requested remedies have narrowed. But by its own admission, Smithfield remains unwilling to make three critical changes necessary to comply and abate the public nuisance and remedy its breach of its duty to its workers. An injunction is therefore necessary to mandate compliance with these three aspects of the guidance and, given Smithfield's recalcitrance, to ensure it will continue to abide by the other CDC guidelines.

---

[3] Public Health Order, MO. DEP'T OF HEALTH & SENIOR SERVS. (April 3, 2020), available at https://governor.mo.gov/priorities/stay-home-order

First, Smithfield is failing to space workers "at least six feet apart" wherever "[f]easible." Dkt. No. 29-5 & 32-4, at 3. Six feet of social distancing has been a cornerstone of public health and safety requirements for at least a month, with Missouri's April 3 Stay at Home Order stating "every person and business in the State of Missouri shall abide by social distancing requirements, including maintaining six feet (6') of space" except where an individual's "job duties require contact." Dkt. No. 29-1, at 2. However, the photos Smithfield submitted show its break area remains set up with chairs closer than six feet. Dkt. No. 32-1, Ex. 6. And according to Smithfield, on the production line at the Plant people have "***either*** six feet of separation from their nearest co-worker(s) ***or*** a plastic barrier separating them from their nearest co-worker(s)." Dkt. No. 32, at 8 (emphasis added).[4] Yet the CDC, like the State of Missouri makes clear its spacing guidance is *in addition to*, not *instead of* other changes to workstations, such as putting "[p]hysical barriers." Dkt. Nos. 29-5 & 32-4, at 3.

Smithfield is out of compliance because it has not attempted to follow the guidance. But following the guidance would be easy and practicable. Dr. Perry explains that reducing the line speed is *all* that is necessary to space workers. Dkt. No. 35-2 ¶¶ 11-12. Smithfield admits that it has not made this change. At the hearing on this matter it stated, "[t]he line speed has not changed" in response to COVID-19 guidance. Tr. 26:21-27:2. This is despite the fact that the CDC explains "[c]hanges in production practices may be necessary in order to maintain appropriate distances among workers." Dkt. Nos. 29-5 & 32-4, at 2. Indeed, Smithfield has already "reduc[ed] the number of hogs processed each day," which would allow it to slow the line without impacting its current production. Dkt. No. 46, at 2. And, as the CDC guidance

[4] In addition, Plaintiffs' counsel relayed at the hearing that workers report certain areas of the Plant continue to lack either six feet of distance or plastic barriers. Tr. 7:16-21.

recognizes, there may be ways to extend production hours to exceed prior production while still reducing line speeds: "a plant that normally operates on one daytime shift may be able to split workers into two or three shifts throughout a 24-hour period," Dkt. Nos. 29-5 & 32-4, at 4. It is true that such changes would involve payroll costs. But it cannot be that CDC guidance or Missouri common law licenses Smithfield to maintain a health hazard so it may maximize profit during a pandemic. *See* Dkt. No. 32, at 7 (noting Smithfield has cut workers' hours)

Second, Smithfield is refusing to "build[] additional short breaks into staff schedules to increase how often staff can wash their hands," which will also allow them to use tissues, as recommended by the CDC. Dkt. Nos. 29-5 & 32-4, at 5. These logical recommendations are nothing new. The original March 2020 OSHA Guidance for Preparing Workplace for COVID-19 instructed employers to "[p]rovid[e] resources and a work environment that promotes personal hygiene." Dkt. No. 29-3, at 14. Yet Smithfield acknowledges it has offered no additional breaks but maintains "the Plant's regularly scheduled breaks" and will only "accommodate" additional requests if "possible." Dkt. No. 32, at 9 n.7. Again, Dr. Perry explains that if Smithfield were merely to slow down the line, it could easily implement the recommendations. Dkt. No. 35-2 ¶¶ 19, 26.

