I have a couple of questions that I have added in the attachment.

Richard

Richard Ewell
Senior Attorney
(202) 693-0961

Pronouns: he, him, his

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Hello all,

Attached is my memo (with attachments) Please let me know if there are additional suggested changes!

Richard – if you’d like

Best,

(OSHA Summer Intern)

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All,

Here’s my bluebooked memo.

Best,

OSH Summer Intern

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From: Kramer, Allison - SOL
To: (b) 6 SOL
To: (b) 6 SOL
To: (b) 6 SOL
To: (b) 6 SOL
Subject: Questions for the Record
Subject: Questions for the Record
Attachment: QFRs from OSHA PDAS Loren Sweatt’s May 28, 2020 hearing before Subcommittee on COVID-19.docx

Ed suggested that you three would good people to,

(b) 5

Thank you.
Thank you.
Allison
Allison Kramer
Allison Kramer
Counsel for Legal Advice
Counsel for Legal Advice
Division of Occupational Safety and Health
Division of Occupational Safety and Health
Office of the Solicitor
Office of the Solicitor
United States Department of Labor
United States Department of Labor
(202) 693-(b) 6
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Message

From: Sweatt, Loren E. - OSHA [O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP
(FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=5AD5299DC47D4277A956850442D8669B-SWEATT, LOR]
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To: Kilberg, Andrew G - OSEC [/o=ExchangeLabs/ou=Exchange Administrative Group
(FYDIBOHF23SPDLT)/cn=Recipients/cn=285bfb7c58734e858f9cbb77c1bcf3c7-Kilberg, An]; Squitieri, Chad C - OSEC
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CC: Pearce, Krisann - OSHA [/o=ExchangeLabs/ou=Exchange Administrative Group
(FYDIBOHF23SPDLT)/cn=Recipients/cn=0a3aff68891c49cbb6b2dec6bca283c-Pearce, Kri]
Subject: FW: Meat Plant COVID - Potential Case Coming

(b) 5
ORDER OF THE HEALTH OFFICER OF THE COUNTY OF MERCED
DIRECTING FOSTER FARMS POULTRY PROCESSING PLANT
IN LIVINGSTON, CA TO RESPOND TO CURRENT OUTBREAKS AT THE LIVINGSTON
COMPLEX AND COMPLY WITH OTHER DIRECTIVES OF THIS ORDER

DATE OF ORDER: August 26, 2020

WHEREAS, the worldwide pandemic of COVID-19 disease, also known as “novel coronavirus” has infected over 7,500 Merced County residents and has resulted in the death of 112 Merced County residents.

WHEREAS, over 800 residents in the City of Livingston, located in Merced County, have been infected with COVID-19.

WHEREAS, there is significant evidence of increasing transmission of COVID-19 within the County of Merced and surrounding counties, placing a measurable strain on the local healthcare systems.

WHEREAS, according to the Meat and Poultry Processing Workers and Employers Interim Guidance from CDC and the Occupational Safety and Health Administration (OSHA), meat and poultry processing facilities are particularly vulnerable to COVID-19 infections due to working conditions. These conditions include prolonged, close contact with coworkers on the production line.

WHEREAS, Foster Poultry Farms maintains a poultry processing facility located in the City of Livingston.

WHEREAS, the California Department of Public Health has defined an outbreak in a congregate employment setting as three (3) or more cases of laboratory confirmed COVID-19 in employees not linked outside of the workplace.

WHEREAS, the Foster Farms complex at Livingston consists of multiple buildings on the same campus. Foster Farms first experienced an outbreak of COVID-19 at their Livingston facility on June 29, 2020, the first known case dated to June 9, 2020. As of the date of this Order, the initial outbreak is ongoing and outbreaks are widespread throughout multiple separate buildings at the Livingston facility. One department at the facility currently has an active outbreak that has affected 105 workers and other departments have active outbreaks affecting over 20 workers. Of the approximate 2,600 workers at the Livingston facility, 13.7 percent of the workforce has received a positive test result based on worker self-reporting. Most concerning is that these current testing figures do not accurately represent the extent of outbreak at the facility as universal testing has not been accomplished within the timeline necessary to accurately identify the extent of the outbreak.

WHEREAS, since April 24, 2020, the Merced County Department of Public Health (MCDPH) has received report of 358 confirmed cases of COVID-19 and eight (8) deaths attributed to COVID-19 linked to workers from the Foster Farms Livingston facility. Five (5) of the eight (8) deaths occurred in a hospital located outside of Merced County, illustrating the serious impact of the Foster Farms outbreak on healthcare systems and the community-at-large in California.
WHEREAS, in the past month, Foster Farms has experienced an increase of 214 reported cases of COVID-19 positive workers and six (6) deaths. Weekly reports from Foster Farms indicate the outbreak has continued since the initial reported outbreak on June 29, 2020.

WHEREAS, to-date, there has been insufficient timely testing of Foster Farms workers to assess the true extent of cases at the facility. Without accurate information on the number of cases, it is not possible to properly identify workers who require testing and/or quarantine because of exposure to the virus. This is hampered by the difficulty of testing and monitoring a growing temporary workforce. Hospital data on current hospitalizations and mortality has been slowly reported to MCDPH, further complicating decisive interventions that would allow a safe production process to continue at the facility.

WHEREAS, the Merced County Health Officer issued Directives to Foster Farms on August 5, 2020 and August 11, 2020, providing specific direction on testing requirements and other measures to control the spread of COVID-19 within the Livingston building. In summary, these Directives required immediate COVID PCR testing of all permanent, volunteer, and temporary employees who share air within a facility that has an outbreak (three or more individuals within the same building). Once an outbreak is initiated within a building, the outbreak is not considered resolved until the building reports zero additional cases for two consecutive weeks, or until universal testing of the building within the previous three (3) day period, reveals less than 1% positivity rate within the workforce.

WHEREAS, in response to the previous Merced County Health Officer Directives, Foster Farms has not implemented the required universal testing of the entire Livingston Complex, as directed. Over the three-week period since the August 5, 2020 directive was issued, the spread of disease within the facility has not been contained and active outbreaks continue to spread, creating a public nuisance as defined by California Penal Code 370 and Civil Code 3479, and posing a great risk to the health and safety of Merced County residents and the surrounding counties. Given the current epidemiological data, the slowness in testing workers, and the time necessary to complete comprehensive contact tracing and quarantine those who are exposed, partial closure of the facility for timely, universal testing of all workers and sanitation is necessary.

WHEREAS, based on the increasing number of positive COVID-19 cases at the Foster Farms Livingston Facility, the mounting death rates, the delay in implementation of a comprehensive testing scheme, the need for comprehensive contact tracing and quarantine of those exposed, decisive intervention is essential to control the COVID-19 outbreak. It is imperative that the Merced County Health Officer issue this Order to protect and preserve the health of workers at the Facility and residents of Merced County, surrounding counties, and the State of California.

Under the authority of California Health and Safety Code Sections 101040, 101085, 120175; California Government Code Sections 8610, 8630, and 8634; Article XI of the California Constitution; Title 17 California Code of Regulations Section 2501; and Merced County Code Chapter 2.72, the Health Officer of the County of Merced ("Health Officer") Orders Foster Poultry Farms A Corp (Foster Farms):
1. **Livingston Plant** (including, but not limited to, Food Service Operations, Livingston Plant 1, Livingston Plant 2, Livingston Retail Packaging, Livingston Weigh and Price, and Livingston Rotis Room) located at 843 Davis St., Livingston, CA 95334: To cease all operations within twelve (12) hours of issuance of this Order including any and all on-site manufacturing, transportation, processing, food service, packing, administrative, and/or other similar operations within Livingston Plant for the purposes of deep cleaning and testing all workers (permanent, temporary, contract, volunteer, and other) for clearance (as defined as two (2) negative PCR COVID-19 tests taken at least three (3) days but no more than seven (7) days apart), and implementing other measures in compliance with this Order. Foster Farms is further required to direct its agents, employees, officers, and others acting on its behalf, as well as subsidiaries, affiliates, and other entities controlled by Foster Farms, in such a manner as to ensure the closure of the entire Livingston Plant and that Livingston Plant on-site operations cease and resume only in accordance with this Order.

   a. Once Foster Farms accomplishes the requirements of this Section to the satisfaction of the Merced County Public Health Officer and/or Health Officer designee (MCDPH contact), Foster Farms may be able to resume operations at the Livingston Plant facility.

   b. No worker may return to work at the Livingston Plant until they have received two (2) negative PCR COVID-19 tests taken at least three (3) days but no more than seven (7) days apart.

2. **NCDC 2** located at 843 Davis St., Livingston, CA 95334: will be allowed to remain open and operational despite active outbreak status due to the ability to maintain at least six (6) foot social distancing within the workplace and a lower worker density within the facility, if:

   a. Foster Farms enforces 6 feet of social distancing between workers at NCDC 2;

   b. The current break room(s) are closed and Foster Farms provides an alternative, appropriate break space that can accommodate and ensure social distancing (that is actively monitored); and

   c. Foster Farms to provides food provisions, accommodating dietary needs to its workers to preventing the need for kitchen facilities for all workers with the facility until outbreak is cleared from NCDC 2 facility;

   d. Items 2(b)-(c) shall remain in place until the facility is cleared, defined as <1% positivity rate of the entire workforce at the NCDC 2, tested same day, for 2 rounds of testing, three (3) days apart. If testing positivity rate is greater than 1%, testing must be continued every three (3) days until outbreak is cleared.

3. **All Other Facilities** located at 843 Davis St., Livingston, CA 95334 and 1000 Davis St., Livingston, CA 95334: can remain open and operational, if:

   a. All employees (permanent, temporary, contract, volunteer, and other) are tested immediately and every seven (7) days thereafter until Livingston Complex is cleared from outbreak. If testing positivity rate is greater than 1%, testing must be increased to every three (3) days.
4. Conduct a terminal cleaning of the entirety of the Livingston Complex through a qualified cleaning agency either during facility closure or within seven (7) days of the issuance of this Order. Ensure that high-traffic areas and high-touch areas are disinfected following CDC guidelines:
https://www.cdc.gov/coronavirus/2019-ncov/community/dischettng-building-facility-.html and

5. The following COVID-19 line lists of data, at a minimum and as required by MCDPH, shall be reported to the MCDPH contact directly in a format determined by MCDPH and at intervals determined by MCDPH, but at no time less often than two times each week on Tuesdays and Fridays by 12:00PM:
   a. Worker full name, date of birth, gender, race, phone number, county of residence, job title, location in facility/assigned department, unit/shift (e.g., day, night, swing), if the individual works in another facility/location and name of the other facility, positive test date, last day worked, symptom start date (note if asymptomatic), testing location, if worker was tested due to part of mandated response testing, type of test used (e.g., PCR, antigen), return to work date, if worker was hospitalized due to illness, hospitalization date, if worker died due to illness (if yes, immediately e-mail the MCDPH contact), date of death, number of close contacts sent home/teleworking due to exposure, and if the case was a close contact to another index/case in the facility.
   b. The full laboratory testing line list data (including on-site testing), at a minimum, shall be reported to the MCDPH contact directly in a format and at intervals determined by MCDPH, including worker full name, date of birth, phone number, address of residence, county of residence, test result, and test date. Submission via the CalREDIE system alone will not be accepted.

6. Immediately upon issuance of this Order, a COVID-19 Mitigation Plan for the entire Livingston Complex is required to be prepared and submitted to and approved by the MCDPH contact and shall include continued proper COVID-19 worker medical screening, symptom-based testing, and testing of new hires and temporary workers, including the following:
   a. Permanent employees, temporary workers, contract workers, and/or volunteers that present with a positive COVID-19 test result shall be sent home from work for the required quarantine period and follow MCDPH, California Department of Public Health (CDPH), and CDC requirements and guidance. Workers who refuse or are unable to be tested as directed by MCDPH should be quarantined at home for 14 days, and shall not be allowed to work during the isolation period as defined by CDC:
   b. Workplace contact tracing shall be conducted by Foster Farms within 24 hours of notification of a positive employee. Close contacts, is defined as being within six
(6) feet for more than 15 minutes during the case’s infectious period to positive workers. Close contacts shall be sent home from work for a 14-day quarantine period. The infectious period begins 48 hours prior to development of symptoms. For the purposes of contact tracing of individual who were asymptomatic and tested positive, the infectious period commences 48 hours prior to the day the sample was collected.

c. Temporary workers, permanent employees, contract employees, and/or volunteers will not be allowed to begin work without submitting proof to Foster Farms of a COVID-19 negative point-of-care antigen or PCR test result dated same day before start of work up to 48 hours before the start date.

d. Symptom-based testing is required when a permanent employee, temporary worker, contract worker, and/or volunteer presents with any one of the COVID-19 symptoms described by the CDC in the following guidance: https://www.cdc.gov/coronavirus/2019-ncov/symptoms-testing/symptoms.html. Immediately upon notice to or observation by Foster Farms of any one of the COVID-19 symptoms by any worker at the site, testing of the worker shall immediately occur by either PCR or point-of-care antigen testing, or other Health Officer approved testing method, and results shall be obtained within 24-48 hours.

e. When there is a COVID-19 outbreak of three (3) permanent employees, temporary workers, contract workers, and/or volunteers in any building, or area that shares the same air supply, all individuals who had worked in the area during the potential outbreak period (within 48 hours prior to the onset of symptoms of a positive employee throughout the duration of the outbreak) must be tested for COVID-19 by PCR immediately and every seven (7) days thereafter until the building reports zero additional cases for two consecutive weeks, or until universal testing of the building reveals less than 1% positivity rate within the workforce.

f. The employer is responsible for ensuring all workers, including temporary workers, permanent employees, contract employees, and/or volunteers, are offered and provided COVID-19 testing at no cost to the employee.

7. As soon as practical, but no less than 14 days of issuance of this Order, expand the on-site Occupational Health program and clinic, consisting of a designated licensed medical or nursing professional and liaison for MCDPH to ensure and oversee proper COVID-19 worker medical screening processes, contact tracing, case investigation and referral to health care provider as needed, accurate data collection and reporting of all workers tested, reporting of all COVID-19 positive results regardless of county of residence, immediate notification of COVID-19 related hospitalizations to the MCDPH contact and CalOSHA, immediate reporting of COVID-19 related deaths to the MCDPH contact and CalOSHA, data quality assurance verification protocol, and the implementation of adequate COVID-19 surveillance testing and reporting to the MCDPH contact, as approved by MCDPH. These requirements are subject to review and supervision by MCDPH to ensure adequate procedures and practices are implemented.

8. Foster Farms management shall ensure that all employees be informed of testing requirements, outbreaks that occur, areas affected, and trained on safety requirements, in English, Spanish, and Punjabi, working with the union as applicable.
9. Provide proper face coverings at no cost to all contract employees, permanent employees, temporary workers, and/or volunteers prior to each shift, and if a replacement is needed during a shift, and require use as directed in the Merced County Health Officer Order.


11. This Order is issued in accordance with, and incorporates by reference, the: March 4, 2020 Proclamation of a State of Emergency issued by Governor Gavin Newsom; March 12, 2020 Executive Order N-25-20 and March 19, 2020 Executive Order N-33-20, each issued by Governor Newsom ordering all state residents to heed any orders and guidance of state and local public health officials with respect to COVID-19; May 4, 2020 Executive Order N-60-20 issued by Governor Newsom ordering various protocols and reaffirming the existing authority of local health officers to establish public health measures that are more restrictive or additional to statewide directives; Government Code section 8567(a); the March 13, 2020 Declaration of Local Health Emergency in Merced County pursuant to Health and Safety Code section 101080; the March 13, 2020 Proclamation of Local Emergency pursuant to Government Code section 8630 and Merced County Code section 2.72.060; the March 16, 2020 Resolutions of the Board of Supervisors of the County of Merced ratifying the Local Emergency and Local Health Emergency; and the California Department of Public Health, Cal/OSHA, and the California Department of Food and Agriculture jointly issued Industry Guidance for Food Packing and Processing updated on July 29, 2020 and any future dated updates.

12. Violation of this Order by Foster Farms is a misdemeanor punishable by fines up to $1,000 per day, imprisonment of 90 days, or both. Violation also subjects Foster Farms to civil enforcement actions including injunctive relief, attorneys’ fees and costs. A violation of this Order constitutes a public nuisance. (Health and Safety Code Sections 120275 and 120295; Penal Code Sections 19 and 370; Government Code Sections 25132 and 8665; Merced County Code 2.72.100)

13. Pursuant to Government Code Sections 26602 and 41601 and Health and Safety Code Sections 101029, the Health Officer requests that the Sheriff and all chiefs of police in the County ensure compliance with and enforce this Order.

14. Copies of this Order shall promptly be: (1) made available at the County Administration Building at 2222 M Street, Merced, California 95340; (2) and provided to any member of the public requesting a copy of this Order.
NOTICE OF RIGHTS

1. If you object to this order, you have a right to arrange for your own legal representative.
2. You have a right to also file for judicial relief to seek release from the order.
3. All requests to contact the County Health Officer will be through Merced County Department of Public Health at 209-381-1203 during normal business hours.

Salvador Sandoval, MD, MPH  
Merced County Health Officer  
Dated: August 26, 2020  
Time: 2025 hr.
RURAL COMMUNITY WORKERS ALLIANCE
and JANE DOE,

Plaintiffs,

v.

SMITHFIELD FOODS, INC. and SMITHFIELD
FRESH MEATS CORP.,

Defendants.

IN THE UNITED STATES DISTRICT COURT
FOR WESTERN DISTRICT OF MISSOURI

PLAINTIFFS' SUGGESTIONS IN OPPOSITION TO SMITHFIELD'S EMERGENCY
MOTION TO DISMISS
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I. INTRODUCTION

Plaintiffs seek a straightforward and uncontroversial remedy: an order from this Court that pursuant to Missouri’s “stay at home” order, Defendants Smithfield Foods, Inc. and Smithfield Fresh Meats Corp. (together, “Smithfield”) must operate their Milan, Missouri plant (the “Plant”) consistent with Centers for Disease Control (“CDC”) guidance, including guidance issued by the CDC this weekend regarding the operation of slaughterhouses and meatpacking plants during the COVID-19 pandemic, Dkt. No. 29-5 (collectively, “CDC guidance”). Consistent with the purpose of that guidance, and with the support of a range of public health experts, Plaintiffs argue that Smithfield’s failure to comply with this guidance poses an urgent and ongoing threat to Plant workers, their community, and to the nation, including the food supply, which would be threatened further if the Plant experienced an outbreak like those that have emerged at other Smithfield plants.

Smithfield’s Motion to Dismiss (“Smithfield Br.”), Dkt. No. 29, does not argue that Plaintiffs have not pled the elements of their state law claims for public nuisance and breach of the duty to provide a reasonably safe workplace. Smithfield also does not argue they are somehow free to ignore Missouri’s “stay at home” order or the CDC guidance that it incorporates. Instead, Smithfield asks this Court to step back and wait to adjudicate this case and protect public health and safety because it is possible that the federal Occupational Safety and Health Administration (“OSHA”) or the Missouri Department of Health and Senior Services (“MDHSS”) may, at some future point, decide to step in.

No law or doctrine prohibits this Court from addressing the urgent risks posed by Smithfield’s operation of the Plant in a manner inconsistent with CDC guidance. Missouri courts have long allowed private plaintiffs to go to court to seek abatement of public nuisances that may cause harm to the public health, Scheurich v. Sw. Missouri Light Co., 84 S.W. 1003, 1007 (Mo. 1905).
Ct. App. 1905), and to seek injunctions for breaches of the duty to provide a reasonably safe workplace, *Smith v. W. Elec. Co.*, 643 S.W.2d 10, 13 (Mo. Ct. App. 1982). This case is consistent with those bedrock principles of Missouri tort law. The doctrines of primary jurisdiction and *Burford* abstention do nothing to change that tradition.

There is also nothing to wait for. OSHA and MDHSS have already acted by pointing to the CDC guidelines as the standards that employers should follow to prevent further spread of COVID-19. Those standards have recently become even more specific and undeniable pursuant to recommendations issued by CDC and OSHA to protect workers at poultry and meat processing facilities from the disease. *See* Dkt. No. 29-5.¹ Plaintiffs allege that Smithfield’s failure to follow those guidelines violates Missouri common law and requires injunctive relief. The Court need not defer to agencies who have said all they need to say on this matter to resolve Plaintiffs’ claims. This is all the more true because neither OSHA nor the MDHSS is engaged in enforcement of the CDC guidance within the Milan plant and OSHA and Missouri’s public statements establish they will not enforce these essential rules.

This litigation and the Court’s Order of April 26, which required Smithfield to comply with CDC guidance pending a hearing on Plaintiffs’ motion for a preliminary injunction, *see* Dkt. No. 20, have already resulted in concrete improvements at the Milan Plant. New social distancing protocols and mask-wearing requirements, announced for the first time on April 27, are already making workers and the surrounding community safer than they were before. Supplemental Declaration of Jane Doe ("Second Doe Decl.") ¶¶ 6-8. These changes also put the

¹ Importantly, this new guidance calls for many of the same reforms recommended in Dr. Robert Harrison’s declaration in support of Plaintiffs’ Motion for Preliminary Injunction. Dkt. No. 3-4.
lie to Smithfield’s prior representations to the Court that they were already in compliance when Plaintiffs filed suit. Smithfield Br. 3.

