



Submitted Testimony of

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to the

Committee on the Judiciary

United States Senate

on

Examining Liability During the COVID-19 Pandemic

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Public Citizen appreciates the opportunity to submit testimony. Public Citizen is a non-profit organization with more than 500,000 members and supporters nationwide. We represent the public interest through legislative and administrative advocacy, litigation, research, and public education on a broad range of issues including fair and equitable access to justice for all people.

We are deeply concerned by proposals from a broad range of businesses seeking immunity from potential liability for any harms related to COVID-19.^{1,2,3} If adopted, these proposals will lead to more preventable death and disease. They will encourage corporations to cut corners on vital health and safety measures for their employees, resulting in avoidable spread of COVID-19 and more death—impacts that will be felt disproportionately by lower-income and people of color. They will create incentives for nursing homes and assisted living facilities, as well as other consumer-facing companies, in exactly the wrong direction—away from adopting appropriate protections. They will likely result in more pollution, sickness, and industrial accidents. They will invite price gouging and fraud. In other words, not only will these proposals transfer costs from employers to workers, corporations to patients and consumers, and polluters to communities, they will result in *greater* social cost and needless suffering and fatalities.

For these reasons and as detailed below, we oppose vigorously any proposals asking the federal government to override state-law claims and remedies that enable workers and consumers to hold companies accountable through the civil justice system. At a moment when unemployment is heartbreakingly high and consumer confidence is astonishingly low, proposals to grant businesses immunity from the consequences of their actions, if enacted, undermine consumer and worker protections, excuse negligent conduct, and show unwarranted disrespect for state law, including centuries-old state-law remedies. Both by undermining public confidence in workplace and marketplace safety, and by making workplaces, nursing homes, institutions, stores and other enterprises less safe, these proposals will impair the effort to restart the economy on a sustainable basis.

I. Liability Laws Protect Public Health.

Because state law—not federal law—provides the mechanism by which injured individuals sue for harm caused by a company, proposals to immunize businesses from liability ask Congress to

¹ Jeff Stein and Robert Costa, *White House Readies Push to Slash Regulations as Major Part of its Coronavirus Economic Recovery Plan*, WASH. POST (April 21, 2020), <https://www.washingtonpost.com/business/2020/04/21/white-house-coronavirus-regulations/>.

² Latest Updates, *Testing Is Biggest Obstacle to Reopening States, Experts Say*, NEW YORK TIMES (April 15, 2020), <https://www.nytimes.com/2020/04/15/us/coronavirus-cases-update-live.html?action=click&module=Spotlight&pgtype=Homepage>.

³ U.S. Chamber Institute for Legal Reform, *Businesses Face Liability Concerns When Employees Return to Work*, <https://www.instituteforlegalreform.com/resource/businesses-face-liability-concerns-when-employees-return-to-work>.

override the laws of every state. Doing so would be an unprecedented overreach by the federal government.

What is more, state laws serve a crucial function by encouraging businesses to take reasonable steps to protect workers and consumers. They establish the duties of care by which we assess the reasonableness of conduct, and those duties are enforceable through state-law remedies. The duties and the remedies go hand in hand: Overriding the remedies both cuts off a person's only avenue of seeking compensation for harm and neuters a key incentive for businesses to take reasonable steps to protect workers and consumers.

Some businesses have argued that the state-law duty, imposed on all of us, to take reasonable actions to avoid harming other people, should be deemed satisfied, as a matter of federal law, if the business follows safety standards. To begin with, state laws already take compliance with government standards into account when determining liability for harm. The federal government need not and should not override the operation of these state laws, developed over centuries, for the purpose of protecting businesses from reasonable conduct. The fact that businesses are seeking such an override is evidence that they are, in fact, seeking immunity from the consequences of *unreasonable* conduct.

Moreover, the predicate for the argument that businesses should be immune if they complied with federal standards is the existence of federal standards. We have no such standards at this time. Currently, we lack both meaningful COVID-19 related-safety standards and meaningful government enforcement even of the weak and very general voluntary guidelines that have been issued.⁴ Workers groups have asked the Department of Labor's Occupational Health & Safety Administration (OSHA) to issue standards specifically related to COVID-19, which OSHA declined to do. Moreover, the Administration has blocked the Centers for Disease Control and Prevention (CDC) from issuing workplace safety guidelines.⁵ And the White House overruled the CDC on standards for airports.⁶ Because no meaningful standards are in place, the business immunity proposal is based on a false premise and, more significantly, is a distraction from the important work of Congress in addressing the pandemic and its consequences for our country.

⁴ U.S. Department of Labor, *Statement of Enforcement Policy by Solicitor of Labor Kate O'Scannlain and Principal Deputy Assistant Secretary for OSHA Loren Sweatt Regarding Meat and Poultry Processing Facilities* (April 28, 2020), <https://www.dol.gov/newsroom/releases/osha/osha20200428-1>.

⁵ Nick Valencia et al., *Trump Administration Rejects CDC Guidance on Reopening US Amid Coronavirus*, CNN (May 7, 2020), <https://www.cnn.com/2020/05/07/politics/cdc-guidance-coronavirus-reopen-america/index.html>.