Third, Smithfield's sick leave policies remain noncompliant. Consistent with the March 2020 recommendations, Dkt. No. 23-3, at 11, the recent CDC slaughterhouse guidelines instruct employers to "[a]nalyze sick leave policies and consider modifying them to make sure that ill workers are not in the workplace" and "[m]ake sure that employees are aware of and understand these policies," Dkt. Nos. 29-5 & 32-4, at 4. Yet Smithfield's sick policy is so convoluted it had to correct the declaration of its own Plant supervisor on this issue. Tr. 54:16-24. Moreover, although Smithfield's Plant supervisor now insists "all employees who miss work for a reason

related to COVID-19 are paid," it appears Smithfield *still* requires employees with symptoms to come into the Plant and expose others to receive the benefits of this policy. Dkt. No. 46-2 ¶ 4 (emphasis removed). The new protocols Smithfield submitted—which were not crafted until April 30, 2020, nearly a week after Plaintiffs filed this lawsuit—provide employees must "exhibit symptoms of COVID-19" to plant officials or test positive before they will be allowed sick leave for COVID-19. *Id.* Ex. 9, at 1, 3 (noting sick leave only granted to employees "at home" if they "test[] positive").

Therefore, Plaintiffs ask that this Court Order Smithfield to comply with the CDC guidance incorporated into state law and, in particular: (1) make all reasonable changes to its "production practices," including potentially lowering its line speeds, to place as many workers as possible at least six feet apart; (2) provide reasonable additional breaks to allow workers to care for their personal hygiene without penalty, including blowing their noses, using tissues, and hand washing; and (3) ensure that its policies do not require workers to come to the Plant to obtain COVID-19-related sick leave and take all reasonable steps to communicate that policy clearly to workers.

In the alternative, should the Court believe Smithfield needs greater flexibility or that the Court needs to review more evidence regarding Smithfield's practices and expert opinion on them and their consequences, it could order Smithfield to bring itself into what it believes is full compliance with the CDC guidelines by a given date—within, for example, two weeks of the Court's order—and report back on how it has responded to each of the guidelines and why.

This relief is modest, uncontroversial, and specific. Although Smithfield suggests that this will lead it to be hauled into court "at any given moment," Dkt. No. 46, at 12, the proposed injunction merely creates actual assurance Smithfield will bring itself in line with the standards it

was supposed to be abiding by throughout this crisis. Its failure to do so violates Plaintiffs' rights under Missouri law, and Smithfield cannot complain about the inconvenience of being held to account. The guidelines at issue have remained essentially consistent throughout the pandemic and it is extraordinarily unlikely that the guidelines Plaintiffs seek to enforce will change.[5] And if they do, Rule 65 allows, and Plaintiffs would not object, for Smithfield to seek a modification of the injunction.

III. Smithfield's Preemption and Primary Jurisdiction Arguments Fail.

To hear Smithfield tell it, the Executive Order issued on April 28 designating meat and poultry as "critical and scarce" materials under the Defense Production Act ("DPA") means that no one, anywhere in the country, can enforce state law against meat or poultry plants because the Secretary of Agriculture is now the sole arbiter of everything that occurs in the plants. Neither the Executive Order nor the DPA are so sweeping.

The Executive Order was concerned with closures—something that has not occurred at the Plant and something that Plaintiffs are not seeking—and ensuring that plants have the supplies they need to safely continue operations so the food supply will not be disrupted. By designating meat and poultry as "critical" under the DPA, the President triggered the procurement power granted to him by Congress—specifically, to prioritize contracts and orders, and to "allocate materials, services, and facilities," necessary to production. 50 U.S.C. § 4511(a)(2).

---

[5] In fact the CDC's May 1 morbidity and mortality weekly report, *see* supra, note 1, reinforces the importance of the same CDC guidance that has been in place for several weeks, including the paramount importance of social distancing in workplaces, adequate hand-washing opportunities, and sick leave policies that do not create "incentives that might encourage workers to come to work while symptomatic."

Nothing in the DPA's procurement powers authorizes the President to preempt state laws or to immunize private parties from suit. The DPA also has nothing to do with workplace safety. The only way in which the Executive Order arguably concerns this lawsuit is by reinforcing the seriousness of the harm posed by Smithfield's ongoing, admitted noncompliance with CDC guidelines. The Executive Order stipulated that meat processors must act "consistent with guidance for their operations jointly issued by the CDC and OSHA." Dkt. 36-1 § 1. However, from its failure to slow line speeds so that workers can stand more than six feet apart, to its failure to allow additional breaks for workers to blow their noses or wash their hands, Smithfield continues to violate the very CDC guidance referenced in the Executive Order.