There remains much more that Smithfield must do to comply with the CDC guidance and ensure the Plant can remain open without the disastrous spread of COVID-19 that has forced other plants to close. Dismissing this action now in hopes of enforcement by OSHA and/or MDHSS, when both have indicated enforcement action is not forthcoming, undermines basic rights and threatens the safety of the Nation. Neither law nor logic suggests such a result.

II. FACTUAL BACKGROUND

Smithfield’s argument that the Court need not order the requested relief because, so far, there are no confirmed cases of COVID-19 among workers at the Plant and relatively low numbers of cases in surrounding counties compared to other parts of the state misses the point. Smithfield Br. 3-4. Most importantly, “confirmed cases” is a peculiar standard on which to rely, because workers have already shown symptoms, Dkt. No. 3-5 ¶ 4 (“First Doe Decl.”) (identifying at least 8 workers with symptoms), and Smithfield continues to refuse to offer the workers testing, Second Doe Decl. ¶ 13. A public health and slaughterhouse expert explains to the Court that without the relief requested here, spread of the disease in the Plant is “inevitable.” E.g., Declaration of Dr. Melissa Perry (“Perry Decl.”) ¶¶ 9-10, 32.

Without Court intervention, Milan will likely join a long line of slaughterhouses around the country to become the source of a virus cluster. This morning, Smithfield’s packing facility in Clinton, North Carolina reported two new positive cases.² Just this past Monday, Crete, Nebraska officials stated Smithfield’s plant there would be closed because of an outbreak

(although it now appears Smithfield may be keeping that plant open despite the health and safety concerns). 3 Last week, a report examining meat and poultry plants determined that 150 such plants are located in counties that have an infection rate higher than 75% of the United States. 4 Plaintiffs filed this suit seeking solely injunctive relief to bring the Plant into compliance with existing public health guidance so that it could remain in operation, and so that the residents of the surrounding counties would not join the list of other rural areas that have turned into COVID-19 hot spots because they are home to meat processing facilities.

Plaintiffs’ efforts to enforce Missouri law appear to be working already. In response to the suit, this Court Ordered Smithfield on April 26 to “comply with all guidance from CDC and other public authorities.” Dkt. No. 20, at 3. Then, on April 27, a new sign appeared in the plant stating that masks must be worn at all times. Second Declaration of Axel Fuentes (“Fuentes Decl.”) ¶¶ 4-5 & Ex. A. That same day, another new sign provided an updated protocol for clock-in and clock-out procedures to permit greater social distancing. Id ¶ 6; Second Doe Decl. ¶ 7.

However, Smithfield’s Milan workers remain without some basic protections. They continue to stand shoulder-to-shoulder on the line. Second Doe Decl. ¶ 5. Hallways, restrooms, and break areas remain crowded, with workers “regularly closer than 6-feet apart.” Id. ¶ 9. Smithfield has failed to provide handwashing breaks or allow workers to step off the line to blow

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4 Kyle Bagenstose, Sky Chadde & Matt Wynn, Coronavirus at meatpacking plants worse than first thought, USA TODAY investigation finds: Coronavirus closed Smithfield and JBS meatpacking plants. Many more are at risk. Operators may have to choose between worker health or meat in stores, USA TODAY (Apr. 22, 2020), https://www.usatoday.com/in-depth/news/investigations/2020/04/22/meat-packing-plants-covid-may-force-choice-worker-health-food/2995232001/.
their noses. *Id.* ¶ 10. Smithfield’s actual enforcement of its stated mask policy appears non-existent. *Id.* ¶¶ 3-4. Smithfield provides no paid sick leave and encourages workers to come in sick. *Id.* ¶¶ 12, 15. And Smithfield has not provided for testing or any system of contact tracing. *Id.* ¶ 13. These facts remain contrary to what Dr. Robert Harrison, Dr. Melissa Perry, and the CDC explain is necessary to keep the Plant from becoming an incubator for disease. See Declaration of Dr. Robert Harrison (“Harrison Decl.), Dkt. No. 3-4. In fact, Dr. Perry explains that immediately correcting these conditions is both practical and essential. Perry Decl. ¶¶ 8-32.

III. ARGUMENT

A. The Court Should Not Exercise Its Discretion to Apply the Primary Jurisdiction Doctrine Where the Relevant Federal Guidance Has Already Been Issued and the Only Question Is Its Enforcement, Which OSHA Has Disclaimed.

Primary jurisdiction “is to be ‘invoked sparingly, as it often results in added expense and delay.’” *Alpharma, Inc. v. Pennfield Oil Co.*, 411 F.3d 934, 938 (8th Cir. 2005) (quoting *Red Lake Bank of Chippewa Indians v. Barlow*, 846 F.2d 474, 477 (8th Cir. 1988)). The district court should dismiss a case and refer a matter to a federal agency pursuant to the primary jurisdiction doctrine only where “the parties would not be unfairly disadvantaged.” *Reiter v. Cooper*, 507 U.S. 258, 268-69 (1993). This is not such a case.

Here, Jane Doe and her coworkers, including many Rural Community Workers Alliance (“RCWA”) members, as well as the communities where they live, have already benefitted from the changes instituted at the Plant in response to this Court’s Order. Plaintiffs would be unfairly disadvantaged if the Court withdrew its supervisory presence, which ensures that Smithfield will continue complying with applicable OSHA and CDC guidance. This is particularly the case where Smithfield relies entirely on an “informal” letter they have received from OSHA, that cannot and—based on OSHA’s statements—will not result in federal enforcement. Declaration

1. Plaintiffs' Claims Do Not Involve OSHA Expertise.

The Eighth Circuit explains that a core objective of this prudential doctrine is to take advantage of "agency expertise," Alpharma, 411 F.3d at 938, but here, Plaintiffs ask the Court to consider claims that call for judicial, not administrative, resolution. Plaintiffs' public nuisance claims seek a remedy against business operations that cause a harm to the public generally. OSHA's jurisdiction focuses on the workplace. It has no authority to promulgate standards to protect the general public. Steel Inst. of N.Y. v. City of New York, 716 F.3d 31, 33 (2d Cir. 2013) ("the Act does not protect the general public, but applies only to employers and employees in workplaces"); accord Michaels Decl. ¶ 8; Rosenthal Decl. ¶ 5. And although Missouri's cause of action for violation of the right to a safe workplace certainly relates to occupational safety, that claim has long formed the basis for injunctive relief in court, even subsequent to the creation of OSHA in 1970. See, e.g., Smith v. W. Elec. Co., 643 S.W.2d 10, 12-13 (Mo. App. 1982).

Plaintiffs bring claims under state common law doctrines that OSHA's regulatory scheme does not displace, and there is no reason for this Court to defer to the primary jurisdiction of OSHA before resolving those claims. See 29 U.S.C. § 653(b)(4); United Steelworkers of America v. Marshall, 647 F.2d 1189, 1235-36 (D.C. Cir. 1980) (OSHA leaves "state schemes wholly intact as a legal matter"). In fact, primary jurisdiction is not applicable where plaintiffs do not seek to

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5 The Missouri court expressly rejected an argument that it should defer and allow OSHA to address the problem because it could not identify an "OSHA standard which would appear to cover tobacco smoke." Smith, 643 S.W.2d at 14. Similarly, OSHA "has not adopted a specific standard that protects employees from the risks of infectious disease like COVID-19." Michaels Decl. ¶ 10.
enforce a federal statute or regulation but bring “an independent state law cause of action for negligence and strict liability.” Ryan v. Chemlawn Corp., 935 F.2d 129, 132 (7th Cir. 1991).

Allowing Plaintiffs claims to proceed will also further national “consistency”—the other rationale for primary jurisdiction—because any relevant OSHA activity has already occurred, and the Court already has the benefit of the agency’s “expertise.” See Alpharma, 411 F.3d at 938.

In particular, OSHA, in conjunction with the CDC, has published detailed guidelines on how to mitigate the spread of COVID-19 in meat processing facilities. Dkt. No. 29-5 (guidance). Plaintiffs simply request that the Court require Smithfield to comply with those guidelines, as Drs. Harrison and Perry recommend. Eighth Circuit precedent instructs that courts should not defer to agencies under the primary jurisdiction doctrine when the court is asked to analyze what an agency has already done, not substitute its judgment as to what an agency might or should do in the future. Alpharma, 411 F.3d at 939 (“The question of whether Pennfield’s BMD has been approved as safe and effective is much different from the question of whether Pennfield’s BMD should be approved as safe and effective, and it is only the latter that requires the FDA’s scientific expertise.”); see also Illinois Pub. Interest Research Grp. v. PMC, Inc. Through PMC Specialties Grp., 835 F. Supp. 1070, 1076 (N.D. Ill. 1993) (declining to defer to agency’s primary jurisdiction where the court was not being asked to set standards but merely “to enforce existing standards”); Segedie v. Hain Celestial Grp., Inc., No. 14-5029, 2015 WL 2168374, at *13 (S.D.N.Y. May 7, 2015) (declining to defer to agency’s primary jurisdiction where the “claims seek to hold Defendant to existing regulations, not proposed regulations”).

2. There Are No Relevant OSHA Proceedings.

Further, there is no administrative activity to which the Court could defer—as is necessary for the primary jurisdiction doctrine to apply. See, e.g., Natural Res. Def. Council v.
Metro. Water Reclamation Dist. of Greater Chi., No. 11-02937, 2016 WL 1298124, at *4 (N.D. Ill. Mar. 31, 2016) (holding primary jurisdiction doctrine does not apply because defendant did “not identify with precision any relevant proceedings to which this Court should defer for the resolution of the question presented.”). Smithfield argues that an April 22 letter from OSHA’s regional administrator suggests that “OSHA is already in the process of exercising its jurisdiction at the Plant.” Smithfield Br. 1. But that letter responds to a specific workplace injury that occurred on April 15 and says nothing about COVID-19. Dkt. No. 29-2. The sole reference to the virus appears in a generic COVID-19 questionnaire following a more specific questionnaire addressing the April 15 incident. Id.

Moreover, the April 22 letter represents an inquiry, not an inspection, and does not suggest an inspection is imminent. It is conceivable that under OSHA’s regulatory regime this written exchange of information, called an investigation, could lead OSHA to request an in-person inspection. Michaels Decl. ¶¶ 15-16. However, the interim guidance OSHA has issued for its administrators during the pandemic makes this unlikely; OSHA has expressly stated its policy is not to inspect meat packing plants. Michaels Decl. ¶¶ 13-14; Rosenthal Decl. ¶ 13; see also Dkt. No. 29-4 (guidance). An inspection is a prerequisite to any OSHA action that could require a workplace to abate unsafe conditions. 29 U.S.C. § 658(a); see also Michaels Decl. ¶ 15; Rosenthal Decl. ¶ 14. Furthermore, if such an inspection did occur, it could in turn lead to a

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6 Indeed, Dr. Michaels, the longest serving head of OSHA in its history, and a current scholar on its practices states that throughout the crisis “OSHA has failed to enforce any of its limited requirements that could conceivably protect meatpacking workers from illness.” Michaels Decl. ¶ 8; see also id. ¶¶ 10, 12 (explaining OSHA’s only potentially applicable standards leave their implementation to the discretion of the employer and that OSHA has not taken any steps to make them mandatory in response to COVID-19). See also Rosenthal Decl. ¶¶ 10-12 (stating substantially the same).
citation issued anytime in the next six months, which would then be reviewable by the independent Occupational Safety and Health Review Commission before it could be enforced. 29 U.S.C. § 658(c), 659(c); see also Michaels Decl. ¶¶ 16-17; Rosenthal Decl. ¶¶ 15-17.

Dr. Michaels and Anne Rosenthal, both of whom served long stints within high levels of OSHA, are of the opinion that written investigation letters like the one sent to Smithfield on April 22 rarely, if ever, lead to citations, enforcement actions, or penalties, particularly in light of OSHA’s stated non-enforcement policy against meat packing plants. Michaels Decl. ¶¶ 13-16. Rosenthal Decl. ¶¶ 11-3. Michaels and Rosenthal also opine that even if the letter did lead to an inspection and to any kind of enforcement on a reasonable timeline, none of the specific OSHA standards spelled out on page 13 of Smithfield’s motion would be sufficiently strong to allow OSHA to enforce the CDC guidelines, even the guidelines that OSHA has helped to promulgate. Michaels Decl. ¶¶ 10-12; Rosenthal Decl. ¶¶ 8-9.

Smithfield argues that the Department of Labor could seek an emergency injunction to enforce OSHA standards even absent an inspection, but that argument is belied by statute and Supreme Court and Eighth Circuit law. 29 U.S.C. § 662(c) (noting that the Secretary of Labor will request an injunction only in response to a recommendation from an in-person inspector); Whirlpool Corp. v. Marshall, 445 U.S. 1, 8-9 (1980) (explaining that OSHA’s emergency injunction process begins with an inspection); N.L.R.B. v. Tamara Foods, Inc., 692 F.2d 1171, 1181 (8th Cir. 1982) (same). Furthermore, Smithfield points to no case where this power was actually used. Plaintiffs could locate only two in the entire country, neither of which was decided in the past 25 years. Reich v. Dayton Tire, a Div. of Bridgestone/Firestone, Inc., 853 F. Supp. 376, 378-79 (W.D. Okla. 1994) (Secretary issued request for injunction following multiple inspections over an eleven-month period); Marshall v. Daniel Const. Co., Inc., 563 F.2d 707,
710-15 (5th Cir. 1977) (noting that employee’s right under OSH Act is limited to requesting an inspection, and inspector’s right is limited to recommending that the Secretary seek an emergency injunction from the court in the event that dangerous conditions are found). 7

Finally, Smithfield attempts to frighten this Court with claims that the injunctive relief Plaintiffs are seeking is “truly unprecedented” because it gives Plaintiffs’ experts too much control over crafting a remedy. Smithfield Br. 14. Although some courts have declined to issue preliminary injunctive relief responding to emergency conditions caused by COVID-19, many other courts have granted such relief, even when it required detailed changes to facility operations recommended by plaintiffs and their experts. See, e.g., Fraihat v. U.S. Immigration & Customs Enf’t, No. 19-1546, 2020 WL 1932570, at *21-*29 (C.D. Cal. Apr. 20, 2020) (granting preliminary injunction mandating that ICE revisit custody determinations, including considering release for all persons in ICE detention whose age or health conditions place them at increased risk due to the COVID-19 pandemic); Esshaki v. Whitmer, No. 20-10831-, 2020 WL 1910154, at

7 Last night, the President issued an Executive Order stating that the United States Department of Agriculture (“USDA”) would be protecting worker health and safety at meat packing plants. See “Executive Order on Delegating Authority Under the DPA with Respect to Food Supply Chain Resources During the National Emergency Caused by the Outbreak of COVID-19,” The White House (April 28, 2020), https://www.whitehouse.gov/presidential-actions/executive-order-delegating-authority-dpa-respect-food-supply-chain-resources-national-emergency-caused-outbreak-covid-19/. This order does not impact these proceedings. Importantly, twice in the last six months USDA expressly disclaimed that its Food Safety and Inspection Service, which is its division that works in the plants, has any role to play in worker safety and thus any expertise on how to protect workers. USDA Brief, UFCW v. USDA, No. 19-2660, Dkt. No. 16, at 29 (D. Minn.) (“[N]or are issues of workplace safety reasonably related to FSIS’s food safety mission” (citing Dawkins ex rel. Estate of Dawkins v. United States, 226 F. Supp. 2d 750, 757 (M.D.N.C. 2002)); USDA Reply, UFCW v. USDA, No. 19-2660, Dkt. No. 24, at 15 (D. Minn.) (“[W]orker safety falls outside FSIS’s regulatory authority” and therefore USDA defers to OSHA).

Moreover, the Executive Order references OSHA guidance—not USDA promulgating any new standard—confirming that the Court already has before it whatever expertise the government can provide.

Here, where Plaintiffs’ experts’ recommendations track closely if not completely CDC guidance, including recent guidance specific to the meat processing industry, Court action will not be radical. Plaintiffs merely request the Court extend the Order it already issued and allow an inspection by Plaintiffs’ designated expert to determine whether the guidelines are being followed and if additional measures may be necessary given the particular feature of the Plant. In light of the certain crisis that will result if Smithfield continues to delay protecting its workers, it is Smithfield’s request the Court decline to act that is extraordinary. See generally Perry Decl.

B. The Court Should Not Exercise Its Discretion to Defer to State and County Health Departments That Expressly Embrace the Same CDC Guidance Plaintiffs Seek to Enforce.

With its primary jurisdiction argument, Smithfield suggests that the workplace safety issues at stake in this case are so uniquely committed to the expertise of federal OSHA that this Court should dismiss the matter and defer to OSHA. With its Burford abstention argument, Smithfield makes the entirely contradictory suggestion that the matters at stake here are so bound up with the state public health regulatory scheme that the federal courts should defer to the State of Missouri, its agencies, and its courts in this matter. Smithfield’s self-defeating Burford argument provides no basis to dismiss Plaintiffs’ claims.
With respect to *Burford* abstention, the Supreme Court has instructed that “federal courts have a strict duty to exercise the jurisdiction conferred upon them by Congress” and may decline to do so only “under exceptional circumstances.” *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 716 (1996) (citations and internal quotations omitted). The Eighth Circuit has likewise stated “*Burford* abstention applies when a state has established a complex regulatory scheme supervised by state courts and serving important state interests, and when resolution of the case demands specialized knowledge and the application of complicated state laws.” *Bilden v. United Equitable Ins. Co.*, 921 F.2d 822, 825 (8th Cir. 1990). *Burford* applies only where the state has developed a centralized “system of thorough judicial review” specific to the complex regulatory scheme at issue. *Burford v. Sun Oil Co.*, 319 U.S. 315, 325 (1943); see also *United States v. Morros*, 268 F.3d 695, 705 (9th Cir. 2001) (applying *Burford* abstention only when a state has consolidated all disputes regarding the regulatory scheme at issue into a single, designated court). This balancing of interests “only rarely favors abstention.” *Quackenbush*, 517 U.S. at 728. Where, as here, federal court jurisdiction is conferred by diversity of citizenship, even if there were “difficult or uncertain” questions of state law (and there are not) the Supreme Court has made clear that *Burford* supplies no basis to relinquish the jurisdiction Congress has conferred. *Meredith v. City of Winter Haven*, 320 U.S. 228, 234 (1943).

In lieu of actually meeting the doctrine, Smithfield suggests vaguely that “this matter should be handled by state and county public health agencies.” Smithfield Br. 17. But the fact that state and local health agencies have the authority, in theory, to enforce public health rules does not amount to a centralized “system for thorough judicial review” of disputes relating to the common law rights that Plaintiffs assert here. Instead, to enforce their rights, Plaintiffs must rely on their time-honored ability to petition a court, including a federal court where federal

The alternative to federal courts exercising their jurisdiction over cases like these is that these cases will go to state court where they are just as likely to be heard by courts without public health expertise in these matters and just as likely to yield inconsistent outcomes. Compare Burford, 319 U.S. at 326 (“To prevent the confusion of multiple review of the same general issues, the [Texas] legislature provided for concentration of all direct review of the Commission’s orders in the State district courts of Travis County.”).

Furthermore, although state courts may have jurisdiction to hear Plaintiffs’ claims, Burford abstention is only appropriate “[w]here timely and adequate state-court review is available.” New Orleans Pub. Serv., Inc. v. Council of City of New Orleans, 491 U.S. 350, 361 (1989); Univ. of Maryland at Baltimore v. Peat Marwick Main & Co., 923 F.2d 265, 271 (3d Cir. 1991). In this case, remanding this issue to state court would require delay that Plaintiffs and the public generally cannot afford.

The Court’s exercise of its jurisdiction here likewise “would [not] disrupt a state administrative process.” Heartland Hosp. v. Stangler, 792 F. Supp. 670, 672 (W.D. Mo. 1992) (quoting Cty of Allegheny v. Frank Mashuda Co., 360 U.S. 185, 189 (1959)). It may be true that public health agencies in Missouri have expertise regarding public health matters and have a responsibility for exercising public enforcement. But the “exceptional circumstances” warranting abstention apply only where the party seeking abstention can point to a specific state administrative process that will be disrupted by the federal proceedings. Caranchini v. Kozeny &
Smithfield identifies no such process here.  

