

September 21, 2020

Via Email

Attorney General Philip Weiser
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1300 Broadway, 10th Floor
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RE: JBS's Commission of a Public Nuisance Relating to COVID-19

Dear Attorney General Weiser,

We write to urge your office to investigate the workplace safety and public health crisis that has plagued JBS USA, Inc. ("JBS") workers and their communities in and around Greeley, Colorado during the COVID-19 pandemic.

As you know, the federal Occupational Safety and Health Administration ("OSHA") recently issued a citation to JBS and proposed a \$15,615 penalty against the company for its "serious violations" at JBS's Greeley facility. We fear that this meager and insulting penalty, which amounts to only around \$2500 per worker life lost at that plant, will only embolden JBS's brazen prioritization of its extraordinary profits over the health and safety of working Coloradans.

Colorado is not, however, helpless to act. Along with violating the Occupational Safety and Health Act ("OSH Act"), JBS's conduct is also a public nuisance in violation of Colorado law because the wide but preventable spread of the virus at JBS led to an outbreak that caused a "significant interference with the public health." Restatement (Second) of Torts § 821B(2)(a) (1979). Throughout this pandemic until the present day, JBS has sought to maintain production speeds by forcing hundreds of workers along its production lines to work shoulder to shoulder. This conduct is a clear violation of Centers for Disease Control and OSHA guidance, state public health orders, and the consensus opinion of public health experts—the inevitable result of which has been the rapid spread of disease among workers and the communities in which they live, with a particularly harsh impact on people and communities of color. In turn, the State of Colorado and local governments in northern Colorado have had to dedicate substantial resources to respond to the crisis and the resulting hot spot of COVID-19 transmission in Weld County.

Whereas OSHA has failed to act to protect some of the most vulnerable workers in Colorado, you have the authority, under your *parens patriae* powers, to intervene to protect

workers and their communities from the ongoing threat of harm and to force JBS to internalize some of the extraordinary costs it has forced its workers, their families, and the public generally to bear.

This letter sets out (1) the scope of the harm caused by JBS's misconduct at the Greeley facility, with particular attention to the disproportionate toll JBS's failures have had on communities of color; (2) JBS's breach of its duty to protect workers and the public; (3) the failure of OSHA to intervene to stave off the ongoing threat of harm or to otherwise sufficiently respond to JBS's misconduct; and (4) your authority to act, pursuant to Colorado public nuisance law, to investigate JBS's misconduct.

I. The Scope of the Harm

A. The Tragic Consequences of JBS's Violations of Workplace Safety and Health Guidance and State Public Health Orders

You are at this point familiar with the tragic consequences of JBS's refusal to comply with workplace safety and public health guidance and orders. In Greeley, CO alone, at least 286 JBS workers and likely many more have contracted the virus that causes COVID-19, and eight plant workers have died.¹ Workers who contracted the virus within the JBS plant in Greeley took the virus home to their family members and communities. Several family members of JBS workers who contracted the virus have died, and countless others have become sick, sometimes resulting in permanent injury.

The ripple effects of JBS's misconduct extended beyond workers and their families to affect the rest of Weld County and the State of Colorado. At points in April of this year, Weld County, where JBS's facility is located and where many of its workers live, was one of the State's most serious hotspots for the spread of the virus, causing the State to redirect testing capacity and augment healthcare resources in that region.² Based on trends around the country, there is every reason to think that this community-wide surge was caused by the spread of the virus among JBS's workforce.³ In other words, JBS's misconduct resulted in injury or death to hundreds of workers and family members, and shifted onto workers and the public the costs of this pandemic.

¹ Shelly Bradbury, *How Coronavirus Spread Through JBS's Greeley Beef Plant*, DENVER POST (July 12, 2020), <https://www.denverpost.com/2020/07/12/jbs-greeley-coronavirus-investigation/>.

² Michael Roberts, *COVID-19: Colorado v. Weld County War Over Virus Rules Escalates*, WESTWORD (April 27, 2020), <https://www.westword.com/news/covid-19-update-colorado-and-weld-county-at-war-over-virus-rules-11699091>.

³ Nina Lakhani, *U.S. Coronavirus Hotspots Linked to Meat Processing Plants*, THE GUARDIAN (May 15, 2020), <https://www.theguardian.com/world/2020/may/15/us-coronavirus-meat-packing-plants-food>.

B. The Disproportionate Suffering of People and Communities of Color

It is well documented that JBS's failures have disproportionately harmed people of color. Towards Justice, among other organizations, was counsel on a complaint filed against JBS in July 2020 with the United States Department of Agriculture pursuant to Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d-2000d-7. That complaint alleged that JBS, along with its subsidiary Pilgrim's Pride, received \$45,774,572 in revenue from federal contracts between January 1 and July 7, 2020. Yet, in contravention of federal law, JBS's policies have had a deadly disparate impact on Black, Latino, and Asian workers who disproportionately work in line positions, and who were disproportionately exposed to the virus that causes COVID-19. JBS has failed to follow public health guidance with respect to its line workers, even as it permitted other workers, who are much more likely to be white, to protect themselves from the spread of the virus.⁴

II. JBS's Breach of Its Duties to Protect Workers and the Public

JBS may suggest that the spread of the virus within the Greeley facility and the public more broadly was unavoidable. In fact, however, JBS could have continued to operate its Greeley plant safely had it implemented critical and legally-mandated safeguards, most importantly (1) permitting workers to socially distance along production lines, where they work shoulder to shoulder for hours every day, and (2) clearly eliminating a harsh attendance points system and a culture of workplace fear that coerces workers to attend work when sick.

JBS's non-compliance with federal and state law is undeniable, and yet JBS could have easily complied if it had merely slowed production lines—even if that meant increasing costs or reducing production—and actively and clearly abandoned its policies that encourage workers to attend work sick, even if that resulted in workforce strains. Instead, JBS chose to minimize its own costs during this pandemic and shift those costs onto its workers and the State of Colorado.

