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.	C. A. No. 5:20-cv-06063-DGK

POST-HEARING SUPPLEMENTAL BRIEF

Smithfield's top priority is the health and safety of its employees. Smithfield is complying with CDC and OSHA guidance, and Plaintiffs have not presented reliable or credible evidence to suggest otherwise—let alone meet their legal burden of proof. There have been no cases of COVID-19 diagnosed in the Plant or in Sullivan County. Putting aside legal arguments and precedent, there is no emergency at this moment that requires the Court to act.

Moreover, the Secretary of Agriculture has stated that the Department is coordinating a national response to address meat processing facilities and COVID-19. *See* **Exhibit A**. "Worker health and safety is the first priority here," the Secretary said. "We want to assure the workers and the community of their safety." *Id.* Workers should begin receiving more protective gear and access to coronavirus testing "virtually immediately," and the Department of Agriculture has "already begun" working on orders to get them filled on a priority basis by vendors similar to health care workers. *Id.*

As authorized by the Court at the preliminary injunction hearing, Smithfield submits this brief to provide the Court with additional facts, address primary jurisdiction and preemption, and

demonstrate that an injunction requiring Smithfield to comply with CDC and OSHA guidance would be improper.

I. SUPPLEMENTAL FACTS

A. Additional COVID-19 Response Procedures at the Plant

The Plant is continuing to develop its COVID-19 response procedures. **Exhibit B**, Supplemental Declaration of Timmy D. Messman, Plant Manager ("Supp. Messman Decl."). For example, it is installing more permanent and sturdier plastic barriers between employees on the production line, posting additional signs reminding employees to wear masks at all times, modifying clocking in and out procedures to facilitate social distancing, expanding the cafeteria to facilitate social distancing, and reducing the number of hogs processed each day to reduce the number of hours employees spend at the Plant and thereby improve distancing. *Id.* ¶¶ 5-9.

To be clear, the Plant did not implement any changes to its COVID-19 response as a result of Plaintiffs' lawsuit. *Id.* ¶ 10. Instead, these changes have been a part of the Plant's continuously evolving response to COVID-19 as it seeks to comply with the quickly changing regulatory landscape, obtains additional materials and supplies for its response, and identifies risk mitigation strategies that are tailored to the facility and the realities of a meat processing operation that has been ordered by the President to remain open. *Id.* Those efforts will continue. Indeed, the Secretary of Agriculture recently stated that the Department would work collaboratively with companies to ensure compliance with CDC and OSHA guidelines. Exhibit A.

B. Clarification of the Plant's COVID-19 Related Leave Policy

The Supplemental Messman Declaration makes one update and one clarification for the Court. First, after the CDC revised its COVID-19 symptom list, Smithfield correspondingly expanded the symptoms for which employees should self-monitor and which qualify for paid leave as of Tuesday, April 28. *Id.* ¶ 3. Specifically, in addition to COVID-19 symptoms of fever, cough,

and shortness of breath, employees are instructed to monitor for secondary symptoms of chills, repeated shaking with chills, muscle pain / extreme fatigue, headache, sore throat, and/or loss of taste or smell. *Id.* Employees with a fever of 100.4 degrees Fahrenheit, cough, or shortness of breath, or two or more secondary symptoms are directed to stay at home for 14 days of paid leave. *Id.* Employees taking this leave remain eligible for Smithfield's Responsibility Bonus. *Id.*

Second, the Supplemental Declaration confirms unequivocally that all employees who miss work for a reason related to COVID-19 receive 14 days of paid leave and remain eligible for Smithfield's Responsibility Bonus. *Id.* ¶ 4.

II. ARGUMENT

A. Primary Jurisdiction and Preemption Apply Here.

On April 28, 2020, President Trump issued an Executive Order ("EO") "delegating authority under the Defense Production Act with respect to food supply chain resources during the national emergency caused by the outbreak of COVID-19." *See* ECF No. 36-1.

The Executive Order emphasizes that it is "important" that meat processors "continue operating and fulfilling orders to ensure a continued supply of protein for Americans." EO at 2. It further recognizes that COVID-19 outbreaks have occurred at some large processing facilities, and that some states have taken action that has resulted in complete shutdown of some facilities. *Id.* The EO expresses concern that such actions may "differ from or be inconsistent with" interim guidance issued jointly by OSHA and the CDC for meat processing plants. *Id.* The EO states that "[s]uch closures threaten the continued functioning of the national meat and poultry supply chain, ***undermining critical infrastructure during a national emergency***." *Id.* (emphasis added).