Assuming there was a special forum to which the Court could defer (and there is not), there is also no reason to defer as nothing in Missouri’s law of public nuisance or its right to a safe workplace tort is “particularly complicated,” and the Court’s exercise of its jurisdiction here would not frustrate Missouri’s interest in managing public health issues. Doe v. McCulloch, 835 F.3d 785, 788 (8th Cir. 2016) (declining to apply Burford abstention to question of Missouri state law). Aside from general principles of Missouri tort law, the only state law at issue here is the “stay at home” order issued by the Governor in March. That already-promulgated order provides a relatively straightforward mandate. It includes multiple references to “CDC guidance,” Dkt. No. 29-1 (“stay at home” order), and makes the same recommendations regarding social distancing, even for essential businesses that must remain open, that the CDC and OSHA have emphasized in their guidance documents, including guidance documents specific to the meat processing industry, see Dkt. No. 29-4. An established state regime that actually relies on federal guidance, which is what Plaintiffs seek to enforce, is not a basis for Burford abstention.

Smithfield seeks to manufacture a complex question by pointing to language in the “stay at home” order that designates meatpacking Plants as essential operations that should stay open.

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8 It bears mentioning that Missouri’s attorney general saw no need to defer or to litigate in state court because of the “active involvement” of state and local public health agencies, See Smithfield Br. 17. He filed a lawsuit in federal district court against the People’s Republic of China, asserting Missouri common law claims of public nuisance. Missouri v. The People’s Republic of China, No. 20-99, Compl., Dkt. No. 1 (E.D. Mo.). The chief law enforcement officer of the state properly concluded that the federal interests in “in affording foreign litigants a neutral forum for the adjudication of state law claims against them” outweigh any state law interests regarding coherent application of its public nuisance doctrine. See Cleveland Hous. Renewal Project v. Deutsche Bank Tr. Co., 621 F.3d 554, 568 (6th Cir. 2010).
and suggesting Plaintiffs’ request that Smithfield provide for social distancing would prevent Smithfield from operating. Smithfield Br. 17. Not so. Plaintiffs do not seek to close the Plant. Smithfield and its workers can continue operations while complying with social distancing requirements. In fact, that may be the only way that Smithfield can operate the Plant safely. Dr. Perry, an occupational health and safety professor and past president of the American College of Epidemiology, states that in her professional opinion, workers on meat production lines must stand at least six feet apart in order to perform their jobs safely during the current pandemic. If they do not, disease will spread in the Plant and into the surrounding community. Perry Decl. ¶¶ 9-13 ("Without social distancing, it is my expert opinion that the spread of COVID-19 in slaughterhouses and meat packing plants is inevitable."). Requiring social distancing in this case, therefore, would not be “disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern,” Wolfson v. Mutual Benefit Life Ins., 51 F.3d 141, 144 (8th Cir. 1995). Smithfield fails “to prove that the exercise of federal jurisdiction would in any way frustrate the state’s interests on the facts of this case” as is necessary for Burford abstention. Melahn v. Pennock Ins., Inc., 965 F.2d 1497, 1507 (8th Cir. 1992).

IV. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court deny Smithfield’s motion to dismiss.
April 29, 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
A federal safety inspector tipped off a coronavirus-tainted Pennsylvania meatpacking plant before visiting the next day — then failed to issue a citation, according to testimony in a lawsuit accusing the agency of failing to do its job.

The inspector said notifying a plant before an inspection wasn’t typical practice for the Occupational Safety and Health Administration, but that she was told to do it by her supervisors for her own safety, according to a court transcript.

“OSHA has a right to protect their employees also,” she said when pressed by a federal judge at a hearing.

Three anonymous workers at the Maid-Rite plant in Dumore claim the regulator failed to respond to complaints that they were forced to work shoulder-to-shoulder and weren’t provided with masks or breaks to wash or sanitize their hands. That was after another worker told OSHA “about half the plant is out sick.”

The coronavirus rampaged through U.S. meatpacking plants this spring, sickening thousands of employees in more than 200 facilities.

A plant manager at Maid-Rite said by phone late Friday that no one was available to comment.

In response to the Labor Department’s request for dismissal of the suit, lawyers for the workers said in a filing Friday that the pre-planned visit defeated the purpose of surprise inspections.
The advance notice mattered. Workers report that in anticipation of the inspection, Maid-Rite made changes to hide the extent of its unsafe working conditions, spacing workers further along production lines,” according to the filing. “After the inspection, workers were once again forced to work immediately next to each other, sometimes touching.”

They want the court to order OSHA to take steps to declare the plant an imminent danger or conduct a prompt, unannounced on-site inspection of the facility.

The Labor Department argued last month that workers failed to prove an imminent hazard existed and warned that if the court gives the workers what they seek, an “avalanche” of worker suits could follow.

The AFL-CIO sued OSHA earlier in the pandemic to put emergency safety standards in place. The U.S. Court of Appeals in Washington rejected the union’s request.

The agency has received more than 7,000 complaints since the start of the pandemic, but has only issued four citations, officials said at the July 31 hearing.

OSHA didn’t respond immediately to a request for comment Friday.
IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
ST. JOSEPH DIVISION

RURAL COMMUNITY WORKERS ALLIANCE and JANE DOE,1
Plaintiffs,
v.
SMITHFIELD FOODS, INC. and
SMITHFIELD FRESH MEATS CORP.,
Defendants.

No. 5:20-CV-06063-DGK

ORDER GRANTING DEFENDANTS’ MOTION TO DISMISS

This lawsuit arises from Plaintiffs’ allegations that Defendant Smithfield Foods, Inc. and its wholly owned subsidiary, Defendant Smithfield Fresh Meats Corporation (collectively, “Smithfield”) have failed to adequately protect workers at its meat processing plant in Milan, Missouri, (“the Plant” or “the Milan Plant”) from the virus that causes COVID-19. Now before the Court are Plaintiffs’ Motion for a Temporary Restraining Order (“TRO”) and Preliminary Injunction (Doc. 3), and Smithfield’s motion to dismiss and/or stay pursuant to the primary-jurisdiction doctrine (Doc. 28).

After carefully reviewing the motions and the existing record, the Court holds that it should decline to hear this matter pursuant to the primary-jurisdiction doctrine to allow the Occupational Health and Safety Administration (“OSHA”) to consider the issues raised by this case. But even if the Court did not apply the primary-jurisdiction doctrine, the Court would not

1 The Court notes that there is currently a motion pending to allow Jane Doe to proceed using a pseudonym (Doc. 42). Given the Court’s dismissal of this action and the denial of injunctive relief, the Court finds that requiring Plaintiff to reveal her identity would serve no important purpose, especially given that another named plaintiff appears in this case. The issues presently before the Court are—for the most part—purely legal, and the majority of Plaintiff’s allegations are not individualized. Thus, the public’s interest in Plaintiff’s identity and the prejudice to Smithfield in allowing Plaintiff to proceed anonymously for purposes of deciding the instant motions is minimal. Plaintiff Doe may therefore use a pseudonym for purposes of the motions presently before this Court. This Court reserves judgment on her ability to do so should this case proceed to further stages of litigation.
issue a preliminary injunction because Plaintiffs have not met their burden of proving that the extraordinary remedy of an affirmative injunction is justified. Smithfield’s motion is GRANTED, and the case is DISMISSED WITHOUT PREJUDICE.

**Background**

The Background section of this order is arranged in chronological order. Although regrettably lengthy, it details how the regulatory environment in which meat-processing plants operate is constantly changing during this unique national emergency.

In late 2019, a new coronavirus emerged named severe acute respiratory syndrome coronavirus 2 (SARS-CoV-2). This virus causes coronavirus disease 2019 (COVID-19), a respiratory illness that can cause serious health problems, including death. SARS-CoV-2 is highly contagious; it appears to spread from person to person through respiratory droplets produced when an infectious person coughs, sneezes, or talks, and the virus can be spread by presymptomatic, or even asymptomatic, individuals.

A global pandemic ensued, and the virus and COVID-19 reached the United States in early 2020. On March 13, 2020, the President declared a national emergency concerning COVID-19. That same day, Missouri’s governor also declared a state emergency, and on April 3, the Missouri Department of Health and Senior Services issued a stay-at-home order that mandated all individuals abide by social-distancing requirements and closed all nonessential

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3 Id.

4 Id.
businesses in Missouri through May 4. The stay-at-home order defines essential businesses in accordance with guidance from the U.S. Department of Homeland Security, Cybersecurity & Infrastructure Security Agency ("Homeland Security"), which identified livestock-slaughter facilities, including the Plant and its operations, as "critical infrastructure." On April 9, the Centers for Disease Control ("CDC") published *Interim Guidance for Businesses and Employers to Plan and Respond to Coronavirus Disease 2019 (COVID-19)*, which outlined several policies and procedures employers should implement to help prevent workplace exposure and community spread of the virus.

On April 22, OSHA sent Smithfield a "Rapid Response Investigation" requesting information regarding its COVID-19 work practices and infection at the Milan Plant, giving Smithfield seven days to respond. As part of its inquiry, OSHA requested information about Smithfield’s COVID-19 practices including what, if any, personal protective equipment has been given to its workers, what engineering controls have been implemented, what contact tracing methods have been employed, and what policies have been changed or implemented in light of the pandemic (Doc. 29-2). Smithfield responded on April 29 (Doc. 41).

The next day, on April 23, Plaintiffs Jane Doe and the Rural Community Workers Alliance ("RCWA") filed suit. They allege Smithfield is not taking adequate steps to prevent transmission of the virus at its Plant, thereby endangering workers and members of the surrounding community. According to her declaration, Doe is a current Smithfield employee who has worked at its Milan Plant for at least five years. She claims she currently works on the

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“cut floor” where animals are broken down into products and packaged.

The RCWA is a Missouri non-profit advocacy group whose members consist exclusively of workers in Northern Missouri. Several members of RCWA’s current leadership council work at the Plant, and sixty to seventy workers who attend its meetings work at the Plant, including Jane Doe.

Defendant Smithfield is one of the largest meat-processing companies in the world, with meat-processing plants all over the United States, including in Milan, Missouri. Several of its meat-processing plants in the United States have closed recently due to outbreaks of COVID-19 among its workers.

The Complaint (Doc. 1) alleges that several meat-processing plants in this country owned and operated by Smithfield have become major COVID-19 “hot spots.” It also alleges that in direct contravention of CDC guidelines, Smithfield has not implemented certain precautions to keep its workers and the Milan community safe from the virus. Such measures include keeping adequate distance between workers, prohibiting workers from taking a break to wash their hands or face, preventing workers from covering their faces if they need to cough or sneeze, implementing a sick-leave policy that penalizes workers for missing work even if they are exhibiting COVID-19 symptoms, and failing to implement plans for testing and contact tracing.

The Complaint brings state-law claims for public nuisance and breach of duty to provide a safe workplace. Plaintiffs are not seeking monetary damages, only declaratory judgments stating that: (1) Smithfield’s practices at the Plant constitute a public nuisance; and (2) Smithfield has breached its duty to provide a safe workplace.

The same day Plaintiffs filed suit, they also moved for a temporary restraining order and preliminary injunction (Doc. 3), seeking to force Smithfield to: provide masks; ensure social
distancing; give employees an opportunity to wash their hands while on the line; provide tissues; change its leave policy to discourage individuals to show up to work when they have symptoms of the virus; give workers access to testing; develop a contact-tracing policy; and allow their expert to tour the Plant. Attached to the motion were declarations from: (1) Jane Doe, who described working conditions at the Plant and stated she was afraid for health and safety, as well as the health and safety of the Milan community, because of what she considers inadequate safety procedures at the Plant; (2) RCWA’s Executive Director, Alex Fuentes; (3) a senior lobbyist with the non-profit organization Food & Water Watch (“FWW”), Anthony Corbo; (4) a lawyer, Thomas Fritzschke, who has interviewed a number of Alabama poultry-plant workers about working conditions and authored a 2013 report for the Southern Poverty Law Center about modern industrial slaughterhouse workers; and (5) an occupational-medicine specialist, Dr. Robert Harrison, who works as Clinical Professor of Medicine at the University of California, and also serves the California Department of Public Health.

On April 26, the Court set a videoconference hearing on the preliminary injunction motion for April 30. That same day, the CDC and OSHA issued *Meat and Poultry Processing Workers and Employers – Interim Guidance* (“the Joint Guidance”), which provided supplemental guidance to meat-processing plants concerning COVID-19. The Joint Guidance states that to reduce the risk of transmission among employees, employers at meat-processing facilities should, where “feasible,” implement engineering controls, such as staggering shifts and breaks, requiring workers to stay six-feet apart, and/or erecting physical barriers; place handwashing or hand-sanitizing stations in multiple locations and encourage hand hygiene; give workers additional short breaks to wash hands; provide tissues; and allow workers to take breaks.

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in alternative areas to ensure social distancing. It also recommends employers provide personal protective equipment for workers to use during their shift and increase the frequency of sanitization in work and common spaces. It states employers should educate employees on measures they can take to decrease the risk of spreading the virus and provides a specific list of measures employers should take to promote social distancing, such as providing visual cues on floors, as reminders for social distancing. It encourages employers to screen workers for COVID-19 by implementing temperature checks prior to entering the workplace and sending home workers who appear to have symptoms (e.g., cough, fever, or shortness of breath), and monitor workers’ contacts so they can alert anyone who may have been exposed to the virus. Finally, it recommends employers review leave and incentive policies so as to not penalize workers for taking sick leave if they contract COVID-19.

On April 27, Smithfield filed a motion to dismiss this case pursuant to the primary-jurisdiction doctrine, arguing this Court should defer to OSHA in this case. The next day—April 28—the President signed an executive order (“the Executive Order”) under § 4511(b) of the Defense Production Act (“DPA”), 50 U.S.C. § 2061 et seq., delegating authority to the Secretary of Agriculture to take all appropriate action “to ensure that meat and poultry processors continue operations consistent with the guidance for their operations jointly issued by” the CDC and OSHA.8

On April 29, Smithfield made several filings, including a supplemental brief to its motion to dismiss, which alleged that pursuant to the Executive Order, the United States Department of Agriculture (“USDA”) now had jurisdiction over this case. It also submitted its Suggestions in

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Opposition (Doc. 32) to the preliminary injunction motion. Attached to its brief as exhibit A (Doc. 32-1) is a declaration from the Plant’s general manager, Tim Messman, along with pictures of the Plant and copies of the Plant’s policies and procedures related to COVID-19. Exhibit B (Doc. 32-2) is a declaration from John Henshaw, the head of OSHA from 2001 to 2003.

Later that same day, Plaintiffs’ filed their suggestions in opposition (Doc. 35) to Smithfield’s motion to dismiss. Included in it is a declaration from Dr. Melissa Perry (Doc. 35-2), a professor of environmental health at George Washington University.

On April 30, the Court held a hearing on the motion via teleconferencing. The Court offered the parties an opportunity to introduce evidence, including witness testimony, but both parties elected to stand on the existing record. The parties then argued their respective positions.

After the hearing, the parties filed supplemental briefs. Attached to Smithfield’s brief (Doc. 46) is a supplemental declaration from Smithfield’s plant manager, clarifying Smithfield’s leave policy and updating the Court on additional safety changes at the Plant.

Plaintiffs concede that Smithfield implemented new policies and procedures after this lawsuit was filed and have narrowed their requested injunctive relief to direct Smithfield to:

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.

(Doc. 48 at 10). Plaintiffs characterize their requested relief as compliance with the Joint Guidance.

Findings of Fact

The Court gives the various declarations submitted by the parties the following
The Court gives Jane Doe’s declaration limited weight. While she has personal knowledge of conditions in those parts of the Plant in which she works, it is unclear exactly what part of the “cutting floor” she works in, and whether she can see all that she claims to see from this area. Further, it appears that some of the information in her declaration is no longer accurate due to recent changes in the Plant’s policies and procedures. For example, although her declaration may be correct that Smithfield initially told workers they would receive only one mask per week, this policy has been superseded. As discussed below, workers are now given masks every day. Finally, because her identify is unknown, there is no way to determine, through the adversarial process or otherwise, whether Doe has some bias against Smithfield that could lead her to misrepresent or exaggerate conditions at the Plant. The Court notes that at least one of her statements—that Smithfield has increased the line speed at the Plant during the pandemic—is contradicted by other, more persuasive evidence.

Mr. Fuentes’ declaration concerning working conditions at the Plant are even less reliable than Jane Doe’s, and so the Court gives them less weight. Mr. Fuentes has no personal knowledge of conditions at the Plant because he has never set foot in it. His understanding is based on hearsay from unidentified employees whose statements to him, even if accurately relayed by Mr. Fuentes, were not made under penalty of perjury. That said, the Court finds the portions of his declaration concerning RCWA’s membership and activities are credible.

The Court finds the declarations of Messrs. Corbo, Fritzsche, and Harrison are based on some relevant knowledge, education, and experience concerning working conditions in American meat-processing plants generally, and so they possess some limited insight into what

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9 Smithfield filed a motion to strike Plaintiffs’ five declarations attached to the motion for a temporary restraining order and/or preliminary injunction (Doc. 34). The Court denies the motion, since, in considering these motions, the issues it complains of go to the weight of the evidence rather than its admissibility.
steps could be taken to prevent the spread of the SARS-CoV-2 virus in a generic American meat-processing facility. Because they are unfamiliar with specific working conditions at the Plant, however, their declarations provide limited help in determining whether Smithfield’s policies and procedure at the Plant are sufficient to stem transmission of the virus.

Finally, the Court turns to the declaration of Dr. Melissa J. Perry, Professor and Chair of Environmental and Occupational Health at the Milken Institute School of Public Health of the George Washington University. Dr. Perry credentials are excellent: She is a past President of the American College of Epidemiology and a past chair of the Board of Scientific Counselors for the CDC. She has also served as a member of the National Institute for Occupational Safety and Health research grant-review panel. She has studied meat-processing facilities since 2004 and has published six peer-reviewed-journal articles on work health and safety at meat-processing facilities. As part of that work, she has visited four meat-processing plants and spoken with engineers regarding the organizational structure of processing plants and how they can be redesigned to further worker health and safety.

Dr. Perry opines that meat-processing plants can allow workers to stand six feet apart if they reduce production line speed, and that, if they do not space production line workers six feet apart, the plants will “inevitably” have a COVID-19 outbreak. She contends slowing the production line is the only way the plant will be able to continue meat production without an outbreak. She also endorses the other requests Plaintiffs make, such as for more rest breaks and paid leave, as “absolutely necessary” so the Plant can continue operating.

This Court has respect for Dr. Perry’s opinion but finds it of limited value in this case. While this Court agrees that slowing down line speed may be beneficial for workers and allow more opportunities for social distancing, the Court found nothing in the Joint Guidance
recommending a decrease in line speed. To that point, she provides no specific opinion regarding whether the Milan Plant is currently in compliance with the Joint Guidance, and there is no evidence that Dr. Perry reviewed the policies and procedures at the Milan Plant in forming her opinion. Accordingly, the Court gives little weight to her opinion that unless the production line speed is slowed and workers spread six feet apart, spread of the virus through the Plant is “inevitable” and it “will be forced to shutter.” This assertion appears to be more of a good-faith speculation than an evidenced-based conclusion.

The Court gives more weight to the declarations provided by Smithfield. The statements made by Mr. Messman, the Plant’s general plant manager, are almost all based on his personal knowledge. He possesses the most recent information concerning working conditions at the Plant, and he appears to be a reliable source of information about Smithfield’s policies and procedures there.

The Court gives considerable weight to the declaration of John Henshaw, Smithfield’s expert witness. After reviewing Smithfield’s written policies and procedures at the Plant, the general manager’s declaration, the pictures, and the declarations in Plaintiffs’ motion, Mr. Henshaw opined that Smithfield’s current policies and procedures, if followed, were consistent with the Joint Guidance as of April 29, 2020. Although the Court is aware that he is a retained expert witness whose assumptions and conclusions have not been tested by cross-examination, his opinion is measured, qualified, and grounded in the facts at the Milan Plant.

With the credibility determinations in mind, the Court makes the following findings of fact concerning current the Plant’s working conditions and Smithfield’s COVID-19 policies and procedures.
Before entering the Plant, Smithfield requires all employees to undergo thermal screening. If employees exhibit one primary symptom or two secondary symptoms of COVID-19, Smithfield provides them with instructions for next steps, including directions to quarantine and call their physician for guidance, and sends the employee home for fourteen days of paid leave or until the individual receives a negative COVID-19 test result. Employees with underlying health concerns—verified by a doctor—that place them at a higher risk of COVID-19 are given fourteen days of paid leave and then are shifted to short-term disability leave.

While quarantining as a result of COVID-19 symptoms, Smithfield requires employees to complete a questionnaire that in part entails naming all other employees they have closely contacted within the two days before experiencing symptoms. If the employee tests positive for COVID-19, Smithfield notifies and screens the close contacts. As of April 29, 2020, thirteen employees had been tested for COVID-19. None were positive.

If employees miss work as a result of COVID-related symptoms, Smithfield does not penalize them. They do not receive attendance points and remain eligible for Smithfield’s Responsibility Bonus ($500), regardless of whether individuals provide a doctor’s or nurse’s note. Moreover, Smithfield has expanded its employee benefits by eliminating co-pays for COVID-related testing and treatment.

To ensure that those inside the Plant are complying with Smithfield’s COVID-19 safety procedures and policies, Smithfield has assigned both a nurse and a health-and-safety clerk to perform checks throughout the Plant. Smithfield has communicated these procedures and policies to its employees by several different media, including on televisions and signs at the Plant, through the Beekeeper communications app, and through the Textcaster mass communications system.