A. The Executive Order Promulgated Pursuant to the DPA Does Not and Cannot Preempt Missouri Common Law.

The DPA does not evince a Congressional desire to preempt, or to authorize the President to preempt, state laws regarding food production, worker safety, or public health more broadly as is required for preemption of any kind. The scope of the powers granted by the DPA, and therefore the scope of the Executive Order at issue here, is limited to what "Congress manifestly intended." *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 377 (2000)*; see also id.* at 376 n.10 (looking to the text of the statute to determine the limits of authority and flexibility delegated to the President by Congress).[6] "[A]ny evidence of pre-emptive purpose, whether

[6] Smithfield suggests that executive orders may have preemptive effect beyond the congressional grant of authority to preempt state laws. Dkt. No. 46, at 7. This is incorrect. The case on which Smithfield relies, *Old Dominion Branch No. 496, National Ass'n of Letter Carriers, AFL-CIO v. Austin*, involved an executive order "express[ly] authoriz[ed]" by 5 U.S.C. § 7301, which empowered the President to regulate the conduct of executive branch employees. 418 U.S. 264, 273 n.5 (1974). In exercising his authority to regulate personnel matters within the branch of government that he leads, the President crafted an executive order closely modeled on a statute Congress had enacted. *Id.* at 273-74 and n.5. Thus, nothing in *Old Dominion*, a case that predates *Crosby* by more than 25 years, supports Smithfield's suggestion that executive orders may have a broader preemptive reach than the Congressional grant of authority animating them.

express or implied, must . . . be sought in the text and structure of the statute at issue." *Virginia Uranium, Inc. v. Warren*, 139 S. Ct. 1894, 1907 (2019) (alterations and internal quotations omitted). And, as with all questions regarding the preemptive scope of federal law, "[w]hen determining whether federal law preempts state-law causes of action, [courts] start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Soo Line R. Co. v. Werner Enters.*, 825 F.3d 413, 420 (8th Cir. 2016) (internal quotations omitted).

Nothing in the text and structure of the DPA evidences a "clear and manifest purpose" to supersede Missouri's, or any state's, historic police powers to protect their residents through common-law tort. All the DPA gives the President is the authority to determine which contracts or orders "he deems necessary or appropriate to promote the national defense," to prioritize these contracts or orders above others, and to "require acceptance and performance of such [high-priority] contracts or orders in preference to other contracts." 50 U.S.C. § 4511(a)(1). It also authorizes the Executive Branch to "allocate materials, services, and facilities" as "necessary or appropriate to promote the national defense." 50 U.S.C. § 4511(a)(2).

As for field preemption, the DPA is a law about contracting that allows the President to require manufacturers to produce certain materials deemed "essential" even if this means that the manufacturers' non-governmental customers suffer. Nothing in this narrow, procurement-focused statute establishes "a framework of regulation so pervasive" that "Congress left no room for the states to supplement it," as would be required for field preemption. *Keller v. City of Fremont*, 719 F.3d 931, 943 (8th Cir. 2013) (internal quotations omitted).

Moreover, Congress passed the DPA against the backdrop of well-established doctrines of negligence and public nuisance, and nothing in the "text and structure" of the DPA suggests

that Congress intended to displace these historic state-law powers when it allowed the President to prioritize certain contracts over others. *Virginia Uranium*, 139 S. Ct. at 1907. *See also Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947) (noting that the "historic police powers" of the state are only superseded when that is the "clear and manifest purpose of Congress").[7]

Nor do the common-law causes of action Plaintiffs bring here create an obstacle to the DPA. Smithfield notes that the Executive Order expressed a "desire for uniformity to protect the nation's food supply during the pandemic" and that inconsistent application of state law could undermine that objective. Dkt. No. 46, at 9. But what the Executive Order actually expressed concern about was "recent actions in some states" that "led to the complete closure of some large processing facilities" and that "may differ from or be inconsistent" with the guidance issued by the CDC and OSHA that Plaintiffs have asked this Court to enforce at the Plant. Dkt. 36-1 § 1. And pursuant to that authority, the President acted "to allocate materials, services, and facilities" to meat processing plants to ensure their continued safe operation. *See* 50 U.S.C. § 4511(a)(2). Where Plaintiffs and the Executive Order share not only the same goal—allowing the Plant to continue operating safely—but also the same means of achieving that goal—ensuring compliance with CDC guidelines—Plaintiff's state-law claims pose no obstacle to accomplishing federal objectives.