The Executive Order declares meat and poultry "critical" under §4511(b) of the Defense Production Act. As a critical good, the Defense Production Act grants the President (or his designee) vast powers to coordinate a national strategy:

> The President is hereby authorized (1) to require that performance under contracts or orders (other than contracts of employment) which he deems necessary or appropriate to promote the national defense shall take priority over performance under any other contract or order, and, for the purpose of assuring such priority, to require acceptance and performance of such contracts or orders in preference to other contracts or orders by any person he finds to be capable of their performance, and (2) to allocate materials, services, and facilities in such manner, upon such conditions, and to such extent as he shall deem necessary or appropriate to promote the national defense.

50 U.S.C. § 4511(a).

Under the Executive Order, the President has designated this authority to the Secretary of Agriculture. The President has directed the Secretary of Agriculture to "take all appropriate action under [§ 4511 of the DPA] to ensure that meat and poultry processors continue operations consistent with the guidance for their operations jointly issued by the CDC and OSHA." EO at 2.

On April 28, 2020, the Secretary of Agriculture issued a statement regarding the Executive Order, which affirmed that the Department of Agriculture would operate in accordance with the CDC and OSHA guidance:

> The Centers for Disease Control and Prevention (CDC) of the Department of Health and Human Services and the Occupational Safety and Health Administration (OSHA) of the Department of Labor have put out guidance for plants to implement to help ensure employee safety to reopen plants or to continue to operate those still open. Under the Executive Order and the authority of the Defense Production Act, ***USDA will work with meat processing to affirm they will operate in accordance with the CDC and OSHA guidance***, and then work with state and local officials to ensure that these plants are allowed to operate to produce the meat protein that Americans need. USDA will continue to work with the CDC, OSHA, FDA, and state and local officials to ensure that facilities implementing this guidance to keep employees safe can continue operating.

Exhibit C (emphasis added).

In addition to the statement from the Secretary of Agriculture, the Solicitor of Labor and the Principal Deputy Assistant Secretary of OSHA issued a statement of enforcement policy regarding meat and poultry processing facilities. *See* ECF No. 36-2. The statement was issued

"[i]n light of President Trump's invocation of the Defense Production Act . . . to clarify the effect of the Joint Meat Processing Guidance in this circumstance." *Id.* It recognizes that not all of the guidelines will be feasible for every facility, and that the Department of Labor and OSHA will use discretion in issuing citations, particularly where meat and poultry processing facilities are making "good faith attempts" to adhere to the guidance. *Id.*

The statement further states, in no uncertain terms, that "no part of the Joint Meat Processing Guidance should be construed to indicate that state and local authorities may direct a meat and poultry processing facility to close, to remain closed, ***or to operate in accordance with procedures other than those provided for in this Guidance***." *Id.* (emphasis added).

1. Primary Jurisdiction

The day after Smithfield filed its Motion to Dismiss or, in the Alternative, to Stay this action, the President issued his Executive Order, and the Secretary of Agriculture, the Solicitor of the DOL, and the Principal Deputy Assistant Secretary of OSHA issued their follow-up statements. These additional orders and statements underscore the applicability of the doctrine of primary jurisdiction to this case.

The doctrine of primary jurisdiction "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)); *see also Redlake Bank of Chippewa Indians v. Barlow*, 846 F.2d 474, 476 (8th Cir. 1988) (noting the flexible nature of the doctrine of primary jurisdiction).

Here, a dismissal or stay of this action is necessary to serve both purposes of the primary jurisdiction doctrine: (1) deference to agency expertise, and (2) uniformity. The President has directed meat and poultry processing plants to continue to operate, and has delegated to the Secretary of Agriculture the responsibility to ensure continued operation consistent with OSHA and CDC guidance. The Secretary of Agriculture immediately issued a statement indicating that he intended to work with multiple agencies with expertise in this area, including OSHA, CDC, FDA, and state and local health departments, to achieve this objective. The fact that more than one agency is involved does not render the primary jurisdiction doctrine inapplicable. Under the Executive Order, the Secretary of Agriculture is now in charge, but many other agencies, including state and local public health authorities, will bring their expertise to the table.

