



April 30, 2020

The Honorable Nancy Pelosi
Speaker
United States House of Representatives
Washington, DC 20515

The Honorable Kevin McCarthy
Minority Leader
United States House of Representatives
Washington, DC 20515

The Honorable Mitch McConnell
Majority Leader
United States Senate
Washington, DC 20510

The Honorable Chuck Schumer
Minority Leader
United States Senate
Washington, DC 20510

Re: Opposition to COVID-19 Legal Immunity

Dear Speaker Pelosi, Leader McCarthy, Leader McConnell, and Leader Schumer:

We understand that Congress is considering providing a “liability shield” to protect certain businesses from lawsuits alleging that their negligent operations caused customers or employees to be infected with COVID-19. The Center for Science in the Public Interest¹ writes to urge Congress to reject this call for COVID-19 legal immunity. First, it incentivizes harmful conduct, which ultimately is counterproductive to keeping essential businesses operating and the recovery of our economy. Second, it deprives people of redress for negligent conduct. Lastly, it is unnecessary. The law already adequately shelters businesses that take reasonable precautions to protect employees and the public from contracting COVID-19.

On April 14, 2020, numerous industry associations, including the American Beverage Association, North American Meat Institute, National Grocers Association, and SNAC International, wrote a letter to Majority Leader Mitch McConnell seeking such immunity.² In this letter, the industry groups claimed that immunity was necessary because they provide essential

¹ The Center for Science in the Public Interest is a nonprofit organization that advocates for and educates consumers on issues of food safety, nutrition, transparent advertising, and health. We have been actively engaged during this pandemic, supporting food workers, food security, safe food, and reliable food supply chains, and calling out unproven treatments and opportunistic fraudulent schemes.

² Letter from American Bakers Association *et al.* to the Honorable Mitch McConnell, dated April 14, 2020, <https://bit.ly/3cSYz09>.

services and the potential for “some to take advantage of the current crisis to file unfounded lawsuits against them alleging that customers and employees were infected with COVID-19” represented an “emerging threat to their ability to continue serving customers.”³

We value and fully support the efforts of businesses to provide Americans with critical products and services during this health crisis. However, these businesses must do so while operating reasonably safely. Unsafe operations have already resulted in business closures and the further spread of COVID-19, which causes fatalities, threatens supply chains, puts workers’ and the public’s health and safety at risk, harms our economy, and further burdens health care workers. Legal accountability provides essential incentives for businesses to take reasonable protective measures, and where appropriate, compensation to victims of businesses that fail to do so.

We appreciate that many of the companies represented by these groups provide essential products and services, and that these businesses face unprecedented challenges in continuing to do so. However, existing law already shields companies from non-meritorious lawsuits. State tort law already provides companies with sufficient legal protection and takes into account the context in which any potentially tortious act occurs. As a general matter, to bring a successful tort lawsuit, employees or customers would need to prove that a company’s negligent conduct caused them to contract COVID-19.⁴ Plaintiffs would need to establish that the company was negligent, which, according to the Second Restatement of Torts, takes into account the magnitude of risk, the importance of the companies’ operations, industry customs, regulatory guidance, information gaps, and the existence of an emergency.⁵ Since our country’s founding, courts and juries have properly made exactly this sort of fact-specific determination, which in this circumstance would give due regard to the difficult circumstances of the emergency situation and the important roles essential businesses are playing during this crisis.⁶

There are other existing legal structures that already limit companies’ exposure to liability—including targeted coronavirus immunity in numerous states, worker’s compensation coverage, damage caps, federal immunity provided to vaccine manufactures, and liability insurance.⁷ Companies that follow administrative regulations and guidance, adopt industry best practices, and take reasonable precautions will have better outcomes and some legal protection.⁸

³ *Id.*

⁴ Restatement (Second) of Torts, § 281

⁵ *Id.* §§ 282, 283, 285, 292, 293, 295A, 296.

⁶ There are other significant impediments to bringing a successful tort action. For example, it will be prohibitively difficult for most individuals to prove that they contracted an illness at a specific location and that they would not have caught the illness had the business taken additional precautions. *Id.* §§ 430–431.