⁴ The Title VI complaint details a 2020 Centers for Disease Control ("CDC") report that reviewed data from 21 states and concluded that while approximately "39% [of meat processing workers are] white, 30% [are] Hispanic, 25% [are] [B]lack, and 6% [are] Asian," among the thousands of meat-processing workers in 2020 "with COVID-19 with race/ethnicity reported, approximately **56%** were Hispanic, 19% were black, 13% were white, and 12% were Asian, suggesting that Hispanic and Asian workers might be disproportionately affected by COVID-19 in this workplace setting." *See* Jonathan W. Dyal, et al., CDC, Update: COVID-19 Among Workers in Meat and Poultry Processing Facilities — United States, April-May 2020, 69(18) MMWR Morb Mortal Wkly Rep 2020, Early Release (May 1, 2020), <http://dx.doi.org/10.15585/mmwr.mm6918e3> (emphasis added).

A. JBS's Failure to Allow Social Distancing Along Production Lines

JBS will likely point your office to the ways in which it has sought to present a façade of compliance with federal and state guidance, including through performing ineffective temperature checks, placing plastic barriers between workers, and staggering shifts. But JBS cannot deny that during this pandemic, in violation of federal and state law, it has forced hundreds of workers at the Greeley facility to work shoulder to shoulder, sometimes touching, while they process meat along JBS's fast-moving production lines. This has occurred daily throughout the pandemic. Because workers are not able to socially distance along production lines, the meager safety measures JBS does enforce, have been and remain wholly insufficient to protect against the spread of disease at the Greeley plant.

Social distancing along production lines is mandated by federal and state law: Throughout the pandemic, OSHA and the CDC have emphasized the critical importance of allowing meat-processing workers to spread along production lines. OSHA's and the CDC's joint guidance for meatpacking employers from April 2020 notes, for example, that the forced close proximity of meatpacking workers "may contribute substantially to their potential exposures," and recommends that employers like JBS "[m]odify the alignment of workstations, including along processing lines, if feasible, so that workers are at least six feet apart in all directions (e.g., side-to-side and when facing one another)."⁵

The federal government has also identified the direct causal relationship between the failure to socially distance workers along production lines and outbreaks at meat-processing plants. As part of its review of an outbreak at a facility in North Dakota, the CDC explained that "keeping space between individuals (social distancing) is one of the best strategies to avoid being exposed to the virus and slowing its spread."⁶ "Changes in production practices (e.g., line speed reductions) may be necessary in order to maintain appropriate distancing among employees."⁷ The CDC noted that the plant at issue had been conducting temperature screenings, had installed plexiglass barriers between workers along production lines, provided protected spaces in all lunchrooms and break areas, created adjusted schedules to facilitate distancing, provided additional hand sanitizer dispensers, assigned additional staff to sanitize

⁵ See Meat and Poultry Processing Workers and Employers, Interim Guidance from CDC and the Occupational Safety and Health Administration (OSHA), available at <https://www.cdc.gov/coronavirus/2019-ncov/community/organizations/meat-poultry-processing-workers-employers.html>.

⁶ Michael Grant, et al., *Strategies to Reduce COVID-19 Transmission at the Smithfield Foods Sioux Falls Pork Plant*, CDC (April 22, 2020) at 5, available at https://covid.sd.gov/docs/smithfield_recs.pdf.

⁷ *Id.* at 7.

commonly touched surfaces more frequently, and offered informational flyers.⁸ But those measures were insufficient absent social distancing along production lines.⁹

In August, the CDC published a study of the same plant and explained that the “highest attack rates” of COVID-19 occurred where “employees tended to work <6 feet (2 meters) from one another on the production line.”¹⁰ Therefore, meat-processing plants must “prioritize implementation of control measures consistent with published guidelines” and in particular combine “engineering (e.g., modification of workstations to separate workers) and administrative (e.g., promoting social distancing when possible) controls.”¹¹

Finally, social distancing among workers, even within so-called “critical businesses” like JBS, was mandated by Governor Polis in the State’s Fourth Updated Public Health Order Implementing Stay at Home Requirements on April 9, 2020. That Order required that critical businesses, including JBS, must “comply with social distancing requirements at all times . . . and implement other strategies, such as . . . re-designing workplaces, to create more distance between workers unless doing so would make it *impossible* to carry out critical functions.”¹² For the reasons explained below, spreading workers along JBS’s production lines was entirely possible, but JBS failed to comply with Colorado law because it refused to slow its production, even slightly, to protect its workers.

Experts agree that social distancing along production lines is necessary to prevent the spread of COVID-19 in meatpacking plants: Social distancing along production lines is not only mandated by law; experts agree that it is the most critical modification that meat-processing plants must make to protect their workers and the public. Dr. Melissa Perry, an epidemiologist who has studied meat-processing plants, emphasized in a recent court filing that spacing meatpacking workers more than six feet apart on the production line is the single most important control measure a meatpacking employer can adopt to mitigate spread of a respiratory virus like COVID-19.¹³ Other measures that fall lower in the “hierarchy of controls,” such as instituting temperature checks and performing regular cleaning, are necessary but not sufficient to control the virus’s spread.¹⁴ Dr. Perry also explained that “once the virus is present in a facility that fails to follow the highest-priority recommendations in the

⁸ *Id.* at 2-3.

⁹ See *id.*

¹⁰ Jonathan Steinberg et al., COVID-19 Outbreak Among Employees at a Meat Processing Facility — South Dakota, March–April 2020, 69(31) MMWR Morb Mortal Wkly Rep 2020 (Aug. 7, 2020), <http://dx.doi.org/10.15585/mmwr.mm6931a2>.

¹¹ *Id.*

¹² Exec. Order, April 9, 2020, Sec. II.A, <https://tinyurl.com/y67f5jjy> (emphasis added).

¹³ Declaration of Dr. Melissa Perry, *Does v. Scalia*, No. 3:20-cv-01260-MEM, Dkt. No. 43-4 ¶ 11 (M.D. Pa.).