10 Primary symptoms include fever, persistent dry cough, and shortness of breath, while secondary symptoms include chills, repeated shaking with chills, muscle pain/extreme fatigue, headache, sore throat, and/or loss of taste or smell (Doc. 46-2 at 8).
text-messaging tool. Signs at the Plant relay the information in English, Spanish, and French, while the Beekeeper and Textcaster communications are available in the employee’s language of choice. Interpreters are also available at the Plant to assist with these communications.

The Plant provides workers with an ear-looped face mask upon entry to the Plant each day, and if a mask breaks or becomes soiled, it provides a new one. Smithfield now requires all workers at the Plant to wear a mask at all times other than during meals and in certain offices where employees are spaced six feet apart. These masks prevent the spread of germs if an employee sneezes or coughs while on the line, reducing the need for tissues to reduce the spread of COVID-19. Additionally, Smithfield requires employees on the production floor to wear nitrile gloves and a plastic face shield.

As Smithfield concedes, it does not provide tissues to employees. It cannot provide tissues to individuals working on the production line because doing so would violate health standards set by the USDA. Thus, one of Plaintiff’s original complaints cannot be remedied. Smithfield could, however, provide tissues for employees to wipe their nose while on breaks, but the record does not support that employees are banned from bringing their own tissues or other hygienic wipes to use while on breaks.

As for Plaintiff’s claim that Smithfield does not allow employees to wash their hands without penalty, the Court finds that Smithfield policies and procedures are reasonable under the circumstances. Due to the nature of the meat-processing business, employees must wear gloves on the production line. When workers leave the line for a break, they remove their gloves and sanitize their hands before entering common areas. They must also wash their hands and put on gloves before returning to the line. Smithfield currently administers hand sanitizer to employees every thirty minutes to use on their gloves and has added approximately 110 hand-sanitizing
stations throughout the Plant. Smithfield also expects a shipment of small hand-sanitizer bottles soon, which it will make available to employees for personal use. In the meantime, the Plant has invited employees to bring in personal bottles they may refill using the company supply. Thus, the need for continued hand washing is unnecessary because any contamination that may occur on the line is contained by the required use of gloves.

Moreover, Smithfield has also enhanced cleaning and disinfection of the Plant’s frequently touched surfaces in common areas using cleaning solutions identified by the CDC for use against the virus. These cleanings are performed as often as every two hours throughout the workday. Additional deep cleanings occur over the weekends, and Smithfield is working to implement use of fogging/misting disinfectants where possible.

Finally, the Court turns to the steps Smithfield has taken steps to facilitate social distancing at the Plant. Smithfield has staggered workday start times, as well as lunch and break times, to avoid large numbers of workers congregating in break rooms or around time clocks. Smithfield is currently working to secure a wireless means for employees to clock in and out of their shifts to minimize crowding. In the meantime, it has expanded the number of available clocks for employees to use and will implement a grace period for workers to clock in and out of their shifts, all increasing the ability of workers to maintain social distance.

Smithfield has erected two large tents and three carport structures on the Plant lawn and placed tables and chairs underneath each so that workers have more space to eat while on breaks. The Plant has also installed plastic barriers on eating tables that separate employees from those sitting beside and across from them. Tables are sanitized after one employee leaves and before another sits down.
Smithfield has also reduced the number of hogs harvested each day and sends some employees home before lunch. This requires fewer employees to be at the Plant, helping to minimize crowding in the cafeteria and other areas. However, these policies reduce the number of hours worked by the affected employees, thereby decreasing their weekly pay. To ease the resulting financial burden on employees, Smithfield has temporarily increased pay by $5/hour, and such pay is available to any employee who takes an approved leave as a result of COVID-related symptoms. Smithfield has also installed clear plastic barriers along the Plant production line to separate employees working across from each other and employees working side by side.

Discussion

I. The primary-jurisdiction doctrine applies. 11

Before reaching the merits of Plaintiffs’ request for a preliminary injunction, the Court must determine whether it should dismiss or stay this case pursuant to the primary-jurisdiction doctrine. “Primary jurisdiction is a common-law doctrine that is utilized to coordinate judicial and administrative decision making.” Access Telecomms. v. Sw. Bell Tel. Co., 137 F.3d 605, 608 (8th Cir. 1998) (citation omitted). “The doctrine allows a district court to refer a matter to the appropriate administrative agency for ruling in the first instance, even when the matter is initially cognizable by the district court.” Id. (citation omitted). “There exists no fixed formula for determining whether to apply the doctrine of primary jurisdiction.” Id. (citing United States v. W. Pac. R.R. Co., 352 U.S. 59, 64 (1956)). Instead, courts must consider in each case “whether the reasons for the doctrine are present and whether applying the doctrine will aid the purposes

11 Although Smithfield previously argued Burford abstention also applied here, it conceded during the preliminary-injunction hearing that that argument no longer applies due to the President’s Executive Order. Accordingly, the Court does not address it. Because this Court finds the primary jurisdiction doctrine applies, it does not address Smithfield’s preemption arguments, which were asserted after the preliminary-injunction hearing.
for which the doctrine was created.” Id. (citation omitted). In undertaking this analysis, a court must be mindful that the primary-jurisdiction doctrine “is to be invoked sparingly, as it often results in added expense and delay.” Alpharma, Inc. v. Pennfield Oil Co., 411 F.3d 934, 938 (8th Cir. 2005). “Once a district court decides to refer an issue or claim to an administrative agency under the doctrine of primary jurisdiction, it may either dismiss or stay the action.” Chlorine Inst., Inc. v. Soo Line R.R., 792 F.3d 903, 913 (8th Cir. 2015).

There are two primary reasons courts apply the primary-jurisdiction doctrine. First, “to obtain the benefit of an agency’s expertise and experience . . . in cases raising issues of fact not within the conventional experience of judges or cases requiring the exercise of administrative discretion. . . .” Access Telecomms., 137 F.3d at 608 (noting “agencies created by Congress for regulating the subject matter should not be passed over”) (quoting Far E. Conference v. United States, 342 U.S. 570, 574 (1952)). Second, “to promote uniformity and consistency within the particular field of regulation.” Id. (citation omitted). Thus, in deciding whether to apply the doctrine, courts focus on two questions: (1) “whether the issues raised in the case ‘have been placed within the special competence of an administrative body,’” and (2) whether the court’s disposition of the case could lead to inconsistent regulation of businesses in the same industry. Sprint Spectrum L.P. v. AT&T Corp., 168 F. Supp. 2d 1095, 1098 (W.D. Mo. 2001) (quoting United States v. W. Pac. R.R. Co., 352 U.S. at 64). In this case, the answer to both questions is yes.

Plaintiffs allege that because the Plant is not abiding by the Joint Guidance, it constitutes a public nuisance and has created an unreasonably unsafe workplace. Thus, Plaintiffs’ claims both succeed or fail on the determination of whether the Plant is complying with the Joint Guidance. Due to its expertise and experience with workplace regulation, OSHA (in
coordination with the USDA per the Executive Order) is better positioned to make this determination than the Court is. Indeed, this determination goes to the heart of OSHA’s special competence: its mission includes “enforcing” occupational safety and health standards. In fact, OSHA has already shown interest in determining whether the Plant is abiding by the Joint Guidance. The day before Plaintiffs filed this lawsuit, OSHA sent Smithfield a request for information regarding its COVID-19 work practices and infection at the Plant.

Turning to the second question, the Court finds only deference to OSHA/USDA will ensure uniform national enforcement of the Joint Guidance. If the Court ruled on whether the Plant is complying with the Joint Guidance, this ruling would be binding on Smithfield but not other meat-processing facilities because the Court lacks personal jurisdiction over them. Thus, any determination by this Court whether the Plant is complying with the Joint Guidance could easily lead to inconsistent regulation of businesses in the same industry. And under these circumstances, where the guidelines are rapidly evolving, maintaining a uniform source for guidance and enforcement is crucial.

Plaintiffs’ argue that deference will add delay. But OSHA has already requested information about the Plant’s safety measures. And if OSHA fails to act quickly on this information, Plaintiffs have a remedy: they may receive emergency relief through OSHA’s statutory framework. Section 662(a) of the Occupational Safety and Health Act (“the Act”), 29 U.S.C. §§ 651 et seq., permits the Secretary of Labor to petition the court “to restrain any [dangerous] conditions or practices in any place of employment . . . which could reasonably be expected to cause death or serious physical harm immediately or before the imminence of such danger can be eliminated through the enforcement procedures otherwise provided by [the Act].” Upon the filing of such petition, “the district court shall have jurisdiction to grant such injunctive
relief or temporary restraining order pending the outcome of an enforcement proceeding.” Id. at § 662(b). If the Secretary “arbitrarily or capriciously fails to seek relief,” a worker can file a writ of mandamus to compel the Secretary to seek such an order. Id. at § 662(d). Granted, there may be some delay before Plaintiffs can invoke this procedure, but following this procedure ensures the USDA and OSHA can take a measured and uniform approach to the meat-processing plants under its oversight. The Court’s intervention at this point, on the other hand, would only risk haphazard application of the Joint Guidance.

In sum, the Court holds that the issue of Smithfield’s compliance with OSHA’s guidelines and regulations falls squarely within OSHA/USDA’s jurisdiction. The Court finds dismissal without prejudice is preferable to a stay here so that Plaintiffs may seek relief through the appropriate administrative and regulatory framework.

III. Plaintiffs’ have not met their burden for a preliminary injunction.

Although the Court’s ruling on the primary-jurisdiction doctrine is dispositive, to aid in any appellate review, the Court will consider whether Plaintiffs have met their extraordinary burden of proving an affirmative preliminary injunction is proper in this case.

In determining whether to grant injunctive relief the Court considers the following factors, which were set forth in the seminal decision Dataphase Sys., Inc. v. C L Sys., Inc., 640 F.2d 109, 114 (8th Cir. 1981): 1) the threat of irreparable harm to the movant; 2) the balance between this harm and any injury that granting the injunction will inflict on the non-moving party; 3) the likelihood that the moving party will prevail on the merits; and 4) the public interest. Phelps-Roper v. Nixon, 509 F.3d 480, 484 (8th Cir. 2007). No single factor is determinative; they must be “balanced to determine whether they tilt towards or away” from


1. **Plaintiffs have not demonstrated a threat of irreparable harm.**

To demonstrate a sufficient threat of irreparable harm, the moving party must show that there is no adequate remedy at law; that is, that an award of damages cannot compensate the movant for the harm. *See Noodles Dev.*, 507 F.Supp.2d at 1036-37. But, when analyzing this factor, the Eighth Circuit has held that “[m]erely demonstrating the ‘possibility of harm’ is not enough.” *Chlorine Inst., Inc. v. Soo Line R.R.*, 792 F.3d 903, 915 (8th Cir. 2015); *see also S.J.W. ex rel Wilson v. Lee’s Summit R-7 Sch. Dist.*, 696 F.3d 771, 779 (8th Cir. 2012) (“Speculative harm does not support a preliminary injunction.”). In the context of a global pandemic, this Court must consider the threat after “accounting for the protective measures” defendant has already implemented. *Valentine v. Collier*, --- F.3d ---, 2020 WL 1934431, *5 (5th Cir. Apr. 22, 2020).

Plaintiffs argue that their injury is potentially contracting COVID-19, which could result in serious illness or even death. But this type of injury is too speculative under Eighth Circuit precedent.
Plaintiffs’ claim otherwise, citing two cases from the Eighth Circuit, which they argue held the possibility of “death or serious illness” constitutes an irreparable injury (Doc. 3 at 24). Plaintiffs’ cite *Kai v. Ross*, 336 F.3d 650, 656 (8th Cir. 2003), a case in which the state of Nebraska revoked a program providing medical care for the needy. The plaintiffs, who suffered from physical and mental disabilities and received their prescription medications through the program, sought to enjoin revocation of the program. *Id.* The Eighth Circuit held that the present danger to plaintiffs’ health without their medications is an irreparable harm. *Id.* Plaintiffs also cite *Harris v. Blue Cross Blue Shield of Mo.*, 995 F.2d 877, 879 (8th Cir. 1993), which similarly held that denial of coverage for the treatment of a life-threatening illness is an irreparable injury. These two cases are inapposite, since the plaintiffs were already suffering from illnesses, and would undoubtedly suffer serious illness or death in the absence of an injunction. 12 In other words, the threat of serious injury or death was a certainty and not merely a possibility.

The Court is not unsympathetic to the threat that COVID-19 presents to the Plant’s workers. But in conducting its analysis, the Court must determine whether Plaintiffs will suffer an actual, imminent harm if the injunction is denied. This is not the same as analyzing whether employees risk exposure if they continue to work, and, unfortunately, no one can guarantee health for essential workers—or even the general public—in the middle of this global pandemic.

12 Plaintiffs also cite *Mertzlufft v. Bunker Res. Recycling & Reclamation, Inc.*, 760 S.W.2d 592 (Mo. Ct. App. 1988) as persuasive authority. In *Mertzlufft*, the plaintiffs sought to enjoin a business which was illegally transporting, storing, and incinerating hazardous waste without a permit. *Id.* at 595. The plaintiffs brought a citizen’s suit to enjoin the defendant from charging and loading the incinerator with hospital wastes, or otherwise operating it, which the trial court granted. *Id.* The Missouri court of appeals, reviewing the case under a standard deferential to the trial court’s judgment—not operating under the preliminary injunction standard set forth in *Dataphase*—held that the preliminary injunction was warranted. *Id.* at 598. It did not, however, address whether the plaintiffs proved there was a threat of irreparable harm. *Id.* at 598. To the contrary, the court held that plaintiffs were “not obligated to allege and prove they had suffered irreparable harm in order to obtain injunctive relief, but were only required to prove that they were adversely affected in fact by the unlicensed operation, which they did.” *Id.* Accordingly, this case is also inapplicable because the court of appeals did not consider—and plaintiffs were not required to prove—a threat of irreparable harm. But, even if they were, the defendant was illegally operating a hazardous waste facility, and thus presented a present threat of certain harm to the plaintiffs.
But given the significant measures Smithfield is now taking to protect its essential workers from COVID-19 and the fact that there are no confirmed cases of COVID-19 currently at the Plant, the Court cannot conclude that the spread of COVID-19 at the Plant is inevitable or that Smithfield will be unable to contain it if it occurs. Thus, Plaintiffs have not established an immediate threat of irreparable harm.

2. **Plaintiffs have not shown that the balance of harms favors issuing injunctive relief.**

The second factor “examines the harm of granting or denying the injunction upon both of the parties to the dispute and upon other interested parties, including the public.” *Noodles Dev.*, 507 F. Supp. 2d at 1038 (citing *Dataphase*, 640 F.2d at 114). “To determine what must be weighed, . . . courts of this circuit have looked at the threat to each of the parties’ rights that would result from granting or denying the injunction.” *Id.* The “potential economic harm to the parties” is a relevant consideration, as is “whether the defendant has already voluntarily taken remedial action.” *Id.*

Here, there is no doubt that if workers at the Plant contract COVID-19, the harm to Plaintiffs could be great. But Plaintiffs have alleged only that—potential harm—and, in this time, no essential-business employer can completely eliminate the risk that COVID-19 will spread to its employees through the workplace. Thus, it is important that employers make meaningful, good faith attempts to reduce the risk. Here, Smithfield has taken significant remedial steps in accordance with the Joint Guidance to protect its workers from COVID-19.

Moreover, national and local guidance on COVID-19 is continuously evolving and changing. An injunction would deny Smithfield the flexibility needed to quickly alter workplace procedures to remain safe during the ever-changing circumstances of this pandemic. *Valentine*, 2020 WL 1934431 at *5 (staying injunction that would “interfer[e] with the rapidly changing and
flexible system-wide approach that [defendant] has used to respond to the pandemic so far” and “[defendant’s] ability to continue to adjust its policies is significantly hampered by the preliminary injunction, which locks in place a set of policies for a crisis that defies fixed approaches”) (citing Jacobson v. Massachusetts, 197 U.S. 11, 28–29 (1905); In re Abbott, 954 F.3d 772, 791 (5th Cir. 2020)). Thus, the remedial measures Smithfield has implemented convince the Court that the balance of harms weighs in its favor.

3. **Plaintiffs have not shown a likelihood of success on the merits.**

To demonstrate likelihood of success on the merits, a movant does not need to show that it ultimately will succeed on its claims, only that the movant’s prospects for success is sufficiently likely to support the kind of relief it requests. See Noodles Dev., 507 F.Supp.2d at 1036–37 (emphasis added) (citations omitted). That is, the movant need only show “a fair chance of prevailing.” Phelps-Roper, 509 F.3d at 485. On this record, Plaintiffs have not shown a fair chance of prevailing on either of their claims.

a. **Plaintiffs have not shown they are likely to succeed on their public-nuisance claim.**

Under Missouri law, “a public nuisance is an offense against the public order and economy of the state and violates the public’s right to life, health, and the use of property, while, ‘at the same time annoys, injures, endangers, renders insecure, interferes with, or obstructs the rights or property of the whole community, or neighborhood, or of any considerable number of persons.’” State ex rel. Schmitt v. Henson, ED 107970, 2020 WL 1862001, at *4 (Mo. Ct. App. April 14, 2020) (citations omitted).

The parties agree that the Plant cannot be a public nuisance simply by virtue of the fact that it is a meat-processing plant during a global pandemic. Moreover, in this case, Smithfield has implemented substantial health and safety measures to protect Plant workers, and no
employees of the Plant have been diagnosed with COVID-19. While Plaintiffs argue that Smithfield could do more to protect its workers, that is not the issue before this Court. The issue is whether the Plant, as it is currently operating, constitutes an offense against the public order. Because of the significant measures Smithfield has implemented to combat the disease and the lack of COVID-19 at the facility, the Plant cannot be said to violate the public’s right to health and safety. Thus, the Court finds that Plaintiffs are unlikely to be succeed on their public nuisance claim.

b. Plaintiffs have shown they are unlikely to succeed on their right to a safe workplace claim.

Under Missouri law, Plaintiffs must prove that Smithfield negligently breached its duty to provide a safe place to work and that such negligence was the direct and proximate cause of the Plaintiffs injuries. Hamilton v. Palm, 621 F.3d 816, 818 (8th Cir. 2010). As discussed, Smithfield has taken substantial steps to reduce the potential for COVID-19 exposure at the Plant and appears to the Court to be complying with the Joint Guidance regarding the same. Thus, Plaintiffs are not substantially likely to prove Smithfield breached any duty.

More importantly, however, Plaintiffs have not alleged they have suffered any injury, only that they may suffer an injury in the future. A potential injury is insufficient to state a claim of the breach of the duty to provide a safe workplace under Missouri law. Plaintiffs citation to Smith v. W. Elec. Co., 643 S.W.2d 10 (Mo. Ct. App. 1982), to establish that they have stated a sufficient injury is unavailing. In Smith, the plaintiff proved that he had been exposed to harmful second-hand smoke in the workplace which caused him to suffer a severe adverse reaction. Id. at 12. The adverse reaction was the actual injury he suffered, and he suffered this harm—and sought relief through an administrative process—before seeking an injunction. Thus, Smith is not analogous to this case, and Plaintiffs have not shown they are likely to be successful on their
 breach of a safe workplace claim.

4. **The public interest factor is neutral.**

Certainly, the spread of COVID-19 is a public-health matter of great concern, and, so, preventing transmission of the virus which causes COVID-19 is within the public interest. At the same time, the public has an interest in maintaining the food-supply chain and access to meat products, an interest which might be impaired if the Court granted the injunction. Because Smithfield’s current policies and procedures temper public health worries, the Court finds a preliminary injunction is not in the public interest at this time.

Thus, Plaintiffs have not met their extraordinary burden of showing an affirmative preliminary injunction is warranted in this case.

III. **Plaintiffs’ requested relief lacks the specificity required for a preliminary injunction.**

Finally, the Court finds that Plaintiffs requested relief is impermissibly vague. Federal Rule of Civil Procedure 65(d) states that an injunction must be “specific in [its] terms” and describe in reasonable detail the actions sought to be enjoined. Fed. R. Civ. P. 65(d). This specificity requirement is “designed to prevent uncertainty and confusion on the part of those to whom the injunction is directed and to avoid the possible founding of a contempt citation on a decree too vague to be understood.” *Helzberg’s Diamond Shops, Inc. v. Valley W. Des Moines Shopping Ctr., Inc.*, 564 F.2d 816, 820 (8th Cir. 1977).