⁷ Laura Strickler & Adiel Kaplan, *Nursing Home Industry Pushes for Immunity from Lawsuits During Coronavirus Emergency*, NBC News (April 27, 2020), <https://nbcnews.to/2zw4UjF>; Russell Gold & Leslie Scism, *States Aim to Expand Workers’ Compensation for Covid-19*, WSJ (April 27, 2020), <https://on.wsj.com/2yWotkP>; *Fact Sheet: Caps on Compensatory Damages: A State Law Summary*, Center for Justice and Democracy (June 20, 2019), <https://bit.ly/3f9Em8q>; 42 U.S.C. § 300aa-22.

⁸ For example, the CDC and OSHA recently issued joint guidance for meat processing facilities with recommendations on how to control the spread of COVID-19. The Department of Labor and OSHA issued a related

However, a liability shield improperly protects companies that do not take such reasonable measures, and it deprives victims of the fact-finding tools to ferret out bad actors and seek reasonable compensation.

For example, we all need grocery stores, food supply chains, medical supply companies, and nursing homes to provide essential services and remain in business. But, if the grocery stores do not follow reasonable protective measures, such as limiting the number of people in the store, requiring social distancing, providing reasonable protective gear for their employees, and requiring employees to stay home when sick,⁹ not only will the employees get sick, but also more customers will get sick,¹⁰ which will result in overburdening our health care system, a greater loss in life, the inability of the grocery store to be able to provide essential services, and further economic harm.

A liability shield will also place our food workers and the food supply chain at risk. By its failure to provide adequate personal protective equipment, to assure social distancing, and encourage sick employees to take leave, the meat industry has downplayed the risks of COVID-19, resulting in numerous plant closures and the death of at least twenty workers.¹¹ President Trump's recent executive order, invoking the Defense Production Act to keep meat processing facilities open, and the related statement by federal agencies that the United States would support meat suppliers in COVID-19 related litigation, is certain to exacerbate this issue.¹² Further immunity would gut any incentive these companies have to adequately protect their workforce. A more effective way to keep these plants open and operating is to implement the necessary measures to keep the meat packing plant employees healthy and able to work.

statement saying that “courts often consider compliance with OSHA standards and guidance as evidence in an employer’s favor in litigation” and that they would consider supporting a company in litigation that has “demonstrated good faith attempts to comply with the [guidance] and is sued for alleged workplace exposures.” Kate O’Scannlain & Loren Sweatt, *Statement of Enforcement Policy Regarding Meat and Poultry Processing Facilities*, Dep’t of Labor & OSHA (April 28, 2020), <https://bit.ly/2zCgdH6>.

⁹ The Families First Coronavirus Response Act only required companies with fewer than 500 employees to provide paid leave, which excludes large grocery chains. CSPI has called on Congress to expand the paid sick leave benefits to employers with over 500 employees. See *National Poll: Grocery Shoppers Want Staff to Wear Masks, Have Access to Paid Sick Leave*, CSPI (April 7, 2020), <https://bit.ly/2Yf4zMz>. According to a national survey commissioned by CSPI, 95 percent of Americans feel sick leave benefits are important or very important for preventing the spread of COVID-19. *Id.*

¹⁰ Anna North, “I did not sign up for the military. I signed up for Walmart,” VOX (April 23, 2020), <https://bit.ly/3bGRQWZ>; Quentin Fottrell, “Your Boss Is Playing God’: My Grocery Store Banned Face Masks for Staff. I Don’t Want to Contract Coronavirus. How Can I Stay Safe?”, MarketWatch (April 6, 2020), <https://on.mktw.net/2KIy01H>.

¹¹ Taylor Telford & Kimberly Kindy, *As they Rushed To Maintain U.S. Meat Supply, Big Processors Saw Plants Become Covid-19 Hot Spots, Worker Illnesses Spike*, Washington Post (April 25, 2020), <https://wapo.st/2W84U16>. Liz Crampton & Gabby Orr, *Trump Orders Meat Plants to Stay Open as Worker Deaths Rise*, Politico (April 28, 2020), <https://politi.co/2YgIzqp>.