¹⁴ *Id.* at ¶¶ 15-18.

Meatpacking Guidance,” including social distancing on production lines, “it is [her] opinion that spread among workers at such a workplace [is] *inevitable*.”¹⁵

JBS has refused to allow social distancing along production lines: Yet, notwithstanding the science, OSHA’s and the CDC’s clear guidance, and Colorado law, JBS has refused to spread workers along production lines at the Greeley facility. This fact is undeniable by JBS, and now an established finding by OSHA. In its recent citation, OSHA recognized that JBS’s failure to space workers along production lines was one of the principal causes of the spread of disease at the facility. OSHA noted, for example, that “[e]mployees throughout the [Greeley] facility worked in close proximity to each other during the COVID-19 pandemic” and that “establish[ing] . . . a social distancing program on the fabrication floor” was one of the most important things JBS could do to abate the hazard.¹⁶

JBS could have protected workers and the public without endangering our food supply: This failure has been deadly and wholly avoidable. Throughout this pandemic, JBS would have been able to operate safely while spacing workers along production lines had it slowed those lines or spaced meat further apart along those.¹⁷ Yet, in contravention of public health and workplace safety guidance, it has simply refused to do so.

JBS may tell you that its ongoing production at current levels has been and remains essential for the American food supply and, therefore, that spreading workers along productions lines is “impossible,” absolving them of the federal and state requirements. But that is a lie. United States Department of Agriculture data through May 31, 2020, shows that the amount of beef and chicken in cold storage increased during the pandemic compared to the same period last year.¹⁸ Furthermore, large American meat companies, including JBS, exported more than 1.3 billion pounds of beef and pork from March 20 through early June. Beef and pork exports during that time—the same time when the virus was killing JBS workers and spreading through northern Colorado—exceeded any lost production during the pandemic.¹⁹

¹⁵ *Id.* at ¶ 20 (emphasis added).

¹⁶ OSHA Citation, Addendum A; *see also* Matt Sebastian, *Feds Hit JBS with \$15,000 Fine for Failing to Protect Greeley Plant Workers from COVID-19*, DENVER POST (Sept. 11, 2020), <https://www.denverpost.com/2020/09/11/osha-fines-jbs-greeley/>.

¹⁷ Declaration of Dr. Melissa Perry, *Rural Cmty. Workers All. v. Smithfield Foods, Inc.*, No. 5:20-cv-06063-DGK, Dkt. No. 35-2 ¶¶ 12-13 (W.D. Mo.).

¹⁸ 1 USDA, COLD STORAGE REPORT 7, 10 (Jun. 21, 2020), <https://downloads.usda.library.cornell.edu/usdaesmis/files/pg15bd892/sf268s898/9593vg26b/cost0620.pdf>.

¹⁹ Letter from Senators Elizabeth Warren and Cory Booker to Meatpacking Companies (Jun. 22, 2020), *available at* <https://www.warren.senate.gov/imo/media/doc/2020.06.22%20Letter%20to%20meatpackers%20investigating%20manipulation%20of%20COVID-19%20crisis.pdf>.

In other words, the failure to slow production lines to protect workers and the public in northern Colorado had everything to do with JBS's profits and nothing to do with keeping Americans fed.

B. JBS's Culture of Fear that Coerces Workers to Come to Work Sick

The other key driver of the spread of the virus among JBS workers was the fear of potential consequences for calling in sick from work. JBS, like many meat-processing companies, employs a draconian attendance point system, under which workers receive "points" every time they miss work, no matter the cause.²⁰ During the pandemic, JBS has announced that it has "[r]elaxed [its] attendance policies so people don't come to work sick."²¹ Nonetheless, reports from workers have continued to suggest that JBS has continued to rely on its work-while-sick culture and policies to maintain production levels, even if that means increasing the risk of spread of disease.²²

JBS's sick leave policies may violate the recently enacted Colorado Healthy Families and Workplaces Act, SB20-205. The Colorado Department of Labor and Employment, Division of Labor Standards and Statistics has the authority to enforce that law. However, violations of that law are relevant to your authority and your investigation of JBS, at least insofar as those violations exacerbated the public nuisance caused by JBS's failure to space workers along production lines.

III. The Federal Government's Failure to Intervene on Behalf of Workers

We understand that it is not your office's traditional role to investigate workplace safety and public health violations and hold accountable businesses that place their profits over the health and safety of workers and their communities. But the people of Colorado cannot rely on the federal government to perform these essential tasks.

Colorado is not an OSHA plan state, which means its workers rely principally on OSHA to protect workers. But OSHA has shown that it is not up to the job of meaningfully enforcing its own guidance. OSHA's JBS citation is case in point. That citation recognized serious violations of OSHA guidance but recommended only a \$15,615 penalty, which

²⁰ See generally Dina Bakst, Elizabeth Gedmark, and Christine Dinan, *Misled and Misinformed*, A BETTER BALANCE (June 2020), https://www.abetterbalance.org/wp-content/uploads/2020/06/Misled_and_Misinformed_A_Better_Balance-1-1.pdf.

²¹ *Coronavirus*, JBS USA (2020), <https://jbssa.com/about/news/2020/coronavirus/>.

²² See, e.g., Tyler Jett, *Iowa JBS Meatpacking Employees Warned of 'Excessive Absenteeism' as Pandemic Continues*, DES MOINES REGISTER (June 18, 2020), <https://www.desmoinesregister.com/story/money/business/2020/06/17/covid-19-iowa-letter-warns-meatpacking-workers-excess-absences/3202317001/>. The signatories to this letter are able to provide you with more evidence related to the continued implementation of harsh attendance policies at JBS Greeley throughout the pandemic.

amounts to only around \$2500 per worker life lost at that plant, not even taking into account the deaths of community members caused by JBS's failures. Relative to JBS's \$51.7 billion in net revenue in 2019, that penalty will do nothing to deter JBS's ongoing violations or force JBS to bear any of the costs it has forced its workers and Colorado to bear. Indeed, it will embolden JBS to sit on its hands and continue accumulating profits.