⁶ Brett Murphy and Letitia Stein, *CDC Scientists Overruled in White House Push to Restart Airport Fever Screenings for COVID-19*, USA TODAY (May 10, 2020), <https://www.usatoday.com/story/news/investigations/2020/05/09/white-house-push-airport-fever-screenings-overrules-cdc-scientists/309715>.

In any event, federal standards are not a substitute for holding companies accountable when they fail to take reasonable steps to protect workers, patients, or consumers. State common law is the method by which this country, for two centuries, has provided people a pathway to seek compensation for injuries caused by the unreasonable, or negligent, or reckless conduct of others. In a nation without mandatory paid sick leave and where many people lack health insurance, this pathway is particularly crucial.

II. Businesses' Liability Risks are Appropriately Limited.

Employees' ability to hold employers accountable in court for COVID-related injury is already subject to substantial limits. To begin with, in some states, workers harmed by an employers' failure to protect against transmission of the virus will be compensated through state workers compensation programs.⁷ Under workers compensation laws, workers who get sick on the job have their medical costs covered and receive a portion of their wages.⁸ Unless employers engage in egregious conduct, workers compensation laws generally bar workers from suing their employers in court. In addition, large numbers of employers have forced workers to agree, as a condition of employment, to arbitrate any disputes that may arise with the employer. Even where workers compensation does not apply, employees subject to forced arbitration agreements cannot sue their employers; they can pursue their claims only through arbitration—a forum that is advantageous to the employer.⁹

Businesses calling for immunity claim a need to stop “frivolous lawsuits,” but this claim has no basis in evidence. Rather, it a claim invoked by corporations frequently throughout the past few decades in a variety of contexts, of which COVID-19 is just the latest. The law, however, does not allow people to recover for “frivolous lawsuits”; indeed, lawyers can be sanctioned for filing them.¹⁰

Nonetheless, to support their claim, business interests have been talking about the number of lawsuits related to COVID-19 that have been filed so far.¹¹ That number alone tells us nothing about the number of tort suits or the number of suits that lack merit. In fact, the majority of COVID-related lawsuits to date seem to address phony “cures” (a problem that the Federal Trade

⁷ HG.org, *Can I Sue My Employer Instead of Pursue Workers' Compensation*, <https://www.hg.org/legal-articles/can-i-sue-my-employer-instead-of-pursue-workers-compensation-45024>.

⁸ HG.org, *How Does Workers' Compensation Work?*, <https://www.hg.org/legal-articles/how-does-workers-compensation-work-35401>.

⁹ Christopher Ingraham, *There's a Little Known Provision Enabling Billions of Dollars in Wage Theft Each Year*, WASH. POST (Feb. 13, 2020), <https://www.washingtonpost.com/business/2020/02/13/theres-little-known-employment-contract-provision-enabling-billions-dollars-wage-theft-each-year/>.

¹⁰ Fed. R. Civ. P. 11(c).

¹¹ Morning Edition (Transcript), NPR (May 5, 2020), <https://www.npr.org/2020/05/05/850485387/as-states-economies-reopen-businesses-worry-about-liability-lawsuits>.

Commission has also flagged),¹² price-gouging for consumer products such as face masks,¹³ injunctive relief to require adequate protections,¹⁴ and contractual disputes brought by consumers seeking refunds for services that they never received.¹⁵ A number of lawsuits have also been brought by businesses against banks and insurance companies, asserting claims related to loans and business interruption insurance.¹⁶ None of these types of suits exemplify the problem that the businesses are describing; they appear to be good-faith disputes appropriately resolved in the courts.

Arguing for immunity, business interests imagine potential lawsuits by consumers claiming that they contracted COVID-19 while in a store or restaurant. That type of imagined lawsuit would be unlikely to succeed because it would be extremely difficult to establish that a person became sick because of exposure at a particular location.

One category of people, however, who likely could establish that they were exposed at a particular location would be residents living in nursing homes or other long-term residential care facilities. Statistics released just this week show that COVID-19 has infected more than 153,000 residents and workers in long-term care facilities.¹⁷ A facility that made strong efforts to obtain an adequate supply of personal protective equipment, provided timely instructions to staff and residents, and took other reasonable steps to protect staff and residents may already have a state-law defense to liability. But a facility that failed to take reasonable precautions should be held

¹² See, e.g., Aila Slisco, *Former Governor Joins Televangelist in Fighting Lawsuit over Fake Coronavirus Cure*, Newsweek (May 6, 2020), <https://www.newsweek.com/former-governor-joins-televangelist-fighting-lawsuit-over-fake-coronavirus-cure-1502450>; Hanna Kozłowska, *Alex Jones Peddled a Fake Coronavirus Cure that Can Turn People's Skin Permanently Blue*, QUARTZ (March 14, 2020), <https://qz.com/1818606/alex-jones-ordered-to-stop-selling-fake-coronavirus-cures>; and James Leggate, *Stop Selling Phony Coronavirus Cures, FTC Warns Marketers*, Fox Business (May 7, 2020), <https://www.foxbusiness.com/lifestyle/stop-selling-phony-coronavirus-cures-ftc-warns-marketers>. See also U.S. Federal Trade Commission, *FTC Sends 45 More Letters Warning Marketers to Stop Making Unsupported Claims That Their Products and Therapies Can Effectively Prevent or Treat COVID-19* (May 7, 2020), <https://www.ftc.gov/news-events/press-releases/2020/05/ftc-sends-45-more-letters-warning-marketers-stop-making>.

