

August 25, 2020

Via U.S. Mail and electronic mail

The Honorable Eugene Scalia
Secretary
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Ms. Loren Sweatt
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Re: Resign Immediately

Dear Secretary Scalia and Ms. Sweatt:

The undersigned organizations call on you to resign immediately because you have failed to perform your sworn duty to enforce the law. As American workers have risen to the challenge during the COVID-19 pandemic, you have, instead, stooped to new lows to jeopardize workers, public health, and our country's economic recovery. Your inaction has allowed and continues to allow significant, adverse impacts from COVID-19 to fall disproportionately on Black, Latino, and Asian workers. Your failures underscore the urgency with which Congress must act to require the Occupational Health and Safety Administration ("OSHA") to promulgate an Emergency Temporary Standard. That you have been unwilling to do so on your own demonstrates agency capture and the corporate control of OSHA. Moreover, efforts to pass corporate immunity from COVID-19-related suits is nothing but a handout to shareholders when OSHA has not actually compelled corporations to protect their workers and, even worse, signaled that OSHA would assist in the defense of worker lawsuits.

In passing the Occupational Safety and Health Act ("OSH Act"), Congress declared its objective to "assure so far as possible every working man and woman in the Nation safe and healthful working conditions[.]" 29 U.S.C. § 651. "The Act does not wait for an employee to die or become injured. It authorizes the promulgation of health and safety standards and the issuance of citations in the hope that these will act to prevent deaths or injuries from ever occurring." *Whirlpool Corp. v. Marshall*, 445 U.S. 1, 12 (1980). The OSH Act prescribes a comprehensive enforcement scheme that includes OSHA's authority to inspect and investigate workplaces without prior notification of the

inspection. 29 U.S.C. § 657; 28 C.F.R. § 1903.6. Additionally, OSHA is empowered to issue citations to employers where, “upon inspection or investigation,” OSHA believes that the OSH Act or any standard, rule, or order promulgated under it has been violated. 29 U.S.C. § 658. The OSH Act provides that in addition to complying with specific workplace standards, employers must, and OSHA can require employers to, “furnish to each of [their] employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees.” 29 U.S.C. § 654(a). Finally, OSHA has the authority to promulgate an Emergency Temporary Standard to protect workers when workers “are exposed to *grave danger* from exposure to substances or agents determined to be toxic or physically harmful or from new hazards.” 29 U.S.C. § 655(c)(1) (emphasis added).

Under your leadership, the OSHA has failed to effectuate Congress’s objective given the urgency and magnitude of the COVID-19 pandemic. Specifically, you have failed to investigate and enforce violations of the OSH Act as it relates to coronavirus exposure in the workplace for front-line workers. As of July 31, 2020, OSHA (at federal District Court direction) disclosed it had issued *four* COVID-19-related citations across all workplaces in the nation. No citations *at all* had been issued to employers in the meat processing industry.

You have failed to use the authority Congress granted to promulgate an Emergency Temporary Standard to mandate worker protections during a pandemic inflicting grave danger. On April 10, 2020 in a letter declining several Senators’ request for OSHA adopt an ETS, Department of Labor Deputy Assistant Secretary Joe Wheeler stated:

OSHA is able to issue an Emergency Temporary Standard (ETS) when there is a minimum level of workplace safety practice that is necessary to protect workers, but is not being followed by employers . . . at this time, we see no additional benefit from an ETS in the current circumstances relating to COVID-19.¹

On May 28, 2020 under questioning from Congresswoman Alma Adams, Ms. Sweatt refused to state whether COVID-19 presented a grave danger to workers in general and to meat processing and health care workers in particular.² The Director of the National

¹ Letter to Scott S. Dahl, Inspector General, Department of Labor, from Senators Elizabeth Warren, Tammy Baldwin, Bernard Sanders, Tim Kaine, Robert P. Casey, Jr., and Tammy Duckworth, May 27, 2020 (citing Letter to Senator Elizabeth Warren from Department of Labor Deputy Assistant Secretary Joe Wheeler, April 10, 2020), <https://www.warren.senate.gov/imo/media/doc/Letter%20to%20DOL%20IG%20requesting%20OSHA%20audit.pdf>.