Moreover, the Greeley citation comes after months of inaction, even as meatpacking workers around the country died because of the preventable spread of this virus. In a mandamus action brought against OSHA in Pennsylvania, seeking a determination from the court that OSHA has arbitrarily and capriciously failed to protect meat-processing workers from an imminent danger, OSHA has acknowledged that it had taken effectively no action to protect workers while the height of the pandemic was unfolding. OSHA's lawyer in that case explained that there had been only "four citations issued by OSHA in connection with COVID violations" in the entire country as of July 21,²³ notwithstanding thousands of complaints, and one of OSHA's area directors testified that the failure to spread workers along production lines would never on its own constitute an "imminent danger" to workers,²⁴ notwithstanding how likely it would be to cause the spread of disease.

OSHA's failure to act presents an ongoing threat to Colorado's workers and the communities where they live. As *The New York Times* Editorial Page recently remarked, "without the threat of real enforcement from the nation's top cop for worker safety, there is little incentive for businesses to change their ways to better protect their employees and their communities."²⁵ But OSHA's failures also insult all those who have suffered from JBS's misconduct. The Greeley Tribune editorial page recently wrote:

The pitiful federal action in response to the handling of a virus that killed at least seven of us — including the corporate death — and infected, weakened and crippled many, many more of us, is not an affront to just JBS workers. It's not an affront to just immigrants, or just refugees, or just meat plant workers, or just blue-collar workers.

It's an affront to Greeley.²⁶

²³ Transcript of July 31 Hearing, *Does v. Scalia*, No. 3:20-cv-01260-MEM, Dkt. No. 43-1, p. 96:7-20 (M.D. Pa.).

²⁴ *Id.* at 174:21-25.

²⁵ Editorial Board, *Under Trump, OSHA's COVID-19 Response Is Failing Workers*, NEW YORK TIMES (Sept. 14, 2020), <https://www.nytimes.com/2020/09/14/opinion/trump-covid-osha-workers.html>.

²⁶ Greeley Tribune Staff, *OSHA Embarrasses Itself, Re-lights Bitter Fires with Late, Low Fine of JBS*, GREELEY TRIBUNE (Sept. 12, 2020), <https://www.greeleytribune.com/2020/09/12/editorial-osha-embarrasses-itself-re-lights-bitter-fires-with-late-low-fine-of-jbs/>.

For the reasons explained here, you have the power to act where OSHA and the Trump Administration have failed Colorado and failed Greeley. We urge you to use it.

IV. The Attorney General Office's Authority to Investigate and Intervene

We urge you to use your office's existing authority to intervene both to protect workers at the facility and to force JBS to bear the costs of its failures.

A. JBS's Misconduct Is a Public Nuisance Under Colorado Law

Because JBS's failure to comply with established guidance and state public health orders resulted in the spread of COVID-19 among its workers and the public generally, its conduct violates Colorado law.

A private business's irresponsible conduct in violation of public health guidance and orders that contributes to the spread of infectious disease among the public generally is a paradigmatic public nuisance. *See* Restatement (Second) of Torts, § 821B, cmt. G (1979) ("the threat of communication of smallpox to a single person may be enough to constitute a public nuisance because of the possibility of an epidemic"). While workplace safety and health issues do not always have such conspicuous and harmful consequences for the public health more generally—and, therefore, rarely support public nuisance claims, the COVID-19 pandemic has illustrated how business's failure to comply with labor standards laws can cause substantial harm outside the workplace. In fact, courts around the country have already recognized that employers' failures to comply with public health guidance during the COVID-19 pandemic may constitute a public nuisance by contributing to the spread of disease among the public. *See, e.g., Massey v. McDonalds*, 20 CH 4247 (Circuit Ct. of Cook County June 24, 2020).

There is also abundant precedent for your office investigating conduct like that at issue here. For example, there are striking similarities between JBS's conduct here and the conduct alleged in your First Amended Complaint against Purdue Pharma, which asserts public nuisance claims based on that company's misconduct contributing to the opioid epidemic.²⁷ Just as alleged in *Purdue Pharma*, JBS's conduct has undoubtedly "caused significant injury to the public health and interfered with the public's comfortable enjoyment of life and property."²⁸ The State has undoubtedly also had to "use public funds to reimburse [costs] covered by the [State's] employee and retiree health plans, and the State's Workers' Compensation Program,"²⁹ and "to remediate the impacts of the [COVID-19 pandemic] caused by" JBS by paying "for services to address the harms caused to the State's citizens and

²⁷ *See* First Amended Complaint, *State v. Purdue Pharma*, No. 2018CV33300, 2019 WL 6910685, at ¶¶ 710-21 (Denver Dist. Ct. July 21, 2019) (outlining public nuisance claim); *see also* Phil Weiser, *Combating the Opioid Epidemic*, COLO. DEP'T OF LAW (Oct. 26, 2019), <https://coag.gov/blog-post/combating-the-opioid-epidemic-10-26-19/>.

²⁸ First Amended Complaint, ¶ 714.

²⁹ *Id.*, ¶ 719.

to the healthcare . . . and other social service programs the State provides to its citizens.”³⁰ Put bluntly, “[t]he State has suffered and continues to suffer injuries from a public health crisis . . . [and] borne the financial costs to manage the impacts of that crisis.”³¹

In fact, JBS’s conduct may present an even stronger case for public nuisance than *Purdue*. JBS’s failure to follow basic public health guidelines and State public health orders during the COVID-19 pandemic is a textbook example of public nuisance.³² Courts in Colorado and elsewhere have long held that private conduct that exacerbates the spread of infectious disease creates a public nuisance.³³ Additionally, the financial burden shifted to the State has been severe, resulting in a statewide budget crisis.³⁴

B. JBS’s Potential Counterarguments Do Not Have Merit

JBS may argue that your authority to investigate JBS and force it to internalize the costs of the pandemic that it has forced the public to bear is cabined by federal law and oversight of meatpacking plants. Those arguments do not have merit.