¹² Ana Swanson and David Yaffe-Bellany, *Trump Declares Meat Supply ‘Critical,’ Aiming to Reopen Plants*, NY Times (April 28, 2020), <https://nyti.ms/3f2Jxa5>; Kate O’Scannlain & Loren Sweatt, *Statement of Enforcement Policy Regarding Meat and Poultry Processing Facilities*, Dep’t of Labor & OSHA (April 28, 2020).

Another example is provided by medical products companies. We greatly need more testing capacity to detect COVID-19 infections and the presence of antibodies to bring the COVID-19 crisis under control and to assist with the prudent reopening of businesses and our economy. However, there are many tests that make false promises or are of poor quality.¹³ It would be counterproductive to ending this health crisis to remove incentives for companies to provide tests that can be reasonably relied upon. Unreliable tests could lead to individuals with COVID-19 entering the workplace, healthy individuals staying home, or a false-sense of security. They can also obscure the actual extent of the health threat, leading to erroneous policy decisions.

Finally, nursing homes provide another example of where a liability shield would be poor policy. There are hundreds of nursing homes with high numbers of COVID-19 infections and fatalities.¹⁴ Many of these nursing homes have previously been cited for violations of regulations meant to control the spread of infections.¹⁵ These nursing homes may not improve their handling of patients unless they face accountability for negligent conduct. In fact, inspectors for Department and Health and Human Services have already determined that at least nine nursing home's failures to take appropriate actions to prevent the spread of COVID-19 put residents in "immediate jeopardy."¹⁶ Why should nursing homes who behave in this way be spared legal exposure?

Indeed, it is the failure to take reasonable measures to protect employees and the public that have led, and will continue to lead, essential businesses to close¹⁷ and have resulted in further community spread of COVID-19.¹⁸ That is the true "threat to [businesses'] ability to continue serving customers" and to our safe economic recovery.

¹³ Steve Eder *et al.*, *Antibody Test, Seen as Key to Reopening Country, Does Not Yet Deliver*, NY Times (April 19, 2020), <https://nyti.ms/2VOkEaB>.

¹⁴ Jon Kamp & Anna Wilde Mathews, *Coronavirus Deaths in U.S. Nursing, Long-Term Care Facilities Top 10,000*, WSJ (April 22, 2020), <https://on.wsj.com/3f40FMw>; Debbie Cenziper *et al.*, *Hundreds of Nursing Homes with Cases of Coronavirus Have Violated Federal Infection-Control Rules in Recent Years*, Washington Post (April 17, 2020), <https://wapo.st/3aPCw96>.

¹⁵ Debbie Cenziper *et al.*, *Hundreds of Nursing Homes with Cases of Coronavirus Have Violated Federal Infection-Control Rules in Recent Years*, Washington Post (April 17, 2020).

¹⁶ Charles Ornstein & Tophers Sanders, *Nursing Homes Violated Basic Health Standards, Allowing the Coronavirus to Explode*, ProPublica (April 24, 2020), <https://bit.ly/3fcbwEq>.

¹⁷ Taylor Telford & Kimberly Kindy, *As they Rushed To Maintain U.S. Meat Supply, Big Processors Saw Plants Become Covid-19 Hot Spots, Worker Illnesses Spike*, Washington Post (April 25, 2020).

¹⁸ Caitlin Dickerson & Miriam Jordan, *South Dakota Meat Plant Is Now Country's Biggest Coronavirus Hot Spot*, NY Times (April 15, 2020), <https://nyti.ms/2yNDZjc>.

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We strongly oppose any legislation that would immunize businesses that fail to operate in a reasonably safe manner during the COVID-19 pandemic.

Sincerely,

A handwritten signature in blue ink that reads "Peter Lurie". The signature is written in a cursive style and is underlined with a single horizontal stroke.

Peter Lurie, M.P.H., M.D.
President and Executive Director

A handwritten signature in blue ink that reads "Laura MacCleery". The signature is written in a cursive style and ends with a large, sweeping flourish that extends to the right.

Laura MacCleery
Policy Director