² Hearing, Workforce Protections Subcommittee, Education & Labor Committee, “Examining the Federal Government’s Actions to Protect Workers from COVID-19,” at hour 2:02, May 28, 2020, <https://edlabor.house.gov/hearings/examining-the-federal-governments-actions-to-protect-workers-from-covid-19>.

Institute for Occupational Safety and Health at the Centers for Disease Control and Prevention, Dr. John Howard, unequivocally answered “yes” to the same questions.³

You have failed to ensure courageous workers who report COVID-19 workplace safety violations receive whistleblower protection. The Department of Labor Office of Inspector General analyzed how OSHA has handled COVID-19 whistleblower complaints and found the “pandemic has significantly increased the number of whistleblower complaints OSHA has received, and at the same time, the Whistleblower Program’s full-time equivalent employment (FTE) has decreased.”⁴ While OSHA’s whistleblower program has received 30% more complaints during the pandemic compared to the same period in 2019, you have allowed the number of staff in the program to decrease.

You have completely failed to meet the basic purposes of your office while workers face the most dire workplace hazard in the history of OSHA. Your lack of any true leadership has made an unimaginably difficult situation for workers immeasurably worse. The impact of your inaction is matched only by the depth of your disregard.

Recent Evidence Demonstrating Your Failure to Enforce the Law.

On July 31, 2020, testimony from OSHA officials in federal District Court confirms OSHA’s utter failure to enforce the law to protect workers.⁵ Three workers at the Maid-Rite Specialty Foods meat processing plant in Dunmore, Pennsylvania – acting through their representative – submitted an OSHA Complaint on May 19, 2020. The workers explained there had been an outbreak of COVID-19, but the company had *not* distanced workers on the processing line, increased the number of breaks for workers to wash their hands, placed markers on the floor to enable workers to distance, or provided masks. The workers stated these conditions, among others, created an imminent danger to their health and safety that required OSHA to mandate additional protections at the plant. OSHA declined to do so. The workers filed a petition in federal District Court pursuant to the OSH Act to compel you to perform your duty.

Confirming the essential role our civil justice system plays in securing worker rights, sworn statements and oral testimony in that case demonstrate OSHA’s disregard and hypocrisy. At the July 31 hearing, OSHA witnesses explained that under your leadership, the agency’s default practice is *not* to inspect any workplaces other than medical facilities, which would prevent OSHA from ever issuing citations against other workplaces. As a result, despite receiving complaints from Maid-Rite workers that the

³ *Id.* at hour 2:03.

⁴ Dept. of Labor, Office of the Inspector General, COVID-19: OSHA Needs to Improve its Handling of Whistleblower Complaints During the Pandemic, Report No. 19-20-010-10-105, August 14, 2020, <https://www.oig.dol.gov/publicreports/oa/viewpdf.php?r=19-20-010-10-105&y=2020>.

⁵ Transcript of Proceedings, *Jane Does v. Scalia*, No. 3:20-cv-1260 (M.D. Pa.) (Doc. 43-1), <https://food.publicjustice.net/wp-content/uploads/sites/3/2020/08/2020.08.14-Dkt.-43-1-Hearing-Transcript.pdf>.

company was not protecting them from COVID-19 starting in early April 2020, OSHA waited until July 9th before sending an inspector to the plant.