Colorado public nuisance law is not preempted by the OSH Act: First, the OSH Act expressly saves from preemption state laws on any matter for which OSHA has not enacted a workplace standard, 29 U.S.C. § 667(a), and OSHA has refused to enact any standard respecting the spread of COVID-19 within workplaces. *In re Am. Fed’n of Labor*, No. 20-1158, 2020 WL 3125324, at *1 (D.C. Cir. June 11, 2020) (affirming denial of mandamus petition to force OSHA to enact an emergency temporary standard). OSHA’s citation of JBS for misconduct at the Greeley facility was founded upon the OSH Act’s general duty clause.³⁵ But the general duty clause does not preempt state law, and concluding that it does so would read

³⁰ *Id.*, ¶ 720.

³¹ *Id.*, ¶ 721.

³² See Restatement (Second) of Torts § 821B cmt. g (Am. Law Inst. 1979) (“the threat of communication of smallpox to a single person may be enough to constitute a public nuisance because of the possibility of an epidemic”).

³³ See *Seigle v. Bromley*, 124 P. 189, 193–95 (Colo. App. 1912) (concluding that hog farm likely to spread disease constituted public and private nuisance); *Stickleley v. Givens*, 11 S.E.2d 631, 637 (Va. 1940) (“Cattle afflicted with a dangerous and contagious disease are public nuisances as defined by the common law” (quoting *Durand v. Dyson*, 111 N.E. 143, 145 (Ill. 1915))); *Roth v. City of St. Joseph*, 147 S.W. 490, 491–92 (Mo. App. 1912) (concluding that stagnant, disease-breeding pond was a public nuisance); *Birke v. Oakwood Worldwide*, 169 Cal. App. 4th 1540, 1549–52 (2009) (concluding that plaintiff sufficiently alleged that second-hand smoke is a public nuisance because it can cause lung cancer and heart disease).

³⁴ Andrew Kenney, *The Coronavirus Pandemic Is Tearing a \$3 Billion Hole in Colorado’s Budget*, CPR NEWS (May 12, 2020), <https://www.cpr.org/2020/05/12/coronavirus-pandemic-tearing-a-three-billion-dollar-hole-in-colorados-budget/>; John Frank, *Colorado Faces \$6.8 Billion Coronavirus Hit to State Budget in Coming Years, New Forecast Projects*, COLORADO SUN (May 12, 2020), <https://coloradosun.com/2020/05/12/colorado-budget-shortfall-coronavirus/>.

³⁵ See Addendum A at 6 (citing Section 5 of the OSH Act).

29 U.S.C. § 667(a) out of the Act. *See Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 100 (1992) (§ 667 “preserv[es] . . . state authority in the absence of a federal standard”).

Second, even if OSHA had promulgated a standard on point, the OSH Act also saves from preemption “the common law or statutory rights, duties, or liabilities of employers and employees under any law with respect to injuries, diseases, or death of employees arising out of, or in the course of, employment.” 29 U.S.C. § 653(b)(4). Courts have concluded that the OSH Act includes no “warrant whatever for an interpretation which would preempt enforcement in the workplace of private rights and remedies traditionally afforded by state laws of general application.” *Pedraza v. Shell Oil Co.*, 942 F.2d 48, 52-53 (1st Cir. 1991). Even when enforced by the state, public nuisance laws of generally application fall clearly within this savings provision.

The primary jurisdiction doctrine does not apply: In one suit brought by meatpacking workers under state public nuisance law to seek an order abating ongoing violation of state public health orders, a federal court deferred to OSHA’s “primary jurisdiction” and dismissed the plaintiffs’ complaint. *Rural Cmty. Workers All. v. Smithfield Foods, Inc.*, No. 5:20-CV-06063-DGK, 2020 WL 2145350, at *7 (W.D. Mo. May 5, 2020).

We disagree with the reasoning in that case. But even if the primary jurisdiction doctrine applies in cases like that one where OSHA had not yet resolved the question of whether the employer at issue had violated the OSH Act, the doctrine certainly does not apply in a case like this one where OSHA has already acted and the involvement of other agencies besides OSHA could be said to interfere with OSHA’s prerogative. *United States v. Philadelphia Nat. Bank*, 374 U.S. 321, 353 (1963) (“Thus, even if we were to assume the applicability of the doctrine to merger-application proceedings before the banking agencies, the present action would not be barred, for the agency proceeding was completed before the antitrust action was commenced.”).

President Trump’s Executive Order does not remove your authority: Finally, you should not be deterred by President Trump’s Executive Order regarding meatpacking, which suggested that the United States Department of Agriculture (USDA) would be protecting worker health and safety at meatpacking plants.³⁶ Importantly, the USDA has 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.³⁷

³⁶ “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-orderdelegating-authority-dpa-respect-food-supply-chain-resources-national-emergency-causedoutbreak-covid-19/>.

³⁷ 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.

Furthermore, the order does not require plants to operate production lines at pre-pandemic speeds, and there is certainly nothing that prevents your office from investigating and intervening to ensure appropriate safety measures are in place at JBS, especially when such measures are necessary to protect Colorado’s workers and the public more generally. In fact, the executive order emphasizes the importance of enforcing workplace safety protections at meat-processing plants to ensure that those plants remain open.

* * *

The JBS plant workers are Coloradans and human beings. The federal government has failed its legal and moral imperative to protect them.³⁸ As advocates, organizers, and—in the case of Coloradans for the Common Good members—religious leaders, we submit that this matter should have your very highest attention.

/s/ David H. Seligman

David H. Seligman, Director
Brianne Power, Attorney
Towards Justice

/s/ Kim Cordova

Kim Cordova, President
Todd McNamara, General
Counsel
UFCW Local 7

/s/ Marilyn Winokur

Marilyn Winokur, Co-chair
Dr. Joyce Brooks, Co-chair
Coloradans for the Common
Good

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).