In this case, Plaintiffs request this Court enter an injunction requiring Smithfield to “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” (Doc. 46 at 10). Plaintiffs do not explain what changes would be “reasonable,” except for “potentially” reducing line speeds. In other words, they do not specify in reasonable detail what Smithfield should do. They
demand workers have “reasonable additional breaks to allow workers to care for their personal hygiene without penalty, including blowing their noses, using tissues, and hand washing,” but they do not specify how often or how long such breaks should take place, or what would constitute a reasonable break. Finally, Plaintiffs request the Court order Smithfield to change its policies to “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.” But Plaintiffs do not identify which policies should be eliminated, what constitutes “reasonable steps,” or why Smithfield’s current policies are insufficient. Because “a person of ordinary intelligence” would not understand what is prohibited based on Plaintiffs’ proposed preliminary injunction, Schenck v. Pro-Choice Network of W. N.Y., 519 U.S. 357, 383 (1997), it is impermissibly vague, and thus unenforceable.

Conclusion

Plaintiffs are naturally concerned for their health and the health of their community in these unprecedented times. The Court takes their concern seriously. Nevertheless, the Court cannot ignore the USDA’s and OSHA’s authority over compliance with the Joint Guidance or the significant steps Smithfield has taken to reduce the risk of a COVID-19 outbreak at the Plant.

For the reasons discussed above, Defendants motion to dismiss is GRANTED, and the case is DISMISSED without prejudice.

IT IS SO ORDERED.

Date: May 5, 2020

/s/ Greg Kays
GREG KAYS, JUDGE
UNITED STATES DISTRICT COURT
Ms. Loren Sweatt, MBA  
Principal Deputy Assistant Secretary  
Occupational Safety and Health Administration  
200 Constitution Avenue, NW  
Washington, D.C. 20210

Dear Ms. Sweatt,

I would like to thank you for testifying at the May 28th Workforce Protections Subcommittee hearing entitled “Examing the Federal Government’s Actions to Protect Workers from COVID-19.”

Please find enclosed additional questions submitted by Committee Members following the hearing. Please provide a written response no later than Thursday, July 2, 2020 for inclusion in the official hearing record. Your responses should be sent to Jordan Barab of the Committee staff. He can be contacted at 202-225-3725 should you have any questions.

I appreciate your time and continued contribution to the work of the Committee.

Sincerely,

ROBERT C. “BOBBY” SCOTT  
Chairman

Enclosure
Workforce Protections Subcommittee Hearing
“Examining the Federal Government’s Actions to Protect Workers from COVID-19”
Thursday, May 28, 2020 10:15 a.m.

Chairman Robert C. “Bobby” Scott (D-VA)

- Has OSHA staff conducted any preliminary work on a draft Emergency Temporary Standard (ETS) for COVID-19? If so, what is the status of that preliminary work product?

- If an OSHA state plan requested a draft ETS for COVID-19 from OSHA, would OSHA provide a copy of its draft ETS for COVID-19?

- If an OSHA state plan requested technical assistance in drafting a state based ETS for COVID-19, would OSHA provide technical assistance in drafting an ETS for COVID-19?

- If an OSHA state plan issues an ETS that has additional safety requirements for COVID-19 beyond that set forth in the OSHA/CDC Guidance for Meat and Poultry Processing Workers and Employers, would OSHA seek to pre-empt that that state standard as inconsistent with the Guidance?

- The HEROES Act (H.R. 6800), which was passed by the House on May 15, 2020, includes a provision in Division L requiring OSHA to issue an Emergency Temporary Standard. That legislation would require employers to prepare an exposure control plan tailored to the particular workplace.

  o What is OSHA’s position on this specific legislation? Does it support or oppose it? If opposed, please explain the specific reasons for OSHA’s opposition?

  o Would you be prepared to work with the Committee to address OSHA’s concerns?

Representative Alma Adams (D-NC)

- Do you believe that COVID-19 presents a “a grave danger” to workers?

  o If not, what is the DOL’s threshold for determining whether COVID-19 presents a grave danger to workers?

- CDC reports that as of June 4, 2020, there are almost 80,000 health care workers infected with COVID-19 and over 400 who have died from COVID-19. Does this meet the threshold for COVID-19 to constitute a grave danger to health care workers?

- Last month, OSHA announced a new round of Susan Harwood Worker Training Grants, but these programs won’t begin until October.
In the meantime, is it true that OSHA is prohibiting current grantees from conducting COVID-19 training, or changing the terms of their work plans to include COVID-19 training?

As you know, following the H1N1 pandemic, OSHA began work in earnest on an Infectious Disease Standard. Although OSHA’s Bloodborne Pathogens Standard has been very effective in protecting workers from bloodborne pathogens, it does not address infectious diseases transmitted by other routes (e.g., contact, droplet and airborne). Work on the Infectious Disease Standard was relegated to the long-term agenda in 2017. Please address the following:

- What remained to be done to issue an official proposal for this Infectious Disease Standard?
- When do you expect to issue a proposed standard for notice and comment?
- What specific actions have been taken with respect to the completion of the OSHA Infectious Disease Standard since it was relegated to the long-term agenda? Please list these actions.
- Who specifically decided to remove the Infectious Disease Standard from the active regulatory agenda? Was this decision made by the Secretary of Labor? Was this decision made by the White House?
- In addition to COVID-19, workers are also exposed to tuberculosis, influenza, MRSA and other transmissible pathogens (not covered under the bloodborne pathogen standard). What are the benefits to worker safety from finalizing a comprehensive Infectious Disease Standard particularly for health care workers, first responders, and other populations at elevated risk? How do these benefits compare with just relying on existing standards and the General Duty Clause?
- If the permanent Infectious Disease Standard had been issued prior to the COVID-19 pandemic, would it have provided OSHA with additional tools to protect health care and social assistance workers during the COVID-19 pandemic?
- Does OSHA intend to resume work on a permanent Infectious Disease Standard this calendar year?
- What is OSHA’s next planned action for a permanent infectious disease standard?

There has been a widespread and growing number of COVID-19 infections of workers in the meatpacking industry.
o How many complaints has OSHA received regarding conditions in meatpacking and poultry plants?

o How many physical, onsite inspections has OSHA conducted in the meatpacking and poultry industry?

o How many of these inspections has OSHA closed?

o How many citations have been issued following these meatpacking and poultry plant inspections?

• After President Trump issued the April 28, 2020 Executive Order Delegating Authority Under the DPA with Respect to Food Supply Chain Resources During the National Emergency Caused by the Outbreak of COVID-19, you and Solicitor of Labor Kate O’Scannlain issued a statement stating that “OSHA will take into account good faith attempts to follow the Joint Meat Processing Guidance.”

o Who directed you and the Solicitor to issue this Memorandum?

o Please define “good faith attempts” and provide any instructions to CSHO’s describing how to determine whether an employer has made a “good faith attempt” to comply with CDC guidance.

o Please explain how OSHA defines “feasible” in this context and provide any instructions to CSHO’s describing how to determine whether an employer’s claim that it was infeasible to comply with CDC guidance is legitimate.

o How many times has OSHA declined to issue a citation, despite an identified violation of an OSHA standard or the General Duty Clause, because the employer documented a “good faith” attempt to comply with the OSHA/CDC Guidelines? Please provide examples.

o How many times has OSHA declined to issue a citation, despite an identified violation of an OSHA standard or the General Duty Clause, because the employer documented infeasibility to comply with the OSHA/CDC Guidelines? Please provide examples.

o Keeping workers infected with COVID-19 out of meatpacking plants is necessary. However, the OSHA/CDC Guidelines say that “Screening meat and poultry processing workers for COVID-19 symptoms (such as temperature checks) is an optional strategy that employers may use.” How does an employer show “good faith”, since testing is optional?

• Since studies show that many of those who are infected with COVID-19 are asymptomatic, or pre-symptomatic, please explain why screening for fevers prior to employee entry to a meatpacking plant is sufficient to keep the infection out of work...
settings?

• Would mandatory testing of employees for COVID-19 on a regular basis prior to entry to a meatpacking plant be more effective than screening for fevers? If so, why has the OSHA/CDC Guidelines not been updated to require this?

• Except for state and local regulations that are of “general applicability”, OSHA’s regulations generally pre-empt the field of worker safety protections in those states where federal OSHA has jurisdiction.
  
  o Is it DOL’s view that non-binding OSHA Guidance or non-binding OSHA/CDC Guidance pre-empts enforcement actions by state health agencies, if the state health agencies require meat processors to take more protective measures than those in the Joint CDC/OSHA Guidance for Meatpacking Industry?

  o Are regulations and enforcement actions by state health agencies, which are seeking to control infections in congregate workplace settings as a necessary means of controlling community spread, subject to federal pre-emption by OSHA?

• How are you ensuring that OSHA inspectors can perform inspections without putting themselves at risk of infection?

• OSHA officials have stated previously that the Bloodborne Pathogens Standard can be effectively used to keep workplaces safe from COVID-19. Can you explain how this standard is relatable to a virus that is spread through airborne droplets?

**Representative Pramila Jayapal (D-WA)**

• How many on-site inspections has OSHA conducted related to COVID-19?
  
  o How many remote investigations or inquiries related to COVID-19 has OSHA conducted using remote “Phone-Fax” or Rapid Response Investigation (RRI) procedures?

  o How many of those remote investigations or inquiries were the result of complaints?

  o How many of these remote investigations or inquiries resulted in inadequate responses from the employer?

  o In how many of those remote investigations or inquiries, conducted as a result of complaints, did OSHA contact the complainant to determine if the employer’s assurances were accurate, as described in Chapter 9, Section I(I) of the Field Operations Manual?
How many Hazard Alert Letters has OSHA issued recommending the implementation of protective measures that address SARS-CoV-2 hazards? Please provide a total, sorted by 4-digit NAICS code.

How many COVID-19 related fatality reports has OSHA received? Please provide this information sorted by 4-digit NAICS code.

How many of the fatality reports that OSHA has received were investigated?

How many of those investigated were conducted by on-site inspections?

Please provide a list of facilities that have submitted fatality reports to OSHA for deaths due to COVID-19 infections.

How many of OSHA’s fatality investigations for COVID-19 resulted in citations related to the fatality?

Please describe any actions OSHA is taking to ensure that all COVID-19 work-related fatalities are reported to OSHA.

Representative Bradley Byrne (R-AL)

- Ms. Sweatt, OSHA’s recent guidance on recording COVID-19 cases asked employers to ascertain whether an individual came down with COVID-19 as a result of exposure at work. The guidance requires employers to interview employees about other possible sources of exposure. I am concerned about workers’ privacy. Does OSHA have suggestions on how to handle privacy concerns?

- Ms. Sweatt, I am also worried about the reliability of this data given that our understanding about transmission, recovering, and asymptotic infections is constantly evolving and that employers are not equipped to do the type of contract tracing needed to identify sources. Inaccurate data could later be used to make erroneous conclusions or misused to mischaracterize the situation at a workplace or in a community. While I know it’s very important for public health agencies to track cases, has OSHA considered alternatives to having employers make cursory and possibly unreliable work-related determinations?
IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI

RURAL COMMUNITY WORKERS ALLIANCE
and JANE DOE,

   Plaintiffs,

vs.

SMITHFIELD FOODS, INC. and SMITHFIELD
FRESH MEATS CORP.,

   Defendants.

Case No. 5:20-cv-06063-DGK

DEFENDANTS’ SUPPORTING SUGGESTIONS IN SUPPORT OF
EMERGENCY MOTION TO DISMISS, OR IN THE ALTERNATIVE TO STAY,
BASED ON PRIMARY JURISDICTION AND/OR BURFORD ABSTENTION
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I. PRELIMINARY STATEMENT

Plaintiffs Rural Community Workers Alliance ("RCWA") and Jane Doe ("Plaintiffs") initiated this action on April 23, 2020 seeking extraordinary relief in the form of a mandatory injunction. In support, they have offered allegations that grossly misrepresent the substantial safety measures that Smithfield has implemented at its Milan, Missouri Plant (the "Plant"). It is not surprising that not a single Smithfield employee was willing to apply their name to this baseless lawsuit. Plaintiffs’ request that this Court develop, monitor, and administer Smithfield’s occupational health and safety program at the Plant is unprecedented and improper.

In any event, the Court never needs to reach the merits of the Complaint or consider Plaintiffs’ overreaching request for injunctive relief. Rather, pursuant to the primary jurisdiction doctrine, the Court can—and should—dismiss or stay this suit in favor of the Occupational Health and Safety Administration’s ("OSHA") regulatory authority over workplace safety issues and the Missouri Department of Health and Senior Services’ ("MDHSS") jurisdiction over public health in Missouri. Even if the Court does not dismiss or stay the suit because OSHA has primary jurisdiction, there is an independent basis for dismissal under Burford abstention.

Indeed, OSHA is already in the process of exercising its jurisdiction at the Plant. On the day before Plaintiffs filed their Complaint in this case, OSHA sent Smithfield a "Rapid Response Investigation" requesting information regarding its COVID-19 work practices and infection at the Plant, giving Smithfield only seven days to respond. Smithfield is preparing its response for submission on April 29, and intends to cooperate fully with OSHA. The Court should defer to OSHA and its expertise to investigate and enforce any purported safety violations at the Plant. Indeed, on Sunday, April 26, 2020, OSHA and the Centers for Disease Control ("CDC") joined together and issued specific COVID-19 guidance for meat processing plants.
In addition to OSHA’s oversight, the MDHSS has the authority to implement all appropriate and necessary measures to protect the public from the spread of COVID-19. And another layer of public health oversight—county public health administrators—provides further protection. Indeed, where food processing plants in Missouri have seen actual employee infections—as opposed to speculation about future infections—county public health administrators have worked closely with plants to protect employees and the public.

Public policy strongly supports the Court deferring to OSHA and MDHSS on these issues. Smithfield is an essential business critical to the nation’s food supply. There are many other essential businesses operating throughout the country that are critical to the country’s survival. Subjecting these entities to private lawsuits for injunctive relief, in which safety standards are determined piecemeal by plaintiffs and the courts, will result in inconsistent rulings and uncertainty for both employers and employees.

The workplace safety and public health concerns created by the novel coronavirus are both outside the conventional experience of judges and squarely within the technical and policy expertise of OSHA and MDHSS. The agencies are already responding to these concerns in real time, adapting as new facts emerge. That is not a role that a district court can or should take on. Plaintiffs are wrong to ask the Court to interpose itself between these agencies and essential businesses like Smithfield’s Milan Plant. Considerations of institutional competency and prudence militate strongly in favor of a dismissal or stay on primary jurisdiction, or a dismissal based on Burford abstention, and the Court should grant Smithfield’s Motion.

II. FACTS

A. Smithfield and the Plant

The named defendants in this action are Smithfield Foods, Inc. and its wholly owned subsidiary, Smithfield Fresh Meats Corp. (collectively, “Smithfield”). The Plant at issue is a meat
processing facility, which is an essential business that has lawfully continued to operate under the Governor of Missouri’s stay at home order.¹ The Plant and its operations constitute “critical infrastructure” pursuant to the guidelines issued by the U.S. Department of Homeland Security, Cybersecurity & Infrastructure Security Agency, which were adopted in Missouri’s stay at home order.²

The Plant has voluntarily implemented substantial workplace safety measures in response to COVID-19, including providing personal protective equipment such as masks and face shields to all workers and persons who enter the building, social distancing both in common areas, installing partitions between line workers, conducting temperature scans, providing multiple hand-sanitizer stations, implementing additional sanitation of workspaces and other areas, and encouraging workers to stay home when sick with pay and without penalty. These measures will be further detailed in Smithfield’s response to Plaintiffs’ Motion for Preliminary Injunction/Temporary Restraining Order to be filed on April 29, 2020.

As of the date of this filing, there have been no confirmed diagnoses of COVID-19 at the Plant.³ Moreover, to Smithfield’s knowledge, there have been no positive cases reported in Sullivan County (which surrounds the city of Milan). A majority of counties adjacent to Sullivan

² See id. Item 2 (incorporating CISA’s definition of “critical infrastructure”); U.S. CYBERSECURITY AND INFRASTRUCTURE SECURITY AGENCY, ADVISORY MEMORANDUM ON IDENTIFICATION OF ESSENTIAL CRITICAL INFRASTRUCTURE WORKERS DURING COVID-19 RESPONSE (April 17, 2020), https://www.cisa.gov/sites/default/files/publications/Version_3.0_CISA_Guidance_on_Essential_Critical_Infrastrucure_Workers_4.pdf, p. 8 (defining “critical infrastructure” employees to include “food manufacturer employees,” such as those working in “livestock [and] poultry … slaughter facilities”). [The order references Version 2.0 of the guidance, which appears to be no longer publicly available, as it was removed from the CISA website after Version 3.0 was published. A description of the update on CISA’s website indicates the definitions regarding food processing plants remain unchanged. See https://www.cisa.gov/publication/guidance-essential-critical-infrastructure-workforce.]
County also have zero positive cases to date, and the case counts are relatively low in the few adjacent counties that have reported positive cases.  

B. **Plaintiffs’ Allegations and Request for Relief**

Plaintiffs assert claims about Smithfield’s safety practices as they relate to potential COVID-19 exposure and seek declaratory and injunctive relief. See Compl. However, Plaintiffs do not allege that there have been any positive diagnoses associated with the Plant, and as noted above, Smithfield is aware of none.

To be clear, this is not a suit for personal injury or wrongful death. RCWA does not allege that any of its members have contracted COVID-19 at the Plant or otherwise. Likewise, Jane Doe does not allege that she has tested positive for COVID-19. Indeed, Plaintiffs stipulate that they are not seeking money damages. Compl. at ¶ 16.

Plaintiffs seek a declaration that “Smithfield’s failure to implement appropriate worker protections during the COVID-19 crisis constitutes a public nuisance under Missouri law and a violation of the right to a safe work place under Missouri law.” Compl. at ¶ 123. However, the primary relief sought by Plaintiffs is a Court Order, in the form of an injunction, requiring Smithfield to adopt a list of work practices, many of which are vague and ill-defined, such as “providing sufficient personal protective equipment” and “creating and implementing a social distancing plan for the Plant” and “creating and implementing a protocol to clean surfaces.” Complaint at ¶ 123. Plaintiffs also request that the Court require Smithfield to allow Plaintiffs’ experts to inspect the plant to identify additional precautions that Smithfield should take. Id. at ¶ 123(viii). Smithfield will demonstrate in its response to Plaintiffs’ Motion for Preliminary

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4 Compare the number of positive cases in neighboring counties (Adair - 12, Livingston - 2, Linn - 5, and Macon - 2) with other significant outbreak locations in the state (St. Louis County - 2,897, Kansas City - 500, Greene County - 83). Id.
Injunction that it has already implemented all of the safety measures for which Plaintiffs’ seek injunctive relief.

C. OSHA’s Request for Information

On the day before this case was filed, Smithfield received a request for information from OSHA regarding its COVID-19 safety practices at the Plant. See Exhibit 2. OSHA has directed Smithfield to respond to the request for information by Wednesday, April 29, 2020. Id. Smithfield intends to cooperate fully with OSHA in this matter.

D. OSHA’s Role

The Occupational Safety and Health Act, 29 U.S.C. §§ 651, et. seq. (the “Act”), was enacted “to assure so far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources.” 29 U.S.C. § 651(b). The Act authorizes “the Secretary of Labor to set mandatory occupational safety and health standards applicable to businesses affecting interstate commerce.” Id. at § 651(b)(3).

OSHA is the federal agency charged with administering the Act. OSHA provides a procedure for an employee who is concerned about workplace safety to file a confidential complaint requesting that OSHA initiate an investigation into the employer’s work practices.5

The Act provides for “an effective enforcement program.” Id. at § 651(b)(10). The Act authorizes OSHA to inspect or investigate any place of employment in order to carry out the purposes of the Act. Id. at § 657. OSHA may issue a citation to an employer for any violation of the Act, including the General Duty Clause, which requires an employer to furnish “a place of employment which [is] free from recognized hazards that are causing or are likely to cause death

5 See https://www.osha.gov/workers/file_complaint.html
or serious harm.” *Id.* at § 658. Any such citation “shall fix a reasonable time for the abatement of the violation.” *Id.* The Act provides for additional enforcement mechanisms if an employer does not correct a violation for which a citation has been issued. *Id.* at § 659. The Act further provides for penalties for violations and/or failure to abate. *Id.* at § 666.

The Act specifically includes procedures to address an imminent danger. *Id.* at § 662. The Act permits the Secretary of Labor to petition the court
to restrain any conditions or practices in any place of employment which are such that a danger exists which could reasonably be expected to cause death or serious physical harm immediately or before the imminence of such danger can be eliminated through the enforcement procedures otherwise provided by [the Act].

*Id.* The Act authorizes an employee to file a writ of mandamus to compel the Secretary to seek such an order if the employee believes that the Secretary “arbitrarily or capriciously fails to seek relief.” *Id.* In such a case, OSHA is directly involved, and the court is not acting without the agency’s participation.

OSHA has published “Guidance on Preparing Workplaces for COVID-19,” which makes clear that the agency will use the General Duty Clause to enforce any unsafe conditions relating to COVID-19. Exhibit 3 at 4. OSHA’s General Duty Clause provides that “employers are required to provide their employees with a workplace free of recognized hazards likely to cause death or serious physical harm.” *Id.* OSHA has also issued Interim Enforcement Guidance for Coronavirus Disease 2018 (issued April 13, 2020), which identifies applicable standards that may apply to COVID-19. See Exhibit 4. On Sunday, April 26, 2020, the CDC and OSHA jointly issued Interim Guidance specific to the meat processing industry. See Exhibit 5.