---

[7] Smithfield suggests that the Executive Order and a press release by the Secretary of Agriculture, rather than the DPA, occupy an entire field of regulation. Dkt. No. 46, at 8. But an executive order unmoored from the law that authorized it cannot trigger field preemption, and an agency press release certainly cannot do so. Further, field preemption cannot be satisfied by defining the relevant "field" so narrowly as to coincide completely with the case at bar. *Id.* (claiming the Executive Order and press release indicate "the federal government's intent to 'occupy the field' as it relates to continued operations of meat processors and their compliance with CDC and OSHA guidance during the pandemic").

Finally, Congress knew how to immunize businesses and preempt state law claims when it enacted the DPA. The DPA provides that "[n]o person shall be held liable for damages or penalties for any act or failure to act resulting directly or indirectly from compliance with a rule, regulation, or order issued pursuant to this chapter." 50 U.S.C. § 4557. This limitation of liability does not immunize contractors producing materials found necessary to the national defense from all liability *whatsoever*. Courts, including the Eighth Circuit, have held this provision merely allows military or other government-preferred contracts to jump to the front of the line. *Compare United States v. Vertac Chemical Corp.*, 46 F.3d 803, 811-13 (8th Cir. 1995) (exculpatory provision of DPA codified at 50 U.S.C. § 4557 did not immunize contractor from liability for environmental damage caused by Agent Orange, which it produced under auspices of the DPA), *with Eastern Air Lines, Inc. v. McDonnell Douglas Corp.*, 532 F.2d 957, 996-97 (5th Cir. 1976) (holding this provision of the DPA provided a defense to an aircraft manufacturer sued for breach of contract by an airline whose order was delayed). This provision certainly does not immunize businesses from any suit seeking injunctive relief to protect workers and their community. In fact, its specificity and narrowness counsels strongly against broadly reading the DPA or executive orders promulgated under it to preempt such state law causes of action. *Merck Sharp & Dohme Corp. v. Albrecht*, 139 S. Ct. 1668, 1677 (2019) (where Congress shows it is aware of the potential for "state-law suits" and chose not to act, that strongly counsels against preemption) (internal quotations omitted).

B. The Court Should Not Defer to the Primary Jurisdiction of the Department of Agriculture Pursuant to the Defense Production Act.

Plaintiffs have already explained to this Court why it should not defer to the primary jurisdiction of the Occupational Safety and Health Administration ("OSHA"), which has not initiated an inspection at the Plant (a prerequisite to a citation or request for emergency relief

under the OSH Act) or indicated an intent to do so. This Court has even less reason to defer to the U.S. Department of Agriculture ("USDA"), which has neither experience nor training in matters of worker safety. To the extent USDA will be relying on OSHA's expertise, OSHA has already applied that expertise to the working conditions of meat processing plants during the pandemic by promulgating guidance for those plants in conjunction with the CDC, Dkt. Nos. 29-5 & 32-4—the very guidance that Plaintiffs seek to enforce. *Alpharma, Inc. v. Pennfield Oil Co.*, 411 F.3d 934, 939 (8th Cir. 2005) (primary jurisdiction inappropriate when court asked to rule based on actions agency already has taken).

Moreover, OSHA's authority to issue standards binding against employers (which it has not used to date with respect to the COVID-19 pandemic) and its authority to issue non-enforceable recommendations (which it has already exercised by drafting recommendations in conjunction with the CDC) both exist alongside state tort laws that allow for private litigation. OSHA has never displaced these enforcement mechanisms, and the OSH Act's savings provision expressly contemplates a role for private enforcement under state law. 29 U.S.C. § 653(b)(4); *Schweiss v. Chrysler Motors Corp.*, 922 F.2d 473, 474-75 (8th Cir. 1990); *see also McFadden v. 3M Co.*, No. 4:14-CV-803 CEJ, 2015 WL 905083, at *2 (E.D. Mo. Mar. 3, 2015) (describing the OSH Act's savings clause as extremely broad). Moreover, as Plaintiffs have previously explained, the rights they seek to vindicate here extend beyond the workplace and concern the health of the surrounding community, over which OSHA has neither expertise nor legal authority. *Steel Inst. of N.Y. v. City of New York*, 716 F.3d 31, 33 (2d Cir. 2013).