³⁸ See Letter in Support from Faith Leaders, Addendum B.

Addendum A



Citation and Notification of Penalty

To:
JBS Foods, Inc., dba Swift Beef Company
800 N. 8TH AVENUE
Greeley, CO 80631

Inspection Number: 1475131
Inspection Date(s): 05/11/2020 - 08/31/2020
Issuance Date: 09/11/2020

Inspection Site:
800 N. 8TH AVENUE
Greeley, CO 80631

The violation(s) described in this Citation and Notification of Penalty is (are) alleged to have occurred on or about the day(s) the inspection was made unless otherwise indicated within the description given below.

This Citation and Notification of Penalty (this Citation) describes violations of the Occupational Safety and Health Act of 1970 (the Act). The penalties listed herein are based on these violations. You must abate the violations referred to in this Citation by the dates listed and pay the penalties proposed, unless within 15 working days (excluding weekends and Federal holidays) from your receipt of this Citation and Notification of Penalty **you either call to schedule an informal conference (see paragraph below) or** you mail a notice of contest to the U.S. Department of Labor Area Office at the address shown above. Please refer to the enclosed booklet (OSHA 3000) which outlines your rights and responsibilities and which should be read in conjunction with this form. Issuance of this Citation does not constitute a finding that a violation of the Act has occurred unless there is a failure to contest as provided for in the Act or, if contested, unless this Citation is affirmed by the Review Commission or a court.

Posting - The law requires that a copy of this Citation and Notification of Penalty be posted immediately in a prominent place at or near the location of the violations cited herein, or, if it is not practicable because of the nature of the employer's operations, where it will be readily observable by all affected employees. This Citation must remain posted until the violations cited herein have been abated, or for 3 working days (excluding weekends and Federal holidays), whichever is longer.

Informal Conference - An informal conference is not required. However, if you wish to have such a conference you may request one with the Area Director during the 15 working day contest period by calling (303) 844-5285. During such an informal conference you may present any evidence or views which you believe would support an adjustment to the citations and/or penalties.

If you are considering a request for an informal conference to discuss any issues related to this Citation and Notification of Penalty, you must take care to schedule it early enough to allow time to contest after the informal conference, should you decide to do so. Please keep in mind that a written letter of intent to contest must be submitted to the Area Director within 15 working days of your receipt of this Citation. The running of this contest period is not interrupted by an informal conference.

If you decide to request an informal conference, please complete, remove, and post the Notice to Employees next to this Citation and Notification of Penalty as soon as the time, date, and place of the informal conference have been determined. Be sure to bring to the conference any and all supporting documentation of existing conditions as well as any abatement steps taken thus far. If conditions warrant, we can enter into an informal settlement agreement which amicably resolves this matter without litigation or contest.

Right to Contest – You have the right to contest this Citation and Notification of Penalty. You may contest all citation items or only individual items. You may also contest proposed penalties and/or abatement dates without contesting the underlying violations. **Unless you inform the Area Director in writing that you intend to contest the citations and/or proposed penalties within 15 working days after receipt, the citations and the proposed penalties will become a final order of the Occupational Safety and Health Review Commission and may not be reviewed by any court or agency.**

Penalty Payment – Penalties are due within 15 working days of receipt of this notification unless contested. (See the enclosed booklet and the additional information provided related to the Debt Collection Act of 1982.) Make your check or money order payable to “DOL-OSHA”. Please indicate the Inspection Number on the remittance. You can also make your payment electronically on www.pay.gov. On the left side of the pay.gov homepage, you will see an option to Search Public Forms. Type “OSHA” and click Go. From the results, click on **OSHA Penalty Payment Form**. The direct link is:

<https://www.pay.gov/paygov/forms/formInstance.html?agencyFormId=53090334>.

You will be required to enter your inspection number when making the payment. Payments can be made by credit card or Automated Clearing House (ACH) using your banking information. Payments of \$25,000 or more require a Transaction ID, and also must be paid using ACH. If you require a Transaction ID, please contact the OSHA Debt Collection Team at (202) 693-2170.

OSHA does not agree to any restrictions or conditions or endorsements put on any check, money order, or electronic payment for less than the full amount due, and will process the payments as if these restrictions or conditions do not exist.

Notification of Corrective Action – For each violation which you do not contest, you must provide ***abatement certification*** to the Area Director of the OSHA office issuing the citation and identified above. This abatement certification is to be provided by letter within 10 calendar days after each abatement date. Abatement certification includes the date and method of abatement. If the citation indicates that the violation was corrected during the inspection, no abatement certification is required for that item. The abatement certification letter must be posted at the location where the violation appeared and the corrective action took place or employees must otherwise be effectively informed about abatement activities. A sample abatement certification letter is enclosed with this Citation. In addition, where the citation indicates that ***abatement documentation*** is necessary, evidence of the purchase or repair of equipment, photographs or video, receipts, training records, etc., verifying that abatement has occurred is required to be provided to the Area Director.

Employer Discrimination Unlawful – The law prohibits discrimination by an employer against an

employee for filing a complaint or for exercising any rights under this Act. An employee who believes that he/she has been discriminated against may file a complaint no later than 30 days after the discrimination occurred with the U.S. Department of Labor Area Office at the address shown above.

Employer Rights and Responsibilities – The enclosed booklet (OSHA 3000) outlines additional employer rights and responsibilities and should be read in conjunction with this notification.

Notice to Employees – The law gives an employee or his/her representative the opportunity to object to any abatement date set for a violation if he/she believes the date to be unreasonable. The contest must be mailed to the U.S. Department of Labor Area Office at the address shown above and postmarked within 15 working days (excluding weekends and Federal holidays) of the receipt by the employer of this Citation and Notification of Penalty.

Inspection Activity Data – You should be aware that OSHA publishes information on its inspection and citation activity on the Internet under the provisions of the Electronic Freedom of Information Act. The information related to these alleged violations will be posted when our system indicates that you have received this citation. You are encouraged to review the information concerning your establishment at www.osha.gov. If you have any dispute with the accuracy of the information displayed, please contact this office.