¹³ See, e.g., Ina Steiner, *Buyer Sues eBay for Alleged Price Gouging*, ECOMMERCEBYTES (May 5, 2020), <https://www.ecommercebytes.com/C/blog/blog.pl?/comments/2020/5/1588694058.html>.

¹⁴ Sebastian Martinez Valdiva and Dan Margolies, *Workers Sue Smithfield Foods, Allege Conditions Put Them At Risk For COVID-19*, NPR (April 24, 2020), <https://www.npr.org/2020/04/24/844644200/workers-sue-smithfield-foods-allege-conditions-put-them-at-risk-for-covid-19?eType=EmailBlastContent&eId=e3302acd-706c-42f6-9c5b-c81ac1dd1a3a>.

¹⁵ Shayna Jacobs, *771 lawsuits — and Counting: Wave of Virus Litigation Hits Businesses Across the U.S.*, WASH. POST (May 2, 2020), https://www.washingtonpost.com/world/national-security/771-lawsuits--and-counting-wave-of-virus-litigation-hits-businesses-across-the-us/2020/05/01/6f7c015c-89c3-11ea-9dfd-990f9dcc71fc_story.html.

¹⁶ Kevin Krause, *These North Texas Businesses Bought Insurance, Only to Learn Coronavirus-Related Losses Aren't Covered*, THE DALLAS MORNING NEWS (May 10, 2020), <https://www.dallasnews.com/business/local-companies/2020/05/10/these-north-texas-businesses-bought-insurance-only-to-learn-coronavirus-related-losses-arent-covered/>.

¹⁷ Karen Yourish et al., *One-Third of All U.S. Coronavirus Deaths Are Nursing Home Residents or Workers*, NEW YORK TIMES (May 11, 2020), <https://www.nytimes.com/interactive/2020/05/09/us/coronavirus-cases-nursing-homes-us.html>.

accountable for the consequences of its actions, not absolved of responsibility by a federal grant of immunity.

III. The Public Overwhelmingly Supports Holding Corporations Accountable for their Choices.

Overall, 64% of voters oppose letting corporations off the hook by giving them immunity from liability if it is proved that a company “engaged in unsafe practices.”¹⁸ That includes 72% of Democrats, 64% of Independents, and 56% of Republicans. After hearing arguments on both sides, 69% of voters believe that giving corporations immunity from liability is a bad idea—including 60% of Republicans and 58% of supporters of President Donald J. Trump.¹⁹

In addition, 73% of undecided voters oppose granting corporations immunity, with 54% of those voters saying that they support the president and 54% oppose business immunity. And “[t]hree in five voters believe that giving corporations and other businesses immunity in coronavirus cases would result in more people getting the coronavirus.”²⁰ In other words, the public understands if businesses cannot be held accountable by members of the public, the public’s very health is at risk.

IV. Conclusion

Economic recovery will require public confidence that businesses are operating as safely as possible. If people do not trust that stores, offices, and workplaces are safe, they will not return to them. Eliminating a key incentive for businesses to operate safely would sabotage that effort. It would also, in all likelihood, lead to more COVID-19 infections, because where safety precautions are not in place, infection spreads.²¹ Safe practices, not liability from accountability, are the key to a sustainable economic recovery.

Organizations representing millions of people have called on Congress to oppose any attempt to let businesses off the hook when they fail to protect the public.²² Good public policy, a commitment to worker and public health and safety, respect for the States and our federalist

¹⁸ Geoff Garin and Guy Molyneux, *Survey Finds Bipartisan Opposition to Guaranteeing Businesses Immunity from COVID Lawsuits*, HART RESEARCH ASSOCIATES (May 6, 2020), <https://www.justice.org/sites/default/files/Hart%20Research%20Poll%20on%20Business%20Liability%20Immunity.pdf>.

¹⁹ *Id.*

²⁰ *Id.*

²¹ Rebecca Klar, *Nearly 900 Workers at Tyson Meat Plant in Indiana Test Positive for Coronavirus*, THE HILL (April 30, 2020), <https://thehill.com/homenews/news/495564-nearly-900-workers-at-tyson-meat-plant-in-indiana-test-positive-for-coronavirus>.

²² Letter to Congressional Leadership from 118 Organizations, *available at* <https://www.justice.org/sites/default/files/Hart%20Research%20Poll%20on%20Business%20Liability%20Immunity.pdf>.

system, and common sense—all counsel against immunizing companies from liability when their own conduct causes harm.

Thank you for the opportunity to share our views.