The only thing that has changed since Plaintiffs briefed this issue is that another agency, with no expertise in worker safety, has been tasked with coordinating the federal DPA response to potential food supply shortages. To the extent the Executive Order speaks to this matter, it

counsels against deference and delay. Smithfield notes that the Executive Order cited "state law interference with plant operations" that "undermin[ed] critical infrastructure during the national emergency." Dkt. No. 46, at 6. Those references were to plant closures, not to the request in this lawsuit—compliance with the CDC guidelines that the Executive Order and subsequent USDA and Department of Labor ("DOL") statements agree is immediately necessary. Dkt. Nos. 46-1, 36-2.

Furthermore, as Plaintiffs pointed out at Thursday's hearing, the federal government appears to contemplate that there may be litigation brought by workers involving COVID-19 exposure in the workplace; the government does not suggest that courts must or even should dismiss those cases and defer to the federal government's primary jurisdiction. Instead, the government has suggested that it will participate in such litigation to guide courts: "Where a meat, pork, or poultry processing employer operating pursuant to the president's invocation of the DPA has demonstrated good faith attempts to comply with the Joint Meat Processing Guidance and is sued for alleged workplace exposures, the DOL will consider a request to participate in that litigation in support of the employer's compliance program." Dkt. No. 36-2, at 2.

Smithfield argued that this statement somehow does not apply to cases like this one because it was about "exposure litigation," which in Smithfield's view, this case is not. Tr. 53:10-11. To the extent Smithfield meant that DOL only envisioned participating in damages suits, not requests for injunctive relief, that distinction is absent from DOL's statement. Moreover, that claim makes little sense, as damages cases based on workplace injures will almost always be adjudicated in workers' compensation proceedings.

Plaintiffs, this Court, President Trump, and all of the federal agencies that have spoken on the matter all agree the CDC guidelines must be followed in meat processing facilities; yet Smithfield's own documents and declarations indicate that its compliance is sporadic at best. Maintaining the order this Court has already issued requiring that Smithfield comply will promote, not hinder, uniformity.[8]

IV. Plaintiffs Have Established the Need For a Preliminary Injunction.

A. Plaintiffs Have Demonstrated a Likelihood of Success on their Claims.

If it is a public nuisance for a landowner "to collect and hold [surface water] in a stagnant, offensive, and disease-breeding body," *Roth*, 147 S.W. at 491, and a breach of an employer's duty to provide a reasonably safe workplace to fail to "control and assume its responsibility to eliminate the hazardous condition caused by tobacco smoke," *Smith*, 643 S.W.2d at 13, then it is surely both of those things for a large employer like Smithfield to operate in a manner that violates broadly accepted CDC guidance and that will result in the "inevitable" spread of disease among workers and the public generally, Dkt. No. 35-2 ¶¶ 10-12 (Perry Decl.).

i. Public Nuisance

Smithfield argues "the Plant is not a nuisance" because "it is an essential business that continues to operate under a presidential Executive Order and has taken its workers' safety seriously." Dkt. No. 46, at 9. It fails to explain, however, how the essential nature of its operation licenses it to operate in a manner that contributes to the "inevitable" spread of disease. *See* Dkt. No. 35-2 ¶¶ 10-12 (Perry Decl.). Such conduct is a classic public nuisance. *See Roth*, 147 S.W. at 491-92; *Stickley v. Givens*, 11 S.E.2d 631, 637 (Va. 1940) ("Cattle afflicted with a dangerous and

[8] If the court is inclined to defer to USDA's purported primary jurisdiction, it should still not dismiss this case. Because of the urgent matters at stake here, it should stay this case until a date certain, 14 days from the date of the order, to allow USDA to take action at the Plant.

contagious disease are public nuisances as defined by the common law" (*quoting Durand v. Dyson*, 111 N.E. 143, 145 (Ill. 1915))); *Seigle v. Bromley*, 124 P. 191, 193-95 (Colo. App. 1912) (concluding that hog farm likely to spread disease constituted public nuisance); *accord* Restatement (Second) of Torts § 821B cmt. g ("[T]he threat of communication of smallpox to a single person may be enough to constitute a public nuisance because of the possibility of an epidemic."). As discussed above, nothing in the President's Executive Order suggests otherwise.