NOTICE TO EMPLOYEES OF INFORMAL CONFERENCE

An informal conference has been scheduled with OSHA to discuss the citation(s) issued on 09/11/2020. The conference will be held by telephone or at the OSHA office located at 1391 Speer Blvd, Suite 210, Denver, CO 80204 on _____ at _____.

Employees and/or representatives of employees have a right to attend an informal conference.

CERTIFICATION OF CORRECTIVE ACTION WORKSHEET

Inspection Number: 1475131

Company Name: JBS Foods, Inc., dba Swift Beef Company
Inspection Site: 800 N. 8TH AVENUE, Greeley, CO 80631
Issuance Date: 09/11/2020

List the specific method of correction for each item on this citation in this package that does not read "Corrected during Inspection" and return to: **U.S. Department of Labor – Occupational Safety and Health Administration, 1391 Speer Blvd, Suite 210, Denver, CO 80204.**

Citation Number _____ and Item Number _____ was corrected on _____
By (Method of Abatement): _____

Citation Number _____ and Item Number _____ was corrected on _____
By (Method of Abatement): _____

Citation Number _____ and Item Number _____ was corrected on _____
By (Method of Abatement): _____

Citation Number _____ and Item Number _____ was corrected on _____
By (Method of Abatement): _____

Citation Number _____ and Item Number _____ was corrected on _____
By (Method of Abatement): _____

Citation Number _____ and Item Number _____ was corrected on _____
By (Method of Abatement): _____

I certify that the information contained in this document is accurate and that the affected employees and their representatives have been informed of the abatement.

Signature

Date

Typed or Printed Name

Title

NOTE: 29 USC 666(g) whoever knowingly makes any false statements, representation or certification in any application, record, plan or other documents filed or required to be maintained pursuant to the Act shall, upon conviction, be punished by a fine of not more than \$10,000 or by imprisonment of not more than 6 months or both.

POSTING: A copy of completed Corrective Action Worksheet should be posted for employee review



Citation and Notification of Penalty

Company Name: JBS Foods, Inc., dba Swift Beef Company
Inspection Site: 800 N. 8TH AVENUE, Greeley, CO 80631

Citation 1 Item 1 Type of Violation: **Serious**

OSH ACT of 1970 Section (5)(a)(1): The employer did not furnish employment and a place of employment which were free from recognized hazards that were causing or likely to cause death or serious physical harm to employees in that employees were working in close proximity to each other and were exposed to SARS-CoV-2, the virus that causes Coronavirus Disease 2019 (COVID-19):

- (a) **JBS Foods, Inc. dba Swift Beef Company at 800 N. 8th Avenue in Greeley, CO:** On or about and at times prior to March 25, 2020, the employer did not develop or implement timely and effective measures to mitigate the exposures to the hazard of SARS-CoV-2, the virus that causes Coronavirus Disease 2019 (COVID-19). Employees throughout the establishment worked in close proximity to each other during the COVID-19 pandemic exposing them to the hazard of contracting COVID-19. Hundreds of employees contracted the virus and developed symptoms ranging from mild irritation to severe illnesses that resulted in at least 51 hospitalizations and six fatalities due to COVID-19 related illnesses. As of July 30, 2020, the employer had 290 confirmed positive cases at the establishment.

Among other methods, recognized and feasible means of abatement for this hazard include:

1. Establish, implement, and enforce a social distancing program on the fabrication floor and in break areas that allow for at least a six-foot distance between workers where feasible;
2. When workers are unable to socially distance at least six feet from one another, implement protective measures such as barriers between work stations, face coverings, and face shields on the fabrication floor and in break areas and communicate the purpose and correct usage of such measures;
3. The use of symptom screening prior to allowing employees to enter the establishment and in the onsite clinic; and
4. The employer should work with state, local, tribal and/or territorial health officials to facilitate the identification of other exposed and potentially exposed employees at the establishment.

See pages 1 through 4 of this Citation and Notification of Penalty for information on employer and employee rights and responsibilities.

U.S. Department of Labor
Occupational Safety and Health Administration

Inspection Number: 1475131
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Citation and Notification of Penalty

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ABATEMENT CERTIFICATION AND DOCUMENTATION REQUIRED FOR THIS ITEM

Date By Which Violation Must be Abated:	10/29/2020
Proposed Penalty:	\$13,494.00

Type text here

See pages 1 through 4 of this Citation and Notification of Penalty for information on employer and employee rights and responsibilities.

U.S. Department of Labor
Occupational Safety and Health Administration

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Citation and Notification of Penalty

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Citation 2 Item 1 Type of Violation: **Other-than-Serious**

29 CFR 1904.35(b)(iii): A copy of the OSHA 300 Log required in 1904.29(a) was not provided upon request to an employee, former employee, personal representative, or authorized employee representative by the end of the next business day:

- (a) **JBS Foods, Inc. dba Swift Beef Company at 800 N 8th Ave in Greeley, CO:** On or about May 19, 2020, a copy of the OSHA 300 Log required in 1904.29(a) was not provided upon request to an employee, former employee, personal representative, or authorized employee representative by the end of the next business day. An employee representative from the UFCW Local 7 requested a copy of the OSHA 300 Log(s) on May 19, 2020. The employer did not provide a copy of the OSHA 300 Log(s) to an authorized employee representative until June 22, 2020.

Abatement Note: Abatement certification is required for this item (see enclosed "Certification of Corrective Action Worksheet").

Date By Which Violation Must be Abated: 10/29/2020
Proposed Penalty: \$2,121.00

Amanda Kupper

Amanda Kupper
Area Director

See pages 1 through 4 of this Citation and Notification of Penalty for information on employer and employee rights and responsibilities.