Moreover, the purpose of the Executive Order was to provide for uniformity and a cohesive approach that allows meat processing plants to operate while protecting worker safety—which is exactly when the primary jurisdiction doctrine should apply. The President expressly identified state law interference with plant operations as "undermining critical infrastructure during the national emergency." EO at 2. Uniformity can only be achieved if the Court defers to the Secretary of Agriculture, and those agencies who assist him, in his directive "to ensure that meat and poultry processors continue operations consistent with" OSHA and CDC guidance. *Id.*

2. Preemption

The Supremacy Clause dictates that federal law "shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any state to the Contrary notwithstanding." U.S. Constitution, Art. VI, cl. 2. Pursuant to this provision, federal law "has the power to preempt state law." *Arizona v. U.S.*, 567 U.S. 387, 399 (2012).

Implied preemption occurs in at least two ways. "First, the States are precluded from regulating conduct in a field that Congress, acting within its proper authority, has determined must

be regulated by its exclusive governance." *Id.* Implied preemption may also occur when state law conflicts with federal law. *Id.* "This includes cases where 'compliance with both federal and state regulations is a physical impossibility' . . . . and those instances where the challenged state law 'stands as an obstacle to the accomplishment and execution of the full purpose and objectives of Congress.'" *Id.* (citations omitted); *see also Pet Quarters, Inc. v. Depository Trust and Clearing Corp.*, 559 F.3d 772, 780 (8th Cir. 2009) (discussing Supremacy Clause and types of preemption, and holding that plaintiff's state tort claims were preempted).

Importantly, preemption applies even where the federal and state law "share the same goals." *Crosby v. National Foreign Trade Council*, 530 U.S. 363, 379 (2000) (state law prohibiting state agencies from purchasing goods or services from companies doing business in Burma preempted by federal law imposing mandatory and conditional sanctions on Burma). As the Supreme Court has recognized, "[t]he fact of a common end hardly neutralizes conflicting means." *Id.* Indeed, "'conflict is imminent' whenever 'two separate remedies are brought to bear on the same activity.'" *Wisconsin Dept. of Industry v. Gould Inc.*, 475 U.S. 282, 286 (1986) (citations omitted). Moreover, when the state law threatens to undermine the flexibility and discretion granted to the federal government to address the subject matter, the state law is preempted. *Crosby*, 475 at 388 ("Because the state Act's provisions conflict with Congress's specific delegation to the President of flexible discretion, with limitation of sanctions to a limited scope of actions and actors, and with direction to develop a comprehensive, multilateral strategy under the federal Act, it is preempted, and its application is unconstitutional, under the Supremacy Clause.").

Preemption may be based on a federal statute or federal regulation. *Pet Quarters*, 559 F.3d at 780. Preemption may also be based on an Executive Order. *Old Dominion Branch No. 496, National Ass'n of Letter Carriers, AFL-CIO v. Austin*, 418 U.S. 264, 273 (1974).

a. Field Preemption

Here, the President's Executive Order and the Secretary of Agriculture's statement indicate the federal government's intent to "occupy the field" as it relates to continued operations of meat processors and their compliance with CDC and OSHA guidance during the pandemic. The President, pursuant to the Defense Production Act, has directed the Secretary of Agriculture "to ensure that meat and poultry processors continue operations consistent with" CDC and OSHA guidance. EO at 2. The EO instructs the Secretary to strike a balance between continued operation and worker safety, and develop rules and regulations as he deems necessary to achieve it.

The President has identified state interference with meat and poultry processors as "undermining critical infrastructure during the national emergency." *Id.* The statement of intent and policy underlying the Executive Order could not be more clear. State law, whether statutory or through private lawsuits, cannot be used to regulate the subject matter covered by the EO. This task belongs exclusively to the federal government.[1]

b. Conflict and Obstacle Preemption

Conflict and obstacle preemption also apply. Any injunction that issues, even if it orders Smithfield "to comply with CDC and OSHA guidance," runs the risk of conflicting with federal law and the Secretary of Agriculture's effort to carry out the President's order. As discussed below, an injunction that directs Smithfield to follow CDC and OSHA guidance would necessarily require the Court to interpret that guidance and apply it to Smithfield's operations.