OSHA's Wilkes-Barre Area Director was so concerned with the OSHA inspector's safety he ordered the inspector to notify Maid-Rite the day before the inspection so that the inspector could confirm her own safety. As the OSHA inspector confirmed, this is *not* standard practice. In fact, it is so anathema to OSHA's practice OSHA's regional solicitor stated it was "inappropriate" for Plaintiffs to suggest notice was given, only for him to later learn this actually occurred. The testimony offered by Maid-Rite workers confirms why OSHA typically does *not* give notice. Notice allows companies to create the appearance of compliance, and then after the inspection companies return to business as usual.⁶ If the facility endangered the inspector during a brief inspection enough to justify prenotification, then workers most certainly warrant protection.

Despite OSHA's disregard of its policies and procedures to warn the employer, OSHA's inspector largely confirmed each of the workers' allegations. The inspector explained that during her July 9, 2020 inspection workers on the production line were as close as 2-3 feet, unable to socially distance, the company had only spaced workers where the workstations were "naturally" set-up pre-pandemic to space workers, there were no physical barriers to separate workers on the processing line, and there were no social distance markings on the floor.

Testimony further demonstrated that workers cannot rely on your leadership to protect them. The director of the OSHA Wilkes-Barre area office testified he would *never* consider these conditions an imminent danger to workers. Specifically, he stated the absence of distancing or even masks would never on their own be considered an actionable, imminent danger. Instead, the director stated OSHA would consider an employer's willingness to take what OSHA itself labels as secondary and tertiary protections as sufficient to remove the danger to workers. In other words, under your leadership, OSHA considers a workplace safe when an employer pays lip-service to worker safety, rather than you doing your duty to ensure "every working man and woman in the Nation safe and healthful working conditions[.]" 29 U.S.C. § 651.

You Failed to Protect Meat Processing Workers.

A myriad of agency reports and media accounts of labor conditions document your failure to exercise your authority to protect meat processing workers. OSHA allowed meat processing corporations to self-regulate until April 26, 2020, at which time OSHA and the Centers for Disease Control and Prevention ("CDC") issued non-binding guidance calling for critical worker protections "if feasible" or "if possible."⁷ Two days

⁶ See Declaration of John Doe worker *Jane Does v. Scalia*, No. 3:20-1260 (M.D. Penn.) (Doc. 37-1).

⁷ CDC & OSHA, INTERIM GUIDANCE FOR MEAT & POULTRY PROCESSING WORKERS & EMPLOYERS, <https://www.cdc.gov/coronavirus/2019-ncov/community/organizations/meat-poultry-processing-workers-employers.html> [hereinafter "CDC Guidance"].

later on April 28, 2020, OSHA stated that the agency “does not anticipate citing employers that adhere to the” non-binding guidance and that, in any action to enforce workplace protections, the “Department of Labor will consider a request to participate in that litigation in support of the employer’s compliance program.”⁸

Over two months later, the CDC published data collected through May 31, 2020, analyzed the COVID-19 harm suffered by workers in meat processing facilities, and discussed the measures implemented – or more importantly not implemented – at such facilities to protect workers.⁹ The CDC Disparity Report found the majority Black, Latino, and Asia work force suffered a disproportionate impact.

The effects of COVID-19 on racial and ethnic minority groups are not yet fully understood; however, current data indicate a disproportionate burden of illness and death among these populations. Among animal slaughtering and processing workers from the 21 states included in this report whose race/ethnicity were known, approximately 39% were white, 30% were Hispanic, 25% were black, and 6% were Asian. However, among 9,919 workers 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.¹⁰

The CDC further found that, with many states not reporting data, COVID-19 adversely affected workers with 16,233 infections and 86 deaths.¹¹ During this same period through May 31, the Washington Post reports that OSHA received over 4,200 complaints from workers nationwide and issued only one citation.¹²

⁸ Statement of Enforcement Policy by Solicitor of Labor Kate O’Scannlain and Principal Deputy Assistant Secretary for OSHA Loren Sweatt Regarding Meat and Poultry Processing Facilities, April 28, 2020, <https://www.dol.gov/newsroom/releases/osha/osha20200428-1>.