Smithfield also argues that Plaintiffs have no special injury because "fear of 'community spread' during a pandemic is perforce not different in kind from the general public's injury." Dkt. No. 46, at 9. But Plaintiffs' special harms go far beyond fear of community spread. Plaintiffs experienced special harm due to the direct exposure of Jane Doe and RCWA members to the dangerous working conditions at the Plant and the resources RCWA must expend to help its members cope with the nuisance. *See* Dkt. No. 1 ¶¶ 113–16 (Complaint).

Jane Doe and RWCA's members working at the Plant are harmed by their direct exposure to the unsafe conditions at the Plant. Direct exposure is different in kind from indirect community spread that would expand beyond the Plant. The special injury flowing from Plaintiffs' proximity to the Smithfield-created nuisance is analogous to the special injury demonstrated by neighbors immediately next to a business spewing pollution, a textbook example of special harm. *Glaessner v. Anheuser-Busch Brewing Ass'n*, 13 S.W. 707, 709 (Mo. 1890) (concluding that plaintiff suffered special injury because plaintiff's property was within 75 feet of public nuisance); *Edmondson v. City of Moberly*, 11 S.W. 990, 991 (Mo. 1889) (concluding that plaintiffs suffered special injury where their proximity to the nuisance caused sickness in their family and impaired the enjoyment of their home); *Caskey v. Edwards*, 107 S.W. 37, 38 (Mo. App. 1908) (concluding that neighboring plaintiffs suffered special injury

where "unhealthy odors and noxious vapors would inevitably arise, and specially destroy the comfort and health of their homes"); *see also, e.g., Arcadia Realty Co. v. City of St. Louis*, 30 S.W.2d 995, 997 (Mo. 1930); *Scheurich v. Southwest Missouri Light Co.*, 84 S.W. 1003, 1007 (Mo. App. 1905).

Moreover, Jane Doe and RWCA's members experience mental distress different in kind and degree than the harm experienced by the general public. The mental anguish caused by being directly subjected to unsafe working conditions is distinct from the general fear of community spread. *See Wilson v. Parent*, 365 P.2d 72, 78 (Or. 1961) ("The hearing of obscene words directed at and characterizing plaintiff's conduct is a different harm from the mere hearing or seeing of vile words and acts in general by a member of the public not personally defamed thereby.").

Finally, in addition to the special harms experienced by its members, *see Armory Park Neighborhood Ass'n v. Episcopal Cmty. Servs. in Arizona*, 712 P.2d 914, 919 (Ariz. 1985) (concluding that association can bring public nuisance claim on behalf of its specially injured members), RWCA is also specially harmed because it has been forced to incur expenses and divert resources in response to the nuisance, *see* Restatement (Second) of Torts § 821C, cmt. h. ("A contractor who loses the benefits of a particular contract or is *put to an additional expense* in performing it because of the obstruction of a public highway preventing him from transporting materials to the place of performance, can recover for the public nuisance" (emphasis added)).

Smithfield argues that RWCA's diversion of resources does not constitute a special injury because they "are necessarily premised on the same injury or threat of injury faced by the general public—fear of COVID-19 exposure." Dkt. No. 32, at 20. This is incorrect as both a factual and legal matter. As a factual matter, RWCA's diversion of resources is not necessarily premised on

the fear of COVID-19 exposure. It is premised on RWCA's mission to support its member-workers at the Plant. As a legal matter, special injuries often stem from the same source as the public injury. *See, e.g., Arcadia Realty Co*., 30 S.W.2d at 997. Smithfield points to no precedent suggesting otherwise.