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6 Plaintiffs’ Opposition, which purports to provide a timeline of OSHA action, ignores these emergency procedures. Opposition at 3.
7 These include the following:
   29 CFR § 1904, Recording and Reporting Occupational Injuries and Illness;
E. Plaintiffs’ Criticisms of OSHA

In Plaintiffs’ Opposition to Letter Request for Extension of Time to Respond to Plaintiffs’ Emergency Motion for a Preliminary Injunction (Doc. 19), Plaintiffs make several unfounded criticisms of OSHA and its response to COVID-19, to which Smithfield briefly responds below.

- Plaintiffs contend that “OSHA is hardly performing any onsite inspections.”
  Opposition at 2-3. However, Plaintiffs do not provide any support for this statement. Whether true or not, OSHA continues to pursue its mission and is conducting aggressive investigations using electronic means and demands for information, as is evidenced by its request to Smithfield regarding the Milan Plant.

- Plaintiffs suggest that OSHA is not investigating meat processing plants. Opposition at 3. This is a red herring. Whatever OSHA’s general policy is with respect to meat processing plants, it has inserted itself into safety issues at Smithfield’s Milan Plant. Moreover, just yesterday, OSHA and CDC issued joint guidance regarding COVID-19 safety issues directed at meat processing facilities.

- Plaintiffs contend that OSHA may only issue a citation to “abate[]” a violation after an inspection. 29 U.S.C. § 658(a). Opposition at 3. This is patently incorrect. OSHA may seek an immediate injunction under its emergency powers, as discussed above.

29 CFR § 1910.132, General Requirements [Personal Protective Equipment]
29 CFR § 1910.133, Eye and Face Protection
29 CFR § 1910.134, Respiratory Protection
29 CFR § 1910.141, Sanitation
29 CFR § 1910.145, Specifications for Accident Prevention Signs and Tags
29 CFR § 1910.1020, Access to Employee Exposure and Medical Records
29 CFR § 1910.1030, Bloodborne Pathogens
Plaintiffs contend that “even if their claims were not emergent, the wait for OSHA to act would likely be years.” Opposition at 3. Again, this is incorrect. Plaintiffs cite to statutes of limitations (6 months for OSHA to issue a citation) and employer response times (15 days), which are outer limits. Moreover, Plaintiffs assume an appeals process—a process that is available in the courts is well.

F. State and Local Public Health Authority Over COVID-19

While OSHA is responsible for workplace safety, Missouri state and local government has a corresponding responsibility for public safety. Missouri, like other states around the country, has implemented statewide policies to address the threat of COVID-19 exposure and transmission.


MDHSS continues to fulfill this responsibility, as it has issued dozens of guidance statements containing specific COVID-19 safety measures, including several statements pertaining specifically to workplace safety. Additionally, MDHSS and local health agencies

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9 See id., Items 1-3.
10 See id., p. 2.
have worked closely with a number of private businesses to monitor and develop their COVID-19 safety measures. MDHSS has also worked closely with federal agencies in responding to the virus, and the Center for Disease Control has made itself available to assist state and local agencies in their response to health emergencies such as COVID-19.

Missouri’s COVID-19 response led by state and local agencies is consistent with—and in fact required by—Missouri law. All “public health functions and programs” in Missouri must be supervised and managed by the MDHSS. Mo. Rev. Stat. Ann. § 192.005. Further, Missouri regulations specifically provide that the Director of MDHSS must use “the legal means necessary to control ... any disease or condition listed in 19 Mo. CSR 20-20.020 which is a threat to the public health.” 19 Mo. C.S.R. 20-20.040. Listed diseases and conditions include “[o]utbreaks (including nosocomial) or epidemics of any illness, disease, or condition that may be of public health concern.” 19 Mo. C.S.R. 20-20.020. That provision undoubtedly covers COVID-19.

Under MDHSS regulations, upon report of an infectious disease under Section 20-20.020, both the Director and “local health authorit[ies]” have a duty to take appropriate measures to lessen the effect of the disease:

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(A) Inspect any premises that they have reasonable grounds to believe are in a condition conducive to the spread of the disease; . . .

(E) Establish and maintain quarantine, isolation or other measures as required; . . .

(G) Establish appropriate control measures which may include isolation, quarantine, disinfection, immunization, closure of establishment, notification to the public of the risk or potential risk of the disease and such information required to avoid or appropriately respond to the exposure, the creation and enforcement of adequate orders to prevent the spread of the disease and other measures considered by the department and/or local health authority as appropriate disease control measures based upon the disease, the patient’s circumstances, the type of facility available, and any other available information related to the patient and the disease or infection.


III. ARGUMENT

A. The Court Should Dismiss or Stay This Action In Favor of OSHA’s Primary Jurisdiction Over Workplace Safety.

1. Legal Standard for Invoking Primary Jurisdiction Doctrine

The doctrine of primary jurisdiction applies to claims “properly cognizable in court that contain some issue within the special competence of an administrative agency.” Reiter v. Cooper, 507 U.S. 258, 268 (1993). It is a “common-law doctrine that is utilized to coordinate judicial and administrative decision making.” Access Telecommunications v. Southwestern Bell Tel. Co., 137 F.3d 605, 608 (8th Cir. 1998) (citations omitted). The doctrine “is concerned with promoting proper relationships between the courts and administrative agencies charged with particular regulatory duties.” United States v. Western Pac. R.R. Co, 352 U.S. 59, 63 (1956).

There is no set formula for when the doctrine applies, but “[i]n every case the question is whether the reasons for the existence of the doctrine are present and whether the purposes it serves will be aided by its application in the particular litigation.” Chlorine Inst., Inc. v. Soo Line R.R., 792 F.3d 903, 909 (8th Cir. 2015) (quoting United States v. Western Pac. R.R. Co., 352 U.S. 59, 64 (1956)); Asarco, LLC v. NL Indus., No. 11-00123-CV-SW-BP, 2013 U.S. Dist. LEXIS 43013,
The two primary reasons for applying the primary jurisdiction doctrine are: (1) “to obtain the benefit of the agency’s expertise and experience”; and (2) “to promote uniformity and consistency within the particular field of regulation.” *Sprint Spectrum L.P. v. AT&T Corp.*, 168 F.Supp.2d 1095, 1097-98 (W.D. Mo. 2001) (citations omitted).

The doctrine of primary jurisdiction may be applied even where claims arise under state law. For example, in *Sprint Spectrum L.P.*, the plaintiff asserted state law claims for implied contract and quantum meruit. 168 F.Supp.2d at 1099. Nevertheless, the court stayed the case in favor of an FCC proceeding because the outcome turned on the “reasonableness” of Sprint’s rates, “a fact that must be proven and one which the FCC is in a better position than the Court to evaluate.” *Id.* at 1099-1100; see also *Nader v. Allegheny Airlines*, 426 U.S. 290, 296-97 (1976) (observing that the D.C. Court of Appeals determined that the viability of plaintiff’s common-law fraudulent misrepresentation claim would be affected by agency determination).\(^6\)

Moreover, as the cases cited herein demonstrate, there need not be an existing agency proceeding for the court to invoke the doctrine of primary jurisdiction.\(^7\) However, the fact that a collateral agency action is already underway weighs in favor of the court deferring to the agency process. *See Asarco*, 2013 U.S. Dist. 43013 at *14-19.

In applying the primary jurisdiction doctrine, the court has discretion whether to dismiss or stay the lawsuit pending the agency determination. *Chlorine Institute*, 792 F.3d at 913 (citing *Reiter*, 507 U.S. at 268-69). Generally, dismissal is appropriate where resolution of the deferred

\(^{16}\) Plaintiffs’ Opposition brief incorrectly argues that the primary jurisdiction doctrine cannot be applied to state law claims. Opposition at 3-4.

\(^{17}\) Plaintiffs’ Opposition suggests that primary jurisdiction may only be applied where there is an *existing* agency proceeding. Opposition at 2. However, the case cited, *Curran v. Bayer Healthcare*, does not stand for this proposition. It merely indicates that defendant in that case failed to identify any such proceeding. Moreover, the case on which *Curran* relies focused on whether such a proceeding is available—not whether it has already been initiated. Here, Plaintiffs have available relief through OSHA’s complaint process and emergency powers.
issue will likely dispose of the entire case. See id. However, the Court may choose to stay the
matter while the agency action proceeds. See id.

2. **The Primary Jurisdiction Doctrine Applies Here.**

   This is a quintessential case for application of the primary jurisdiction doctrine. The issues
   presented by Plaintiffs’ Complaint relate to workplace safety. Plaintiffs seek only declaratory and
   injunctive relief. Specifically, they seek a Court order requiring Smithfield to adopt a list of work
   practices identified by Plaintiffs to protect against the spread of COVID-19. But there is a federal
   agency, OSHA, with special expertise in this area. Moreover, OSHA is actively involved in
   investigating and enforcing COVID-19 safe work practices throughout the country. Indeed,
   OSHA has already contacted Smithfield using a “Rapid Response Investigation” to obtain
   information regarding its COVID-19 safety practices at the Plant, and Smithfield is cooperating
   with OSHA. The Court should defer to OSHA as to whether Smithfield’s existing safety practices
   are sufficient to protect employee health, or whether additional measures should be implemented.\(^{18}\)

   Plaintiffs’ request for injunctive relief implicates several specific OSHA regulations. The
   table below highlights some of the specific OSHA standards at issue:

\(^{18}\) Plaintiffs’ reference the OSHA savings clause in their Opposition. Opposition at 4. However, the savings clause
relates to preemption—not primary jurisdiction. Smithfield will address the issue of OSHA preemption in its
Opposition to Plaintiffs’ Motion for Preliminary Injunction/Temporary Restraining Order.
<table>
<thead>
<tr>
<th>Relief Requested in Complaint</th>
<th>OSHA Standard</th>
</tr>
</thead>
<tbody>
<tr>
<td>Order Smithfield to provide “sufficient personal protective equipment” Compl. ¶ 123(c)(i).</td>
<td>General Personal Protective Equipment (PPE), 29 CFR 1910.132</td>
</tr>
<tr>
<td></td>
<td>1910.132(d)</td>
</tr>
<tr>
<td></td>
<td>Hazard assessment and equipment selection.</td>
</tr>
<tr>
<td></td>
<td>1910.132(d)(1)</td>
</tr>
<tr>
<td></td>
<td>The employer shall assess the workplace to determine if hazards necessitate the use of personal protective equipment (PPE). If such hazards are present, or likely to be present, the employer shall:</td>
</tr>
<tr>
<td></td>
<td>1910.132(d)(1)(i)</td>
</tr>
<tr>
<td></td>
<td>Select and require the use of PPE that will protect the affected employee;</td>
</tr>
<tr>
<td>Order Smithfield to “create[] and implement[] a social distancing plan” Compl. ¶ 123(c)(ii).</td>
<td>Bloodborne Pathogens, 29 CFR 1910.1030 (which OSHA has stated provides guidance for purposes of COVID-19 safety)</td>
</tr>
<tr>
<td></td>
<td>1910.1030(d)(2)</td>
</tr>
<tr>
<td></td>
<td>Engineering and Work Practice Controls.</td>
</tr>
<tr>
<td></td>
<td>1910.1030(d)(2)(i)</td>
</tr>
<tr>
<td></td>
<td>Engineering and work practice controls shall be used to eliminate or minimize employee exposure.</td>
</tr>
<tr>
<td>Order Smithfield to “create[] and implement[] a protocol to clean surfaces” Compl. ¶ 123(c)(v).</td>
<td>Sanitation, 29 CFR 1910.141:</td>
</tr>
<tr>
<td></td>
<td>1910.141(a)(3)(i)</td>
</tr>
<tr>
<td></td>
<td>All places of employment shall be kept clean to the extent that the nature of the work allows.</td>
</tr>
<tr>
<td>Order Smithfield to “provide[] tissues”19 Compl. ¶ 123(c)(iv).</td>
<td>Medical Services and First Aid, 29 CFR 1910.151</td>
</tr>
<tr>
<td></td>
<td>1910.151(b)</td>
</tr>
<tr>
<td></td>
<td>Adequate first aid supplies shall be readily available.</td>
</tr>
</tbody>
</table>

OSHA is in the best position to assess Smithfield’s COVID-19 work practices—not the Court in the first instance. Moreover, deferring to OSHA will promote uniformity, which is critical in these unprecedented times. Essential businesses that continue to operate to provide the public

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19 For obvious reasons, the United States Department of Agriculture would not allow production line workers to have tissues while working on the line.
and the government critical products and services should not be subject to piecemeal and inconsistent safety requirements imposed by private plaintiffs and courts.

The relief requested by Plaintiffs is truly unprecedented. Plaintiffs are asking this Court to develop, monitor, and administer Smithfield’s occupational health and safety program at the Plant. Plaintiffs have appointed themselves and their “experts” the role of inspecting the Plant and making determinations about what safety procedures must be implemented. The Court is then expected to take their recommendations and fashion a mandatory injunction that will require Smithfield to implement a specific safety program, which the Court presumably will police over the course of the pandemic.

Smithfield is not aware of a single case where a court commandeered an employer’s occupational safety and health program in such a manner, and Plaintiffs have cited none. Indeed, courts have refused such invitations—even in the face of the COVID-19 pandemic. For example, in Alaska State Employees Association, Local 52 v. SOA, 3AN-20-056652CI, the Union representing the state employees of Alaska filed suit against the state for alleged violation of the duty to provide a safe place to work and seeking injunctive relief to require the state to implement work practices to protect the employees from COVID-19. The court denied the injunction and declined to insert itself in the state’s determination of how to best protect its employees and continue to provide essential services. See Order Regarding ASEA’s Motion for a Temporary Restraining Order and Preliminary Injunction, attached as Exhibit 6. Courts have denied similar requests for injunctive relief that would require the court to oversee safety protocols at prisons. Baxley v. Jividen, 2020 WL 1802935 (W.D. Va. April 8, 2020). The Court should likewise

20 In Valentine v. Collier, __ F.3d __, 2020 WL 1934431 (5th Cir. Apr. 22, 2020), the district court granted injunctive relief related to the state prison system’s response to COVID-19, but the Court of Appeals stayed the injunction pending appeal. The Court noted that the prison system’s “ability to continue to adjust [their] policies [would be]
decline Plaintiffs’ invitation here, and defer workplace safety issues to OSHA and its expertise, working in conjunction with the Plant.

B. **This Court Should Abstain from Injecting Itself into Areas of Public Health Which Are Uniquely State Issues.**

1. **Legal standard for Burford abstention.**

   Federal courts “should exercise their discretionary power with proper regard for the rightful independence of state governments in carrying out their domestic policy.” *Burford v. Sun Oil Co.*, 319 U.S. 315, 334-35 (1943) (Douglas, J., concurring) (quoting *Commonwealth of Pennsylvania v. Williams*, 294 U.S. 176, 185 (1935)); see *Johnson v. Collins Entertainment Co., Inc.*, 199 F.3d 710, 720 (4th Cir. 1999) (holding that federal court abstention is required when states are protecting their residents’ health, safety, and welfare, and “different states can arrive at different answers based on their different experiences”).

   A federal court may abstain from jurisdiction under the *Burford* abstention doctrine when (1) “there have been presented difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case at bar”; and (2) “exercise of federal review of the question in a case and in similar cases would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern.” *Wolfson v. Mutual Benefit Life Ins. Co.*, 51 F.3d 141, 144 (8th Cir. 1995); *Melahn v. Pennock Insurance Inc.*, 965 F.2d 1497, 1506 (8th Cir. 1992) (“*Burford* abstention applies when a state has established a complex regulatory scheme supervised by state courts and serving important state interests, and when resolution of the case demands specialized knowledge and the application of

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*significantly hampered by the preliminary injunction, which locks in place a set of policies for a crisis that defies fixed approaches.”* *Id.* (citing *Jacobson v. Mass.*, 197 U.S. 11, 28-29 (1905); *In re Abbott*, 954 F.3d 772, 791 (5th Cir. 2020)).
complicated state laws”) (quoting *Bilden v. United Equitable Ins. Co.*, 921 F.2d 822, 825-26 (8th Cir. 1990)).

The application of the *Burford* doctrine does not require that a state authority have already intervened with respect to the specific matter. *See generally Johnson.* Rather, it is enough that a plaintiff may seek redress in a state court, where questions of local policy related to regulation and enforcement should be decided. *See id.* at 716 (noting that “[t]he state courts are intimately involved in [the regulatory] scheme through the adjudication of private actions and the review of administrative decisions”); *see also Heartland Hosp. v. Strangler*, 792 F.Supp. 670, 672 (W.D. Mo. 1992) (“Burford abstention is necessary when federal review would likely be ‘disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern’” (quoting *Colorado River Water Conservation Dist. v. U.S.*, 424 U.S. 800, 814 (1976)).

Abstention is especially appropriate when the issue to be decided “lies at the heart of the state’s police power” because “[f]ormulations of that power underscore the state’s paramount interest in the health, welfare, safety, and morals of its citizens.” See *Johnson*, 199 F.3d at 720. Otherwise, “the federal courts might adjudicate all kinds of disputes involving the most sensitive questions of state law and policy that arrive at their door . . . . This would in time endanger the independence of state policy at the core of state police power and cause friction between the federal and state systems.” *Id.*

2. The Court should abstain in favor of Missouri’s Public Health Agencies.

The Court should exercise its discretion to abstain in this case pursuant to the *Burford* abstention doctrine. Plaintiffs are seeking to serve as private attorneys general to enforce the state of Missouri’s public health law. A federal court should not insert itself into the state’s public policy regarding the protection of its citizens from COVID-19 exposure and transmission, particularly when there is a substantial risk that the federal court would decide the case differently.
than the state. See Lac D’Amiante du Quebec, Ltee v. Am. Home Assur. Co., 864 F.2d 1033, 1046
(3d Cir. 1988) (abstaining because “the risk is not insubstantial” that state agencies “would adopt
a different interpretation than did the district court”). Rather, this matter should be handled by
state and local public health agencies.

There is no question that the State of Missouri is already actively involved in protecting
the public from COVID-19 exposure and transmission. The Governor has issued a “stay-at-home”
order for this express purpose, but made the decision to permit businesses such as the Plant, which
are essential to the State and nation’s food supply, to continue to operate. The order specifically
provided that essential businesses need not require six feet between individuals if the workers’
“job duties require contact with other people closer than six feet.” The injunction Plaintiffs seek
requiring Plant employees to remain more than six feet apart would directly contradict the
Governor’s order. That is improper: “The purpose of Burford abstention is to discourage such
federal court second-guessing of state regulatory matters.” Sierra Club v. City of San Antonio, 112
F.3d 789, 796 (5th Cir. 1997) (vacating preliminary injunction because the district court should
have abstained under Burford).

Moreover, the Governor assigned responsibility for implementing and enforcing specific
COVID-19 safety measures to Missouri’s local and state health authorities. MDHSS has embraced
this responsibility, and both MDHSS and local health agencies have worked closely with a number
of private businesses to monitor and develop their COVID-19 safety response. MDHSS has also
worked closely with federal agencies in responding to the virus, and has the ability to invite the
Centers for Disease Control to assist with state and local response as needed.

Missouri law specifically vests authority over public health matters with MDHSS, and
requires MDHSS to use “the legal means necessary to control” a disease such as COVID-19,
“which is a threat to the public health.” 19 Mo. C.S.R. 20-20.040. Under state law, public health authorities have the duty and authority to inspect premises suspected of spreading disease, establish and maintain quarantines, and implement appropriate control measures to prevent the spread of disease. Id. Public health agencies throughout Missouri have acted on these duties and responsibilities, and there is no reason to believe they would not also do so if alerted to any threat to public health associated with the Plant.

It is entirely improper for this Court to assume responsibility for Missouri’s public health law. Plaintiffs have not asserted a federal law claim, and the federal court has no overriding interest in this matter. If there are truly public health concerns related to the Plant (and Smithfield vehemently disputes that), then addressing those issues is a matter of state policy that can be addressed by MDHSS and the local public health authorities. This is not the proper forum to adjudicate Missouri’s public health policy.

Plaintiffs cite to examples of Smithfield and other meat processing plants being shut down in other jurisdictions. However, in none of these examples was a state or federal court involved. Rather, in some instances state and local public health agencies made the decision to order the plant to close pending further investigation, and in others, the plants voluntarily closed in response to requests from state government or for other reasons (e.g., Smithfield’s Cudahy, Wisconsin facility that Plaintiffs cite closed because of supply chain issues – not a COVID-19 outbreak in the plant). These examples do not support the federal court’s involvement in this matter. To the contrary, they militate against it. The Court should therefore dismiss this action pursuant to the Burford abstention doctrine.