Thus, there is a significant risk the Court would interpret the guidance differently than the Secretary of Agriculture and the expert agencies working with him, creating a conflict between Plaintiffs' state law claims for injunctive relief and federal law. The conflict is greater if the Court

[1] The Court need not determine whether a state law claim for personal injury damages would be preempted, as that is not the case here. This case seeks only injunctive relief.

imposes any of the specific obligations on Smithfield originally requested by Plaintiffs, including that Plaintiffs' experts be permitted to inspect the Plant to determine additional safety protocols. Similarly, Plaintiffs' state law claims pose an "obstacle" to the "full purposes and objectives" of the Defense Production Act and the President's Executive Order. The President made clear his desire for uniformity to protect the nation's food supply during the pandemic. Plaintiffs' requested injunction threatens that uniformity, and is barred by obstacle preemption.

B. An Injunction to Obey the Law Is Improper

Plaintiffs initially requested that this Court order Smithfield to do nine things that either had already been done (like providing masks), were unworkable (like allowing their expert to inspect the Plant), or, in one instance, were downright illegal (providing tissues in the production area). At the hearing on the preliminary injunction, the Court inquired whether it could instead enter a preliminary injunction ordering Smithfield to comply with OSHA and CDC guidance. It cannot, for several reasons.

First, no injunction can issue unless Plaintiffs meet the four standards for an injunction, and they have not. As outlined in Smithfield's Opposition to Plaintiffs' Emergency Motion for Preliminary Injunction (ECF No. 32), Plaintiffs fail on all four elements:

> **No likelihood of success on the merits**. Plaintiffs cannot succeed on their public nuisance claim because the Plant is not a nuisance—it is an essential business that continues to operate under a presidential Executive Order and has taken its workers' safety seriously. Plaintiffs also have no special injury—fear of "community spread" during a pandemic is perforce not different in kind from the general public's injury. Nor can Plaintiffs succeed on their workplace safety claim because they have no injury, they have not shown that Smithfield failed to comply with the regulations, and the OSH Act preempts this claim in any event.
>
> **No threat of immediate and irreparable harm**. Plaintiffs have not shown a threat of immediate and irreparable harm because there are no confirmed COVID-19 cases at the Plant or in the county where the Plant is located. Potential exposure is not enough. In addition, Smithfield has complied with OSHA and CDC recommendations, and has proactively taken actions to protect its workers.

The balance of harms weighs against Plaintiffs. While Plaintiffs have shown nothing but a potential harm, an injunction would tie Smithfield's hands, preventing it from responding to changing circumstances to protect its workers and the nation's food supply.

Public policy supports denial. The President himself has recognized that meat processing plants are critical during this national emergency. There is an obvious public interest in permitting such essential businesses to continue operating during this pandemic.

For all of those reasons, Plaintiffs have not shown themselves entitled to any injunction, regardless of its terms.

Second, an injunction from this Court requiring compliance with the guidelines would be contrary to the President's Executive Order: "Under the delegation of authority provided in this order, ***the Secretary of Agriculture*** shall take all appropriate action under that section to ensure that meat and poultry processors continue operations consistent with the guidance for their operations jointly issued by the CDC and OSHA." *See* ECF No. 36-1 (emphasis added). After the President issued his Order, the Department of Agriculture announced that it "will work with meat processing to affirm they will operate in accordance with the CDC and OSHA guidance. . ." *See* Ex. C. As such, this Court does not have the authority to enforce compliance with the CDC and OSHA guidance; that authority lies in the hands of the Secretary of Agriculture and the agencies that will work with him.

Third, even if Plaintiffs had shown their entitlement to an injunction, obey-the-law injunctions are improper and violate Rule 65. The Eighth Circuit has held repeatedly that a command to obey the law is "overbroad under general equitable principles." *Jake's, Ltd., Inc. v. City of Coates*, 356 F.3d 896, 904 (8th Cir. 2004) (directing the district court to modify its injunction); *Daniels v. Woodbury County, Iowa*, 742 F.2d 1128, 1134 (8th Cir. 1984) (same); *Calvin Klein Cosmetics Corp. v. Parfums de Coeur, Ltd.*, 824 F.2d 665, 666 (8th Cir. 1987)

(vacating injunction that the defendant comply with federal copyright law). And the Eighth Circuit is hardly alone in holding these types of injunctions overbroad.[2]

These courts have recognized two major problems with this type of injunction: it neither provides notice to the parties of what conduct is prohibited nor, on appeal, allows the appellate court to "assess the correctness of the judgment entered." *Daniels*, 742 F.2d at 1134 ("While we certainly understand the trial court's desire to maintain flexibility, we nevertheless must conclude that an injunction which does little or nothing more than order the defendants to obey the law is not specific enough.").