ii. Duty to Provide a Safe Workplace

Smithfield does not dispute that if its conduct violates CDC guidance, that breaches its duty to provide a reasonably safe workplace. *See* Dkt. No. 32, at 21 ("[P]art of an employer's duty to provide a safe workplace is complying with federal regulations."). Its only defense to Plaintiffs' claims is that Plaintiffs have not alleged injury. As an initial matter, Missouri law clearly allows workers to obtain injunctive relief to remedy ongoing breaches of the duty to provide a safe workplace that may result in *imminent* injury. *See Smith*, 643 S.W.2d at 13 (injunction available for worker "where the harm has not yet resulted in full-blown disease or injury"). This conclusion is consistent with the fundamental principle that "a plaintiff should not have to await harm's fruition before being entitled to seek an inadequate legal remedy of damages," *A.B. Chance Co. v. Schmidt*, 719 S.W.2d 854, 859-60 (Mo. App. 1986), and with the purposes of the Declaratory Judgment Act, which forms part of the foundation for this suit, *MedImmune, Inc. v. Genentech, Inc*., 549 U.S. 118, 129 (2007).

Practical considerations also dictate that plaintiffs should not have to suffer life-threatening disease in order to obtain injunctive relief from unsafe working conditions through this tort. As one Missouri court aptly noted in another context, to wait "until residents of a community . . . became infected with a dread disease and thus suffered irreparable harm before injunctive relief was possible, [makes it] entirely possible that infectious and contagious diseases of epidemic proportions could follow." *Mertzlufft v. Bunker Res. Recycling & Reclamation, Inc.*, 760 S.W.2d 592, 598 (Mo. App. 1988).

In any event, even if Plaintiffs are required to allege past injury as an element of the claim, the complaint plainly states that Jane Doe and RCWA members "have already been harmed as a result of [Smithfield's] breach, including emotional harm and in some cases pecuniary harm and physical harm associated with the COVID-19 infection." Dkt. No. 1 ¶ 120; *see also* Dkt. No. 3-3 ¶¶ 31, 3335 (First Fuentes Decl.); Dkt. No. 3-5 ¶ 24 (First Doe Decl.).

iii. Evidence to Support Plaintiffs' Claims

There is ample evidence to support Plaintiffs' allegations that Defendants' conduct is a public nuisance and a breach of their duties to protect workers. The declarations from Axel Fuentes and Jane Doe, Dkt. Nos. 3-3, 3-5, 35-1, 35-3, contain detailed evidence regarding, for example, Smithfield's (1) ongoing refusal to allow for social distancing, (2) ongoing refusal to provide any breaks for personal hygiene, and (3) continuing failure to clarify their sick leave policies.

Smithfield suggests the Court ignore this evidence because it contains hearsay. But courts frequently consider hearsay evidence at the preliminary injunction stage. "The dispositive question is not the[] [evidence's] classification as hearsay but whether, weighing all the attendant factors, including the need for expedition, this type of evidence was appropriate given the character and objectives of the injunctive proceeding." *Asseo v. Pan Am. Grain Co., Inc.*, 805 F.2d 23, 26 (1st Cir. 1986).

Even more importantly, while Smithfield continues to loudly proclaim that its policies at the Plant comply with CDC guidance, the evidence it has submitted to the Court belies that assertion and reinforces the credibility of Doe's and Fuentes's declarations. For example, Smithfield concedes workers continue to work shoulder to shoulder along production lines, Dkt. No. 32, at 8, that they do not receive any additional breaks to wash their hands, *id.* at 9 n.7, and that it has refused to alter its production practices, Tr. 26:21-27:2. Furthermore, while Smithfield

appears to have changed its tune regarding the availability of bonus and incentive payments for workers who miss work because they are sick, those policies appear to *still* require employees with symptoms to come into the Plant and expose others to receive the benefits of the bonus pay. Dkt. No. 46-2 ¶ 4. At the very least, workers are likely to be confused about these policies since Defendants themselves seem to be confused about them. *See id.* And evidence submitted by Smithfield along with its supplemental filings confirms that Smithfield only made the most important changes—including extending clock-in times to allow for social distancing at the beginning of the workday—in the week *after* Plaintiffs filed this lawsuit, *id.* ¶¶ 7-9, just as reported by Doe and Fuentes.

Smithfield's recalcitrance and refusal to comply with CDC guidance puts Plaintiffs, their co-workers, and community at risk. Plaintiffs are substantially likely to succeed on the merits.

b. The Balance of the Equities Favors an Order Granting the Preliminary Relief Requested Here.