IV. CONCLUSION

A stay or dismissal is proper here. The principle of comity underlying primary jurisdiction and Burford abstention takes on heightened importance – and militates even more heavily in favor
of invoking the doctrines – where the possibility exists that the relief in the private action might conflict with the agency action. *Davies v. Nat’l Coop. Refinery Ass’n*, 963 F. Supp. 990, 997 (D. Kan. 1998) (abstaining from exercising RCRA jurisdiction in favor of the agency “charged by state law with responsibility for ... protecting human health and the environment” to avoid “prospect of conflicting directives from this court as to how the contamination should be remedied”). 21

It is not hard to imagine the chaos that would flow if courts take over the occupational health and safety programs of essential businesses around the country and appoint themselves keepers of the public health. An employee who claims an unsafe workplace already can file an OSHA complaint or seek the assistance of public health officials. If this additional avenue of court oversight of safety were opened businesses, already strapped to survive during the pandemic, would be faced with increased financial costs of litigation. A company that operates in multiple jurisdictions, such as Smithfield, would have no expectation of uniformity and could even be in a position to have inconsistent legal obligations as between OSHA and a decision from the court.

None of this is necessary. OSHA has broad powers to investigate and enforce workplace safety, and MDHSS has the necessary police power to regulate plant operation and ensure public health. This Court need not—and should not—wade into this area, and put itself in the position of policing workplace safety and directing state public health policy at the behest of a private plaintiff. The Court should grant Smithfield’s Motion, and dismiss or stay this action in favor of the authority and expertise of OSHA and MDHSS.

**SMITHFIELD FOODS, INC. and SMITHFIELD FRESH MEATS CORP.**

[21 The Davies court based its decision to abstain on both primary jurisdiction and the Burford abstention doctrine.]
By: /s/ Jean Paul Bradshaw II  
Jean Paul Bradshaw II (#31800)  
Mara Cohara (#51051)  
**Lathrop GPM LLP**  
2345 Grand Boulevard, Suite 2200  
Kansas City, Missouri 64108  
Telephone: (816) 460-5507  
Facsimile: (816) 292-2001  
jeanpaul.bradshaw@lathropgpm.com  
mara.cohara@lathropgpm.com

Alexandra B. Cunningham *(admitted PHV)*  
**Hunton Andrews Kurth LLP**  
Riverfront Plaza, East Tower  
951 East Byrd Street  
Richmond, Virginia 23219-4074  
Telephone: (804) 787-8087  
Facsimile: (804) 788-8218  
acunningham@HuntonAK.com

Susan F. Wiltsie *(admitted PHV)*  
**Hunton Andrews Kurth LLP**  
2200 Pennsylvania Avenue, NW  
Washington, District of Columbia 20037  
Telephone: (202) 955-1500  
Facsimile: (202) 778-2201

*Counsel for Defendants*
CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of April, 2020, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send electronic notification of the same to the following counsel of record:

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
ginachiala@jobsandfreedom.org

David S. Muraskin (admitted pro hac vice)
Karla Gilbride (admitted pro hac vice)
Stevie K. Glaberson (admitted pro hac vice)
Public Justice
1620 L. Street, NW, Suite 630
Washington, DC 20036
Telephone: (202) 797-8600
Facsimile: (202) 232-7203
dmuraskin@publicjustice.net
kgilbride@publicjustice.net
sglaberson@publicjustice.net

I hereby certify that I will send copies of the foregoing via electronic mail to Plaintiffs' counsel who have pending motions to appear pro hac vice:

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

Counsel for Plaintiffs

/s/ Jean Paul Bradshaw II
An Attorney for Defendants
ORDER GRANTING DEFENDANTS' MOTION TO DISMISS

This lawsuit arises from Plaintiffs’ allegations that Defendant Smithfield Foods, Inc. and its wholly owned subsidiary, Defendant Smithfield Fresh Meats Corporation (collectively, “Smithfield”) have failed to adequately protect workers at its meat processing plant in Milan, Missouri, (“the Plant” or “the Milan Plant”) from the virus that causes COVID-19. Now before the Court are Plaintiffs’ Motion for a Temporary Restraining Order (“TRO”) and Preliminary Injunction (Doc. 3), and Smithfield’s motion to dismiss and/or stay pursuant to the primary-jurisdiction doctrine (Doc. 28).

After carefully reviewing the motions and the existing record, the Court holds that it should decline to hear this matter pursuant to the primary-jurisdiction doctrine to allow the Occupational Health and Safety Administration (“OSHA”) to consider the issues raised by this case. But even if the Court did not apply the primary-jurisdiction doctrine, the Court would not

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1 The Court notes that there is currently a motion pending to allow Jane Doe to proceed using a pseudonym (Doc. 42). Given the Court’s dismissal of this action and the denial of injunctive relief, the Court finds that requiring Plaintiff to reveal her identity would serve no important purpose, especially given that another named plaintiff appears in this case. The issues presently before the Court are—for the most part—purely legal, and the majority of Plaintiff’s allegations are not individualized. Thus, the public’s interest in Plaintiff’s identity and the prejudice to Smithfield in allowing Plaintiff to proceed anonymously for purposes of deciding the instant motions is minimal. Plaintiff Doe may therefore use a pseudonym for purposes of the motions presently before this Court. This Court reserves judgment on her ability to do so should this case proceed to further stages of litigation.
issue a preliminary injunction because Plaintiffs have not met their burden of proving that the extraordinary remedy of an affirmative injunction is justified. Smithfield’s motion is GRANTED, and the case is DISMISSED WITHOUT PREJUDICE.

Background

The Background section of this order is arranged in chronological order. Although regrettably lengthy, it details how the regulatory environment in which meat-processing plants operate is constantly changing during this unique national emergency.

In late 2019, a new coronavirus emerged named severe acute respiratory syndrome coronavirus 2 (SARS-CoV-2). This virus causes coronavirus disease 2019 (COVID-19), a respiratory illness that can cause serious health problems, including death. SARS-CoV-2 is highly contagious; it appears to spread from person to person through respiratory droplets produced when an infectious person coughs, sneezes, or talks, and the virus can be spread by presymptomatic, or even asymptomatic, individuals.

A global pandemic ensued, and the virus and COVID-19 reached the United States in early 2020. On March 13, 2020, the President declared a national emergency concerning COVID-19. That same day, Missouri’s governor also declared a state emergency, and on April 3, the Missouri Department of Health and Senior Services issued a stay-at-home order that mandated all individuals abide by social-distancing requirements and closed all nonessential


3 Id.

4 Id.
businesses in Missouri through May 4. The stay-at-home order defines essential businesses in accordance with guidance from the U.S. Department of Homeland Security, Cybersecurity & Infrastructure Security Agency ("Homeland Security"), which identified livestock-slaughter facilities, including the Plant and its operations, as "critical infrastructure." On April 9, the Centers for Disease Control ("CDC") published *Interim Guidance for Businesses and Employers to Plan and Respond to Coronavirus Disease 2019 (COVID-19)*, which outlined several policies and procedures employers should implement to help prevent workplace exposure and community spread of the virus.

On April 22, OSHA sent Smithfield a "Rapid Response Investigation" requesting information regarding its COVID-19 work practices and infection at the Milan Plant, giving Smithfield seven days to respond. As part of its inquiry, OSHA requested information about Smithfield’s COVID-19 practices including what, if any, personal protective equipment has been given to its workers, what engineering controls have been implemented, what contact tracing methods have been employed, and what policies have been changed or implemented in light of the pandemic (Doc. 29-2). Smithfield responded on April 29 (Doc. 41).

The next day, on April 23, Plaintiffs Jane Doe and the Rural Community Workers Alliance ("RCWA") filed suit. They allege Smithfield is not taking adequate steps to prevent transmission of the virus at its Plant, thereby endangering workers and members of the surrounding community. According to her declaration, Doe is a current Smithfield employee who has worked at its Milan Plant for at least five years. She claims she currently works on the

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“cut floor” where animals are broken down into products and packaged.

The RCWA is a Missouri non-profit advocacy group whose members consist exclusively of workers in Northern Missouri. Several members of RCWA’s current leadership council work at the Plant, and sixty to seventy workers who attend its meetings work at the Plant, including Jane Doe.

Defendant Smithfield is one of the largest meat-processing companies in the world, with meat-processing plants all over the United States, including in Milan, Missouri. Several of its meat-processing plants in the United States have closed recently due to outbreaks of COVID-19 among its workers.

The Complaint (Doc. 1) alleges that several meat-processing plants in this country owned and operated by Smithfield have become major COVID-19 “hot spots.” It also alleges that in direct contravention of CDC guidelines, Smithfield has not implemented certain precautions to keep its workers and the Milan community safe from the virus. Such measures include keeping adequate distance between workers, prohibiting workers from taking a break to wash their hands or face, preventing workers from covering their faces if they need to cough or sneeze, implementing a sick-leave policy that penalizes workers for missing work even if they are exhibiting COVID-19 symptoms, and failing to implement plans for testing and contact tracing.

The Complaint brings state-law claims for public nuisance and breach of duty to provide a safe workplace. Plaintiffs are not seeking monetary damages, only declaratory judgments stating that: (1) Smithfield’s practices at the Plant constitute a public nuisance; and (2) Smithfield has breached its duty to provide a safe workplace.

The same day Plaintiffs filed suit, they also moved for a temporary restraining order and preliminary injunction (Doc. 3), seeking to force Smithfield to: provide masks; ensure social
distancing; give employees an opportunity to wash their hands while on the line; provide tissues; 
change its leave policy to discourage individuals to show up to work when they have symptoms 
of the virus; give workers access to testing; develop a contact-tracing policy; and allow their 
expert to tour the Plant. Attached to the motion were declarations from: (1) Jane Doe, who 
described working conditions at the Plant and stated she was afraid for health and safety, as well 
as the health and safety of the Milan community, because of what she considers inadequate 
safety procedures at the Plant; (2) RCWA’s Executive Director, Alex Fuentes; (3) a senior 
lobbyist with the non-profit organization Food & Water Watch (“FWW”), Anthony Corbo; (4) a 
lawyer, Thomas Fritzsche, who has interviewed a number of Alabama poultry-plant workers 
about working conditions and authored a 2013 report for the Southern Poverty Law Center about 
modern industrial slaughterhouse workers; and (5) an occupational-medicine specialist, 
Dr. Robert Harrison, who works as Clinical Professor of Medicine at the University of 
California, and also serves the California Department of Public Health.

On April 26, the Court set a videoconference hearing on the preliminary injunction 
motion for April 30. That same day, the CDC and OSHA issued Meat and Poultry Processing 
Workers and Employers – Interim Guidance (“the Joint Guidance”), which provided 
supplemental guidance to meat-processing plants concerning COVID-19. The Joint Guidance 
states that to reduce the risk of transmission among employees, employers at meat-processing 
facilities should, where “feasible,” implement engineering controls, such as staggering shifts and 
breaks, requiring workers to stay six-feet apart, and/or erecting physical barriers; place 
handwashing or hand-sanitizing stations in multiple locations and encourage hand hygiene; give 
workers additional short breaks to wash hands; provide tissues; and allow workers to take breaks

7 Ctrs. for Disease Control and Prev. & Occ. Safety and Health Admin., Meat and Poultry Processing Workers and 
in alternative areas to ensure social distancing. It also recommends employers provide personal protective equipment for workers to use during their shift and increase the frequency of sanitization in work and common spaces. It states employers should educate employees on measures they can take to decrease the risk of spreading the virus and provides a specific list of measures employers should take to promote social distancing, such as providing visual cues on floors, as reminders for social distancing. It encourages employers to screen workers for COVID-19 by implementing temperature checks prior to entering the workplace and sending home workers who appear to have symptoms (e.g., cough, fever, or shortness of breath), and monitor workers’ contacts so they can alert anyone who may have been exposed to the virus. Finally, it recommends employers review leave and incentive policies so as to not penalize workers for taking sick leave if they contract COVID-19.

On April 27, Smithfield filed a motion to dismiss this case pursuant to the primary-jurisdiction doctrine, arguing this Court should defer to OSHA in this case. The next day—April 28—the President signed an executive order (“the Executive Order”) under § 4511(b) of the Defense Production Act (“DPA”), 50 U.S.C. § 2061 et seq., delegating authority to the Secretary of Agriculture to take all appropriate action “to ensure that meat and poultry processors continue operations consistent with the guidance for their operations jointly issued by” the CDC and OSHA. 8

On April 29, Smithfield made several filings, including a supplemental brief to its motion to dismiss, which alleged that pursuant to the Executive Order, the United States Department of Agriculture (“USDA”) now had jurisdiction over this case. It also submitted its Suggestions in

Opposition (Doc. 32) to the preliminary injunction motion. Attached to its brief as exhibit A (Doc. 32-1) is a declaration from the Plant’s general manager, Tim Messman, along with pictures of the Plant and copies of the Plant’s policies and procedures related to COVID-19. Exhibit B (Doc. 32-2) is a declaration from John Henshaw, the head of OSHA from 2001 to 2003.

Later that same day, Plaintiffs’ filed their suggestions in opposition (Doc. 35) to Smithfield’s motion to dismiss. Included in it is a declaration from Dr. Melissa Perry (Doc. 35-2), a professor of environmental health at George Washington University.

On April 30, the Court held a hearing on the motion via teleconferencing. The Court offered the parties an opportunity to introduce evidence, including witness testimony, but both parties elected to stand on the existing record. The parties then argued their respective positions.

After the hearing, the parties filed supplemental briefs. Attached to Smithfield’s brief (Doc. 46) is a supplemental declaration from Smithfield’s plant manager, clarifying Smithfield’s leave policy and updating the Court on additional safety changes at the Plant.

Plaintiffs concede that Smithfield implemented new policies and procedures after this lawsuit was filed and have narrowed their requested injunctive relief to direct Smithfield to:

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.

(Doc. 48 at 10). Plaintiffs characterize their requested relief as compliance with the Joint Guidance.

**Findings of Fact**

The Court gives the various declarations submitted by the parties the following
The Court gives Jane Doe’s declaration limited weight. While she has personal knowledge of conditions in those parts of the Plant in which she works, it is unclear exactly what part of the “cutting floor” she works in, and whether she can see all that she claims to see from this area. Further, it appears that some of the information in her declaration is no longer accurate due to recent changes in the Plant’s policies and procedures. For example, although her declaration may be correct that Smithfield initially told workers they would receive only one mask per week, this policy has been superseded. As discussed below, workers are now given masks every day. Finally, because her identity is unknown, there is no way to determine, through the adversarial process or otherwise, whether Doe has some bias against Smithfield that could lead her to misrepresent or exaggerate conditions at the Plant. The Court notes that at least one of her statements—that Smithfield has increased the line speed at the Plant during the pandemic—is contradicted by other, more persuasive evidence.

Mr. Fuentes’ declaration concerning working conditions at the Plant are even less reliable than Jane Doe’s, and so the Court gives them less weight. Mr. Fuentes has no personal knowledge of conditions at the Plant because he has never set foot in it. His understanding is based on hearsay from unidentified employees whose statements to him, even if accurately relayed by Mr. Fuentes, were not made under penalty of perjury. That said, the Court finds the portions of his declaration concerning RCWA’s membership and activities are credible.

The Court finds the declarations of Messrs. Corbo, Fritzsche, and Harrison are based on some relevant knowledge, education, and experience concerning working conditions in American meat-processing plants generally, and so they possess some limited insight into what

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9 Smithfield filed a motion to strike Plaintiffs’ five declarations attached to the motion for a temporary restraining order and/or preliminary injunction (Doc. 34). The Court denies the motion, since, in considering these motions, the issues it complains of go to the weight of the evidence rather than its admissibility.
steps could be taken to prevent the spread of the SARS-CoV-2 virus in a generic American meat-processing facility. Because they are unfamiliar with specific working conditions at the Plant, however, their declarations provide limited help in determining whether Smithfield’s policies and procedure at the Plant are sufficient to stem transmission of the virus.

Finally, the Court turns to the declaration of Dr. Melissa J. Perry, Professor and Chair of Environmental and Occupational Health at the Milken Institute School of Public Health of the George Washington University. Dr. Perry credentials are excellent: She is a past President of the American College of Epidemiology and a past chair of the Board of Scientific Counselors for the CDC. She has also served as a member of the National Institute for Occupational Safety and Health research grant-review panel. She has studied meat-processing facilities since 2004 and has published six peer-reviewed-journal articles on work health and safety at meat-processing facilities. As part of that work, she has visited four meat-processing plants and spoken with engineers regarding the organizational structure of processing plants and how they can be redesigned to further worker health and safety.

Dr. Perry opines that meat-processing plants can allow workers to stand six feet apart if they reduce production line speed, and that, if they do not space production line workers six feet apart, the plants will “inevitably” have a COVID-19 outbreak. She contends slowing the production line is the only way the plant will be able to continue meat production without an outbreak. She also endorses the other requests Plaintiffs make, such as for more rest breaks and paid leave, as “absolutely necessary” so the Plant can continue operating.

This Court has respect for Dr. Perry’s opinion but finds it of limited value in this case. While this Court agrees that slowing down line speed may be beneficial for workers and allow more opportunities for social distancing, the Court found nothing in the Joint Guidance
recommending a decrease in line speed. To that point, she provides no specific opinion regarding whether the Milan Plant is currently in compliance with the Joint Guidance, and there is no evidence that Dr. Perry reviewed the policies and procedures at the Milan Plant in forming her opinion. Accordingly, the Court gives little weight to her opinion that unless the production line speed is slowed and workers spread six feet apart, spread of the virus through the Plant is “inevitable” and it “will be forced to shutter.” This assertion appears to be more of a good-faith speculation than an evidenced-based conclusion.

The Court gives more weight to the declarations provided by Smithfield. The statements made by Mr. Messman, the Plant’s general plant manager, are almost all based on his personal knowledge. He possesses the most recent information concerning working conditions at the Plant, and he appears to be a reliable source of information about Smithfield’s policies and procedures there.

The Court gives considerable weight to the declaration of John Henshaw, Smithfield’s expert witness. After reviewing Smithfield’s written policies and procedures at the Plant, the general manager’s declaration, the pictures, and the declarations in Plaintiffs’ motion, Mr. Henshaw opined that Smithfield’s current policies and procedures, if followed, were consistent with the Joint Guidance as of April 29, 2020. Although the Court is aware that he is a retained expert witness whose assumptions and conclusions have not been tested by cross-examination, his opinion is measured, qualified, and grounded in the facts at the Milan Plant.

With the credibility determinations in mind, the Court makes the following findings of fact concerning current the Plant’s working conditions and Smithfield’s COVID-19 policies and procedures.
Before entering the Plant, Smithfield requires all employees to undergo thermal screening. If employees exhibit one primary symptom or two secondary symptoms of COVID-19, Smithfield provides them with instructions for next steps, including directions to quarantine and call their physician for guidance, and sends the employee home for fourteen days of paid leave or until the individual receives a negative COVID-19 test result. Employees with underlying health concerns—verified by a doctor—that place them at a higher risk of COVID-19 are given fourteen days of paid leave and then are shifted to short-term disability leave.

While quarantining as a result of COVID-19 symptoms, Smithfield requires employees to complete a questionnaire that in part entails naming all other employees they have closely contacted within the two days before experiencing symptoms. If the employee tests positive for COVID-19, Smithfield notifies and screens the close contacts. As of April 29, 2020, thirteen employees had been tested for COVID-19. None were positive.

If employees miss work as a result of COVID-related symptoms, Smithfield does not penalize them. They do not receive attendance points and remain eligible for Smithfield’s Responsibility Bonus ($500), regardless of whether individuals provide a doctor’s or nurse’s note. Moreover, Smithfield has expanded its employee benefits by eliminating co-pays for COVID-related testing and treatment.

To ensure that those inside the Plant are complying with Smithfield’s COVID-19 safety procedures and policies, Smithfield has assigned both a nurse and a health-and-safety clerk to perform checks throughout the Plant. Smithfield has communicated these procedures and policies to its employees by several different media, including on televisions and signs at the Plant, through the Beekeeper communications app, and through the Textcaster mass communication system.

10 Primary symptoms include fever, persistent dry cough, and shortness of breath, while secondary symptoms include chills, repeated shaking with chills, muscle pain/extreme fatigue, headache, sore throat, and/or loss of taste or smell (Doc. 46-2 at 8).
text-messaging tool. Signs at the Plant relay the information in English, Spanish, and French, while the Beekeeper and Textcaster communications are available in the employee’s language of choice. Interpreters are also available at the Plant to assist with these communications.

The Plant provides workers with an ear-looped face mask upon entry to the Plant each day, and if a mask breaks or becomes soiled, it provides a new one. Smithfield now requires all workers at the Plant to wear a mask at all times other than during meals and in certain offices where employees are spaced six feet apart. These masks prevent the spread of germs if an employee sneezes or coughs while on the line, reducing the need for tissues to reduce the spread of COVID-19. Additionally, Smithfield requires employees on the production floor to wear nitrile gloves and a plastic face shield.

As Smithfield concedes, it does not provide tissues to employees. It cannot provide tissues to individuals working on the production line because doing so would violate health standards set by the USDA. Thus, one of Plaintiff’s original complaints cannot be remedied. Smithfield could, however, provide tissues for employees to wipe their nose while on breaks, but the record does not support that employees are banned from bringing their own tissues or other hygienic wipes to use while on breaks.