⁹ M. Waltenburg, et al., CDC, *Update: COVID-19 Among Workers in Meat and Poultry Processing Facilities — United States, April-May 2020*, 69 MORBIDITY & MORTALITY WEEKLY REPORT 887 (Jul. 10, 2020), <https://www.cdc.gov/mmwr/volumes/69/wr/pdfs/mm6927e2-H.pdf> [hereinafter CDC DISPARITY REPORT]. The report documents inconsistent implementation of CDC-recommended measures at 111 facilities, including 77% requiring facial coverings, 62% installing physical barriers between workers, 30% removing financial incentives to work while sick, 21% reducing the rate of animal processing, and zero reporting social distancing on production lines.

¹⁰ *Id.* Several states with significant meat processing capacity declined to report data to the CDC, including Arkansas, Indiana, Iowa, Minnesota, North Carolina, Oklahoma, and Texas.

¹¹ *Id.*

¹² Eli Rosenberg, *Meatpacking workers file lawsuit against OSHA, accusing agency of failing to keep them safe*, Washington Post (Jul. 24, 2020), <https://www.washingtonpost.com/business/2020/07/23/lawsuit-osha-safety-coronavirus/>

Current data show workers continue to contract COVID-19 while OSHA fails to enforce the law. As of August 21, the Food & Environment Reporting Network reports the number of cases in the food system with “[a]t least 772 meatpacking and food processing plants (491 meatpacking and 281 food processing) and 100 farms and production facilities have had confirmed cases of Covid-19. At least 56,510 workers (41,167 meatpacking workers, 8,937 food processing workers, and 6,406 farmworkers) have tested positive for Covid-19 and at least 241 workers (193 meatpacking workers, 34 food processing workers, and 14 farmworkers) have died.”¹³ As of July 21, 2020, OSHA has received 7,943 complaints from workers nationwide and issued only four citations.¹⁴

In late June 2020, four meat processing corporations – Tyson, JBS USA, Smithfield, and Cargill – responded to Senator Elizabeth Warren’s and Senator Cory Booker’s request to provide, among other data, the measures the corporations had taken to protect workers.¹⁵ Those responses were vague, evasive, and followed the pattern of data suppression seen in the CDC Disparity Report. With respect to protective measures afforded workers, Senator Warren and Senator Booker found that the “lack of consistency in the companies’ responses about the actions they are taking to protect workers – and the failure of those actions to curb the growing number of COVID-19 cases among their workers – underscores the need for an OSHA Emergency Temporary Standard.”¹⁶

Your Failure to Enforce the Law Compounds the COVID-19 Disparate Harm to Black and Latino Workers.

Front-line Black and Latino workers in the United States urgently need workplace protections and you are denying them the benefit of a law designed to protect them. Women are disproportionately front-line workers while people of color and immigrants are overrepresented in certain front-line industry occupations.¹⁷ Roughly one-third of

¹³ Leah Douglas, *Mapping Covid-19 Outbreaks in the Food System*, FERN (updated Aug. 21, 2020), <https://thefern.org/2020/04/mapping-covid-19-in-meat-and-food-processing-plants>. Neither the OSHA nor the CDC have instituted a federal reporting program, and some states are not disclosing data on COVID-19 cases and deaths, so these data are likely understated.

¹⁴ Rosenberg, *supra* note 5.

¹⁵ Press Release, Warren, Booker Release Information from their Investigation into Giant Meatpackers Exploiting Workers and Consumers during COVID-19, June 24, 2020, <https://www.warren.senate.gov/newsroom/press-releases/warren-booker-release-information-from-their-investigation-into-giant-meatpackers-exploiting-workers-and-consumers-during-covid-19>.

¹⁶ *Id.* Senators Warren and Booker noted that the low implementation rate of certain measures, including finding that “[n]one of the companies are consistently implementing the CDC’s recommendation of 6-foot social distancing on processing lines.”