Smithfield argues that it would be improper for the Court to order the requested relief because, among other things, it would amount to nothing more than a vague and impermissible "injunction to follow the law." As explained above, considering changes made at the Plant, the order that Plaintiffs seek is tailored specifically to the three ways in which Smithfield, by its *own admission*, continues to violate CDC guidance and thus breach its duty to provide a reasonably safe workplace for its workers and create a public nuisance: (1) failing to allow for social distancing during while workers are on production lines and on breaks, (2) failing to provide additional breaks for hand washing and personal sanitation, and (3) incentivizing workers to come into the Plant when sick and failing to communicate sick leave polices clearly.

Plaintiffs in the alternative request an injunction requiring Smithfield to comply with CDC guidance and to report back to the Court and Plaintiffs regarding changes made at the Plant

and what aspects of the CDC Guidance are infeasible in the workplace and why. Where the CDC has issued detailed guidance specific to the harms alleged, it is particularly appropriate for this Court to order compliance with those guidelines.

To be sure, Courts are cautioned against "sweeping injunction[s] to obey the law" because "defendants ought to be informed, as accurately as the case permits, what they are forbidden to do." *Swift & Co. v. United States*, 196 U.S. 375, 401 (1905). For example, in *N.L.R.B. v. Express Pub. Co.*, the Supreme Court concluded that it was not appropriate to issue a "blanket order" restraining an employer from violating the National Labor Relations Act where the employer had violated only two subsections. 312 U.S. 426, 433 (1941). The Eighth Circuit has condemned injunctions that fail to specify exactly what conduct is prohibited. *See Jake's, Ltd. v. City of Coates*, 356 F.3d 896, 900-01 (8th Cir. 2004) (observing that injunction enjoining Defendant "from operating a sexually-oriented business at their current location' if that would violate 'relevant ordinances'" was too broad or vague). These orders are inappropriate because they are "not specific enough." *Daniels v. Woodbury Cty, Ia*, 742 F.2d 1128, 1134 (8th Cir. 1984).

An order to comply with the CDC Guidance related to COVID-19 would not be an overbroad "obey-the-law" injunction. Here, the CDC has issued detailed guidance specific to reducing the risk of spread of COVID-19 at meat packing plants. Far from an order to follow "relevant ordinances," *see Jake's, Ltd.*, 356 F.3d at 900-01, or follow the entirety of a vast act, see *Express Pub.*, 312 U.S. at 433, an order to follow specific CDC guidelines would be limited in scope to the unlawful conduct at issue, *see Perez v. Ohio Bell Tel. Co.*, 655 F. App'x 404, 412 (6th Cir. 2016). The guidelines are specific enough to provide Smithfield with notice regarding

the covered conduct and allow appellate courts an opportunity for meaningful review. *See Daniels*, 742 F.2d at 1134.

Moreover, the narrow injunction Plaintiffs seek here essential to protecting the health and safety of workers and the broader community. There is already at least one positive COVID-19 test in Sullivan County, Missouri. It may not be long before the virus reaches the Plant (if it has not already). *See* Dkt. No. 3-5 ¶ 21 (First Doe Decl.). When it does, Smithfield should be implementing, at the very least, the specific public health guidance that has been incorporated into state orders to minimize spread. The CDC has already told Smithfield what to do. Now it just needs to do it. People's lives are at stake.

May 2, 2020

Respectfully Submitted,

By: /s/ David S. Muraskin
David S. Muraskin (*pro hac vice*)
Karla Gilbride (*pro hac vice*)
Stephanie K. Glaberson (*pro hac vice*)
Public Justice
1620 L. St, NW, Suite 630
Washington, DC 20036
Telephone: (202) 797-8600
Facsimile (202) 232-7203
Email: dmuraskin@publicjustice.net
Email: kgilbride@publicjustice.net

Gina Chiala #59112
HEARTLAND CENTER
FOR JOBS AND FREEDOM, INC.
4047 Central Street
Kansas City, MO 64111
Telephone: (816) 278-1092
Facsimile: (816) 278-5785
Email: ginachiala@jobsandfreedom.org

David Seligman (*pro hac vice*)
Juno Turner (*pro hac vice*)
Towards Justice
1410 High Street, Suite 300
Denver, CO 80218
Telephone: (720) 441-2236
Facsimile: (303) 957-2289
Email: david@towardsjustice.org
Email: juno@towardsjustice.org
Attorneys for Plaintiffs