As for Plaintiffs’ claim that Smithfield does not allow employees to wash their hands without penalty, the Court finds that Smithfield policies and procedures are reasonable under the circumstances. Due to the nature of the meat-processing business, employees must wear gloves on the production line. When workers leave the line for a break, they remove their gloves and sanitize their hands before entering common areas. They must also wash their hands and put on gloves before returning to the line. Smithfield currently administers hand sanitizer to employees every thirty minutes to use on their gloves and has added approximately 110 hand-sanitizing
stations throughout the Plant. Smithfield also expects a shipment of small hand-sanitizer bottles soon, which it will make available to employees for personal use. In the meantime, the Plant has invited employees to bring in personal bottles they may refill using the company supply. Thus, the need for continued hand washing is unnecessary because any contamination that may occur on the line is contained by the required use of gloves.

Moreover, Smithfield has also enhanced cleaning and disinfection of the Plant’s frequently touched surfaces in common areas using cleaning solutions identified by the CDC for use against the virus. These cleanings are performed as often as every two hours throughout the workday. Additional deep cleanings occur over the weekends, and Smithfield is working to implement use of fogging/misting disinfectants where possible.

Finally, the Court turns to the steps Smithfield has taken steps to facilitate social distancing at the Plant. Smithfield has staggered workday start times, as well as lunch and break times, to avoid large numbers of workers congregating in break rooms or around time clocks. Smithfield is currently working to secure a wireless means for employees to clock in and out of their shifts to minimize crowding. In the meantime, it has expanded the number of available clocks for employees to use and will implement a grace period for workers to clock in and out of their shifts, all increasing the ability of workers to maintain social distance.

Smithfield has erected two large tents and three carport structures on the Plant lawn and placed tables and chairs underneath each so that workers have more space to eat while on breaks. The Plant has also installed plastic barriers on eating tables that separate employees from those sitting beside and across from them. Tables are sanitized after one employee leaves and before another sits down.
Smithfield has also reduced the number of hogs harvested each day and sends some employees home before lunch. This requires fewer employees to be at the Plant, helping to minimize crowding in the cafeteria and other areas. However, these policies reduce the number of hours worked by the affected employees, thereby decreasing their weekly pay. To ease the resulting financial burden on employees, Smithfield has temporarily increased pay by $5/hour, and such pay is available to any employee who takes an approved leave as a result of COVID-related symptoms. Smithfield has also installed clear plastic barriers along the Plant production line to separate employees working across from each other and employees working side by side.

Discussion

I. The primary-jurisdiction doctrine applies.11

Before reaching the merits of Plaintiffs’ request for a preliminary injunction, the Court must determine whether it should dismiss or stay this case pursuant to the primary-jurisdiction doctrine. “Primary jurisdiction is a common-law doctrine that is utilized to coordinate judicial and administrative decision making.” Access Telecomms. v. Sw. Bell Tel. Co., 137 F.3d 605, 608 (8th Cir. 1998) (citation omitted). “The doctrine allows a district court to refer a matter to the appropriate administrative agency for ruling in the first instance, even when the matter is initially cognizable by the district court.” Id. (citation omitted). “There exists no fixed formula for determining whether to apply the doctrine of primary jurisdiction.” Id. (citing United States v. W. Pac. R.R. Co., 352 U.S. 59, 64 (1956)). Instead, courts must consider in each case “whether the reasons for the doctrine are present and whether applying the doctrine will aid the purposes

11 Although Smithfield previously argued Burford abstention also applied here, it conceded during the preliminary-injunction hearing that that argument no longer applies due to the President’s Executive Order. Accordingly, the Court does not address it. Because this Court finds the primary jurisdiction doctrine applies, it does not address Smithfield’s preemption arguments, which were asserted after the preliminary-injunction hearing.
for which the doctrine was created.” Id. (citation omitted). In undertaking this analysis, a court must be mindful that the primary-jurisdiction doctrine “is to be invoked sparingly, as it often results in added expense and delay.” Alpharma, Inc. v. Pennfield Oil Co., 411 F.3d 934, 938 (8th Cir. 2005). “Once a district court decides to refer an issue or claim to an administrative agency under the doctrine of primary jurisdiction, it may either dismiss or stay the action.” Chlorine Inst., Inc. v. Soo Line R.R., 792 F.3d 903, 913 (8th Cir. 2015).

There are two primary reasons courts apply the primary-jurisdiction doctrine. First, “to obtain the benefit of an agency’s expertise and experience . . . ‘in cases raising issues of fact not within the conventional experience of judges or cases requiring the exercise of administrative discretion. . . .’” Access Telecomms., 137 F.3d at 608 (noting “‘agencies created by Congress for regulating the subject matter should not be passed over’”) (quoting Far E. Conference v. United States, 342 U.S. 570, 574 (1952)). Second, “to promote uniformity and consistency within the particular field of regulation.” Id. (citation omitted). Thus, in deciding whether to apply the doctrine, courts focus on two questions: (1) “whether the issues raised in the case ‘have been placed within the special competence of an administrative body,’” and (2) whether the court’s disposition of the case could lead to inconsistent regulation of businesses in the same industry. Sprint Spectrum L.P. v. AT&T Corp., 168 F. Supp. 2d 1095, 1098 (W.D. Mo. 2001) (quoting United States v. W. Pac. R.R. Co., 352 U.S. at 64). In this case, the answer to both questions is yes.

Plaintiffs allege that because the Plant is not abiding by the Joint Guidance, it constitutes a public nuisance and has created an unreasonably unsafe workplace. Thus, Plaintiffs’ claims both succeed or fail on the determination of whether the Plant is complying with the Joint Guidance. Due to its expertise and experience with workplace regulation, OSHA (in
coordination with the USDA per the Executive Order) is better positioned to make this determination than the Court is. Indeed, this determination goes to the heart of OSHA’s special competence: its mission includes “enforcing” occupational safety and health standards. In fact, OSHA has already shown interest in determining whether the Plant is abiding by the Joint Guidance. The day before Plaintiffs filed this lawsuit, OSHA sent Smithfield a request for information regarding its COVID-19 work practices and infection at the Plant.

Turning to the second question, the Court finds only deference to OSHA/USDA will ensure uniform national enforcement of the Joint Guidance. If the Court ruled on whether the Plant is complying with the Joint Guidance, this ruling would be binding on Smithfield but not other meat-processing facilities because the Court lacks personal jurisdiction over them. Thus, any determination by this Court whether the Plant is complying with the Joint Guidance could easily lead to inconsistent regulation of businesses in the same industry. And under these circumstances, where the guidelines are rapidly evolving, maintaining a uniform source for guidance and enforcement is crucial.

Plaintiffs’ argue that deference will add delay. But OSHA has already requested information about the Plant’s safety measures. And if OSHA fails to act quickly on this information, Plaintiffs have a remedy: they may receive emergency relief through OSHA’s statutory framework. Section 662(a) of the Occupational Safety and Health Act (“the Act”), 29 U.S.C. §§ 651 et seq., permits the Secretary of Labor to petition the court “to restrain any [dangerous] conditions or practices in any place of employment . . . which could reasonably be expected to cause death or serious physical harm immediately or before the imminence of such danger can be eliminated through the enforcement procedures otherwise provided by [the Act].” Upon the filing of such petition, “the district court shall have jurisdiction to grant such injunctive
relief or temporary restraining order pending the outcome of an enforcement proceeding.” Id. at § 662(b). If the Secretary “arbitrarily or capriciously fails to seek relief,” a worker can file a writ of mandamus to compel the Secretary to seek such an order. Id. at § 662(d). Granted, there may be some delay before Plaintiffs can invoke this procedure, but following this procedure ensures the USDA and OSHA can take a measured and uniform approach to the meat-processing plants under its oversight. The Court’s intervention at this point, on the other hand, would only risk haphazard application of the Joint Guidance.

In sum, the Court holds that the issue of Smithfield’s compliance with OSHA’s guidelines and regulations falls squarely within OSHA/USDA’s jurisdiction. The Court finds dismissal without prejudice is preferable to a stay here so that Plaintiffs may seek relief through the appropriate administrative and regulatory framework.

III. Plaintiffs’ have not met their burden for a preliminary injunction.

Although the Court’s ruling on the primary-jurisdiction doctrine is dispositive, to aid in any appellate review, the Court will consider whether Plaintiffs have met their extraordinary burden of proving an affirmative preliminary injunction is proper in this case.

In determining whether to grant injunctive relief the Court considers the following factors, which were set forth in the seminal decision Dataphase Sys., Inc. v. C L Sys., Inc., 640 F.2d 109, 114 (8th Cir. 1981): 1) the threat of irreparable harm to the movant; 2) the balance between this harm and any injury that granting the injunction will inflict on the non-moving party; 3) the likelihood that the moving party will prevail on the merits; and 4) the public interest. Phelps-Roper v. Nixon, 509 F.3d 480, 484 (8th Cir. 2007). No single factor is determinative; they must be “balanced to determine whether they tilt towards or away” from


1. **Plaintiffs have not demonstrated a threat of irreparable harm.**

To demonstrate a sufficient threat of irreparable harm, the moving party must show that there is no adequate remedy at law; that is, that an award of damages cannot compensate the movant for the harm. *See Noodles Dev.*, 507 F.Supp.2d at 1036-37. But, when analyzing this factor, the Eighth Circuit has held that “[m]erely demonstrating the ‘possibility of harm’ is not enough.” *Chlorine Inst., Inc. v. Soo Line R.R.*, 792 F.3d 903, 915 (8th Cir. 2015); see also *S.J.W. ex rel Wilson v. Lee’s Summit R–7 Sch. Dist.*, 696 F.3d 771, 779 (8th Cir. 2012) (“Speculative harm does not support a preliminary injunction.”). In the context of a global pandemic, this Court must consider the threat after “accounting for the protective measures” defendant has already implemented. *Valentine v. Collier*, --- F.3d ---, 2020 WL 1934431, *5 (5th Cir. Apr. 22, 2020).

Plaintiffs argue that their injury is potentially contracting COVID-19, which could result in serious illness or even death. But this type of injury is too speculative under Eighth Circuit precedent.
Plaintiffs’ claim otherwise, citing two cases from the Eighth Circuit, which they argue held the possibility of “death or serious illness” constitutes an irreparable injury (Doc. 3 at 24). Plaintiffs’ cite *Kai v. Ross*, 336 F.3d 650, 656 (8th Cir. 2003), a case in which the state of Nebraska revoked a program providing medical care for the needy. The plaintiffs, who suffered from physical and mental disabilities and received their prescription medications through the program, sought to enjoin revocation of the program. *Id.* The Eighth Circuit held that the present danger to plaintiffs’ health without their medications is an irreparable harm. *Id.*

Plaintiffs also cite *Harris v. Blue Cross Blue Shield of Mo.*, 995 F.2d 877, 879 (8th Cir. 1993), which similarly held that denial of coverage for the treatment of a life-threatening illness is an irreparable injury. These two cases are inapposite, since the plaintiffs were already suffering from illnesses, and would undoubtedly suffer serious illness or death in the absence of an injunction. In other words, the threat of serious injury or death was a certainty and not merely a possibility.

The Court is not unsympathetic to the threat that COVID-19 presents to the Plant’s workers. But in conducting its analysis, the Court must determine whether Plaintiffs will suffer an actual, imminent harm if the injunction is denied. This is not the same as analyzing whether employees risk exposure if they continue to work, and, unfortunately, no one can guarantee health for essential workers—or even the general public—in the middle of this global pandemic.

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12 Plaintiffs also cite *Mertzlufft v. Bunker Res. Recycling & Reclamation, Inc.*, 760 S.W.2d 592 (Mo. Ct. App. 1988) as persuasive authority. In *Mertzlufft*, the plaintiffs sought to enjoin a business which was illegally transporting, storing, and incinerating hazardous waste without a permit. *Id.* at 595. The plaintiffs brought a citizen’s suit to enjoin the defendant from charging and loading the incinerator with hospital wastes, or otherwise operating it, which the trial court granted. *Id.* The Missouri court of appeals, reviewing the case under a standard deferential to the trial court’s judgment—not operating under the preliminary injunction standard set forth in *Dataphase*—held that the preliminary injunction was warranted. *Id.* at 598. It did not, however, address whether the plaintiffs proved there was a threat of irreparable harm. *Id.* at 598. To the contrary, the court held that plaintiffs were “not obligated to allege and prove they had suffered irreparable harm in order to obtain injunctive relief, but were only required to prove that they were adversely affected in fact by the unlicensed operation, which they did.” *Id.* Accordingly, this case is also inapplicable because the court of appeals did not consider—and plaintiffs were not required to prove—a threat of irreparable harm. But, even if they were, the defendant was illegally operating a hazardous waste facility, and thus presented a present threat of certain harm to the plaintiffs.
But given the significant measures Smithfield is now taking to protect its essential workers from COVID-19 and the fact that there are no confirmed cases of COVID-19 currently at the Plant, the Court cannot conclude that the spread of COVID-19 at the Plant is inevitable or that Smithfield will be unable to contain it if it occurs. Thus, Plaintiffs have not established an immediate threat of irreparable harm.

2. Plaintiffs have not shown that the balance of harms favors issuing injunctive relief.

The second factor “examines the harm of granting or denying the injunction upon both of the parties to the dispute and upon other interested parties, including the public.” Noodles Dev., 507 F. Supp. 2d at 1038 (citing Dataphase, 640 F.2d at 114). “To determine what must be weighed, . . . courts of this circuit have looked at the threat to each of the parties’ rights that would result from granting or denying the injunction.” Id. The “potential economic harm to the parties” is a relevant consideration, as is “whether the defendant has already voluntarily taken remedial action.” Id.

Here, there is no doubt that if workers at the Plant contract COVID-19, the harm to Plaintiffs could be great. But Plaintiffs have alleged only that—potential harm—and, in this time, no essential-business employer can completely eliminate the risk that COVID-19 will spread to its employees through the workplace. Thus, it is important that employers make meaningful, good faith attempts to reduce the risk. Here, Smithfield has taken significant remedial steps in accordance with the Joint Guidance to protect its workers from COVID-19.

Moreover, national and local guidance on COVID-19 is continuously evolving and changing. An injunction would deny Smithfield the flexibility needed to quickly alter workplace procedures to remain safe during the ever-changing circumstances of this pandemic. Valentine, 2020 WL 1934431 at *5 (staying injunction that would “interfer[e] with the rapidly changing and
flexible system-wide approach that [defendant] has used to respond to the pandemic so far” and “[defendant’s] ability to continue to adjust its policies is significantly hampered by the preliminary injunction, which locks in place a set of policies for a crisis that defies fixed approaches”) (citing Jacobson v. Massachusetts, 197 U.S. 11, 28–29 (1905); In re Abbott, 954 F.3d 772, 791 (5th Cir. 2020)). Thus, the remedial measures Smithfield has implemented convince the Court that the balance of harms weighs in its favor.

3. **Plaintiffs have not shown a likelihood of success on the merits.**

To demonstrate likelihood of success on the merits, a movant does not need to show that it ultimately will succeed on its claims, only that the movant’s prospects for success is sufficiently likely to support the kind of relief it requests. See Noodles Dev., 507 F.Supp.2d at 1036–37 (emphasis added) (citations omitted). That is, the movant need only show “a fair chance of prevailing.” Phelps-Roper, 509 F.3d at 485. On this record, Plaintiffs have not shown a fair chance of prevailing on either of their claims.

a. **Plaintiffs have not shown they are likely to succeed on their public-nuisance claim.**

Under Missouri law, “a public nuisance is an offense against the public order and economy of the state and violates the public’s right to life, health, and the use of property, while, ‘at the same time annoys, injures, endangers, renders insecure, interferes with, or obstructs the rights or property of the whole community, or neighborhood, or of any considerable number of persons.’” State ex rel. Schmitt v. Henson, ED 107970, 2020 WL 1862001, at *4 (Mo. Ct. App. April 14, 2020) (citations omitted).

The parties agree that the Plant cannot be a public nuisance simply by virtue of the fact that it is a meat-processing plant during a global pandemic. Moreover, in this case, Smithfield has implemented substantial health and safety measures to protect Plant workers, and no
employees of the Plant have been diagnosed with COVID-19. While Plaintiffs argue that Smithfield could do more to protect its workers, that is not the issue before this Court. The issue is whether the Plant, as it is currently operating, constitutes an offense against the public order. Because of the significant measures Smithfield has implemented to combat the disease and the lack of COVID-19 at the facility, the Plant cannot be said to violate the public’s right to health and safety. Thus, the Court finds that Plaintiffs are unlikely to be succeed on their public nuisance claim.

b. Plaintiffs have shown they are unlikely to succeed on their right to a safe workplace claim.

Under Missouri law, Plaintiffs must prove that Smithfield negligently breached its duty to provide a safe place to work and that such negligence was the direct and proximate cause of the Plaintiffs injuries. *Hamilton v. Palm*, 621 F.3d 816, 818 (8th Cir. 2010). As discussed, Smithfield has taken substantial steps to reduce the potential for COVID-19 exposure at the Plant and appears to the Court to be complying with the Joint Guidance regarding the same. Thus, Plaintiffs are not substantially likely to prove Smithfield breached any duty.

More importantly, however, Plaintiffs have not alleged they have suffered any injury, only that they may suffer an injury in the future. A potential injury is insufficient to state a claim of the breach of the duty to provide a safe workplace under Missouri law. Plaintiffs citation to *Smith v. W. Elec. Co.*, 643 S.W.2d 10 (Mo. Ct. App. 1982), to establish that they have stated a sufficient injury is unavailing. In *Smith*, the plaintiff proved that he had been exposed to harmful second-hand smoke in the workplace which caused him to suffer a severe adverse reaction. *Id.* at 12. The adverse reaction was the actual injury he suffered, and he suffered this harm—and sought relief through an administrative process—before seeking an injunction. Thus, *Smith* is not analogous to this case, and Plaintiffs have not shown they are likely to be successful on their
breach of a safe workplace claim.

4. The public interest factor is neutral.

Certainly, the spread of COVID-19 is a public-health matter of great concern, and, so, preventing transmission of the virus which causes COVID-19 is within the public interest. At the same time, the public has an interest in maintaining the food-supply chain and access to meat products, an interest which might be impaired if the Court granted the injunction. Because Smithfield’s current policies and procedures temper public health worries, the Court finds a preliminary injunction is not in the public interest at this time.

Thus, Plaintiffs have not met their extraordinary burden of showing an affirmative preliminary injunction is warranted in this case.

III. Plaintiffs’ requested relief lacks the specificity required for a preliminary injunction.

Finally, the Court finds that Plaintiff’s requested relief is impermissibly vague. Federal Rule of Civil Procedure 65(d) states that an injunction must be “specific in [its] terms” and describe in reasonable detail the actions sought to be enjoined. Fed. R. Civ. P. 65(d). This specificity requirement is “designed to prevent uncertainty and confusion on the part of those to whom the injunction is directed and to avoid the possible founding of a contempt citation on a decree too vague to be understood.” Helzberg’s Diamond Shops, Inc. v. Valley W. Des Moines Shopping Ctr., Inc., 564 F.2d 816, 820 (8th Cir. 1977).

In this case, Plaintiffs request this Court enter an injunction requiring Smithfield to “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” (Doc. 46 at 10). Plaintiffs do not explain what changes would be “reasonable,” except for “potentially” reducing line speeds. In other words, they do not specify in reasonable detail what Smithfield should do. They
demand workers have “reasonable additional breaks to allow workers to care for their personal hygiene without penalty, including blowing their noses, using tissues, and hand washing,” but they do not specify how often or how long such breaks should take place, or what would constitute a reasonable break. Finally, Plaintiffs request the Court order Smithfield to change its policies to “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.” But Plaintiffs do not identify which policies should be eliminated, what constitutes “reasonable steps,” or why Smithfield’s current policies are insufficient. Because “a person of ordinary intelligence” would not understand what is prohibited based on Plaintiffs’ proposed preliminary injunction, Schenck v. Pro-Choice Network of W. N.Y., 519 U.S. 357, 383 (1997), it is impermissibly vague, and thus unenforceable.

Conclusion

Plaintiffs are naturally concerned for their health and the health of their community in these unprecedented times. The Court takes their concern seriously. Nevertheless, the Court cannot ignore the USDA’s and OSHA’s authority over compliance with the Joint Guidance or the significant steps Smithfield has taken to reduce the risk of a COVID-19 outbreak at the Plant.

For the reasons discussed above, Defendants motion to dismiss is GRANTED, and the case is DISMISSED without prejudice.

IT IS SO ORDERED.

Date: May 5, 2020

/s/ Greg Kays
GREG KAYS, JUDGE
UNITED STATES DISTRICT COURT
Hi Anne,

I just learned that OSHA has a contractor looking at (b) 5. I followed up with them to let them know that I had just asked you to look into it as well. Below is their response, along with the attachment.

- Richard

Thanks for checking, Richard. Attached please find...