¹⁷ Hye Jin Rho, et al., Center for Economic and Policy Research, A BASIC DEMOGRAPHIC PROFILE OF WORKERS IN FRONTLINE INDUSTRIES, April 2020, <https://cepr.net/wp-content/uploads/2020/04/2020-04-Frontline-Workers.pdf>.

front-line workers live in low-income households.¹⁸ Existing social disparities and the impact of the COVID-19 pandemic on Black and Latino people place these front-line workers in especially harmful working circumstances which underscores your failure to execute the will of Congress and the urgency of an Emergency Temporary Standard.

Characteristics of COVID-19 Deaths from February 1-August 19, 2020

	Black	Latino	White
COVID-19 Deaths	34,332	31,403	81,176
Proportion of COVID-19 Deaths	21.8%	19.9%	51.6%
Unweighted Distribution of Population	12.5%	18.3%	60.4%
Weighted Distribution of Population	15.8%	30.8%	41.1%

Social and racial inequity compound the impact inflicted by COVID-19 exposure in the workplace. Black and Latino workers who become infected with coronavirus are significantly more likely to die from the virus due to higher rates of serious illness,¹⁹ and longstanding inequities related to race, class, and access to healthcare.²⁰ According to the most recent CDC data available, Black and Latino people are overrepresented in COVID-19 deaths.²¹ From February 1 to August 19, 2020, Black people accounted for 21.8% of deaths, but only 12.5% of the unweighted population.²² Latino people accounted for 19.9% of deaths, but only 18.3% of the unweighted population.²³

¹⁸ *Id.*

¹⁹ E. Stokes, et al., CDC, *Coronavirus Disease 2019 Case Surveillance — United States, Jan. 22–May 30, 2020*, 69 MORBIDITY & MORTALITY WEEKLY REPORT 759 (Jun. 19, 2020) (noting that “[d]eaths were 12 times higher among patients with reported underlying conditions compared with those without reported underlying conditions”), <http://dx.doi.org/10.15585/mmwr.mm6924e2>.

²⁰ Aditi Nayak, et al., *Impact of Social Vulnerability on COVID-19 Incidence & Outcomes in the United States* (Apr. 17, 2020) (finding that counties with higher social vulnerability have higher COVID-19 case fatality), [doi:10.1101/2020.04.10.20060962](https://doi.org/10.1101/2020.04.10.20060962).

²¹ CDC, National Center for Health Statistics, *Health Disparities: Race and Hispanic Origin, Provisional Death Counts for Coronavirus Disease 2019 (COVID-19)* (updated Aug. 19, 2020) (hereinafter “CDC Health Disparities”), https://www.cdc.gov/nchs/nvss/vsrr/covid19/health_disparities.htm.

²² CDC, Table 1. *Count and percent distribution of deaths involving coronavirus disease 2019 (COVID-19) with distribution of the weighted and unweighted percent population by race and Hispanic origin group* (updated Aug. 19, 2020), https://www.cdc.gov/nchs/nvss/vsrr/covid19/health_disparities.htm.

²³ *Id.*

When taking into account age and the racial and ethnic distribution in the geographic locations of COVID-19 outbreaks, Latino people are significantly overrepresented in COVID-19 deaths, accounting for 39.9% of age-standardized deaths and 31.7% of the weighted population distribution.²⁴ Conversely, CDC data reveals that white people are significantly underrepresented when accounting for age and geographic outbreaks. White people accounted for 22.4% of age-standardized deaths, and comprise 40% of the age-standardized and weighted population distribution.