Instead, district courts "should limit the scope of [an] injunction to the conduct which has been found to have been pursued or is related to the proven unlawful conduct." *Perez v. Ohio Bell Tel. Co.*, 655 F. App'x 404, 412 (6th Cir. 2016) (affirming denial of injunction requiring compliance with OSH Act). The injunction "must be tailored to remedy the specific harms shown rather than to enjoin all possible breaches of the law." *Hughey v. JMS Dev. Corp.*, 78 F.3d 1523, 1531 (11th Cir. 1996) (vacating an injunction that enjoined violation of the Clean Water Act). Here, as detailed above, Plaintiffs have not shown their entitlement to a narrowly tailored injunction either.

Fourth, injunctions must "describe in reasonable detail—***and not by referring to the complaint or other document***—the act or acts restrained or required." Fed. R. Civ. P. 65(d)(1)(C)

[2] *See, e.g.*, *Perez v. Ohio Bell Tel. Co.*, 655 Fed. Appx. 404, 412 (6th Cir. 2016); Peregrine Myanmar Ltd. v. Segal, 89 F.3d 41, 51 (2d Cir. 1996) ("[U]nder Rule 65(d), an injunction must be more specific than a simple command that the defendant obey the law."); *McLendon v. Cont'l Can Co.*, 908 F.2d 1171, 1182 (3d Cir. 1990) ("A broad 'obey the law' injunction will be vacated."); *Davis v. Richmond, Fredericksburg & Potomac R. Co.*, 803 F.2d 1322, 1328 (4th Cir. 1986) (vacating a paragraph of an injunction that directs the enjoined party to "obey the statute"); *Payne v. Travenol Labs., Inc.*, 565 F.2d 895, 898 (5th Cir. 1978) (explaining that broadly worded "'obey the law' injunctions cannot be sustained"); *Glover Const. Co. v. Babbitt*, 172 F.3d 878 (10th Cir. 1999) (noting that "[s]uch injunctions are not appropriately issued"); *Hughey v. JMS Dev. Corp.*, 78 F.3d 1523, 1531 (11th Cir. 1996) ("Consistent with the two foregoing purposes, appellate courts will not countenance injunctions that merely require someone to 'obey the law.'").

(emphasis added); *IDG USA, LLC v. Schupp*, 416 F. App'x 86, 88-89 (2d Cir. 2011) (holding that "the party enjoined must be able to ascertain from the four corners of the order precisely what acts are forbidden"); *E.W. Bliss Co. v. Struthers-Dunn, Inc.*, 408 F.2d 1108, 1115 (8th Cir. 1969) (noting that portion of injunction referring to a separately filed exhibit did not comply with Rule 65). An order requiring compliance with OSHA and CDC guidance would violate that rule.

And for good reason: the impact of an order requiring Smithfield to comply with OSHA and CDC guidance would change daily, because the guidance is changing daily. Does the injunction require compliance with the guidance on the day the injunction is entered, or does the meaning of the injunction change alongside the guidance? How quickly must Smithfield implement new guidance?

Fifth, an order that Smithfield comply with the law would put this Court in charge of ongoing workplace safety decisions, instead of the agencies tasked with making those decisions. As the Eighth Circuit has noted, obey-the-law injunctions "embroil[] the district court in the ongoing task of enforcing" the law. *Jake's, Ltd., Inc.*, 356 F.3d at 904. Instead of complaints being processed through OSHA and other agencies, "day-to-day enforcement actions" would be shifted to the district court. *Id.* Indeed, this injunction would not just affect complaints by Plaintiffs; any worker complaint related to COVID-19 would require this Court's involvement.

For example, the OSHA and CDC guidance states that meat processing plants should "[c]onfigure communal work environments so that workers are spaced at least six feet apart, if possible," and gives guidance on how to arrange work stations "if feasible." *See* **Exhibit D** at 2-3. Plants are instructed to "consider modifying" their incentive programs, "if warranted." *Id.* at 4. These instructions would require continual monitoring by the Court to determine what is possible, feasible, or warranted at any given moment.

Sixth, an order requiring Smithfield to obey the law would suggest to its employees and the public at large that it is not—which is contrary to the facts and would cause harm in this uncertain environment. Smithfield has taken *substantial* steps to protect both its employees and the public at large.

III. CONCLUSION

For the foregoing reasons, this case should be dismissed or stayed, and a preliminary injunction should not be entered.

SMITHFIELD FOODS, INC. and
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CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of May, 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:

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