U.S. Department of Labor
Occupational Safety and Health Administration
1391 Speer Blvd, Suite 210
Denver, CO 80204



INVOICE / DEBT COLLECTION NOTICE

Company Name: JBS Foods, Inc., dba Swift Beef Company
Inspection Site: 800 N. 8TH AVENUE, Greeley, CO 80631
Issuance Date: 09/11/2020

Summary of Penalties for Inspection Number: 1475131

Citation 1, Serious	\$13,494.00
Citation 2, Other-than-Serious	\$2,121.00
TOTAL PROPOSED PENALTIES	\$15,615.00

To avoid additional charges, please remit payment promptly to this Area Office for the total amount of the uncontested penalties summarized above. Make your check or money order payable to: "DOL-OSHA". Please indicate OSHA's Inspection Number (indicated above) on the remittance. You can also make your payment electronically on www.pay.gov. On the left side of the pay.gov homepage, you will see an option to Search Public Forms. Type "OSHA" and click Go. From the results, click on **OSHA Penalty Payment Form**. The direct link is <https://www.pay.gov/paygov/forms/formInstance.html?agencyFormId=53090334>. You will be required to enter your inspection number when making the payment. Payments can be made by credit card or Automated Clearing House (ACH) using your banking information. Payments of \$25,000 or more require a Transaction ID, and also must be paid using ACH. If you require a Transaction ID, please contact the OSHA Debt Collection Team at (202) 693-2170.

OSHA does not agree to any restrictions or conditions or endorsements put on any check, money order, or electronic payment for less than the full amount due, and will cash the check or money order as if these restrictions or conditions do not exist.

If a personal check is issued, it will be converted into an electronic fund transfer (EFT). This means that our bank will copy your check and use the account information on it to electronically debit your account for the amount of the check. The debit from your account will then usually occur within 24 hours and will be shown on your regular account statement. You will not receive your original check back. The bank will destroy your original check, but will keep a copy of it. If the EFT cannot be completed because of insufficient funds or closed

account, the bank will attempt to make the transfer up to 2 times.

Pursuant to the Debt Collection Act of 1982 (Public Law 97-365) and regulations of the U.S. Department of Labor (29 CFR Part 20), the Occupational Safety and Health Administration is required to assess interest, delinquent charges, and administrative costs for the collection of delinquent penalty debts for violations of the Occupational Safety and Health Act.

Interest: Interest charges will be assessed at an annual rate determined by the Secretary of the Treasury on all penalty debt amounts not paid within one month (30 calendar days) of the date on which the debt amount becomes due and payable (penalty due date). The current interest rate is two percent (2%). Interest will accrue from the date on which the penalty amounts (as proposed or adjusted) become a final order of the Occupational Safety and Health Review Commission (that is, 15 working days from your receipt of the Citation and Notification of Penalty), unless you file a notice of contest. Interest charges will be waived if the full amount owed is paid within 30 calendar days of the final order.

Delinquent Charges: A debt is considered delinquent if it has not been paid within one month (30 calendar days) of the penalty due date or if a satisfactory payment arrangement has not been made. If the debt remains delinquent for more than 90 calendar days, a delinquent charge of six percent (6%) per annum will be assessed accruing from the date that the debt became delinquent.

Administrative Costs: Agencies of the Department of Labor are required to assess additional charges for the recovery of delinquent debts. These additional charges are administrative costs incurred by the Agency in its attempt to collect an unpaid debt. Administrative costs will be assessed for demand letters sent in an attempt to collect the unpaid debt.

Amanda Kupper

Amanda Kupper

Area Director

September 11, 2020

Date

Addendum B



Attorney General Philip Weiser
Ralph L. Carr Judicial Building
1300 Broadway, 10th Floor
Denver, CO 80203

Dear Attorney General Weiser,

As faith leaders with *Coloradans for the Common Good* we urge you investigate the situation at JBS that continues to afflict its workers, their families and the larger community.

The persistent life-threatening working conditions at JBS remind us that the Book of Exodus begins with an account of the brutal and increasingly dangerous conditions under which the Israelites labored as slaves in Egypt:

"Therefore [the Egyptians] set taskmasters over them to oppress them with forced labor. [...] The Egyptians became ruthless in imposing tasks on the Israelites, and made their lives bitter with hard service in mortar and brick and in every kind of field labor."

JBS workers are being maltreated. They are being maltreated in the midst of a pandemic. They are being penalized for staying home while sick. In disregard of physical distancing protocols, they are being told to work 'shoulder to shoulder.' Such conditions have resulted in the deaths of workers and their family members. As with the ancient Israelites, today's meatpacking workers are fundamental to providing a vital product to society, while their employers are those who profit from these essential tasks. We are angry that the value of this labor and these daily sacrifices are not being supported by a safe working environment.

Scripture tells us that the labor conditions for the Israelites only got worse, until their only way out was divine intervention and mass exodus. God intervened by sending Moses. Following in the footsteps of biblical prophets, let us say "here I am; send me."

We lift our voices along with the voices of these oppressed workers and families. We say, "let our people go!" Let them go to work without fear that they won't return home healthy at the end of the day. Let them go to the doctor when they are sick and stay home to recover. Let them go into their communities with their heads held high, knowing that we value and reward their hard work.

If we don't listen to those who cry out for justice, we enable the oppressors. Now it is clear to everyone that federal authorities, including the Occupational Safety and Health Administration (OSHA), have abandoned the workers. We urge you to join us now to protect the workers and the community as a whole from this public health crisis.

On behalf of *Coloradans for the Common Good*,

Rev. Reagan Humber, House for All Sinners and Saints, Denver
Rabbi Evette Lutman, B'nai Havurah Jewish Reconstructionist Congregation, Denver
Deacon David Plevak, Ascension Catholic Church, Montbello
Monsignor Jorge de los Santos, Our Lady Mother of the Church, Commerce City
Rev. Laura Krauss, Body of Christ Presbyterian Church, Greeley
Rev. Zach Martinez, Sojourn Mennonite Church, Greeley
Rev. Ben Konecny, First Congregational Church - UCC, Greeley
Rev. Krista Dias, St. Luke's Episcopal Church, Fort Collins