Characteristics of COVID-NET Hospitalizations from March 1-August 15, 2020

	Black	Latino	White
Age-adjusted Hospitalization Rate (per 100,000)	304.9	305.8	65
Proportion of Hospitalized COVID-NET Cases	33%	23.1%	31.4%
Proportion of Population in COVID-NET Catchment Area	17.9%	14.1%	58.5%
Prevalence Ratio	1.9	1.6	0.5

Black and Latino workers who contract the virus are significantly more likely to need treatment, such as hospitalization and ventilation, due to increased rates of serious illness.²⁵ Recent data from the CDC confirms that Black and Latino people endure significantly higher hospitalization rates than white people. According to the CDC data on COVID-19 hospitalizations from March 1 to August 15, 2020, Black and Latino people were nearly five times more likely to be hospitalized for COVID-19 complications than white people.²⁶ Black people accounted for 33.2% of all hospitalized patients, but only 17.9% of the relevant population and Latino people accounted for 23.1% of hospitalizations, but only 14.1% of the relevant population.²⁷ Conversely, white people are underrepresented in hospitalizations with white people accounting for 31.3% of hospitalizations, but 58.5% of the relevant population.

²⁴ CDC Health Disparities, Figures 3a and 3b.

²⁵ M. Killerby, et al., CDC, *Characteristics Associated with Hospitalization Among Patients with COVID-19 — Metropolitan Atlanta, Georgia, March–April 2020.*, MORBIDITY & MORTALITY WEEKLY REPORT (Jun. 17, 2020), <http://dx.doi.org/10.15585/mmwr.mm6925e1>; E. Stokes, et al., *supra* note, at 759 (finding that hospitalizations were 6 times higher and deaths 12 times higher among those with underlying conditions than those with no reported conditions).

²⁶ CDC, SURVEILLANCE SUMMARY OF U.S. COVID-19 ACTIVITY FOR WEEK 33, ENDING AUGUST 15, 2020, at 2, 11 (updated Aug. 21, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/covid-data/pdf/covidview-08-21-2020.pdf>.

²⁷ *Id.* at 10; *see also* U.S. Census Data on Race & Hispanic Origin (estimates as of July 1, 2019), <https://www.census.gov/quickfacts/fact/table/US/PST045219>.

And this racial injustice inflicted on Black and Latino people holds true in the most severely affected counties, as demonstrated by the recent CDC findings of racial disparity in COVID-19 “hotspot” counties.²⁸ The CDC analyzed data from 205 hotspot counties in 33 states, with 79 counties in 22 states having sufficient race/ethnicity data to analyze. The CDC found that in these 79 counties, disparities “in cases were identified among underrepresented racial/ethnic groups in 76 (96.2%) analyzed counties (Table 1).” Moreover, the CDC further found that Hispanic and Black people disproportionately contracted COVID-19 in approximately 75% and 28% of the 79 counties, respectively. The CDC’s “findings illustrate the disproportionate incidence of COVID-19 among communities of color, as has been shown by other studies, and suggest that a high percentage of cases in hotspot counties are among persons of color.” The CDC also identified several factors that likely lead to the racial disparities found, including essential worker employment status.

Conclusion.

When the history of this pandemic is written, your tenures will be remembered as chapters of callous corruption, racial discrimination, and deadly indifference. It is more than apparent that you believe OSHA should protect employers *from* workers. That political world view, however distorted and inconsistent with the urgent needs of American workers during the COVID-19 pandemic, does not comport with Congressional objectives. Your failure to protect workers while ensuring employers maximize profits warrants your immediate resignation.

Furthermore, it is clear you are unwilling to perform the job for which you were appointed and unable to carry out OSHA’s mission. As a result, the best step you can now take to help workers is to step down and allow more competent, compassionate, and committed leaders to take the helm. It is urgent that you do so, before more livelihoods are placed at risk, and more lives are destroyed.



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²⁸ J. Moore, et al., CDC, *Disparities in Incidence of COVID-19 Among Underrepresented Racial/Ethnic Groups in Counties Identified as Hotspots During June 5-18, 2020 – 22 States, February-June 2020*, Early Release/Vol.69, Morbidity & Mortality Weekly Report (Aug. 14, 2020), <https://www.cdc.gov/mmwr/volumes/69/wr/pdfs/mm6933e1-H.pdf>.

Towards Justice

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